Articles posted by

Jamie Stewart

California Backs $9 Billion School Bonds Blasted by Brown.

California is poised to take advantage of near-record low rates and its highest credit rating since 2001 by borrowing to fix crumbling schools. Democratic Governor Jerry Brown, who helped lead the turnaround to surpluses from deficits, doesn't want it to.

Voters in the most-indebted and populous state will decide in November whether to approve $9 billion in general obligations for school construction and modernization, the first statewide education-debt measure in a decade. They have approved about $40 billion of such bonds since 1998, and an April poll showed most respondents support the latest one, which would also aid community colleges and technical programs.

A coalition of education advocates and building industry representatives, with backing of politicians across the Golden State, pushed for the proposition and raised $8.9 million. While Brown has characterized it as a "developers'" bond that would deepen inequities in a state where high rates of poverty collide with Silicon Valley riches, no money has been donated to oppose it.

The measure is just one of 17 statewide questions Californians will consider on Election Day, and it comes after the state used budget surpluses brought on by the growing economy to pay down debt, helping win credit-rating upgrades. Other questions include extending a tax increase on the wealthy and requiring statewide approval for revenue bonds exceeding $2 billion.

"In the scheme of what the state needs to do, I don't consider this a pressing need and there are other ways to finance it," said Howard Cure, head of municipal research in New York at Evercore Wealth Management, which oversees $6.3 billion of investments. "It's another potential burden that if the economy gets weaker and income and capital gains revenues go down, it could put some additional pressure on the state."

Now, California is reaping gains as turmoil in financial markets and negative interest rates overseas help keep the extra interest on its bonds over benchmark securities close to record low levels.

Those focusing on the industry's support miss the point that the measure supports children's education, said David Walrath, a consultant for the Coalition for Adequate School Housing, which helped put the question on the ballot.

"This bond is about kids having safe, clean, quality classrooms," said Walrath. "Yes, somebody's going to build it. If you don't build it, the kids don't have it."

Under the program, school districts raise local dollars and apply for matching state aid for projects. Low-income communities can also request grants. The state's bond-funded pot has been depleted, and advocates estimate at least $2 billion in projects await financing.

The new measure would add about $500 million annually in debt service for about 35 years, the Legislative Analyst's Office said. The governor's office questions the need. Enrollment is expected to decline over the next decade and the threshold for voter approval of bonds issued by the districts has been lowered, unlike in 1998 when the current state program started.

"Larger school districts, relative to their smaller counterparts, have greater resources to work through what's an unquestionably convoluted and multi-layered system," said H.D. Palmer, a spokesman for Brown's finance department.

Brown has said the measure "squanders money" that low-income communities could use. In a state whose economic recovery has been propelled by the technology industry, about one in five live in poverty. At the same time, California accounts for more billionaires among the world's 400 richest people than any other U.S. state, according to the Bloomberg Billionaires Index. If it were a country, it would have more billionaires than anywhere else.

Scores of communities are experiencing influxes of students, said Walrath. Noting that enrollment is declining statewide without acknowledging the growth in those districts "assumes we can bus kids from L.A. to the Central Valley," he said.

And some districts' needs dwarf their ability to raise funds locally, he said. He pointed to Twin Rivers Unified School District, which can currently only sell $52 million in bonds but has $2.6 billion in projects through 2040, documents show.

Under the measure, $3 billion would go to new construction, $3 billion to modernizing facilities, $2 billion for community colleges and $500 million each to charter schools and career technical education programs.

In the campaign, supporters point to the need to retrofit classrooms for earthquake and lead safety, upgrade technology so students can compete globally, and help people hone skills to garner jobs. The top 10 contributors are the associations for the building industry, school housing, and Realtors, as well as D.R. Horton Inc., Lewis Pacific Partners and the Irvine Company, state election records show.

A group called California Taxpayers and Educators Opposed to Sprawl and Developer Abuse registered to oppose the proposition but has yet to raise any money.

"The governor has his priorities and we believe that the people of the state have theirs," said Dave Cogdill, chief executive officer of the California Building Industry Association. "They should have an opportunity to weigh in and determine how they want the money spent."

Bloomberg Markets

by Romy Varghese

September 16, 2016 — 2:00 AM PDT Updated on September 16, 2016 — 9:56 AM PDT

Puerto Rico Extends Millstein Pact as Federal Oversight Looms.

Puerto Rico, which triggered the biggest default in the municipal-bond market by skipping nearly $1 billion of debt payments in July, is set to pay Millstein & Co. as much as $8.4 million in the next year to provide outside restructuring advice.

The commonwealth extended its contract with Millco Advisors LP, an affiliate of Washington-based Millstein, through June 30, 2017, according to a review of the agreement provided by the island's Office of the Comptroller. The commonwealth's Fiscal Agency and Financial Advisory Authority is set to pay the firm as much as $8.4 million, according to the contract.

Jane Vris, general counsel at Millstein, didn't immediately return an e-mail seeking comment on the extension.

Millstein has been advising Puerto Rico since February 2014 on how the commonwealth and its agencies can reduce its $70 billion of debt and has been negotiating on the island's behalf with creditors. A seven-member federal control board will begin overseeing any restructuring of Puerto Rico's obligations and help end its reliance on deficit borrowing to fill budget gaps. President Barack Obama in June enacted a law, called Promesa, which means promise in Spanish, to create the control panel and establish a framework allowing the commonwealth to reduce its debt load.

Millstein has a separate $3 million contract with Puerto Rico that runs through December and would compensate the firm if a restructuring deal is finalized.

Puerto Rico has effectively been shut-out of the capital markets since Governor Alejandro Garcia Padilla in June 2015 said it couldn't repay all of its obligations. To conserve cash to keep the government running, it has since defaulted on a growing share of its debt, including nearly $1 billion of principal and interest due in July, the largest ever in the U.S. municipal market. Unlike many local governments, Puerto Rico isn't authorized to file for bankruptcy to reduce what it owes.

Millstein contracts totaled $17.6 million through July 31, 2016, according to the Office of the Comptroller.

Bloomberg Markets

by Michelle Kaske

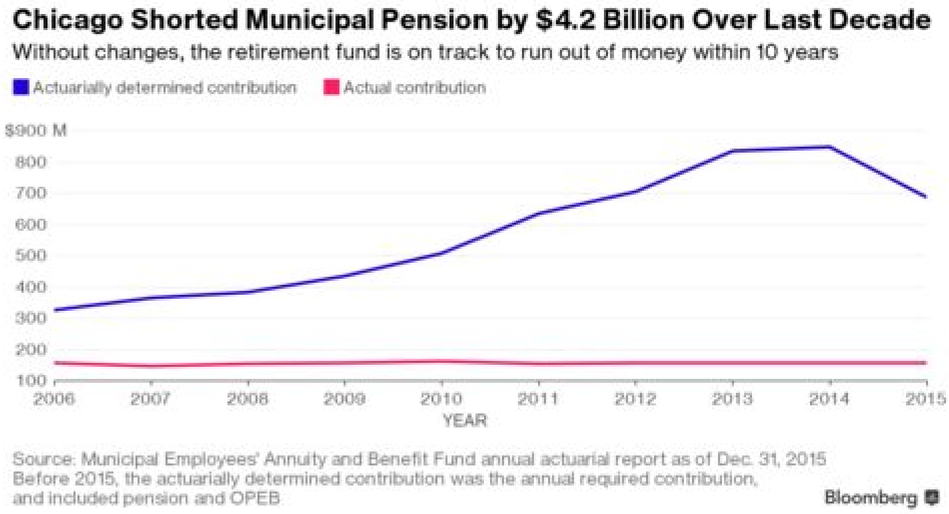
September 13, 2016 — 9:50 AM PDT

Chicago Raises Water and Sewer Taxes to Fund Pension Deficit.

Chicago moved to save its largest and most indebted pension from insolvency by raising the city's water and sewer taxes to shore up the municipal fund that serves more than 70,000 workers and retirees.

The city council on Wednesday voted to approve Mayor Rahm Emanuel's plan to hike the levies by about 33 percent over five years. The plan boosts the city's contributions so the pension reaches 90 percent funded in 40 years. Chicago will pay about $3 billion to the fund over the next six years. That's up from the $1 billion under the previous funding schedule. The higher utility taxes will help cover this through 2022, and after that, the city will need to find new revenue to meet the stepped-up payments.

“This year marks the year, 2016, where every one of those funds went from insolvency to solvency,” Emanuel told reporters at a news conference. “Every one of those funds now can meet its obligations to retirees.”



Without the tax increase, the municipal fund was set to run out of money within 10 years. As of Dec. 31, it only had 20 cents for every $1 owed to beneficiaries. For decades, the city failed to put aside enough money to cover the cost of rising benefits for retirees, leaving Chicago with $34 billion of retirement debt across its four pension systems. The higher levies follow a record property tax hike that Emanuel pushed through in October to fund the public-safety pensions and a telephone charge to bolster the laborers’ fund.

A portion of the city’s taxable debt, which matures in 2042, traded for an average of 90.7 cents on the dollar, compared to 87 cents on Aug. 3, the day Emanuel outlined his plan. The debt yields 6.1 percent, down from 6.5 percent.

The council also approved borrowing as much as $3.5 billion to refinance debt and pay for projects at O’Hare International Airport. The deals’ proceeds will help pay for construction projects like terminal upgrades and runway improvements. The bonds are expected to price in the fourth quarter.

Chicago sold about $2 billion in bonds for O’Hare in October 2015, the city’s biggest bond issue ever at the time.

Bloomberg Markets

by Elizabeth Campbell

September 14, 2016 — 9:43 AM PDT Updated on September 14, 2016 — 11:42 AM PDT

[Bloomberg Brief Weekly Video - 09/15]

Amanda Albright, a reporter for Bloomberg Briefs, talks with Joe Mysak about this week’s municipal market news.

[Watch the video.]

September 15, 2016

August Saw Companies, Municipalities Return to Capital Markets.

Following a weak July, companies and municipalities were ready to dip their toes back in the markets for stocks and bonds last month, judging by the number of requests for unique securities codes known as CUSIP numbers that are used to identify securities.

U.S. and Canadian companies, for example, asked for 12% more CUSIPs in August than in July, although through August the requests were down 8.6% from the same period last year, according to a report from CUSIP Global Services, which administers the system.

Municipal bond requests were up 7% for the month and are up 3.4% year to date through August. CUSIPs are issued to help facilitate ordering, trading and clearing, and are required by exchanges for the listing of most public and private securities.

“We did see a slower issuance after Brexit,” said Gerard Faulkner, director of operations for CUSIP Global Services, in an interview. Issuance is often softer in the beginning of the year and picks up as the months progress, but there is no hard and fast rule. “It’s hard to say if there’s always a pattern or trend,” he said.

Companies and municipalities are sensitive to interest-rate fluctuations, Mr. Faulkner said, particularly in the bond markets.

“If market rates are coming down, we do see an uptick in corporate bond issuance,” he said.

Bond issuers often act when market sentiment is strongly predicting a Federal Reserve move at its next meeting.

Among state bond issuers, Texas is leading the way with 1,414 new CUSIP requests this year, followed by New York and California with 1,093 and 836, respectively.

“Based on the August data, we expect to see a sustained pace of new security issuance through the next several months,” Mr. Faulkner said in a statement that accompanied the report.

The U.S. market for initial public offerings has been lackluster this year, but August indicates that activity may pick up. Domestic corporate equity CUSIP orders soared to 1,078 last month, the highest monthly tally since April 2015, CGS said.

CUSIP stands for Committee on Uniform Security Identification Procedures.

THE WALL STREET JOURNAL

By MAXWELL MURPHY

Sep 14, 2016 7:10 am ET

Jury Finds Miami Defrauded Bond Investors.

A federal jury found Wednesday that the city of Miami and its former budget director had defrauded bond investors by failing to truthfully disclose the city's deteriorating financial condition.

The verdict came in the first federal jury trial by the U.S. Securities and Exchange Commission against a municipality. The SEC last month settled other civil cases with 71 municipal issuers as part of an agency initiative to improve disclosure.

"We will continue to hold municipalities and their officers accountable, including through trials, if they engage in financial fraud or other conduct that violates the federal securities laws," Andrew Ceresney, director of the agency's enforcement division, said Wednesday.

Miami City Manager Daniel J. Alfonso said the city "has put into place procedures, policies and practices to improve transparency and accountability."

City Attorney Victoria Mendez said the city is reviewing its legal options. "While we respect the jury and the judicial process, we are disappointed in the jury's verdict," she said.

The jury found that Miami had committed securities fraud while reporting on the city's finances in 2007, 2008 and 2009. According to the SEC's complaint, Miami transferred dollars earmarked for specific capital projects between funds, enabling the city to meet its own reserve-fund requirements.

Miami bond offerings were subsequently rated favorably by rating firms, which later downgraded Miami after an auditor's report forced the city to reverse most of the transfers, the SEC complaint said.

Former City Budget Director Michael Boudreaux was found not liable on one count—using a fraudulent scheme—but was found liable for negligence and misrepresentations during his time as budget director, his lawyer said. The lawyer, Benedict Kuehne, said his client plans to challenge those portions of the verdict.

Mr. Kuehne described his client as a "responsible government officer who tried to do the right thing at all times."

Mr. Boudreaux said in an interview with The Wall Street Journal in 2011 that "there was no deception on my part." He said that others implemented the ideas to transfer funds and that he was fired in 2010 after speaking to federal investigators.

This is the second time Miami has run into trouble over disclosure issues. The SEC said Wednesday that it now expects the court to find Miami violated a 2003 SEC order prohibiting the city from engaging in fraud, which followed an administrative trial.

The verdict could be costly for Miami. An SEC attorney said in court the agency would make a request for injunctive relief and monetary penalties the next two weeks.

THE WALL STREET JOURNAL

By HEATHER GILLERS

Updated Sept. 14, 2016 11:40 p.m. ET

Write to Heather Gillers at heather.gillers@wsj.com

SEC, City of Miami Lay Out Final Arguments in Bond Case.

MIAMI — The U.S. Securities and Exchange Commission and the city of Miami squared off in Florida federal court on Tuesday, with the regulator accusing city officials of playing a financial shell game to cut costs on a $150 million municipal bond sale in 2009.

In a 2013 complaint, the SEC alleged that the city and Miami's former budget director, Michael Boudreaux, violated the anti-fraud provisions of federal securities law.

Both the city and Boudreaux denied any wrongdoing in their closing arguments. The SEC is seeking an injunction against both parties as well as unspecified financial penalties.

The lawsuit alleges both the city and Boudreaux failed to tell credit rating agencies and investors they had churned money through various city accounts in an attempt to keep its general fund above a minimum, city-mandated, $100 million mark.

"They were playing a shell game of such epic proportions that years later, to unwind this, the city had to take money from people who serve, firemen, policemen, in order to replenish those capital projects," Amie Riggle Berlin, senior trial counsel for the SEC said in her closing argument.

"They failed to disclose anywhere in their financial statements that the projects from which they had taken money were operating at a deficit," Berlin said.

According to the SEC's complaint, in 2007 Boudreaux wrongly told city officials that certain money he planned to transfer into the city's general fund were unused.

"The city was told the transfer was from unused funds that could be transferred back to the general fund," said Scott Cole, a lawyer representing the city of Miami.

"The money was in plain sight not in some offshore bank account. He attached his work papers to his recommendation, that's not fraud," Cole told said.

Boudreax was fired in 2010.

His lawyer, Benedict Kuehne, said he was made a scapegoat.

"He's not a CPA. He relied on city personnel. He relied on CPAs. He used the information they had, that he obtained and did his level-headed analysis," Kuehne said, adding: "He put nothing in his pocket other than the city salary he earned."

Among the transfers redirected from capital projects into the city's general fund as its overall finances were deteriorating were $13.1 million in fiscal 2007 followed by a similar, $24.4 million-transfer the following fiscal year, according to court documents.

The SEC also implicated the city itself after elected leaders voted to approve Boudreaux's transfers and administrators signed off on audited financial reports that were later presented to ratings agencies.

This is not the first time the SEC has sought legal recourse against Miami. The city is still under a

2003 cease-and-desist order tied to a series of 1995 bond issues that also violated anti-fraud provisions of the federal securities laws.

Municipalities across the nation are watching closely as this trial is among the first where a public employee is being personally charged for actions taken in their professional positions.

By REUTERS

SEPT. 13, 2016, 5:57 P.M. E.D.T.

(Reporting By Zachary Fagenson in Miami; Editing by Daniel Bases, Bernard Orr)

Chicago City Council Passes Tax for Pensions, Airport Bonds.

CHICAGO — The last piece of Chicago's pension funding puzzle fell into place on Wednesday with final approval of a tax on water and sewer usage to save the largest of the city's four retirement systems from going broke.

The tax, passed in a 40-10 city council vote, is projected to raise an estimated $240 million a year once it is fully phased in over five years, helping Chicago gradually increase contributions to its municipal retirement system, which is projected to run out of cash within 10 years.

"Your acts today changed the course of the city's finances from insolvency to solvency," Mayor Rahm Emanuel said, praising aldermen for their "collective courage."

Credit ratings for the nation's third-largest city have tumbled into the low investment grade to junk levels due largely to an unfunded pension liability that stood at $33.8 billion at the end of fiscal 2015 for the four retirement systems.

Chicago has already authorized a phased-in $543 million property tax for its police and fire retirement systems and a telephone surcharge increase for its laborers' pension fund.

For the municipal fund, an actuarially required funding level would be reached in 2023, when the payment would spike to nearly $879 million from $577 million in 2022, according to city documents. The aim of the plan is to bring the retirement system's funded level to 90 percent in 2057.

Some aldermen have raised concerns that even with the new tax revenue, the city will be short $300 million in 2023.

The city's next step involves the Illinois Legislature, which will be asked in November to approve the new funding schedule for the municipal system, as well as one for the laborers' fund.

The Democratic-controlled legislature in May overrode Governor Bruce Rauner's veto of a new funding schedule for Chicago's police and fire retirement systems.

In a 26-21 vote on Wednesday, the city council authorized the sale of up to $3.5 billion of bonds for O'Hare International Airport.

The city will refund up to $1.5 billion of general airport revenue bonds (GARBs) through Bank of America Merrill Lynch to save an estimated $187.2 million, according to a city briefing document. Another batch of GARBs worth as much as $1.5 billion will be sold through Morgan Stanley to fund a runway and air field improvements.

Loop Capital Markets will price up to $500 million of new and refunded passenger facility charge (PFC) bonds.

By REUTERS

SEPT. 14, 2016, 2:48 P.M. E.D.T.

(Reporting by Karen Pierog; Editing by Matthew Lewis)

SEC's Miami Win Likely to Embolden Muni Crackdown: Lawyers

NEW YORK — The U.S. Securities and Exchange Commission’s courtroom victory in a fraud case against the City of Miami will likely further embolden the agency in its years-long effort to more tightly regulate the $3.7 trillion municipal bond market, securities lawyers said.

A jury took only a few hours on Wednesday to find Miami and its former budget director Michael Boudreaux liable for securities fraud in the sale of over $150 million in municipal debt in 2009. The SEC had accused the city of “playing a shell game” by shuffling money among accounts to conceal its deteriorating financial condition from investors.

The SEC told the court on Wednesday it would present a request for injunctive relief and monetary penalties within two weeks. The city and Boudreaux, who argued the fund transfers had been approved by auditors and publicly disclosed, said they planned to appeal.

The verdict is a “big boost” for the SEC, making the agency likely to sue more municipalities, Bradley Bondi, a former SEC lawyer now with Cahill Gordon & Reindel, said in an interview. The SEC has been criticized for favoring administrative proceedings over trials to resolve cases, he noted.

The SEC had subjected the municipal bond market to light enforcement, for reasons that include a reluctance to impose penalties that might be passed on to taxpayers. But its stance changed following a wave of defaults during the financial crisis.

In 2010, the agency set up a special enforcement unit for municipal securities and public pensions. Since 2012, it has brought cases against 19 municipal issuers over faulty disclosures, most of which have settled or ended in default judgments. An additional 71 issuers settled charges last month through a special self-reporting program.

Other cases have targeted municipal officials with fines. Since the start of 2013, eight officials have been hit with SEC civil penalties, compared to just five in the 15 preceding years, Robert Doty, a litigation consultant who tracks securities cases, said.

“It is truly a sea change and we have seen the SEC ramp up its municipal enforcement very aggressively,” Stephen Crimmins, a lawyer with Murphy & McGonigle who had previously led the SEC’s trial unit, said in an interview.

The Miami case also shows the SEC is losing some of its aversion to seeking financial penalties, said Kit Addleman, a former SEC lawyer now with Haynes and Boone in Dallas.

Now the SEC feels very strongly that "in some cases conduct is egregious enough that a penalty is the only way to drive the message home that the entity needs to clean up its act," she said in an interview on Tuesday.

The SEC had won a 2003 cease-and-desist order against the city in a previous case over similar conduct. Miami's repeat offense was a "rare situation" among muni cases, Bondi said.

In April, the SEC, which is only empowered to bring civil charges, announced a cooperative case with the U.S. Justice Department involving the criminal indictment of a town supervisor of Ramapo, New York, and one other individual over fraudulent disclosures in the sale of $150 million municipal bonds.

The SEC also has civil lawsuits pending against Rhode Island's economic development agency and the municipality of Victorville, California.

"We will continue to hold municipalities and their officers accountable, including through trials, if they engage in financial fraud or other conduct that violates the federal securities laws," Andrew Ceresney, director of the SEC's division of enforcement, said in a statement following the Miami verdict.

Crimmins said municipal issuers would be challenged by the SEC's more aggressive stance. Despite raising large sums of money, they largely fall short compared to corporations in terms of gathering financial data and evaluating and reporting it.

"Obviously this is a wake up call for people in the municipal securities area," he said.

By REUTERS

SEPT. 15, 2016, 3:57 P.M. E.D.T.

(Reporting by Dena Aubin and Sarah N. Lynch; Editing by Anthony Lin and Richard Chang)

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- BDA Submits Comment Letter to the SEC on FINRA's Retail Confirmation Rule.
- S&P: What's Next For U.S. Municipal Green Bonds?
- Enrollment for Series 50 Exam Begins September 12, 2016.
- *Nichols v. City of Rehoboth Beach* – Court of Appeals holds that city's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer who sought to challenge certain voting procedures used in the special election authorizing the bonds.
- And finally, Unclear on the Concept is brought to you this week by *Carolina Convenience Stores, Inc. v. City of Spartanburg*, in which the city attempted to resolve a hostage standoff in a convenience store by breaching the building with a bulldozer. An honest-to-god bulldozer. Upon noticing that, mysteriously, the building suddenly looked a tad dinged up, the owners "were asked to tear it down as it did not comply with ordinances regarding vacant commercial buildings in its damaged state." [Cut to the dumbfounded Patels.] And then we get to the part where we try – and

fail – to cram the words “negotiate” and “bulldozer” into the same sentence. Job well done, Spartanburg. Job well done.

PENSIONS - ALABAMA

Boman v. City of Gadsden

Supreme Court of Alabama - September 2, 2016 - So.3d - 2016 WL 4585731

Retired city police officer brought action against city, State Employees’ Insurance Board, and local-government health-insurance plan, seeking in part an injunction requiring city to provide continuing medical care and a judgment for unpaid medical bills due and owing.

The Circuit Court entered injunction and dismissed claims against Board and plan. City appealed. The Supreme Court reversed and remanded with directions. On remand, the Circuit Court issued two orders granting injunctive relief to retired officer. City and members of Board appealed. The Supreme Court reversed and remanded. On remand, the Circuit Court entered summary judgment in favor of city, and retired police officer appealed.

The Supreme Court of Alabama held that:

- Employee handbooks distributed by city to its police officers did not create a contract under which city was obligated to provide retired police officer with lifetime health benefits;
- Doctrine of promissory estoppel did not operate to require city to provide retired police officer with lifetime health benefits; and
- No evidence existed of outrageous conduct on city’s part in refusing to provide retired police officer with lifetime health benefits, as required to support his tort-of-outrage claim.

Employee handbooks distributed by city to its police officers did not create a contract under which city was obligated to provide retired police officer with lifetime health benefits. While some versions of the handbook summarized health benefits provided by city, they applied to active uniformed employees of the city, not retirees, and retirement benefits mentioned in the handbooks regarded pension benefits, and not health-care benefits.

Doctrine of promissory estoppel did not operate to require city to provide retired police officer with lifetime health benefits, when city did not promise to provide him with such benefits.

No evidence existed of outrageous conduct on city’s part in refusing to provide retired police officer with lifetime health benefits, as required to support his tort-of-outrage claim.

ELECTION LAW - ARIZONA

Public Integrity Alliance, Inc. v. City of Tucson

United States Court of Appeals, Ninth Circuit - September 2, 2016 - F.3d - 2016 WL 4578366

Voters and advocacy organization brought action challenging the constitutionality of city’s hybrid system for electing members of its city council through staggered ward-level primary elections and at-large general elections.

The United States District Court entered judgment in city’s favor, and plaintiffs appealed. The Court of Appeals reversed, and rehearing en banc was granted.

The Court of Appeals, en banc, held that:

- Balancing and means-end fit analysis, rather than traditional rational basis review, was the appropriate standard of review, overruling *Libertarian Party of Washington v. Munro*, 31 F.3d 759, and
- City's hybrid election system did not violate the Equal Protection Clause.

The balancing and means-end fit analysis set forth by *Burdick v. Takushi*, 112 S.Ct. 2059, rather than traditional rational basis review, was the appropriate standard for reviewing whether city's hybrid system for electing its city council members violated the Equal Protection Clause; overruling *Libertarian Party of Washington v. Munro*, 31 F.3d 759.

City's hybrid system for electing its city council members, whereby candidates were nominated in staggered partisan primaries held in each of city's six wards but all residents voted in general election for one council member from each ward that held primary during same election cycle, did not violate Equal Protection Clause. Burden on voters was minimal, as every voter had the equal right to vote in both the primary and general elections, even if every voter could not vote in a primary in every election year, and there was no unequal weighting of votes, discrimination, or impediment to voting, and any such burden was justified by city's interest in ensuring local representation by and geographic diversity among its elected officials.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Superior Court

Court of Appeal, First District, Division 2, California - August 31, 2016 - Cal.Rptr.3d - 2016 WL 4540053

Requestor filed petition for writ of mandamus and complaint for injunctive and declaratory relief against California Public Utilities Commission (CPUC) for failing to produce documents under Public Records Act (PRA) related to CPUC's investigation of nuclear plant shutdown and subsequent settlement and meeting relating to costs and losses due to shutdown.

CPUC demurred on grounds that the Superior Court lacked subject matter jurisdiction and that requestor had failed to exhaust his administrative remedies.

Following hearing, the Superior Court overruled demurrer. CPUC filed petition for extraordinary writ directing the Superior Court to vacate its order and sustain demurrer.

The Court of Appeal held that as a matter of apparent first impression, trial court had no jurisdiction over requestor's petition, other than to sustain CPUC's demurrer.

Trial court had no jurisdiction over requestor's petition for writ of mandamus seeking to compel California Public Utilities Commission (CPUC) to produce documents under Public Records Act (PRA), other than to sustain CPUC's demurrer without leave to amend on ground that court lacked subject matter jurisdiction over matter. Duty to comply with PRA was an official duty of CPUC within meaning of statute providing that no court, except Supreme Court and Court of Appeal, had jurisdiction to interfere with CPUC in the performance of its official duties, fact that provision of PRA referred to proceedings in trial court did not enlarge jurisdiction of trial court when case was against CPUC, and statute providing for original appellate jurisdiction over applicable claims against

CPUC did not limit any right of access, and thus statute was not subject to narrow construction.

BOND ELECTIONS - DELAWARE

Nichols v. City of Rehoboth Beach

United States Court of Appeals, Third Circuit - September 7, 2016 - F.3d - 2016 WL 4651383

Taxpayer brought action against city challenging special election for approval of bond issue and the resultant issuance of bonds.

The United States District Court for the District of Delaware dismissed. Taxpayer appealed.

The Court of Appeals held that:

- Taxpayer's challenge to bond was insufficient to confer municipal taxpayer standing on her;
- City's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer; and
- City's purchase of advertisement in local newspaper to inform voters of special election was not sufficient to establish municipal taxpayer standing on taxpayer.

Municipal taxpayer's challenge to debt incurred by city from $52.5 million bond issue approved by special election that allegedly violated the Fourteenth Amendment with regard to requirements to vote in election was insufficient to confer municipal taxpayer standing on taxpayer in her action against city, where city did not expend funds from bond on the allegedly illegal elements of the special election.

City's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer who sought to challenge certain voting procedures used in special election under Fourteenth Amendment in her action against city, where taxpayer did not assert that city expended funds on the allegedly unconstitutional aspects of the special election, special election itself would have been held regardless of procedures city employed in holding election, causing city to expend the funds regardless of voting requirements used, and funds expended on special election were de minimis.

City's purchase of advertisement in local newspaper to inform voters of special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer who sought to challenge certain voting procedures use in special election under Fourteenth Amendment in her action against city, where purported illegality of election procedures had nothing to do with expenditure of funds for advertisement, and cost of advertisement was de minimis.

PUBLIC RECORDS - MARYLAND

Action Committee for Transit, Inc. v. Town of Chevy Chase

Court of Special Appeals of Maryland - September 1, 2016 - A.3d - 2016 WL 4570428

Public transportation advocacy organization and activist affiliated with organization brought action against town, alleging that the town violated the Maryland Public Information Act (MPIA) when it denied their requests for waivers of fees proposed by town for responding to information requests.

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

The Court of Special Appeals held that:

- Arbitrary and capricious standard of review applied to fee waiver decisions under MPIA;
- Town's decision to deny organization's fee waiver request was arbitrary and capricious; and
- Town's decision to deny activist's fee waiver request was arbitrary and capricious.

The arbitrary and capricious, rather than de novo, standard of review applied to judicial review of town's decision to deny requests for fee waivers made in connection with requests for information under the Maryland Public Information Act (MPIA). De novo review standard for fee waiver disputes under the federal Freedom of Information Act (FOIA) was statutory, and applying the federal statute's prescription that "the court's review of the matter shall be limited to the record before the agency" would burden government units with the obligation of generating a record against the possibility that a dispute will end up in court.

Town's decision to deny fee waiver request made by public transportation advocacy organization in connection with its request for information under the Maryland Public Information Act (MPIA) was arbitrary and capricious. In its response to organization, town failed to explain the reasons for its decision to deny the waiver request, but it was clear that a significant factor, if not the primary factor, in the town's decision was the fact that the organization had previously criticized town officials for their opposition to light rail project, and town was not permitted to base its fee waiver decision on considerations that violated the organization's free speech rights.

Town's decision to deny fee waiver request made by activist, who was associated with public transportation advocacy organization, in connection with his request for information under the Maryland Public Information Act (MPIA) was arbitrary and capricious. Although town, which did not identify any reason for denying activist's request other than his affiliation with the organization, may have reasonably believed that activist, who submitted and withdrew an MPIA request on behalf of organization within hours of submitting his own request, was acting as a proxy for the organization, the town's denial of the organization's fee waiver request was not based on legitimate concerns.

EMIENENT DOMAIN - MINNESOTA

American Family Insurance v. City of Minneapolis

United States Court of Appeals, Eighth Circuit - September 6, 2016 - F.3d - 2016 WL 4608142

Property insurers for condominium association and basement unit owners brought state-court subrogation action against city to recover for violation of Equal Protection Clause and unlawful takings arising out of water-main break.

Case was removed. The United States District Court for the District of Minnesota entered summary judgment in favor of city. Insurers appealed.

The Court of Appeals held that:

- City's payments to uninsured owners, but not insurers, did not violate Equal Protection Clause, and
- Insurers were required to bring inverse condemnation claim through mandamus action in Minnesota state court before pursuing federal takings claim.

City's decision to pay claims of uninsured property owners flooded by water main break, but not property insurers as subrogees, was rationally related to legitimate government interests in protecting welfare of citizens by minimizing time they were without housing and suffering uncompensated damages and in minimizing city's own costs and litigation risks from sympathetic jurors and, therefore, did not violate Equal Protection Clause.

Property insurers that had paid claims for damage from city water main break were required to bring their inverse condemnation claim through mandamus action in Minnesota state court before pursuing federal takings claim, and, thus, it was not ripe for review by federal court. State court hearing had ability not only to determine whether a taking occurred under the state constitution, but also to determine the monetary value of harm, and that remedy would not be futile.

PUBLIC CONTRACTS - NEW YORK

Michael R. Gianatasio, PE, P.C. v. City of New York

Supreme Court, New York County, New York - August 26, 2016 - N.Y.S.3d - 2016 WL 4522061 - 2016 N.Y. Slip Op. 26270

Construction company brought action against city, city administration for children's services (ACS), and service provider, asserting claims for breach of contract, quantum meruit, unjust enrichment, and fraudulent inducement, based on allegations that city and ACS failed to pay company full amount owed under two construction contracts.

The Supreme Court, Westchester County, granted city and ACS's motion to change venue to New York County. City, ACS, and provider moved to dismiss, and provider separately moved for sanctions against company.

The Supreme Court, New York County, held that:

- City was not estopped from challenging validity of contracts;
- City could not ratify contracts;
- City and ACS did not fraudulently induce company to enter into contracts;
- Service provider could not be held liable for city's and ACS's breach of contracts;
- Construction company could not maintain unjust enrichment claim against provider; and
- Sanctions against company were not warranted.

City's unlawful failure to abide by requirements of competitive bidding statute and procurement regulations in awarding contracts to construction company, and city's failure to pay company for work done and money outlaid, did not estop city from challenging validity of contracts as illegal; company assumed risk when it entered into contracts with city.

An illegal contract cannot be ratified by a municipality, even if the municipality already made partial payment and accepted some of the contract's benefits.

City and city administration for children's services (ACS) did not fraudulently induce construction company to enter into contracts that were illegal in that they were awarded in violation of the competitive budding statute and procurement regulations; at time contracts were executed, ACS intended to pay company, company was paid much of the money due under the contracts, the non-payment arose from subsequent discovery of the contracts' illegality, and company could have, and should have been aware of law requiring contracts to be bit-out and it could thus not justifiably rely on ACS's invitation to work on no-bid contracts.

FIRST AMENDMENT RETALIATION - PENNSYLVANIA

[Feibush v. Johnson]

United States District Court, E.D. Pennsylvania - August 25, 2016 - F.Supp.3d - 2016 WL 4478775

Real estate developer brought action against city councilman, alleging First Amendment retaliation based on councilman's efforts to stop sale of two city lots to developer in retaliation for developer's criticisms of councilman and challenge of councilman for office.

After jury returned verdict in favor of developer, councilman moved for judgment as a matter of law.

The District Court held that:

- Evidence demonstrated that councilman's actions were sufficient to deter a person of ordinary fitness from exercising his First Amendment rights, as required for retaliation claim;
- Evidence demonstrated that municipal custom or policy was moving force behind developer's injuries, as required for *Monell* claim; and
- Developer was not required to present evidence of city's deliberate indifference in making his *Monell* claim.

Given the evidence at trial, it was reasonable for jury to conclude that real estate developer's potential financial loss, allegedly caused by city councilman's refusal to introduce resolution into city council approving sale of two city-owned lots to developer, was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights, as required for retaliation claim by developer, who alleged that councilman's conduct was in response to developer's challenge for councilman's position in city council and general criticism of councilman. Real estate developer allegedly lost out on $260,000 profit he would have realized had he been able to buy the lots and develop them as he had planned.

Given the evidence presented at trial, it was reasonable for jury to conclude that real estate developer's First Amendment rights were violated and that a municipal custom or policy was the moving force behind his injuries, as required for *Monell* claim based on city councilman's block of sale of two city lots to developer, following developer's political challenge and criticism of councilman, which caused developer to sustain financial loss. Councilman would not have been able to block the sale of two city lots to developer absent city's custom of councilmanic prerogative, confident that he would not be subverted by his city council colleagues because custom required deference by them to his decision not to introduce resolution approving the sale.

Real estate developer's *Monell* claim, based on city councilman's prevention of sale of two city lots to developer by refusing to introduce resolution approving the sale, was premised on custom of city council which gave council members power to stop any land use requiring legislative approval, rather than conduct of city employees and city's deliberate indifference thereto, and thus developer was not required to present evidence regarding deliberate indifference.

EMINENT DOMAIN - SOUTH CAROLINA

[Carolina Convenience Stores, Inc. v. City of Spartanburg]

Supreme Court of South Carolina - August 31, 2016 - S.E.2d - 2016 WL 4537656

Convenience store owner brought inverse condemnation and negligence against city following city police department's bulldozing of a section of the store to gain access to a suspect who had fled into the store and taken an employee hostage.

The Circuit Court granted summary judgment in favor of city on inverse condemnation claim and entered judgment on jury verdict in favor of city on negligence claim. Store owner appealed. The Court of Appeals affirmed. Store owner petitioned for writ of certiorari, which was granted.

On an issue of apparent first impression, the Supreme Court of South Carolina held that city's actions in bulldozing section of convenience store to gain access to suspect who had fled into store and taken employee hostage was not compensable taking.

City's actions in bulldozing section of convenience store to gain access to suspect who had fled into store and taken an employee hostage did not constitute a compensable taking through inverse condemnation pursuant to the state constitution. Framers of the state constitution did not intend that law enforcement operate under the fear that their actions could lead to takings-based liability.

EMINENT DOMAIN - TEXAS

State v. YS & LS & LS Partnership, Ltd.

Court of Appeals of Texas, Corpus Christi-Edinburg - July 28, 2016 - Not Reported in S.W.3d - 2016 WL 4040320

In October 2013, the State filed a petition for condemnation seeking to condemn a strip of land consisting of 0.034 of an acre fronting a state highway.

Landowner counterclaimed for inverse condemnation, alleging that the State noticed its intent to take the property in November 2007, requiring Landowner to disclose the impending condemnation to prospective tenants and therefore preventing Landowner from leasing the property. Landowner alleged that the State's acts constituted a taking of its property.

The State filed a plea to the jurisdiction in which it argued that it was entitled to sovereign immunity because Landowner had not alleged a valid inverse condemnation claim. The trial court denied the State's plea to the jurisdiction. The State appealed.

The Court of Appeals reversed, holding that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property."

