
Colorado Treasury Launches New Bond Investor Transparency Website.

DENVER, CO / ACCESSWIRE / September 27, 2022 / Today, the Colorado Department of the Treasury announced the launch of its new investor relations (IR) website, www.stateofcoloradofinancings.bondlink.com, to enhance transparency.

The new IR website is focused on potential investors and is accessible to all who want to learn more about the State, its finances, and the capital program that funds public infrastructure across Colorado.

The website is powered by BondLink, a financial technology company that has set the standard for investor transparency in the $4 trillion municipal bond market. BondLink also powers the investor transparency of a host of other states across the country, including California, Ohio, Virginia, Georgia, Oklahoma, and Rhode Island. Within the Centennial State, BondLink also partners with the University of Colorado.

“We’re excited to leverage technology for better transparency. Developing a strong investor relations program is a cornerstone of Colorado’s fiscal health,” said Dave Young, State Treasurer. “This investor relations website disseminates information effectively, while also engaging current and prospective bondholders.”

“Investor transparency is absolutely essential for any issuer looking to finance its public infrastructure at low costs,” said Colin MacNaught, Co-Founder and CEO of BondLink. “Given how turbulent the capital markets have become over the last six months, it’s even more important. We look forward to partnering with the State and advancing its financing programs.”

Academic research shows that better, more accessible disclosure can lead to lower costs for municipal issuers and investors. Enhanced issuer transparency has also been a continued point of emphasis from market regulators.

Illinois Federal Court Joins Line of Decisions Rejecting Attempts to Impose Municipal Franchise Fees on Streaming TV Providers: Duane Morris

We previously addressed a recent series of cases across the country in which municipalities sought to impose franchise fees, like those that apply to cable TV, on streaming TV providers like Netflix and Hulu. The latest decision in this string was issued last week in the Eastern District of Illinois, *City of East St. Louis v. Netflix, Inc. et al.*, Case No. 3:21-CV-561 (S.D. Ill., Sept. 23, 2022). The judge dismissed a suit by the City of East St. Louis against streaming TV providers, finding that the Illinois

Cable and Video Competition Law of 2007 (220 ILCS 5/21-100 et seq.), which requires video service providers to register with the state and pay service provider fees to local units of government, does not contain an express or implied right of action for local governments. Rather, it contains only an express right of action for the state attorney general. The court added that it would not make sense to leave enforcement to individual cities, since they may interpret and apply the law differently. The court also dismissed the City's claims for trespassing, unjust enrichment, and ordinance violations. It held that, under Illinois law, trespassing requires a physical act of entering or causing someone else to enter land owned by a third person, without permission, and that the transmission of video streaming services doesn't do that. Dismissal of the City's claims is in line with most decisions in other states, as discussed in our prior posts.

Duane Morris LLP – J. Tyson Covey

September 29 2022

This Muni Fund Holds Overlooked Winners for Long-Term Success.

Karl Zeile planned to work for a nonprofit after getting a master's degree in public policy from Harvard University.

He changed his mind after meeting municipal-bond analysts during an internship. "It was very clear to me that that's exactly what I wanted to do, because to me, it was the perfect combination of investment analysis, research, and public policy," says the 55-year-old Zeile.

He is now the principal investment officer at Capital Group's $22.9 billion American Funds Tax-Exempt Bond Fund of America (ticker: AFTEX). The fund finds value in under-trafficked parts of the muni market, such as single-family housing bonds in Illinois, affordable-housing bonds in California, and medical-center bonds in Wisconsin.

Continue reading.

Barron's

By Debbie Carlson

Sept. 28, 2022

Schwab Undercuts Vanguard With Launch of Muni ETF Offering 0.03% Fee.

- **Schwab Asset Management announces launch of new muni ETF**
- **Fund's expense ratio is just 0.03%, lower than large rivals**

Charles Schwab Corp.'s asset management arm is launching a new municipal-bond exchange-traded fund with an ultra-low fee that will compete with giants in the space.

The new fund, the Schwab Municipal Bond ETF, will be the cheapest in the municipal-bond market with an expense ratio of just 0.03%, according to a statement by Schwab Asset Management on Wednesday. That's lower than even The Vanguard Group's $17 billion muni ETF, which charges

0.05%.

Muni ETFs, which offer a cheap way for investors to access the market, have been able to lure investor cash this year despite a steep selloff. The funds have seen more than $13 billion in inflows year-to-date, while mutual funds have recorded steep outflows, according to Bloomberg Intelligence data.

“Schwab woke up this morning and chose expense ratio violence as they undercut the current market leader, Vanguard,” said Eric Kazatsky, muni strategist for Bloomberg Intelligence. “With cheap beta leading all asset growth in the passive municipal ETF space, the aggressive move is sure to garner a response by other firms.”

Schwab’s statement notes that the ETF will be cheaper than comparable funds. The median fee charged by muni ETFs is 0.25%, according to data compiled by Bloomberg.

“Schwab Asset Management’s pricing objective in broad market ETFs has been and continues to be among the lowest cost providers,” said John Sturiale, head of product management and innovation at Schwab Asset Management, in an emailed response. “Our scale as the fifth largest ETF provider enables us to price our new municipal bond ETF at 3 bps and take a leadership position in bringing down costs for investors.”

Schwab’s announcement also points to the rise in yields this year. The yield on the 30-year muni benchmark is inching closer to 4%, a level last breached in 2014, according to Bloomberg BVAL.

“As bond yields have risen, fixed income investing is more attractive than it has been in years, making this an opportune moment to introduce a new choice for investors seeking a low-cost, straightforward approach to income, diversification and risk management in their portfolios,” Sturiale said in the announcement.

The fund, which is expected to begin trading Oct. 12, will invest only in investment-grade rated securities, the statement reads.

Bloomberg Business

By Amanda Albright

September 28, 2022

Sky-High Yields and Stellar Credit Make Muni Bonds a Buy, Investors Say.

- **Ten-year benchmark munis yield 3.23%, highest since 2011**
- **Government credit supported by federal aid and tax receipts**

In the midst of a historically rough year in the $4 trillion municipal bond market, investment managers see ample opportunity as surging yields provide a compelling entry point.

Ten-year benchmark municipal bond yields are hovering around 3.23%, the highest since 2011, while 30-year munis are yielding more than comparable US Treasury debt. Those prices open the door for investors looking for income in a market where many state and local governments are flush with cash, said Sylvia Yeh, co-head of municipal fixed income at Goldman Sachs Asset Management and Brian Barney, managing director for institutional portfolio management and trading at

Parametric Portfolio Associates, at a Bloomberg muni market panel discussion on Tuesday.

Conversations with clients now are “almost entirely opportunistic,” Barney said. “During times of volatility and attractive rates would be a good time to enter.”

Continue reading.

Bloomberg

By Hadriana Lowenkron

September 28, 2022

Texas’ ESG Attack Sweeps Up Some Funds That Aren’t Really ESG.

Almost 40% of the funds targeted by state comptroller have investments in fossil-fuel stocks.

A Texas statute targeting perpetrators of “ESG” includes a significant number of investment funds that don’t have a genuine environmental, social or governance focus.

Of the 348 funds singled out by Texas Comptroller Glenn Hegar, 14% don’t qualify as ESG, according to an estimate by Morningstar Inc. What’s more, almost 40% invest in the oil and gas industry they’re accused of boycotting, data compiled by Bloomberg show.

It’s the latest counter-intuitive moment in an unlikely battle that has thrust a once obscure financial acronym into the center of American politics. Ironically, many of the firms and funds targeted by the GOP for sidelining oil and gas have been criticized by climate activists for their continued support of the fossil-fuel industry.

“The fact that many funds on the banned fund list hold companies involved in the oil and gas industry raises questions about the research done by the Texas comptroller on these investments,” said Hortense Bioy, global director of sustainability research at Morningstar. “Clearly, these funds aren’t boycotting energy companies.”

The state’s position hasn’t changed since the decision was announced last month, said Chris Bryan, director of communications for the Texas comptroller. The test isn’t that the funds are ESG focused, the test is on whether the funds boycott energy companies based on state statute, which is broader than just having oil and gas investments, he said.

“If new information is provided to us about the funds, we will actively consider whether to update the list and we will do this on a regular basis,” Bryan said.

Hegar denounced Wall Street and “environmental crusaders” in August for creating a “false narrative” that the economy “can completely transition away from fossil fuels, when, in fact, they will be part of our everyday life into the foreseeable future.” Aside from 348 investment funds, the state targeted 10 asset managers and banks, including BlackRock Inc. and Credit Suisse Group AG. Texas Attorney General Ken Paxton also has joined a multistate investigation, questioning Morningstar’s use of “ESG factors.”

BlackRock, which has since been slammed by Democratic states for appearing to backtrack on its

pledge to cut CO2 emissions, said GOP attacks ignore the fact that it holds more than $100 billion in Texas energy companies. It would therefore be “inaccurate” to accuse it of boycotting fossil fuels, Dalia Blass, BlackRock’s head of external affairs, said on Sept. 7.

Applying an ESG investment approach generally entails screening for environmental, social and governance opportunities and risks. Some fund managers apply exclusion policies, while others adopt so-called engagement strategies, whereby they continue to hold sectors such as oil and gas with a view to helping the companies adapt to a low-carbon world. ESG often faces criticism from activists for being too focused on financial performance.

The fund managers boycotted by Texas have failed “to provide assurance that they are taking sufficient steps to address the climate crisis,” said Pete Uhlenbruch, director of financial sector standards at sustainability nonprofit ShareAction.

Funds targeted by Hegar include BlackRock’s iShares ESG Aware MSCI USA ETF (ticker ESGU), which holds shares of Exxon Mobil Corp., Chevron Corp., ConocoPhillips and Halliburton Co.; CREF Social Choice Account, which has stakes in Kinder Morgan Inc., Schlumberger NV and Southwestern Energy Co.; and Vanguard ESG US Stock ETF (ESGV), which has investments in companies including Murphy USA Inc.

Vanguard Group’s “only objective is to maximize investment returns for our clients and help them achieve their financial goals,” said spokesperson Emily Ferrell.

Over the past decade, Morningstar estimates US investors exposed to ESG strategies saw investment returns that were consistently between one and seven percentage points higher than those of conventional funds.

Others note that fund managers have increasingly limited investment options because more and more companies incorporate ESG considerations into their business models.

“So many companies are now setting science-based emission reduction targets and embracing bold climate action that large investors would struggle to build any kind of profitable portfolio that excludes such businesses,” said Maria Mendiluce, chief executive of the We Mean Business Coalition.

That said, Republican Party concerns that the oil and gas industry isn’t getting enough money from big finance appear overdone. Banks have loaned $302 billion to fossil-fuel companies this year, compared with $268 billion in the same period of 2021 and $256 billion in 2020, according to Bloomberg data.

At the same time, there are signs that ties are continuing between the financial firms vilified by the GOP, and the states publicly attacking them.

Five firms targeted in a pair of anti-ESG statutes passed by Texas a year ago led to the initial departure of Goldman Sachs Group Inc., JPMorgan Chase & Co., Fidelity Capital Markets, Bank of America Corp. and Citigroup Inc. Their absence caused borrowing costs for Texas municipalities to rise by as much as $530 million, one study shows.

Since then, a number of those same banks appear to be back in. JPMorgan, for example, wasn’t included in an updated version of Texas’ list, and now intends to begin bidding on public contracts again.

Meanwhile, regulators policing the finance industry are taking steps to set up guardrails around

what asset managers can call an ESG investment. In May, the US Securities and Exchange Commission proposed tougher disclosure requirements, while asset managers targeting EU clients face a January deadline to provide investors with more information.

Bloomberg Green

By Frances Schwartzkopff

September 30, 2022

— With assistance by Amine Haddaoui, and Wladislaw Kobzar

Vanguard's Malloy Says Crossover Buyers Are Key to Muni Recovery.

- **Muni market on track for worst performance in decades**
- **Banks, insurance companies helped drive rally in spring 2022**

Paul Malloy, who oversees roughly $211 billion of municipals at the Vanguard Group Inc., says conditions are ripe for a recovery from this year's steep muni selloff.

Buyers known as "crossover investors" that usually acquire taxable securities could jump in to take advantage of cheap valuations, once again aiding in the securities' recovery, Malloy said. The muni market has tumbled 12% year-to-date, and if that drop holds it would be the worst performance since at least the 1980s, according to Bloomberg indexes.

Crossover investors, including banks and insurers, drove a short-lived municipal-bond market rally in late May and early June, and another similar recovery is possible. "They haven't come back in force yet, but they are interested," Malloy said in an interview Tuesday. "All the preconditions are there for a snapback."

Despite the rout, the financial health of municipal-bond issuers remains strong after tax revenue beat expectations and the federal government stepped in with aid after the pandemic.

The ratio of muni yields compared to Treasuries for long-dated securities is above 100%, which Malloy says is "pretty attractive" for investors. The yield on the 30-year AAA benchmark offers about 102% of the yield on similar-dated Treasuries, according to Bloomberg data.

A less volatile Treasury market would embolden crossover buyers to start wading back into the muni market, he said.

Crossover buyers' participation is key as they're often first movers, driving recovery from selloffs while retail investors — the major buying force in the state and local debt market — often follow, according to Malloy, who is based in Malvern, Pennsylvania.

"They'll put a bid to the market, and retail will come in on top of that," he said.

Bloomberg Markets

By Amanda Albright

September 28, 2022

— With assistance by Marvis Gutierrez, and Jennah Haque

Munis a Great Spot to Invest Now, Vanguard's Malloy Says.

Paul Malloy, Vanguard's head of municipals, says municipal bonds are in the best fundamental shape they've been in decades. He speaks with Taylor Riggs on "Bloomberg Markets: The Close."

Watch video.

Bloomberg Markets: The Close

September 27th, 2022

Doreen M. Frasca Thrived in Muni Bonds and Funded Airports.

Advisory-firm founder, who has died at age 68, made early mark by defeating Sonia Sotomayor in high-school election

The 1972 race for student body president at Cardinal Spellman High School in the Bronx pitted Doreen M. Frasca against Sonia Sotomayor. Ms. Frasca won, but things worked out quite well for both of them.

"That defeat convinced me to refrain evermore from participating in electoral politics," said Ms. Sotomayor, now a U.S. Supreme Court justice, who described Ms. Frasca as a special person.

Though Ms. Frasca remained fascinated by politics, a summer job led her to Wall Street. She became a star in the municipal bond market as a managing director at Merrill Lynch and later as an independent adviser to public entities seeking to raise money. Her specialty was airport projects. She was an early advocate of public-private partnerships.

Continue reading.

The Wall Street Journal

By James R. Hagerty

Sept. 30, 2022

- SEC Brings First Charges Against Muni Market Underwriters Alleging Failure to Meet Requirements for Limited Offering Disclosure Exemption: Ballard Spahr
- MSRB Votes to Amend Municipal Advisor Advertising and Registration Rules.
- Financial Services Professionals: Check Your Political Contributions for Compliance to Avoid Pay-To-Play Fines – Nossaman
- Stuck With The Bill: Local Governments Deluged With Rising Climate Damage Costs
- The Financial Data Transparency Act: What GFOA Members Need to Know – Podcast

- Our more depraved readers may be interested in two S&P Second Party Opinions issued in connection with NYC social bonds here and here.
- *Vandercar, LLC v. Port of Greater Cincinnati Development Authority* – Court of Appeals holds that Port Authority's issuance of revenue bonds constituted both Property Acquisition Bonds *and* Redevelopment Bonds pursuant to the Agreement Regarding Assignment entered into between the Port and property developer in connection with hotel redevelopment.
- And finally, New Frontiers In Consent: No Means OH MY GOD I'M GONNA DIE is brought to us this week by *Flores v. City of San Diego*, in which William Flores participated in a high-speed police pursuit on his motorcycle featuring 100+ mph speeds, blown red lights, reckless maneuvers, surface streets, freeways, and the accompaniment of most of the San Diego PD. Pretty standard local tv fodder, but for one little detail: his girlfriend was on the back of the bike. Fortunately, it all ended well. Nah, he crashed and died. She was just seriously injured. And you thought your date nights were spicy. Maybe stick to Applebee's? We hear that the Four Cheese Mac + Cheese with Honey Pepper Chicken Tenders are lovely this time of year.

IMMUNITY - CALIFORNIA

Flores v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - September 15, 2022 - Cal.Rptr.3d - 2022 WL 4244284 - 2022 Daily Journal D.A.R. 9981

Mother and girlfriend of motorcyclist, who died during police vehicle pursuit when his motorcycle crashed, brought actions against city for wrongful death and negligence. Actions were consolidated.

The Superior Court granted city's motion for summary judgment based on statutory immunity. Mother and girlfriend appealed.

The Court of Appeal held that:

- Commission on Peace Officer Standards and Training (POST) regulation specifying minimum standards for legislatively-mandated training courses applied to annual trainings;
- Vehicular pursuit training requirements specified in immunity statute were "legislatively mandated" within meaning of POST regulation;
- Term "guidelines" in immunity statute referred to "standards" in vehicle pursuit training statute;
- POST regulation setting forth standard of one year of annual vehicular pursuit training did not exceed statutory authority; and
- Triable issue existed as to whether city provided at least one hour in annual vehicular pursuit training.

PUBLIC UTILITIES - COLORADO

United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - F.4th - 2022 WL 4281979

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility

members of cooperative.

Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and
- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation to pay an equitable exit charge, cost of electricity under requirements contract would have been

higher.

PUBLIC MEETINGS - CONNECTICUT

Priore v. Haig

Supreme Court of Connecticut - September 7, 2022 - A.3d - 344 Conn. 636 - 2022 WL 4099434

Special permit applicant filed suit against neighbor for libel per se, libel per quod, slander per quod, and defamation, alleging neighbor's comments at planning and zoning commission meeting caused reputational damage to his standing in community and profession and falsely accused him of criminal misconduct and being untrustworthy.

The Superior Court granted neighbor's motion to dismiss on grounds that court lacked subject matter jurisdiction and denied applicant's motion to reargue. Applicant appealed, and the Appellate Court affirmed. Applicant petitioned for certification to appeal, which was granted.

The Supreme Court held that public hearing on special permit application was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim.

A proceeding may be "quasi-judicial," for purposes of absolute defamation privilege, when the body or entity conducting the proceeding has the discretion to apply the law to the facts, while additional factors that could assist in determining whether a proceeding is quasi-judicial in nature include whether the body has the power to exercise judgment and discretion, hear and determine or to ascertain facts and decide, make binding orders and judgments, affect the personal or property rights of private persons, examine witnesses and hear the litigation of the issues on a hearing, and enforce decisions or impose penalties; these factors are not exclusive, nor must all factors militate in favor of a determination that a proceeding is quasi-judicial in nature for a court to conclude that the proceeding is quasi-judicial.

Public hearing on special permit application before town planning and zoning commission was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim; while commission had discretion to apply the law to the facts of the application before it, and was empowered to make binding orders or judgments affecting the rights of private persons, the hearing lacked procedural safeguards, the commission had limited authority to reject evidence or otherwise limit what information was brought before it to ensure the reliability of the proceeding, and there was a lack of a public policy rationale for extending absolute immunity.

SCHOOLS - FLORIDA

Chabad Chayil, Inc. v. School Board of Miami-Dade County, Florida

United States Court of Appeals, Eleventh Circuit - September 8, 2022 - F.4th - 2022 WL 4100687

Operator of Jewish oriented afterschool program brought § 1983 action against school district and county's Office of Inspector General (OIG), alleging violations of its First Amendment right to freely exercise religion, violation of equal protection rights, and violation of due process under the

Fourteenth Amendment.

United States District Court for the Southern District of Florida dismissed the claims with prejudice and without leave to amend. Operator appealed.

The Court of Appeals sitting by designation, held that:

- School district did not have *Monell* liability;
- OIG did not have § 1983 liability for alleged violations of operator's First Amendment right to freely exercise its religion;
- Operator failed to establish a "class of one" equal protection claim;
- Operator's alleged agreement with school district did not support its due process claim;
- Operator did not have a due process protected right to have school district consider its application for use of school facilities; and
- OIG did not have § 1983 liability for the alleged due process violation.

School superintendent's alleged actions in making decision to prevent operator of Jewish oriented afterschool program from using school district's facilities for the program were subject to meaningful administrative review and therefore lacked the final policymaking authority required for school district to have *Monell* liability for alleged violations of operator's religious freedom rights under the First Amendment, and equal protection and procedural due process rights under the Fourteenth Amendment, where state statutory scheme as a whole made clear that the school district retained ultimate authority to review and reverse any of the superintendent's decisions that it disapproved.

Allegations by operator of Jewish oriented afterschool program, that county's Office of Inspector General (OIG), in investigating operator for failing to reveal it collected monies in application for free access to school district facilities, exhibited bias against operator based on its teaching of religion and that OIG investigators pressured interviewees to say that teaching religious topics violated some policy, despite having no basis to believe that religious orientation of the program violated any school district policy, were insufficient to plausibly allege an official policy or custom of OIG that would render it liable for violating operator's right to freely exercise its religion; allegations did not demonstrate a custom so longstanding and widespread that it was deemed authorized by policymaking officials.