The court found that, in order to allege a valid inverse condemnation claim, there must be a "current, direct restriction" on the use of the land, referring to a physical act or legal restriction on the property's use, "such as a blocking of access or denial of a permit for development." Here, Landowner alleged that the State's announcement of its intent to take the property prevented Landowner from leasing the property to prospective tenants, thereby causing it damages. Landowner had not alleged a "current direct restriction" on the use of its land such as an "actual physical or legal restriction on the property's use, such as a blocking of access or denial of a permit for development." Accordingly, Landowner had failed to state a valid inverse condemnation claim, and the State's sovereign immunity was not waived.

MUNICIPAL ORDINANCE - VERMONT

In re LaBerge NOV

Supreme Court of Vermont - September 2, 2016 - A.3d - 2016 WL 4582182 - 2016 VT 99

Neighbor sought review of decision by Development Review Board that overturned notice of violation issued by town zoning administrator.

The Superior Court, Environmental Division, concluded that landowners violated town noise ordinance. Landowners appealed.

The Supreme Court of Vermont held that:

- Noise ordinance was not unconstitutionally vague on its face;
- Noise ordinance was not unconstitutionally vague as applied;
- Admission of standards on noise levels was warranted; and
- Decibel measurements taken by sound expert were admissible.

Town ordinance prohibiting unreasonable noises was not, on its face, unconstitutionally vague under due process clause. In addition to incorporating an objective "reasonableness" standard, ordinance identified key factors in assessing reasonableness: intensity, duration, and frequency—guidance that further focused the reasonableness inquiry, guarded against arbitrary enforcement, and puts individuals on notice of the law's requirements.

Town ordinance prohibiting unreasonable noises gave landowners fair notice that noise levels produced from motocross racing on their property were proscribed, and therefore, as applied to landowners, ordinance was not unconstitutionally vague under the due process clause. Noise level at property line, 80 decibels, was very high, and neighbor testified that noise was extremely loud, irritating, assaultive, and disruptive.

Admission of world health organization standards on noise levels, used by neighbor's expert in forming opinion relating to noise levels produced on landowners' motocross track, was warranted in proceedings to determine if landowners violated town noise ordinance. Expert's testimony was based in part on the standards, and expert testified that the standards were typically used as a reference level.

Decibel measurements taken by sound expert were admissible to show level of noise on date of alleged ordinance violation by landowner through operation of motocross track, despite fact that measurements were not taken on the date at issue; neighbor had taken own measurements on date at issue, accompanied expert during his measurements, and testified that the sound level was identical to the level on the date at issue.

Registration launches for 2016 California Economic Summit in Sacramento.

Registration opens today for the 2016 California Economic Summit taking place in Sacramento on December 13-14.

The fifth annual Summit will bring together one of the state's largest networks of public- and private-sector leaders committed to the triple bottom line. At the event, members of the expanding

Summit coalition will advance the One Million Challenges, the Summit's ambitious goals for expanding upward mobility—and ensuring widely shared prosperity—for all Californians. Released in January, the Summit's 2016 Roadmap to Shared Prosperity offers detailed action plans to:

- Improve the workforce pipeline so more Californians can develop the skills they need to earn livable wages.
- Increase the supply of housing near transit and jobs so more Californians can find affordable homes in sustainable communities.
- Expand regional water management to ensure more Californians live in healthy watersheds with reliable water supplies.

As living costs rise and more than one in four Californians continue to struggle to find pathways out of poverty, the December event will galvanize action to put even more families on the road to shared prosperity. It will also give participants a unique opportunity to discuss how business executives, civic innovators and policy leaders can work together to promote a prosperous economy, a green and resilient environment, and thriving communities.

Register today!

What: 2016 California Economic Summit
When: December 13-14
Where: Sacramento Convention Center

Confirmed Speakers:

- Leon Panetta, Former Secretary of Defense
- Janet Napolitano, University of California President
- Timothy White, California State University Chancellor
- Eloy Oakley-Ortiz, California Community Colleges Incoming Chancellor

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CDFA Intro Rural Finance WebCourse.

October 12-13, 2016 | Daily: 12-5pm (EDT)

The **Intro Rural Finance Training WebCourse** focuses on how the development finance toolbox can be structured to support rural communities and help them with strategies to invest in infrastructure, redevelopment, and job creation. This course differs from other curriculums in that it focuses on designing programs targeted to serve rural communities.

Leaders in rural and agricultural development finance will discuss how to develop and establish long-term financing within rural communities. In addition, the course will highlight successful programs that are working throughout the country in communities with varying levels of capacity and size. Topics discussed during the course include targeted financing programs available at the federal, state, and local levels for rural communities, along with best practices for employing these financing programs.

To learn more, and to register, click here.

Expanding Municipal Securities Enforcement: Profound Changes for Issuers and Officials.

Robert Doty's new book – *Expanding Municipal Securities Enforcement: Profound Changes for Issuers and Officials* – discusses significant expansion since early 2013 in the enforcement activities of the Securities and Exchange Commission relating to municipal bond issuers and officials. Not only has the scope of securities law enforcement actions increased greatly in terms of number and subject matter, but penalties imposed are substantially more exacting for both municipal issuers and officials.

To learn more, and to order, click here.

To read an excerpt, click here.

GFOA, NABL Issue Guidance on Post-Issuance Tax-Compliance.

The Government Finance Officers Association ("GFOA") and the National Association of Bond Lawyers ("NABL") have issued guidance to issuers and their counsel on developing policies to maximize continuing compliance with the tax-exempt bond rules after the issuance of tax-advantaged bonds. The two organizations cooperated on the issuance of separate but complementary guidance to their respective members.

Post-issuance tax compliance procedures describe the courses of action to be taken by an organization to maximize the likelihood that tax rules applicable to tax-advantaged bonds – tax-exempt bonds, tax credit bonds and direct pay bonds – are followed after the bonds are issued and while the bonds remain outstanding. Post-issuance tax compliance procedures have two fundamental purposes: to enhance the likelihood of compliance with rules and to facilitate and streamline the organization's administrative functions.

Broadly speaking, the tax rules applicable to tax-advantaged bonds address four principal categories: (1) expenditure of proceeds; (2) use of financed assets; (3) investment of proceeds; and (4) recordkeeping.

GFOA's alert, *Developing and Implementing Procedures for Post-Issuance Tax Compliance for Issuers of Governmental Bonds*, is available here. NABL's *Considerations for Developing Post-Issuance Tax Compliance Procedures* is available here.

For more information, contact Emily Brock of GFOA at ebrock@gfoa.org or Bill Daly of NABL at bdaly@nabl.org.

Enrollment for Series 50 Exam Begins September 12, 2016.

Beginning September 12, 2016, municipal advisor firms can enroll their municipal advisor representatives to take the MSRB's Municipal Advisor Representative Qualification Examination (Series 50). As provided for under MSRB Rule G-3, municipal advisor representatives are required to take and pass the Series 50 in order to engage in municipal advisory activities.

The MSRB is providing a one-year grace period, ending on September 12, 2017, to allow municipal advisor representatives to continue to engage in municipal advisory activities while preparing to take and pass the Series 50 exam.

A list of associated persons at registered municipal advisor firms who have passed the Series 50 exam is available on the MSRB's website. The list includes individuals who participated in the Series 50 pilot exam, which was administered January – February 2016.

Series 50 Resources

- How to sign up for the Series 50 exam
- Content outline for the Series 50 exam
- Sample test questions for the Series 50 exam
- FAQs about the Series 50 exam
- Additional information on the MSRB's website

First Municipal Advisor Political Contribution Disclosures Due in October.

Effective August 17, 2016, new provisions of MSRB Rule G-37 address municipal advisors' political contributions and municipal advisory business. Municipal advisors are now required to disclose to the MSRB, on a quarterly basis, information about their political contributions to municipal entity officials, state or local political parties, and bond ballot campaigns, as well as information about municipal entities with which they have engaged in municipal advisory business.

This information is submitted through electronic Form G-37 by the last day of the month following the end of each calendar quarter. The first submission period for municipal advisors opens October 1, 2016 and ends October 31, 2016.

Refer to the MSRB Rule G-37 Submission Handbook for assistance submitting political contribution disclosures. The MSRB makes these disclosures available to the public on its Electronic Municipal Market Access (EMMA®) website to facilitate public scrutiny of the potential linkages between the giving of political contributions and the awarding of municipal advisory business.

GASB Forms OPEB Implementation Guidance Consultative Group.

GASB Chair David A. Vaudt recently announced the appointment of a consultative group to assist with the Board's development of implementation guidance relating to the accounting and financial reporting standards for other postemployment benefits (OPEB). The members of the consultative group are:

- John Bartel, President, Bartel Associates, LLC
- Bruce Eastes, Compliance and Reporting Specialist, California Public Employees Retirement System
- Joan Fontes, Deputy Director, Department of the State Treasurer, State of North Carolina (for issues related to OPEB plan reporting)
- Jodie Hartman, Finance Director, Village of Lake Zurich, IL
- Staci Henshaw, Director of Reporting and Standards, Auditor of Public Accounts, Commonwealth

of Virginia
- Daniel Jaroche, Accounting Manager, Office of Financial Management, State of Michigan
- Frederick Lantz, Partner, Sikich, LLP
- Preeta Nayak, Senior Accounting and Financial Management Advisor, Department of the State Treasurer, State of North Carolina, (for issues related to employer reporting of OPEB)
- Jun Peng, Associate Professor, University of Arizona
- Heather Ricard, Chief Financial Officer, Municipal Association of South Carolina
- James Rizzo, Senior Consultant and Actuary, Gabriel, Roeder, Smith and Company
- David Showalter, Partner, Vavrinek, Trine, Day & Co., LLP
- Jenny Starr, Chief Financial Officer, Ohio Public Employees Retirement System
- Sean Walker, Partner, CliftonLarsonAllen, LLP
- Jim Whelpley, Consulting Actuary, Rael & Letson

ABOUT THE PROJECT

The implementation guidance developed in this GASB project will address the standards contained in Statement No. 74, *Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans*; Statement No. 75, *Accounting and Financial Reporting for Postemployment Benefits Other Than Pensions*; and related pronouncements. The GASB expects to issue two drafts for public comment—one containing proposed implementation guidance for OPEB plans and governments applying Statement 74 (fourth quarter of 2016) and the other proposing implementation guidance for governments applying Statement 75 (third quarter of 2017).

WHAT DO CONSULTATIVE GROUPS DO?

The GASB assembles consultative groups at the discretion of the GASB Chair for projects expected to lead to implementation guidance. Consultative groups serve as a sounding board, providing suggestions and feedback to the GASB staff as materials are developed. As part of this process, consultative group members review drafts of materials prepared by GASB staff, commenting as appropriate.

HOW ARE PARTICIPANTS SELECTED?

Consultative groups are officially appointed by the GASB Chair after consultation with the other GASB members and GASB staff. Consultative group members typically have a particular expertise or experience with the standards being addressed and also are capable of articulating the views of other, similar constituents.

Members primarily are identified from the GASB's database of stakeholders, including persons who have indicated a willingness to volunteer for a consultative group. In general, the GASB attempts to maintain an appropriate balance of financial statement preparers, auditors, and users on each consultative group. However, consultative groups related to the development of implementation guides generally are composed primarily of preparers and auditors because they are consulting on relatively technical accounting matters. Consultative groups for projects related to postemployment benefits also include actuaries and employee benefit consultants.

Within each group, the GASB seeks to include a variety of types of stakeholders, such as finance officers from governments, as well as employee retirement systems, and auditors in government and private practice. The GASB also tries to balance other factors that may be relevant, such as governments of various sizes and from geographic areas of the country.

Recent Developments in Green Bonds: White & Case

Brief Overview of Green Bonds

Green Bonds raise funds for new and existing projects with environmental benefits. They are similar to mainstream bonds with the difference residing essentially in a defined use of proceeds for specific green projects. From a credit perspective, Green Bonds are indistinguishable from other bonds. Operationally, Green Bonds largely function as conventional debt instruments. They are risk-weighted and credit rated in the usual way, based on the creditworthiness of the issuer, and they are generally listed, traded and regulated in the same way as other bonds in the international bond markets. Issuers and the dealers/managers expect pricing and transaction costs to be similar to the issuer's regular bonds.

However, there are a number of advantages to issuing a Green Bond as opposed to a regular corporate bond. From the issuer's perspective, a Green Bond (i) results in the diversification of its investor pool (e.g. greater numbers of asset managers and insurance or pension funds), and (ii) contributes to 'green' investor relations and corporate social responsibility initiatives. From a dealer/manager's perspective, Green Bonds can be marketed as premium products to their clients as many investors are required to invest in products such as Green Bonds in order to meet sustainability guidelines or criteria in their investment strategies.

Green Bond Market

The Green Bond market accounted for US$800m of issuance in 2007, but has expanded significantly every year since then. Moody's reported in February 2016 that Green Bond issuance for 2016 could exceed US$50bn2.

The Green Bond Principles3

In order to standardise Green Bonds, the Green Bond Principles ("GBP"), the first set of principles for verifying the credentials of Green Bonds, were launched in 2014 with the latest iteration published in June 2016. The GBP are voluntary guidelines that recommend transparency and disclosure and promote integrity in the development of the Green Bond market by clarifying the approach for issuance of a Green Bond. The GBP: (i) provide issuers guidance on the key components involved in launching a Green Bond; (ii) aid investors by ensuring availability of information necessary to evaluate the environmental impact of their Green Bond investments; and (iii) assist dealers/managers by moving the market towards standard disclosure which will facilitate transactions.

As there is no standard definition of what constitutes a 'Green Bond', the 'Use of Proceeds' section of a typical Green Bond Prospectus plays a key role in allowing investors to assess whether or not a given bond is "green enough" for them. The GBP reflect this, with disclosure of use of proceeds being central to the GBP. The GBP are not, however, prescriptive as to the form such disclosure should take. As a practical matter this means that an issuer will designate a "green" use of proceeds in the prospectus or other issuing documentation and then provide summarised information about the green uses, reporting and second party opinions (if any). Typically in a basic Green Bond, the use of proceeds, reporting and second party opinions do not form part of the terms and conditions of the Green Bond and do not create specific contractual obligations. However, they typically form part of the disclosure documents or are referred to in the disclosure documents.

Types of Green Bonds

The GBP identify four types of Green Bonds (additional types may emerge as the market develops):

Green Use of Proceeds Bond – a standard debt obligation for which the proceeds are moved to a segregated account or otherwise tracked by the issuer and attested to by a formal internal process that will be linked to the issuer's lending and investment operations for projects. The vast majority of Green Bonds currently fall within this category.

Green Use of Proceeds Revenue Bond – a debt obligation in which the credit exposure in the bond is linked to the pledged cash flows of the revenue streams, fees, taxes etc., and the proceeds of the bond are used to fund related or unrelated green project(s) such as a utility provider issuing a bond backed by fees on electricity bills.

Green Project Bond – this is a project bond for a single or multiple Green Project(s) for which the investor has direct exposure to the risk of the project(s) with or without potential recourse to the issuer.

Green Securitised Bond – a bond collateralised by one or more specific projects, including covered bonds, ABS, and other structures. The first source of repayment is generally the cash flows of the assets. This type of bond covers, for example, asset-backed securitisations of rooftop solar PV.

Investor Appetite

The initial demand in the Green Bond market was largely driven by environmentally and socially responsible investors and this segment of the market has continued to grow (e.g. dedicated Green Investment Funds are developing rapidly). However, the market has quickly become mainstream with institutional investors and Green Bonds are developing into their own asset class. With the growth in diversity of issuer type and structure, the investor base for the Green Bond product has expanded to include more pension funds, insurance companies, asset managers, and retail investors. For their investors, Use of Proceeds Green Bonds are fixed income products that meet their underlying financial requirements, but which in addition enable them to show support for initiatives they deem to be important global priorities.

For all categories of investors, providing certainty and transparency on the use of proceeds and investments are, and will continue to be, important requirements. Green Bonds are part of a wider trend toward increased focus on social and environmental responsibility among companies and financial institutions. This trend is strongly encouraged by governments, public and other regulatory authorities, NGOs and even the community at large.

Recent Developments in the Green Bond Market

The GBP provide a minimum standard of process guidelines that recommend transparency and disclosure in the Green Bond market. As a result, the environmental undertakings of Green Bonds issuers are only partially reflected in transaction documentation. A microcosm has developed around the GBP in support of the Green Bond market that involves standard providers, certifiers and assurance providers (including accountancy firms, ESG analysts and academics). Some markets and jurisdictions have begun to integrate elements of the voluntary GBP guidelines into domestic Green Bond regulations and mandatory market criteria. In many jurisdictions adopting mandatory regimes, the GBP are the minimum starting point to which additional mandatory requirements are added. The regulator in these regimes takes a more active role in setting out: (i) rules for listing Green Bonds; (ii) the liability and covenant requirements; and (iii) the Green Bond catalogue of sectors and projects which define “green” for that market.

There has been a difference in the approach to the development of Green Bond markets in different jurisdictions. They are roughly split into those markets which, for the time being, rely on a voluntary approach to criteria and reporting and those which have implemented codified criteria and/or enshrined it in legislation. There is some market debate on the need: (i) to provide greater clarity on what a Green Bond is and what distinguishes it from regular bonds; (ii) for independent certification; (iii) for green catalogues and definitions; and (iv) for green covenants and liabilities. While standardisation of disclosure will support credibility and provide criteria for independent validation in the Green Bond market, a balance has to be struck between enhancement and over-regulation. It is important nonetheless to be aware of regional differences in the developing Green Bond market.

In terms of recent market trends, we have noticed an increase in the demand for specific products, including both investment grade and high-yield corporate Green Bonds, bespoke structured deals such as project bonds and securitisations and nationally driven products (e.g. Pfandbriefe, Schuldscheine and green Sukuk). There is increased interest from emerging market issuers in developing Green Bond frameworks, for example in India, China and Mexico and we are seeing prominent global stock exchanges dedicating separate platforms to Green Bonds.

Considerations for Green Transactions

We have worked closely with a number of issuers, dealers/managers, financial intermediaries and trade bodies in the Green Finance sector and our considerable experience in this field means we are well placed to help structure your green transaction and advise you on green requirements and market expectations. These are some of the key points you will need to consider including in your Green Bond:

- Types of Green Bonds
- Types of ‘green’ investors
- Green Bond Listing Venues
- Structuring and Offering Green Bond
- Reporting
- Disclosure requirements (including specific green risk disclosure)
- Key “green” terms included in Green Bond documentation
- Expectations of Green Bond Market Participants

White & Case

by Cenzi Gargaro, Gavin McLean, Karsten Wöckener, Tallat Hussain

30 Aug 2016

White & Case is an international law firm that serves companies, governments and financial institutions. The global presence of White & Case gives us both an opportunity and a responsibility to provide legal counsel and assistance through our social responsibility programme and green initiatives.

Footnotes

1 The vast majority of which are in the area of renewable energy and energy efficiency
2
www.moodys.com/research/Moodys-Green-bond-issuance-could-exceed-50-billion-in-2016–PR_34323

4
3 See the latest iteration of the GBP at www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/

Mindy Hauman, a Professional Support Lawyer at White & Case, assisted in the development of this publication.

How Pooling Assets Could Help Sustain Public Pension Funds.

They badly need to improve their ability to generate investment returns. A Canadian province's initiative looks like a model worth studying.

For all of the angst about the burden of funding public employees' pension funds on state and local government budgets — and on the public workers who contribute part of their paychecks to their retirement funds — the most critical factor in the equation is the funds' ability to achieve their investment-return targets. The money the funds earn on investments pays, on average, more than 60 cents of every dollar that is disbursed to retirees.

But the news is not good on the investment front. According to the Wilshire TUCS performance tracking service, median returns in fiscal years 2014 and 2015 were 3.43 percent and 1.07 percent, respectively — nowhere close to the sector's average assumed rate of return of 7.5 percent. And experts say that it will be even harder for public pensions to make money in stocks and bonds over the coming decades.

Yet efforts to increase the efficiency and effectiveness of investment-management practices for retirement assets, such as the Investment Modernization and Cost Reduction Act proposed by the Oregon State Treasurer's Office or the Bloomberg Liu initiative for the New York City Retirement System, have met with great resistance.

One modernization approach in particular, pooling assets to invest on a collective basis, holds a lot of promise. But only a handful of governments have moved to pool assets to one degree or another. Most pooling proposals, such as combining the Chicago and Illinois teachers' retirement systems or Pennsylvania's attempt to combine its 3,200 local pension plans, have involved consolidation or mergers that would mean giving up control of the assets. This has been a non-starter for pension trustees and board members.

But a new pooled-asset entity just launched in Canada could provide a model for U.S. public pensions funds to move forward, not only in protecting retirement systems' long-term sustainability but also in increasing their ability to compete in the global financial markets.

This $38 billon pooled platform, the Investment Management Corporation of Ontario (IMCO), is organized as a nonprofit corporation, and it provides investment management services to pension funds at cost. Seeded with assets from the Ontario Pension Board and another public agency, IMCO enables pension funds to enhance returns by lowering costs and leveraging scale while retaining control of their assets. Remarkably, pension funds join IMCO as members, on a voluntary basis, and elect board members from their own ranks. What's more, it hasn't cost Canada's national government a dime.

Ontario's initiative offers encouragement to U.S. policymakers and researchers who have recognized the benefits of asset pooling. A 2010 Government Accountability Office study found that pooling pension assets could achieve economies of scale and reduce the investment fees paid to outsourced managers. As the study suggested, that could alleviate some of the budgetary pressures on states and municipalities due to unfunded pension obligations. The GAO study cited the mandate of the Massachusetts Pension Reserves Investment Trust Fund "to reduce the state's significant unfunded liability and to assist participating local retirement systems in meeting their future pension obligations."

State investment boards chartMassachusetts' investment fund is one of 15 state pooled-asset structures, which are commonly called state investment boards and often are responsible for managing several different types of funds in addition to pensions. The North Dakota State Investment Board, for example, invests the assets of the state's sovereign wealth fund, funded by tax revenues from oil extraction and production, as well as the assets of two pension funds for public employees and teachers. As the table here shows, 12 of the 15 state investment boards already oversee pooled public pension funds.

Ontario's approach takes the advantages of the asset pooling already being realized by the U.S. state investment boards to the next level by introducing a cost-recovery model designed to end pension funds impoverishing reliance on money managers and consultants.

American policymakers interested in ensuring the long-term sustainability of our public-sector employee retirement systems might look at what the Canadian province has done. As healthy investment returns prove tougher than ever to come by, it's hard to see an argument for failing to modernize our struggling retirement systems' organizational structures as a step toward maximizing their ability to make money for the benefit of retirees and taxpayers alike.

GOVERNING.COM

BY JILL EICHER | SEPTEMBER 8, 2016

Developing and Implementing Procedures for Post-Issuance Tax Compliance for Issuers of Governmental Bonds.

Introduction

State and local government issuers of tax-exempt bonds must comply with federal tax rules both at the time the bonds are issued and during the entire period the bonds are outstanding in order for the bonds to maintain tax-exempt status.1 For the last decade, the Internal Revenue Service (IRS) has engaged in extensive enforcement of these rules for tax-exempt bonds through a variety of activities including random audits. If an issuer fails to meet applicable federal tax rules, the IRS can declare the interest on the bonds to be taxable, although the IRS has not frequently done so.2 In connection with these enforcement efforts, the IRS has encouraged issuers to develop post-issuance compliance policies and procedures to help detect and correct potential violations of federal tax law on a timely basis.

The National Association of Bond Lawyers (NABL) released together with this GFOA Alert a white paper entitled "Considerations For Developing Post-Issuance Tax Compliance Procedures" (the

"NABL Considerations"), which presents an in-depth discussion of post-issuance tax compliance and the applicable tax requirements that must be satisfied. This Alert provides a general overview of post-issuance tax compliance and highlights points that may be discussed in greater detail in the NABL Considerations or other publications.3 The Alert focuses on compliance for "governmental bonds," (i.e., bonds issued for governmental use and purposes) but can be helpful for complying with qualified 501(c)(3) or other types of private activity bonds.

What is Post-Issuance Compliance?

Post-issuance compliance consists of practices and procedures designed to assist an issuer of governmental bonds in complying with the federal tax requirements that apply from the date the bonds are issued until the date the bonds, or any refunding bonds, are no longer outstanding. The substantive rules can be categorized as: (a) arbitrage and rebate; and (b) use of bond proceeds and of bond financed facilities. Compliance with these rules must be documented by records that meet IRS requirements.

Why Implement Post-Issuance Compliance?

The IRS has encouraged issuers to adopt post-issuance compliance procedures in order to assist in preventing, identifying and correcting possible tax violations that may occur during the term that tax-exempt bonds are outstanding. These procedures help an issuer prevent or correct violations so the IRS does not have a reason to either declare the bonds taxable or negotiate a settlement. The IRS Forms 8038 that must be filed when bonds are issued ask whether the issuer had written procedures and the IRS previously offered issuers with written procedures the possibility of a lower settlement amount in connection tax violations discovered by the issuer for which the issuer sought a closing agreement pursuant to the IRS's Voluntary Closing Agreement Program (VCAP). More recently, the IRS is offering a lower settlement amount if the issuer has "effective" procedures (whether or not written).4 Procedures may also prove helpful in providing information and documentation in the event that the IRS audits an issue. See "Why are Post-Issuance Tax Compliance Procedures Important" in the NABL Considerations.

What Rules Need To Be Monitored?

For governmental bonds, i.e., bonds issued by state and local governments to finance public purpose projects, in the broadest terms, the tax requirements can be grouped into two categories: (a) arbitrage and rebate; and (b) use of bond proceeds and of bond-financed facilities. Each of these categories involve many rules that make it advisable for an issuer to adopt practices that track how bond proceeds are invested and how and when bond proceeds are spent.

Arbitrage and Rebate

Federal tax law and regulations restrict the amount of "arbitrage" an issuer can earn and retain from investing proceeds of a tax-exempt bond.5 As applied to tax-exempt bonds, "arbitrage" generally refers to the profit earned from taxable investments purchased with proceeds of bonds bearing interest at tax-exempt rates. There are two main categories of requirements – yield restriction and rebate. If ***either*** the yield restriction requirements ***or*** the rebate requirements are not satisfied, tax-exempt bonds become "arbitrage bonds" and lose their tax-exempt status.*6*

Yield Restriction

The general rule of "yield restriction" is that bond proceeds may not be invested at a "materially higher" yield than the yield on the bonds.7 Exceptions to this rule apply during "temporary periods" such as the 3-year temporary period that is available for proceeds that an issuer expects to spend on construction or acquisition of capital projects under certain circumstances.8 Additional exceptions including other temporary periods of varying length may apply.9 If there is no exception or a temporary period ends and proceeds remain unspent, either the investments must be yield restricted or a “yield reduction payment” must be made to the federal government.

Rebate

The general rule is that any actual earnings in excess of the yield on the bonds must be paid as “rebate” to the federal government. There are a number of possible exceptions including the $5,000,000 “small issuer” exception for issuers with general taxing powers who do not issue more than $5,000,000 in bonds during a calendar year, and limited exceptions for earnings on a reasonably required debt service reserve fund and on a bona fide debt service fund. There is also an exception for tax and revenue anticipation notes, for proceeds invested in other tax-exempt obligations and exceptions that apply if proceeds are spent within 6-months, 18-months or 2 years for construction.10 Rebate, if any, is due every 5 years or when bonds are paid off, either at maturity or redemption. If there is no rebate exception, it is necessary to determine whether any rebate is due. The calculation depends on a number of factors including whether the bonds are fixed or variable rate and whether there are any hedges (e.g., interest rate swaps) that must be taken into account.

To comply with both the yield restriction and rebate rules an issuer needs to have procedures that identify the type of, and return on, investments made with bond proceeds and when proceeds are spent.

Use of Proceeds and of Bond-Financed Facilities

The general rule for governmental bonds is that no more than 10% of bond proceeds may be used in a private business use and no more than 10% of debt service on the bonds may be paid or secured by payments arising from or related to private business use. The 10% limit is reduced to 5% in the case of unrelated private business use or related business use which is disproportionate. No more than 5% of bond proceeds may be used for and no more than 5% of debt service on the bonds may be paid or secured by payments in respect of, unrelated private business use or disproportionate related business use. In addition, with certain exceptions, no more than the lesser of 5% of bond proceeds or $5,000,000 may be used to finance direct or indirect loans to non-governmental persons.11

To monitor compliance with this requirement, an issuer needs to have procedures to identify who is a private “nonqualified user” and what constitutes private business use. For governmental bonds, any user other than a state or local government is a “nonqualified user”. This means that individuals, for-profit entities, non-profits including section 501(c)(3) organizations and the federal government are “nonqualified users,” and use by users in any of these categories must be analyzed to determine whether it is “private business use”. Use in the trade or business of any non-qualified user is “private business use”. Use by the general public is not typically business use. “Private business use” can be created by a lease or license of a bond financed facility. It can also be created through a management or service contract between the issuer (or other qualified user) and a non-qualified user on terms that do not meet a safe-harbor recognized by the IRS12 that gives the non-qualified user a share in the net profits from the use of the facility. Research agreements or special arrangements that give a non-qualified user priority or a benefit not available to the general public may also create private business use.

When are Procedures Effective?

To be effective, procedures should address the substantive issues necessary to assure tax and other legal and contractual compliance. Procedures should also be implementable, manageable, and diligently followed by the issuer. The design and implementation should take into account the issuer's size, organizational structure, frequency of bond issuance and budget/staffing resources.

If implemented properly, the following elements should assist an issuer with effective oversight of tax rules relating to tax-exempt bonds: (1) identify the individual or individuals responsible for coordinating activities; (2) provide for due diligence review at regular intervals; (3) facilitate training for responsible individuals; (4) describe retention of adequate records to substantiate compliance; (5) accommodate review that identifies areas that are most susceptible to noncompliance; and (6) include procedures to correct identified noncompliance in a timely manner.

Designing a Post-Issuance Compliance Program

General Considerations

A post-issuance compliance program should reflect an issuer's size, resources and borrowing pattern. An issuer may decide to handle compliance in-house or to engage bond counsel or other third-party provider for some or all compliance activities including arbitrage, rebate and monitoring of private business use and payments. In either case, the post-issuance compliance program should have the following elements. The following is a summary of the considerations for designing a post-issuance compliance program. More detail is provided under the heading "Characteristics of Effective Procedures" in the NABL Considerations.

Responsible Staff Should Be Assigned

Whether an issuer will conduct compliance in-house or will engage providers, a "chief compliance officer" with overall responsibility for implementation of the program should be assigned. In a large organization, there may be staff in addition to the chief compliance officer that can be assigned specific responsibilities or the chief compliance officer can have authority to delegate where appropriate. If third-party providers will be engaged to perform some or all of the activities, the program should specify how the providers will be engaged and monitored. The chief compliance officer or officers should be designated by job title rather than name to assure continuity.

Identify the Source of the Tax Requirements Being Monitored

It will be helpful to identify the documents that set forth the tax requirements being monitored so that the compliance officer(s) can find details if necessary.

Identify the Frequency of the Actions to Be Undertaken

The IRS has recommended at least an annual review as a general matter. However, it may be advisable to provide for a review when specific events occur, such as renewal of management contracts, or other events that may result in private business use. A program should also provide for a final allocation of bond proceeds as required by tax regulations.13

Establish a Deadline Reminder System

Where deadlines exist, a reminder system should be established and a back-up reminder is helpful in avoiding an oversight. Examples of deadlines include ending of temporary periods for yield restriction and deadlines for meeting spend down exceptions for rebate compliance, paying rebate if applicable, and making final allocations.

Identify Records to be Maintained and the Record Retention Period

Records necessary to assure and document compliance should be maintained for the required time periods. The issuer should list the records being maintained and where or by whom. Tax records must be maintained until full payment of the bonds and any refunding bonds plus three years. In addition, state or local record retention requirements need to be considered. In some cases, an issuer may need to seek approval for changes in its record retention policy in order to keep tax or other records for periods longer than otherwise permitted under state law.

Specific to tax-exemption compliance, the following records should be maintained.

1. The bond transcript for each bond issue (which includes among other documents, the trust indenture, loan, lease, or other financing agreement, the relevant IRS Form 8038 (including Forms 8038-G or 8038, as applicable) with proof of filing, the bond counsel opinion and the tax agreement including all attachments, exhibits and any verification report).
2. Records of debt service payments for each issue of bonds.
3. Documentation evidencing the expenditure of bond proceeds, such as construction or contractor invoices and receipts for equipment and furnishings, bond trustee requisitions and project completion certificates, as well as records of any special allocations made for tax purposes including post-issuance changes in allocations.
4. Documentation evidencing the lease or use of bond-financed property by public and private sources, including, but not limited to, service, vendor, and management contracts, research agreements, licenses to use bond-financed property, or naming rights agreements.
5. Documentation pertaining to investment of bond proceeds, including the yield calculations for each class of investments, actual investment income received from the investment of proceeds, investment agreements, payments made pursuant to investment agreements and rebate calculations and copies of any 8038-T or 8038-R filed with respect to the bonds.
6. Documentation pertaining to remedial action and other change-of-use records.
7. Amendments and other changes to the bond Documents (including interest rate conversions and defeasances).
8. Letters of credit and other guarantees for bond issues.
9. Interest rate swaps and other derivatives that are related to bond issues.

Require Training for Responsible Officers

Periodic training for compliance officers should be identified and documented. The issuer should also determine whether the training can be done in-house or whether third-party conferences, courses or providers are appropriate.

Describe Procedures to Identify and Correct Violations

The policy should describe the review process to assure compliance and describe what actions will be taken to correct any non-compliance. Corrective strategies may require engaging counsel or third-party advisors to assist in the remedial action.

Address Other Substantive Issues for Tax-Advantaged Bond Compliance

The policy should also consider other substantive matters that should be included in a post-issuance compliance program for tax-advantaged bonds such as yield restriction, rebate and tracking possible private business use.

How Should A Post-Issuance Program Be Adopted and Reflected?

An issuer's post-issuance compliance procedures can be included in its general debt management policies or be stated separately. Procedures may be adopted by formal action of the issuer's governing board or be developed independently by management.

Conclusion

GFOA recommends that state and local governments adopt comprehensive written debt management policies, in so doing, the GFOA and NABL work together to provide tools for the state and local government to use in managing these policies, such as the Post Issuance Compliance Checklist. This Alert provides a general overview of the NABL white paper "*Considerations for Developing Post-Issuance Tax Compliance Procedures*" and in so doing, this Alert brings additional awareness to post-issuance tax compliance for issuers within the parameters of federal tax rules. Compliance with federal tax rules both at the time a state or local government issues bonds and during the entire period the bonds are outstanding is necessary in order for the bonds to maintain their tax-exempt status is enforced through current federal tax rules.

Footnotes

1. State and local governments may also issue tax-credit and taxable direct-pay bonds that must satisfy federal tax rules on a continuing basis to retain tax-advantaged status. References herein to tax-exempt bonds also refer to tax-advantaged bonds.
2. If bonds are declared taxable, the tax must be collected from bondholders. The IRS has chosen in most instances to negotiate settlements with the issuers.
3. This Alert together with the NABL Considerations updates information about this topic previously provided through the joint publication with the National Association of Bond Lawyers (NABL) in 2007 of the NABL/GFOA Post-Issuance Compliance Checklist (the "Checklist") and in GFOA's best practices for debt management policies released in 2012. The debt management policies best practices publication is available online.
4. See Internal Revenue Manual ("IRM") 7.2.3.4.4 relating to the IRS's Voluntary Closing Agreement Program (VCAP), which was released in September 2015. This IRM states: "Under this revision of the IRM, post issuance compliance procedures are not required to be in any other pre-specified format. To obtain a TEB VCAP, however, an issuer is required to provide evidence that it has implemented a change to its procedures that is reasonably expected to prevent the same type of violation from happening in any of its bond issues. This change to the procedures is being made to allow issuers to develop their own best practices for post-issuance compliance procedures and to measure the benefit of those procedures by their effectiveness, that is, whether they enable the issuer to capture a violation quickly. TEB continues to strongly encourage issuers to have post-issuance compliance procedures that effectively monitor compliance with all of the IRC and Regulations requirements applicable to the bonds." (Emphasis added).
5. Internal Revenue Code §148 and regulations thereunder.
6. See "Tax Exempt Bonds: A Roadmap to Arbitrage Requirements for Tax-Exempt Governmental Bonds and Qualified Section 501(c)(3) Bonds of Smaller Issuers and Conduit Borrowers", 2013 Report of the Advisory Committee to Tax-Exempt and Governmental Entities (referred to herein as "Twelfth ACT Report").
7. For "new money" bonds, as a general rule, "materially higher" means 1/8 of 1% and for advance refunding bonds, "materially higher" is 1/1000 of 1%. Treas. Reg. §§1.148-2(d)(2)(i) and (ii).
8. This exception applies if, at the time of bond issuance, the issuer reasonably expects to become obligated to spend at least 5% of bond proceeds within 6 months, to allocate at least 85% of proceeds on the financed project within 3 years and to complete the project with due diligence. Treas. Reg. §1.148-2(e)(2)(i)(A)(B) and (C).

9. Temporary period exceptions of varying lengths are also available for bona fide debt service funds, investment proceeds, working capital and refundings. See Treas. Reg. §1.148 -2 (2 and 1.148-9 (d). In addition, there are exceptions for a reasonably required debt service reserve fund and a "minor portion" of the lesser of $100,000 or 5% and for investments in other tax-exempt obligations. Treas. Reg. §1.148-2(d)(2)(v), (f) and (g).
10. See "Exceptions to Rebate", Section VC of the Twelfth ACT Report, supra for a discussion of the exceptions to rebate.
11. Issuers should consult bond counsel for detailed information about the rules that apply to private business use and payments in respect of private business use.
12. Rev. Proc. 97-13 as modified by Rev. Proc. 2001-39 and as amplified by Notice 2014-67, and Rev. Proc. 97-14 as modified by 2007-47 provide safe harbors against "private business use" for management contracts and research agreements
13. Treas. Reg. §1.148-6(d) requires that expenditures be allocated to bond proceeds no later than 18 months after the later of the date the expenditure is made or the project is placed in service and in no event later than 60 days after the 5th anniversary of the date the bonds are issued or retired, if earlier.

SEC Approves FINRA & MSRB (Almost) Pay-to-Play Rules.

The SEC announced August 25 that it approved FINRA's pay-to-play rules governing placement-agent or solicitor broker-dealers and was "prepared" to approve the extension of MSRB Rule G-37 to municipal advisors as well.

The two rule proposals would complete the pay-to-play suite of rules across municipal securities dealers, investment advisors, broker-dealers, and municipal advisors. The bedrock Rule – MSRB's Rule G-37 governing municipal finance professionals and dealers – has been in place since 1994. After Dodd-Frank's expansion of municipal-advisory regulation, the SEC adopted a similar rule governing registered investment advisers, Rule 206(4)-5.

The latest proposals by the MSRB and FINRA complete the picture by extending Rule G-37 to municipal advisors and adopting a similar rule governing broker-dealers working with IAs and MAs.

The SEC's Order says it's ready to approve the MSRB rule proposals, but gives interested parties until September 19th to request a hearing. That might be a gambit to get past October 1st and into the next federal budget cycle: The SEC recently argued in pending litigation challenging the MSRB Rule that a Congressional budget rider prevents the agency from spending money on any effort to approve rules requiring political contribution disclosures. I discussed that here.

The SEC's order on the MSRB proposal, Rel. No. IA-4512, File No. S7-17-16, is here.

And on the FINRA proposal, Rel. No. 34-78683, File No. SR-FINRA-2015-056, is here.

Burr & Forman LLP

by Thomas K. Potter, III

September 6, 2016

Pithy Maxims That Govern The Municipal Bond Market.

If you're an investor that follows the stock or bond markets with any diligence, you've surely come across some headline with a dire prediction screaming something like "stock valuations are just like before the crash of 1929!" or similar such parallels. It grabs us because it preys on the intrinsic fear of uncertainty that all investors face. Cognitively, we know it is hyperbole, but emotionally we feel a little bit of nervous twinge because, well, who knows? This time they just might be right. After all, isn't there a pithy maxim that tells us that "those who do not remember the past are condemned to repeat it?"

This year, the headlines for municipal bonds are anything but dire. In fact, it's been quite the opposite–everyone is predicting a great year for munis. The market is up around 4.50% year-to-date (source: Barclays Municipal Bond Index). Intermediate and long municipal bond rates are now at multi-generational lows. Thomson Reuters' bellwether Municipal Market Data ("MMD") benchmark curve has the 10-year and 30-year AAA yields hovering in the 1.40% and 2.15% range, respectively.

Municipalities and public authorities alike are taking advantage of the low interest rate environment to refund their higher yielding debt. As data from The Bond Buyer shows, there are more refundings than there are bonds issued for new projects. Investors getting their money back from refunded bonds are finding fewer bonds to reinvest in. This supply-demand imbalance is further fueling the market's gains.

The rising tide is lifting all boats. Mutual funds are prospering, finding their assets under management up by more than $50 billion, enjoying 11 uninterrupted months of positive flows since October 2015 (source: Investment Company Institute). Municipal ETFs have enjoyed similar positive flows during the same period, netting $5.7 billion. Money is also flowing into separately managed accounts. Cerulli Associates reported that flows into municipal SMAs were up 33.9% in 2015. With no signs of these SMA flows abating, 2016 could well become the fifth consecutive year of asset growth nearly making or exceeding 30%. By that estimate, the top SMA tax-exempt bond managers could see upwards of $45 billion added to their AUM by year end.

There are even flows coming into the market from so-called 'non-traditional' buyers. Given negative rates in Europe, foreign buyers are putting money to work in municipals so as to enjoy the positive risk adjusted rates. It's unclear what the split is between taxable and tax-exempt buy-in from the internationals, but there is 100% agreement that it's coming in.

Not only are rates lower, credit spreads are tighter. The spread in yield between AAA general obligation bonds and A hospital bonds is about 57 basis points. At the start of 2014, the spread was 125 (source: MMD Thomson Reuters). It seems that, with all that money to put to work, investors are more open-minded about expanding their credit parameters.

I hate to be a 'Debbie Downer' in the midst of all this ebullience, but I have in mind another pithy maxim, this one from Shakespeare: "What's past is prologue" (The Tempest, Act 2, Scene 1). When these conditions occurred previously—the large flows, the non-traditional buyers, the eschewing of credit standards—it never ended well, as is detailed below and in the charts.

An event occurs, usually tied to rates, which suddenly changes everyone's perspective. Money starts flowing out as fast as it flowed in. The non-traditional buyer who had been taking advantage of the arbitrage, gets jittery or finds better opportunities in other markets. The individual investor usually just panics and sells. As investors large and small rush to the exit en masse, they quickly discover the persistent liquidity problem the municipal bond market has when faced with large outflows. Prices back-up fast in a volatile reaction.

The past here is really not that far in the past and the parallels are striking. Think back to the time period from September 2011 to the end of 2012. For 15 consecutive months, mutual fund investors poured in nearly $65 billion into the market. The trend culminated in January 2013 when investors bought an astonishing $7.1 billion of municipal bond mutual fund shares. It was the largest single month of inflows since September 2009 and would prove to be the third largest inflow over the last ten years.

Then in May 2013, Federal Reserve Chairman Ben Bernanke made what he thought was a fairly innocuous announcement regarding tapering off the Fed's quantitative easing program. Fearing rates were about to rise, nothing short of panic ensued. Over the next few weeks, investors pulled out nearly $65 billion from the market (see When Bonds Turn Negative, Keep Your Perspective). Outflows exceeded both the Credit Crisis of 2008 and the Meredith Whitney-caused blow-out in 2011—two other recent examples when the market lost its collective reason.

The whole episode was later given the cutesy moniker of "Taper Tantrum" but it was anything but cutesy. In a few short weeks, investors lost billions of dollars of net worth in their municipal bond holdings. From the beginning of May 2013 to mid-September. Thomson Reuters' MMD AAA 10 year yield spiked from 1.66% to over 2.80%—a nearly 115 basis point give up. The 30 year AAA yield rose from 2.79% to just shy of 4.40% over the same time, a 160 basis point roll-back.

Look, I know it's not 2013 all over again. Yes, the parallels are there, but the circumstances are different, the facts are different, the markets are different—there are a host of reasons things aren't 'just like' the prior period of disaster. Recall that other pithy maxim: "predictions are difficult—particularly about the future?"

Yet something lingers in the back of my mind. The particulars today may indeed be very different, the circumstances completely divergent—but the market's reaction to a trigger event that precedes a crisis hasn't changed. We don't forget history, but we don't necessarily learn from it either. In the heat of the moment, people are still people and people will still panic and act irrationally. An event will occur and, if history is any guide, it won't be one anyone is anticipating. Today's bull market in municipals will face a crisis in the months ahead. Flows will reverse and the exits will clog. When that happens, as the nearly ubiquitous saying these days goes, "Keep calm and carry on."

Barron's

Sep 7, 2016

by Barnet Sherman, Contributor

Barnet Sherman has managed money for and advised to mutual funds, high net worth clients, consultants and insurance companies on successful investment strategies in the municipal bond market.

Tax-Exempt Municipal Bonds and the Financing of Professional Sports Stadiums: Brookings

In "Tax-exempt municipal bonds and the financing of professional sports stadiums," Brookings

Senior Fellow Ted Gayer, Austin J. Drukker, and Alexander K. Gold quantify the federal subsidies given to finance professional sports stadiums built or majorly renovated since 2000, and the total loss in federal tax revenue.

SEC Announces Enforcement Actions Under Its Muni Bond Disclosure Initiative: Akin Gump

Last week, the Securities and Exchange Commission (SEC) announced that it brought enforcement actions against 71 municipal issuers and other obligated persons as part of the SEC's Municipalities Continuing Disclosure Cooperating (MCDC) Initiative. Specifically, the SEC claims that, from 2011 to 2014, the 71 municipal issuers and obligated persons sold municipal bonds using offering documents containing materially false statements or omissions about their compliance with continuing disclosure obligations. As it previously announced, the SEC has also brought actions against underwriters for similar violations as part of the MCDC Initiative. The MCDC Initiative is designed to encourage issuers, underwriters and obligated persons to self-report certain violations of the federal securities laws in exchange for more favorable settlement terms. In the latest round of enforcement actions, the parties settled without admitting or denying the findings, agreed to cease and desist from future violations, and agreed to certain undertakings.

Continuing Disclosure Obligations

Rule 15c2-12 under the Exchange Act requires dealers, when underwriting certain types of municipal securities, to ensure that issuers enter into an agreement to provide information to the Municipal Securities Rulemaking Board (MSRB) on an ongoing basis. Such information includes annual financial information and operating data. Event notices are also required, which are triggered by, among other things, principal and interest payment delinquencies, nonpayment related defaults, changes in applicable bond ratings, bankruptcy and other significant events. In most cases, issuers or obligated persons must submit the required disclosure on or before the date specified in the continuing disclosure agreement or provide notice of failure to do so to the MSRB through the Electronic Municipal Market Access (EMMA) website. For bonds issued after December 2010, disclosure must be submitted to EMMA within 10 business days of the event.

In addition to preventing underwriters from purchasing and selling securities in the absence of a continuing disclosure agreement, Rule 15c2-12 generally requires the offering documents to contain a description of any material failure by the issuer to comply with its continuing disclosure commitments during the previous five years. The SEC may bring an enforcement action against the issuer under Section 17(a) of the Securities Act and/or Section 10(b) of the Exchange Act for any failure to provide such required disclosure. Because, according to the SEC, it is doubtful that an underwriter could form a reasonable basis for relying on the accuracy or completeness of an issuer's ongoing disclosure representations without affirmatively inquiring as to the issuer's filing history, the SEC may also bring an enforcement action against any underwriter of such securities. To defend against these actions, underwriters must demonstrate that they have exercised adequate due diligence in determining whether issuers have, in fact, complied with such continuing disclosure obligations during prior years. To this end, the SEC has stated that an underwriter may not rely solely on a written certification from an issuer regarding the fulfillment of past filing obligations.

Municipal Market Report and the MCDC Initiative

In 2012, the SEC released its Municipal Market Report, which listed the failure of issuers to comply with their continuing disclosure obligations as a significant problem. On March 10, 2014, the SEC launched the MCDC Initiative to encourage self-reporting by issuers, underwriters and other obligated persons of continuing disclosure violations. For eligible issuers and underwriters that report such violations, the Division of Enforcement recommends that the SEC accept a settlement pursuant to which the issuer or underwriter consents to the institution of a cease-and-desist proceeding under Section 8A of the Securities Act for violations of Section 17(a)(2) of the Securities Act. Additionally, the Division of Enforcement recommends a settlement in which the issuer or underwriter neither admits nor denies the findings of the SEC. The settlement includes certain undertakings by the issuers and underwriters, including establishing policies and procedures to prevent future violations, updating past delinquent filings, cooperating with subsequent SEC investigations and disclosing the settlement in future offering documents. For eligible issuers, the Division of Enforcement will recommend to the SEC a settlement with no civil penalty. For eligible underwriters, recommended civil penalties range from $20,000 to $60,000 for each offering containing a materially false statement, depending on whether or not the offering exceeds $30 million. Caps on the aggregate amount an underwriter is required to pay range from $100,000 to $500,000 and depend on the size of the underwriter's revenue.

Considerations for Municipal Issuers and Underwriters

Given the SEC's increased focus on this area, issuers and underwriters should continue to review their policies and procedures relating to continuing disclosure. As part of this review, it is important to review an issuer's prior disclosure for any material violations of reporting obligations. Material violations, according to the SEC, include an issuer's failure to file or timely file annual audited financial information, annual operating information and quarterly reports. Material violations also include an issuer's failure to file notices of late filings as required under the continuing disclosure agreements. It is also important for issuers to develop processes to ensure compliance with disclosure obligations going forward.

Furthermore, the SEC has stated that for issuers and underwriters that would otherwise be eligible for the terms of the MCDC Initiative but do not self-report, there is no assurance that the Division of Enforcement will recommend terms as favorable in any subsequent enforcement recommendation. Additionally, the SEC has cautioned that enforcement actions outside of the MCDC Initiative could result in the SEC seeking remedies beyond those described in the MCDC Initiative, including increased financial penalties of both issuers and underwriters. Therefore, issuers and underwriters that discover material violations of disclosure obligations will likely need to consider whether such violations should be self-reported on the SEC's MCDC Initiative Questionnaire.

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Article by Alice Hsu, Lucas F. Torres and John Patrick Clayton

Akin Gump Strauss Hauer & Feld LLP

SEC Charges 71 Municipal Issuers and Obligated Persons Pursuant to Municipalities Continuing Disclosure Cooperation Initiative: Andrews Kurth

On March 10, 2014, the Securities and Exchange Commission's ("SEC") Enforcement Division (the "Enforcement Division") introduced the Municipalities Continuing Disclosure Cooperation Initiative ("MCDC Initiative"). The SEC's stated intent in introducing the MCDC Initiative was to address potentially widespread violations of federal securities laws by municipal issuers and obligated persons (each, an "issuer" and collectively, "issuers") and underwriters of municipal securities in connection with representations in bond offering documents related to prior compliance with continuing disclosure undertakings. To that end, the MCDC Initiative sought to incentivize issuers and underwriters of municipal securities to self-report possible violations by offering what the SEC described as favorable, standardized settlement terms to participants.

The MCDC Initiative accepted self-reported submissions from underwriters through September 10, 2014, and from issuers through December 1, 2014. The Enforcement Division began the MCDC Initiative on July 8, 2014, by charging one California school district and then shifted its focus to municipal underwriting firms. In three separate waves (occurring on June 18, 2015, September 30, 2015, and February 2, 2016, respectively), the SEC announced enforcement actions against a total of 72 municipal underwriting firms. In its third announcement of charges against underwriters under the MCDC Initiative, the SEC affirmatively stated that the actions would "conclude charges against underwriters." According to the SEC, the municipal underwriting firms charged comprised approximately 96% of the market share for municipal underwriting services.

On August 24, 2016, the SEC announced that it had entered into settlement agreements with 71 issuers in connection with the MCDC Initiative. The SEC found that the issuers had sold municipal bonds using offering documents that contained materially false statements or omissions about their prior compliance with continuing disclosure obligations.

A review of the cease and desist orders relative to the settlements with these issuers provides the following insights:

- The bulk of the orders related to issuers that, despite either stating within official statements that the issuers had materially complied with prior undertakings or omitting to state whether they had so complied, failed to file annual financial information, audited financial statements, or both on more than one occasion during the prior five year period. This indicates that such failures are considered material failures to comply with a continuing disclosure undertaking. For example, one issuer "filed its audited financial reports for fiscal years 2006, 2007, 2009, and 2010 late by two months, two months, a month, and nine months, respectively, and failed to file timely certain operating data for fiscal years 2008 through 2010. [The issuer] also failed to file timely notices of late filings for each of those."
- Depending on the facts and circumstances, a single failure to file audited financial statements and/or annual financial information could be considered a material failure to comply with a continuing disclosure undertaking. For example, one issuer stated that it had not failed to comply with its prior continuing disclosure undertakings in any material respect, but it had actually filed one set of audited financial statements 1,014 days late. The orders did not contain any allegations of an issuer with a single failure to file within a short timeframe (i.e. less than one month after being due).
- Depending on the facts and circumstances, even an issuer's failure to file notices of defeasances could be considered a material failure to comply with a continuing disclosure undertaking. For example, in one order, the issuer "failed to file certain notices of defeasances prior to the offering, though due before, resulting in bonds in the outstanding principal amount of over $24.5 million trading with significantly different credit structures for up to two years." No other failures by that issuer were noted within the order. However, it is implicit in the order that the failure to file potentially caused a large number of bonds to be traded without material information regarding

the security for the bonds.
- As evidenced by the repeated references in the orders to issuers failing to file notices of late and delinquent filings, the filing of such notices could potentially mitigate the consequences of the issuer's original failure to file. Similarly, many of the orders emphasized the fact that filings should have been made before the offering document at issue was circulated, indicating that an issuer could potentially lessen the severity of an enforcement action if it corrects any failures prior to subsequent bond offerings.

The summaries above are provided for illustrative purposes only. Notwithstanding the general insights from the cease and desist orders summarized above, if an issuer is concerned about either ongoing compliance with its continuing disclosure undertakings or potential exposure to an SEC enforcement action, it should discuss the matter directly with its bond counsel, disclosure counsel or both. In such an event, the issuer and legal counsel should assess the unique facts and circumstances of the issuer, its continuing disclosure compliance history and the potential legal consequences, if any, in light of the guidance afforded by the MCDC Initiative enforcement actions.

The issuers included within the August 24th actions were diverse, including two states, seven state authorities, eight special districts and local authorities, six institutions of higher education (including a non-profit education foundation), 31 localities, eight school districts, five hospitals, one retirement community, one charter school, and two private service providers. All issuers received what the SEC has characterized as "favorable settlement terms." Such terms included compliance with a cease and desist order, but did not contain an admission or denial by the issuer with respect to the SEC's findings or a requirement that the issuer pay fines to the SEC. In addition, the orders required the issuers to:

- establish appropriate policies and procedures and training regarding continuing disclosure obligations within 180 days of the institution of the proceedings;
- comply with existing continuing disclosure undertakings, including updating past delinquent filings within 180 days of the institution of the proceedings;
- cooperate with any subsequent investigation by the Enforcement Division regarding the false statement(s), including the roles of individuals and/or other parties involved;
- disclose in a clear and conspicuous fashion the settlement terms in any final official statement for an offering by the issuer within five years of the date of institution of the proceedings; and
- provide the SEC staff with a compliance certification regarding the applicable undertakings by the issuer on the one year anniversary of the date of institution of the proceedings.

It is unclear whether the August 24th charges represent the only round of enforcement actions that will be brought by the SEC against issuers. Unlike the SEC's third round of actions against municipal underwriting firms, the SEC did not indicate that this would "conclude" their actions against issuers. Rather, the SEC stated that the actions were "**the first** against municipal issuers since the first action under the initiative was announced in July 2014." But some observers have speculated that this will be the only round of enforcement actions against issuers, noting that the SEC has already shown that continuing disclosure failures are not an isolated or infrequent issue. Other observers have speculated that the SEC will now pursue enforcement actions against issuers and underwriters that did not voluntarily self report pursuant to the MCDC Initiative. Since the MCDC Initiative did not apply to individuals, the SEC could also potentially pursue individuals involved in municipal offerings containing material misstatements and omissions related to compliance with prior continuing disclosure undertakings.

While it is not clear whether more charges against issuers will follow in connection with the MCDC Initiative, it is clear that the SEC is focused on material misstatements regarding prior compliance with continuing disclosure undertakings. According to the SEC, the "diversity among the 71 entities in these actions demonstrates that continuing disclosure failures were a widespread and pervasive problem in the municipal bond market." The cease and desist orders should send a strong message that representations within bond offering documents related to prior compliance with continuing disclosure undertakings should be diligently vetted by both issuers and underwriters.

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Article by James Hernandez, Thomas A. Sage, Rick Witte and Edward B. Morse

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

IRS Publishes New Management Contract Safe Harbors For Property Financed With Tax-Exempt Bonds: Foley & Lardner

On August 22, 2016, the Internal Revenue Service (IRS) released Rev. Proc. 2016-44, which provides new guidance on the treatment of "management contracts" for purposes of the restrictions on use of property financed with tax-exempt bonds. This published guidance provides for new safe harbors under which the IRS will not treat management contracts as giving rise to private business use.

The new guidance applies to tax-exempt bonds that are governmental bonds issued for the benefit of state and local governments and to qualified 501(c)(3) bonds issued for the benefit of section 501(c)(3) organizations. This guidance also applies to certain qualified tax credit bonds, such as Build America Bonds, that are subject to the same private business use rules. Although the guidance nominally refers to "management contracts," it applies to most types of service contracts. The new guidance is a significant development for those types of bond issues.

Highlights

- The new guidance establishes new safe harbors that are in some ways much more liberal and flexible than the Rev. Proc. 97-13 safe harbors, but in other respects stricter.
- The new safe harbors reflect a reconceived framework and will replace the Rev. Proc. 97-13 safe harbors. Issuers and borrowers generally may continue to rely on the Rev. Proc. 97-13 safe harbors for management contracts entered into before February 18, 2017, and certain extensions of those contracts pursuant to their term.
- The new safe harbors permit almost any type of variable or fixed compensation and abandon the Rev. Proc. 97-13 framework focusing on fixed fees.
- The new safe harbors rely much more heavily on the rule that "net profits arrangements" are not permitted under the safe harbors.
- The new guidance permits management contracts having a term up to 30 years, but retain a rule limiting the term to no more than 80 percent of the weighted economic life of the managed property.
- The new guidance establishes new safe harbor requirements relating to control of the managed property, bearing of net losses, risk of loss and consistency of tax positions.
- In general, the new safe harbors are more "principles-based," and provide fewer bright lines than the Rev. Proc. 97-13 safe harbors. Accordingly, more interpretive questions may arise than under the Rev. Proc. 97-13 safe harbors, particularly with respect to the new requirements. Also, the

question of whether a management contract that does not exactly meet all of safe harbor requirements should still be treated as not resulting in private business use may arise more commonly than under the Rev. Proc. 97-13 standards.
- Many management contracts that have been customarily treated as within the Rev. Proc. 97-13 safe harbors may not exactly meet the new safe harbors.
- In general, the new safe harbors may be particularly helpful for certain long-term management contracts for infrastructure. Certain shorter term management contracts in particular, however, will be subject to new standards that may involve compliance burdens.
- Many issuers and borrowers may need to consider implementing new practices to review management contracts relating to tax-exempt bond financed property that are entered into, materially modified, or in certain cases renewed after February 17, 2017.

Description of the New Safe Harbors

"Safe Harbor" Guidance. The new guidance provides for revised "safe harbors" in the form of a new revenue procedure. It does not change the substantive rules in the IRS regulations for when a management contract gives rise to private business use. Accordingly, the new guidance would not properly be used adversely against issuers and borrowers by the IRS in examinations, but rather sets forth standards that are intended to provide a basis for conservative tax positions of issuers and borrowers.

Immediate Permissive Application. The new guidance may be applied immediately to either new or existing management contracts.

Relationship to IRS Rev. Proc. 97-13, As Amended. The new guidance supersedes Rev. Proc. 97-13, including the portions of Notice 2014-67 that amend Rev. Proc. 97-13. Issuers and borrowers may continue to rely on Rev. Proc. 97-13, as amended, to a management contract that is entered into before February 18, 2017, unless it is materially modified or in certain cases extended on or after that date. An additional effective date rule also grandfathers extensions of a management contract entered into before February 18, 2017 if the extension is pursuant to a "renewal option" provided in the contract. A renewal option is defined as a provision under which either party has a legally enforceable right to renew the contract. Accordingly, during a long transitional period, an important consideration in reviewing certain management contract extensions likely will be whether the extension is pursuant to the terms of the contract.

Because Rev. Proc. 97-13 is superseded, "Rev. Proc. 97-13 compliance" will now be referred to as "Rev. Proc. 2016-44 compliance."

The new guidance is in response to public comment requests for more flexible safe harbors for management contracts having a term greater than five years. It states that it builds upon the amplifications in IRS Notice 2014-67 that provide for flexible safe harbors for contracts having a term up to five years.

Notably, however, the new guidance reframes and in many respects reconceives the safe harbors for management contracts. Although the new guidance responds to industry calls for more flexible safe harbors, one important question raised is whether certain management contracts that currently qualify for safe harbor treatment will no longer so qualify, as is discussed further below. In general, public comments to the IRS requested additional safe harbors, not new safe harbors that displaced the existing ones; the IRS and Treasury Department did not adopt that approach.

Safe Harbor Framework Restated. The new guidance states that it provides for a "more flexible and less formulaic approach toward variable compensation for longer-term management contracts" and “applies a more principles-based approach focusing on governmental control over projects, governmental bearing of risk of loss, economic lives of managed projects, and consistency of tax positions taken by the service provider.”

The new guidance provides a general safe harbor and another safe harbor for “eligible expense reimbursement arrangements.” The references in this description to the “new safe harbor” refer to the new general safe harbor when context requires.

Term Up to 30 Years Permitted. If a management contract meets the other requirements for the new safe harbor, the term of the contract may have a term that is no greater than the lesser of 30 years or 80% of the “weighted average reasonably expected economic life of the managed property.” By comparison, the existing Rev. Proc. 97-13 establishes separate safe harbors for management contracts with terms not exceeding five years, 10 years, 15 years, and, in some cases, 20 years. The new safe harbor applies the 80 percent limit to contracts with any term, although Rev. Proc. 97-13 does not apply the 80 percent limit to contracts having a term not exceeding five years.

The Rev. Proc. 97-13 safe harbors also generally limit the term of longer-term contract to not more than 80 percent of the useful life of the “financed property.” The reference to the “managed property” rather than the “financed property” possibly signals a helpful clarification, because the new safe harbor possibly can be read as focusing on the economic life of the property that is managed, and not the assets that are financed by a particular bond issue. New provisions that describe in more detail how the 80 percent limit applies may raise additional questions.

Variable and Fixed Compensation Permitted. If a management contract meets the other requirements of the new safe harbor, almost any type of variable or fixed compensation is permitted. The Rev. Proc. 97-13 safe harbors are based on the extent to which compensation is fixed. That fixed fee framework will no longer apply under Rev. Proc. 2016-44.

No “Net Profits Arrangements.” The new guidance relies more heavily on the rule in the IRS regulations that states that a management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation based, in whole or in part, on a share of net profits from the operation of the facility. The new guidance provides an additional gloss on this continuing standard, which may or may not be helpful to issuers and borrowers.

The new guidance states that compensation to the service provider will not be treated as providing a share of net profits if “no element of the compensation takes into account, or is contingent upon, either the managed property’s net profits or both the managed property’s revenues or expenses for any fiscal period.” For this purpose, the elements of compensation are “the eligibility for, the amount of, and the timing of the payment of the compensation.”

In general, this appears to be a somewhat strict interpretation of the no “net profits” standard. Because a contract will not qualify for the safe harbor if the “eligibility for” or “timing of” a payment is based on a net profits standard, it appears that any trigger for a payment based on net profits will not qualify. By comparison, in a recently released private letter ruling (PLR 20162203), the IRS concluded that a hotel management contract did not give rise to private business use, even though the contract provided for additional compensation triggered by a benchmark that was “a variant of net profits.” In that case, the IRS permitted favorable treatment of the contract, in part because the amount of the payment was not based on net profits. Such a private letter ruling only applies to the specific issuer that requested it, and it is unclear whether its favorable conclusion would still apply under the reframed standards of Rev. Proc. 2016-44.

The new guidance also states that "incentive compensation will not be treated as providing a share of net profits if the eligibility for incentive compensation is determined by the service provider's performance in meeting one or more standards that measure quality of services, performance or productivity," but only if the amount and timing of the payment meets the requirements set forth above.
In general, this reframed "net profits" standard will be one of the most important considerations in reviewing management contracts for private business use compliance. One important point, however, is it appears that the somewhat strict interpretation of the no "net profits" rule in the new guidance applies only for the purposes of the safe harbor, and is not necessarily an interpretation of the substantive rule in the IRS regulations for when a management contract is noncompliant.

No Bearing of Net Losses of the Managed Property. The new guidance provides that a management contract will not meet the safe harbor if it, in substance, imposes on the service provider "the burden of bearing any share of net losses from the operation of the managed property." For this purpose, an arrangement will not be treated as requiring the service provider to bear a share of net losses if: (1) the determination of the amount of the service provider's compensation and the amount of any expenses paid by the service provider (and not reimbursed), separately and collectively, do not take into account either the managed property's net losses or both the managed property's revenues and expenses for any fiscal period; and (2) the timing of the payment of compensation is not contingent upon the managed property's net losses.

The new guidance helpfully provides that, as an example, a service provider whose compensation is reduced by a stated dollar amount (or one of multiple stated dollar amounts) for failure to keep the managed property's expenses below a specified target (or one of multiple specified targets) will not be treated as bearing a share of net losses as a result of this reduction.

This new requirement is not set forth in Rev. Proc. 97-13. In general, it is framed in a manner similar to the provision concerning net profits arrangements.

Control Over Use of the Managed Property. Perhaps the core provision of the new guidance is a requirement that the qualified user "must exercise a significant degree of control over use of the managed property." This new requirement is not set forth in the current Rev. Proc. 97-13, although certain provisions relating to control were set forth in prior versions.

The "qualified user" is the term used in the safe harbors for the state or local government or 501(c)(3) organization that uses the bond-financed property. The qualified user is usually the issuer or the borrower, and may include other users, such as affiliates.

The new guidance states that this control requirement is met if "the contract requires the qualified user to approve the annual budget of the managed property, capital expenditures with respect to the managed property, each disposition of property that is part of the managed property, rates charged for the use of the managed property, and general nature and type of use of the managed property (for example, the type of services)." It is unclear whether the "significant degree of control" requirement can be established in other ways. For example, it is unclear whether a contract including most of this list of control rights, but not all, can still meet the safe harbor.

The new guidance provides some clarification of what is meant by certain of the listed control rights. As an example, a qualified user may show approval of capital expenditures for a managed property by approving an annual budget for capital expenditures described by functional purpose and specific amounts, and may show approval of dispositions of property in a similar manner. Further, a qualified user may show approval of rates charged for use by either expressly approving such rates (or the methodology for setting such rates) or by including in the contract a requirement that the service provider “charge rates that are reasonable and customary as specifically determined by an independent third party.”

These new control rights requirements, and in particular the requirement that the qualified user control rates, may raise many questions and require a change in practices for management contracts entered into, materially modified, or in certain cases extended after February 17, 2017. For example, in the case of physician contracts for hospitals financed with tax-exempt bonds, many existing “separate billing” arrangements that have been treated as within the Rev. Proc. 97-13 safe harbors may not be within the new safe harbors, unless the contracts are reframed to reflect these new requirements.

Risk of Loss of the Managed Property. In order to meet the new safe harbor, the qualified user must bear the risk of loss of the managed property (for example, upon force majeure). A qualified user does not fail to meet this risk of loss requirement as a result of insuring against risk of loss through a third party or imposing on the service provider a penalty for failure to operate the managed property in accordance with standards set forth in the management contract. This is another new requirement.

No Inconsistent Tax Position. Another new requirement is that the service provider must agree “that it is not entitled to and will not take any tax position that is inconsistent with being a service provider to the qualified user with respect to the managed property.” As an example, the service provider must agree not to take any depreciation or amortization, investment tax credit, or deduction for any payment as rent with respect to the managed property. It appears that this express agreement will need to be included in contracts under the new safe harbor.

This new requirement is another provision that will likely require a change from current prevailing practices for management contracts entered into, materially modified, or in certain cases extended after February 17, 2017. Many existing contracts that are treated as within the Rev. Proc. 97-13 safe harbors do not contain such an express agreement. Specific agreements regarding tax treatment of the type required by the new safe harbor as a matter of prevailing practice may have been included in long-term management contracts, but have been less common in shorter-term contracts because the tax treatment has been regarded as implicit.

No Circumstances Substantially Limiting Exercise of Rights. The new guidance continues the general requirement in Rev. Proc. 97-13 that the service provider must not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user’s ability to exercise its rights under the contract.

Like Rev. Proc. 97-13, the new guidance contains a “safe harbor within a safe harbor” for establishing that the service provider has no such role or relationship. This safe harbor continues the general approach of Rev. Proc. 97-13, but is in some respects stricter. The new guidance requires as a safe harbor that (1) no more than 20 percent of the governing body of the qualified user is vested in persons having a role with the service provider; and (2) that the governing body of the qualified user not include the chief executive officer of the service provider (or a person with equivalent management responsibilities) or the chairperson (or equivalent executive) of the service provider’s governing body. For the purpose of this safe harbor, “service provider” now expressly includes related parties to the service provider.

Because the specific requirements concerning overlapping board members continue to be framed as a “safe harbor within a safe harbor,” it appears that issuers and borrowers could reasonably meet the substantive requirement based on other factors.

Functionally Related and Subordinate Use. The new guidance contains a new helpful provision relating to "functionally related and subordinate use." Under this new rule, a service provider's use of a project that is functionally related and subordinate to performance of its services under a management contract does not result in private business use, if the contract meets all of the requirements of the new guidance. An example is use of storage areas to store equipment used to perform activities under a management contract.

Eligible Expense Reimbursement Arrangements. A separate safe harbor is established for "eligible expense reimbursement arrangements." An "eligible expense reimbursement arrangement" is defined as a management contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the service provider to unrelated parties and reasonable related administrative overhead expenses of the service provider. An eligible expense reimbursement arrangement does not result in private business use, regardless of whether the other requirements of the new guidance are met.

This separate safe harbor is an expansion of an exception set forth in the IRS regulations from private business use that previously applied only to management contracts for public utility property.

Contracts Properly Characterized as Leases. The new guidance recites a rule in the IRS regulations that provides that a lease generally results in private business use and that any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease (even if the arrangement is in form a management contract). The new guidance further recites a provision in the IRS regulations to the effect that, in determining whether a management contract is properly characterized as a lease, it is necessary to consider all the facts and circumstances, including (1) the degree of control over the property that is exercised by the service provider; and (2) whether the service provider bears the risk of loss of the financed property.

The new guidance does not otherwise expressly address the question of when a management contract is properly characterized as a lease. As a practical matter, however, it would appear that any management contract meeting the new safe harbor should not ordinarily be subject to characterization as a lease, because many of the new requirements (including requirements relating to control and risk of loss) are also factors relevant to determining whether an arrangement is in substance a lease.

Anti-Abuse Rules. The new guidance does not override any of the provisions of the IRS regulations. Accordingly, it is important to continue to interpret the new guidance in the context of the rules of the IRS regulations. In particular, the anti-abuse rules in the IRS regulations provide that, in certain circumstances, an arrangement that directly or indirectly passes through to private persons the financial benefit of tax-exempt interest rates may result in private business use, even if the arrangement would not otherwise result in private business use under the regulations. This anti-abuse rule will continue to be an important consideration in the consideration of certain management contracts.

Expected Future Developments. The new guidance does not request any further public comments. We expect that public comments may be submitted, however, particularly in light of the reconceived nature of the new safe harbor and its many new requirements. One likely request will be to permit issuers and borrowers to continue to rely on the Rev. Proc. 97-13 safe harbors, at least for a period longer than six months. There is no current indication, however, that the IRS and the Treasury Department would respond to any such public comments. We expect, however, that officials of the IRS and the Treasury Department will make clarifying public statements before February 18, 2017.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

MSRB Proposes Historic Dealer Markup Disclosure for Retail Investors.

WASHINGTON – In an historic action, the Municipal Securities Rulemaking Board has filed a markup disclosure proposal with the Securities and Exchange Commission that MSRB said will likely lower transaction costs for retail investors, enable them to better understand dealers' pricing practices, and improve investor confidence in the municipal market.

The proposal to amend rules G-15 on confirmation and G-30 on prices is similar to one that the board released in September, but includes a few changes as well as the MSRB's robust defense of why muni markup disclosure is needed.

The proposed rule changes would require a dealer, which buys or sells munis for or from its own account to a retail customer and engages in one or more offsetting transactions on the same trading day in the same security, to disclose its markup and markdown in the confirmation they send the customer.

The rule filing with the SEC also includes guidance for dealers on how to establish the prevailing market price of a municipal security in order to calculate their compensation.

If approved by the SEC, the proposed rule changes would take effect no later than one year afterwards, the MSRB said.

The board told the SEC in the filing that the proposal "would provide retail customers with information similar to that currently received by retail customers in equity trades and muni trades in which the dealer acts in an agent capacity (on behalf of the customer).

The proposal also would "enable customers to evaluate the costs and quality of the execution service that dealers provide … improve communication between dealers and their customers, and make the enforcement of Rule G-30 more efficient," the MSRB said.

"The concept of providing this type of transparency of transaction costs for municipal securities was first floated 40 years ago," MSRB executive director Lynnette Kelly said in a release. "Charges in technology and in the municipal market have made it possible for investors to receive similar transaction information as investors in the equity market. This is a meaningful and historical shift for the municipal market."

"Our proposal will provide dealer compensation information on an estimated 8,000 retail investor municipal securities transactions each day," Kelly said. "That's a significant number of people who will have additional information about the cost of their transactions."

Dealer groups, firms and some issuers had complained the proposed rule changes would add complexity to the market and be burdensome and costly.

But the MSRB told the SEC that it believes the benefits of markup disclosure far outweigh any burdens to issuers.

The board said it "recognizes that some dealers may exit the market or consolidate with other dealers as a result of the costs associated with the proposed rule change relative to the baseline."

But it added that it, "does not believe — and is not aware of any data that suggest — that the number of dealers exiting the market or consolidating would materially impact competition."

The MSRB provided evidence from a survey of pricing data on its EMMA system that it said buttresses its contention that this kind of muni market disclosure is needed.

It analyzed various data reported to EMMA by dealers from July 1, 2015 through September 30, 2015 and found the average daily number of retail-size customer transactions in the secondary market for munis in which dealers acted as principals was 15,538.

About 700 firms reported trades during the period but the top 20 with the highest volumes accounted for about 73% of the muni trades.

The MSRB found that of the retail-size customer trades in which dealers acted as principals, about 55% would have likely received markup and markdown disclosures had the rule had been in place. Of those trades, 83% of the offsetting trades occurred within 30 minutes.

For those trades where they would have been markup and markdown disclosure, the estimated median markup value was 1.2% and the median markdown value was 0.5%. The MSRB found that "many customers paid considerably more than the median value," with at least 5% of them paying markups higher than 2.25%. At least 5% of customer sales had markdowns higher than 1.51%.

The board also said that joint investor testing by the Financial Industry Regulatory Authority and the board revealed that investors do not understand how dealers are compensated when they act in a principal capacity and that investors want more information on this topic.

The biggest change from the proposal released in September to the one filed with the SEC is that the MSRB decided the markup disclosure requirement would be triggered if the offsetting transaction occurred on the same trading day rather than over a two-hour period.

The MSRB kept the same three exceptions. Markup disclosure would not be required: if the offsetting trade is done by a functionally separate trading desk; for primary market trades at the list offering price; and for municipal fund securities.