Operator of Jewish oriented afterschool program failed to demonstrate that its comparators were similarly situated in all relevant respects and thus failed to establish a "class of one" equal protection claim against county's Office of Inspector General (OIG) arising from allegations that OIG singled it out for investigation for failing to disclose it collected monies in order to get facility use fee waivers from the school district when numerous other organizations received fee waivers while charging fees, where OIG's investigation into operator was instigated by an anonymous complaint alleging that operator was improperly receiving fee waivers, and operator did not allege that any of the proposed comparators were also the subject of such a complaint.

Purported informal agreement between operator of Jewish oriented afterschool program and school district, allowing operator to use school facilities for program until conclusion of county Office of Inspector General (OIG) investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility, was not a stigma plus legal entitlement, and thus, operator failed to establish a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against OIG for making allegedly false and defamatory statements in its investigation report, where operator did not have a signed, written agreement to use school district facilities for the school year.

Right to have applications for use of school facilities be considered by school district was not a property right recognized under state law, and thus, operator of Jewish oriented afterschool program did not have a stigma plus legal entitlement supporting a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against county Office of Inspector General (OIG), arising from OIG's investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility; operator did not point to any legal authority providing that it had a right to have a local school district consider its applications.

Even if county's Office of Inspector General (OIG) acted in accordance with some official policy or custom, that policy or custom did not cause harm suffered by operator of Jewish oriented afterschool program from school district's action in barring operator from continuing to use school facilities following OIG's investigation into operator's alleged misrepresentations in effort to obtain free use of school facilities, and thus, OIG did not have § 1983 liability for operator's due process claim for deprivation of a liberty interest based on reputational harm arising from OIG's alleged defamatory statements in its investigation report; OIG's role was to conduct investigations and issue reports, and it did not have authority to refuse any group permission to use school district property.

MARKETABLE TITLE ACT - MINNESOTA

Lundstrom v. Township of Florence

Court of Appeals of Minnesota - September 6, 2022 - N.W.2d - 2022 WL 4074769

Landowners brought declaratory-judgment action against township, claiming that township's interest in unopened streets abutting their property was extinguished by Marketable Title Act (MTA).

The District Court denied landowners' summary judgment motion and granted township's summary judgment motion in which they sought a declaration that the disputed streets were platted, public, unopened roads. Landowners appealed.

The Court of Appeals held that:

- Landowners established a "source of title" for purposes of their claim under MTA, and
- Township neither timely recorded notice of its easement interest nor identified evidence that satisfied possession exception notice requirement of MTA.

Landowners established a "source of title" for purposes of their claim under Marketable Title Act (MTA) in declaratory-judgment action against township regarding their respective interests in portions of two platted, unopened streets that abutted landowners' lots; fee simple title to real estate was "source of title" for MTA purposes, landowners owned fee simple interests in their lots, lots abutted streets dedicated by plat, neither street had been vacated, and landowners had fee simple interest to center of street.

Township neither timely recorded notice of its easement interest in unopened streets abutting landowners' property nor identified evidence that satisfied possession exception notice requirement of Marketable Title Act (MTA), and thus township was conclusively presumed to have abandoned its interest in unopened streets to which landowners had asserted interest, although township had purported interest through execution and recording of land by plat dedication in 1857 and claimed that public used street to access river abutting landowners' property; recording of plat did not

satisfy township's duty to file notice of claim under MTA, township did not show that public used streets to access riverfront, and abandonment of platted public street did not require affirmative act.

REFERENDA - NEW JERSEY

Kumar v. Piscataway Township Council

Superior Court of New Jersey, Appellate Division - August 23, 2022 - A.3d - 2022 WL 3589079

Voters sought review of a decision from township council, which approved resolutions to place non-binding public opinion questions on general election ballot regarding proposed ordinances to establish emergency medical services department and to required township to record, broadcast, or stream township's public meetings.

The Superior Court found township's resolutions were void and enjoined township from placing non-binding public opinion questions on the ballot, but denied voters' motion for attorney's fees. Appeals were taken.

The Superior Court, Appellate Division, held that:

- Township council was not authorized to place non-binding public opinion questions on general election ballot under the Faulkner Act, but
- Voters were entitled to award of attorney's fees under Civil Rights Act.

Township council was not authorized to place non-binding public opinion questions concerning identical binding questions proposed by voters on the same general election ballot under the Faulkner Act; voters had already asked township council to consider and place binding questions regarding creation of an emergency medical services department and recording or broadcasting of township meetings under statutory procedure governing initiatives for proposed ordinances, and inclusion of both binding and non-binding questions would have caused voter confusion and could have resulted in contradictory results.

Voters' right to petition initiatives for proposed township ordinances constituted a "substantive right" protected by the Civil Rights Act (CRA), such that a deprivation of the right entitled voters to an award of attorney fees as the prevailing party under the CRA; township, through its council, violated the Act and prevented voters from having their petitions fully and fairly considered, and court's order enjoining township from placing non-binding questions on the ballot altered legal relationship between the parties in favor of voters.

EMINENT DOMAIN - NEW YORK

20 Rewe Street, Ltd. v. State

Supreme Court, Appellate Division, Second Department, New York - September 14, 2022 - N.Y.S.3d - 2022 WL 4230493 - 2022 N.Y. Slip Op. 05145

Landowner brought action against State for damages from partial taking of real property. Following nonjury trial, the Court of Claims rendered judgment in favor of landowner, and awarded landowner $3,310,500 in damages. Landowner appealed.

The Supreme Court, Appellate Division, held that record supported trial court's pre-taking value of real property based on State's appraisal.

Record supported trial court's $4,389,000 pre-taking value of landowner's real property based on State's appraisal, in action to recover damages arising from a partial taking of real property; comparable sales proffered by State's expert were sufficiently similar to serve as a guide to the market value of the property, notwithstanding differences between the comparables and the property, and State's appraiser sufficiently and credibly explained the basis for his selection of comparable properties and relevant adjustments made to the valuation of the properties, and evidence supported trial court's rejection of certain adjustments made by landowner's appraiser.

BONDS - OHIO

Vandercar, LLC v. Port of Greater Cincinnati Development Authority

Court of Appeals of Ohio, First District, Hamilton County - September 9, 2022 - N.E.3d - 2022 WL 4112705 - 2022-Ohio-3148

In 2019, Developer entered into a $36 million purchase contract for the purchase of the Millennium Hotel in downtown Cincinnati in order to facilitate the redevelopment of the hotel. Developer later assigned its interest in the contract to the Port of Greater Cincinnati Development Authority under an Agreement Regarding Assignment ("the Agreement") in exchange for two potential fees totaling $7.5 million.

Under the purchase and sale agreement, the Port was obligated to pay Developer a $2.5 million "Developer Fee" upon the closing of the transaction. In the event that the Port issued the "Redevelopment Bonds" within one year of the closing of the sale, it was obligated to pay Developer an additional $5 million.

On February 13, 2020, the Port issued revenue bonds in the amount of $52 million. On February 14, 2020, the Port closed on its acquisition of the real property and paid Developer its $2.5 million Development Fee.

Developer subsequently submitted an invoice for the remaining $5 million, Developer asserted that the revenue bonds were issued for purposes other than simply property acquisition and were thus Redevelopment Bonds issued within one year of closing, which triggered the Port's obligation to pay the Redevelopment Fee. Developer claimed that the $52 million of revenue bonds consisted of both Property Acquisition Bonds and Redevelopment Bonds.

The Port argued that the revenue bonds consisted only of Property Acquisition Bonds, and that it was not obligated to pay the Redevelopment Fee because it did not issue Redevelopment Bonds to construct a new hotel.

The Agreement did not define "acquisition" or "redevelopment," and defined "Property Acquisition Bonds" only as bonds issued to acquire the Real Property and "Redevelopment Bonds" as those issued for redevelopment of the Real Property.

The Court of Appeals held that:

- The $52 million issuance of revenue bonds constituted both Property Acquisition Bonds and Redevelopment Bonds, triggering the Port's obligation to pay Developer's $5 million Redevelopment Fee.

- Remand was necessary to determine if the Port acted in bad faith, as the basis for an award of attorneys' fees as costs.
- Developer was not entitled to the payment of prejudgment interest, as the Port was an arm or instrumentality of the state.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

Supreme Court of Ohio - September 13, 2022 - N.E.3d - 2022 WL 4137610 - 2022-Ohi--3205

Relators sought writ of mandamus to have referendum on zoning ordinance passed as emergency legislation placed on upcoming general-election ballot.

The Supreme Court held that:

- Relators caused unreasonable delay in waiting to file action, as relevant to whether action was barred by laches;
- City and prospective purchaser of land were not prejudiced by delay, and thus action was not barred by laches;
- Relators lacked adequate remedy in ordinary course of law;
- Ordinance validly passed as emergency legislation was not subject to referendum under city charter; and
- Ordinance sufficiently stated reasons for passage as emergency legislation.

Zoning ordinance validly passed as emergency legislation was not subject to referendum under city's charter, which stated that zoning ordinances "shall be subject to the provisions of [the charter] pertaining to their enactment and matters of initiative or referendum"; natural reading of charter was that "subject to" had one object, i.e., "the provisions of [the charter]," meaning that zoning ordinances could be enacted in same way as other ordinances and that charter's referendum provisions applied to such ordinances, and charter incorporated state law concerning referendum petitions, which law exempted from referendum power ordinances passed as emergency legislation.

Stated reasons in zoning ordinance for its passage as emergency legislation, specifically, to preserve and increase municipal income tax revenues, to protect value of previously made utility infrastructure investments in zoned area, and to protect city's influence over and ability to fund infrastructure improvements in zoned area, were sufficient to satisfy requirement that ordinance set forth reasons for passage as emergency legislation under statute providing that such ordinances go into immediate effect, and thus zoning ordinance was not subject to referendum.

MUNICIPAL CORPORATIONS - OHIO

State ex rel. Village of Moscow v. Clermont County Board of Elections

Supreme Court of Ohio - September 8, 2022 - N.E.3d - 2022 WL 4100752 - 2022-Ohio-3138

Protestors, a village and its mayor, sought writ of prohibition to reverse Board of Elections' denial of protest to keep petition to surrender the corporate powers of village off the ballot as it had not been

submitted to village's legislative authority prior to its submission to the Board of Elections and had not been filed with township Board of Trustees, and to reverse Board of Elections' certification of petition to the ballot, and sought a writ of mandamus compelling Board of Elections to remove the measure from the ballot.

The Supreme Court held that:

- Board of Elections failed to follow applicable legal provisions by placing surrender petition on ballot despite fact that petition had not been submitted to village's legislative authority prior to its submission to Board of Elections, as would support writ of prohibition to reverse certification of surrender petition to ballot, abrogating *Pringle v. Clermont Cy. Bd. of Elections*, 12th Dist. Clermont No. CA2019-10-078, 2019-Ohio-4528, 2019 WL 5692285; and
- Grant of writ of prohibition mooted request for a writ of mandamus.

SCHOOLS - OKLAHOMA

Ritter v. State

Supreme Court of Oklahoma - September 20, 2022 - P.3d - 2022 WL 4359959 - 2022 OK 73

Parents of public school students brought a declaratory judgment action challenging the constitutional validity of statutes prohibiting a public school district from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located.

The District Court granted a temporary injunction. State appealed and parents filed a counter-appeal.

The Supreme Court held that:

- Statutes were an unconstitutional delegation of legislative authority to the extent they required Governor to declare an emergency, and
- Unconstitutional provision could be severed from the remainder of statutes.

Principles of sovereign immunity did not preclude plaintiffs from pursuing a declaratory judgment action against the State challenging the validity of statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools as violative of various constitutional provisions including provision on delegation of legislative authority; a declaratory judgment could be sought to determine the validity of any statute, and a suit for declaratory judgment was neither strictly legal nor equitable, but assumed the nature of the controversy at issue.

Statutes prohibiting school boards for public school districts from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located were an unconstitutional delegation of legislative authority, to the extent the statutes required the Governor to declare an emergency before school boards could make decisions regarding local health matters; statutes removed the school boards' authority to act independently and exercise the authority granted to school boards and statutes granted that authority to Governor, who had neither constitutional nor statutory authority over operation of schools.

Unconstitutional provision in statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools, which impermissibly delegated legislative authority to the Governor to declare an emergency before local school districts could make decisions regarding local health matters, could be severed from the valid provisions, which remained enforceable; valid provisions were separable, or were capable of being executed in accordance with the legislative intent of the statutes as enacted.

SIFMA US Municipal Bonds Statistics.

SIFMA Research tracks issuance, trading, and outstanding data for the U.S. municipal bond market. Issuance data is broken out by bond type, bid type, capital type, tax type, coupon type and callable status and includes average maturity. Trading volume data shows total and average daily volume and has customer bought/customer sold/dealer trade breakouts. Outstanding data includes holders' statistics. Data is downloadable by monthly, quarterly and annual statistics including trend analysis.

YTD statistics include:

- Issuance (as of August) $279.5 billion, -11.9% Y/Y
- Trading (as of August) $13.6 billion ADV, +54.1% Y/Y
- Outstanding (as of 2Q22) $4.0 trillion, +0.2% Y/Y

Download xls

September 12, 2022

NEW - NASBO National Overview & Summaries of FY2023 Enacted Budgets

View the NASBO budgets.

Fitch: Corrective Action Taken on 2021 Transition & Default Studies

Fitch Ratings-New York-23 September 2022: Fitch Ratings has revised the average cumulative default rates for sovereigns in its 2021 Transition & Default Studies (the Studies) that were initially published on March 31, 2022.

A system error in reporting software resulted in average cumulative default rates that were too low being calculated for sovereigns in 'BB' and below categories and included on the "Sovereign Default Rates" tab of the initial version of the Studies. To correct for the understated default rates, Fitch has published a revised version of the Studies. No other figures in the Studies were affected.

The revised version of the Studies can be found at https://www.fitchratings.com/research/corporate-finance/2021-transition-default-studies-31-03-2022

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Fitch: FACT Shows U.S. NFP Hospitals in a Calm Before the Storm

Fitch Ratings-New York-22 September 2022: Fitch Ratings' medians for U.S. not-for-profit (NFP) hospitals show a sector currently at a highpoint with notable declines on the horizon, according to the latest Fitch Analytical Comparative Tool (FACT) for the sector.

'2022 medians show deceptively strong numerical improvements that are pointing to a cautionary calm before the storm,' according to Fitch Senior Director Kevin Holloran. Hospital medians are likely to reverse course this time next year due to inflation, a very challenged operational start to calendar 2022, and, most notably, staffing shortages to persist well into 2023 and likely longer in some markets.

The FACT contains financial data for 218 hospitals and health systems that can be benchmarked against peers, medians and self-defined peer groups along with historical statistics and metrics going back to 2011. This report is the third in a recent series of reports Fitch has published in recent weeks, the most recent one being Fitch's sector outlook revision for U.S. NFP hospitals to Deteriorating.

The FACT includes a dashboard feature to graphically plot annual issuer metrics and median performance, a peer analysis tool that allows users to review and compare metrics of two issuers, and a charting tool that generates a comparison of issuer metrics against rating category medians.

'Not-for-Profit Hospitals and Healthcare Systems 2022 FACT' is available at 'www.fitchratings.com'.

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S&P U.S. Not-For-Profit Health Care Rating Actions, August 2022.

S&P Global Ratings affirmed 23 ratings without revising the outlooks, took eight rating actions, and revised six outlooks without changing the ratings in the U.S. not-for-profit health care sector in August 2022. We also placed ProMedica Healthcare Obligated Group on CreditWatch with negative implications in addition to lowering the rating and revised the outlook on Princeton Community Hospital in West Virginia from negative to developing. There was one new sale in August. The 14 rating and outlook actions consist of the following:

- Seven downgrades, on six stand-alone hospitals and one system;
- One upgrade, on one standalone hospital;
- Five unfavorable outlook revisions on one standalone hospital, three systems, and one long-term care provider (all to negative from stable); and
- One favorable outlook revision on one standalone hospital (from stable to positive).

The table below summarizes S&P Global Ratings' monthly bond rating actions for U.S. not-for-profit health care providers in August. 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 but we are incorporating the changing dynamics of the sector including the increased inflationary pressures, economic developments, and investment market volatility.

Continue reading.

19 Sep, 2022

NYC Preps Inaugural 'Social' Bonds as Part of $1.4 Billion Debt Sale.

- **Deal includes $400 million of taxable debt for housing**
- **Investors bought $50 billion in new muni ESG debt last year**

New York City plans to sell about $1.4 billion of debt next month, in part to address its deepening housing crisis. The deal includes $400 million of taxable debt that will be the city's first-ever issuance of bonds explicitly earmarked to tackle social issues.

Proceeds from these social bonds are expected to finance more than 3,000 units of affordable housing, according to a press release Tuesday from Mayor Eric Adams's office. The remaining $950 million will be sold as tax-exempt debt, and will be used for general capital purposes.

The city, like many other issuers in the $4 trillion municipal-bond market, hopes to seize on growing investor appetite for environmental, social and governance — or ESG — bonds. Investors snapped up $50 billion in new-issue municipal ESG debt in 2021, up 79% from the previous year, the release said. Driven by sales of affordable housing bonds, the sector is already ahead of the pace last year, when it set a record.

"This groundbreaking sale of the city's first social bonds will ensure we are tapping a rising source of investor demand to promote a stronger, more resilient city," said Mayor Adams.

The proposed bond sale comes at a precarious time for the city as it grapples with the consequences of insufficient homebuilding. Between 2011 and 2020, New York City produced only 27 new housing units for every 1,000 residents, below the national average of 34. And the New York City Housing Authority currently faces a $40 billion backlog in capital needs, according to Adams's housing blueprint.

Proceeds from the social bonds will finance a slew of projects currently under development through programs run by a different agency, the New York City Department of Housing Preservation and Development. More than 80% of the money are for projects in the Extremely Low- and Low-Income Affordability program, which finances the construction of low-income multifamily rentals.

Additionally, about 70% of the units will be designated for residents earning below a certain income threshold: 60% or less than the median area income, which is about $72,000 for a family of three, the release said. More than 900 of the units will be for individuals and families who formerly experienced homelessness.

The taxable portion of the deal is slated to price on Oct. 4, via negotiated sale led by Citigroup Inc. and Morgan Stanley as joint lead managers. The tax-exempt portion is led by Citi, and is expected to price the same day, according to roadshow documents.

Other cities have also made similar moves. In August, Chicago Chief Financial Officer Jennie Bennett said the city plans to sell its first ever ESG-labeled municipal bonds in the fall. The city will sell between $100 million and $150 million of debt, with proceeds slated for environmentally and socially beneficial projects as part of the Chicago Recovery Plan, a $1.2 billion economic development initiative that uses federal aid alongside municipal borrowing.

While selling social bonds, or any ESG bonds, helps issuers tap a broader base of potential investors, the muni market still hasn't seen evidence of a pricing advantage for such debt, said Ruth Ducret, senior research analyst at Breckinridge Capital Advisors.

Still, "it's pretty low-hanging fruit to do it," she said.

Bloomberg CityLab

By Nic Querolo and Marvis Gutierrez

September 21, 2022 at 11:04 AM PDT

— With assistance by Mackenzie Hawkins

Small-Town Sewers Are Getting Tech-Like Premiums.

The money to be had for selling water systems to private operators can seem too good to ignore. But these deals often have unintended consequences for taxpayers.

Biotech, social media and cryptocurrencies are the usual hotspots for crazy asset prices. This year, though, one of the highest valuations offered in any US acquisition is for the sewer system of a tiny township in Pennsylvania.

NextEra Energy Inc., the world's biggest utility by market capitalization, announced in June it was

buying the wastewater system of Towamencin township, a community of some 18,000 people about 30 miles north of Philadelphia. The price, $115 million, made it pocket change for a company valued at $169 billion. But at 21 times revenue, NextEra offered a higher multiple than all but two US deals announced this year, both of which were in biotech. 1

This raises questions. Why is an electricity and renewables powerhouse paying a tech-like premium for roughly 8,000 sewer accounts in some patch of Pennsylvania? And why is this township selling its biggest asset in the first place? The answers blend strategy, state privatization laws and small-town politics — and the profits to be made in water.

Continue reading.

Bloomberg Opinion

By Liam Denning

September 19, 2022

S&P Second Party Opinion: City of New York's Social Financing Framework

The City of New York (the City) established the Department of Housing Preservation and Development (HPD) in 1978 to handle the development and maintenance of its affordable housing. HPD's mission is to promote the quality and affordability of the City's housing and the diversity and strength of its neighborhoods.