For a muni trade subject to markup disclosure, a dealer would have to calculate the markup under Rule G-30 and related guidance and express the markup as both a percentage of the prevailing market price and a total dollar amount. The dealer would also have to provide a reference or hyperlink to the "security details" for the muni on EMMA, along with a brief description of the type of information available on that page. The dealer would also have to provide the time of execution.

The proposed changes to Rule G-30 and related guidance state that a dealer 'must exercise "reasonable" diligence in establishing the market value of a security and the reasonableness of the compensation received." Also, the markup or markdown "must be a fair and reasonable amount, taking into account all relevant factors."

Rule G-30 already prohibits dealers from engaging in principal transactions with customers except at aggregate prices (including any markup or markdown) that is fair and reasonable, the MSRB noted.

The changes to Rule G-30 show how to establish the prevailing market price, upon which a dealer's costs and markup or markdown is determined. The dealer's compensation would be the amount it charges over the prevailing market price when selling bonds and the difference between what it pays and the prevailing market price when buying bonds.

The MSRB proposes a "waterfall" or hierarchy of factors that dealers should look at in establishing the prevailing market price of a muni.

First, dealers should look at their contemporaneous trades of the same muni with other dealers or customers to establish a presumption of prevailing market price. The prevailing market price should not differ if the dealer trade is with another dealer or a customer.

If the dealer believes contemporaneous trades are not representative of market value, they can rebut the presumption that they determine the prevailing market price by showing changes in interest rates, changes in the credit quality of the debt, or news that has changed the market's perception of the market value of the security.

If the dealer does not have any contemporaneous trades of the muni security, it can look at contemporaneous trades of the muni security among other dealers. If it fines none, it can look at trades of that muni security between other dealers and institutional investors with which the dealers regularly trade that same security. If there are none, the dealer can look at alternative trading systems, or other electronic platforms, where trades occur at displayed quotations.

If there are no contemporaneous trades in the muni security or quotes for it, the dealer can look at contemporaneous trades of similar securities. A muni security would be similar if it had a comparable yield. Other "non-exclusive factors" that can be used to determine similarity include: credit quality; the extent to which there are comparable spreads; general structural characteristics and provisions of issue; the size of the issue, the float or recent turnover of the issue and legal restrictions on transferability; and comparable federal and/or state tax treatment.

If these factors cannot be used to find similar securities, dealers can consider prices or yields derived from economic models, the MSRB said.

The board cautions dealers against relying on isolated transactions or quotations, saying they should be given little or no weight in establishing the prevailing market value or price.

Dealer groups are still concerned about the proposal's complexity.

John Vahey, director of federal policy of the Bond Dealers Association said that while "BDA accepts the premise that retail investors may benefit from greater information on transaction costs, we urge regulators to more fully appreciate the operational complexity of the proposed rule and the significant difference between establishing prevailing market price in the context of fair pricing and creating an automated operational process that computes prevailing market price for inclusion on a customer confirmation."

"Dealers, especially smaller dealers, will need at least 18 months to develop and test new systems designed to comply with the rule, especially with other significant effective dates, including the Department of Labor's fiduciary duty rule, fast approaching," he said.

Leslie Norwood, a managing director and co-head of the muni division at the Securities Industry and Financial Markets Association said, “We are reviewing the proposal and will send a comment letter to the SEC. At first glance, it appears to be substantially similar to the FINRA filing. We believe there are significant implementation and operational issues that will likely require additional guidance.”

The Bond Buyer

By Lynn Hume

September 2, 2016

Bill in Senate Would Boost Tribes' Ability to Issue Bonds.

WASHINGTON — A bill introduced in the Senate by Republicans would put Indian tribal governments more on a par with state and local governments for bond financings, giving them better access to capital to support infrastructure and local economic development.

The Indian Community Economic Enhancement Act of 2016 (S. 3234), introduced this summer by Sen. John Barrasso, R-Wyo., chairman of the Senate Committee on Indian Affairs, and Sen. John McCain, R-Ariz., would create an Indian Economic Development Fund to support the Bureau of Indian Affairs’ loan guarantee and the Community Development Financial Institutions bond guarantee program for Indian tribal communities.

The Senate Committee on Indian Affairs is scheduled to hold a hearing on the bill on Wednesday.

“Accessing capital is paramount for economic development in tribal communities,” Barrasso said. “This bill will break down existing barriers for growth, support loan and bond guarantee programs … and increase opportunities for tribal members.”

In a joint release, the Senators said the legislation was based on input they had received from Indian tribes and businesses. The bill would amend several pieces of existing legislation, including: the Native American Business Development, Trade Promotion, and Tourism Act of 2000; the Native American Programs Act of 1974; the Indian Trader Act; and the Buy Indian Act. The Republican Senators said the bill would also spur tribally owned businesses by improving and expanding on these current laws.

“Many Indian reservations across my home state of Arizona and the western United States continue to struggle with high unemployment rates and few business opportunities,” McCain said. “We must do more to change this.”

Kathleen Nilles, a partner at Holland & Knight in Washington, said the bill is “trying to do a lot of different things,” but added the effort to make the loan guarantee program more effective could be positive for tribal governments.

“One of the biggest problems for tribes in getting tax-exempt financing is just establishing to a regular lender their credit worthiness,” Nilles said. “Loan guarantees are really good for struggling tribal governments. They can result in getting a loan versus not.”

An area of the bill Nilles said struck her was a provision that states, “for purposes of financing and economic or community development, the essential governmental functions of an Indian tribe shall be considered to include any function that may be performed or financed by a state or unit of local government with general taxing authority."

Indian tribal governments have long called for a repeal of tax law restrictions that limit them to only issuing governmental bonds if the proceeds are used for "essential governmental functions" such as schools or roads. Unlike state and local governments, tribes cannot issue private activity bonds. The vague nature and implicit reference to repealing the essential governmental function in the bill does raise additional questions, Nilles said.

"I'm somewhat skeptical that it would be effective since it overrides a tax code provision without even citing it," Nilles said. "I'm wondering if it would really be that effective because it says for purposes of financing and economic or community development, yet doesn't even mention tax-exempt financing."

Barrasso and McCain's bill, introduced on July 14 and referred to the Senate Committee on Indian Affairs, would establish an Indian Economic Development Fund that would allow Indian tribes to deposit funds beginning one year after the enactment of the measure.

Funding would be allocated beginning two years after the enactment of the act by the Secretary of the Treasury and administered through the Secretary of the Interior, according to the bill.

For each fiscal year, the Assistant Secretary for Indian Affairs would provide up to either $7.5 million or 40% of fund amounts in credit subsidies to the loan guarantee program of the Bureau of Indian Affairs under the Indian Financing Act of 1974.

No more than 5% of the fund can be used for administrative purposes each fiscal year. A reserve fund would also be created within the fund.

Nilles called the fund an "interesting" concept because of the access it allows tribal governments in depositing their own funds to an account.

"Tribes have gaming money, investment income on holdings or excess cash they could put into this fund and it could be used to support financing for other Indian tribes," Nilles said. "It sounds like a really novel idea."

In a statement put in the Congressional Record in July, Barrasso said remote locations and a lack of infrastructure are just two of the problems affecting the quality of life for tribal communities as well as the ability to build "strong sustainable economies."

"Indian tribes could engage in more cohesive community development and infrastructure building," Barrasso said. "Federal bureaucracy is diminished, thereby reducing the costs of economic development."

The Barrasso bill follows the bipartisan Tribal Tax and Investment Reform Act of 2016 (H.R. 4943) introduced by Rep. Ron Kind, D-Wis., in April, which would remove the special status for tribal government and establish a volume cap for their tax-exempt bonds. That bill, which also would effectively place tribal governments more on par with state and local governments under the federal tax law, is currently before the House Education and the Workforce Committee.

Under The American Recovery and Reinvestment Act passed in 2009, Tribal Economic Development (TED) bonds were created to ease restrictions on tribes' abilities to issue bonds.

Although TED bonds are not subject to the “essential governmental function” requirement, many tribes are hesitant to access them because they cannot be used for projects on trust land. The Kind bill would remove the location restriction that deters many tribes from utilizing TED bonds.

In August, the Internal Revenue Service published a notice saying the volume cap limit for TED bonds is $191.51 million and the amount of available cap is $957.54 million.

The Bond Buyer

By Evan Fallor

September 6, 2016

Judge Refuses to Stay Puerto Rico Bondholder Suit.

WASHINGTON – A federal judge in Puerto Rico has refused to temporarily halt a lawsuit in which bondholders claim Gov. Alejandro García Padilla violated PROMESA by declaring a moratorium on constitutional debt payments after the law was enacted but before a control board was established.

The lawsuit, which was filed on July 20 by Delaware-based Lex Claims LLC and other companies that hold Puerto Rico’s constitutionally backed debt, focuses on three actions the government took that allegedly violated PROMESA after President Obama signed it into law on June 30. They are seeking a declaration that the government violated PROMESA as well as an injunction halting the violations.

Puerto Rico fought the lawsuit claiming it should be stayed or temporarily halted under PROMESA. But Judge Francisco Besosa ruled on Sept. 2 that the stay doesn’t apply to this lawsuit.

John Mudd, a Puerto Rico lawyer who has closely followed PROMESA, said the decision against the stay on litigation may be a first step toward an ultimate ruling that García Padilla and the government infringed on PROMESA. The case will likely continue into October, he said, and there is a chance the seven-member oversight board created under the law could also weigh in on the government’s cited actions before a ruling is handed down.

The plaintiff companies charge in their complaint that the governor’s Executive Order 2016-30, which was also issued on June 30, violated a section of PROMESA that prohibits Puerto Rico from enacting new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory between the date of the law’s enactment and the time the oversight board and its chair have been appointed.

The complaint also claims that the commonwealth’s fiscal year 2017 budget violates that section because it “makes huge transfers outside the ordinary course of business and diverts vast resources to purposes that apparently enjoy political favor but are indisputably junior to constitutional debt.” The companies cite a roughly $800 million contribution to the pension system in the budget as well as about $250 million from the territory’s general fund to “prop up its insolvent Government Development Bank.”

“All of this is well outside the ‘ordinary course of business’ and flouts the Puerto Rico constitution, which expressly requires appropriations for full payment of constitutional debt,” the companies said in their complaint.

They also allege that a commonwealth law enacted on July 20 that allows the commonwealth, without approval of the oversight board, to take on responsibility for debts owed to the GDB by other, independent entities violates Section 207 of PROMESA. That section says Puerto Rico cannot "issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt" without getting the oversight board's approval.

The commonwealth responded to the complaint by arguing it triggered a provision of PROMESA that puts an automatic stay on debt litigation against the commonwealth.

"This is, in short, precisely the sort of bondholder litigation against Puerto Rico that PROMESA sought to halt for a temporary period to allow the commonwealth to stabilize its financial situation and to give the oversight board time to set up and review," the commonwealth said in a document filed with the court.

But Besosa's ruling that the stay did not apply was based mostly on considerations regarding the timing of the suit and whether the plaintiffs' requested relief claims could be considered monetary relief.

The first way a stay could be triggered is if the judicial actions "against the government of Puerto Rico … [were] or could have been commenced before the enactment of [PROMESA]," Besosa wrote in his order. He found that because the plaintiffs' complaint seeks an injunction enjoining commonwealth action that took place after PROMESA's enactment, the plaintiffs could not have brought the case before the enactment of the law and the case did not meet that requirement necessary to trigger the stay.

A suit could also be subject to the stay if it is a judicial action to recover a "liability claim" against the government of Puerto Rico that arose before the enactment of PROMESA, the judge said. The law associates "liability claim" with monetary relief, defining it as a claim that relates to liability, right to payment, or right to an equitable remedy for breach of performance if such breech gives rise to a right to payment, he said.

"In their amended complaint, plaintiffs expressly state that their lawsuit 'does not seek to compel payment on plaintiffs' bonds.' Rather, plaintiffs seek only declaratory and injunctive relief," Besosa wrote. "Thus, plaintiffs do not seek to recover a right to payment that arose before PROMESA's enactment" and the suit does not meet that requirement for a stay.

The Bond Buyer

By Jack Casey

September 7, 2016

NABL: Municipal Finance Caucus Launches Website.

The Congressional Municipal Finance Caucus has recently launched its website.

NABL members should check the list of members of the Municipal Finance Caucus. If your representative is already a member of the caucus, contact them and thank them for joining. If your representative is not a member, contact them and ask them to join.

The website also includes news related to the caucus and additional resources, including letters from stakeholders, letters to house leadership and testimony before the House Ways and Means Tax Policy subcommittee.

The caucus's website can be found here.

BDA Submits Comment Letter to the SEC on FINRA's Retail Confirmation Rule.

Today, Bond Dealers of America submitted a comment letter to the SEC in response to FINRA's proposed retail confirmation disclosure rule.

BDA's letter focuses on:

- The urgent need for FINRA and MSRB to harmonize their rules from a policy, testing date, and effective date standpoint
- BDA urges regulators to appreciate the operational burdens associates with automating the process for making a 'prevailing market price' judgement
- Due to the operational and technology burdens of the rule and the other major rules that will be effective in the next 18 months, BDA urges regulators to adopt an effective date no earlier than June 2018
- BDA urges the SEC to institute proceedings on both the FINRA and MSRB filings to extend the time period for assessing the rules prior to approval or disapproval

Proposal Overview

Scope of Securities: Corporate and agency debt securities

Scope of Transactions: The proposal will apply to retail trades when a dealer has entered into an offsetting principal trade in the same security in a total quantity greater than the retail trade during the same trading day

Timing of Trades: FINRA proposes to have the rule apply to offsetting principal and retail trades that are executed on the same trading day as opposed to over a certain amount of hours during a given trading day

Disclosure Computation: FINRA has proposed to base the confirmation disclosure computation on the difference between the prevailing market price that exists at the time of the retail trade and the retail trade price

Proposed Exceptions: FINRA has proposed two exceptions to the rule for 'functionally separate trading desks' and for fixed-price offering transactions executed at the fixed offering price

Proposed Effective Date: No later than 365 days after the SEC approves the rule

A recap of BDA's April 2016 Member Fly-in Meeting with FINRA and MSRB can be viewed here.

BDA's December 2015 comment letters to FINRA and MSRB can be reviewed here.

NABL Endorses the Modernizing American Manufacturing Bonds Act.

Read the NABL press release.

TIF Bond Issues Last Year Hit Highest Level Since 2006.

Tax-increment financing began in 1952 in California as a way to jump-start development in blighted areas.

Since then it has spread to nearly every state. Typically new property tax revenue generated by development in a TIF district is pledged to pay for public infrastructure within the district. Laws in some states also allow sales tax to be diverted and some permit TIF funds to be spent on private development costs.

New TIF bond issues in 2015 totaled nearly $700 million, according to data analyzed by Elise Lomel of the financial advisory firm PFM Group in Atlanta. That total, which excludes refinancings, was the highest yearly total since 2006, excluding California, which largely exited the TIF sector by 2012. Not all TIF projects involve the issuance of debt.

However, the numbers have bounced around in recent years, and the total in the first half of 2016 came to just $77 million, her analysis found. Counting California, the peak for non-refinancing TIF bonds since 2000 occurred in 2006, at about $3 billion.

U.S. property values began falling in late 2006 as the real estate bubble burst. That eventually led to declines in property tax receipts, sometimes below levels needed to cover debt service.

“Certainly some projects failed, or they had to be restructured or refinanced, but really what happened is nothing new could happen,” said Toby Rittner, chief executive of the Council of Development Finance Agencies. He said use of the tool “really took a back seat.”

Compared with a decade ago, “there’s absolutely more scrutiny” of TIF proposals by both the public and private sectors, he said. He estimates no more than 30% of local governments still back TIF bonds, a common practice 15 years ago.

THE WALL STREET JOURNAL

By SCOTT CALVERT

Sept. 6, 2016 2:37 p.m. ET

Write to Scott Calvert at scott.calvert@wsj.com

GFOA, NABL Publish Guidance on PostIssuance Tax Compliance.

WASHINGTON – The National Association of Bond Lawyers and the Government Finance Officers Association on Thursday each issued guidance to issuers and counsel on how to comply with tax-exempt bond rules after the issuance of tax-advantaged bonds.

The guidance came after three years of research, according to Matthias Edrich, an attorney with Kutak Rock in Denver and chair of NABL's tax law committee.

Edrich, who authored NABL's 14-page publication, said the groups issued the guidance because of the Internal Revenue Service's focus on the need for issuers to have good policies and procedures in recent years.

"The IRS is telling them today we hope you have effective policies in place, but what means effective is up to you," Edrich said. "We recommend policies that contain certain elements, but they are not penalized if they don't have these elements."

NABL cited several suggestions that the IRS had for issuers in March, including that they: identify those responsible for coordinating post-issuance tax compliance; provide for due diligence reviews at regular intervals; address the timely identification of noncompliance; and promote the retention of adequate records.

"Procedures assist the entity in complying with tax and document covenants, in the transfer of knowledge and to streamline the entity's financing operations, all for the purpose of maintaining the tax benefits associated with the bonds," NABL officials wrote.

The IRS oversees and enforces the post-issuance compliance of tax-advantaged bonds, and NABL said the agency has increased its efforts to encourage issuers and conduit borrowers to adopt effective procedures.

Though it provides oversight, the agency does not dictate to an issuer what elements need to be in a policy, Edrich said. The guidance was written as tips for what an issuer could consider without proposing best practices, he said.

"It's written fairly broad and supposed to be a guide for issuer boards to be able to think about what are best practices," Edrich said. "It's a paper that I hope will be useful for years to come."

Procedures suggest courses of action an entity can take to maximize the likelihood that rules applicable to tax-advantaged bonds are followed after the bonds are issued and remain outstanding.

A bond is considered tax-advantaged if it is tax-exempt and interest on the bond is excluded from gross income to the bondholder, if it is a taxable tax credit bond and the holder receives federal tax credits, or if it is a direct-pay, taxable bond and the issuer receives federal subsidies from the Treasury Department.

The four principal categories that tax compliance rules address, according to NABL, are the expenditure of bond proceeds, the use of bond-financed assets, the investment of bond proceeds, and the gathering and maintenance of records relating to the bonds.

The two groups added that issuers should consult with bond counsel and other professionals on post-issuance tax compliance as tax laws, rules and practices continue to change.

Emily Brock, director of GFOA's federal liaison center, said the guidance stems from enforcement actions and settlements, including those reached under the IRS Office of TaxExempt Bonds' Voluntary Closing Agreement Program (VCAP) as well as other IRS settlements. The IRS has said if such procedures are in place, then it will consider them when issuing orders, she added.

"It's so important that issuers know and understand all of these compliance procedures so that they can prevent and correct any tax violations while tax-exempt bonds are outstanding," Brock said. "We just really wanted to make sure the issuer and counsel are informed of the procedures."

GFOA and NABL issued separate publications, though they were produced as complementary guidance to their respective members.

The guidance was published separately because GFOA wanted to glean those things most important to issuers, while issuers can share the "significantly comprehensive" NABL publication with counsel, Brock said.

"The project taken together is a way for NABL and GFOA to reach an even broader community," she said.

As of Thursday afternoon, Edrich said he had not received any feedback from NABL members or IRS officials.

NABL officials also said that Congress may develop new types of tax-advantaged bonds in the future that will be subject to additional special tax rules. This could need to be addressed in revisions to the entity's post-issuance tax compliance procedures, they said.

The Bond Buyer

By Evan Fallor

September 8, 2016

Privately Sold Junk-Rated Chicago School Bonds Could Go Public.

Municipal bond investors may get a shot at $150 million of junk-rated bonds issued by the Chicago Board of Education if the bank that purchased the bonds in July decides to launch a public offering amid financial uncertainties for the school district.

Brian Marchiony, a spokesman for J.P. Morgan Securities, which acquired the bonds in a private placement, declined to comment on Tuesday beyond the disclosure in an official statement released by the school board on Friday that the bank may sell the bonds.

The 30-year general obligation bonds were sold with a 6.5 percent coupon and 7.25 percent initial yield, which was 513 basis points over Municipal Market Data's benchmark triple-A scale. The wide spread was indicative of the big market penalty paid by the cash-strapped Chicago Public Schools (CPS) to sell debt.

The bonds' official statement showed that the nation's third-largest public school system, which began its new school year on Tuesday, remains under fiscal stress, projecting to end fiscal 2017 on June 30 with a slim cash balance of $30.5 million.

That balance takes into account that the district's $5.46 billion operating budget will include $215 million from Illinois that is tied to the uncertain enactment of state-wide pension reforms. It also relies on $31 million in savings if the Chicago Teachers Union (CTU) reverses its opposition to a CPS plan to have teachers pay more toward their pensions.

The district is struggling with escalating pension payments that will jump to $720.2 million this fiscal year from $676 million in fiscal 2016, as well as drained reserves and debt dependency.

CPS expects to begin short-term cash flow borrowing of about $325 million this week, followed by $150 million in early October, according to the official statement. The board of education in August approved up to $1.55 billion of short-term debt in fiscal 2017.

The document also warns of a possible teachers' strike that could affect state aid revenue if the school year is shortened.

CTU President Karen Lewis said in her back-to-school message on Monday that teachers will not work another year without a contract and that negotiations are a priority. The union's contract expired on June 30 of last year. Its last prolonged strike occurred in 2012.

REUTERS

Tue Sep 6, 2016 12:46pm EDT

(Reporting by Karen Pierog; Editing by Matthew Lewis)

Big Banks Don't Follow Goldman on Trump Donation Ban.

Firm aims to prevent breaches of rules on muni bonds and pensions; other banks weigh contributions case by case

Goldman Sachs Group Inc. has taken a hard line on contributions by its partners to Donald Trump's campaign for fear of running afoul of municipal bond and pension rules. Its Wall Street peers aren't following suit.

J.P. Morgan Chase & Co., Bank of America Corp., Citigroup Inc., Morgan Stanley and Wells Fargo & Co. all said they currently had no plans for a blanket contribution ban. Instead, those banks are looking at contributions on a case-by-case basis.

Donations to the campaign of Donald Trump became an issue for Goldman because of vice presidential candidate Mike Pence, who is governor of Indiana. Goldman's roughly 550 partners received an email from the compliance department in late August instructing them that as of Sept. 1 they were banned from making campaign contributions to sitting state and local elected officials or candidates running for state and local offices. The email noted that this includes the Trump campaign. Other Goldman employees wouldn't be affected by the blanket ban.

The new policy, though, doesn't affect donations by Goldman partners and other employees to groups such as the Republican National Committee, an option that remains open and that has been communicated informally within the bank, according to a person familiar with the matter.

Rather, Goldman said the focus on the Trump campaign and Gov. Pence was aimed at preventing breaches of the Securities and Exchange Commission's pay-to-play rules. Those rules seek to prevent investment advisers from using political contributions to influence government officials charged with selecting underwriters for municipal securities or advisers for government investment assets, including state pension funds.

Under a rule adopted by the SEC in 2010, political contributions to state and local officials with influence over hiring investment advisers above a few hundred dollars trigger a two-year “timeout” period, during which the investment adviser can’t receive compensation from the relevant government entity. The rule applies to contributions from firms’ top executives and managing partners, employees who solicit a government entity for advisory business and any political-action committees they control.

Similar rules have covered municipal-bond underwriting since the 1990s. After John McCain tapped then-Alaska Gov. Sarah Palin as his running mate in 2008, the Municipal Securities Rulemaking Board, which makes rules regulating dealers of municipal bonds, sent a notice to the broker-dealer industry informing them that contributions to the McCain-Palin campaign would trigger the ban under its rules.

The pay-to-play rules aren’t an issue for Hillary Clinton’s campaign because neither she nor her running mate, Tim Kaine, is a state or local government official. Mr. Kaine is a U.S. senator for Virginia and a former governor of that state, but the rules don’t cover federal officeholders or former officeholders.

Goldman’s blanket contribution ban is especially notable because the firm isn’t among the bigger Wall Street players in the market for underwriting municipal bonds. It has, however, served as an investment adviser to the Indiana Public Retirement System.

The firm may be taking a harder line because it has previously run “afoul of the municipal-bond pay-to-play rules,” said Stetson University College of Law associate professor Ciara Torres-Spelliscy. In 2012, Goldman agreed to pay $12 million to settle charges that a former banker in its Boston office worked for the political campaign of a former Massachusetts treasurer while winning bond underwriting business in the state. The fine was the largest ever imposed by the SEC at the time for pay-to-play violations, said Ms. Torres-Spelliscy.

In addition, there has been concern within Goldman about “look-back” provisions in the rules. Even if an employee who isn’t covered makes a donation, this could later become an issue if that staffer moves into an area that is covered by pay-to-play rules, such as within certain areas of the firm’s municipal-bond or asset-management businesses. That has become more of a concern as employees move into the asset-management business, according to a person familiar with the matter.

Rivals aren’t being as strict. Instead of applying a ban to all senior staff, other banks are following longstanding policies of evaluating whether a particular individual’s role would make a proposed contribution a breach of pay-to-play rules.

At Bank of America, certain employees are supposed to get clearance from compliance officials before making any political contributions, a spokesman said. Citigroup employees, depending on their role and location, can be required to get clearance for political contributions, according to a spokesman. Policies at J.P. Morgan, Wells Fargo and Morgan Stanley are generally along the same lines.

Most big banks have their own political-action committees, but they usually don’t contribute to presidential candidates.

It is unlikely that the different approaches among big banks will tilt campaign fundraising either way. Even though political contributions from Wall Street banks in this election cycle have tilted Republican, much of that has gone to defunct campaigns of former candidates for the Republican nomination and campaigns for House and Senate seats, rather than to the Trump campaign.

Mrs. Clinton is the top recipient of campaign cash from employees of many of the big banks, according to data from the Center for Responsive Politics.

THE WALL STREET JOURNAL

By JOHN CARNEY and LIZ HOFFMAN

Updated Sept. 8, 2016 3:09 p.m. ET

—Emily Glazer and Christina Rexrode contributed to this article.

Philadelphia Financial Management Of San Francisco buys $30,811,255 Stake in Assured Guaranty Ltd. (AGO)

Assured Guaranty Ltd. (AGO) : Philadelphia Financial Management Of San Francisco scooped up 212,292 additional shares in Assured Guaranty Ltd. during the most recent quarter end , the firm said in a disclosure report filed with the SEC on Aug 15, 2016. The investment management firm now holds a total of 1,134,435 shares of Assured Guaranty Ltd. which is valued at $30,811,255.Assured Guaranty Ltd. makes up approximately 6.64% of Philadelphia Financial Management Of San Francisco's portfolio.

Other Hedge Funds, Including , First Trust Advisors Lp boosted its stake in AGO in the latest quarter, The investment management firm added 108,312 additional shares and now holds a total of 386,023 shares of Assured Guaranty Ltd. which is valued at $10,654,235. Assured Guaranty Ltd. makes up approx 0.03% of First Trust Advisors Lp's portfolio. Sg Americas Securities sold out all of its stake in AGO during the most recent quarter. The investment firm sold 4,038 shares of AGO which is valued $108,340.Quantbot Technologies Lp reduced its stake in AGO by selling 305 shares or 2.27% in the most recent quarter. The Hedge Fund company now holds 13,111 shares of AGO which is valued at $351,768. Assured Guaranty Ltd. makes up approx 0.04% of Quantbot Technologies Lp's portfolio.Nordea Investment Management Ab boosted its stake in AGO in the latest quarter, The investment management firm added 36,765 additional shares and now holds a total of 119,870 shares of Assured Guaranty Ltd. which is valued at $3,151,382. Assured Guaranty Ltd. makes up approx 0.01% of Nordea Investment Management Ab's portfolio.

Assured Guaranty Ltd. closed down -0.18 points or -0.65% at $27.59 with 4,84,081 shares getting traded on Thursday. Post opening the session at $27.89, the shares hit an intraday low of $27.34 and an intraday high of $27.89 and the price fluctuated in this range throughout the day.Shares ended Thursday session in Red.

On the company's financial health, Assured Guaranty Ltd. reported $1.03 EPS for the quarter, beating the analyst consensus estimate by $ 0.50 according to the earnings call on Aug 3, 2016. Analyst had a consensus of $0.53. The company had revenue of $372.00 million for the quarter, compared to analysts expectations of $284.76 million. The company's revenue was down -42.7 % compared to the same quarter last year.During the same quarter in the previous year, the company posted $1.83 EPS.

Assured Guaranty Ltd. is a holding company. The Company provides through its operating subsidiaries credit protection products to the United States and international public finance including infrastructure and structured finance markets. The Company markets its financial guaranty insurance directly to issuers and underwriters of public finance and structured finance securities as well as to investors. It conducts its financial guaranty business on a direct basis from the following companies: Assured Guaranty Municipal Corp. (AGM) Municipal Assurance Corp. (MAC) Assured Guaranty Corp. (AGC) Assured Guaranty (Europe) Ltd. (AGE) and Assured Guaranty Re Ltd. (AG Re). The Company insures obligations issued in the United States. It also offers credit protection through reinsurance. The Company insures and reinsures various types of United States public finance obligations and various non-United States public finance obligations.

By: Robert Richardson

Last Updated: September 7, 2016

Study Shows Broncos' Mile High Stadium Cost Federal Taxpayers $54 Million.

Sports Authority Field at Mile High, the home of the Super Bowl 50 champions, has shortchanged federal tax collectors by $54 million, a Brookings Institution analysis says.

In the first-of-its-kind study, Brookings looked at 36 professional football, baseball, basketball and hockey stadiums built or renovated since 2000 using $13 billion in tax-exempt municipal bonds and concluded the work resulted in a $3.2 billion federal subsidy, and $3.7 billion loss in federal tax revenue.

It's one thing when local taxpayers pay for stadiums in their hometowns. Front Range residents in 2002 assumed about $300 million of the $400 million cost to build the Broncos' new stadium in the parking lot of the old Mile High Stadium. The tax-free municipal bonds that funded the new stadium were paid off in 2012.

If those bonds had not been not tax-exempt, the federal government would have collected $49 million in taxes. Then taxpayers who held those bonds got a federal income tax break that saved them estimated $5 million, adding up to a $54 million total loss to the federal taxpayers since 2002, according to the Brookings study.

"I love sports. If I want to pay for sports in my town, I have a weak-but-plausible argument that my local community should subsidize a stadium," said Brookings senior fellow Ted Gayer, who co-wrote the study. "But the weakest and most implausible argument is that someone in Montana should be subsidizing whether or not a football team relocates from St. Louis to Los Angeles. A federal subsidy should have federal benefits. There is no benefit to me whether the Broncos play in Denver or Austin."

The Broncos are hardly the largest beneficiaries of tax-exempt municipal bonds. That crown belongs to the New York Yankees, which spent $2.5 billion on Yankee Stadium in 2009, $1.7 billion of which was financed by tax-exempt municipal bonds issued by New York City. The interest earned on those bonds is tax-exempt, resulting in a federal subsidy of $431 million. Bondholders who used the bonds to lower their tax liability received $61 million in tax breaks, creating a total revenue loss of $492 million.

The researchers at Brookings concluded that beyond some hard-to-measure local benefits, federal taxpayers saw no economic benefit for their tax dollars spent on stadiums in Indianapolis, Chicago, Cincinnati, Houston, Miami, Milwaukee, Washington, D.C. and Seattle.

It didn't used to be that way. Stadiums once were private affairs. But in 1953, the era of public financing for stadiums began when Milwaukee lured the Boston Braves with a new stadium built with tax dollars. In the mid-1980s, Congress passed the Tax Reform Act, which meant to curtail federal subsidies by tying them to municipal financing deals.

That legislation required that municipalities finance a large chunk of the stadium and said governments can't pay for that financing with taxes harvested from the stadium. Instead, cities typically rely on taxes on hotels, rental cars and "tourist taxes" to support new stadiums and still qualify for federal subsidies in the form of tax-free bonds. Taxing visitors is a good way to convince local taxpayers they won't be alone in shouldering the burden of paying off the new stadium.

"That doesn't make sense," Gayer said. "If you want to collect revenue, you should collect from the people who are gaining the most from the new stadium: the people who are actually using the stadium, not my aunt across town who doesn't care about football."

Gayer and his fellow researchers conclude that Congress should end tax-exempt financing for private businesses like professional sports stadiums. Or, at least, the researchers said, limit tax subsidies by offering "qualified private activity bonds" that are subject to statewide caps. A state cap would mean that New York would not get $860 million federal subsidies for homes for its Yankees, Mets, Nets and Islanders and Texas could not get $446 million in federal subsidies for its Astros, Texans, Cowboys, Rockets, Spurs and Stars.

The researchers say the evidence of economic benefits of new stadiums spilling into local communities is "weak."

"Academic studies consistently find no discernible positive relationship between sports facility construction and local economic development, income growth or job creation," reads the study.

Jon Caldara, the Independence Institute chief who has long railed against stadium financing schemes he calls "corporate welfare," said booing a new stadium in Bronco Country does not bolster his popularity. But he does it anyway.

"As much as sports fans might be grateful, I don't think they realize they are on the hook for other people's entertainment. Even if everything the economic development guys say is true — that for every dollar spent it spurs $20 or something in spending in the community, which, by that logic, we should be building five stadiums — it's still wrong because you have the government picking winners and losers," Caldara said. "The money they are playing with is our money, and they are taking chances with our money. We need to recognize we are subsidizing private-sector entertainment.

"At what point do the teams belong to the city?" Caldara asked. "If we are going into debt, and our kids are taking on all this long-term risk, at what point does the mayor get to choose the starting lineup?"

THE DENVER POST

By JASON BLEVINS | jblevins@denverpost.com

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SEC Fines BOK Financial Over Municipal Bond Scheme.

BOK Financial Corp. has agreed to pay $1.6 million to the Securities and Exchange Commission to settle charges it failed to exercise proper oversight over a series of fraudulent bond offerings by a Georgia businessman.

The SEC also filed a complaint against a former senior vice president at the bank, Marrien Neilson. The agency said Neilson failed to properly oversee bond offerings by an Atlanta-based businessman, Christopher F. Brogdon.

Brogdon has been charged separately with fraud and ordered to repay $85 million to investors in a scheme to buy and renovate senior-living centers.

The SEC said BOK failed in its gatekeeper role as indenture trustee and dissemination agent for Brogdon's bond offerings. Tulsa-based BOK Financial is parent to Bank of Oklahoma, the state's largest bank.

"BOKF was in a crucial gatekeeper position to stand up for bondholders and notify them about material problems with the bonds, but instead turned a blind eye and chose to protect Brogdon and the fees it collected from his deals," said Lara Shalov Mehraban, associate regional director in the SEC's New York office, in a news release Friday.

BOK did not admit or deny the SEC's findings. The bank agreed to pay disgorgement of more than $984,000 in fees it collected on the bond deals. BOK also will pay a penalty of $600,000 and interest of more than $83,500. "With today's settlement agreement, we can put this matter behind us and move forward," Scott Grauer, BOK's executive vice president, said in a statement. "Our company has built its solid reputation by being a good corporate citizen, serving the needs of clients and communities with integrity, and never sacrificing our values in the interest of short-term results.

"The actions of a former employee in this matter are completely contrary to our guiding principles. Our board of directors and audit committee have worked with the SEC to create policies and procedures to prevent this from happening again."

BOK took a $1.6 million charge to its first-quarter earnings for legal contingencies related to the case.

The SEC said the bank and Neilson were aware that Brogdon was withdrawing money from reserve funds for the bond offerings and didn't replenish the reserve accounts.

BOK and Neilson also were aware one of the nursing homes put up as collateral had been closed for years, the agency said.

The SEC said Brogdon, 67, amassed nearly $190 million from dozens of municipal bond and private placement offerings for nursing homes, assisted-living facilities and other retirement community projects. The agency said he commingled investor funds, diverting investor money to other business ventures and personal expenses.

According to its civil complaint against Neilson, the SEC said she brought Brogdon in as a client to BOK in 2000.

Neilson, 66, was a senior vice president in the bank's corporate trust department from 2007 until she was fired in July 2015.

Some employees at the bank's corporate trust department in Tulsa raised concerns with Neilson about the Brogdon bond offerings, the SEC said.

“They described the offerings to her as a ‘house of cards’ or that Brogdon was ‘robbing Peter to pay Paul,’ phrases they also heard used by brokers who called with questions about the status of the bonds,” the SEC said in the complaint.

“Neilson herself received at least one complaint in 2012 that Brogdon was running a Ponzi scheme. Nevertheless, Neilson never escalated these complaints internally at BOKF and did not express concerns to others in Tulsa Corporate Trust about the offerings.”

Neilson, a former Broken Arrow resident, has been living in Mexico since March, the SEC said in its complaint.

THE OKLAHOMAN

by Paul Monies

September 10, 2016 12:00 AM CDT

Christopher Brogdon Bond Investors Seek Recovery of Their Investments: New Lawsuit Filed.

CLEVELAND, Sept. 10, 2016 /PRNewswire/ — Christopher Brogdon municipal bond investors have retained the Peiffer Rosca Wolf securities attorneys and are pursing claims to recover money they invested with Brogdon. Recently, the Peiffer Rosca Wolf law firm filed a lawsuit on behalf of investors seeking to recoup their investments from third parties that assisted the Brogdon bond programs according to allegations in the complaint. Brogdon bond investors may contact Alan Rosca or James Booker at 888-998-0520 for more information about the case.

Christopher Brogdon organized a series of municipal bond offerings that sought money for investments in retirement housing, nursing homes, and assisted living facilities that would be managed by Brogdon-controlled companies. Bonds were sold to raise money for projects related to the purchase, renovation, construction, leasing and managing of nursing homes and assisted living.

In November 2015, Brogdon and a number of related entities were sued by the Securities and Exchange Commission (“SEC”). The SEC alleged that Brogdon committed fraud by making misrepresentations in offering documents provided to investors, commingling investor funds, and not disclosing from where investor payments were derived. Specifically, instead of directing investor funds for their intended purposes, Brogdon was accused of diverting some of those funds to other uses, including his family’s personal expenses and facilities unrelated to the offering for which the funds were raised.

While testifying under oath, Brogdon refused answering questions about his bond programs and invoked his Fifth Amendment right against self-incrimination.

What Investors May Do

The Peiffer Rosca Wolf attorneys have been investigating this matter and have filed a lawsuit on behalf of investors against third parties that allegedly assisted the Brogdon bond program, with the goal of recovering money for those investors. They continue to explore additional recovery options from third parties that may have assisted the Brogdon program.