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S&P Second Party Opinion: City of New York's $400 Million Taxable General Obligation Social Bonds

The City of New York (the City) established the Department of Housing Preservation and Development (HPD) in 1978 to handle the development and maintenance of its affordable housing. HPD's mission is to promote the quality and affordability of the City's housing and the diversity and strength of its neighborhoods.

Download

The Emerging Concerns Over the Infrastructure Law Rollout.

State and local leaders are happy to have the money. But state transportation officials are flagging issues they're worried about, as Republican lawmakers chafe over Biden administration rules.

Republican lawmakers in Congress and some state highway officials are criticizing a proposal by the Transportation Department that would require states to set goals for reducing greenhouse gas

emissions on their roads.

State officials are also pressing for federal agencies to grant their departments greater flexibility in deciding how to spend funding from the new infrastructure law. And they're warning that they could run into problems trying to meet requirements for buying American-made materials for projects—including with the nationwide buildout of electric vehicle charging stations.

The Transportation Department's rules for giving out discretionary grants under the $1.2 trillion Infrastructure Investment and Jobs Act tend to be so complicated that West Virginia Transportation Secretary Jimmy Wriston said he can "confidently predict" the administration of that money will be seen as an "abject failure" a year from now.

Continue reading.

Route Fifty

By Kery Murakami

SEP 21, 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.

Continue reading.

NATIONAL ASSOCIATION OF COUNTIES

by TERYN ZMUDA, SARAH EDWARDS, JONATHAN HARRIS

JULY 18, 2022

Stuck With The Bill: Local Governments Deluged With Rising Climate Damage Costs

Who's stuck with the bill for climate impacts? Too often, local governments.

Much of Columbus, Ohio, was without power for days this past June as the local electric utility struggled to manage simultaneous impacts of powerful storms and a heat wave. Many buildings lost

air conditioning, and the city faced a potential public health crisis. Officials directed residents to several cooling centers, including a museum that was paid $60,000 per day to open its doors to the public.

According to Columbus City Council member Rob Dorans, this fee is just one of the many expenses added to the municipal books as rising temperatures and changing rainfall patterns have strained the infrastructure in the Ohio capital. Since 2019, Columbus has spent more than $62 million on flood mitigation projects and $21 million on a flood tunnel designed to prevent stormwater runoff from overpowering the sewer system.

“The biggest variable that we’re dealing with now when you talk about these sorts of infrastructure investments is being caused by a changing climate,” Dorans said. “That is the driving force behind these investments.”

Continue reading.

YALE CLIIMATE CONNECTIONS

by SARAH WESSELER

SEPTEMBER 21, 2022

Texas Pushes Back With Municipal Bonds.

Political push-back comes in many forms. In a September 12, 2022 amendment to a municipal bond Official Statement for bonds issued by the City of Anna, Texas, they drew a giant line in the sand for the lefties. In bold caps just two paragraphs into the Official Statement Amendment was this paragraph (irrelevant boiler plate removed):

Further state law compliance: *The city reserves the right to reject any bid or bidder…who is…on a list maintained by the Texas Comptroller or has received a letter or other inquiry from…the Texas Comptroller or the Texas Attorney General related to its inclusion on any list of financial companies boycotting energy companies or companies that have…a practice, policy, guidance or directive that discriminates against a firearm entity or firearm trade association.*

As President George W. Bush said, “Don’t mess with Texas.” Politics has always played a part in issuing municipal bonds. This usually focuses around a new city hall, water and sewer system improvements, or school districts that want a new school. As the bond issue gains support, underwriters swarm to scrutinize the city’s numbers. Once the underwriter(s) is selected, a selling group forms—usually consisting of a dozen or more firms. For the Anna, Texas Certificates of Obligation, Robert W. Baird & Co. was the underwriter. The bulge bracket, left-leaning New York firms either didn’t bother applying or were summarily rejected if they did.

Continue reading.

Forbes

by Marilyn Cohen

Sep 20, 2022

UBS Loses Texas Muni Deal After It's Named an Energy-Industry Boycotter.

- Texas school district planned to work with UBS unit on bond
- State AG's office told district it wouldn't approve the sale

UBS Group AG's municipal-underwriting subsidiary lost out on a Texas bond deal after the state comptroller included the parent company on a list of firms he deems "boycott" the fossil fuels industry.

Normangee Independent School District, about 140 miles (225 kilometers) south of Dallas, had accepted a bid by UBS Financial Services Inc. to underwrite a bond deal sold via auction Aug. 8, according to bond documents.

But two weeks later, state Comptroller Glenn Hegar, a Republican, included UBS Group on a list of 10 companies that his office considers boycott the energy business. There's typically a weeks-long gap between when a muni deal prices and when it closes.

The district wound up reselling the bonds last week, hiring RBC Capital Markets as underwriter instead, at a time when yields were broadly higher than levels that prevailed for the first borrowing.

The school district took that step after the Texas attorney general's office said it wouldn't approve the sale that UBS had underwritten, Aaron Reitz, the state's deputy attorney general for legal strategy, said in an email.

The state comptroller published his list on Aug. 24. His probe was triggered by a GOP-backed state law that took effect in September 2021, and which limits Texas governments from entering into certain contracts with firms that have curbed ties with carbon-emitting energy companies.

Removal Request

A UBS spokesperson said in an emailed statement that the bank has asked the comptroller to remove the company from the list.

"We recently met with the Texas Comptroller's Office to better understand the rationale for our inclusion on its list and reinforce the importance of the energy industry and Texas to our business with the aim that UBS be considered for removal from the list," the statement said.

Last month, a spokesperson for the firm said it was assessing the situation, and was looking into whether the parent company's inclusion on the list would preclude a subsidiary from contracts.

The outcome of this deal suggests UBS may face difficulty working in the Texas municipal-bond market, one of the nation's most lucrative, after the parent was named an energy boycotter.

The attorney general's office, led by Republican Kenneth Paxton, approves most bond sales in the state, making its approval of the school district's deal crucial.

Reitz said a representative from the district contacted the Texas attorney general's office to ask about the impact on the bond sale following UBS's inclusion on the list.

"We told Normangee that OAG agreed with the comptroller's analysis and conclusions set forth in the list and, as a result, could not approve the bonds with UBS as a purchaser," Reitz said. "Normangee then decided not to move forward with the UBS-backed bond sale."

Higher Yields

The school district returned to the market on Sept. 15, selling $18.4 million of bonds in a competitive auction won by RBC, according to data collected by Bloomberg.

The school faced a tougher market backdrop in September, suggesting it may have had to pay additional interest costs as a result of the delay. Benchmark 10-year munis yielded 2.8% on Sept. 15, compared with about 2.2% on Aug. 8, the date of the original bond sale.

Mark Ruffin, the district's superintendent, declined to comment.

The school district isn't the only Texas locality to see its financing decisions swayed by a GOP-backed state law. A Texas city saw its borrowing costs climb after it declined to award a bond deal this month to Citigroup Inc. even though the bank submitted the most competitive bid.

Citigroup has been contending with a separate GOP law limiting Texas governments' work with companies unless the firms verify that they don't "discriminate" against gun entities.

The municipality chose the second-best bid, which it said will cost it an estimated $277,334 additionally over more than 25 years.

Bloomberg Markets

By Amanda Albright and Danielle Moran

September 21, 2022

— With assistance by Dan Wilchins

JPMorgan Wins Texas Muni Deal in Key Step After Year-Long Pause.

JPMorgan Chase & Co. won a competitive auction for a municipal-bond deal sold by a Texas school district, marking a major step for the bank after it paused most public-finance work in the state because of a new Republican law targeting Wall Street's gun policies.

Frisco Independent School District, about 30 miles (48 kilometers) north of Dallas, awarded a roughly $13 million bond issue to the bank on Tuesday, according to data compiled by Bloomberg.

JPMorgan hasn't underwritten any municipal obligations sold by the state or its schools, cities or counties since at least August 2021, although it has handled deals by entities that are unaffected by the gun law, such as a health system, the data show. Texas is one of the nation's most lucrative public-finance markets.

The biggest US bank published a letter last week stating its interest in underwriting municipal securities for the state and its myriad issuers, including cities, counties and school districts. The letter amounted to a formal assertion by the bank that it doesn't "boycott energy companies" or have "a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association."

The gun law took effect in September 2021 with the backing of state GOP lawmakers. It says Texas governments can't work with companies unless the firms verify that they don't "discriminate"

against firearms entities. JPMorgan doesn't finance companies that make military-style weapons for civilians.

JPMorgan, the No. 2 underwriter in the $4 trillion market for US municipal debt, has long argued that it can comply with the firearms law. Back when the measure went into effect, the bank said its business practices should permit it to certify compliance with the firearms law, but that the legal risk from the "ambiguous" law prevented it from bidding on most business with Texas public entities.

A spokesperson for the school district didn't immediately respond to a request for comment. A representive for the bank declined to comment.

Bloomberg Markets

By Amanda Albright and Danielle Moran

September 20, 2022

S&P Charter School Brief: Texas

View the Brief.

22 Sep, 2022

Fitch: Weak Enrollment Pressures US Higher Education

Fitch Ratings-Chicago/New York-19 September 2022: Enrollment pressures are expected to continue to weigh on US higher education even as the pandemic effects recede, with less selective institutions facing credit pressure, Fitch Ratings says. While freshmen matriculation and international student enrollment have rebounded somewhat from 2021 and 2020, unfavorable demographics and shifting employment qualifications in the broader economy may negatively affect long-term enrollment.

Enrollment pressures will be felt unevenly. The most selective universities, few of which saw any significant enrollment declines during the pandemic, are expected to see steady student demand. Enrollment at less selective, typically smaller, four-year degree institutions is unlikely to rebound to pre-pandemic levels this fall, further straining budgets given their higher dependence on student-generated revenues.

Total enrollment at four-year colleges and universities declined by roughly 3% in fall 2021 compared with fall 2020, according to preliminary estimates from the National Student Clearinghouse. This is a deviation from projected growth expectations from the National Center for Education Statistics (NCES). Enrollment is projected to decline a further 1.6% yoy in fall 2022, according to NCES, which would reflect an improvement against declines in both prior-year and spring 2022 enrollment, which fell 4.1% yoy. Some states, such as Texas and Illinois, have acted to combat these pressures by implementing mandatory Free Application for Federal Student Aid completion for all high school graduates, which helped boost applications in 2021-2022 from pandemic lows.

Continue reading.

Fitch Ratings Updates USPF College and University Rating Criteria.

Fitch Ratings-Chicago-22 September 2022: Fitch Ratings has published an updated criteria report titled 'U.S. Public Finance College and University Rating Criteria'. The report replaces the existing criteria dated Nov. 4, 2021.

Fitch made minor editorial revisions to the criteria. There have been no material changes to Fitch's underlying methodology, and no rating actions are expected as a result of the application of the updated criteria.

The updated criteria report is available at 'www.fitchratings.com/criteria/us-public-finance'.

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SEC Brings First Charges Against Muni Market Underwriters Alleging Failure to Meet Requirements for Limited Offering Disclosure Exemption: Ballard Spahr

Summary

The Securities and Exchange Commission (SEC) recently announced enforcement proceedings against four municipal market underwriters for alleged violations of municipal bond disclosure requirements. Three of the four underwriters have settled with the SEC.

The Upshot

- The four underwriting firms allegedly sold new issue municipal securities in primary offerings intended to meet the limited offering exemption to broker-dealers and investment advisers without a reasonable belief that the entities were making purchases for their own accounts or without a view to distribute the securities.
- The underwriters allegedly failed to ascertain for whom the broker-dealers and investment advisers were purchasing the securities and were unable to form a reasonable belief that the

purchases were for investors who possessed the necessary knowledge and experience to evaluate the investments.
- The three underwriters that settled with the SEC agreed to disgorgement and penalties ranging between $100,000 and $300,000. In pending charges against the fourth underwriter, the SEC alleges the underwriter "made no inquiry to determine if those entities were buying on behalf of their customers and/or clients and, if so, whether such investors met the exemption criteria."

The Bottom Line

The pending complaint identifies certain matters that the SEC believes underwriters should consider in determining compliance with the limited offering exemption requirements. But the SEC provides no guidance on how such inquiries should be undertaken or whether investor letters can be used for this purpose. The SEC said it is investigating whether other firms are properly relying on the limited offering exemption and is encouraging firms that believe they may have not complied with the exemption requirements to self-report possible violations.

On September 13, 2022, the Securities and Exchange Commission (SEC) announced enforcement proceedings against four municipal market underwriters for alleged violations of municipal bond offering disclosure requirements under SEC Rule 15c2-12. The SEC rule establishes certain requirements in connection with primary market and continuing disclosures to be provided to investors, unless an exemption applies. Three of the underwriters settled with the SEC while charges are pending against the fourth underwriter.

Under federal securities law, a limited offering exemption is available for offerings sold in $100,000 authorized denominations if the securities are sold to no more than 35 persons who the underwriter reasonably believes (i) have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the investment (the "sophisticated investor clause") and (ii) are not buying the securities for more than one account or with a view to distributing the securities (the "investment purpose clause").

According to the SEC, the four underwriting firms sold new issue municipal securities in primary offerings intended to meet the limited offering exemption to broker-dealers and investment advisers without a reasonable belief that the entities were making purchases for their own accounts or without a view to distribute the securities, as required by the investment purpose clause. The SEC asserts that, because the underwriters failed to ascertain for whom the broker-dealers and investment advisers were purchasing the securities, the underwriters were unable to form a reasonable belief that the broker-dealers and investment advisers were purchasing the securities for investors who possessed the necessary knowledge and experience to evaluate the investments, as required by the sophisticated investor clause.

The SEC's pending complaint against the underwriter that did not settle provides more details about the alleged violations. In that compliant, the SEC observes that some broker-dealers and investment advisers purchasing securities in the primary offerings from the underwriter shortly thereafter resold the securities to multiple brokerage customers or allocated the securities to multiple advisory clients. The SEC alleges that the underwriter "made no inquiry to determine if those entities were buying on behalf of their customers and/or clients and, if so, whether such investors met the exemption criteria." The SEC argues that the underwriter "did not reasonably believe the broker-dealers were buying the securities for their own accounts because the broker-dealers that were buying the securities were in the business of servicing brokerage customer accounts" and also "did not reasonably believe the investment advisers were buying the securities for their own accounts because these investment advisers were in the business of managing accounts for their advisory clients."

The SEC notes in the pending complaint that the underwriter did not inquire whether the broker-dealers or investment advisers were purchasing on behalf of their customers or clients. Further, in cases where the broker-dealers or investment advisers may have been purchasing on behalf of their customers or clients, the SEC states that the underwriter "neither requested nor received information from the broker-dealers [or investment advisers] about: how many customers [or clients] would receive the securities; how much each customer [or client] was investing; each customer's [or client's] level of financial experience; or whether each customer [or client] was buying for a single account." The SEC concludes that, without this information, the underwriter could not have formed the requisite reasonable belief that the broker-dealers or investment advisers, or the customers or clients on whose behalf they may have been buying, were sufficiently sophisticated and buying for their own account, as the limited offering exemption requires. The SEC also alleges that the underwriter violated MSRB Rule G-17, which requires fair dealing, by deceptively representing to municipal market issuers that it complied with the limited offering exemption requirements.

While the pending complaint identifies certain matters that the SEC believes underwriters should consider in determining compliance with the limited offering exemption requirements, the SEC provides no guidance on how such inquiries should be undertaken or whether investor letters can be used for this purpose. As a matter of practice, investor letters are often used by municipal market underwriters to confirm the sophisticated status and investment intent of municipal securities purchasers.

The SEC further alleges that the four firms also violated Municipal Securities Rulemaking Board (MSRB) Rule G-27, which requires municipal market underwriters to put in place sufficient supervisory policies and procedures to ensure compliance with federal securities laws.

The three underwriters that settled with the SEC agreed to disgorgement and penalties ranging between $100,000 and $300,000. The case against the fourth underwriter is pending. The SEC stated in its news release that it has started investigating whether other firms are properly relying on the limited offering exemption. The SEC is encouraging firms that believe they may have not complied with the exemption requirements to self-report possible violations to the SEC at: LimitedOfferingExemption@sec.gov. The SEC did not provide a form for self-reporting or standard settlement terms.

by Teri Guarnaccia, Ernesto Lanza, Kimberly Magrini, William Rhodes, Tesia Stanley

September 22, 2022

Ballard Spahr LLP

Municipal Bonds Face 'Challenging Time Ahead,' Strategist Says.

Jason Appleson, PGIM Fixed Income Head of Municipal Bonds, joins Yahoo Finance Live anchors Akiko Fujita and Ines Ferre to explain the outlook for munis.

Watch video.

MSRB Votes to Amend Municipal Advisor Advertising and Registration Rules.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB or Board) met virtually on September 15 for the final Board meeting of the fiscal year. The Board voted to amend MSRB Rule G-40, on advertising by municipal advisors, to allow municipal advisors to use testimonials in advertisements, and MSRB Rule A-12, on registration, to make accompanying changes to Form A-12.

The proposed amendments to Rule G-40 would allow municipal advisors the use of testimonials, subject to limitations in alignment with analogous requirements under the Securities and Exchange Commission's (SEC) new Rule 206(4)-1, on Investment Adviser Marketing, under the Investment Advisers Act of 1940. The proposed rule change is anticipated to be filed with the SEC before the end of the calendar year.

"When the MSRB established advertising standards for municipal advisors in 2018, it sought to enhance the MSRB's fair-dealing provisions by promoting regulatory alignment with other financial regulators," said Patrick Brett, MSRB Board Chair. "In the same spirit, following the SEC's modernization of its advertising rule for investment advisors, which allows investment advisors use of testimonials in marketing materials, the MSRB is proposing to make conforming amendments to Rule G-40."

The proposed amendments to Rule A-12 would include extending the annual affirmation period through January 31 of each calendar year and permitting regulated entities to update optional information on Form A-12 during the annual affirmation period rather than within 30 days of a change. In addition, regulated entities, on a voluntary basis, would be able to identify whether the firm has identified as a women and minority-owned business or veteran-owned small business. The proposed rule change and the enhancements to Form A-12 are anticipated to be operational on January 1, 2023, to coincide with the 2023 annual affirmation period.

At this final board meeting of the fiscal year, MSRB CEO Mark Kim stated, "On behalf of the staff of the MSRB, I would like to thank Board Chair Patrick Brett along with our other departing Board members, Caroline Cruise, Joseph Darcy and Seema Mohanty for their dedication and service." The MSRB's new fiscal year begins on October 1, 2022.

Date: September 16, 2022

Contact: Bruce Hall, Senior Manager, Communications
202-838-1300
bhall@msrb.org

GFOA: Modernizing Internal Control Checklists in State and Local Governments

Internal control checklists aren't the most exciting topic to work on in a government. Frequently, they are left alone unless something goes wrong. If used correctly, however, a comprehensive, well-designed checklist can be the first line of defense to notify management that something is wrong. This article outlines the history of the State of Illinois internal control checklist and lessons learned for the future.

Publication date: August 2022

Author: Jack Rakers

DOWNLOAD

Financial Accounting Foundation Relocation.

Norwalk, CT, September 19, 2022 — The Financial Accounting Foundation (FAF) today announced it is moving to a new location in Norwalk, CT, along with the staffs of the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB).

The new offices are located at 801 Main Avenue, Norwalk, CT 06851.

The FAF is the parent organization of the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB).

During a brief transition period, employees will work remotely, remaining fully available to stakeholders. All staff are expected to be working in the new office space by Monday, October 3, 2022.

Arizona Sports Park's Early Cash Crunch Squeezes Bondholders.

Some projects that launched when muni junk debt surged during the pandemic's borrowing boom have struggled in a time of rising rates, slowing growth

The pandemic was a few months old when a two-year-old nonprofit sold municipal bonds to build a $280 million privately owned recreational sports complex on the edge of the Arizona desert.

Yield-starved mutual funds snapped up the tax-exempt debt. Bond payments were slated to come from parking and admission fees, a 670-seat sports bar and tournaments, festivals and after-school programs renting the park's stadium, fields and courts.

The 320-acre park opened in February in Mesa, Ariz.

After projecting first-year revenue of $125 million, the park brought in $15 million in its first six months and is relying on an emergency cash infusion to pay bondholders. Bond prices have slipped, relations with funds have soured and the Securities and Exchange Commission is asking questions.

Continue reading.

The Wall Street Journal

By Heather Gillers

Sept. 15, 2022

Where Are Munis Headed This Fall? (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 Kriti Gupta.

Listen to audio.

Bloomberg

Sep 23, 2022

Whither the Yield Curve Now? Vanishing Muni Issuance (Bloomberg Podcast)

Listent to audio.

Bloomberg

Sep 23, 2022

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

Overview

Illinois counties and municipalities (or local governments [LGs]) have demonstrated stable or improved credit characteristics during the past year despite the effects of the pandemic because of the receipt of substantial pandemic relief aid, strong revenue patterns, and generally conservative budgeting, that enabled many Illinois LGs to outperform expected forecasts. S&P Global Ratings expects credit quality for Illinois LGs will remain stable in the near term. Credit pressures remain, though, with macroeconomic trends, particularly higher inflation and the risk of recession, presenting new challenges for Illinois LGs in the coming year. Continued increases in annual pension contributions to address large unfunded liabilities could create budget pressure leading to weaker credit quality for some.

S&P Global Ratings maintains ratings on 253 LGs in Illinois–22 counties and 231 municipalities. The credit trajectory was mostly positive over the past year with one county and four municipalities upgraded since November 2021, following a sustained period of improved reserves. Over the same period, we revised the outlook on one county and eleven municipalities to stable from negative and downgraded two municipalities (Granite City and Palos Hills), both due to structural imbalances due to poorly funded pension plans. Currently, 95% or 242 of our ratings on Illinois counties and municipalities have a stable outlook, while seven municipalities and one county carry negative outlooks, with two counties and one municipality having positive outlooks (see rating distribution table below).

Continue reading.

20 Sep, 2022

How to Invest in ESG-Focused Muni Bonds.

State and local governments naturally spend large amounts on environmental and social causes. For example, a local government may issue a bond to add solar panels to government-owned buildings or construct a non-profit hospital. As a result, these bonds are an excellent way for investors to align their portfolios with their values.

Let's take a closer look at ESG-focused muni bonds and how you can add them to your portfolio.

What Are ESG Muni Bonds?

ESG-focused municipal bonds come in many different flavors.

Continue reading.

municipalbonds.com

by Justin Kuepper

Sep 21, 2022

Financial Services Professionals: Check Your Political Contributions for Compliance to Avoid Pay-To-Play Fines - Nossaman

During these last weeks of the 2022 election season, campaigns are ramping up urgent, last-minute fundraising efforts. Financial services professionals should not let their guard down amid this flurry. Recently published Securities Exchange Commission (SEC) fines are a reminder that a contribution by such individuals could have consequences for their employer and for them, according to the SEC's Rule 206(4)-5, the so-called federal "pay-to-play rule."[1] As seen in the SEC's recently unveiled settlements with four investment advisers, the most common source of a pay-to-play violation stems from an associate contributing to a governor or other chief executive, such as a mayor. With 36 states and three territories electing governors in 2022 (not to mention countless municipal elections), the SEC is holding up the proverbial yield sign with its announcement of these settlements so close to the election. These cases are a reminder that financial services firms should remind their professionals of compliance checks before making political contributions.

The SEC's Pay-to-Play Rule

SEC Rule 206(4)-5 places limits on political contributions made by certain "covered associates" of an investment adviser that has a contract with a government client. However, only contributions to candidates for an office that has the authority to influence the government's award of an investment advisory contract will trigger the pay-to-play rule. If a "covered associate" makes such a contribution, the investment adviser is prohibited from providing investment advisory services for compensation to a government client for two years from the time of that contribution, and if it does engage in those services, it is subject to penalty. It may also need to disgorge previously earned fees.

There are limited ways by which a "covered associate" can make contributions. SEC Rule 206(4)-5

permits certain de minimis contributions by a "covered associate" of up to $350 to a candidate for whom the associate is entitled to vote and contributions of up to $150 for other candidates.

Recent Settlements

With less than 60 days before the November election, the SEC's settlement of pay-to-play allegations with four investment advisers neither admitted nor denied the violation and contain a total of $300,000 in penalties, ranging from $45,000 to $90,000. Although these violations and fines appear in line with other SEC settlements, there are three key takeaways from a compliance perspective.

- *Statewide and Citywide Offices Pose the Greatest Compliance Risk.*

Notably, three out of the four settlements involved $1,000 contributions to three different 2018 candidates for governor, with the other being contributions to a candidate for Mayor of New York City for the 2021 election.

- *The SEC Rule is one of Strict Liability.*

As Commissioner Hester Pearce points out in her statement critiquing the settlements, the pay-t--play rule is a "blunt" instrument. As a matter of law, there is strict liability under the rule – the intent of the donor does not matter, only the fact that the contribution was made to a certain official above the *de minimis* threshold.

- *There is Limited Opportunity for Remediation.*

The contributor in the case of the $1,000 contribution to the Massachusetts candidate sought and obtained a refund of the contribution, but to no avail. A refund of the contribution will only negate the violation if (1) the contribution does not exceed $350; (2) the adviser discovered the contribution within four months of the date of the contribution; and (3) the contributor obtains a refund within 60 days after learning of the contribution.

Although the SEC's pay-to-play rule applies throughout the year, the months heading into an election present a heightened risk of inadvertent violations, given the push from campaigns and the desire of donors to support the candidates and causes about which they care. As these settlements show, even a contribution as much as $50 over the de minimis limit can trigger a significant penalty, a reminder of the importance of proactive compliance and vetting.

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[1] The SEC pay-to-play rule covers investment advisers, but other financial service providers may be covered by similar rules issued by the Municipal Securities Rulemaking Board (MSRB), the Financial Industry Regulatory Authority (FINRA), and the Commodities Futures Trading Commission (CFTC).

Nossaman LLP – William A. Powers and Frederick T. Dombo, III

09.22.2022

Broker-Dealer Settles Charges for Unregistered Municipal Advisory

Operations.

A broker-dealer settled SEC charges for operating as an unregistered municipal advisory firm by providing advice to a municipality regarding securities that were purchased with the proceeds from an issuance of bonds. In a release, the SEC stated that "[t]he action marks the first time the SEC has charged a broker-dealer for violating the municipal advisor registration rule."

The SEC found that a registered representative of the firm made recommendations for specific financial products that included subjective opinions, which the SEC determined constitutes as investment advice. The SEC said that the broker-dealer failed to adequately supervise registered representatives' municipal securities activities. The broker-dealer maintained (i) improper procedures to enable its registered representatives to identify municipal bond proceeds accounts, (ii) inadequate training on the municipal advisor registration requirements and (iii) insufficient electronic communication monitoring to identify potential communications violations.

As a result, the SEC determined the broker-dealer violated Exchange Act Section 15B(a)(1)(B) and 15B(c)(1) ("Municipal securities") as well as MSRB Rule G-27 ("Supervision"). To settle the charges, the broker-dealer agreed to (i) cease and desist, (ii) accept a censure, (iii) pay a civil monetary penalty of $100,000, plus additional disgorgement and prejudgment interest.

Commentary

Firms that provide services to municipalities should be mindful that the definition of "municipal advisor" does not correspond to the definition of "investment adviser," and that it is not intuitive.

Fried Frank Harris Shriver & Jacobson LLP – Steven Lofchie

September 21 2022

Delays in Obtaining Permits Leading to Property Foreclosure Not a Regulatory Taking - New Jersey

Federal Court Judge Cheryl Ann Kraus was 'riding the Circuit' and decided a regulatory takings case while sitting in the District Court, District of New Jersey captioned *James v. Vornlocker*. Full opinion here 2022-8-31 Vornlocker.

The case was decided on motions for summary judgment, and it appears that Plaintiff admitted most of the facts and failed to genuinely contest the remaining facts set forth in the motions.

In 2007, Plaintiff purchased two adjacent lots in Franklin Township intending to subdivide them into three residential building lots. "Although she had no direct experience with construction or home-building, she declined to hire a construction company or general contractor for the construction of her home. Instead, Plaintiff opted to serve as her own general contractor … and had family members do "a lot of the work" to keep the cost of construction down." Plaintiff's plan was to live in the house while she obtained approvals and then construct the two additional houses and sell at a profit. "But for myriad reasons, Plaintiff's plan to complete the construction herself quickly ran into trouble. For one, there were wetlands on her property, and she faced repeated delays, stop work orders, and violations arising out of her improper dumping and failure to comply with other wetlands-related requirements of the NJDEP."

To make a long story short, Plaintiff was not adequately capitalized for the project and intended on borrowing money to finance the project. Serial and complex real estate transactions were effectuated over the years in a "strategy of robbing Peter to pay Paul" which "eventually caught up with Plaintiff, and she was unable to make payments on her various loans" and, in 2014, the lender foreclosed on the unimproved land, and in 2018 another lender foreclosed on her residence. Plaintiff lost the properties and sued the municipality and various officials, alleging that the delay in obtaining a Certificate of Occupancy was a "taking" and further that the delay itself was caused by unlawful discrimination by municipal officials.

The Court found that there was not a "per se" taking or a regulatory taking arising from the undisputed facts presented on the motion for summary judgment. The court further found that there was no unequal treatment or discrimination to be found within the alleged facts.

The Court quickly dispatched the takings claim simply because there was no 'state action.' ("Fatal to her takings claim, however, Plaintiff does not establish any connection between the alleged "taking"- i.e., the foreclosures-and Defendants' actions. The "purely private" foreclosure by third-party banks on Plaintiff's property is not state action, much less government action for public use.") Even so, the Court went on to analyze whether Plaintiff's claim established a taking under the familiar (and complicated) Penn Central analysis, and found, "in fact, none of the Penn Central factors weigh in favor of Plaintiff."

I will leave you to read the entirety of the opinion, but add the following as perhaps a cautionary reminder –

"In advancing her takings and due process claims, Plaintiff points only to the straightforward application of garden variety local and state land use regulations as violative of her Constitutional rights. The Court declines Plaintiff's invitation to "convert[] federal courts into super zoning tribunals" and will therefore grant summary judgment to Defendants on Counts 1 and 4."

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

September 19 2022

US Senate Mulls Onerous, Costly Financial Reporting Standards for Counties.

The Financial Data Transparency Act of 2022 (S. 4295), sponsored by Senator Warner (D-VA) and Senator Crapo (R-ID), would mandate governments and nonprofits to report financial information using uniform reporting categories, or "data standards," which would likely require costly updates or extensive workarounds for county finance systems.

Companion legislation (H.R. 2989), introduced by Reps. Carolyn Maloney (D-N.Y.) and Patrick McHenry (R-N.C.) passed the US House of Representatives on July 14, 2022, as an amendment to the House version of the fiscal 2023 National Defense Authorization Act (NDAA), which is annual must-pass legislation. Like the House, the Senate is actively considering attaching S. 4295 to its version of the fiscal 2023 NDAA.

Section 203 of this legislation would require the Municipal Securities Rulemaking Board (MSRB) to develop data standards for financial reporting related to the municipal bond market.

These data standards include universal reporting standards, and reporting entities would be required to the extent practicable to render fully searchable and machine-readable data with accompanying metadata that clearly defines the semantic meaning of the data. In addition, the legislation would require the MSRB to "scale" reporting requirements for "smaller regulated entities."

If enacted, the legislation requires joint rulemaking for regulated entities that will take place two years after passage, and then it provides two years for implementation. Full implementation and compliance would begin in 2027.

Transitioning to a new uniform reporting system requires significant resources — consultants, software, and reconfiguring county financial systems to account for the new reporting standards. Moreover, this costly unfunded mandate would fall on the backs of local governments, with no financial support from the federal government.

According to the National Association of Counties (NACo):

> Counties recognize the need for full disclosure of all relevant information concerning a county's financial condition to potential investors, citizens, and other parties interested in municipal bonds. Counties also oppose federally imposed standards for county financial accounting and reporting and supports those principles put forth by the Governmental Accounting Standards Board (GASB). As such, NACo is concerned with the unfunded and federally mandated financial reporting standards included in this bill.
>
> NACo is following this closely and will provide members with updates.

The Local Government Article, Section 16-306 of the Annotated Code of Maryland requires each county, incorporated city or town, and taxing district in Maryland to file audit reports annually or once every four years under specified conditions.

The Office of Legislative Audits, part of the Maryland Department of Legislative Services, reviews the financial statements. The financial statements must be prepared using generally accepted accounting principles and audited per generally accepted auditing standards.

There were 186 local government audit reports are included in OLA's fiscal year 2021 review (23 counties and Baltimore City, 150 other incorporated cities and towns, and 12 taxing areas). The latest report is available here.

Maryland Association of Counties

by Kevin Kinnally

September 21, 2022

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3 Municipal Bond Funds That Should Be on Your Radar.

The debt securities category will always be the first choice for risk-averse investors because this class of instruments provides a regular income flow at low levels of risk. Income from regular dividends helps to ease the pain caused by plunging stock prices.

When considering the safety of capital invested, municipal bond mutual funds are second only to those investing in government securities. In addition, interest income earned from these securities is exempt from federal taxes and, in many cases, from state taxes.

Below, we share with you three top-ranked municipal bond funds, viz., Vanguard Short Term Tax Exempt Fund VWSTX, Colorado Bond Shares A Tax Exempt Fund HICOX and AB Municipal Bond Inflation Strategy AUNAX. Each has a Zacks Mutual Fund Rank #1 (Strong Buy) and is expected to outperform its peers in the future. Investors can click here to see the complete list of municipal bond funds.

Vanguard Short Term Tax Exempt Fund usually maintains a dollar-weighted average maturity of 1 to 2 years. VWSTX invests the majority of its assets in municipal bonds that are in the top three credit-rating categories as determined by a nationally recognized statistical rating organization or, if unrated, determined to be of comparable quality by the advisor.

Vanguard Short Term Tax Exempt Fund has three-year annualized returns of 0.4%. VWSTX has an expense ratio of 0.17% compared with the category average of 0.60%.

Colorado Bond Shares A Tax Exempt Fund invests the majority of its net assets in tax-exempt bonds and other tax-exempt securities. HICOX declares dividends daily and distributes them monthly.

Colorado Bond Shares A Tax Exempt Fund has three-year annualized returns of 1.7%. Fred R. Kelly Jr.has been one of the fund managers of HICOX since 1990.

AB Municipal Bond Inflation Strategy invests the majority of its net assets in high-quality investment-grade municipal fixed-income securities that pay interest exempt from federal tax, and are rated A or better by one or more recognized rating agencies. AUNAX also invests a small portion of its assets in below-investment-grade fixed-income securities or junk bonds.

AB Municipal Bond Inflation Strategy has three-year annualized returns of 2.8%. As of April 2022, AUNAX had 63.6% of its assets invested in Total Misc. Bonds.

To view the Zacks Rank and the past performance of all municipal bond funds, investors can click here to see the complete list of municipal bond funds.

Zacks Equity Research

September 23, 2022

Prospects for the Sales, Hotel, and Lodging Taxes: GFOA Webinar

October 7, 2022 | 2 pm – 3 pm ET

The COVID-19 pandemic has significantly impacted local tax revenues in a number of ways. Reduced consumption of goods and services has led to a decline in sales taxes in many areas, which often represents a sizable proportion of local government revenues. Additionally, hotels are experiencing more vacancies than ever which means less hotel and lodging taxes. Many economists argue these are temporary changes and both economies should mostly rebound in the near future, but it presents a difficult conundrum to local governments in the interim. In this webinar you'll learn

various approaches to weathering the current dip in sales and hotel taxes and how to be better prepared for similar future economic downturns.

Click here to learn more and to register.

The Financial Data Transparency Act: What GFOA Members Need to Know - Podcast

Currently, U.S. Senators are considering including the bill (S. 4295) as part of the federal defense authorization legislation that must be taken up before the end of the year. GFOA has long advocated for governments to demonstrate transparency and accountability by making financial information readily accessible to the public, but hastily passing this bill may create data standards that opens the door to directing the use of specific technologies for reporting governmental financial information.

LISTEN

The Fighting Over Online Sales Taxes Isn't Finished.

Deals worked out between local governments and companies before the Supreme Court cleared the way for taxing e-commerce are drawing increased scrutiny. If the agreements fall apart, it could blow a hole in some city budgets.

Welcome back to Route Fifty's Public Finance Update! I'm Liz Farmer and this week I'm writing about sales taxes. More than four years after the U.S. Supreme Court issued its landmark decision clearing the way for states to collect taxes from online sales, there are still issues to work out. In this newsletter, I'll explain one of them, which involves longstanding sales tax incentives, rule changes for remote sales and, in Texas and elsewhere, has pit cities against states.

Located in Central Texas just outside of Austin, the suburb of Round Rock is in the heart of one of the country's fastest-growing regions. It's home to major employers, like Amazon and UPS. Dell Technologies has been headquartered there since the mid-1990s. The sales taxes collected from those companies and others help pay for servicing the city's rapid growth.

Continue reading.

Route Fifty

By Liz Farmer |

SEP 20, 2022

- Municipal Bond Market Impact of the SEC's Mutual Fund ESG Proposals: Ballard Spahr
- BDA Monitoring Legislation Mandating Specific Technologies for Issuer Financial Reporting.
- SEC Charges Four Underwriters in First Actions Enforcing Municipal Bond Disclosure Law.

- NFMA Introduction to Municipal Bond Credit Analysis.
- Citigroup Snubbed on Muni Deal Over Gun Law, Costing Texas City $277,334.
- *Rawls v. Woodville ISD* – Court of Appeals holds that – in failing to name the presiding officer of the authority that ordered the contested election or the presiding officer of the final canvassing authority for the contested election – citizen contestee failed to comply with the statutory prerequisite to filing an election contest suit.
- And finally, Secrete Santa – Department of Corrections Edition is brought to us this week by *Clayton v. Commonwealth*, in which we learned that , "It shall be unlawful for a prisoner in a state, local or community correctional facility or in the custody of an employee thereof to procure, sell, secrete or have in his possession any chemical compound which he has not lawfully received." Ok. Wait. Wait, wait, wait. What? Secrete? So many questions we're afraid to ask. Well, I suppose it would be more accurate to state that we're terrified of the answers. Secrete? Seriously? Are inmates now licking each other like those psychoactive Amazonian toads? And you thought crime didn't pay.

IMMUNITY - CONNECTICUT

Daley v. Kashmanian

Supreme Court of Connecticut - August 30, 2022280 A.3d - 344 Conn. 464 - 2022 WL 3692856

Motorcyclist brought action against police officer and city, alleging that officer had negligently and recklessly caused motorcyclist to be ejected from his motorcycle.

Following close of evidence at jury trial, the Superior Court granted officer's motion for directed verdict as to recklessness charge, and subsequently, following jury verdict in motorcyclist's favor on negligence charge, granted officer's and city's motions to set aside the jury verdict. Motorcyclist appealed. The Appellate Court affirmed in part, reversed in part, and remanded. Motorcyclist filed petition for certification.

The Supreme Court held that:

- Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity;
- Officer's operation of unmarked police car was not itself a discretionary activity, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary for purposes of governmental immunity; and
- Officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car.

Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity; terms of the relevant motor vehicle laws establish a ministerial duty, insofar as they contain mandatory statutory language that itself limits discretion in the performance of the mandatory act.

City police officer's operation of unmarked police car was not itself a discretionary activity during the surveillance operation that led to the collision that injured motorcyclist since operation of a motor vehicle was a highly regulated activity that constituted a ministerial function, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary one for purposes of governmental immunity.

City police officer's operation of unmarked police car, including following the statutory rules of the road, was a ministerial function, and thus, officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car, while surveilling motorcyclist, which resulted in motorcyclist's being ejected from his motorcycle; motor vehicle statutes providing the rules of the road imposed numerous ministerial duties that officer violated in his operation of unmarked police car.

IMMUNITY - DISTRICT OF COLUMBIA

Thurman v. District of Columbia

District of Columbia Court of Appeals - September 15, 2022 - A.3d - 2022 WL 4241684

Juvenile brought action against District of Columbia and police officers alleging negligence and excessive force arising from his being bitten by police dog that officers released into house without a canine warning to search for potentially armed juvenile suspects during a burglary call.

The Superior Court granted summary judgment for District of Columbia and officers. Juvenile appealed.

The Court of Appeals held that:

- Juvenile could use defense expert's affidavit on standard of care about deploying police dogs on juvenile suspects at summary judgment stage;
- Factual issues on any deviation from standard of care and causation precluded summary judgment on negligence claims against officers;
- Sovereign immunity barred claims of negligent hiring, training, and supervision against District of Columbia;
- Officers had qualified immunity from excessive force claims; and
- District of Columbia did not have *Monell* liability on excessive force claims.

ZONING & PLANNING - KANSAS

Pretty Prairie Wind LLC v. Reno County

Court of Appeals of Kansas - August 26, 2022 - P.3d - 2022 WL 3693052

Company that was denied conditional-use permit from county to build wind farm brought action against county challenging denial, alleging that protest petitions submitted by county residents were invalid, and that decision to deny permit was unreasonable.

The District Court denied company's motion for partial summary judgment, denied company's subsequent request to file interlocutory appeal, and, at company's request, dismissed outstanding claim and entered final judgment. Company appealed.

The Court of Appeals held that statutes governing requirements for election petitions did not apply to zoning protest petitions for conditional-use permit to build wind farm.

Statute requiring three-fourths majority of board of county commissioners to overrule planning commission's recommendation when the owners of at least 20% of the land within 1,000 feet of the property at issue sign and file protest petitions within 14 days after the end of the public hearings,

rather than statutes governing requirements for election petitions, applied to zoning protest petitions for conditional-use permit for company that sought to build wind farm; language of statutes concerned elections and signature requirements for electors, zoning protest petitions did not trigger public involvement, unlike election petitions, signing requirement for zoning petitions required land ownership, not ability to vote as in election petitions, and zoning petitions were filed with city or county clerk, not election officer.