If you purchased any bonds that were a part of any of the various Brogdon offerings, you may have options to recover your investments. If you would like to learn how you might be able to recover your money, you should contact Peiffer Rosca Wolf securities attorneys Alan Rosca or James Booker at arosca@prwlegal.com or by phone at 888-998-0520.

The Peiffer Rosca Wolf law firm prosecutes cases on behalf of investors throughout the United States. For more information and updates about Christopher Brogdon's offerings and this matter, please visit www.brogdoninvestors.com.

Attorney advertising. Prior results do not guarantee a similar outcome. Please visit our website, www.securitieslitigators.com, for important disclosures, office locations, and attorney admissions. The SEC's allegations are not proof of liability and anyone should be presumed innocent until and unless otherwise found liable or guilty in a court of law. Peiffer Rosca Wolf Abdullah Carr & Cane, A Professional Law Corporations ("Peiffer Rosca Wolf").

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Study Shows Stadiums and Arenas Received $3.2B in Federal Tax Breaks.

A new study from the Brookings Institution, which looked at 45 stadiums and arenas in the four major sports leagues that have been built or renovated in that time, reveals the those stadiums and arenas received $3.2 billion in federal tax breaks.

Those stadiums were financed in part with municipal bonds, which are issued by local governments. Interest on those bonds is exempt from federal taxes. Brookings calculates that the federal government lost $3.2 billion in tax revenue – and $3.7 billion if you count the windfall that high-income bondholders get.

Yankee Stadium, which opened in 2009 and cost $2.5 billion to build, topped the list of those entities getting the tax breaks. It received a federal subsidy of $431 million, and the federal government lost a total of $492 million in possible revenue.

The NFL has built or renovated 13 stadiums using tax-exempt bonds since 2000. Major League Baseball has used bonds for 12 stadiums. The NBA has built seven arenas with them, and the NHL has built four.

Brookings says that stadiums and arenas provide few economic benefits – undercutting a main argument that teams use to persuade cities to finance stadiums.

Because the tax breaks are federal, taxpayers in other states helped fund construction of the stadiums and arenas in other parts of the country. That means that people who live near teams are paying for stadium construction whether they're fans or not.

In order to qualify for federal tax exemption, cities and states can pay back only 10% of the bonds with money that comes from the stadium, such as ticket sales or the rent that the team pays to use the stadium.

Stadiums were largely built without federal funding until 1953. When baseball's Boston Braves moved to Milwaukee, they received a new publicly funded stadium. Using federal money for construction became a trend, despite attempts by Congress to stop it.

More on the effort to build a 65,000-seat Las Vegas-area stadium to house the proposed LV Raiders in Tuesday's print edition and on line at GamingToday.com.

September 10, 2016 9:48 AM

by Robert Mann

[S&P: Rising U.S. State Post-Employment Benefit Liabilities Signal An Unsustainable Trend.]

Total unfunded state other postemployment (OPEB) liabilities have increased, according to S&P Global Ratings' latest survey of U.S. states. For states that have completed new OPEB actuarial studies since our last survey (which used 2013 or prior studies), total liabilities increased $59.4 billion, or 12% over a span of two years. This reverses a trend of stable to declining liabilities found in our 2014 and 2013 surveys. However, looking at recent growth in total liabilities alone would ignore that many states have taken measures to curb their liabilities, with 17 of the 41 states reporting new data showing a decline in liabilities. Also, several states, such as Alaska, have made significant contributions or changes to plans yet to be reflected in new actuarial data. Nevertheless, the growth in total state OPEB liabilities underscores the magnitude of liability growth states can experience over a short period of time absent fully funding actuarially required contributions (ARC) or implementing reforms.

Many states have favored underfunding OPEB ARC as a trade-off to address more immediate rising costs amid a slow revenue growth environment, a practice that we do not view as sustainable. A trend of underfunding and potential changes to actuarial assumptions suggests that OPEB liabilities and annual costs will continue to rise. Given the lean margins we see across many states, fully funding ARC, or even growth in pay-as-you-go expenses, could tip states into budgetary imbalance. While we view efforts to better align OPEB funding with actuarial costs as favorable, increased payments might come at the cost of other areas of budget management.

Treatment of OPEB liabilities varies widely across states, and as such, our analysis studies a variety of ratios, plan offerings, and flexibility to adjust benefits. We also recognize that changes to plan offerings and increases in funding could mitigate OPEB challenges, noting that often OPEB reform efforts produce material improvement in key metrics only as a result of sustained commitment on the part of policymakers and sometimes over many years.

Overview

- While overall unfunded state OPEB liabilities have increased, many states have taken action to mitigate rising costs.
- Liabilities measured on a per capita basis remain low for most states, with several notable exceptions.
- OPEB expenditures make up a small share of overall general spending, but a significant share of liabilities, and these costs could pressure state budgets if fully funded.
- Analysis of OPEB pressure requires a variety of measures.

- Despite many states’ ability to change OPEB benefits, thus reducing liabilities, OPEB ratios still matter to credit quality.

Continue reading.

07-Sep-2016

GAO Examines Use of P3s to Deal With Excess Property.

Federal and state agencies have used two types of P3 agreements to transfer ownership or control of unneeded property to private developers but a range of challenges hinder their use, the U.S. Government Accountability Office (GAO) has found.

GAO was asked by the Senate Committee on Homeland Security and Government Affairs and one of its subcommittees to review how federal and state agencies have used P3s to dispose of or arrange for private management of excess properties.

The report focuses on two types of P3s: enhanced use leases, through which a private developer manages a government-owned property for an extended length of time, and swap exchanges, through which a private developer assumes ownership of government property in return for building a new asset or completing other construction for the public partner.

The report’s authors also examined negotiated sales agreements, in which a property sale is contingent on one of the partners meeting specific property-related requirements but private developers do not generally consider these types of agreements to be P3s.

GAO found that federal agencies have used P3s to deal with excess property fewer than 10 times per year, according to the General Services Administration (GSA), and states’ use of these types of agreements seems to be even lower. For example, none of the three states that were identified as potential negotiators of P3s for this purpose — Washington, Virginia and Texas — could recall recent examples of such agreements being finalized.

GAO identified several obstacles to using P3s to deal with excess government property. They range from a lack of private sector interest in underused properties that have not been well maintained or require massive environmental remediation to difficulty in assessing both the value of such property and the costs of developing or repairing it.

GAO also pointed out that GSA, which helps agencies to acquire and manage their buildings, needs to obtain experience and expertise in conducting P3s. For example, GSA’s inspector general has expressed concern over the agency’s lack of experience in negotiating P3 agreements in connection with GSA’s proposal to swap the FBI’s dilapidated Washington, D.C., headquarters to developers of a replacement building. P3 negotiations for a similar project, involving the potential swap of several federal buildings in the southwest portion of the city in exchange for construction of a new GSA building, fell through in February.

The need to obtain political support from policy-makers and the surrounding community for private development of public assets is another potential hurdle to using P3s to manage excess government property, noted the report’s authors.

Despite these obstacles, P3s could help governments to divest themselves of underused, superfluous or obsolete properties and transfer the responsibility of maintaining and operating historic buildings and infrastructure that may be needed in the future to private developers, GAO said in its report. The report notes that the National Aeronautics and Space Administration worked with GSA to enter into an up-to-96-year lease with a private developer to rehabilitate, develop new uses for, operate and maintain Moffett Federal Airfield and the historic Hangar One in Mountain View, Calif. The Department of Transportation also is working with GSA to swap unused property near the Volpe Natural Transportation Systems Center in Massachusetts to a private developer in exchange for construction of a new facility.

NCPPP

September 8, 2016

[Eds and Meds, Plus Labs and Govs: Partnering to Bring Innovation in Albuquerque.]()

To say a lot is going on in Albuquerque, New Mexico, is an understatement. “We’ve got $157 million in projects coming out of the ground downtown right now. That’s unprecedented,” says Gary Oppedahl, director of economic development for the city. “We’re changing the skyline of downtown Albuquerque, and we were told when we got here that there was no money for any development.”

New buildings are only a small part of Albuquerque’s transformation. “It’s really about culture change here,” Oppedahl says, and he’s not referring to New Mexico’s unique heritage. Instead, it’s attitudes toward entrepreneurship, collaboration, and development. “What I’m doing here is making a platform city with an operating system that is inclusion, infrastructure, and innovation. And quite frankly, innovation is the result if you do inclusion and build an environment which supports it as well.”

At the heart of this vision is entrepreneurship facilitated by an innovation district that covers a two-mile (3.2 km) radius. The hub—named Innovate ABQ and located on 7.2 acres (2.9 ha) in the center of downtown—is the result of a public/private partnership spearheaded by the city of Albuquerque, the University of New Mexico (UNM), and the broader business community. The most important component was getting people to connect, communicate, and collaborate, says Oppedahl. Central New Mexico Community College and UNM, which are typically adversaries in the fight for dollars from the legislature, are working together, prompting a reaction from the community, which Oppedahl describes as, “If these two can get along, maybe I should get out of my silo and start thinking of ways I can collaborate.”

The headquarters of all the major health institutions including Molina Healthcare, Lovelace, and Presbyterian are downtown. Both the Air Force Research Lab and Sandia National Lab are committed to a presence in the innovation district, cementing another important component of Oppedahl’s formula to get “eds, meds, labs, and govs” downtown and collaborating

The involvement of Albuquerque’s research facilities was important. “They have their principal investigators outside the gates mixing with our entrepreneurs,” Oppedahl says. “I’m telling everybody, ‘We’re a laboratory city,’ and it’s a double-entendre. We certainly have national labs, which gets us to the point where we have more PhDs per capita than any other community in the world. But we’ve never been able to translate that into jobs, so now we’re starting to do that.”

To spark and support new businesses, Innovate ABQ also fosters six accelerators, including the first accelerator in the United States focused on painters, sculptors, and other artists. Two years ago, there were no accelerators in New Mexico. “We don’t care what your status is. If you’re an entrepreneur and you want to do some stuff, we’re here,” says Oppedahl, emphasizing the focus on inclusion.

Innovate ABQ might be a catalyst, but it is only a small part of the changes taking place in Albuquerque. The city has pledged more than $24 million in projects, including a retractable 1,000-seat arena added to the convention center. An existing plaza in the center of downtown got improved lighting, a water feature, and shading, and that is only one facet of endeavors to infuse new life into the Civic Plaza. A Heart of a Community grant for placemaking from Southwest Airlines sparked the Civic Plaza Presents initiative to bring performance arts, bands, art installations, outdoor movies, even a synthetic ice rink during the holidays to the venue. The downtown now has a full-service grocery store, which is part of a new four-story mixed-use project with rental apartments, retail, and parking. A large percentage of the apartments will be workforce housing. Another public/private collaboration is the creation of a destination entertainment district, which will also include residential units, adjacent to Innovate ABQ.

Another project focuses on transportation and creating a walkable and bikable downtown, including a proposed 50-mile (80 km), multiuse trail and bikeway. Plans call for a new transit-oriented district, but, instead of light rail, Albuquerque Rapid Transit will use electric buses, making it the first gold-rated bus rapid transit (BRT) system in the country. Implementation will cost substantially less than light rail. Still, the buses travel in a dedicated lane and platforms are raised to facilitate entry. Mayor Richard Berry has described it as “a game-changer for Albuquerque.”

The ten-mile (16 km) system runs along a stretch of old Route 66. According to the plan, historic buildings will be preserved. Todd Clarke, chief executive officer (CEO) of New Mexico Apartment Advisors, estimates that almost $100 million is being invested in transit-oriented development in addition to the investment in the new transit system. Oppedahl says he sees this as another opportunity. “Each of our little enclaves and neighborhoods should have [its] own personality, and I’m creating an economic development center in each one of them.”

Albuquerque’s reputation as a tech center is just beginning. Already it has been included on the Rise of the Rest tour and cited as one of the top five cities to get in on the ground floor for a tech startup and one of the top five cities for women in tech. “In the end,” Oppedahl says, “I’ve got five strategies: business development, workforce challenge development, community development, cultural entrepreneurship development, and capital development. I know [that] if I do those five things, we will markedly change our economy, and it’s working. So it’s those five strategies, 36 performance indicators, and 138 projects that we’re going to accomplish and transfer all of those things into the community.”

The Urban Land Institute

By Camilla McLaughlin

August 29, 2016

S&P: What's Next For U.S. Municipal Green Bonds?

The issuance of U.S. municipal green bonds – bonds backing projects with positive environmental effects — is increasing, joining a trend in the broader market for similarly labeled debt instruments. S&P Global Ratings estimates the municipal market will see between $6.3 billion and $7.2 billion of green bonds in 2016 (see chart 1), a meaningful step up from $4.1 billion in 2015 and $2.4 billion in 2014. Our 2016 estimate is based on actual data through July from Climate Bonds Initiative (CBI) assuming issuance stays on pace and average par remains the same.

However, we believe the market for U.S. municipal green bonds could be significantly larger. A recent HSBC report conservatively identified $30.3 billion of municipal bonds issued from 2014 to 2016 that met its green standard, only $10.9 billion of which were actually labeled green by issuers. This suggests the potential for significant growth simply by a broader acceptance of this asset classification. The same HSBC report estimates that green labeled municipals represented about 8% of the total $118 billion in labeled green bonds issued globally since 2007.

Overview

- The U.S. municipal market could see $6.3 billion-$7.2 billion of green bonds issued this year, up from $4.2 billion in 2015.
- In our view, the potential for broader participation by municipal market issuers into green bonds is high, and will be a function of costs relative to benefits, investor demand, and broader public support for infrastructure projects that promote sustainable long-term environmental objectives.
- Over time we expect to see metrics to evaluate the level of disclosure and environmental credentials of green bonds becoming more important to investors.

Issuance of green labeled transactions in the corporate debt market may reach $15 billion this year while they are just beginning in the real estate sector (see “The Corporate Green Bond Market Fizzes As The Global Economy Decarbonizes,” published April 15, 2016 on RatingsDirect, and “New Shoots Emerging In Green Bond Market For Real Estate,” published Aug. 22, 2016). Globally, the market for green bonds is expected to expand significantly as signatories to the December 2016 Paris climate change agreement increase efforts to reduce carbon emissions (see “The Paris Agreement: A New Dawn for Tackling Climate Change, Or More Of The Same?,” published Jan. 18, 2016).

Continue reading.

07-Sep-2016

Ask Colorado Whether Infrastructure Spending Works.

Here’s something all of divided America should be able to agree on: Smart infrastructure investment works. For evidence, look at Colorado, where elected officials of both parties trace an economic boom to a decision 27 years ago to spend more than $2 billion on a new Denver airport.

The Denver International Airport was the brainchild of Federico Pena, who was elected mayor in 1983 and who would become the Secretary of the Transportation and Energy departments in the Clinton administration. It was assailed as a boondoggle by some local businessmen in a campaign led by Roger Ailes, then a Republican media consultant and later the impresario of Fox News.

The airport was financed by revenue bonds, which proved to be among the best performers in the market for state and local government debt. Today it is the linchpin of Colorado’s transition to a global 21st-century economy flush with high-paying jobs and enhanced by daily nonstop flights to Asia, Central America and Europe.

Colorado has many economic advantages, from shale to ski resorts and beyond, but state officials say the new airport was the catalyst needed to set off the boom. “It’s foundational,” Governor John W. Hickenlooper said in an interview last month in his statehouse office. “I mean we look at infrastructure” as the central element “to build our new economy around.”

JOB GROWTH TOOK OFF …

The airport is seven times the size of Stapleton Airport, which it replaced in 1995 as the largest public-works project in Colorado history. It still is the only major new U.S. airport since Dallas-Fort Worth in 1974. Even though the plan for the new airport was approved by 65 percent of Denver voters in 1989, some airline executives resented its cost and didn’t think it was needed. Robert L. Crandall, the chairman of American Airlines, told Time Magazine in October 1991 that the facility was “a field of dreams” where “a lot of money is being poured into building a great big airport way out in the boonies,” 24 miles from downtown. “There is no need for a new airport in Denver,” he said.

On the contrary, the DIA’s annual economic impact today exceeds $26 billion, more than eight times Stapleton’s in 1984, according to George Karayiannakis, the airport’s director of financial risk and analysis. It has generated more than 270,000 jobs, almost twice the comparable figure for Stapleton 32 years ago, and $295 million in concession gross revenue, compared to $45 million for Stapleton in 1994 (about $73 million after adjusting for inflation). Passenger traffic was a record 27.5 million for the six months through June, up 6.8 percent from 2015. Stapleton had 33.1 million passengers in all of 1994.

Denver’s population during the past five years surged 10 percent to about 700,000 as the fastest-growing major American city after Austin, Texas, overtaking Baltimore, Boston, Detroit and Washington as it climbed to No. 19 from No. 22 in 2010, according to data compiled Bloomberg. As the Denver population booms, the city’s and state’s unemployment rates remain among the lowest at 3.8 percent, more than a percentage point below the national average of 4.9 percent, according to Bloomberg data.

The DIA’s success helped put Denver at the top for U.S. homeowners with above-average growth and below-average price fluctuations. During the past 30 years, the housing market for Denver produced the second-best return after Portland, Oregon, adjusted for price swings of the 20 major cities in the U.S., according to data compiled by Bloomberg. Denver, unlike any other major city, has been among the top five performers over 10 years and 5 years, reflecting its capacity for both fast and steady growth. During the past year, mortgage delinquency in the state declined 22 percent, the fourth-best result after Florida, Oregon and the state of Washington.

… AND SO DID HOME VALUES

Colorado’s economy, meanwhile, is leaving behind its reliance on mining and energy. Since 2012, the accommodations and food services industry grew 22.5 percent, faster than in any other state except Texas and California, according to Bloomberg data. Health care and social assistance companies expanded 17.4 percent, the most for any state. Wholesale trade grew 17.7 percent, the fourth best in the U.S. since 2014, and finance and insurance grew 7.4 percent, bettered only by Utah and Nevada. Today, material and energy make up less than 30 percent of the total market capitalization of Colorado’s publicly traded companies, down from 53 percent in 2010.

Colorado’s bet on infrastructure has been a bonanza for investors as well. The DIA’s bonds during the past five years provided a total return (price appreciation and income) of 19 percent, better than Atlanta, Orlando and Houston, according to data compiled by Bloomberg. Municipal bonds sold by Colorado have the sixth-best return of any state and returned 8.8 percent the past 12 months, a percentage point more than the U.S. average. Bonds sold by the E-470 Public Highway Authority returned 23 percent the past year.

Back in 1984, “a year into my administration, we fell into a major recession,” Pena recalled in a telephone interview last month. “Our unemployment rate was two points above the national average. We had a 30 percent office vacancy rate in downtown Denver. The state of Colorado actually had a net loss of population which had never happened before. Every sector of the economy imploded.” He said shrinking city revenues persuaded local politicians that “we had to invest.”

“We had Republicans, Democrats and Independents coming together to get the airport approved, financed and built,” Pena said. “We understood we had to diversify from what for the past 90 years was referred to as the boom and bust economy.”

The 2016 presidential election is 62 days away and both candidates have urged a greater commitment to national infrastructure. Colorado shows why this national priority could be the gift that keeps on giving.

Bloomberg View

By Matthew A. Winkler

SEP 6, 2016 5:00 AM EDT

(With assistance from Shin Pei)

This column does not necessarily reflect the opinion of the editorial board or Bloomberg LP and its owners.

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China’s Reviving the American Heartland — One Low Wage at a Time.

For six years, the General Motors factory that used to make Chevy Trailblazers in Moraine, Ohio, sat abandoned, a rusting monument to the decline of the American auto industry.

These days, the plant is humming again, fueled by a resurgent U.S. consumer — but now under Chinese management. On the shop floor, Chinese supervisors in sky-blue uniforms that carry the logo of the new owners, Fuyao Glass, teach American employees how to assemble windshields.

Drive along Interstate 75, through America’s industrial heartland, and you’ll find no shortage of Chinese-owned firms like Fuyao. They’re setting up shop in states such as Ohio and Michigan, key voter battlegrounds in November, where traditional manufacturing has been hollowed out — in many cases, by trade. With China.

It's those losses that shape election headlines. Republican candidate Donald Trump excoriates China as an unfair trading partner, and blames a whole class of American politicians — including his Democratic rival Hillary Clinton — for selling out U.S. workers to Beijing. It's an aggressively America-first brand of capitalism. Clinton's whole career suggests she's more comfortable with globalization, though lately she's been drawn into the China-bashing and trade-skepticism too.

Open Arms

But away from the sound and fury of the national campaign, state and municipal governments of both stripes have welcomed Chinese firms with open arms. When it took over the GM plant, Fuyao got a $9.7 million tax credit from the Republican-run state of Ohio, which also kicked in a $1-million grant for road work.

"This is an example of international capital choosing to locate here in Dayton, Ohio," said Republican Congressman Michael Turner, who represents Moraine, about a 10-minute drive southwest of Dayton. "And that international capital happens to be Chinese."

For a quick wrap of the free-trade debate, click here.

And there happens to be a lot of it about. This year has seen $75 billion of Chinese acquisitions across the U.S., more than double the previous record — ranging from luxury hotels to aluminum-foil makers. Since 2008, Chinese companies have invested $4.1 billion in Ohio and Michigan alone, according to the Rhodium Group, a research firm.

Fuyao acquired roughly half the old GM plant in 2014, spending $450 million to buy and remodel it. For a company that started out as a small producer of covers for water-meters and is now the world's second-biggest auto-glass supplier, the acquisition capped a decade-long push into U.S. markets.

For the Dayton area, it meant employment: the city, hometown of the Wright brothers, was hit hard by the shutdown of the GM plant two days before Christmas in 2008. The following year another big local name, NCR Corp., announced it was moving to Atlanta after pioneering the cash-register during more than a century based in Dayton.

So what do locals make of the changes? Clinton-friendly confirmation that the wheels of global capitalism are turning more or less as they should? Or vindication for Trump's dark vision of a declining America betrayed by its economic leaders?

A bit of both, it turns out.

'Sitting Empty'

"Hey, 1,700 jobs is 1,700 jobs," said Shawn Kane, a 28-year-old chef shopping at the Kroger grocery store in Moraine last month. "At least it's not sitting empty anymore."

They're jobs that tend not to pay as well as factory work once did, though — and there probably aren't as many of them. To keep its production in the U.S. viable, Fuyao uses more automation than it does in China, said John Gauthier, president of Fuyao Glass America Inc. "Our customers, all they care about is that their cost doesn't increase," he said.

A line worker at Fuyao starts at $12 per hour, equivalent to an annual salary of about $25,000. GM workers at the old Moraine plant could make at least twice that, topped off by perks like defined-benefit pensions, according to union officials and former employees.

"When you don't have enough protections for American workers, and when you've got a globalized economy, this is what happens," said Chris Baker, a 40-year-old sales rep based near Moraine. "This is the new normal. It's very sad."

Fearing Japan

Anyone wanting to defuse the tensions around economic competition from China could point to the 1980s version, featuring Japan as the feared rival. Those one-time bugbear companies seem like features of the landscape now: Toyota is the third biggest seller of vehicles in the U.S., ahead of Chrysler.

China's carmakers are on the way too, said Paul Haelterman, managing director of automotive advisory services at IHS Markit in Southfield, Michigan. They'll be "selling product in the United States before the end of this decade," he said. (Chinese-owned Volvo already is, of course.)

For now, it's the Chinese parts-makers that are taking the lead, and location is key to their investments. Fuyao's factory in Moraine is close to Big Three plants in the Detroit area, as well as a Honda factory in Marysville, Ohio.

Saginaw, Michigan, where Nexteer Automotive makes power-steering systems, is plugged into the same geographic nexus. Seven years ago, Nexteer was part of Delphi, which was in bankruptcy protection. Its suitors included a private-equity firm that was considering "chopping the business up and marketing it off in pieces," said Mike Richardson, interim president of Nexteer. "Within three years, we wouldn't have existed as we did before."

Patient Capital

Instead, the company was sold for $465 million to Chinese investors. It's now majority-owned by state aircraft maker Aviation Industry Corp. of China. One of AVIC's first moves was to ratchet up spending on research and development by 50 percent, Richardson said. Nexteer turned a profit of $205 million last year and is now worth $3.9 billion.

"When AVIC came along, we didn't really think about them being Chinese," Richardson said. "We did see them as an industrial purchaser that understood what we were going through and understood the value of a long-term view."

That's one China: a source of plentiful, patient capital for American companies. Then there's the vast pool of cheap labor back home — and that's what has made Chinese industrial expansion a bigger shock to American workers than the Japanese version ever was.

For free-trade advocates like Jagdish Bhagwati, author of "In Defense of Globalization," the rise of a new economic power is a fact that has to be dealt with — "China's not going to disappear down the ocean" — and autarky isn't one of the options.

'It Bugs Me'

"If we cut off China from coming in, as many people would like to do, you also deny yourself the gains from trade," said Bhagwati, an economics professor at Columbia University. Instead, policy makers should be "helping those guys move from where jobs are being lost to where they're being created."

Some of the new ones will be in Moraine, if Fuyao's plans work out. The company aims to be the world's biggest auto-glass plant, with capacity to equip 4 million cars a year, double the current level. That will require a workforce of 2,500 people, up from 1,700 now.

That current staff includes as many as 200 Chinese nationals sent over to train their U.S. co-workers. At lunch, a local restaurant delivers deep-fried prawns and chicken's feet for the Chinese employees, many of whom speak halting English. Near the plant's entrance, construction is underway on a Chinese restaurant.

It'll mostly cater to employees — but will also open its doors to the people of Moraine.

It's a cosmopolitan scene. But not everyone in America's factory belt has come to terms with that kind of change.

Up the I-75 in Saginaw, Cheryl Badger is a 62-year-old nurse who used to work at GM. "I take issue any time an American business is sold to foreigners," she said. "It bugs me. But ain't nothing I can do about it."

Bloomberg Business

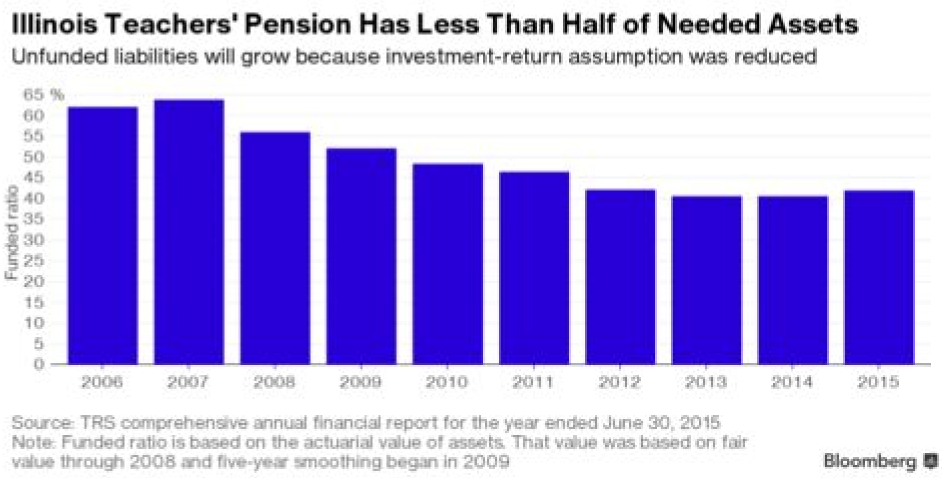
by Andrew Mayeda

September 8, 2016 — 4:00 PM PDT Updated on September 9, 2016 — 6:00 AM PDT

[Illinois Pension Crisis Builds as Market Turmoil Deals a Setback.]

Illinois's lackluster investment gains are making its most notorious problem — pension debt — even worse.

The state with the least-funded retirement system in the U.S. may see next year's contributions jump by nearly half a billion dollars after its largest pension, the Teachers' Retirement System, reduced the assumed rate of return on its portfolio. Because states count on such earnings to cover benefits checks, Moody's Investors Service said the change added $7.4 billion to Illinois's debt to the fund, a tab that it will have to chip away at year by year.



"There are no easy answers or financial or accounting tricks to stabilizing the state's pension systems or the state’s finances,” said Laurence Msall, the president of the Civic Federation, a Chicago-based non-profit that tracks Illinois’s budget. “Pension funds have been allowed for decades to be dramatically underfunded and now — at a time when market returns are difficult for the fund — they need more and more contributions just in order to not lose ground from their already precarious financial position.”

The Land of Lincoln isn’t alone. Public pensions’ returns have dropped as central banks hold down interest rates, pushing bond yields to record lows, and global stock markets have been besieged by volatility. The under-performance has caused funds nationwide, including those in New York, Texas and Oregon, to roll back the returns actuaries use to determine how much governments need to save meet obligations to retirees.

In Illinois, the lowest-rated state, efforts to shore up its employee pensions have fallen victim to political gridlock. With the Democrat-led legislature and Republican Governor Bruce Rauner only able to agree on a stopgap budget, Illinois is on track to end the fiscal year $7.8 billion in the red, according to the Commission on Government Forecasting and Accountability.

It’s been more than 16 months since the Illinois Supreme Court threw out a pension restructuring that was projected to save $145 billion over three decades. The now-defunct plan cut benefits, a violation of the state constitution, according to the justices. Rauner and legislators haven’t been able to enact a new overhaul.

After posting a return of 0.1 percent in the year through June, the teachers fund decided late last month to cut the assumed rate of return to 7 percent from 7.5 percent, a step that will “significantly” affect how much Illinois will owe in the year that starts July 1, according to the retirement plan. While the magnitude hasn’t been determined yet, if the lower figure had been used for the most recent actuarial evaluation Illinois would have had to pay another $421 million this year, according to the fund’s actuaries.

Even with the short-term hit to the budget, the accounting change is a positive for Illinois by prodding it to put more into the cash-strapped fund, said Tom Aaron, a senior analyst at Moody’s.

“It’s reducing risk,” Aaron said. “It leads to better funding.”

Financial markets haven’t been helping pensions catch up, given declines in the U.S. stock market in August and January and equity-price declines overseas.

The impact led other Illinois pensions to pare their expectations. In July, the trustees for the judges’ retirement system lowered their return assumption to 6.75 percent from 7 percent. That same month, the board for the state employees’ system cut its estimate to 7 percent from 7.25 percent, according to member newsletters.

It’s “difficult or near impossible” for entities like pensions to meet current liabilities with these zero or near zero percent yields, Bill Gross, billionaire manager of the Janus Global Unconstrained Bond Fund, said on CNBC on Aug. 31. He said Illinois will “ultimately” have to raise taxes.

The yields on Illinois debt are the highest among states tracked by Bloomberg. The difference between Illinois’s 30-year bonds and top-rated securities widened to 1.7 percentage points on Sept. 2, a three-week high, according to data compiled by Bloomberg.

“It’s still tough to see how the state is going to be able to devote the resources that are necessary to get them where they need to be,” said Tom Schuette co-head of investment research and strategy at Solana Beach, California-based Gurtin Municipal Bond Management, which doesn’t hold Illinois debt among its $10.6 billion of state and local debt. “There’s so much uncertainty.”

Bloomberg Markets

by Elizabeth Campbell

September 7, 2016 — 2:00 AM PDT

Puerto Rico Failed to Make $9.9 Million Bond Payment on Sept. 1.

Puerto Rico’s Government Development Bank, which served as the island’s financial adviser and lender before being placed in a state of emergency, failed to pay investors $9.9 million of interest due Sept. 1., according to a regulatory filing.

The bank, whose regulator says is insolvent and faced a cash shortfall of as much as $1.3 billion in June, has been defaulting on debt payments since May. September’s missed payment was disclosed in a filing Tuesday on the Municipal Securities Rulemaking Board’s website, called EMMA.

President Barack Obama last week selected seven people from lists provided by congressional leaders from both parties to serve on a federal control board that will oversee any restructuring of Puerto Rico’s $70 billion of outstanding debt and monitor the island’s budgets.

Puerto Rico defaulted on nearly $1 billion on July 1, including $780 million on general-obligation bonds, the largest such payment failure in the $3.7 trillion municipal-bond market. The island’s economy has shrunk in the past 10 years and residents are leaving at record levels to find work on the U.S. mainland.

Bloomberg Markets

by Michelle Kaske

September 6, 2016 — 7:44 AM PDT

BlackRock Says Bond Market Views Puerto Rico Board as Positive.

The bond market is viewing a new federal control board charged with overseeing Puerto Rico’s finances as a positive for investors, according to BlackRock Inc.’s Sean Carney.

“Some of the better-secured bonds had a bit of a relief rally after the board was named,” Carney, head of municipal strategy, said Wednesday after a media presentation at the company’s headquarters in Manhattan. BlackRock manages about $124 billion of municipal debt, including Puerto Rico bonds.

President Barack Obama last week appointed seven members to the board from lists submitted by congressional leaders of both parties. The panel must curb the island’s recurring budget shortfalls, oversee any restructuring of its $70 billion of debt and address a $43 billion unfunded pension liability.

"The names that were put on the board seem to be modestly friendly for bondholders, but it's going to be a very long and drawn out process," Carney said. "We don't know what questions they're going to have to answer or what hurdles they'll have to clear. So there's still a lot of unknown, but I think the market appreciated a little bit of certainty in an uncertain environment."

Some Puerto Rico securities gained in price following the board's formation on Aug. 31. Commonwealth general obligations with an 8 percent coupon traded at an average 66.7 cents on the dollar Wednesday, the highest average price since July 29 and up from 65.3 cents on Aug. 30, the day before Obama's board announcement, according to data compiled by Bloomberg.

"We got a nice relief rally out of the board being put in place and we'll look for some more answers, a little bit more clarity," Carney said.

An index of commonwealth securities has gained every day in the past week, increasing by 1 percent since Aug. 31, according to S&P Dow Jones Indices.

Puerto Rico began defaulting on agency debt a year ago and missed nearly $1 billion of principal and interest due to investors on July 1, including $780 million on general obligations. It was the largest such payment failure in the $3.7 trillion municipal-bond market. The control board will manage any debt restructuring after island officials have been negotiating for months with bondholders to accept less than what they're owed on their investments.

"There's no income being generated on these bonds," Carney said. "It's somewhat of a recovery play. This is different than the traditional municipal market, so we have to view it that way. It's more of an opportunistic holding."

Bloomberg Markets

by Michelle Kaske

September 7, 2016 — 11:22 AM PDT

Tobacco Debt Is Addictive for Yield-Starved New York Muni Buyers.

In other times, state and local-government bonds backed by the legal settlement with cigarette makers might scare off would-be buyers, given the risk of default if Americans keep kicking the habit.

But with tax-exempt yields holding near the lowest on record, the securities have rallied, delivering returns of 12 percent this year, double the gain for U.S. stocks and more than any other segment of the municipal-debt market, according to Standard & Poor's indexes. The demand led seven New York counties to offer $294 million of the bonds Thursday, this year's first issue of securities once stung by speculation they'll leave investors burned as smoking declines. The 10-year bonds were priced to yield of 2.11 percent, just 0.6 percentage points more than top-rated securities, according to data compiled by Bloomberg.

"The security is coming to market at a time when there isn't a lot available offering any yield for New York investors," said Ted Jaeckel, who co-manages the $5 billion BlackRock Strategic Municipal Opportunities Fund.

The bonds have been lifted in part because cigarette shipments, which determine the size of the annual settlement payments that back the securities, were little changed in 2015 as low gasoline prices gave consumers more money to spend. That marked a shift from prior years, when sales fell faster than expected, leaving much of the debt with junk ratings because of the likelihood that they won't be paid off when they come due.

"We still have a big allocation to the sector," said David Hammer, head of municipal bonds in New York for Pacific Investment Management Co., which has pared the share devoted to such bonds because of the price rise. "We see a lot of value in it compared to others."

Tobacco bonds were first issued more than a decade ago to allow governments to get an advance on the settlement, which was to help them pay for the health-care costs related to smoking. Since then, tobacco consumption has dropped more than some estimated, with the difficulty of accurately predicting the annual payouts driving Fitch Ratings in June to pull its ranking on the securities.

The New York counties, in offering documents circulated to investors ahead of the sale, said the timely repayment could be jeopardized by regulations, litigation, competition and tax increases, among other factors.

The bonds were sold for Broome, Dutchess, Onondaga, Rensselaer, Ulster, Oswego and Sullivan counties. Mark LeVigne, deputy director of the New York State Association of Counties, which worked with the borrowers, declined to comment.

The sale comes comes after New York Attorney General Eric Schneiderman struck a deal to end a long-running legal dispute over the 1998 settlement in October, freeing up money for the state, counties and New York City that had been held in escrow. S&P Global Ratings gave the new securities preliminary ratings from A on shorter maturities to BBB, two steps above junk, on those due as late as 2045.

"It's in a fairly robust ratings range, that could make it attractive for individual investors," said BlackRock's Jaeckel.

Bloomberg Markets

by Darrell Preston

September 8, 2016 — 2:00 AM PDT Updated on September 8, 2016 — 1:31 PM PDT

San Francisco Boom Spurs Record Debt Sale for Airport Expansion.

In San Francisco, almost everything is flying high: real estate, start-ups and now, the airport.

Serving a region whose economy is fueled by the technology industry, San Francisco International Airport is embarking on a $5.7 billion expansion as it grapples with traffic that has nearly doubled in nine years. The city's sale next week of $881 million in airport bonds, its biggest ever, is the first in a series that will draw demand from municipal investors who've snapped up airline-related debt, leaving the securities on pace to outperform the overall municipal market for a sixth straight year.

Overall, airports have benefited from lower fuel costs and the recovering U.S. economy, as higher numbers of passengers boost collections from parking fees and bar tabs. San Francisco's airport is seeing even more travelers, thanks in part to Silicon Valley.

“Traffic has been booming,” said Kevin Kone, the airport’s managing director for finance. “Here in the Bay area, the economy is strong. We’re responding to the needs of the traveling public.”

At San Francisco International, tourists, budding tech executives and professionals browse high-end boutiques and stretch in yoga rooms as they pass through the region or head to the Pacific Rim. Arrivals and departures total 51.4 million in the 2016 fiscal year, up from 33.9 million nine years ago, documents circulated among investors show. Moody’s Investors Service ranks the debt A1, the fifth-highest investment grade, pointing to the hub’s strong market position and ability to scale back expansion plans if needed.

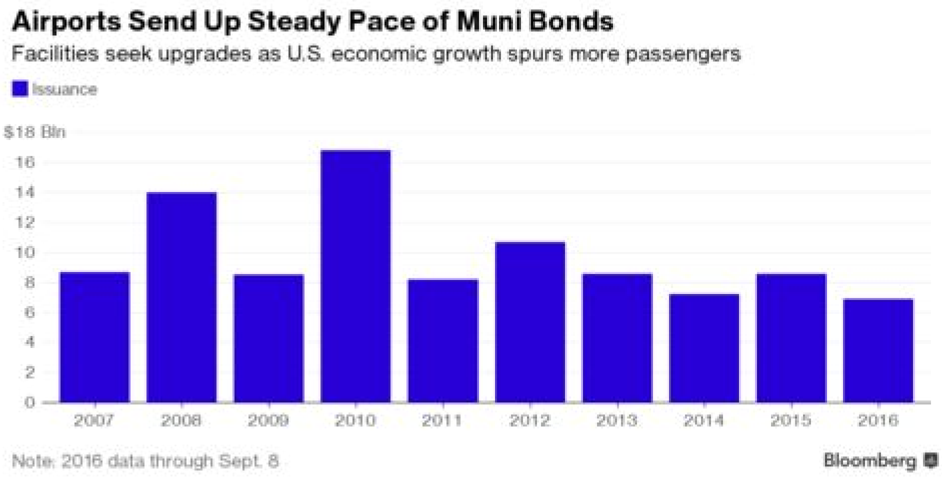
The sale comes amid a streak in airport bonds. In 2015, the securities gained 4 percent, beating the market’s 3.6 percent advance, marking the fifth straight year of outperformance, Bank of America Merrill Lynch data show. So far this year, the debt has continued to have an edge, albeit a smaller one: a 4.6 percent return to the market’s 4.5 percent through Sept. 7.

“The lower hanging fruit has been picked within the sector,” said Gabe Diederich, a Menomonee Falls, Wisconsin-based portfolio manager at Wells Fargo Asset Management, which manages about $40 billion of municipals. He may buy the San Francisco deal if the yields are high enough. “If you have a change that’s due to a slowing economy or yields moving up more broadly and that causes outflows from mutual funds, that could certainly change the performance.”

For now, airports are still reporting growth in passenger traffic. Moody’s has a positive outlook on the sector as it expects volume to grow as much as 4 percent this year.

“Although it’s notably a cyclical sector in general, the economic expansion seems to be hanging in there,” said John Miller, co-head of fixed income in Chicago at Nuveen Asset Management, which oversees $124 billion of munis. He’s looking to add more airport debt and will consider San Francisco’s. “It’s prolonged and extended.”

San Francisco International may sell bonds once or twice a year for the next five years – which will help keep the pace of such debt steady, as has been the case over the past few years. Similar issues have been easily placed: In May, a consortium sold $2.4 billion in bonds to finance a new terminal at New York’s LaGuardia Airport.



The San Francisco area is "at the vanguard of the national expansion," with personal incomes growing by 21 percent since the first quarter of 2012 compared with the national 15 percent advance, according to Chris Lafakis, economist at Moody's Analytics. That, coupled with demand from California residents for tax-free income, should make the deal "very successful," Miller said.

The city through its airport commission is embarking on the five-year construction project to add six gates, renovate others to alleviate congestion and connect two terminals. The deal is almost twice as big as its second-largest sale of $500 million in 1998, said Kone, the airport finance official.

"There are more airplanes that want to come in than we have gates during peak periods. That would sometimes cause delays," Kone said. "We're really building to meet today's demands."

Bloomberg Business

by Romy Varghese

September 9, 2016 — 2:00 AM PDT Updated on September 9, 2016 — 8:48 AM PDT

[Bloomberg Brief Weekly Video - 09/08]

Amanda Albright, a reporter for Bloomberg Briefs, talks with Joe Mysak about this week's municipal market news.

[Watch video.]

September 8, 2016

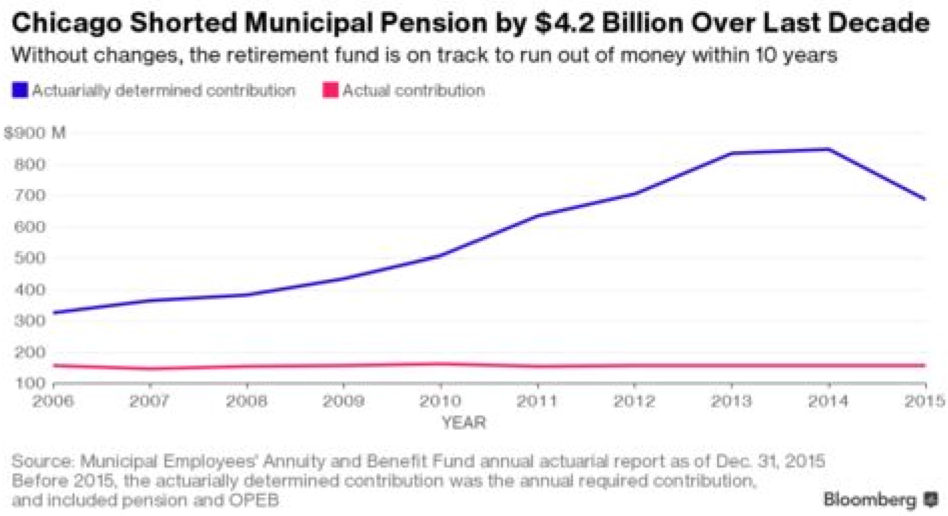
[Chicago Moves to Increase Utility Taxes to Bolster Pension.]

Chicago moved closer to keeping its largest pension fund from running out of money within the next decade.

The city council's finance committee on Thursday approved raising the levy on water and sewer usage over the next five years to avert insolvency for the municipal pension, the most underfunded of the city's four retirement systems. Last month, Mayor Rahm Emanuel outlined his plan to get the Municipal Employees' Annuity and Benefit Fund of Chicago to 90 percent funded in 40 years. The hike still needs to be adopted by the full council, which next meets on Sept. 14.

"We are going from the potential of bankruptcy to the potential of solvency" for the pensions, Carole Brown, Chicago's chief financial officer, said in response to questions from committee members. She acknowledged that the city will still need more revenue down the line. "It puts us on a path where we're addressing the needs of not only this fund but every other pension fund.''

Chicago shortchanged its pension funds for years, neglecting to put aside enough money to cover the rising cost of benefits for retirees. That failure has left the city with $34 billion of retirement debt across its four funds. The strain of the unfunded liabilities pressures its budget and led Moody's Investors Service to slash Chicago's rating to junk last year.



The city's bonds have rallied since Emanuel outlined the plan to hike the utility tax on Aug. 3. That move follows a record increase in the property tax, pushed through by Emanuel in October, to bolster the police and fire pensions. A telephone tax will help shore up the laborers' retirement system. If the plan for the municipal fund is approved, all four funds will be on a path to solvency, according to city officials. The four pensions are only 23 percent funded, according to an annual financial analysis.

A portion of the city's taxable debt, which matures in 2042, traded for an average of 92 cents on the dollar Thursday, compared to 87 cents on Aug. 3, the day Emanuel outlined his plan. The debt yields 6 percent, down from 6.5 percent.

Emanuel's plan for the municipal fund also ramps up the city's payments. Chicago will pay about $3 billion to the fund over the next six years. That compares to only $1 billion under the current funding schedule. In 2022, the city will start making the actuarially-required payment to get to 90 percent funded in 2057.

Chicago plans to seek state authorization to increase its pension payments and alter the employee contributions.

The council has to approve the higher utility rates. Over five years, water and sewer charges will rise by about 33 percent with the new tax. The higher levies will help cover the city's municipal pension bills over the next six years. After 2022, the city will need to find additional revenue to cover the stepped-up payments.

Some council members expressed concern that the tax won't fully cover the revenue needed over the full 40-year period. Brown and Alex Holt, the city's budget director, acknowledged that the work isn't done.

"We're not going to ask taxpayers today to pay for an expense that's 40 years down the line,'' Holt said. "We need to work and put a sustainable plan into place that deals with the biggest increase, which is between now and 2023, and then we need to work towards putting additional sustainable revenues or additional reforms and savings in place to deal with this issue over the 40-year time period.''

Bloomberg Business

by Elizabeth Campbell

September 8, 2016 — 11:14 AM PDT Updated on September 8, 2016 — 12:08 PM PDT

[An Introduction to Evaluation Designs in Pay for Success Projects.]()

Abstract

This brief provides a basic overview of evaluation designs to assist pay for success (PFS) stakeholders engaged in deal development. It focuses on comparison and its relation to various designs, and it presents key questions that PFS planners should address as they participate in evaluation design discussions. In PFS projects, strong evaluations are tasked with determining what happened, if the program caused these outcomes, and if outcome payments are triggered.

[Read the full Brief.]()

The Urban Institute

Kelly Walsh, Rebecca TeKolste, Ben Holston, John Roman

September 7, 2016

[City Parks Become Privatization Battlegrounds.]()

COLORADO SPRINGS, Colo. — A new conservation battleground is emerging in crowded cities, where proposals to convert municipal parkland to other uses have provoked public furor.

Here at the base of the Rocky Mountains, a citizens group in August filed a suit to overturn a deal approved by the city in May to trade 190 acres of historic North Cheyenne Cañon Park to a private resort controlled by Denver billionaire Philip Anschutz. As part of the deal, the city gets access to land in more remote terrain.

“This should not become a theme park for the rich,” Sue Spengler, a nearby resident, said as she surveyed a pine-fringed meadow in the park known as Strawberry Hill.

Officials of the The Broadmoor resort said the park is used by few people, and said the opposition was motivated by neighbors who largely want to keep Strawberry Hill for their own use, such as for walking dogs. “The group that is opposed to this is small in number but loud in voice,” said Jack Damioli, president and chief executive officer.

Municipal parks have long faced threats from new roads and other infrastructure development, but conservationists say cities are under added pressure to sell or trade them because of population growth on limited land.

Of 54 cities responding to a survey earlier this year by the Trust for Public Land, a conservation advocacy group, 14, including Dallas, Phoenix and Detroit, reported they were facing the loss of parkland; 18 said they had lost a total of 688 acres over the past five years.

Officials of the Trust for Public Land said there has also been an increase in organized opposition to park transfers fueled by social media.

“In the past, you would have one park defender with one voice,” said Adrian Benepe, former New York City parks commissioner and a director of Trust for Public Land. “Now because of the internet that defender potentially has a huge voice.”

In Memphis, Tenn., a grass-roots movement sprang up in 2014 to oppose a decades-old practice of the city allowing the Memphis Zoo to use a stretch of grass in Overton Park as a parking lot.

The group organized protests over Facebook, including a standoff last March when some lovers of the 110-year-old park held their arms out to police to be arrested. In July, the city council voted to restrict parking there, prompting cheers from residents packed into the meeting.

In Tulsa, Okla., residents are trying to overturn a sale by a city public trust of nine acres of 67-acre Helmerich Park to a real-estate developer. That part of the park, on a bank of the Arkansas River, is slated for a shopping center and was sold by the Tulsa Public Facilities Authority trust for $1.5 million in August last year.

Officials of the authority said that part of the park, which was first acquired in 1991, was never developed for recreation. But former Mayor Terry Young and a group of other residents who filed suit in state district court in July 2015 to invalidate the deal said the park is held in trust for the public and can’t be sold. The trust countersued in November, asking that a judge affirm its sale.

With the cases pending, opponents of the deal have held protest rallies and peppered local elected officials with emails and calls asking them to reconsider.

“Once you lose open space, you don’t get it back,” said Mr. Young, now 68.

The Colorado Springs issue started in 2014 when city officials approached The Broadmoor over gaining easements to use portions of the resort’s 5,000-acre property to help connect a popular hiking trail that the resort bisects. The resort turned its attention to adjoining Strawberry Hill, after discovering the city might one day open it to downhill bicycle racing and disrupt the solitude for guests, said Mr. Damioli, the resort president.

“We want to keep the land as pristine as possible,” he said.

The two sides agreed to a swap: Strawberry Hill for the resort, in exchange for access to about 500 acres of forest land for the city. The resort agreed to continue allowing public access on all but a nine-acre meadow of Strawberry Hill, where it plans to host barbecues and horseback riding for guests.

"It's an absolute no-brainer for the city of Colorado Springs," Mayor John Suthers said in an interview.
L
Some conservationists support the exchange. "At the end of the day, we end up with more acres of park, open space and more miles of trail," said Susan Davies, executive director of Trails and Open Space Coalition, a local conservation group.

But some residents reacted with outrage when the city council approved the exchange, saying Strawberry Hill is part of a city park residents in 1885 voted to preserve.

"You're going to have the wealthy elite having lavish parties in the center, with the plebes looking in from the perimeter," said Dana Duggan, a media consultant who helped organize opposition to the deal.

Among other concerns by the residents is that much of the property being traded by the resort is far less accessible than Strawberry Hill.

"The bottom line is we get a bunch of junk and we trade a valuable piece of property," said Michael Chaussee, a local resident and real-estate investor.

City officials declined to comment on the litigation.

THE WALL STREET JOURNAL

By JIM CARLTON

Sept. 9, 2016 3:14 p.m. ET

Write to Jim Carlton at jim.carlton@wsj.com

Puerto Rico Debt Fix Unlikely to Resemble Detroit's.

NEW YORK — The federal appointees tapped to help map Puerto Rico's economic future are technocrats more than political actors, and that could make the U.S. territory's fiscal turnaround look more like a corporate restructuring than a politically charged municipal bankruptcy in the vein of Detroit.

The law known as PROMESA, which created the board when it passed the U.S. Congress in June with bipartisan support, envisioned a pragmatic solution for an island combating $70 billion in debt, 45 percent poverty and a brain drain as residents bolt in droves for the mainland United States.

Its members, four Republicans and three Democrats appointed last week, were chosen by Republican and Democratic lawmakers and President Barack Obama. The board has broad powers to help stabilize the island's economy, from investigating Puerto Rico's government to working with that government on projects to spur economic growth.

It must also approve the island's annual budgets, and will eventually facilitate debt-restructuring talks with creditors. In the latter endeavor, it will have to navigate a minefield of competing interests.

The island has 18 separate debt issuers, backed by different revenues streams, as well as $18 billion in so-called general obligation debt backed by the "full faith and credit" of the territory's government. While that promise is legally weak in a bankruptcy setting, it is a sacrosanct pledge in municipal debt markets.

Holders of all that debt will jockey for payouts against government vendors and beneficiaries of the island's public pensions, which have less than $2 billion in assets to cover some $45 billion in liabilities.

Detroit's bankruptcy, which ended in December 2014, treated city pensions much better than its outstanding bonds, which were largely insured. Some Puerto Rico creditors, still suffering Detroit flashbacks, feared Puerto Rico could look similar – especially since Governor Alejandro Garcia Padilla has pushed big haircuts and railed against the idea of reducing government services.

But the makeup of the Puerto Rico board has offered some reassurance, said Nader Tavakoli, chief executive officer of Ambac, which insures $2.2 billion of Puerto Rican bonds and also insured some of Detroit's bonds. "These board members are technocrats, and it gives us confidence that this is not going to be overly politicized," he said.

Deal makers also feature prominently, with an ex-bankruptcy judge, a banker and a hedge fund operator in the mix.

Republicans, generally seen as creditor-friendly, nominated a bankruptcy academic who favors restructuring the island's debt, David Skeel. And Democrats nominated a banker, Jose Ramon Gonzalez, and a Democratic finance expert in Ana Matosantos who directed California's budget under former Republican Governor Arnold Schwarzenegger.

Experts see the group as likely to push a solution that sees all sides share a burden, a typical approach for companies restructuring under Chapter 11.

"There are no ideologues in the group," said Keefe Bruyette & Woods analyst Chas Tyson.

That does not mean there are not drawbacks. For one, the board will have to navigate a testy local political climate with residents who largely revile a panel they see as an extension of colonial rule. Island voters broadly unhappy with the Garcia Padilla administration in November will elect a new governor as well as members of the legislature and scores of mayors.

"There are still politics here," said veteran bankruptcy attorney Richard Levin, who is following the situation. "The governor and legislature retain some authority."

For Height Securities analyst Daniel Hanson, the board is short on expertise in economic development. Any real solution for Puerto Rico requires fundamental economic changes, including at its underperforming education department, and it's unclear whether the board can facilitate such change.

But from a financial perspective, at least, the board seems less inclined to promote a political agenda than figure out a collaborative fix and then get out, said Matt Fabian, partner at Municipal Market Analytics.

“The board is not being installed to fight with Puerto Ricans or to impose some kind of federal view,” Fabian said. “They just want these troubles to be fixed.”

By REUTERS

SEPT. 5, 2016, 7:21 P.M. E.D.T.

(Reporting and writing by Nick Brown; Additional reporting by Hilary Russ; Editing by Dan Burns and Andrew Hay)

MSRB Submits Recommendations for Puerto Rico to the Congressional Task Force.

Read the MSRB’s recommendations.

MSRB Leverages Learning Technology to Offer Municipal Market Education.

Washington, DC – Leveraging advances in online learning technology, the Municipal Securities Rulemaking Board (MSRB) today launched MuniEdPro, a suite of interactive, online courses about municipal market activities and regulations. Each MuniEdPro course provides real-world simulations that allow the learner to understand municipal securities transactions and the related market and regulatory considerations.

“We are excited to be able to combine our goal of providing relevant educational content with the latest digital learning methodologies,” said MSRB Executive Director Lynnette Kelly. “Courses that improve the understanding of the municipal securities market—which is so important to investors and state and local governments—will benefit many market participants.”

MuniEdPro courses are a resource for anyone looking to enhance their understanding of how municipal securities are issued, sold and traded. However, the courses are designed for financial professionals who want to reinforce their knowledge of the municipal securities market and its regulations.

The MSRB plans to regularly add courses to the MuniEdPro course catalog, which today features courses on:

- **The Decision to Borrow:** Roles and Responsibilities of Market Participants in Fixed-Rate, Primary Market Offerings; and
- **Rules and Risks:** Applying MSRB Rules in Relation to Municipal Market Risks.

“As we fully develop our new learning management system, we welcome feedback from market stakeholders to ensure that MuniEdPro meets the needs and expectations of its users,” Kelly said.

Each MuniEdPro course is available for purchase individually or by subscription for organizations that wish to make MuniEdPro courses available to employees on a bulk basis or through an internal learning management system. Read more about MuniEdPro. Click here to access MuniEdPro.

The MSRB has provided municipal market education resources for many years, including free regulatory webinars and digital content available through its Education Center.

Date: September 6, 2016

Contact: Jennifer A. Galloway, Chief Communications Officer
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- SEC Investor Advocate Worried About Narrowing of Muni Market.
- Treasury Department Releases 2016-17 Priority Guidance Plan for Tax-Exempt Bonds – And It's Already About One-Third Complete!
- MSRB Seeks Mark-up Disclosure for Municipal Securities Transactions.
- Dallas' Statler Hotel Sells City's Incentives in Unheard Of Bond Offering.
- GASB Proposes Guidance for Debt that is Extinguished Early Using Only Existing Resources.
- NABL: IRS Modifies Rev. Proc. 2016-44 Transition Date.
- IRS Releases Updated Safe Harbors For Management Contracts In Tax-Exempt Bond-Financed Projects: Thompson Coburn
- Those of you interested in pensions, might want to take a look at *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, *Puckett v. Lexington-Fayette Urban County Government*, and *Lenander v. Washington State Department of Retirement Systems.*
- And finally, *Res Ipsa Oh My God, What's that Smell?* is brought to you this week by *Tangedal v. Mertens*, in which property owners sued county inspectors for gross negligence following the implosion of their septic tank. "You're honor, we're contesting negligence. We'll stipulate to gross."

PUBLIC CONTRACTS - CALIFORNIA

California-American Water Company v. Marina Coast Water District

Court of Appeal, First District, Division 1, California - August 18, 2016 - Cal.Rptr.3d - 2016 WL 4400452 - 16 Cal. Daily Op. Serv. 9086

Water utility brought action against water district and county water resources agency for declaratory judgment that five contracts related to desalination project were void because a board member of the county water resources agency was financially interested in the contract.

Water district cross-complained for a declaration barring any challenge to the contracts, and county water resources agency cross-complained for a declaration the contracts were void. The Superior Court declared four of the contracts void after bench trial. Water district appealed.

The Court of Appeal held that:

- A public agency is not bound by the 60–day limitation period that governs validation actions when it seeks a judicial determination of the validity of a contract under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity;
- Water resources agency's cross-complaint was not barred by statute of limitations; and
- Board member had sufficient financial interest to invalidate contracts.

In water utility's action against water district and county water resources agency for declaratory judgment that contracts were void under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity, water resources agency's cross-complaint against the water district for declaratory judgment that the contracts were void related back to the water district's cross-complaint against the water resources agency that the contracts were valid, and thus the four-year limitation period for water resources agency's cross-complaint stopped running upon the water district's cross-complaint.

Member of county water resources agency's board of directors had a sufficient financial interest in four contracts related to desalination project for his participation in the agency's negotiation of the agreements to support invalidation of the contracts under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity, where the board member was a paid consultant for the project manager, the project manager increased board member's compensation from $25,000 to $160,000 while three of the contracts were being negotiated, and board member reasonably could have expected to receive more work based on the execution of a fourth contract that was negotiated after manager stopped working as a consultant.

PENSIONS - CALIFORNIA

Marin Association of Public Employees v. Marin County Employees' Retirement Association

Court of Appeal, First District, Division 2, California - August 17, 2016 - Cal.Rptr.3d - 2016 WL 4379316 - 16 Cal. Daily Op. Serv. 9044

County employees and their unions brought action against county employees' retirement association for declaratory, injunctive, and writ relief to halt implementation of revised retirement income formula. State intervened to defend constitutionality of Pension Reform Act.

The Superior Court sustained demurrer without leave to amend. Employees and unions appealed.

The Court of Appeal held that:

- Statutory hearing procedure did not apply to retirement board's determination that all members were barred from including in-kind benefits converted to cash in pension calculation because they had "been paid to enhance a member's retirement benefit";
- Retirement association's revision of members' retirement income formula was not an unconstitutional impairment of contracts; and
- Retirement association had no authority to establish equitable estoppel requiring items to be included in calculation of "compensation earnable."

Trial court's order sustaining county employees' retirement association's demurrer to county employees' and unions' estoppel and constitutional contract clause challenges to the revision of their retirement income formula under Pension Reform Act satisfied the statute requiring a statement of the specific grounds for the trial court's decision, and thus the judgment was not subject to reversal based on the brevity of the trial court's statement of grounds, where the order stated that a "statute, once duly enacted, is presumed to be constitutional."

The statute providing that a county employees' retirement board "shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit," and thus whether the element of compensation was subject to exclusion from the retirement association member's "compensation earnable" in calculating the member's pension, did not require a county retirement board to follow such a procedure in determining that in-kind benefits converted to cash were categorically "paid to enhance a member's retirement benefit" as applied to every member of the retirement association, and thus that in the future the payments would be excluded from every member's pension calculation.

County employees' retirement association's revision of retirement income formula under the Pension Reform Act for members who had not yet retired, in excluding payments for services rendered outside of normal working hours and for in-kind benefits converted to cash, was not an unconstitutional impairment of contracts under federal and state constitutions, since the revision was not an "unreasonable" change or a "substantial" impairment of the contracts, even though the revision resulted in a net decrease in the pension benefit, where the revision caused the county to stop making paycheck deductions for the items that were excluded from the pension calculation, and the revision excluded the items from the pension calculation only prospectively for future pay periods.

Short of actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions, the governing body may make reasonable modifications and changes to public employees' pension before the pension becomes payable, and until that time the employee does not have a right under the contract clause of the constitution to any fixed or definite benefits but only to a substantial or reasonable pension.

A public pension system is subject to the implied qualification that the governing body may make reasonable modification and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits, which can mean that any one or more of the various benefits may be wholly eliminated prior to the time they become payable, so long as the employee retains the right to a substantial pension.

Any representations or promises made by county employees' retirement association to county employees regarding calculation of their pensions could not, under doctrine of equitable estoppel, prevent the association from implementing and enforcing new definition of "compensation earnable" set out in Pension Reform Act, and require the association to instead calculate "compensation earnable" to include in-kind benefits converted to cash or payments for additional services rendered outside of normal working hours. Association's representations or promises could not displace clear statutory language or delay its implementation.

PENSIONS - KENTUCKY

Puckett v. Lexington-Fayette Urban County Government

United States Court of Appeals, Sixth Circuit - August 15, 2016 - F.3d - 2016 WL 4269802

Retired county employees brought action against county, Commonwealth of Kentucky, and others, alleging that statutory amendment reducing cost of living adjustments (COLA) to their service retirement annuities violated Contract Clause, Due Process Clause, and Takings Clause of state and federal constitutions.

The United States District Court granted defendants' motions to dismiss and subsequently denied plaintiffs' motions to alter or amend judgment and for leave to amend complaint. Plaintiffs appealed.

The Court of Appeals held that:

- The court was without jurisdiction to consider the claims against the Commonwealth based on

Eleventh Amendment sovereign immunity principles;
- The Ex parte Young doctrine was applicable to permit suit against individual state officers for the alleged violations of plaintiffs' federal constitutional rights;
- Addressing questions of first impression in the circuit, the legislature's statutory scheme for reducing the extent of future COLA increases to retired county workers did not constitute an unconstitutional impairment of contracts;
- Assuming arguendo that plaintiffs had a protected property interest, plaintiffs did not state a plausible procedural due process claim;
- Assuming arguendo that plaintiffs had a protected property interest, plaintiffs did not state a plausible substantive due process claim;
- Plaintiffs did not state a plausible Takings Clause claim; and
- Plaintiffs waived their argument that the district court erred when it denied their motion for leave to amend their complaint.

Based on Eleventh Amendment sovereign immunity principles, the Court of Appeals was without jurisdiction to consider claims brought by retired county employees against Commonwealth of Kentucky concerning reduced cost of living adjustments (COLA) to their service retirement annuities. Kentucky, which did not file an answer to employees' complaint, did not waive its immunity defense by raising that defense in its motion to dismiss, there was no question that Congress had not abrogated Kentucky's immunity for present purposes, and none of the exceptions to the doctrine of sovereign immunity applied.

In action brought by retired county employees against Commonwealth of Kentucky and various state officials concerning reduced cost of living adjustments (COLA) to employees' service retirement annuities, the doctrine set forth in Ex parte Young was applicable to permit suit against individual state officers pursuant to § 1983 for the alleged constitutional violations where the complaint alleged an ongoing violation of federal law and sought prospective relief.

Kentucky legislature's statutory scheme for reducing the extent of future cost of living adjustment (COLA) increases to retired county employees' service retirement annuities did not constitute an unconstitutional impairment of contracts. Even assuming that the Police and Firefighters' Retirement and Benefit Fund Act created some contractual obligations, employees did not plead facts showing a clear intent on the part of the legislature to create contractual rights against the modification of a specific COLA formula, as employees pointed to no language within the Act, such as a provision giving them immutable lifetime entitlement to COLA increases, and nothing in the Act's legislative history, such as evidence that COLA formula was part of bargained-for exchange, indicating any expression of intent by the legislature to create a contractual right to the specific COLA formula in effect at the time they retired.

Assuming arguendo that retired county employees had a protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, employees did not state a plausible procedural due process claim in connection with Kentucky legislature's amendment of statute to reduce future COLAs. Although amendments to state's Police and Firefighters' Retirement and Benefit Fund Act were designated as emergency legislation, employees failed to allege any reason why the legislature's emergency designation was improper, or how that designation denied them any sort of "process" they were due.

Assuming arguendo that retired county employees had a protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, employees did not state a plausible substantive due process claim in connection with Kentucky legislature's amendment of statute to reduce future COLAs. When it amended the Act, the Kentucky General Assembly explained that its basis for doing so was to keep the Policemen's and Firefighters' Retirement Fund financially sound and resolve its financial difficulties, and employees' conclusory allegation, that there was "no rational connection between the amendments to the Act and any legitimate government interest," was nothing more than recitation of essential element of claim, insufficient to withstand motion to dismiss.

Where retired employees of Kentucky county had no protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, their claim under the Takings Clause necessarily also failed.

Plaintiffs waived their amendment claim on appeal where, although they requested reversal of the district court's denial of their motion to amend the complaint, they developed no argument in their brief.

ZONING - MASSACHUSETTS

311 West Broadway LLC v. Zoning Bd. of Appeal of Boston

Appeals Court of Massachusetts, Suffolk - August 23, 2016 - N.E.3d - 90 Mass.App.Ct. 68 - 2016 WL 4431561

Neighbor appealed from decision by city zoning board of appeal granting landowner approval to change occupancy of its property.

After the case was remanded by the Superior Court and proceedings were stayed, the board issued another decision in landowner's favor. After more than 20 days, landowner moved to dismiss the Superior Court action for neighbor's failure to appeal second decision. The Superior Court Department granted the motion. Neighbor appealed.

The Appeals Court held that neighbor was not required to appeal second decision to invoke Superior Court's subject matter jurisdiction.

Neighbor challenging zoning appeal board's approval of landowner's change of occupancy, who had already appealed an earlier decision of board in litigation that remained pending, was not required to appeal board's decision after superior court remand or to amend its complaint within 20 days, in order to invoke subject matter jurisdiction of superior court, despite ordinance stating that appeal must be filed within 20 days. Neighbor had been diligent in efforts to assert rights, landowner could not claim surprise and was not prejudiced by any delay, and decision after remand did not concern an entirely different or new project.

PUBLIC LANDS - MASSACHUSETTS

Smith v. City of Westfield

Appeals Court of Massachusetts - August 25, 2016 - N.E.3d - 2016 WL 4467901

After a preliminary injunction had been granted that prevented school construction project at city playground, the Superior Court vacated injunction. Residents appealed.

The Appeals Court held that:

- City did not specifically designate playground for public use, and thus constitutional protections

were not triggered;
- Statewide comprehensive outdoor recreation plan (SCORP) was inconsistent with statutory and judicial interpretation of applicable constitutional provision; and
- Prior public use doctrine did not apply to preclude city from permitting construction of school building on property.

City did not specifically designate, in a manner sufficient to invoke constitutional protections, by deed or other recorded restriction on the land, a playground for public purposes and land was not taken for those purposes, and therefore city was not required to obtain two-thirds vote of the General Court before permitting construction of school building on land. art. 97 of the Amendments to the Massachusetts Constitution.

Statewide comprehensive outdoor recreation plan (SCORP) that considered land rehabilitated with Federal Land and Water Conservation Fund (LWCF) as being public lands protected under state constitution did not render playground rehabilitated with LWCF grant public lands subject to constitutional protections. SCORP contradicted statutory and judicial interpretation of applicable constitutional provision. art. 97 of the Amendments to the Massachusetts Constitution.

Prior public use doctrine did not preclude city from permitting construction of school building on land that had previously been used as playground, where land had been conveyed to city with no limitation on its use, and there was neither a taking nor a prior public or private grant restricting the use of the land.

ENVIRONMENTAL - MISSOURI

City of Harrisonville v. McCall Service Stations

Supreme Court of Missouri, en banc - August 23, 2016 - S.W.3d - 2016 WL 4443950

City filed suit against owner and prior owner of gas station for negligence and trespass arising out of soil contamination caused by leak from underground petroleum storage tanks, which was discovered during city's project to upgrade sewer system. City also brought claims for compensatory and punitive damages against Missouri Petroleum Storage Tank Insurance Fund for negligent and fraudulent misrepresentation, after Fund refused to pay costs incurred by city to hire contractor qualified to perform that portion of contract affected by contamination.

The Circuit Court entered judgment on jury's verdict for city on all claims, and then entered remittitur on punitive damages award against Fund. Fund, owner, and prior owner appealed, and city cross-appealed remittitur of punitive damages award.

The Supreme Court of Missouri held that:

- Jury instructions referencing "consequential" damages did not give jury impermissible "roving commission";
- Whether city incurred additional costs that exceeded $72,009.89 in completing portion of sewer system upgrade affected by soil contamination, for purposes of calculating compensatory damages, was question for jury;
- Whether city relied to its detriment on misrepresentation by Fund's third-party administrator that Fund would pay costs incurred by city to hire contractor, recommended by administrator, to perform portion of city's sewer system upgrade affected by soil contamination, less amount that city would have paid if it had not hired contractor, was question for jury;

- Statute authorizing Fund to provide coverage for claims involving property damage or bodily injury caused by leaking petroleum storage tanks did not authorize award of compensatory and punitive damages;
  Fund's board of trustees, and not Fund itself, was party subject to liability for fraudulent and negligent misrepresentation; and
- Interests of justice warranted remand following reversal of punitive damages award against Fund, in order to permit city to amend complaint to substitute/add board trustees and its members as defendants.

ANNEXATION - NEBRASKA

City of Springfield v. City of Papillion

Supreme Court of Nebraska - August 26, 2016 - N.W.2d - 294 Neb. 604 - 2016 WL 4491757

City filed suit, claiming that another city and county illegally annexed land that it had mapped for future growth and development.

The District Court dismissed the case for lack of standing. City appealed.

The Supreme Court of Nebraska held, as a matter of first impression, that County Industrial Sewer Construction Act granted city standing to challenge allegedly illegal annexation.

County Industrial Sewer Construction Act granted city standing to challenge other city's and county's annexation of land that infringed on the city's powers over areas mapped for future growth and development. City's right to exercise powers under the Act, associated with a municipality's area of future growth and development, was a personal, legal interest of the city's, regardless of whether it was actively exercising those rights at time the other city annexed the disputed territory.

FAIR HOUSING ACT - NEW JERSEY

In re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean

Superior Court of New Jersey, Appellate Division- July 11, 2016 - 446 N.J.Super. 259 - 141 A.3d 359

Several municipalities brought declaratory judgment actions seeking determination of their fair share of affordable housing obligation under Fair Housing Act (FHA).

Actions were consolidated. The Superior Court, Law Division, Ocean County entered order directing Special Regional Master to include as part of fair share calculation a separate component for municipalities' fair share obligation during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation. Municipalities sought interlocutory review.

The Superior Court, Appellate Division, held that:

- Separate component was improper, and
- Doctrine of judicial estoppel did not preclude such holding.

Separate, retroactive obligation for municipalities' fair share of affordable housing during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation was not an appropriate component of municipalities' housing obligation for third-round cycle under Fair Housing Act (FHA). Text of FHA demonstrated legislature's concern with present and prospective fair share housing, low and moderate income households formed during gap period needing affordable housing could be captured in calculation of municipalities' fair share without resort to retroactive obligation component, and imposition of new obligation was best left to executive and legislative branches.

Doctrine of judicial estoppel did not preclude Appellate Division's holding that separate, retroactive obligation for municipalities' fair share of affordable housing during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation was not an appropriate component of housing obligation for third-round cycle under Fair Housing Act (FHA). Appellate Division had not previously been asked to address, and had not sanctioned, a gap-period affordable housing obligation in prior action, and none of the parties in instant action participated in prior action.

UTILITY IMPACT FEES - NORTH CAROLINA

Quality Built Homes Incorporated v. Town of Carthage

Supreme Court of North Carolina - August 19, 2016 - S.E.2d - 2016 WL 4410716

Developers brought action seeking declaration that water and sewer impact fee ordinances adopted by city exceeded city's municipal authority under Public Enterprise Statutes.

The Superior Court granted summary judgment in favor of city. Developers appealed. The Court of Appeals affirmed. Developers sought discretionary review, which was granted.

The Supreme Court of North Carolina held that water and sewer impact fee ordinances exceeded city's authority under Public Enterprise Statutes.

Water and sewer impact fee ordinances that triggered immediate charges for future and sewer water expansion, regardless of whether the property owner ever connects to the system or whether city ever expanded the system, was not collection of monies for operation, maintenance, and expansion of water and sewer systems permitted by Public Enterprise Statutes. While Statutes allowed city to charge for the contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly failed to empower city to impose impact fees for future services.

MUNICIPAL UTILITIES - NORTH CAROLINA

Acts Retirement-Life Communities, Inc. v. Town of Columbus

Court of Appeals of North Carolina - August 2, 2016 - S.E.2d - 2016 WL 4087669

Owner of retirement facility brought action against town, seeking a declaration that town's decision to charge retirement facility the commercial rate for some water and sewer services but the residential rate for others violated town's charter and state constitution, alleging claim for relief based on unjust enrichment, and requesting permanent injunction requiring town to reclassify meters as commercial.

After bench trial, the Superior Court ruled that reclassification was arbitrary, capricious, and unreasonable, awarded owner compensatory damages, and denied request for injunctive relief. Town appealed, and owner cross-appealed.

The Court of Appeals held that:

- Owner's cause of action accrued, and three-year statute of limitations began to run, when reclassification took effect, and
- Continuing wrong doctrine did not apply.

Owner of retirement facility's cause of action against town challenging town's reclassification of water meters from commercial to residential, seeking declaratory and injunctive relief as well as damages for unjust enrichment, accrued, and three-year statute of limitations began to run, when reclassification took effect.

Each water bill issued by town to owner of retirement facility, after reclassifying some of retirement facility's water meters from commercial to residential, did not constitute a separate wrong that triggered its own limitations period, and thus continuing wrong doctrine did not apply to the three-year statute of limitations applicable to owner's action against town seeking declaratory and injunctive relief as well as damages for unjust enrichment resulting from alleged overcharges. Overcharges were the continual ill effects of the allegedly unlawful reclassification, which triggered the statute of limitations, and town did not reclassify the water meters each month.

IMMUNITY - NORTH DAKOTA

Tangedal v. Mertens

Supreme Court of North Dakota - August 25, 2016 - N.W.2d - 2016 WL 4485811 - 2016 ND 170

Property owners brought negligence action against governmental entity responsible for septic system inspections.

The District Court granted summary judgment in favor of entity and denied property owners' motion to amend their complaint to add entity employee as a defendant. Property owners appealed.

The Supreme Court of North Dakota held that public duty immunity precluded property owners' negligence claim against governmental entity responsible for septic system inspections and its employee.

There was no special relationship between property owners and governmental entity responsible for septic system inspections and its employee, and therefore public duty immunity precluded property owners' negligence claims against entity and employee stemming from inspection, where invoice for septic inspection identified property owners' real estate agent as the customer, and property owners proffered no evidence to establish he existence of a special relationship.