EMINENT DOMAIN - LOUISIANA

City Bar, Inc. v. Edwards

Court of Appeal of Louisiana, First Circuit - August 30, 2022 - So.3d - 2022 WL 3754747 - 2021-1437 (La.App. 1 Cir. 8/30/22)

Bar owners filed class action lawsuit against Governor in his official capacity, alleging that they were uniquely singled out by series of executive orders that closed and restricted the operation of bars statewide for the purpose of slowing the spread of COVID-19, and seeking just compensation for the alleged taking of their property, permits, business operations, and income.

The District Court granted the Governor's peremptory exception of no cause of action. Owners appealed.

The Court of Appeal held that owners plausibly alleged that executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19 was regulatory taking under State Constitution.

Bar owners plausibly alleged that Governor's conduct, in issuing series of executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19, constituted taking of their property under Louisiana Constitution, where owners alleged that they had constitutionally protected property rights in lawfully issued alcohol permits and income derived from their business enterprises, owners alleged that their rights were taken and damaged by Governor for express purpose of removing or reducing risk to public health or safety, and owners alleged that orders constituted regulatory takings that damaged their property rights.

PUBLIC RECORDS - OHIO

State ex rel. Stevenson v. King

Supreme Court of Ohio - September 7, 2022 - N.E.3d - 2022 WL 4086758 - 2022-Ohio-3093

City council president filed a mandamus action seeking to compel city mayor and finance director to produce records related to certain public expenditures.

The Eighth District Court of Appeals granted the writ in part and denied the writ in part. Mayor and finance director appealed.

The Supreme Court held that:

- President of city council was entitled to mandamus relief on her claim seeking the production of public records from mayor and finance director, and
- Evidence was insufficient to establish an attorney-client relationship between city council or city

council president and law firm.

President of city council was entitled to mandamus relief on her claim seeking the production of public records from city mayor and finance director related to funds received and spent by the city under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), where mayor and finance director failed to respond to the request, they failed to present sufficient evidence to support their claim that no written records existed pertaining to the application for and award of CARES Act grant money, and they failed to authenticate evidence submitted in support of their claim that records pertaining to the appropriation and expenditure of CARES Act money had already been shared with the city council through regular financial reports.

Evidence was insufficient to establish an attorney-client relationship between city council or city council president and law firm, and thus city council president was entitled to an award of attorney fees based on city mayor and finance director's failure to comply with public records request; city council passed resolution to hire law firm, mayor vetoed the resolution, council president did not allege that city council overrode the veto, and there was no evidence that president retained law firm in her personal capacity.

BOND ELECTION - TEXAS

Rawls v. Woodville ISD

Court of Appeals of Texas, Beaumont - August 31, 2022 - Not Reported in S.W. Rptr. - 2022 WL 3908530

Charles Rawls filed Plaintiff's/Contestant's Original Election Contest against Woodville ISD (WISD), Lisa Meysembourg, in her official capacity as Superintendent of WISD, and Donece Gregory, in her official capacity as County Clerk of Tyler, County (collectively, the Appellees) concerning WISD's $47.85 million school bonds for 2022 on the May 7, 2022 election ballot.

Rawls alleged a variety of election irregularities in the bond election process. Rawls sought a declaration from the trial court stating that the administration, conduct, and manner of the early voting and election day voting for the Proposition was illegal and invalid as a matter of law.

The trial court granted Appellees' Pleas to the Jurisdiction and Rawls appealed.

The Court of Appeals affirmed, holding that:

- WISD's Board of Trustees ordered the bond election and WISD's Board of Trustees was the canvassing authority for the bond election.
- Because Rawls's suit named WISD, Meysembourg, and Gregory as contestees instead of the presiding officer of the authority that ordered the contested election or the presiding officer of the final canvassing authority for the contested election (namely, the President of WISD's Board of Trustees), Rawls failed to comply with the statutory prerequisite to filing an election contest suit.

POLITICAL SUBDIVISIONS - VIRGINIA

Fines v. Rappahannock Area Community Services Board

Supreme Court of Virginia - September 8, 2022 - 876 S.E.2d - 2022 WL 4099848

Patient brought action against community services board for negligent retention, negligent supervision, negligence, and vicarious liability, alleging that patient received psychological therapy through board at its facilities when he was between six and eight years old, that therapist employed by board molested him multiple times during individual counseling sessions, and that patient suffered significant mental and emotional injuries as result of the repeated sexual assaults.

Board demurred and filed plea in bar asserting sovereign immunity. The King George Circuit Court granted plea in bar. Patient appealed.

The Supreme Court held that:

- Board was not "arm" of Commonwealth entitled to sovereign immunity;
- Board was not specifically created as body corporate and politic and as political subdivision of Commonwealth, for purposes of determining whether board was municipal corporation immune from tort liability;
- Board was created to fulfill public purpose, for purposes of determining whether board was municipal corporation;
- Board only partially satisfied third factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to have common seal, to sue and be sued, to enter into contracts, to acquire, hold and dispose of its revenues, personal and real property;
- Board only partially satisfied fifth factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to borrow money and issue tax-exempt bonds;
- Question whether board was immune from tort liability involved matter of substantive law, for purposes of determining whether board was municipal corporation; and
- Board was not municipal corporation immune from tort liability.

PRISONS - VIRGINIA

Clayton v. Commonwealth

Court of Appeals of Virginia, Lexington - September 13, 2022 - S.E.2d - 2022 WL 4135504

After bench trial, prisoner was convicted in the Danville Circuit Court of possession of an unlawful chemical compound by a prisoner, and he appealed.

The Court of Appeals held that:

- Statute providing that it is unlawful for prisoner to procure, sell, secrete or have in his possession any chemical compound which he has not lawfully received is a strict liability offense, and
- Commonwealth was not required to prove that prisoner had knowing possession of the chemical compound.

Fitch Updates USPF Variable-Rate Demand Obligations and Commercial Paper Criteria.

Fitch Ratings-New York-16 September 2022: Fitch Ratings has published an updated version of its "U.S. Public Finance Variable-Rate Demand Obligations and Commercial Paper Issued with External Liquidity Support Rating Criteria". It replaces the report of the same name published on Dec. 23,

2020.

Fitch has revised the scope of the criteria to apply to non-bank entities providing external liquidity. The key elements of Fitch's external liquidity rating criteria remain consistent with those from the prior criteria report.

The full report is available at 'www.fitchratings.com'.

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Return-to-Office Push Does Little to Solve Transit Agency Problems.

- **Farebox revenue less reliable than taxes during pandemic: S&P**
- **Recent ridership boost won't help agencies recover just yet**

Schoolchildren are piling into morning buses and office workers are jostling for space in the subway on their way home. But as crowded as the urban commute is beginning to seem, stricter return-t--office policies and the start of the academic year won't be enough to rescue beleaguered public transit agencies from the financial woes of the pandemic.

In New York City, for example, the first day of school last week marked a pandemic subway ridership record, with numbers up 35% from the comparable day a year ago. But that boost brought ridership to just 63% of pre-pandemic levels, around the national trend as of late August. Most fare-dependent transit agencies predict a 70% to 90% recovery over the next few years, according to Fitch Ratings.

Transit systems that rely heavily on farebox revenues hoped that relief would come when bosses clamped down on workers returning to their desks, as many have promised to do after the US Labor Day holiday in early September. But for agencies that count on riders to return, the bigger test will be whether they can come up with alternative revenue sources to buoy their finances, said Andy Shin, senior municipal research analyst at Insight Investment.

Continue reading.

Bloomberg CityLab

By Marvis Gutierrez and Mackenzie Hawkins

September 14, 2022

Water Sector Coalition Supports Lead Replacement Funding Using Tax-Exempt Bonds.

Last week, eight drinking water and municipal sector organizations wrote to Sen. Michal Bennet (D-Colo.) in support of his anticipated introduction of legislation to make it easier for water systems to finance full lead service line replacements with tax-exempt bonds.

Sen. Bennet's Financing Lead Out of Water (FLOW Act) is expected to mirror a House bill of the same name that was introduced in March with similar support from prominent industry organizations including the American Water Works Association and Association of Metropolitan Water Agencies (AMWA).

The letter explains how the task of fully replacing a lead service line is often complicated by the fact that ownership is split between the utility and individual homeowners. But when an AMWA member attempted to fully replace public and privately owned lead service lines, and pay for the project with tax exempt bonds, it had to navigate IRS rules that required documentation of how many private businesses operated out of homes where a private lead service line was to be replaced.

"The longer the IRS administrative process, the longer homeowners will have to live with lead service lines," AMWA and the other associations wrote. "If the complete elimination of lead service lines is the goal, then putting time-consuming administrative obstacles in the path of water systems is not the right approach."

In response, the FLOW Act would specify that "qualified lead service line replacement" projects are not subject to these IRS rules, thereby allowing water systems to pay for them more easily and efficiently with tax-exempt bonds. The bill would not require any water system to cover the cost of replacing a privately-owned lead service line but would merely ease administrative burdens on water systems that elect to do so.

Senator Bennet is expected to introduce the bill in the Senate as early as this week. While passage of the measure, as well as its House companion, is not certain before the end of the year, AMWA plans to enlist its members to help build support for the proposal on Capitol Hill and position it for inclusion in a future package of tax legislation.

WATER FINANCE & MANAGEMENT

BY WFM STAFF

SEPTEMBER 12, 2022

Fitch: Airport Credit Profiles Stable as Capital Projects Move Ahead

Fitch Ratings-Chicago/Austin/New York-16 September 2022: US airports have committed to multi-year, billion-dollar capital improvement plans that will increase airport debt, but financial profiles should only be modestly affected due to cost recovery in airline operating agreements, Fitch Ratings says in its report U.S. Airport Capital Spending Ramps Up.

The 12 major large-hub airports' plans covered in the report, which include new terminals or

terminal expansions, have strong airline support and are expected to continue uninterrupted, despite recession risks, as they are considered critical to address aging infrastructure and capacity constraints. The vast majority of these airports came to market in 2022 with new money issuances to support capital programs.

Airline use and lease agreements (AULAs) often include provisions to ensure collaboration between the airport and airlines, which provide for an airport's ability to recover costs. Airlines may be more willing to sign on for longer terms if they believe the capital investments will enhance the efficiency of operations.

Many airports will see airline cost per enplanement surge higher, in some cases to 2x or more above current charges. Federal funding will help cover a portion of project costs but to address the billion dollar needs of airport modernization and expansion, airport projects will still require a majority of debt financing. Some airports are able to use passenger facility charge (PFC) funds and PFC-pay go or other airport revenues to lower the need for borrowing and the burden on charges to the airlines to cover debt service.

Project cost escalation is a concern given inflationary pressures. This risk is typically addressed through pre-determined cost indexes in AULAs or budget contingencies. Longer-dated capital programs could introduce more cost risk but allow for shifting scheduling depending on modularity and rate of passenger growth. Fitch focuses on bids and percent under contract, relative to the total plan, to assess the remaining cost risk in an airport's capital improvement plans.

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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.

Climate Change and Financial Policy: A Literature Review

Read the Federal Reserve Literature Review.

Citigroup Snubbed on Muni Deal Over Gun Law, Costing Texas City $277,334.

- **Bank had best bids on muni sales by city of Anna, Texas**
- **City said the decision followed discussions with state AG**

A Texas city declined to award a bond deal this week to Citigroup Inc. even though the bank submitted the most competitive bid, showing how Wall Street is still contending with a Republican-backed state law that punishes financial firms for taking on gun policies.

The bank was rejected after submitting the best bid among firms that sought to underwrite two bond sales totaling almost $100 million this week by Anna, Texas. It's unusual for a municipality to reject a bank's winning bid on a municipal-bond deal.

Frances La Rue, a spokesperson for Anna, said in a statement that officials chose the second-lowest bid after discussions with the office of the state's Republican attorney general and the municipality's legal counsel and financial adviser. The attorney general's office, which oversees most bond sales in Texas, said Friday that it is still reviewing Citigroup's ability to comply with the state's gun law.

The firearms measure was one of a pair of laws that took effect in September 2021, limiting Texas governments' work with companies unless the firms verify that they don't "discriminate" against gun entities or boycott the fossil fuels industry.

Citigroup initially suspended muni underwriting in the state for a few months after September 2021 as it worked to verify compliance. It resumed underwriting Texas muni deals in November and closed a deal as recently as last week.

In 2018, Citigroup announced policies that set restrictions on the firearms industry after the mass shooting at a high school in Parkland, Florida. Citigroup said it would prohibit retailers that are customers of the bank from offering bump stocks — devices that let semiautomatic rifles fire even more rapidly — or selling guns to people who haven't passed a background check or are younger than 21. The bank's policy does include caveats, including an exemption to the under-21 age restriction if a person has military training, for example.

Additional Cost

Anna, a city of about 20,000 people roughly 50 miles (80 kilometers) northeast of Dallas, awarded the sale to Robert W. Baird & Co., which hasn't been affected by the new laws. It will cost the city an

estimated $277,334 additionally over more than 25 years to work with Baird instead of Citigroup, according to the city spokesperson.

The city's decision signals that Texas municipalities are still hesitant to work with banks affected by Texas Republicans' fight against Corporate America for wading into social issues.

Early this year, the National Shooting Sports Foundation, a national trade association, told Texas Attorney General Kenneth Paxton that Citigroup can't certify compliance with the Texas law. The bank has repeatedly said it doesn't see its policies as violating the law.

In an emailed statement Friday, Paxton said the office had received a complaint that Citigroup's policies would constitute discrimination against the firearm industry, violating the gun measure, known as SB 19.

"As a result, we engaged with representatives of Citi to discuss their policies," the statement said. "More recently, Citigroup and the City of Anna recently contacted my office and asked us if we were still reviewing Citi's eligibility to contract with Texas under SB 19. We confirmed that we were."

Mark Costiglio, a Citigroup spokesperson, said the bank has certified that it complies with both laws and continues to participate in numerous public-sector transactions in Texas.

"We do not believe the claims made by a third-party organization have any merit and we continue to support our clients in this important market," he said in a statement.

Citigroup offered a true interest cost of 4.215% on a roughly $60 million portion of the offering, while Baird offered 4.24%, according to the Anna spokesperson.

"The City Council is confident in Robert W. Baird's ability to ensure the sale of the bonds will close in October with the lowest possible costs and ascertain the City's important public projects move forward efficiently," the city's statement said.

A Baird representative didn't respond to a request for comment.

A paper published earlier this year found that Texas municipal borrowers have been hit with as much as $532 million of extra debt costs because of the two new laws, which have led some of the nation's biggest banks to pause muni underwriting there.

Citigroup has been underwriting deals in Texas for months, most recently pricing $223 million of sustainability bonds for the Harris County Flood Control District last week. The bank is slated to underwrite almost $1 billion of bonds for a state water board later this month.

The bank is the fifth-biggest underwriter of Texas municipal-bond deals in 2022, compared with 8th-biggest for all of 2021, according to data compiled by Bloomberg.

Bloomberg

By Amanda Albright and Danielle Moran

September 16, 2022 at 9:53 AM PDT

JPMorgan Takes Formal Step to Resume Muni Banking in Texas.

JPMorgan Chase & Co. is ready to resume its public-finance business in Texas after being largely absent from that lucrative market for more than a year, following the enactment of two local laws that aim to punish banks for their firearms and energy policies.

The biggest US bank posted a letter on Wednesday with the Municipal Advisory Council of Texas, an industry association, which it also addressed to the public-finance division of the Texas attorney general's office. The letter stated the firm's interest in underwriting municipal securities for the state and its myriad issuers, including cities, counties and school districts.

The letter is a key step to participate in the Texas underwriting market, one of the nation's largest. It amounts to a formal assertion by the bank that it doesn't "boycott energy companies" nor does it have "a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association."

The Texas gun law, backed by local GOP lawmakers, says the state's 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.

JPMorgan, the No. 2 underwriter in the $4 trillion market for US municipal debt, has long argued that it can comply with the firearms law, which took effect on Sept. 1, 2021. At the time, the bank said its business practices should permit it to certify compliance with the firearms law, but that the legal risk from the "ambiguous" law prevented it from bidding on most business with Texas public entities.

A spokesperson for JPMorgan declined to comment. The Texas attorney general's office didn't immediately respond to a request for comment.

In May, Foley & Lardner LLP, a law firm representing JPMorgan, sent a letter to officials with the attorney general's office stating it believes the bank can verify compliance with the two new laws, marking a key step for the bank to return. In Texas, the office signs off on almost all muni bond sales before they can close.

The latest step comes less than a month after JPMorgan avoided being listed among 10 companies named as energy boycotters by Texas Comptroller Glenn Hegar. With that cloud lifted, the bank intends to begin bidding on public contracts again, including municipal underwriting, according to a person familiar with the matter.

Hegar produced that list as mandated in a separate GOP-backed Texas law that took effect on Sept. 1, 2021, which limits the state or its local governments from entering into certain contracts with firms that boycott energy companies.

Bloomberg Markets

By Danielle Moran and Amanda Albright

September 14, 2022

BDA Monitoring Legislation Mandating Specific Technologies for Issuer Financial Reporting.

The BDA, working in concert with our partners in the Public Finance Network led by the GFOA, have been monitoring the progress of the Financial Data Transparency Act of 2022. A similar bill recently passed the House of Representatives as part of the National Defense Authorization Act.

The legislation can be viewed here.

Background

The Senate bill sponsored by Senator Warner (D-VA) and Senator Crapo (R-ID) requires the MSRB to "establish data standards." It also needs to "scale" reporting requirements for "smaller regulated entities."

The provisions in question are in Section 203 of the legislation. The Senate version requires joint rulemaking for regulated entities that will take place for two years after passage and then it provides two years for implementation.

The BDA has flagged concerns about a one-size fits all mandate to the Senate sponsors, as well concerns of the financial burdens this will have on issuers and on how this will be funded at the MSRB – recognizing that dealers pay the majority of the MSRB budget.

The legislation would require identical financial reporting taxonomies across all types of public entities. Given the wide variety of governments the market represents (e.g., states, cities, counties, water systems, public power, public gas, hospitals, etc.), combining all into a single standardized template has the potential to lose valuable information and to reduce transparency by eliminating detail specific to the unique functions or services that governments actually provide.

Full implementation and compliance would be required beginning 2027.

We will continue to provide updates as they become available.

Bond Dealers of America

by Brett Bolton

September 9, 2022

Municipal Bond Market Impact of the SEC's Mutual Fund ESG Proposals: Ballard Spahr

Summary

Two pending proposals could significantly affect how mutual and other funds approach their ESG investments in municipal bonds. If adopted by the Securities and Exchange Commission, the proposals could result in municipal issuers facing ESG-related expectations from mutual funds that are more stringent and less flexible as a precondition of accessing capital from segments of the fund industry that seek to serve the ESG-focused investor base.

The Upshot

- The Fund ESG Proposal would adopt specific disclosure requirements for funds regarding ESG strategies, including requiring some environmentally focused funds to disclose the greenhouse gas emissions associated with their portfolio investments. Municipal ESG holdings may need to conform to these new requirements.
- The Fund Names Proposal would amend existing SEC rules to, among other things, expand the current requirement for certain funds to invest at least 80 percent of their assets in accordance with the investment focus the fund's name suggests. The proposal raises questions on whether municipal bonds may sometimes be limited to the residual portion of fund assets if the name suggests an ESG focus.
- Some ESG-Focused Funds would be required to disclose the carbon footprints and weighted average carbon intensities of their portfolios, including their municipal holdings.

The Bottom Line

These pending SEC proposals on mutual funds may be the first new ESG rules that have a significant impact on the municipal market. While municipal issuers may conform their ESG practices to the proposed criteria for ESG fund holdings in structuring new offerings, they may face considerable obstacles applying the newer ESG practices to outstanding bonds that may be held by funds. In addition, issuers may need to choose between meeting heightened expectations or bypassing some ESG-Focused Funds as potential investors.

The municipal bond market is grappling with how best to approach evolving investor demand for environmental, social, and governance (ESG) disclosures and ESG-designated bonds under existing federal anti-fraud and materiality standards and through voluntary industry best practices. These conversations are happening against the backdrop of the Securities and Exchange Commission's (SEC) pending ESG regulatory proposals for the corporate securities1 and mutual fund2 markets. Many market participants look to these pending SEC proposals for clues to what regulators might have in store for the municipal market in the future.3

However, the pending Fund ESG Proposal and Fund Names Proposal could themselves result in significant and more immediate effects on how mutual and other funds – the second largest investor segment for municipal bonds4 – approach their ESG investments in municipal bonds. If adopted by the SEC, the proposals could result in municipal issuers facing a number of ESG-related expectations that are new, more stringent and/or less flexible than the current market as a precondition to continuing to access capital from the fund industry that seeks to serve the ESG-focused investor base. While municipal issuers may seek to conform their ESG practices to these criteria in structuring their new offerings going forward, they would face considerable obstacles in applying the newer ESG practices to outstanding bonds that may be held by funds.