A political subdivision and an employee may not be held jointly liable for a claim for an injury caused by the performance or nonperformance of a public duty unless a special relationship is established. When the existence of a special relationship is established, the political subdivision may be liable if the employee's actions are within the scope of employment and the employee may be personally liable if the employee's conduct within the scope of employment constitutes reckless or grossly negligent conduct, or willful or wanton misconduct.

IMMUNITY - UTAH

Craig v. Provo City

Supreme Court of Utah - August 26, 2016 - P.3d - 2016 WL 4506309 - 2016 UT 40

Plaintiffs brought timely tort action against city pursuant to the Governmental Immunity Act, which was dismissed without prejudice after the limitations period had lapsed for plaintiffs' failure to submit statutorily-required bond.

Plaintiffs filed second action with the appropriate bond under statute allowing parties to commence a second action within one year of dismissal of original action for reasons other than on the merits.

The Fourth District Court held statute allowing parties to commence a second action did not apply to claims against governmental entities, and dismissed the second action. Plaintiffs appealed. The Court of Appeals reversed. City filed petition for certiorari, which was granted.

The Supreme Court of Utah held that claim filed outside time limits of Act is time-barred and cannot be resurrected by terms of Savings Statute.

PENSIONS - WASHINGTON

Lenander v. Washington State Department of Retirement Systems

Supreme Court of Washington, En Banc - August 18, 2016 - P.3d - 2016 WL 4401213

Retired state trooper brought declaratory judgment action against Department of Retirement Systems (DRS), asserting statutory and constitutional challenges to newly adopted actuarial factors by which DRS reduced trooper's monthly pension benefits based on his opting for a pension that would allow surviving spouse to receive monthly pension benefits at the same amount after his death. Trooper also appealed from administrative proceeding in which DRS held the actuarial reduction was properly calculated.

The Superior Court denied trooper's claims for relief. Trooper appealed. The Supreme Court granted direct review.

The Supreme Court of Washington held that:

- DRS had statutory authority to amend its regulations to ensure that benefits paid to Washington State Patrol Retirement System (WSPRS) retirees who opted for a pension that would allow a surviving spouse to continue to receive monthly pension benefits at the same amount after the retiree's death remained actuarially equivalent in value to the pension benefit previously available;
- DRS has broad authority to adopt such actuarial factors as it deems necessary for the purpose of calculating a WSPRS survivor benefit of "equal value" to the only previously available benefit, but, at a minimum, the DRS must consider and adopt a mortality rate and interest rate it deems appropriate; and
- Amendment by DRS of regulations containing actuarial factors for calculating survivor benefit for retired Washington State Patrol employees did not substantially impair the pension contract rights of retired state trooper, for purposes of analysis under State Constitution's Contract Clause.

Department of Retirement Systems (DRS) had statutory authority to amend its regulations to ensure that benefits paid to Washington State Patrol Retirement System retirees who opted for a pension that would allow a surviving spouse to continue to receive monthly pension benefits at the same amount after the retiree's death remained actuarially equivalent in value to the only pension benefit previously available, i.e., a survivor benefit for a spouse who outlived the retiree that was usually equal to 50 percent of the retiree's monthly benefit. Such authority existed without express statutory language reserving authority to DRS to make future amendments to actuarial factors.

Department of Retirement Systems (DRS) has broad authority, under statute requiring it to collect and keep in convenient form such data as shall be necessary for an actuarial valuation of the assets and liabilities of the state retirement systems, to adopt such actuarial factors as it deems necessary for the purpose of calculating a Washington State Patrol Retirement System survivor benefit of "equal value" to the only previously available benefit, i.e., 50 percent of retiree's monthly benefit, but, at a minimum, the DRS must consider and adopt a mortality rate and interest rate it deems appropriate.

Retired state trooper had contractually protected right under Washington State Patrol Retirement System and Department of Retirement Systems (DRS) statutes to a retirement allowance for life, computed based on years of public service and final average salary, as well as the right to select a survivor benefit that was of equal value, subject to DRS's authority to update the actuarial factors involved in that calculation of equivalency, but retired trooper did not have a vested contract right to the three percent actuarial reduction first used by DRS in calculating survivor benefit.

Amendment by Department of Retirement Systems (DRS) of regulations containing actuarial factors for calculating survivor benefit for retired Washington State Patrol employees did not substantially impair the pension contract rights of state trooper, for purposes of analysis under State Constitution's Contract Clause. Trooper was still entitled to receive a retirement benefit based on same calculation of average final salary and years of service.

Piper Jaffray Fined $12,500 Over Primary Market Disclosure Violations.

WASHINGTON – Piper Jaffray & Co. has agreed to pay a $12,500 fine after the Financial Industry Regulatory Authority found it submitted 23 disclosure documents related to primary offerings late to the Municipal Securities Rulemaking Board's EMMA system.

Representatives from the Minneapolis-based firm could not be reached for comment. The firm accepted the settlement without admitting or denying FINRA's findings.

The self-regulator found that the late filings, which violated MSRB Rule G32 on disclosures in connection with primary offerings rules, took place from November 2014 through September 2015. Each of the late filings was related to primary offerings of municipal bonds that Piper Jaffray underwrote.

Of the 23 documents, 12 were official statements, one was an amendment to an official statement, eight were notices for offerings that were exempt under Securities and Exchange Act Rule 15c212 on disclosure, and two were advanced refunding documents. The submissions were filed from one to 27 business days late. The 23 documents represented 2.4% of Piper Jaffray's submissions to EMMA during FINRA's review period.

MSRB Rule G32(b) requires that the underwriter of a primary offering of municipal securities submit certain documents to EMMA by specified deadlines. Underwriters generally have to submit the official statement linked to the offering within one business day after receiving it and at the latest by the transaction closing date.

If Rule 15c212 exempts the offering and an official statement won't be created, the underwriter must submit a notice divulging that information along with the preliminary official statement by the closing date. If there is no preliminary official statement prepared, the underwriter must give notice of that fact.

Additionally, the rule states that if a primary offering advance refunds outstanding munis and an advanced refunding document is prepared, the underwriter must submit that document and certain other information within five business days after the transaction's closing date.

FINRA found that Piper Jaffray's late filings that violated those provisions were because of turnover in the staff of the department that was responsible for submitting documents to EMMA.

The firm did not have written policies and procedures that adequately addressed the possible effect of turnover on EMMA submissions and thus also violated MSRB Rule G27 on supervisions, FINRA said.

Piper Jaffray has since modified its written supervisory procedures and its supervisory system generally with regard to instructions about the process for submitting documents to EMMA, among other steps, according to FINRA.

The Bond Buyer

By Jack Casey

August 29, 2016

How to Best Use Zoning Policies to Spur Workforce Housing Development.

The potential and limitations associated with inclusionary zoning, a tool used by a growing number of U.S. cities to encourage or require workforce housing development, are explored in a new ULI report, The Economics of Inclusionary Zoning.

While many U.S. cities have experienced a post–Great Recession economic revival, the accompanying run-up in housing costs is threatening to undermine this success by pricing workers out of cities, lengthening their commutes, and diminishing livability, notes the report. As a result, local officials are turning to inclusionary zoning as a way to combat the shortage of housing that is affordable to moderate- and lower-income workers.

The growing use of this zoning authority in cities across the United States—including New York, San Francisco, Atlanta, Detroit, Los Angeles, Nashville, Pittsburgh, and Seattle—has prompted requests for a ULI analysis of its effectiveness, explains J. Ronald Terwilliger, founder and chairman of the ULI Terwilliger Center for Housing and a former ULI chairman. "A number of local government officials and other stakeholders in different localities have sought objective advice from ULI on how to structure an inclusionary zoning policy that addresses the housing needs of their communities," he says. "This report shows how inclusionary zoning can best be used to do just that. Ultimately, we are aiming to foster greater private sector involvement in affordable housing development."

Through inclusionary zoning, cities require or encourage developers to create below-market rental apartments or owner-occupied housing in connection with local zoning approval of a proposed market-rate development. Inclusionary zoning policies depend on a prevalence of market-rate development to be successful; the policies tend to be ineffective in areas not experiencing significant market-rate activity.

“Our analysis and research find that local zoning policies can effectively encourage development of workforce housing, mostly in strong real estate market environments where communities provide the optimal mix of incentives,” says Stockton Williams, the author of the report and the executive director of the Terwilliger Center.

More than 500 cities and counties in 27 states and the District of Columbia have adopted inclusionary zoning policies that either are mandatory or voluntary or that incorporate a mix of the two approaches, the report notes. In general, the less flexible policies tend to be mandatory, require greater set-asides of affordable units, impose longer rent restrictions, target a lower-income category, and are applicable community-wide with no opt-outs and few or no incentives to make the policies more appealing to landowners and developers. The more flexible policies tend to be voluntary, require fewer set-asides, impose shorter rent restrictions, have a higher-income target, apply to specific housing types and locations within a community, make opt-outs available, and include market-responsive incentives.

The report, which focuses on multifamily rental development, is divided into three areas:

- Understanding the economics of development, which provides an overview of real estate development economics and key drivers of real estate development feasibility from a developer’s perspective;
- Assessing the impacts of inclusionary zoning on development, which assesses how key features of inclusionary zoning, such as share of below-market-rate housing and income targeting for those units, affect development feasibility; and
- Optimizing the effectiveness of incentives for inclusionary development, including direct subsidies, tax abatements, density bonuses, and reduced parking requirements.

“To the extent that inclusionary zoning policies remain in place over a sustained period of time, land prices may adjust and the requirements may be absorbed as a ‘cost of doing business’ in the jurisdiction,” the report says. “The challenge is that the most effective policies need to have the ability to adapt in response to changing market conditions. Both policy consistency and policy flexibility have value to developers and contribute to the success of an inclusionary zoning policy. Balancing them [consistency and flexibility] appropriately is perhaps the central challenge for cities seeking to make the best use of this particular policy tool.”

Urban Land Institute

By Trisha Riggs

September 2, 2016

Treasury Department Releases 2016-17 Priority Guidance Plan for Tax-Exempt Bonds - And It’s Already About One-Third Complete!

On August 15, 2016, the Treasury Department released its 2016 – 2017 Priority Guidance Plan (the

"Plan"). Tax-exempt bonds are the last category in the Plan, but the Plan lists the priority guidance categories in alphabetical order. Had these categories been listed in order of esteem, we know that tax-exempt bonds would have been [INSERT ESTEEM-BASED POSITION HERE].

Any respectable "to-do" list includes items that already have been, or soon will be, completed. This balances against the difficult items that have languished so that the person who created the list (or had it thrust upon him or her) has some sense of accomplishment. Otherwise, the creation or review of the to-do list would be the soul crushing experience that it's intended to be. By this standard, the Plan's priority guidance for tax-exempt bonds is an exceptionally well crafted to-do list. Sure, the seven items on the list include projects that have been there (and will very likely continue to be there) for years, but it also includes two items that are complete – one of which was completed before the Plan was released! So, what's the Plan for tax-exempt bonds? Read on.

Herewith are the Treasury Department's 2016 – 2017 priority guidance plan items for tax-exempt bonds:

1. Guidance on remedial actions for tax-advantaged bonds under §§54A, 54AA, and 141.
2. Regulations on the definition of political subdivision under §103 for purposes of the tax-exempt, tax credit, and direct pay bond provisions. Proposed regulations were published on February 23, 2016. As we have previously discussed (here, here, and here), these proposed regulations require nothing short of a page-one rewrite.
3. Revenue procedure that will update Revenue Procedure 97-13 relating to the conditions under which a management contract does not result in private business use under §141. This update was released in the form of Revenue Procedure 2016-44 on August 22, 2016.
4. Final regulations on public approval requirements for private activity bonds under §147(f). Proposed regulations were published on September 9, 2008. This is one of the languishing items that needed the ameliorative counterbalancing of a completed task.
5. Final regulations on arbitrage investment restrictions under §148. These final regulations were promulgated as Treasury Decision 9777 on July 18, 2016 (finalizing proposed regulations that were published on September 26, 2007 and September 16, 2013).
6. Final regulations on the definition of issue price for tax-exempt bonds under §148. Proposed regulations were published on June 24, 2015. As those that follow the tax-exempt bond industry and those that read our blog (there should be complete identity between these groups) know, these proposed regulations are quite controversial.
7. Regulations on bond reissuance under §150. This is another perennial task on the to-do list.

We have been summarizing and analyzing the tax-exempt bond guidance items in the Plan as they have been released (including in the iterative form of proposed regulations), so watch this space for more as the Treasury Department continues to release its tax-exempt bond guidance.

Squire Patton Boggs – Michael A. Cullers

USA August 31 2016

San Antonio's Key to Economic Success: Immigrants.

The city demonstrates how to leverage foreign partnerships.

The typical view of an immigrant in this country is not far removed from the image of thousands of people pouring in to Ellis Island in the early 1900s — people with little money to their names and big dreams of making their fortunes in America. That view is still true in many ways, but it's also true that many of today's immigrants are well-to-do international elites. For instance, in Miami — long associated with Cubans arriving by raft — there are now a lot of rich South Americans. West Coast cities like Seattle and San Francisco have many affluent East Asians. Houston has wealthy Indians, New York City many Russian tycoons, and so on. These immigrants bring financial and human capital. But are cities leveraging their immigrants, and their broader connection with certain countries, to generate growth locally?

The answer varies, but one successful example has been the relationship between San Antonio and Mexico. Their ties run deep; Texas was a part of Mexico until its independence in 1836. Since then, San Antonio has attracted Mexican immigrants. But as crime has risen in Mexico in recent years, there's been a professional-class exodus of Mexican nationals to affluent northern San Antonio.

The influx also has to do with long-existing business partnerships that have been actively encouraged by San Antonio's political establishment. The relationship really blossomed in 1981, when Henry Cisneros was elected as the first Hispanic mayor of a major U.S. city. Cisneros wanted to connect local San Antonio businesses with Mexican consumers. So he established a relationship with the Mexican president, further bolstered existing sister city partnerships, promoted tourism and attended Mexico's trade fairs.

The relationship has grown ever since — getting a strong boost from the signing of the North American Free Trade Agreement in 1992. NAFTA made San Antonio a prominent stop on the Mexico-to-Canada trade route. All this has combined to spur growth in San Antonio, which according to the Milken Institute is one of America's best-performing cities economically. Various Mexican institutions, such as Cemex concrete and the University of Mexico, have opened branches there. According to the local Hispanic Chamber of Commerce, San Antonio exports more goods and services to Mexico than 42 U.S. states combined. Such commerce has encouraged the residential growth of Mexican nationals. "San Antonio is a platform for Mexicans and Mexican companies that want a halfway step [into the U.S.]," says Cisneros. "It's culturally comfortable; business is conducted in multiple languages."

San Antonio, which is 63 percent Hispanic and has been called "Mexico's northernmost city," may be an extreme example of this local-foreign alignment. But the concept is applicable elsewhere. It is common, after all, for municipal officials to travel nationwide recruiting companies and building partnerships. In cities with business-savvy immigrants and existing foreign ties, there is the potential to create lucrative international partnerships that generate growth locally.

GOVERNING.COM

BY SCOTT BEYER | SEPTEMBER 2016

[The Metro Areas With More New Businesses.]()

Younger businesses and startups are often key to fueling future economic growth, so considering the age of employers can provide valuable insight into a local economy.

A Governing analysis of data released Thursday by the U.S. Census Bureau depicts sizable variation in the presence of employers that have been operating for no more than three years. In the largest metro areas, younger companies make up anywhere from 15 percent to 30 percent of employers.

Nationally, they account for about 22 percent of businesses with paid employees.

The census estimates were published as part of the new Annual Survey of Entrepreneurs, which covers data collected in 2014 for states and the top 50 metro areas.

Continue reading.

GOVERNING.COM

BY MIKE MACIAG | SEPTEMBER 1, 2016

Jobs Report: Local Government Employment Picking Up.

The latest job estimates from the Labor Department suggest a recent uptick in local government payrolls.

In August, the sector added 24,000 jobs, while July estimates were revised for a monthly gain of 43,000 positions nationally. Total local government employment, including education, has expanded by about 1 percent so far this year.

Growth in hiring among schools, in particular, appears to have accelerated after changing little over the first half of the year. Aggregate totals increased by 12,000 jobs last month and 35,000 in July.

Employment for all other areas of local government registered increases each month this year, albeit very slight gains some months. In all, local public employment (excluding education) has expanded by 68,000 positions since December, an increase of 1.1 percent.

Still, local government employment remains a long way off from pre-recession levels. The Labor Department's August estimate is more than 300,000 jobs below peak employment, a figure that rises substantially when population growth is taken into consideration.

By comparison, state-level public employment has showed little movement. Current estimates for total state government jobs, excluding education, are the same as they were in January.

GOVERNING.COM

BY MIKE MACIAG | SEPTEMBER 2, 2016

In Flint's Aftermath, Water Will Run by New Rules.

The water crisis in Michigan highlighted major problems with not just federal regulations but the way localities enforce them. That's all likely to change soon.

For years, Denver Water, like many other drinking water utilities, would refer its customers concerned about the lead content in their water to state-approved labs that could collect and analyze samples from the homeowners' faucets. This summer, Denver Water made the process much easier: Now if a resident is concerned, the agency will send out a testing kit, analyze the water in its own labs and report the results back to the customer — all for free. More than 100 homeowners used the new service in its first month.

Perhaps this should have been done earlier. But it wouldn't be happening now had it not been for Flint, Mich. The Flint water crisis, which exposed adults and children to dangerous levels of lead in their drinking water, is reverberating throughout the country.

The Denver agency, which serves 1.4 million people in the city and nearby communities, has also started automatically replacing lead service lines as it finds them in its normal maintenance work. The service lines, which connect water mains under streets to individual buildings, are the main source of lead contamination in water systems. But they usually have split ownership. In many cities, the utility owns everything up to the sidewalk, while homeowners and other landlords own everything on their property. The divided ownership makes it difficult to replace the pipes. In Denver, the property owner actually owns the entire service line. Nonetheless, Denver Water is offering to do the replacements for free, at least in places where it's already digging to do other work.

"Since the tragedy in Flint, people are more aware of what could be happening in their own plumbing and in their homes," says Travis Thompson, a Denver Water spokesman. "But now with people paying attention, how can we use that to get the lead completely out of our community?"

It's a clear-cut goal, but not an easy one to achieve. Just a handful of cities have actually eliminated all the lead in their drinking water systems, and then only through a years-long process. Local officials who want to replace lead pipes completely still have to ensure that the lead plumbing already in the ground is safe until the day, however distant, when those lead pipes are finally removed.

Lead in drinking water has been an issue for decades. Thirty years ago, Congress banned the use of plumbing that contained lead after research showed that any exposure to it can be dangerous, particularly to pregnant women and children. It can damage the brain, red blood cells and kidneys, and can cause lifelong developmental problems.

The disaster in Flint reminded the country, though, that lead pipes are still in operation in many water systems. There are approximately 7.3 million lead service lines throughout the U.S. that connect water mains to buildings. And service lines aren't the only source of lead in water. Lead can leach into the water supply from old plumbing fixtures and drinking fountains. Galvanized steel pipes, which were used frequently for service lines before the 1960s, can also cause lead poisoning. While national attention has focused on Flint, dangerous lead levels have surfaced, among other places, in schools in Newark, N.J., and Portland, Ore.; state homes for the disabled in Texas; and even the drinking fountains in the U.S. Capitol.

The reason why stories like those are not more common — with so many lead pipes still in use — is that water utilities treat their water with chemicals that form a protective layer on the surface of lead pipes. The chemical barrier prevents lead from leaching into the water. In fact, the federal government required drinking water systems to use that approach when the U.S. Environmental Protection Agency (EPA) issued the regulations known as the Lead and Copper Rule in 1991. The rule requires drinking water utilities to take water samples from high-risk homes or buildings every six months. If 10 percent of those samples contain more than 15 parts per billion of lead, the utility must take steps to address it, including the use of anticorrosive chemicals.

The problem with this approach, though, is that the protective coating is fragile. It can be damaged when the pipe is moved or connected to another pipe made of a different metal, or when there is a change in the water source. In Flint, the water system and individual homes have had lead plumbing for decades. Residents didn't report anything out of the ordinary until April 2014, when the city, under a state-appointed emergency manager, switched the source of its drinking water from Detroit's Lake Huron to the Flint River. Because Flint failed to add anticorrosive chemicals to the river water — as required by the EPA — the new water source corroded the pipes, and the toxic metal entered the drinking water.

It's to prevent disasters like the one in Flint that the EPA requires water systems to conduct tests in homes regularly for high levels of lead. Local and state officials in Flint broke those rules. For example, the water samples are supposed to be taken from homes most at risk of lead poisoning, ones which the utility knows or suspects are served by lead service lines. But in Flint, more than half of the samples submitted by the city after the switch to river water were taken from homes with service lines made of copper, rather than lead. Flint's water utility also told customers to run their water for several minutes before taking a sample. The practice, known as "pre-flushing," can lower lead levels in samples submitted for testing.

The testing violations in Flint were particularly egregious, and three officials from the city and Michigan's Department of Environmental Quality face criminal charges for the apparent deception. But environmental and health activists have long complained that the EPA's testing protocol is too lax and ambiguous.

As news of the Flint water crisis spread, it became clear that utilities weren't all conducting their tests the same way. Some, as in Flint, recommended pre-flushing. Others told customers to remove aerators before collecting the sample. Most wanted samples of the water that first came out of the faucet; some asked for samples after the water changed temperature. "One thing that the water utility industry wants is specific instructions on how we do things," says Scott Potter, the director of the Nashville Metro Water Service and the president of the Association of Metropolitan Water Agencies. "If you have specificity, then the entire industry is doing it one way — the way scientists say is the best way — and we can all trust the data."

New rules to address these issues could come as soon as next year, as the federal agency wraps up a six-year effort to rewrite the Lead and Copper Rule. In light of Flint, the new rules could require major changes for water utilities. The federal government could require them to test homes more often. It could lower the threshold of lead in water that requires utilities to respond. And it could even push water utilities to replace lead service lines altogether.

Activists say it's not just the rules that matter, but the way they are enforced. They hope the EPA and the state agencies charged with administering its rules will become more aggressive in making sure they're followed. "Flint is an extreme example of governmental indifference and callousness," says Eric Olson, the director of the health program at the Natural Resources Defense Council. "But I do believe it highlights a more systemic problem with a lack of attention to and, frankly, political will for enforcement and for stepping in and insisting on compliance."

Only 11.2 percent of the 8,000 violations of the Lead and Copper Rule throughout the country resulted in any sort of enforcement action in 2015, according to Olson's analysis of EPA data. Even in those cases, which mostly involved small water systems, regulators operated with a soft touch, typically just prodding the utilities to fix their systems. It's the regulatory equivalent of being let off at a traffic stop with a written warning. Regulators sought or assessed penalties in only 3 percent of the reported violations. There is also evidence that suggests states are underreporting violations. Flint isn't even included in the list of Michigan water systems that broke the rule in 2015. Only government regulators, not individual residents, can start the enforcement process, so if the regulators fail to do their jobs, nothing happens. "There is," Olson says, "no cop on the beat."

Regulators don't usually penalize water utilities because state and federal regulators try to act as "partners" to the water agencies they oversee. "Yes, it's true, you want collaboration. You want partnerships if the folks are doing their jobs," Olson says. "But if the water utility is simply failing to comply with the law, that's where enforcement is legally required."

Diane VanDe Hei, the CEO of the Association of Metropolitan Water Agencies, admits that a "handful" of states have trouble regulating drinking water. "I don't think it's a secret that some states do not have the resources to do all of the things they're supposed to do," she says. "They have a lack of funds or personnel."

A slow response from utilities and their regulators — or no response at all — is another problem. About a decade ago, Virgil Bernero, then a Michigan state senator, grew increasingly frustrated when he and his office tried to track down information about lead levels in Lansing's water. Bernero started looking into it when a constituent raised the issue. It became more urgent when he learned about a major lead-in-water crisis in Washington, D.C., where the local water agency tried to minimize the extent of its problem. At a recent congressional hearing, Virginia Tech engineering professor Marc Edwards, one of the first people to identify the high levels in both Washington and Flint, said the crisis in Washington in the early 2000s had been "20 to 30 times worse" than that of Flint. As many as 42,000 children were affected before the crisis was resolved. The district's problems started when its water utility switched from using chlorine to chloramine as a disinfectant, making the water more corrosive.

Bernero — energized by what he learned about Washington's lead-in-water crisis — wasn't satisfied with the answers he was getting from his local water utility, so he set up a legislative task force that invited Edwards and others to testify about Lansing's water, and particularly about the utility's testing methods. Bernero said the utility's responses amounted to "patting us on the head and saying, 'We're the experts, don't worry about it.'" But Edwards had a different message, Bernero recalls: "Don't buy that. You can't leave this to the so-called experts."

So Bernero didn't. When he became mayor of Lansing, the city did what very few others in the country have done: It embarked on a decade-long program to replace all of the lead service lines in the city. By next year, all of the lead service lines in Lansing will be gone.

The reason so few cities have done what Lansing is doing, though, is that swapping out lead pipes isn't easy. Or cheap.

The first major task for many utilities is to find all of the lead service lines in their system. That sounds much simpler than it often is. It can require water operators to go back through old documents and make their best guess about what kinds of pipes are in the ground, based on historical records. That's because, until the last few decades, water utilities often didn't track what kind of materials their service lines were made of. It's especially true for the portion of the service lines on private property, which typically are the responsibility of the property owner rather than the utility.

The service lines are usually installed during building construction, explains David LaFrance, the CEO of the American Water Works Association, which represents 4,000 water utilities. "Just as the water utility doesn't know whether a house has hardwood floors or linoleum, they wouldn't naturally have an inventory of what the material is for the service line," he says. "When the general public hears that the utility doesn't know, it's surprising. But for the utility it isn't really part of the infrastructure that they put into the ground and they maintain. That's where the problem comes."

Incomplete and inaccurate information has already frustrated Flint's efforts to replace its lead and galvanized steel pipes. When the crisis started, most of Flint’s records on the kinds of pipe it had were still on index cards. The state helped the city convert those records into a GIS database to track which properties had which types of service lines. More than half of the active service lines were made of copper pipe. But that still left nearly half of the lines as candidates for replacement: Eight percent of the lines were made of lead, 18 percent were made of galvanized steel and the remaining 21 percent were unknown.

And that’s assuming the records were even accurate. A contractor hired by the city to replace the service lines of 30 homes throughout the city, in order to gauge the feasibility of a much larger replacement program, found that the records of sites chosen for the new lines were correct only 64 percent of the time.

A second major hurdle for replacing service lines, of course, is cost. Estimates vary greatly on how expensive it is to switch out the pipes, but the most common estimate is near $5,000 a line. As Lansing replaced its pipes, it developed a method, which the city is considering patenting, that speeds up the process and lowers costs. Lansing crews can replace pipes without digging long trenches. They attach the new pipe to the back of the old pipe, and then pull the old pipe out to the street, leaving the new one in place. Lansing officials say the technique can lower the cost of replacing a service line to between $2,000 and $3,000. But that may not hold true for other cities. When Flint started replacing lines, even with help from Lansing crews, their average cost was $7,500 apiece.

Split ownership remains a financing complication for almost any locality trying to do line replacement. In Madison, Wis., which also removed all of its lead service lines, it was a major hurdle. State regulators blocked Madison from using taxpayers’ money to pay for the replacement on private property, so the city had to find other creative revenue sources — such as income from renting out space on its water towers to cellular providers — to help subsidize the water pipe replacement costs for homeowners.

Lansing paid for its program with rate increases, but that’s not an option for most cities. “We can’t just do that,” says Michael Deane, the executive director of the National Association of Water Companies, because private utilities — and some public utilities, like Madison’s — need to have their rate increases approved by state public utility commissions. “We have to work with our economic regulator on how we pay for it. How do we get the capital to make this? How do we earn a return on that capital investment?”

The list of thorny issues goes on, but it’s clear that an increasing number of communities are interested in getting rid of lead service lines, whether the EPA ends up requiring it or not. There is a growing consensus in the water industry, too. Even the American Water Works Association, which once blocked EPA regulations making it easier to replace the private portion of service lines, now supports the goal of taking out the lead service lines. To share their expertise with localities, major water industry groups have joined with environmental and public health groups to form an organization called the Lead Service Line Replacement Collaborative.

As sensible as it might seem to replace every single lead service line in the U.S., there are plenty of reasons to be cautious.

One is that replacing lead service lines doesn’t always solve lead poisoning issues. The Flint water crisis first came to light in part because residents called on Edwards, the Virginia Tech professor, to investigate their situation. Through independent testing, he showed that lead levels in the industrial city were far beyond the federal thresholds. Of the 271 houses Edwards and his team tested, the worst belonged to Elnora Carthan, on the city’s north side. Her water registered readings of 1,000 parts per billion of lead, or 67 times higher than the federal maximum of 15 parts per billion. But when crews in Flint came to replace the service line in Carthan's home, they found out the line was made of copper, not lead. The lead in her water had to be coming from somewhere else, likely her home's internal plumbing.

"I'm all for getting the lead pipe out," Edwards said when the discovery was made. "I want Flint to become the model for replacing lead pipe, but it's not necessarily going to get rid of the lead problem. We're still going to have a lead problem if corrosivity is not controlled."

And ultimately, there is the question of opportunity cost. How wise is it to prioritize lead pipe replacement over other water system needs? Water utilities have many other pressing concerns, such as removing other harmful, corrosive chemicals from drinking water or just trying to maintain and improve decrepit infrastructure. "If you spend $300 million on lead service lines," says VanDe Hei of the Association of Metropolitan Water Agencies, "what are you not doing? What are you not doing that has perhaps more risk?"

GOVERNING.COM

BY DANIEL C. VOCK | SEPTEMBER 2016

TAX - NEW YORK

Joon Management One Corp. v. Town of Ramapo

Supreme Court, Appellate Division, Second Department, New York - August 17, 2016 - N.Y.S.3d - 2016 WL 4371715 - 2016 N.Y. Slip Op. 05795

Property owner brought action against town seeking a judgment declaring that property's tax assessment was overstated and erroneous.

The Supreme Court, Rockland County, granted town's motion for summary judgment and denied property's owner's motion for leave to amend or to enforce settlement agreement. Property owner appealed.

The Supreme Court, Appellate Division, held that:

- Statute of limitations for tax certiorari proceedings applied to action;
- Town's motion for summary judgment was not premature;
- Supreme Court properly denied property owner's motion for leave to amend; and
- Supreme Court properly denied property owner's cross-motion to enforce alleged settlement agreement.

Statute of limitations for tax certiorari proceedings, which required such proceedings to be commenced after exhaustion of administrative grievance remedies and within 30 days after filing of the final assessment roll, applied to property owner's against town seeking judgment declaring that its property's tax assessment was overstated and erroneous, where gravamen of property owner's claim was that its property was overtaxed.

Town's motion for summary judgment on property owner's claim that its property tax assessment was overstated and erroneous was not premature, despite property owner's assertion to the contrary, where property owner failed to demonstrate how discovery might have lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the town.

Supreme Court properly denied property owner's motion for leave to amend its complaint against town challenging tax assessment, where property owner's proposed amendments, which were to add causes of action to recover money had and received and to recover damages pursuant to § 1983 for violation of constitutional rights, were devoid of merit.

Supreme Court properly denied property owner's cross-motion to enforce alleged settlement agreement between owner and town with regard to owner's action against town challenging its property tax assessment, where stipulation of settlement was never approved by town board, thus never becoming binding upon town.

TAX - NEW YORK

Nearpass v. Seneca County Indus. Development Agency

Supreme Court, Seneca County, New York - August 18, 2016 - N.Y.S.3d - 2016 WL 4419135 - 2016 N.Y. Slip Op. 26264

Property owners commenced Article 78 proceeding claiming that resolution by county industrial development agency (IDA) to provide tax benefits to developer of casino being built in county was void under New York State Industrial Development Act (IDA Act), impermissibly provided public assistance for private purpose, unlawfully failed to specify amount of tax benefit, materially miscalculated and misstated amount of tax benefit, and was null due to attorney conflicts of interest, and that IDA usurped town assessor's authority to value property improvements.

The Supreme Court, Seneca County, held that:

- Casino was a commercial project and recreation facility within the meaning of the IDA;
- IDA's decision to grant tax benefits to casino was not arbitrary and capricious;
- IDA was not required to specify amount of tax abatement;
- IDA's failure to adopt critique of appraisal report on casino's value was not arbitrary and capricious; and
- Powers of town assessor were not preempted by tax agreement.

Infrastructure Managers Feeling the Heat.

Infrastructure managers are under pressure to increase their investment in the U.S. as American investors boost infrastructure exposure and the investment climate in Europe — the top region for infrastructure deals — becomes less hospitable.

Managers are in a tough spot. They have more capital than viable deals. At the end of the first quarter, infrastructure managers were sitting on a record $124 billion in unspent capital commitments, according to London-based alternative investment research firm Preqin.

At the same time, the U.K.'s vote to leave the European Union, combined with the upcoming referendum on the Italian government and elections in Germany and France, are starting to cause some infrastructure managers and investors to steer clear of Europe.

This makes the U.S.'s infrastructure need — estimated by the American Society of Civil Engineers to total $3.6 trillion by 2020 — a tempting target. But the much lower cost of municipal bond financing and the high political cost of privatizing publicly funded infrastructure has put the bulk of these potential projects beyond managers' reach.

However, there are signs of change.

Both U.S. presidential candidates have plans to boost infrastructure investment. Democratic nominee Hillary Clinton's proposal is to spend $275 billion over five years for infrastructure that would be funded through business tax reform. Some $250 billion would be direct public investment with the remainder going to fund a national infrastructure bank that would offer loans, loan guarantees and other forms of credit. The bank would expand the Build America Bonds program.

Republican nominee Donald J. Trump has proposed $800 million to $1 billion in infrastructure spending, which would be financed with government bonds.

What's more, U.S. state and local governments are beginning to increase their use of public-private partnerships for everything from roads to courthouses.

And a new IRS regulation released in August makes it easier for infrastructure to be financed with a combination of municipal bonds and private investment.

Geopolitical uncertainty

Outside of public-private partnerships, infrastructure managers increasingly are investing in renewable energy as the U.S. moves away from coal and traditional energy sources. Regulatory changes are making renewable energy investments more attractive to investors.

"A lot of institutional investors today, because of uncertainty in Europe, don't want to take the geopolitical risk that is happening there," said Timothy C. Ng, chief investment officer of outsourced CIO firm Clearbrook Global Advisors LLC, New York. "If anything goes sideways, it will affect your projects and they won't get done."

So a lot of capital is flowing to the U.S. for infrastructure, as well as for real estate and private equity investment, Mr. Ng explained.

"There's huge money here now," Mr. Ng said.

And that is putting more pressure on managers to seek out deals in North America.

Europe is the top region for infrastructure investment. There were 266 deals in Europe in the first half of this year compared with 178 in North America, according to Preqin. The U.S. accounted for 140 of the North American transactions.

Investors typically like to invest their money at home first, said John Sweeney, vice president of New York-based placement agency Park Madison Partners LLC.

Institutional investors globally have an increased appetite for infrastructure, Mr. Sweeney said, because of its low volatility and risk profile.

"This creates a problem for infrastructure funds and infrastructure investors because as more capital is flowing into the sector, pricing is becoming more competitive," Mr. Sweeney said. "And the deal flow was already not as robust as it should be considering there's a lot of need in the U.S."

For investors, the too-much-capital-for-too-few investments is a classic recipe for lower returns, increasing the burden on managers to find viable deal sources.

This overabundance of capital is a concern for officials at longtime infrastructure investor New Mexico Educational Retirement Board, Santa Fe, said Bob Jacksha, CIO of the $11.4 billion pension fund.

“We were one of the first, perhaps the first, U.S. public pension plans to have an active infrastructure program,” Mr. Jacksha said. New Mexico ERB has invested in infrastructure since 2008.

“We have seen the demand increase as other funds have joined us and as they have allocated more and more capital to the space,” he said.

A lot of that demand is for core assets, because of the perceived safety of that category, Mr. Jacksha said. So New Mexico ERB officials have been investing in projects that involve construction.

“We are now often investing in something other than core, as that has become expensive,” and in core greenfield projects, Mr. Jacksha said. “Some other investors may not classify these as core.”

The ERB also has invested in build-to-core projects — projects sold to core buyers after they’re built.

ERB has about 73% of its $413 million in infrastructure exposure — fair value plus unfunded commitments — in the U.S.

Move to U.S.

Infrastructure manager IFM Investors Pty. Ltd. plans to invest as equally as possible in the U.S. and Europe to maintain the diversification of its open-end fund, said Julio Garcia, head of infrastructure, North America, in the New York office. Some 55% of IFM’s global open-end fund portfolio is invested in the U.S., Mr. Garcia said.

In the past 18 months, IFM invested a combined $4 billion in two toll roads: the Indiana Toll Road and the Circuito Exterior Mexiquense in Mexico City. In May, IFM sold a stake in the Indiana Toll Road to the $307.2 billion California Public Employees’ Retirement System, Sacramento, and Allstate Corp.

Mr. Garcia sees a lot of opportunity in the U.S. in energy infrastructure — especially in the midstream space, the pipes that transport oil from source to refinery to market.

Wilson Magee, New York-based director of global real estate and infrastructure securities at Franklin Templeton (BEN) Institutional LLC, said he is seeing “interesting capital investment opportunities” in water and wastewater projects as municipalities need to upgrade their systems.

Franklin Templeton’s global infrastructure funds have 30% to 35% invested in the U.S.

Over time, Mr. Magee said he expects that airports, which are mostly publicly owned in the U.S., will switch to a model that includes private ownership. “The model elsewhere around the world is long-term concession contracts,” he said.

The first big airport project in the U.S. is a public-private partnership that includes finance, design, construction, operation and maintenance of New York City’s LaGuardia Airport Central Terminal B, with a lease term through 2050.

There are other airport public-private partnerships on the drawing board. Los Angeles World Airports, the city agency that operates the City of Los Angeles' three airports, is considering a public-private partnership to finance a modernization program for Los Angeles International Airport that would include a 2.25-mile automated people mover.