Summary of Recent SEC Fund Proposals

In broad summary, the Fund ESG Proposal would apply to registered investment companies and business development companies (funds), as well as registered investment advisers and certain unregistered advisers (advisers). The Fund ESG Proposal would (i) require specific disclosure requirements regarding ESG strategies in fund prospectuses, annual reports, and adviser brochures; (ii) implement a layered, tabular disclosure approach for ESG funds to allow investors to compare ESG funds at a glance; and (iii) generally require certain environmentally focused funds to disclose the greenhouse gas (GHG) emissions associated with their portfolio investments. In addition, the Fund Names Proposal would amend the SEC's existing fund names rule to (i) improve and expand the current requirement for certain funds to adopt a policy to invest at least 80 percent of their assets in accordance with the investment focus the fund's name suggests; (ii) provide new enhanced

disclosure and reporting requirements; and (iii) update the rule's current notice requirements and establish recordkeeping requirements. The provisions of these proposals that are potentially relevant to municipal securities issuers are described below.

Potential Impact of SEC Fund Proposals on Municipal Securities Issuers

Some of the new ESG-related expectations incorporated into the Fund ESG Proposal and Fund Names Proposal, and their potential impacts on municipal issuers, include the following:5

- More Structured Criteria for Consideration of ESG Factors When Making Investment Decisions – For any funds that consider one or more ESG factors in their investment decisions – whether along with other non-ESG factors, with the ESG factors being no more significant than other non-ESG factors (Integration Funds), or as a significant or main consideration in selecting investments (ESG-Focused Funds) – the funds may need to establish more structured criteria than they currently use on how they incorporate ESG factors into the investment selection process, including what factors they consider.
- Municipal issuers may experience less flexibility from funds on how they apply ESG factors in assessing a potential investment in their bonds given funds' need to comply with their publicly disclosed more structured investment criteria.
- Heightened ESG Investment Criteria for ESG-Focused Funds – In the case of ESG-Focused Funds, the fund proposals would require more detailed criteria for considering ESG factors in making investment decisions, including descriptions of any methods for including or excluding investments (such as any quantitative thresholds or qualitative factors used), any scoring methodologies, methods for evaluating the quality of third-party data used, and the use of any third-party ESG framework (including how funds determine that a portfolio holding is consistent with the framework).

- Municipal issuers may experience heightened expectations from ESG-Focused Funds with respect to the information (potentially including quantitative information) issuers would need to make available concerning applicable ESG factors so that such funds can maintain investment portfolios that are consistent with disclosed criteria. As a result, issuers may need to choose between meeting these expectations or bypassing some ESG-Focused Funds as potential investors.
- In addition, ESG-Focused Funds with names suggesting that investment decisions incorporate one or more ESG factors must meet an investment policy requirement that at least 80 percent of the value of assets in the funds' portfolios consist of the type of investment suggested by their names. It is unclear if municipal bonds that have ESG characteristics but may not meet the formal criteria of a particular ESG-Focused Fund might still be considered within the 80 percent investment policy requirement or would otherwise be limited to the remaining more-flexible portion of the fund's portfolio holdings. If so limited, the level of investor interest in such bonds may be significantly reduced.
- Additional Disclosures for Impact Funds – For ESG-Focused Funds that select investments that seek to achieve one or more specific ESG impacts (Impact Funds), in addition to the requirements described above for ESG-Focused Funds, such Impact Funds would be required to disclose the impacts they are seeking to achieve, how they seek to achieve such impacts, how they measure progress toward the specific impacts (including key performance indicators), the time horizons used to analyze progress, and the relationship between the impacts sought and financial return.
- Municipal issuers seeking investments from Impact Funds would in most cases need to be willing and able to provide ongoing qualitative and/or quantitative data on the achievement of specific goals or similar measures of progress toward the applicable impact. Municipal issuers may need to choose between providing this ongoing information or bypassing Impact Funds as potential investors.
- Methodology When Considering Greenhouse Gas (GHG) Emissions – For Integration Funds that

consider GHG emissions of their holdings as one ESG factor in their investment selection process, the funds would be required to describe the methodology used for considering portfolio investment GHG emissions.

- Municipal issuers may need to consider what, if any, information they may be willing and able to generate and disclose with respect to their GHG emissions in light of the various methodologies different Integration Funds may develop. No particular methodology is mandated, nor would Integration Funds be required to use quantitative metrics; however, funds that consider GHG emissions likely would develop more structured criteria for doing so (which may include quantitative measures) and, as a result, may have less flexibility in how they assess GHG emissions tied to a particular investment in a municipal bond for their portfolio in light of these criteria. Municipal issuers may need to choose between meeting such methodologies or bypassing some Integration Funds requiring GHG emissions information as potential investors.
- Quantitative Disclosures of GHG Emissions for Some ESG-Focused Funds – Unless ESG-Focused Funds that consider environmental factors affirmatively disclose that they do not consider issuers' GHG emissions as part of their investment strategy, these ESG-Focused Funds would be required to disclose the carbon footprints and weighted average carbon intensities (WACI) of their portfolios. Calculation at the fund-level of carbon footprint and WACI would require quantitative measurements of each portfolio security issuer's enterprise value, total revenues and Scope 1 and Scope 2 GHG emissions.6 While such funds would be required to use GHG emission data produced by issuers of portfolio investments if available, they would be permitted to use good faith estimates based on publicly disclosed methods of estimation of the portfolio issuer's Scope 1 and Scope 2 emissions if no such issuer-produced data were available.
- Municipal issuers seeking investments from ESG-Focused Funds that consider GHG emissions would in most cases need to be willing and able to provide significant quantitative data of the type required by the proposal. It is unclear whether such funds would be willing to make good faith estimates for issuers that do not produce the required GHG emissions data. Municipal issuers may need to choose between undertaking to provide requisite GHG emissions data or bypassing ESG-Focused Funds that consider GHG emissions.

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[1] "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Securities Act Release No. 11061 (March 21, 2022).

[2] "Investment Company Names," Securities Act Release No. 11067 (May 25, 2022) (the Fund Names Proposal), and "Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies," Securities Act Release No. 11068 (May 25, 2022) (the Fund ESG Proposal).

[3] The Municipal Securities Rulemaking Board (MSRB) also published MSRB Notice 2021-17 (December 8, 2021) requesting information on ESG practices in the municipal securities market, which generated 52 letters from an array of market participants. Commenters on balance expressed the view that substantive ESG-related regulation with respect to municipal securities, if any, should most appropriately be undertaken by the SEC rather than the MSRB, with the MSRB potentially making certain enhancements to its Electronic Municipal Market Access (EMMA) system to support more efficient and effective dissemination of any ESG-related disclosures.

[4] As of the end of the second quarter of 2022, mutual funds (including money market and closed-end funds) held $1.02 trillion out of the outstanding $4.04 trillion of municipal securities, constituting approximately 25.3 percent of the municipal securities market. Board of Governors of the Federal Reserve, Z.1 Financial Accounts of the United States – Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts – Second Quarter 2022 (September 9, 2022), Table L.212.

Only the household sector held more, with approximately $1.61 trillion.

[5] These proposals include a number of other provisions not described herein, and readers should refer to the applicable SEC releases for completes description of each proposal. In addition, the Fund ESG Proposal includes provisions applicable to advisers that may have an impact on their ESG-related investment decisions on behalf of their separately-managed accounts and other clients.

[6] Funds would only be required to disclose Scope 3 GHG emissions of any portfolio issuer that itself discloses Scope 3 emissions.

September 19, 2022

by Ernesto Lanza, Kimberly Magrini, William Rhodes

Ballard Spahr LLP

TAX - OHIO

Beachwood City School District Board of Education v. Warrensville Heights City School District Board of Education

Supreme Court of Ohio - September 6, 2022 - N.E.3d - 2022 WL 4074673 - 2022-Ohio-3071

Plaintiff school district filed complaint against defendant school district for promissory estoppel, unjust enrichment, conversion, fraud, and two counts of breach of contract, and sought monetary damages, declaratory judgment, and permanent injunction in relation to agreements between school districts under which they would share tax revenue from territory annexed by plaintiff's city.

The Court of Common Pleas granted defendant's motion for summary judgment. Plaintiff appealed. The Court of Appeals reversed and remanded. Defendant sought discretionary review.

The Supreme Court held that:

- Approval by state board of education was not required to validate agreement;
- Fiscal-certificate requirement of statute governing expenditures of political subdivisions did not apply; and
- Fiscal-certificate requirement of statute governing school district expenditures did not apply.

Approval by state board of education was not required to validate agreement between school districts to share tax revenue generated from nonresidential and nonagricultural property within territory annexed by city, pursuant to which agreement school district associated with city withdrew its request to transfer territory to itself, and thus agreement was enforceable; while prior version of statute charging state board of education with approving or disapproving transfers of territory required that a division of funds and "indebtedness incident thereto," for a transfer of school-district territory, be completed in manner prescribed by the statute, including obtaining board approval, a division of funds could not be incident to a nonexistent transfer of school-district territory.

Agreement between school districts to share tax revenue generated from nonresidential and

nonagricultural property within territory annexed by city did not involve an "expenditure" of money within meaning of prior version of statute governing authority of political subdivisions to enter into contracts involving such expenditures, and thus statute's requirement that fiscal certificate be attached did not apply; agreement simply allocated collectable tax revenue between districts, and district's entitlement under agreement to collect 70% of tax revenue from relevant portions of territory did not require it to expend the other 30% to be diverted to other district, but instead county treasurer would pay agreed-on percentages of tax revenue directly to districts.

Prior version of statute governing school district expenditures and requiring that fiscal certificate be attached to contracts adopted by school district applied only to contracts involving expenditures of money, and thus certificate requirement did not apply to agreement between school districts to share tax revenue generated from nonresidential and nonagricultural property within territory annexed by city; certification addressed school district's ability to satisfy its financial commitments while maintaining adequate educational program, consequence for failing to attach certificate when required was that no payment under contract was to be made, and other actions for which certificate was required under statute involved commitments to spend money.

TAX - CONNECTICUT

Wind Colebrook South, LLC v. Town of Colebrook

Supreme Court of Connecticut - August 2, 2022 - 344 Conn. 150 - 278 A.3d 442

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 "buildings" 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 "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.

A Sneaky Form of Climate Obstruction Hurts Pension Funds.

In several Republican-led states, the officials who oversee pension funds for millions of state workers are being told, or may soon be told, to ignore the financial risks associated with a warming world. There’s something distinctly anti-free market about policymakers limiting investment professionals’ choices — and it’s putting the retirement savings of millions at risk.

The Texas comptroller, Glenn Hegar, recently announced that 10 financial firms and 348 funds could be barred from doing business with the state’s pension plans because they appeared to consider environmental risks in their investment decisions regarding the fossil fuel industry. The day before, Gov. Ron DeSantis of Florida announced a similar move. Other states, including Idaho, Louisiana and West Virginia, have either taken or are thinking of taking similar actions, which amount to ideological litmus tests that will likely result in lower returns for pensioners.

These are short-sighted political moves from a party that typically champions the free market, and that is why 12 other state treasurers and New York City’s comptroller recently joined me to urge that these policies be reversed. The people who will likely suffer are the public servants whose retirement money won’t be managed for a world being disrupted by a rapidly changing climate.

Continue reading.

The New York Times

By Tobias Read
Mr. Read is the Oregon state treasurer.

Sept. 17, 2022

Pensions Push Back at 'Ridiculous' DeSantis-Led Attacks on ESG.

The decision by numerous US Republicans to ignore environmental and societal investment risks imperils $57 trillion of savings, according to industry executives.

After watching key GOP figures launch an all-out political attack on ESG, senior officials from the $57 trillion global pension industry are speaking out against the risks such an agenda poses to long-term savings.

Matti Leppala, chief executive at PensionsEurope, said efforts to lambaste ESG based on an assessment of short-term returns are "ridiculous" and "meaningless."

"We would argue that not taking ESG into consideration is in fact the real risk factor that will have an impact on long-term, sustainable returns," Leppala, whose association represents firms overseeing a combined $7 trillion in assets, said in an interview.

Continue reading.

Bloomberg Markets

By Anchalee Worrachate and Frances Schwartzkopff

September 16, 2022 at 3:00 AM PDT

Muni Bond Market Sags to Eight-Year Low.

The market value of outstanding municipal debt has dropped below $4 trillion for the first time since 2014, according to Federal Reserve data released last week.

Bond prices, falling for much of 2022, have dropped by an average of 11 cents on the dollar, according to research firm Municipal Market Analytics.

Outstanding municipal bond debt now has a market value of $3.97 trillion, less than at the beginning of 2014. Muni prices tanked in 2013 after Detroit declared bankruptcy and the Federal Reserve signaled that it would start dialing back easy-money policies.

The Wall Street Journal

By Heather Gillers

Sep 14, 2022

Muni Market Shrinks Below $4 Trillion as Bond Prices Fall.

After six months of falling bond prices, the market value of all outstanding municipal debt ended June at $3.97 trillion, according to Federal Reserve data released last week.

The last time the value of outstanding muni debt stood below $4 trillion was in 2014. The previous year, bond prices had tanked following Detroit's bankruptcy and amid fears that the Fed would start dialing back easy-money policies.

Municipal bond prices have dropped by an average of 11 cents on the dollar since the beginning of 2022, according to research firm Municipal Market Analytics.

The Wall Street Journal

By Heather Gillers

Sep 15, 2022

Impact of the Inflation Reduction Act of 2022 on Renewable Energy Tax Credits: Stinson

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 (Act) into law. The Act, while not as expansive as the previously proposed Build Back Better Act, addresses numerous areas of policy and law including health care, corporate taxation and energy. Two particular focuses for the energy community, in addition to incentives for domestic manufacturing of clean energy technology and developing technologies such as geothermal, carbon capture, clean hydrogen and biofuel, are the Act's 1) extension and modification of the production tax credit under Code Section 45 (PTC) and investment tax credit under Section 48 (ITC) and 2) creation of the new Clean Electricity Investment Credit (Clean ITC) under Section 48D and Clean Electricity Production Credit (Clean PTC) under Section 45Y.

NEW PTC AND ITC BASE RATES
Under the Act's modified tax credit program, certain renewable energy projects which place in service after December 31, 2021 will be eligible to receive the new base credit amount. Eligible wind, solar (which previously had expired), closed-loop biomass, open-loop biomass, geothermal, landfill gas, municipal solid waste, qualified hydropower and geothermal facilities would qualify for a PTC base credit amount of 0.3 cents per kWh (adjusted for inflation). Additionally, a new ITC base credit amount of 6% would be available to solar energy property, fuel cell property and waste energy recovery property, as well as the newly added energy storage technology, qualified biogas property and microgrid controllers, which begin construction by December 31, 2024. The 6% credit for energy property includes amounts paid or incurred for qualified interconnection property on projects with a nameplate capacity not greater than 5MWac.

CLEAN PTC AND CLEAN ITC
The Act also provides a new production tax credit and investment tax credit for projects generating electricity that place in service after December 31, 2024 and have a greenhouse gas emission rate of zero or less. An eligible project may receive either the Clean PTC or the Clean ITC but not both. The Clean PTC and Clean ITC will provide the same revised base credit rate available under the PTC and

ITC. As with the ITC, costs incurred in connection with qualified interconnection property will qualify for the Clean ITC.

Both the Clean PTC and Clean ITC will have a phase-down period beginning on the later of 1) the year in which greenhouse gas emissions from the electric power sector are equal to or less than 25% of 2022 sector emission levels or 2) 2032 (Applicable Year). The credit will remain at 100% of the applicable credit percentage in the year following the Applicable Year and then decrease to 75% in the second year and 50% in the third year. After the third year, the credit will expire.

MULTIPLIER REQUIREMENTS

A taxpayer can increase a project's base credit amount by a multiplier of five (up to 1.5 cents per kWh for PTC or Clean PTC and up to 30% for ITC or Clean ITC) by satisfying certain prevailing wage rate and apprenticeship requirements (Multiplier Requirements). Under the prevailing wage requirements, laborers and mechanics employed by the taxpayer or any contractor or subcontractor during the construction, alteration or repair of the facility during the applicable credit period must be paid local prevailing wages as established by the Secretary of Labor (Secretary). A taxpayer can cure a failure to satisfy the prevailing wage requirements by paying underpaid laborers or mechanics the difference in pay, plus interest, as well as paying a $5,000 penalty per underpaid laborer or mechanic to the Secretary. Further guidance on the prevailing wage requirements will be issued by the Secretary.

The apprenticeship requirements establish a minimum number of labor hours on a project that must be completed by qualified apprentices participating in a registered apprenticeship program under Code Section 3131(e)(3)(B). These apprenticeship programs, as well as a project's requisite apprentice-to-journeyman ratios, are established by the Department of Labor or the applicable state apprenticeship agency. Projects beginning construction before January 1, 2023 need only 10% of total labor hours completed by a qualified apprentice. That percentage increases to 12.5% for projects beginning construction in 2023 and 15% for projects beginning construction on or after January 1, 2024. Additionally, each taxpayer, contractor or subcontractor which employs four or more individuals to perform construction, alteration or repair work on the project must employ at least one qualified apprentice. A taxpayer can cure a failure to satisfy the apprenticeship requirements if it 1) pays the Secretary of Labor a penalty equal to $50 per labor hour not in compliance (this amount increases to $500 if the failure is determined to have been intentional disregard) or 2) establishes a good faith effort to obtain apprentices which failed due to a denial or failure to respond by apprenticeship programs.

The Multiplier Requirements apply to projects that begin construction 60 days or more after the Secretary publishes guidance on the requirements. Projects that begin construction earlier, as well as facilities with a maximum net output of less than 1MWac, will automatically qualify for the tax credit multiplier without having to satisfy the Multiplier Requirements.

ADDITIONAL PERCENTAGE BOOSTS

The Act also provides that projects satisfying the Multiplier Requirements and Placed in Service after December 31, 2022 can receive an additional 10% credit increase for containing certain levels of steel, iron or manufactured products that are made in the United States. The taxpayer may certify that any steel or iron used in the project is produced in the U.S. but at least 40% of manufactured products used on a project (20% for offshore wind facilities) must be produced in the U.S. to qualify for the boost. However, a project that does not use projects produced in the U.S.can still receive the 10% boost if not enough materials were produced in the United States or if using U.S. made materials would increase the project cost more than 25%.

Similarly, a project that satisfies the Multiplier Requirements can receive a 10% credit boost for

being located in specified energy communities. Such energy communities include brownfield sites, areas with certain employment related to coal, oil or natural gas experiencing unemployment above the national average, and areas with closed coal mines or coal-generating plants.

Regardless of whether the Multiplier Requirements are satisfied, solar and wind projects can also receive additional boosts for being involved in certain low-income policy goals. Projects located in low-income communities or on Indian Land are eligible for an additional 10% boost, and projects that are part of a low-income residential building project or economic benefit project can receive a 20%. The Act also establishes that energy credits under Section 48 will not apply for purposes of determining eligible basis for LIHTC under Section 42.

DIRECT PAY AND CREDIT TRANSFERABILITY
As many in the energy community anticipated, the Act includes provisions allowing eligible taxpayers to treat tax credits as a direct payment of taxes to the IRS (Direct Pay). Many renewable energy credits, including the PTC if placed in service by December 31, 2022, the ITC, the Clean PTC and the Clean ITC, are eligible for Direct Pay treatment. However, the Act only allows tax-exempt entities, states and political subdivisions, the Tennessee Valley Authority, Indian tribal governments, Alaska Native Corporations and rural electricity co-ops to use Direct Pay for these credits. Other taxpayers can only elect to use Direct Pay for clean hydrogen, carbon oxide sequestration and advanced manufacturing production for the first five years after the facility is placed in service. An election to use Direct Pay must be made no later than the due date for the tax return for the year in which the election is made. For the PTC and Clean PTC, the Direct Pay election will apply for a 10-year period beginning on the eligible facility's placed in service date.

While most taxpayers cannot use Direct Pay, the Act does permit taxpayers to transfer certain tax credits, including the PTC, ITC, Clean PTC and Clean ITC, to an unrelated party. Beginning in taxable year 2023, a tax credit may be transferred once and may not be transferred again. Such transfer must be made in cash, and any gain is not included in the seller's gross income or deducted by the buyer. In the case of a partnership, payment received for the transfer of credits will be treated as tax exempt income and would pass-through to the partners of the seller. Transfers of credits can begin in approximately mid-February 2023 and must be made no later than the tax return due date for the taxable year for which the credit is determined. Transferrable credits would also receive extended carryback and carryforward periods. The carryback period would be increased from one to three years and the carryforward period would increase from 20 to 22 years.

This alert spotlights just a few of the developments included in the 300-page Act. Stinson's Tax Credit & Impact Finance team will continue to monitor the Act's implementation and its potential impact on firm clients.

Stinson LLP

September 9, 2022

S&P: Most U.S. Hospitality Tax-Backed Ratings Have Remained Stable Despite The Pandemic

Key Takeaways

- Out of 93 hospitality tax-backed ratings, S&P Global Ratings has affirmed 81% since April 3, 2020,

and now 84% have stable outlooks.
- We lowered 18 of our hospitality tax-backed ratings because of declining pledged revenues and debt service coverage (DSC) primarily in tourism-driven economies.
- Most issuers with these ratings recorded an increase in pledged revenues for fiscal 2021, with stronger growth expected for fiscal 2022, although gains could be dampened by recessionary pressures.

Continue reading.

15 Sep, 2022

Municipal Bond Underwriters Settle SEC Charges for "Limited Offering" Disclosure Violations.

Three municipal bond underwriters settled SEC charges for failing to provide sufficient disclosure to investors in connection with the sale of municipal securities (see, here, here and here). The SEC also filed a Complaint against a fourth municipal bond underwriter in the United States District Court for the Southern District of New York based on the same alleged violations. The SEC stated, "these are the first SEC actions addressing underwriters who fail to meet the legal requirements that would exempt them from obtaining disclosures for investors in certain offerings of municipal bonds."

According to the separate Orders, the underwriters relied on a "limited offering" disclosure exemption in paragraph (d)(1)(i) of SEA Rule 15c2-12 ("Municipal securities disclosure"), which requires that the securities are sold to no more than 35 persons having "such knowledge and experience in financial and business matters" that they are able to understand the product, and were not purchasing for redistribution. The SEC found that the underwriters did not determine if the broker-dealer and investment advisers purchased the securities for investment purposes, nor did the underwriters know for whom the securities were purchased. As a result, the SEC found that the underwriters were unable to reasonably believe that the securities were purchased for investors that fully understood the product. Further, the SEC found that the underwriters failed to adopt supervisory policies.

As a result, the SEC determined that the underwriters violated SEA Rule 15c-12, SEA Section 15B(c)(1) ("Municipal securities") and MSRB Rule G-27 ("Supervision").

To settle the charges, the underwriters agreed to (i) cease and desist, (ii) accept a censure and (iii) pay civil monetary penalties plus disgorgement with prejudgment interest. Separately, the SEC charged a fourth municipal bond underwriter with similar violations, also alleging that the fourth underwriter also made materially deceptive statements to investors regarding the securities, in violation of MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities").

The Complaint against the fourth underwriter also includes charges for deceptive statements to issuers in violation of Rule G-17 and "seeks permanent injunctions, disgorgement plus prejudgment interest, and a civil money penalty."

September 14 2022

Fried Frank Harris Shriver & Jacobson LLP

Bonds Could Bounce Back — Consider Munis as a Way to Play Rebound.

As fixed income investors know, 2022 has been unkind to bonds. The double-digit year-to-date loss by the Bloomberg US Aggregate Bond Index confirms as much.

Even with that ominous data point and the likelihood the Federal Reserve will raise interest rates again at its next meeting, some market observers are bullish on bonds, including municipal debt. That could be a sign that exchange traded funds, including the VanEck Muni Allocation ETF (MAAX), are worth considering.

“Our preferred strategy is to gradually increase duration of bonds in portfolios at these higher yields. However, we favor higher-credit-quality core bonds, such as Treasuries and investment-grade corporate and investment-grade municipal bonds,” according to Charles Schwab research. “In most cycles, yields tend to converge near the peak of the federal funds rate for the cycle. In the 3% region, yields have already discounted Fed tightening beyond the neutral rate.”

An attractive point regarding MAAX is that its 20 holdings are other ETFs or closed-end municipal bond funds, meaning the VanEck ETF spans a variety of durations and credit profiles. As such, MAAX’s income profile, as highlighted by a 30-day SEC yield of 2.91%, exceeds those offered by many dedicated investment-grade ETFs in this category.

“After years of low yields that drove investors to allocate more to risky investments, income investors can find attractive yields in higher credit quality fixed income. Investment-grade corporate and municipal bonds are offering higher yields than we have seen in several years, and can help investors earn income without excessive risk-taking,” added Schwab.

The actively managed MAAX, which turned three years old in May, does feature some high yield exposure, but the ETF’s overall credit quality is strong, as 68.51% of its holdings carry investment-grade ratings compared to just 9.66% with junk grades, according to issuer data.

Given that compelling credit breakdown and an impressive yield, MAAX is a credible idea for income investors as the third quarter comes to a close.

“Overall, we look for returns in the second half of the year to be better for fixed income investors now that the market has reset interest rates higher. However, we still look for volatility to remain high as central banks shift away from their easy-money policies,” concluded Schwab.

ETF TRENDS

by TOM LYDON

SEPTEMBER 16, 2022

BlackRock Says It Prefers Short-Term Muni Bonds Amid High Rates.

- **One-year munis down 1.6% this year, while benchmark fell 9.7%**
- **‘More defensive stance is warranted’ due to seasonal trends**

BlackRock Inc. says it now prefers short-term municipal bonds as a way to protect against rising

interest rates and a hawkish Federal Reserve.

Short-dated notes have been among the best-performing segments of the $4 trillion municipal debt market in 2022, as rising interest rates left longer-dated securities deep in the red. An index of one-year munis has lost about 1.6% since January, outperforming the market's benchmark and long-term debt, which has lost 9.7% and 16.7%, respectively, data compiled by Bloomberg show.

"We have shifted to a short-duration stance on municipal positioning and have increased cash balances," a note by Peter Hayes, James Schwartz and Sean Carney emailed on Wednesday said. "We favor the intermediate part of the yield curve to maximize income, while avoiding significant duration risk, and are targeting bonds with defensive structures."

Autumn in the US is traditionally a tough period for munis partly because it's when sales of new bonds tend to pick up after a summer lull. And rising interest rates will likely put more pressure on the asset class.

"A more defensive stance is warranted as seasonal trends typically turn less favorable," the note said.

The municipal bond market typically sees increased demand from an uptick in principal and interest payments in the middle of the year, which investors channel back into the market. But come September, those payments tend to decline. CreditSights Inc. estimated that principal and interest payments will total about $31 billion in September, down from about $55 billion the prior month.

Overall, the muni market is on track for its worst year in decades with US state and city debt posting an average return of -0.53% in September — the worst performance of any month over the past six years, according to Bloomberg data.

As such, the asset manager prefers higher-quality bonds overall, with a neutral allocation to non-investment grade bonds.

Bloomberg Markets

By Hadriana Lowenkron

September 14, 2022

American Dream Bondholders Move to Challenge Mall's Tax Appeals.

- **Payments on $800 million of muni debt linked to assessed value**
- **Nuveen is biggest holder of American Dream's muni bonds**

American Dream, the super mall in New Jersey's Meadowlands, has appealed its tax assessment from the borough of East Rutherford for the last four years.

Mutual funds that hold the vast majority of the $800 million of municipal bonds that were issued for the mall and that are backed by property-tax-like payments are pushing back.

The trustee representing fund companies Nuveen LLC, Invesco Ltd. and Lord Abbett & Co. has moved to intervene in cases filed by America Dream in New Jersey Tax Court. The funds hold bonds backed by payments in lieu of taxes made by the project. Known as "Pilots," they were used to spur

the development and are dictated by the annual assessed value of the venture, which was dealt a financial blow by the pandemic.

Continue reading.

Bloomberg Markets

By Martin Z Braun

September 14, 2022

The Muni Bounce Back in 2022 (Bloomberg 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

Sep 16, 2022

Muni Yields Getting Interesting, Neuberger's Iselin Says.

Jamie Iselin, Neuberger Berman's head of municipal fixed income, discusses his strategy for investing in muni bonds amid the stock market selloff with Taylor Riggs on "Bloomberg Markets: The Close."

Watch video.

Bloomberg Markets: The Close

September 14th, 2022

NFMA Introduction to Municipal Bond Credit Analysis

The NFMA will once again offer its Introduction to Municipal Bond Credit Analysis in person!

This year's course will be held at the Sofitel Chicago on **November 17 & 18**.

To view the program, click here. To register, click here.

The Municipal Bond Market Is Primed for Bargain Hunting.

A summer rally in the bond market could be fizzling out, making way for municipal bonds to offer fixed income investors a bargain as the threat of rising interest rates continue in the back half of 2022.

“When the investing herd stampedes in one direction, it can pay to go the opposite way—but only if you step carefully,” a Wall Street Journal report warned potential investors.

With the capital markets expecting another 75-basis point rate hike, it could already be priced into the bond markets. As such, it presents a potential buying opportunity for those looking at municipal bonds.

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

WSJ noted, based on Refinitiv Lipper data, that in the first eight months of 2022, an estimated $83 billion have come out of municipal bond funds. It represents the largest exit recorded, and there are still over a few months left in 2022 as inflation fears have plagued bond markets for much of the year.

As mentioned, it presents an opportune time to get municipal bond exposure at cheap prices. It’s also an ideal opportunity to get cheaper high-yielding municipal debt.

“People are perking up and getting excited about having the opportunity to earn that higher income,” says Alexa Gordon, a municipal-bond portfolio manager at Goldman Sachs Asset Management.

An All-Inclusive Muni ETF Option
As opposed to holding various municipal bonds, exchange-traded funds (ETFs) offer an all-inclusive approach. They include various debt holdings in one position at a low cost.

One place to get tax-free municipal bond exposure is via an ETF wrapper with funds like the Vanguard Tax-Exempt Bond ETF (VTEB A+). With a 0.05% 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).

etfdb.com

by Ben Hernandez

Sep 15, 2022

Muni ETFs Could Be Just What Frustrated Bond Investors Need.

With the widely observed Bloomberg US Aggregate Bond Index down 11.55% year-to-date, it's easy to understand why fixed income investors are frustrated and why many are departing the related funds, including exchange traded funds.

Those scenarios could get worse before improving because the August reading of the Consumer Price Index (CPI) was worse than expected, indicating that the Federal Reserve likely has no choice but to continue raising interest rates, potentially in aggressive fashion.

To that end, it's not surprising that investors yanked $156 billion from taxable bonds this year, as of July 31, but those moves could be hasty, particularly when considering the utility of municipal bonds and ETFs such as the VanEck Vectors High Yield Muni ETF (HYD).

One of the reasons to consider HYD today is that with bonds, just like with any other asset class, timing matters, and selling low and buying higher is a strategy that adversely affects a portfolio's returns.

"For taxable-bond funds, we found that investor returns lagged total returns by 117 basis points, on average, for the 10 years ended Dec. 31, 2021," noted Morningstar analyst Amy Arnott. "On the surface, that's actually better than the 1.7-percentage-point return gap across all category groups. But the low level of returns for taxable-bond funds makes this return gap particularly damaging. Over the trailing 10-year period, total returns averaged only about 3.6% per year, and investors missed out on about a third of those returns, earning only 2.4% per year in dollar-weighted terms."

In favor of HYD are the points that municipal bonds offer credible recession protection and that state and local finances are currently strong, indicating defaults and downgrades are likely to be few and far between.

Additionally, amid a coming wave of folks entering retirement, some investors may be compelled to return bond ETFs such as HYD over the near term.

"Fixed-income holdings also play an increasingly important role as millions of investors transition into retirement. Based on data from the U.S. census bureau, 20.3 million Americans (or 6.2% of the population) are between age 60 and 64 and will reach retirement age within the next several years. An additional 52.4 million individuals (or 16.8% of the U.S. population) were already 65 or older as of mid-2021," added Arnott.

To top it off, HYD offers the benefits of a 30-day SEC yield of 4.24%, which is well above what investors earn with 10-year Treasuries.

ETF TRENDS

by TOM LYDON

SEPTEMBER 14, 2022

For more news, information, and strategy, visit the Beyond Basic Beta Channel.

SEC Charges Loop Capital Markets in First Action against Broker-Dealer for Violating Municipal Advisor Registration Rule.

Washington D.C., Sept. 14, 2022 — The Securities and Exchange Commission today charged Chicago-based Loop Capital Markets, LLC for providing advice to a municipal entity without registering as a municipal advisor. The action marks the first time the SEC has charged a broker-dealer for violating the municipal advisor registration rule.

According to the SEC's order, between September 2017 and February 2019, Loop Capital advised a Midwestern city to purchase particular fixed income securities, which the city purchased using the proceeds of its own municipal bond issuances. In addition, the Commission's order found that Loop Capital did not maintain a system reasonably designed to supervise its municipal securities activities and had inadequate procedures, including insufficient methods to identify potential violations of the municipal advisor registration rules.

"The municipal advisor registration rules apply to all market participants and are intended to protect municipal entities from abuse," said LeeAnn Ghazil Gaunt, Chief of the Enforcement Division's Public Finance Abuse Unit. "Registered broker-dealers must either register as municipal advisors or refrain from engaging in municipal advisory activities."

Loop Capital agreed to settle with the SEC and consented, without admitting or denying any findings, to the entry of an SEC order finding that it violated the rules regarding municipal advisor registration and supervision requirements, censuring it, and ordering it to pay disgorgement and prejudgment interest of $5,456.73 and a civil penalty of $100,000.

The SEC's investigation was conducted by Sally Hewitt and Kristal P. Olson of the Public Finance Abuse Unit with assistance from Jonathan Wilcox and Eric Celauro. The investigation was supervised by Brian D. Fagel. The SEC examination that led to the investigation was conducted by Ben Kempton, Catherine Cotey, David Kinsella, Michael Wells, and John Brodersen of the Chicago Regional Office.

SEC Charges Four Underwriters in First Actions Enforcing Municipal Bond Disclosure Law.

Washington D.C., Sept. 13, 2022 — The Securities and Exchange Commission today filed a litigated action against Oppenheimer & Co. Inc. and separately announced settlements with BNY Mellon Capital Markets LLC, TD Securities (USA) LLC, and Jefferies LLC, charging each of the four firms with failing to comply with municipal bond offering disclosure requirements. These are the first SEC actions addressing underwriters who fail to meet the legal requirements that would exempt them from obtaining disclosures for investors in certain offerings of municipal bonds.

According to the SEC's complaint and the settled orders, during different periods since 2017, the four firms sold new issue municipal bonds without obtaining required disclosures for investors. Each of the firms purported to rely on an exemption to the typical disclosure requirements called the limited offering exemption, but they did not take the steps necessary to satisfy the exemption's criteria.

"I applaud the excellent work of the Division's Public Finance Abuse Unit in bringing these first-ever

actions in the $4 trillion municipal bond space," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "We encourage underwriters to examine their practices and to self-report any failures to us before we identify them ourselves."

"Disclosure helps protect investors from fraud," said LeeAnn G. Gaunt, Chief of the SEC Enforcement Division's Public Finance Abuse Unit. "Underwriters must take seriously their responsibility to ensure municipal bond investors get the information they are entitled to."

The SEC's orders find that BNY, TD, and Jefferies each violated Rule 15c2-12 under the Securities Exchange Act of 1934, which establishes disclosures that must be provided to investors, as well as Municipal Securities Rulemaking Board (MSRB) Rule G-27 and Section 15B(c)(1) of the Exchange Act. Without admitting or denying the SEC's findings, these three firms agreed to settle the charges, cease and desist from future violations of those provisions, be censured, and pay the following monetary relief:

- BNY: $656,833.56 in disgorgement plus prejudgment interest and a $300,000 penalty;
- TD: $52,955.92 in disgorgement plus prejudgment interest and a $100,000 penalty; and
- Jefferies: $43,215.22 in disgorgement plus prejudgment interest and a $100,000 penalty

The SEC's complaint against Oppenheimer, filed in federal district court in Manhattan, charges the same violations as above in connection with at least 354 offerings. The complaint also alleges that Oppenheimer made deceptive statements to issuers in violation of MSRB Rule G-17, which prohibits deceptive, dishonest, or unfair practices. The complaint seeks permanent injunctions, disgorgement plus prejudgment interest, and a civil money penalty.

As a result of its findings in these investigations, the SEC staff has begun investigations of other firms' reliance on the limited offering exemption. Firms that believe their practices do not comply with the securities laws are encouraged to contact the SEC at LimitedOfferingExemption@sec.gov.

The SEC's investigations were conducted by Laura Cunningham, Sue Curtin, Warren Greth, Brian Knight, Steve Varholik, Cori Shepherd Whitten, and Jonathan Wilcox of the Public Finance Abuse Unit, with assistance from Samir Badalov, and supervised by Kevin B. Currid, Jason H. Lee, Ivonia Slade, and Rebecca Olsen. The SEC's litigation against Oppenheimer will be led by Devon Staren. The SEC appreciates the assistance of the Municipal Securities Rulemaking Board.

Chicago BD to Pay Over $105K for Failing to Register as Muni Advisor.

What You Need to Know

- Loop Capital Markets is the first broker-dealer to be charged for violating the municipal advisor registration rule.
- The SEC ordered the firm to pay disgorgement and prejudgment interest of $5,457 and a civil penalty of $100,000.
- The SEC also recently filed a litigated action against Oppenheimer & Co. and reached settlements with BNY Mellon Capital Markets, TD Securities and Jefferies for failing to comply with municipal bond offering disclosure requirements.

A Chicago-based broker-dealer has agreed to pay more than $105,000 for violating the municipal advisor registration rule, The Securities and Exchange Commission said Wednesday.

Loop Capital Markets earned the dubious distinction of being the first BD to be charged for violating that rule, according to the SEC.

According to an SEC order filed Wednesday, between September 2017 and February 2019, Loop Capital advised a Midwestern city to buy particular fixed income securities, which the city purchased using the proceeds of its own municipal bond issuances.

The firm has been registered with the SEC as a BD since 1997. Loop Capital was temporarily registered as a municipal advisor before July 1, 2014, but has not been registered with the SEC as a municipal advisor since then, according to the SEC order.

The SEC also found that Loop Capital didn't maintain a system reasonably designed to supervise its municipal securities activities and had inadequate procedures that included insufficient methods to identify potential violations of the municipal advisor registration rules.

"The municipal advisor registration rules apply to all market participants and are intended to protect municipal entities from abuse," according to LeeAnn Ghazil Gaunt, chief of the SEC Enforcement Division's Public Finance Abuse Unit.

"Registered broker-dealers must either register as municipal advisors or refrain from engaging in municipal advisory activities," she said in a statement.

Without admitting or denying the SEC's findings, Loop Capital agreed to settle with the SEC and consented to the entry of an SEC order finding it violated the rules regarding municipal advisor registration and supervision requirements.

The SEC also ordered the firm to pay disgorgement and prejudgment interest of $5,457 and a civil penalty of $100,000. The firm also agreed to be censured.

Loop Capital didn't immediately respond to a request for comment on Thursday.

The SEC said Tuesday it filed a litigated action against Oppenheimer & Co. Inc. and had reached settlements with BNY Mellon Capital Markets LLC, TD Securities LLC and Jefferies LLC for failing to comply with municipal bond offering disclosure requirements.

ThinkAdvisor

By Jeff Berman

September 16, 2022

- August Edition of GFR Now Available.
- SEC Risk Alert for Municipal Advisors Highlights Key Compliance Issues: Ballard Spahr
- Inflation Reduction Act: Implications for Solar and Wind Tax Credit Equity Markets – Jones Walker
- NFMA Advanced Seminar on Public Power.
- CDFA Infrastructure Finance Learning Series: Reviewing the Guidance
- Fifth Circuit Condemns Texas Transmission ROFR Law on Constitutional Grounds: Bracewell
- First Circuit Holds that Fifth Amendment Takings Claims Must be Paid in Full: Dechert
- And finally, You Keep Using That Word. I Do Not Think It Means What You Think It Means. is brought to us this week by *Frein v. Pennsylvania State Police*, in which Circuit Judge Stephanos

Bibas began his opinion as follows, "Although police may seize potential evidence using a warrant, they may not keep it forever. Yet they did that here." Forever, you say? And yet here you are adjudicating a case about the return of that very evidence. Hmm. But let's not let that distract us from the heartwarming tale of the parents whose son murdered a state trooper and later sued for the return of the firearms seized in the ensuing investigation. Who could possibly have guessed that there could be violence brewing in a household containing, "forty-six guns belonging to the parents: twenty-five rifles, nineteen pistols, and two shotguns." Although only two in number, at least the shotguns had each other.

PUBLIC PENSIONS - CALIFORNIA

Hale v. California Public Employees' Retirement System

Court of Appeal, First District, Division 3, California - August 29, 2022 - Cal.Rptr.3d - 2022 WL 3713449

Retired firefighters with California's Department of Forestry and Fire Protection who had served as executive officers for union sought judicial review of ALJ's proposed decision that was adopted by California Public Employees' Retirement System board (CalPERS), concluding that cash-outs or buy-downs of holiday leave credits were not compensation earnable and therefore should not be included in final compensation for purposes of calculating monthly retirement allowances.

Union officers petitioned for writ of administrative mandamus. The Superior Court denied petition. Union officers appealed.

The Court of Appeal held that:

- Rule defining special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS did not control whether holiday cash-outs were special compensation that were required to be included in calculating pensions;
- Cash-outs met the statutory definition of special compensation, and thus were required to be included in income when calculating pension benefits;
- Characterization of group or class was the union bargaining unit, rather than class-of-two consisting of union officers alone;
- Cash-outs were not required to be available to all members of bargaining unit, regardless whether they were similarly situated, to be considered special compensation; and
- Court would take judicial notice of decision indicating that CalPERS had taken inconsistent positions on whether state members were subject to rule.

EMINENT DOMAIN - INDIANA

624 Broadway, LLC v. Gary Housing Authority

Supreme Court of Indiana - August 29, 2022 - N.E.3d - 2022 WL 3714283

Condemnee brought action against municipal housing authority, seeking injunctive relief and damages based on allegations that authority unlawfully exercised eminent domain over condemnee's commercial real property and violated condemnee's constitutional and statutory procedural rights.

The Superior Court granted authority's motion for summary judgment and denied condemnee's motion for summary judgment. Condemnee appealed. The Court of Appeals affirmed in part,

reversed in part, and remanded with instructions. Petition to transfer was granted.

The Supreme Court held that:

- Notice of condemnation proceedings by publication violated due process;
- Inadequate notice in violation of due process was not harmless; and
- Proper remedy for due process violation was new hearing on just compensation.

Municipal housing authority's use of notice by publication to provide condemnee with notice of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, violated due process; housing authority knew identity and name of registered agent from condemnee's articles of organization filed with Secretary of State.

Municipal housing authority's due process violation in providing condemnee notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, was not harmless; if condemnee had been given sufficient notice, it could have timely presented its appraisal of the property before the final valuation hearing, and condemnee's appraisal in the amount of $325,000 was significantly higher than the authority's $24,000 appraisal and significantly higher that the final award of $75,000.

Proper remedy for municipal housing authority's due process violation in providing condemnee inadequate notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and valuation of the property was new hearing on damages to determine just compensation for taking; authority strictly followed statutory procedures for administrative taking of the property, the taking was not subterfuge to convey private property to another individual for private use, there was no showing that authority acted arbitrarily and capriciously, and adequate legal remedy could be provided through just compensation.

PUBLIC UTILITIES - MAINE

NECEC Transmission LLC v. Bureau of Parks and Lands

Supreme Judicial Court of Maine - August 30, 2022 - A.3d - 2022 WL 3723172 - 2022 ME 48

Owner of renewable energy project, which involved construction of high-voltage direct current (HVDC) transmission line from Canada to New England, brought declaratory judgment action seeking to permanently block retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state and that required a two-thirds approval from legislature for any similar project on public lands.

The Business and Consumer Court denied owner's motion for preliminary injunction and reported the interlocutory ruling for review.

The Supreme Judicial Court held that retroactive application of ballot initiative could violate due process thus warranting a preliminary injunction.

Retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state, and that required a two-thirds approval from legislature for any similar project on public lands, would violate due process clause of the State Constitution if owner of renewable energy project undertook substantial construction consistent

with and in good-faith reliance on its previously-issued public convenience and necessity (CPCN) for the project, which involved the construction of high-voltage direct current (HVDC) transmission line from Canada into New England, and thus owner was entitled to a preliminary injunction in its declaratory judgment action seeking to permanently block retroactive application of ballot initiative.

REFERENDA - NEBRASKA

Eggers v. Evnen

United States Court of Appeals, Eighth Circuit - August 31, 2022 - F.4th - 2022 WL 3905817

Ballot campaign committee and ballot sponsor brought action alleging that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause.

The United States District Court for the District of Nebraska granted plaintiffs' motion for preliminary injunction, and state appealed.

The Court of Appeals held that:

- Claim that requirement violated Equal Protection Clause was subject to rational basis review;
- Plaintiffs failed to establish likelihood of success on merits; and
- Balance of equities and public interest did not favor issuance of preliminary injunction.

Provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives did not restrict fundamental right, and thus claim that requirement violated Equal Protection Clause was subject to rational basis review.

Ballot campaign committee and ballot sponsor failed to establish likelihood of success on merits of their claim that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause by devaluing signatures of voters in populous counties relative to signatures of citizens in less populous counties, and thus were not entitled to preliminary injunction; state had legitimate interest in limiting ballot initiatives to those with reasonable chance of success in order to avoid overcrowded ballot, and lawmaker could rationally conclude that signature distribution requirement furthered that interest by weeding out initiatives with small but concentrated support base.

Balance of equities and public interest did not favor issuance of preliminary injunction barring application of Nebraska constitution's signature distribution requirement for ballot initiatives in evaluating petition to place proposals to legalize marijuana for medical and recreational purposes on ballot, in light of state's interest in lawfully managing its elections, and fact that signature distribution requirement appeared not to violate ballot campaign committee's equal protection rights.

SHORT TERM RENTALS - NEW JERSEY

Nekrilov v. City of Jersey City

United States Court of Appeals, Third Circuit - August 16, 2022 - 45 F.4th - 2022 WL 3366430

Individuals who invested in and operated short-term rentals filed § 1983 action alleging that city ordinance limiting short-term rentals violated their rights under Takings, Contracts, and Due Process Clauses.

The United States District Court dismissed complaint, and plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs' forward-looking right to pursue their short-term rental businesses was not property right cognizable under Takings Clause;
- Ordinance did not result in total taking or taking per se;
- Ordinance did not effect partial taking;
- Ordinance did not violate Contracts Clause; and
- Ordinance did not violate plaintiffs' substantive due process rights.

City ordinance limiting short-term rentals did not deprive properties formerly used as short-term rentals of all economically viable use, and thus did not result in total taking or taking per se, even though individuals who invested in and operated short-term rentals could not expect same profits from long-term leases as from short-term rentals; ordinance did not entirely ban short-term rentals, and investors could still make economically viable use of properties by occupying properties or sub-leasing them on long-term basis.

City's enactment of ordinance limiting short-term rentals did not effect partial taking, even though owners and lessees of properties previously used as short-term rentals may have lost between 50% and 66% of their potential revenue, and city officials had encouraged them to invest in short-term rentals; ordinance was general zoning regulation restricting permissible uses of residential housing with goals of protecting residential housing market and promoting public safety, values of underlying properties or leases had not decreased, lost-profit claims failed to account for other potential uses of properties, prior ordinance placed qualifications on operation of short-term rentals, and amended ordinance permitted lessees to use properties for short term rentals for majority of lease term.

City had substantial public purpose in passing ordinance limiting short-term rentals, and thus ordinance did not violate Contracts Clause, even if it substantially impaired long-term leases that investors had entered into for purpose of offering short-term rentals, and mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; city was not party to long-term leases, and ordinance articulated multiple public purposes, including desire to protect residential character of neighborhoods and reduce nuisance activity associated with short-term rentals.

City ordinance limiting short-term rentals did not violate substantive due process rights of individuals who invested in and operated short-term rentals, even if mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; ordinance articulated several legitimate state interests furthered by change in regulation, including protecting long-term housing supply, reducing deleterious effects on neighborhoods caused by short-term rentals, and protecting residential character and density of neighborhoods.

POLITICAL SUBDIVISIONS - OHIO

State ex rel. Ohio-Kentucky-Indiana Regional Council of Governments v. Bureau of Workers' Compensation

Supreme Court of Ohio - September 6, 2022 - N.E.3d - 2022 WL 4074772 - 2022-Ohio-3058

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, sought writ of mandamus ordering state Bureau of Workers' Compensation (BWC) to change council's Ohio State Workmen's Compensation Insurance Fund Manual classification as a "special public authority," a type of public-employer taxing district, which resulted in a much higher premium, and to reassign classifications previously in effect which were applicable to private employers.

Magistrate issued decision recommending issuance of writ. The Tenth District Court of Appeals denied writ. Council appealed.

The Supreme Court held that:

- Council was not a public employer;
- Manual classification that applies to public employers that are taxing districts did not apply to council; and
- BWC's failure to explain why reclassification to "special public authorities" most closely described council's degree of hazard warranted grant of limited writ of mandamus.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "public employer" for classification of council with respect to risk of hazard for purposes of determining workers' compensation premium rates, even though council received some of its funding from public sources and designated itself a public body in its articles of agreement, apparently for purposes of receiving federal transportation funds; council did not fit into any of the categories of public employers, which were delineated with great specificity.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "taxing district," and thus classification in Ohio State Workmen's Compensation Insurance Fund Manual that applies to public employers that are taxing districts, for purposes of determining rate of an employer's workers' compensation premiums, did not apply to council, which was not a territorial division of government throughout which a tax may be levied, and council had no taxing authority.

Bureau of Workers' Compensation's (BWC) failure to explain why reclassification under Ohio State Workmen's Compensation Insurance Fund Manual from classifications for private employers to "special public authorities" most closely described degree of hazard for Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, warranted grant of limited writ of mandamus ordering BWC to evaluate degree of hazard in council's business and to explain any conclusion as to why classification best described council's business with respect to the degree of hazard; council did not meet the definition of a classification.

MANDAMUS - OHIO

State ex rel. Clark v. Twinsburg

Supreme Court of Ohio - September 2, 2022 - N.E.3d - 2022 WL 4005808 - 2022-Ohio-3089

Relator sought a writ of mandamus ordering city, city Clerk of Council, and law director to transmit petition to county Board of Elections concerning a referendum seeking to replace resolution, which stated that the planning commission approved project's final site plan with condition that project's building height not exceed 35 feet.

The Supreme Court held that:

- Laches did not bar action;
- Jurisdictional-priority rule did not apply to bar action;
- Relator lacked an adequate remedy in the ordinary course of law due to the proximity of election; and
- Clerk of Council had a mandatory, ministerial duty to transmit referendum petition to Board of Elections for its signature verification after ten days had elapsed from filing of petition.

Laches did not bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit referendum petition to county Board of Elections seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though case would not have been automatically expedited had petitioner filed sooner than 21 days, absent showing of material prejudice by delay; proximity to election of approximately two months made it likely that even if petitioner had filed at the earliest possible time after the case ripened, court would have ordered case to be expedited.

Jurisdictional-priority rule, providing that as between state courts of concurrent jurisdiction, tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle rights of parties, did not apply to bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit to county Board of Elections referendum petition to allow for a public vote on referendum seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though petitioner had filed an administrative appeal in common pleas court before filing mandamus action, since administrative appeal, which could overturn resolution as improper, would not have provided remedy sought of a public vote on referendum.

Petitioner lacked an adequate remedy in the ordinary course of law due to the proximity of election, which was approximately two months away, as would support petition for writ of mandamus to compel city, city Clerk of Council, and law director to transmit to Board of Elections referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, since an administrative appeal would not have accomplished what petitioner sought of placing referendum on ballot.

City Clerk of Council had a mandatory, ministerial duty to transmit to Board of Elections for its signature verification after ten days had elapsed from filing date of referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, as would support issuance of limited writ of mandamus directing Clerk to transmit referendum petition and a certified copy of resolution to

county Board of Elections, regardless of law director's judicial or quasi-judicial determination that resolution was administrative, rather than legislative, and therefore not subject to referendum.

EMINENT DOMAIN - PENNSYLVANIA

Frein v. Pennsylvania State Police

United States Court of Appeals, Third Circuit - August 30, 2022 - F.4th - 2022 WL 3724097

Parents of defendant who was convicted in connection with fatal shooting brought action against Pennsylvania State Police, district attorney, and prosecutors under § 1983, alleging that the failure to return gun seized from parents during investigation of shooting, which gun was never used at trial or on appeal, constituted a violation of Fifth Amendment's takings clause and of Second Amendment.

The United States District Court granted motion to dismiss for failure to state a claim. Parents appealed.

The Court of Appeals held that:

- Gun was pressed into public use, as could support takings claim;
- Unfavorable decision by state court on parents' motion seeking return of gun did not result in claim-preclusion bar to takings claim;
- Police and district attorney did not lawfully acquire gun using police powers, as would obviate requirement for compensation of parents pursuant to takings clause; and
- Fact that a citizen can retain or acquire another firearm does not prevent seizure of a firearm from burdening Second Amendment rights; but
- Pprocedure afforded to parents by state court, on parents' motion for return of gun under state criminal procedure rule, was sufficient to comply with due process.

Audited Financial Transparency for Public Sector Utilities and Credit Rating Decisions.

When looking at either the historic performance or the forecasted outlook by many of the credit rating agencies, public utilities including water & sewer have been stable and weathered the COVID-19 pandemic with relatively little impact to their financial standings.

A portion of the credit for this positive news goes to the early preparedness undertaken by the management teams on their rate setting initiatives that included building up liquidity for the future capital needs and/or building reserves for a rainy day. These initiatives are looked upon very favorably by the rating agencies, hence earning a stable outlook for this sector. Along the same lines, the need for timely completion and reporting of their audited financials adds to the comprehensive assessment picture.

In this article, we will take a look at the future of public utilities in the wake of natural disasters, aging infrastructure, cyber security, experienced workforce scarcity, and federal push to enhance the public utilities.

Continue reading.

municipalbonds.com

by Jayden Sangha

Sep 07, 2022

S&P U.S. Transportation Infrastructure Transit Sector Update And Medians: Long-Term Funding Decisions Loom For Many Mass Transit Operators

Key Takeaways

- Many mass transit operators that depend on fare revenue face uncertainty as pandemic-related federal aid runs out over the next few years. We expect providers will have to make tough decisions about sustainable tax and revenue models.
- S&P Global Ratings does not expect a full recovery to pre-pandemic ridership in the foreseeable future. We thus believe the credit quality of many transit operators will depend on their ability to adjust operations and align financial performance to achieve structural balance after federal aid is depleted.
- Our mass transit sector median analysis shows only modest erosion of credit quality, which highlights the significance of $71.7 billion in federal aid. The Infrastructure Investment and Jobs Act will provide another $108 billion for the sector to fund capital projects and environmental, social, and governance (ESG) initiatives over the next five years.
- Our data suggest mass transit operators receiving significant tax support will continue to demonstrate relative credit stability, with those in the 'AAA' and 'AA' category that generally derive more than 60% of revenues from taxes maintaining debt service coverage (DSC) and debt-to-net revenue metrics near pre-pandemic levels.

Continue reading.

8 Sep, 2022

S&P: U.S. Public Power Rates Can Withstand Inflation, Rising Commodity Prices, And Higher Borrowing Costs--For Now

Key Takeaways

- Persistent high inflation and reduced affordability can create resistance to retail utility rate increases that are necessary to recover higher electricity production, capital, and borrowing costs, potentially eroding debt service coverage and liquidity.
- Where available, automatic or formulaic pass-through mechanisms can position utilities for stable financial performance in the face of service interruptions, price shocks, or other unforeseen events.
- Utilities that maintain strong liquidity, including rate stabilization funds (RSFs), can use these reserves to partially offset spikes in energy costs, unforeseen service interruptions, exogenous shock events, or severe weather events.
- For many utilities and their customers, hedging arrangements and robust liquidity are forestalling financial pressures associated with inflation.

- Continued federal support for low-income households and clean energy initiatives can help underscore electric utilities' revenue certainty and reduce their capital costs that together can mitigate the financial vulnerability electric utilities and their customers face from inflationary pressures and energy transition capital costs.

Continue reading.

7 Sep, 2022

Fitch 2022 LPC Medians: Inflationary Challenges Await U.S. Life Plan Communities

Fitch Ratings-Austin/New York-06 September 2022: U.S. life plan communities (LPCs) are bracing for inflationary and other macro pressures following a comeback year in fiscal 2021, according to Fitch Ratings in its latest medians report for the sector.

LPCs improved across-the-board in all median ratios. Liquidity, operating and capital-related metrics all reflected recovery within the LPC sector from the pressures of the coronavirus pandemic, which included higher expenses, lower revenues and pressured cash flows. Challenges lie ahead for the sector according to Senior Director and U.S. LPC group head Margaret Johnson.

"Pandemic-related pressures have evolved from healthcare and demand risk to risks involving expense inflation and staffing shortages," said Johnson. "LPCs with a significant skilled nursing component, which tend to have lower ratings, are disproportionately exposed to wage and staffing pressures versus those that are predominantly independent living units."

Fitch maintains a neutral outlook on the LPC sector. However, should these inflationary pressures persist beyond 2022, LPCs may encounter resistance to the substantial rate increases that may be required to offset the added cost pressure, which could pressure operating performance and future demand. Fitch is also keeping a close eye on potential financial market slowdowns, in particular slowing real estate price growth.

Fitch maintained public ratings on 158 LPC Providers as of Aug. 5, 2022. The median rating is 'BBB' and the number of ratings in the 'BBB' rating category remains the most numerous at 81 (or about 51%) versus 31 (20%) in the 'A' rating category. Within Fitch's median portfolio, Type A contract providers remain the plurality with 57 (about 36% of the portfolio), followed by Type C contract providers and Type B contract providers.

Fitch's U.S. LPCs' "2022 Median Ratios" is available at www.fitchratings.com.

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Additional information is available on www.fitchratings.com

[‘Perverse’ GOP Rules Risk Alienating Big Finance: ESG Regulation.]

As key GOP figures ban banks and investors in their states from taking environmental, social and governance risks into account, the global finance industry has mounted a surprisingly united counter-attack.

BlackRock Inc. has called the strategy “bad for the business climate,” Wall Street titans including Goldman Sachs Group Inc. have withdrawn from the Texas muni market rather than abandon ESG, and countless umbrella groups representing big finance have warned that efforts to put the ESG genie back in the bottle are futile.

Nathan Fabian, chief responsible investment officer at the United Nations-backed Principles for Responsible Investment, whose members include well over 5,000 financial firms across the world, called the Republican attack on ESG “perverse.”

Taking ESG risks into account is “part of the fiduciary role” of a financial firm, he said in an interview. “To say that they shouldn’t be thought about is a basic breach of a duty of care and diligence.”

US savers seem to agree. According to the Schroders 2021 US Retirement Survey, nine of every 10 defined-contribution plan participants who were aware of their plan’s ESG options invested in those funds.

Lawyers also are following the GOP’s anti-ESG campaign. Heather Wyckoff, partner at Schulte, Roth & Zabel who advises institutional investors and asset managers on fund formation, said ignoring ESG removes a tool designed to protect returns.

“I don’t see how they can do so without dialing up the risk,” she said in an interview. ESG “is inextricably tied to a profitability analysis.”

In Florida, Governor Ron DeSantis has ordered state pension funds to ignore ESG risks, while Texas last year passed a law that cut off Wall Street banks from its municipal debt market because of their refusal to renounce ESG. Several other Republican states are planning similar measures.

“It’s a very perverse set of outcomes potentially for those states that are actually banning, restricting, using anti-market approaches in some way, to try and protect industries that we all know have to transition,” said Fabian.

The US Department of Labor has proposed removing barriers to considering ESG in pensions management. Morningstar Inc. estimates that 97% of respondents support the DOL's proposal. The American Retirement Association says it expects a final decision by the end of the year.

Bloomberg Markets

By Tasneem Hanfi Brogger and Frances Schwartzkopff

September 6, 2022

Infowars Investing Invades "Anti-Competitive" Texas.

Something's rotten in the State of Texas. Once self-styled as a bastion of free markets and friendly regulation, a down-ballot politician now wields the power of the State purse to whack companies into submission for not toeing the party line.

Texas Comptroller Glenn Hegar recently announced an "initial" list of 10 financial services firms, along with 350 investment funds, whose environmental, social & governance (ESG) sins were so egregious that the firms are now listed next to known terrorist organizations on the State's Divestment Statute. Hegar's 10 Most Naughty included nine European and UK-based firms, but one US asset manager sat conspicuously atop – BlackRock. The charge? "Boycotting Energy Companies."

Now state government agencies must notify Hegar personally of the listed financial companies in which they may have direct or indirect holdings. The Comptroller may be surprised at the push back from State pension funds who take their fiduciary duty seriously and on average voted 90% of the time in favor of ESG resolutions – more often than BlackRock.

Continue reading.

Impact Alpha

by Ryon Harms

September 5, 2022

Wall Street Hits Back at GOP in ESG War.

Wall Street giants are defending a widespread initiative to invest in companies with environmentally friendly policies, moving away from investment in the fossil fuel industry following attacks on the practice from GOP leaders.

Asset management giant BlackRock wrote a letter to GOP states that are trying to curtail a social movement in the financial sector known as Environmental and Social Corporate Governance (ESG), which seeks to move the U.S. economy away from the fossil fuels that contribute to global temperature rise.

Nineteen attorneys general, from mostly Republican-led states, penned a letter to BlackRock in August inquiring about its investment practices.

Continue reading.

THE HILL

BY TOBIAS BURNS – 09/09/22

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.

Continue reading.

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

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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 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

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