In August, the Denver City Council approved continued negotiations with a consortium led by Ferrovial, a Spanish firm that runs London's Heathrow Airport, for a partnership to upgrade one of its terminals.

"There is increased interest in P3 in the U.S. recently," said Justine Kastan, an attorney in law firm Rutan & Tucker LLP's Palo Alto, Calif., office who specializes in public-private partnership infrastructure investments.

In August, the IRS made regulatory changes that increase the length and flexibility of public-private partnerships, Ms. Kastan said.

But even before the IRS rule change, governmental interest in P3s had increased, she said.

"I think there is a growing national awareness that we have infrastructure needs that aren't being met," Ms. Kastan said.

PENSIONS & INVESTMENTS

BY ARLEEN JACOBIUS | SEPTEMBER 5, 2016

This article originally appeared in the September 5, 2016 print issue as, "Infrastructure managers feeling the heat".

— Contact Arleen Jacobius at ajacobius@pionline.com | @Jacobius_PI

IRS Releases Updated Safe Harbors For Management Contracts In Tax-Exempt Bond-Financed Projects: Thompson Coburn

On August 22, 2016, the Internal Revenue Service released Revenue Procedure 2016-44. The purpose of this revenue procedure is to provide revised and broader "safe harbors" under which certain private management contracts will not result in private business use of projects that were financed with the proceeds of tax-exempt governmental or qualified 501(c)(3) bonds.

Potentially impacted issuers and conduit borrowers include governmental and nonprofit healthcare, higher educational and other entities. Market participants have expressed the belief that the more flexible safe harbor provisions may also help facilitate the structuring of public-private partnership (P3) transactions.

The revised safe harbors set forth in the revenue procedure build upon the existing safe harbors originally set forth in Revenue Procedure 97-13, which were in turn modified by Revenue Procedure 2001-39, and amplified by Notice 2014-67. The existing guidance sets forth conditions under which a management contract does not result in private business use, which conditions include constraints on net profits arrangements, the permitted term of the management contract, the types of compensation provided under the arrangement, and the relationship between the parties. Under such existing guidance, the extent to which the compensation to the private party is a fixed amount is key, in that the greater the percentage of fixed compensation, the longer the term of the management contract is permitted to be. Notice 2014-67 provided additional flexibility within the safe harbors by allowing a broader range of variable compensation arrangements for shorter-term (i.e., up to five year) management contracts.

[Continue reading.]

Last Updated: August 31 2016

Article by Steve Mitchell and Henry Bettendorf

Thompson Coburn LLP

[Baltimore Project Would Include Largest TIF District in City History.]

WASHINGTON – The proposed $6.9 billion Port Covington development project in Baltimore would include the largest tax increment financing district in the city's history and would be financed in part with $660 million of bonds backed by the increased property tax revenues.

The project, proposed by Under Armour CEO Kevin Plank, would include a new global headquarters for the sports apparel company as well as residential and retail facilities within a development district.

A new 50-acre, 3.9 million-square-foot headquarters for Under Armour would serve as the project's anchor, and would be flanked by roughly 11 million square feet of mixed-use development.

The project would be owned by Sagamore Development Company, a Baltimore-based real estate firm founded in 2013 by Plank and developer Marc Weller. Development would take place on Port Covington, a 260-acre industrial area roughly two miles south of downtown Baltimore between I-95 and the Middle Branch of the Patapsco River.

The project would be partly financed by $535 million of increased property tax revenue to be collected within a tax increment financing district. Those funds would go toward the construction of infrastructure, including roads and public spaces. None of the TIF revenues would go toward the Under Armour headquarters.

The total bond cost would be $660 million including issuance costs and other costs not associated with construction, according to Baltimore Deputy Finance Director Stephen Kraus.

Kraus said the bonds would be issued by the city of Baltimore Department of Finance in four-to-five phases over the next 12 years. Construction is expected to be developed in phases over roughly 25 years, according to plans.

The $535 million of expected increased property tax revenue, combined with an additional $349.5 million from the state and $224.2 from the federal government would total almost $1.2 billion in city, state and federal subsidies. Private funding provided by Sagamore is roughly $327.8 million. Of the private and governmental funding of roughly $1.4 billion, $115 million would go toward land acquisition costs, $138 million would go toward site work and $1.2 billion would be used for infrastructure.

The bonds would be paid back by incremental tax revenue generated by the development, as is customary in TIF districts. Tax increment financing secures tax-exempt borrowing by anticipated increases in tax revenues within a defined development district.

The Baltimore Development Corporation, the private nonprofit that grants TIFs for the city, approved the TIF application in March, and it is now before the City Council's Taxation, Finance and Economic Development Committee. The committee has held three hearings regarding the project, but moved a work session originally scheduled for Monday to Sept. 8.

At the time of the application, Baltimore had 14 TIF districts with outstanding debt of $147.2 million.

"One risk is that the developer may not move forward with the development once the tax increment financing district and documents authorizing the issuance of bonds have been approved by the city," officials wrote in the TIF application. "Provided that is the case, the tax increment financing district would remain in place but the bonds would not be issued and debt would not be incurred."

According to plans, the first tranche of TIF bonds would be issued in June 2017 for $62 million, followed by a second tranche of $208.3 million in 2018. A third tranche of $169.7 million would be issued in 2023, and a fourth tranche of $218.7 million would be issued in 2028.

The developer would initially purchase the bonds, which are projected to be outstanding between 2046 and 2058.

Proponents claim the project will bring roughly 8,000 jobs to Baltimore and will revitalize a largely vacant three-mile section of waterfront.

"An area essentially cut off from Baltimore's downtown neighborhoods by the elevated structure of I-95 and the adjacent CSX rail yard will become a dynamic, innovative, mixed-use experience and destination," officials wrote in the application. "As one of the largest urban revitalization projects in the United States, the redevelopment of Port Covington will provide extraordinary economic growth and job opportunities for both the city and the greater region."

Mark Pollak, a partner with Ballard Spahr in Baltimore who is serving as counsel for the developers, said project officials hope to have the initial financing occur in early 2017. Pollak, who described the project as "one of the greatest opportunities the city has ever had," said TIF funding would be phased in over an initial period. He did not comment on what the length of that period may be, and said it was dependent on the growth of Under Armour among other factors.

As among the largest TIF deals in U.S. history, the process could take a while, he said.

"I think everybody recognizes it as a potential transformative project for the city because of the scope," Pollak said, adding that Baltimore Mayor Stephanie Rawlings-Blake has expressed support for the proposed plan. "Clearly Under Armour has the opportunity to grow in many places and we and the city would hope that they can keep the growth in this city."

Still, he said there has been discussion in regards to the TIF size and negotiations to provide benefits to other parts of the city.

Some of those concerns have been expressed by Baltimoreans United in Leadership Development (BUILD), which in July called for a TIF agreement to include local hiring mandates of 51% for all future businesses in the TIF district. Should that mandate not be met, BUILD officials said the city should invoke "substantial financial penalties" on the parties responsible.

“BUILD calls on the City Council, Sagamore Development, and Mr. Plank to not agree to any city-wide benefits agreement without the city conducting a comprehensive independent analysis of the deal,” said BUILD co-chair Rev. Andrew Foster Connors. “If after the analysis the city concludes that the costs associated with the development can be managed, then any agreement must treat the city of Baltimore as a ‘first in’ investor.”

Pollak said the cost of the project is $5.5 billion, but rises to $6.9 billion when accounting for infrastructure costs. Estimates have placed Port Covington’s assessed value after construction at $2.6 billion.

In addition to the new Under Armour headquarters, the completed Port Covington project as proposed would include: 1.5 million square feet of retail and entertainment space, more than 7,500 rental and for-sale residential units, 500,000 square feet of industrial/light manufacturing space, 200 hotel rooms, 1.5 million square feet of office space, and 41 acres of public parks and waterfront space, according to the TIF application.

BDC president and CEO William Cole said the group’s TIF recommendation was contingent on five factors, which are that: returns to the city exceed the city’s hurdle rate, a profit-sharing agreement is negotiated, there is federal and state participation in infrastructure, there is no adverse effect on school funding, and there is no adverse effect on the city’s bonding capacity.

If and when the proposal clears the City Council’s Taxation, Finance and Economic Development Committee, it will then go before the full City Council for consideration.

Under Armour’s headquarters is expected to be built over 15-plus years, according to plans. The Baltimore-based company currently has headquarters in the Tide Point neighborhood of Baltimore, where it has been for 18 years.

In January, Under Armour completed a $40 million office space that houses more than 600 employees, marking the first new building to be opened on the Port Covington campus. Plank’s Sagamore Development Company has also completed a reuse of a city garage in Port Covington and the construction of the Sagamore Spirit Distillery in the same neighborhood.

The Bond Buyer

By Evan Fallor

August 30, 2016

Kicking the Taxpayers to Boost a Soccer Stadium.

Los Angeles wants to use antipoverty funds for development around a private arena. Is that any way to help the poor?

Most people outside of the University of Texas at San Antonio have probably never heard of one of its professors, Heywood Sanders, but taxpayers across the country owe him a debt of gratitude. For years Sanders has shined light on questionable state and local investments in convention-center development. Now he’s turned his attention to Los Angeles’ effort to get low-interest federal loans for a private sports complex development.

In his work on convention centers, Sanders has highlighted a process that repeats itself across the country: State and/or local government officials propose to build or expand a convention center, claiming the tab will be picked up by hotel taxes and other fees paid by visitors. Consultants are engaged who invariably conclude that the project will be an economic windfall.

Yet once the center is built or expanded, its economic impact is almost always a fraction of what was projected. The next time the consultants are called upon to evaluate a similar project, they ignore the trail of past failures and again tout it as an engine of economic growth. Sanders' work is beginning to bear fruit. Last year, Massachusetts Gov. Charlie Baker pulled the plug on expanding the Boston Convention & Exhibition Center.

Now Los Angeles has applied for a $22.5 million Department of Housing and Urban Development loan to help develop a conference center, restaurants and a soccer museum as part of a project anchored by a major-league soccer stadium. The Section 108 Loan Guarantee Program is meant to fill small funding gaps in development projects in return for a promise to give up to 51 percent of jobs the project creates to low-income populations.

Of course, lost in this scenario is the basic premise that just building the stadium is what's supposed to attract businesses.

Section 108 loan guarantees are designed to be an anti-poverty program. But in this case, the loan appears to be a last-ditch effort to save a $250 million stadium project without blowing a hole in the city's debt capacity. If that strikes you as neither fiscally prudent nor an effective way to help the poor, you're not alone. "If you had a spare $25 million [in anti-poverty resources] laying around, would you put it towards a stadium?" Sanders told Equity Factor, a blog published by the nonprofit Next City.

As Roger Noll, an economics professor at Stanford University and former member of the President's Council of Economic Advisers, points out, the seasonal nature of sports means stadiums don't generate enough tax revenue to merit public investment. Economic impact also tends to be contained in a very concentrated area around the facility. Some argue that high-paid athletes will spend money in the community, but most tend to leave when the season is over.

Heywood Sanders' work has taught us, once again, that state and local government officials should approach stadium and convention-center developments with skepticism. If the goal is to promote economic development, with a particular focus on low-income populations, propping up sagging private developments is hardly the best way to achieve it. Among the many better approaches would be to focus investments on improving the poor condition of basic infrastructure that is choking off economic growth and making the hard decisions — financial and otherwise — needed to improve public education.

GOVERNING.COM

BY CHARLES CHIEPPO | SEPTEMBER 6, 2016

Big-Box Stores Battle Local Governments Over Property Taxes.

The retailers are deploying a 'dark store' strategy that's hurting cities and counties around the country.

On Michigan's sparsely populated Upper Peninsula, big-box stores are a modern necessity. Where towns are spaced far apart and winters are long, one-stop shopping to load up on supplies adds a crucial convenience to what can be — at least for many — a rugged existence.

Landing one large retailer is a coup. Having more than one can make a city or town a regional shopping destination. Marquette Township, a small community adjacent to the larger city of Marquette, is in the unique position of having a handful of big-box chain stores. Taking advantage of the fact that the city of Marquette was mostly built out, the township began encouraging large-scale commercial development on its western edge early in the 2000s.

The town now boasts the only Lowe's on the Upper Peninsula, and the only PetSmart, Target and Best Buy. A Menards home improvement store and a Walmart Superstore are there as well. The flurry of new building and retail was so great that the township's tax revenue never took a hit during the Great Recession, even at a time when most small towns on the peninsula and elsewhere in Michigan were struggling.

But recently, the township suffered a dramatic drop in its property tax revenue. It had to cut back on spending, trim employee benefits and reduce library hours. The impact has reached up to surrounding Marquette County, which earlier this year closed a youth home to save money. The reason for the lost revenue isn't declining consumer demand. It's a series of rulings by the Michigan Tax Tribunal that have allowed large retailers to reduce their property tax assessments, in many cases by as much as half.

Big-box retailers argue that the market value of their commercial property should be the sale price of similarly sized but vacant retail buildings. They point out that these buildings are extremely hard to sell as-is once the retailer moves out. They tend to sit empty for long periods. Thus, the assertion is, they aren't worth nearly as much as local tax assessors have traditionally assumed in valuing the property.

This appeals approach was first largely successful in the Detroit area following the recession, when nearly all retailers were dealing with depressed property values. But since then, it has spread across otherwise thriving areas in Michigan to the point where it is difficult to find a county that hasn't been challenged on the issue. The assessment community has even given it a name, dubbing it the "dark-store" strategy.

Local governments, needless to say, aren't buying this. "When you get your house appraised, they're going to look at properties that are occupied," says Steve Currie of the Michigan Association of Counties. "They're not going to look at the foreclosed one because that's not an equitable property. It's the same case here."

Michigan is far from alone in seeing localities take dark-store hits to their property tax base. Counties in Alabama, Florida and Indiana are seeing widespread challenges that make use of the dark-store method. The National Association of Counties says it's an emerging issue in Iowa, North Carolina, Ohio, Tennessee, Washington and Wisconsin.

Still, while these cases have been proceeding for the better part of a decade, it's only been recently that county organizations and public officials have realized the geographical magnitude of the challenge. County assessors forced to respond to it aren't always aware of similar controversies outside their jurisdiction. This is particularly true in places that are geographically isolated and where assessors are part-time employees.

Getting policymakers clued in to the problem has also been tricky. The world of property tax assessments is loaded with definitions and methodology that, to the average outsider, can seem overwhelming. Property appraisal laws vary by state, and arguments that hold water in one state might not in the next. So it's not always clear to lawmakers what — if anything — they can do legislatively to help counties respond to the threat.

Even in places where counties have pieced together a coordinated effort to fend off challenges, response on the state level has varied. The Indiana General Assembly took arguably the strong-est action, passing two laws last year that essentially banned the dark-store tactic. But those laws were repealed and replaced with a weaker law this year. Alabama passed a law that amounted to an administrative change giving counties more legal resources. The Michigan Legislature has considered but not approved bills dealing with how the Tax Tribunal hears assessment challenges. In these places and elsewhere, many are concerned that the longer it takes for a concerted state response, the more money counties and local governments will lose.

Big-box retail stores aren't the first to complain that their property's uniqueness should afford them special consideration when it comes to their taxable value. Nearly a century ago, the owners of the New York Stock Exchange tried to get the building's appraisal value lowered by arguing that the building's unusual — and expensive — design would be of no value to any future buyer. In fact, the argument went, the building actually lowered the value of the land itself because a future buyer would be forced to shell out the money for demolition costs. While the court rejected that argument in 1928, it has become a popular case to make ever since, with varying levels of success.

There are different nuances and different case law in every state, but it can be generally said that appraisers look at three factors in determining the taxable value of property: the sale price of comparable properties, the current cost to build minus depreciation and the income generated by rents charged to tenants. Appraisers can apply a blend of these approaches to arrive at a property's value, or place most of the weight on just a single approach.

When it comes to unique properties like big boxes, finding comparable sales is difficult. Property values differ by market and it's simply not often that an oversized retailer in a market area sells its property. For this reason, appraisers prefer giving more weight to building costs.

But big-box retailers say using the construction costs of a building to determine the assessment artificially inflates the value. And they insist it's unfair to value their retail properties based on their worth to the current user (referred to as "value-in-use") instead of the value the property would have on the open market (called "value-in-exchange"). The appropriate use of the competing valuation methods is a topic of seething debate in the appraisal world. Retail representatives fall decidedly on value-in-exchange. "It's easy to be confused by the presence of a business," says Florida real estate broker Sheila Anderson, whose firm Commercial Property Services has represented owners in scores of appeals. "But a business is not [what needs to be] assessed." In her view, it's only the resale value of the empty building that matters for taxation. And that is nearly always a much smaller amount.

Complicating the matter are deed restrictions the big-box retailers place on the properties they do sell. Typically, a retailer closes a location to open up another store close by, or leaves because the market isn't viable anymore. But just to be sure a competitor doesn't move in and fare better, the deed bars the new owner from operating a similar business. Assessors say this limitation artificially depresses the market value of the property. The retailers consider it insignificant.

The debate leads to real questions about the fairest way to value these prolific but unique properties, says Allen Booth, a former city assessor in Rhode Island without any affiliation to a dark-store case. "The reality is there are very few tenants that will move into the custom building when you're dealing with these big-box situations," he says. But, he adds, officials are leery of retail attorneys' motives because they can profit greatly from the challenges by taking a cut of the tax refund if they win. "You have to wonder," Booth says, "are these people just being obnoxious or are the properties really overvalued and it's just that now someone's looking at it?"

Tax courts in Michigan have generally agreed with retailers that properties were being overvalued. In Marquette Township, Lowe's successfully used this argument in a 2012 challenge to its property assessment and succeeded in reducing its taxable value from $5.2 million to less than $2 million, even though the store alone cost $10 million to build. The township spent several hundred thousand dollars in legal costs but failed to win in the appeals process. As a result, the ruling applied to other pending challenges. All told, the township's total property tax collections have fallen nearly 22 percent in just a few years.

Statewide, the results have been similar. According to the International Association of Assessing Officers, the valuation on large retailers across the country is anywhere from $45 to $75 per square foot, depending on the market. After five years of litigation in Michigan, says tax attorney Jack Van Coevering, the average per-square-foot value in the state is $20.

The big-box retailer Meijer brought a case at one of its most successful Indiana locations, in Marion County, after winning reduced assessments in Michigan. The attorney for Meijer went so far as to tell the Indianapolis Business Journal that the appeal in Marion County was a test case because "whatever the value is there would be the upper limit of the value across the state." The retailer won in late 2014 and got its assessment slashed from $83 per square foot to $30 per square foot. The decision applied retroactively, requiring Marion County to refund Meijer $2.4 million for nine years of back taxes. Indiana county officials estimated that if the decision were to be extended to the more than 17,000 commercial properties across the state, it would mean a loss of $120 million in property tax revenue statewide.

Indiana lawmakers responded quickly. In 2015, the legislature passed two bills: One effectively banned using the dark-store method to value existing businesses, and the other required using the cost method for properties over a certain square footage. But those laws were repealed this year under concerns they violated the uniformity clause in the state's constitution, which requires all property to be assessed on an equal basis. The Indiana General Assembly then passed a new law that requires assessments to be based on the value of properties that are "similarly situated in the marketplace."

Other states have tried other tactics. Alabama passed a law this year that allows counties to remove these cases from their district attorney's jurisdiction and hire outside attorneys to fight them. In Michigan, a bill passed the House that would require the Tax Tribunal to consider all three valuation methods (rather than just the one the retailer is arguing for). It will be considered in the Senate later this fall.

In short, the legislative authority of lawmakers to intervene is murky. "It's always appropriate for the legislature to try to clarify and remedy a situation when appropriate," says Joan Youngman, a property tax expert with the Lincoln Institute of Land Policy. "But you want to be sure this is a problem with the existing law."

In the end, the best way to beat back the challenges is to win in court. But that's a tough task for counties that don't have a lot of resources. In Tampa, Fla., Hillsborough County's director of valuation, Tim Wilmath, says counties in his state have caught on early to the dark-store challenge and have for the most part been able to mount successful defenses. Wilmath co-authored an article in an industry magazine last year advising county assessors on how to challenge the tactic, which has made him a de facto adviser to smaller counties across the country. "They're looking for advice on how best to go at it," he says of the calls from outside Florida. "But even when they know all the right things to do, they still settle because they just don't have the money."

In Michigan, a recent Court of Appeals ruling may prove to be a turning point. In May, the court overturned a 2015 decision by the Michigan Tax Tribunal that had favored the retailer Menard against the city of Escanaba in a property tax dispute. The court found that Escanaba's cost-based approach was more reasonable than the retailer's comparable sales method, which included using dark stores. The case was remanded back to the tribunal with directions to consider all the assessment methods. It may end up setting a precedent for cases in Michigan that are currently open.

Still, for counties and townships that have already lost or settled cases, the damage has been done. And because of limits on how much localities can increase the property tax each year, the previous losses in tax revenue will never be made up. In Marquette Township, that means officials will have to figure out how to replenish the reserves that were drained to pay back Lowe's, at the same time adjusting permanently to a shrunken tax base.

"The long and short of it," says Marquette Township Manager Randy Girard, "is that we will not recover."

GOVERNING.COM

BY LIZ FARMER | SEPTEMBER 2016

A Comeback for Bond Insurance.

Bond insurers — companies that provide a money back guarantee to investors on bonds sold by municipalities — were one of the biggest casualties of the 2008 financial crisis. Governments liked to insure their bonds because it typically allowed them to sell the bond with the insurer's higher credit rating. That let governments get a lower interest rate cost on the bonds, making it worth the insurance expense. But the insurers' effectiveness was essentially obliterated when their own credit ratings were downgraded amid the 2008 crisis. A little over a decade ago, half of new bonds issued in the municipal market were insured. Today, just 6 percent are.

While they're down, bond insurers are far from out.

In their monthly outlook, analysts Alan Schankel and Eric Kazatsky of Janney Montgomery Scott predict insurers are biding their time for a comeback. Some existing bond insurers have restructured since the crisis while a new one — Build America Mutual — has come on the scene.

Meanwhile, insurers have been decreasing their exposure to outstanding bonds as governments have not re-upped their insurance when refinancing old debt.

The Takeaway: Low-interest rates have driven down the need for bond insurance because even low-grade governments are getting historically low rates on their bonds. But Schankel and Kazatsky say that has also provided a window for insurers to regain their financial health after losing a lot of money in municipal bankruptcies. When rates rise, more governments will turn back to insurance.

"Bond insurance plays an important role for many municipal investors," the authors wrote. "We expect that role to expand, along with market share, if not immediately, then in coming months and years."

GOVERNING.COM

BY LIZ FARMER | SEPTEMBER 2, 2016

Smart Skills Versus Mindless Megadeals.

Smart Skills versus Mindless Megadeals: Cost-Effective Workforce Development versus Costly "Buffalo Hunting," with Proven Policy Solutions

Using data from dozens of programs and deals in Good Jobs First's Subsidy Tracker database, we draw sharp comparisons between the costs of workforce development programs versus company-specific "megadeals." Whereas 31 out of 33 training programs have four-figure costs per job, our current megadeals database shows an average cost to taxpayers of more than $658,000 per job.

Read the Report.

Good Jobs First

by Thomas Cafcas and Greg LeRoy

September 2016

Broadband Law Could Force Rural Residents Off Information Superhighway.

WILSON, N.C. — On the first day of the harvest last week, a line of trucks brimming with sweet potatoes rolled into Vick Family Farms, headed for a new packing plant that runs on ultrafast internet.

The potatoes were tagged with online bar codes to detail the plots where they grew, their types of seed, and dates and times picked. On a conveyor belt, 50 flashing cameras captured and sent images of the spuds to an online program that sorted the Carolina Golds by size and quality and kicked them into boxes.

The Vick family built the plant only after the nearby city of Wilson agreed early last year to bring its municipal broadband service to the 7,000-acre farm. Since the plant opened in October, the farm's production and sales to Europe have jumped.

But now, after a legal battle between state and federal officials over broadband, the farm and hundreds of other customers in the eastern region of the state may get unplugged.

Continue Reading.

THE NEW YORK TIMES

By CECILIA KANG

AUG. 28, 2016

SEC Investor Advocate Worried About Narrowing of Muni Market.

WASHINGTON – Financial regulators and others should work to reverse the increased narrowing of the municipal market caused by fewer retail investors and more munis concentrated among wealthier bondholders, the Securities and Exchange Commission's Investor Advocate told regulators.

"Personally, I hope we can reverse this trend toward concentration of assets among fewer investors," Rick Fleming said in a speech at the Municipal Securities Rulemaking Board's Securities Regulator Summit on Aug. 25.

Fleming said that, as of December 2015, individuals owned approximately 70% of munis either directly or indirectly through mutual funds or other pooled investment vehicles with the average age of a muni investor at 62.

"However, if you drill beneath those statistics, some interesting – and some might say troubling – patterns emerge," he said.

Fleming noted that "a mere 2.4% of households hold any municipal debt," about half of what the percentage was in 1998.

Further, the wealthiest one-half percent of U.S. households now own 42% of all municipal bonds, compared to ownership of only 24% in 1989. Additionally, the bottom 90% of households, as measured by net wealth, hold less than 5% of munis, falling from 15% in 1989, Fleming said.

"How did muni bond ownership become a lifestyle of only the rich and famous, as opposed to an investment option for the middle and upper-middle classes?" Fleming asked.

The investor advocate traced the narrowing of holdings to munis' tax exemption. While the tax-exempt status is attractive when compared to other investments, the interest rate on munis is often lower than the interest rate on other taxable fixed-income securities like corporate bonds, he said.

Households in higher tax brackets have always had more incentive to invest in muni bonds, he said, adding "this is not news." In addition, the shift from defined benefit pension plans, where the plan sponsor promises payments based on a pre-defined formula rather than individual investment returns, to defined contribution pension plans, where the employer and employee both make regular contributions to an account, "seems to have significantly deteriorated the incentive for less wealthy persons to invest in munis," he said.

Fleming said that the lower-yield for lower-tax tradeoff that munis promise to investors tends to be less attractive to individuals that have tax-advantaged retirement accounts where all holdings are tax-deferred.

"It usually makes little sense to hold tax-exempt munis within an IRA, 401(k), or 403(b), and, as we might expect, research suggests that people who direct their savings into tax-advantaged retirement accounts are unlikely to hold munis," Fleming said. That means that muni investors are likely to be individuals who are wealthy enough to have fully funded their retirement accounts, he added.

While Fleming said more study is probably needed, he added it is "worth asking whether the tax benefits of municipal bonds, which were presumably intended … to incentivize investment in munis, are actually accomplishing that objective."

"Competing tax policies that favor retirement savings may actually drive most investors away from muni bonds, given their traditionally lower yields," Fleming said.

"Regardless of our views on income or wealth inequality, I think we can generally agree that the projects funded by municipal securities improve the quality of life for all Americans, so we all have an interest in making sure the marketplace is attractive to investors of all stripes," Fleming said.

He further warned that "if the current trends continue and we see fewer investors holding an ever-larger proportion of muni bonds, the traditional retail-oriented muni market will change dramatically in the not-too-distant future."

The Bond Buyer

By Jack Casey

August 29, 2016

SEC Aims to Exclude Municipal Advisors from its Pay-to-Play Rule.

WASHINGTON – The Securities and Exchange Commission has announced it intends to issue an order that will allow municipal advisors that are also considered investment advisors to be excluded under its pay-to-play rule for investment advisers because they are now covered under a revised Municipal Securities Rulemaking Board rule.

The SEC's pay-to-play rule, which is found in Rule 206(4)-5 under the Investment Advisers Act of 1940, prohibits an investment advisor from providing advisory services for compensation to a government client for two years after the advisor or certain of its executives or employees make a contribution to elected officials or candidates who can influence the award of advisory business.

According to the SEC filing, the order will be issued unless the commission holds a hearing. Any interested individuals can request a hearing by writing to the commission's secretary by 5:30 p.m. on Sept. 19.

Municipal advisors, which are now included in the MSRB's pay-to-play rule, can only be excluded under the SEC's rule if the commission finds, by order, that the MSRB's revised Rule G-37 on political contributions imposes substantially equivalent or more stringent restrictions on municipal advisors as the SEC pay-to-play rule imposes on investment advisors. It also must find that the revised MSRB rule is consistent with the objectives of the SEC pay-to-play rule.

Under the MSRB's revised rule, municipal advisors, similarly to dealers, are now barred from engaging in municipal advisory business with an issuer for two years if the firm, one of its professionals, or a political action committee controlled by either the firm or an associated professional, makes significant contributions to an issuer official who can influence the award of municipal advisory business.

The revised rule contains a de minimis provision like the original rule for dealers. It allows a municipal finance professional or municipal advisor professional to give a contribution of up to $250 per election to any candidate for whom he or she can vote without triggering the two-year ban.

The SEC's filing lists six examples of how the rules are substantially similar, including the two-year ban on engaging in muni business after a contribution and the prohibition on MAs and their professionals from soliciting contributions, or coordinating contributions, to certain municipal officials with which the MA is engaging or is seeking to engage in muni business.

The SEC and MSRB are currently in a legal dispute with three Republican state groups after the groups claimed the revised MSRB rule violates securities professionals' constitutional rights to free speech by making them choose between contributing to candidates and doing their jobs. The SEC has filed a motion to have the case dismissed during the last two months but a judge has not issued an order on the commission's motion yet.

The SEC's pay-to-play rule was also subject to a legal challenge from two of the three groups but that lawsuit was thrown out after a three-judge panel ruled the Republican groups failed to follow proper appeals procedures.

The Bond Buyer

By Jack Casey

August 26, 2016

Deloitte Power & Utilities Accounting, Financial Reporting, and Tax Update.

Tuesday, November 29, 2016
Chicago, IL

During day one of the seminar, Deloitte's energy specialists focus on industry technical accounting and tax issues to assist participants in preparing for calendar year-end accounting, reporting, and tax requirements.

Participants may choose one of the following sessions:

- **The Accounting and Financial Reporting Update**
  This session includes presentations by Deloitte specialists and industry thought leaders, covering topics such as Securities and Exchange Commission (SEC) developments and trends in SEC comment letters, recently issued and proposed accounting standards, and current tax developments. After attending this seminar, participants will be able to better interpret and apply accounting, financial reporting, and tax rules to current industry issues.
- **The Tax Update**
  This session includes presentations by Deloitte specialists regarding federal income tax topics unique to the power and utility industry, regulatory reporting for income taxes and other income tax and financial accounting for income tax subjects relevant to large corporations. This session will assist participants in applying recent and pending tax and accounting developments in their tax planning and rate filings.

Click here to learn more and to register.

NABL: IRS Modifies Rev. Proc. 2016-44 Transition Date.

The IRS has modified the effective date of Rev. Proc. 2016-44 to extend the transition period by 6 months.

The revision allows an issuer to apply the safe harbors in Rev. Proc. 97-13, as modified and amplified, to a management contract entered into before August 18, 2017 and that is not materially modified or extended on or after August 18, 2017 (other than pursuant to a renewal option as defined in sec. 1.141-1(b)).

The August 18, 2017 date is 6 months later than previously announced.

The updated version will be printed in next week's Internal Revenue Bulletin.

The revised version of Rev. Proc. 2016-44 is available here.

SEC: Investor Protection in the Municipal Securities Markets.

Rick A. Fleming, Investor Advocate

U.S. Securities and Exchange Commission [1]

MSRB Municipal Securities Regulator Summit
Washington, D.C.

Aug. 25, 2016

Thank you, Lynnette [Kelly], for that kind introduction and for inviting me to participate in your event today. It has been a pleasure to spend time with a variety of regulators who are on the front lines of investor protection, and I appreciate the opportunity to provide some closing remarks for your conference. Of course, I need to remind you that the views I express are my own and do not necessarily reflect those of the Commission, the Commissioners, or Commission staff.

I have been the Investor Advocate at the SEC since early 2014, and since day one, I have actively supported a variety of reforms in the municipal securities markets. My interest in these issues is explained, in large part, by the high concentration of individual investors within the muni market. As of December 2015, approximately 41 percent of municipal bonds are owned directly by individual investors, and another 29 percent are owned indirectly through mutual funds or other pooled investment vehicles.[2]

However, if you drill beneath those statistics, some interesting—some might say disturbing—patterns emerge. First, we've seen a narrowing of the market. A mere 2.4 percent of households hold any municipal debt (either direct or indirect), and that figure is about half of what it was in 1998.[3] Second, as we've seen in other areas of wealth concentration, the wealthiest households own an increasing share of total municipal debt. The wealthiest one-half percent of U.S. households now own 42 percent of all municipal bonds, as compared to ownership of 24 percent in 1989. The bottom 90 percent of U.S. households, as measured by net wealth, now hold less than 5 percent of muni bonds, falling from almost 15 percent in 1989.[4]

How did muni bond ownership become a lifestyle of only the rich and famous, as opposed to an investment option for the middle and upper-middle classes? Ironically, the answer appears to lie with the tax advantages of muni bonds. Given the favorable income tax treatment of muni bonds, households in higher tax brackets have always had more incentive to invest in muni bonds—this is not news to this audience. However, the shift from defined benefit pension plans to defined contribution retirement plans seems to have significantly deteriorated the incentive for less wealthy persons to invest in munis.

As you are no doubt aware, the interest on municipal bonds is exempt from federal income tax, and often from state and local taxes. However, given these tax benefits, which make muni bonds attractive as compared to other investments, the interest rate for muni bonds is usually lower than the interest rate on other taxable fixed-income securities such as corporate bonds.[5]

This lower-yield for lower-tax tradeoff may be attractive for certain investors, but it tends to lose its appeal within the context of a tax-advantaged retirement account, where all holdings are tax-deferred. It usually makes little sense to hold tax-exempt munis within an IRA, 401(k), or 403(b),[6] and, as we might expect, research suggests that people who direct their savings into tax-advantaged retirement accounts are unlikely to hold munis.[7]

As employers have shifted away from defined benefit pension plans, there has been a significant increase in tax-advantaged defined contribution plans such as 401(k)s.[8] One outgrowth of this trend, however, is that muni bonds may no longer be attractive for the average investor. Today's muni investors are likely to be those who are wealthy enough to have fully funded their retirement accounts and, unfortunately, recent data suggests this may be a relatively small proportion of the population.[9]

More study is probably needed, but I think it is worth asking whether the tax benefits of municipal bonds, which were presumably intended (at least in part) to incentivize investment in munis, are actually accomplishing that objective. Competing tax policies that favor retirement savings may actually drive most investors away from muni bonds, given their traditionally lower yields. But whatever the cause, if the current trends continue and we see fewer and fewer investors holding an ever-larger proportion of muni bonds, the traditional retail-oriented muni market will change dramatically in the not-too-distant future.

Personally, I hope we can reverse this trend toward concentration of assets among fewer investors. Regardless of our views on income or wealth inequality, I think we can generally agree that the projects funded by municipal securities improve the quality of life for all Americans, so we all have an interest in making sure the marketplace is attractive to investors of all stripes.

Notwithstanding the current concentration of assets, we still have a big job to do. Even though only a small percentage of U.S. households hold municipal securities, that is still millions of people, and it represents a lot of hard-earned money—approximately $3.71 trillion, in fact.[10] And, because the average age of the muni investor is 62 years old,[11] it means that a lot of those investors are seniors, whose vulnerabilities may increase as they age.

This is why I, and many of you, have been fighting for reforms in the muni markets. Although there is still plenty of work to be done, the past few years are evidence that regulators can take strides toward an innovative, flexible market while continuing to protect investors. The MSRB and FINRA have continued to enhance Electronic Municipal Market Access (EMMA) and Trade Reporting and Compliance Engine (TRACE), respectively, so investors would have better access to pricing and other important market information. The MSRB finalized its best execution guidance for dealers and the best execution rule took effect on March 21, 2016. Additionally, FINRA and the MSRB continue to collaborate on a markup disclosure rule and the MSRB is considering interpretive guidance to assist bond dealer in establishing “prevailing market price.” These are important initiatives that will make the markets a better place for investors, which will in turn make it a better place for issuers to get the funds they need for important projects.

As I close, I would like to take advantage of the fact that I am speaking to a group of regulators, and just extend my thanks, on behalf of America’s investors, for the jobs you do. Many of you have been on examinations of dealers, making sure they abide by the rules of the road and treat customers appropriately. Others have been involved in rulemakings that will improve those rules of the road. Some of you have worked to inform consumers about investment products or warn them away from scams, or you have personally talked to them and tried to give them whatever help they need.

Most days, you probably are not thanked for the work you do, but this is not one of those days. Thank you for all you do, each and every day, with little recognition or reward, on behalf of the American public.

[1] The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author’s colleagues upon the staff of the Commission.

[2] Federal Reserve Board, Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Fourth Quarter 2015, Table L.212 (Mar. 10, 2016, 12:00 PM), http://www.federalreserve.gov/releases/z1/current/z1.pdf.

[3] See Bergstresser and Cohen, Changing Patterns in Household Ownership of Municipal Debt: Evidence from the 1989-2013, (Current draft June 2015), at Figure 1; https://www.brookings.edu/wp-content/uploads/2016/07/Bergstresser-Cohen-with-tables.pdf.

[4] Id., at Figure 2.

[5] See https://www.investor.gov/introduction-investing/basics/investment-products/municipal-bonds.

[6] See, e.g., https://www.alamocapital.com/investment-products/bonds-and-fixed-income/munic-pal-bonds/ (“The placement of tax-free municipal securities into a qualified account is deemed to be an anomaly because (1) historically the yield on tax-free municipal securities is less than the yield on taxable securities, (2) the normally lower yield on municipal securities is justified by comparing its yield to the after-tax yield on taxable securities, and (3) the tax-free benefit is lost when “tax-free” securities are placed into a qualified account. The interest received from a “tax-free” security is taxed at ordinary income tax rates at the time it is withdrawn from the qualified account. Therefore the normal rule is that, given a choice, tax-free securities should be placed in a non-qualified account to retain their tax-free treatment.”).

[7] Id., at 3.

[8] See Rick A. Fleming, Protecting Elderly Investors from Financial Exploitation, Feb. 5, 2015, https://www.sec.gov/news/speech/protecting-elderly-investors-from-financial-exploitation.html (“Up until 1985, the aggregate value of defined contribution plans was less than half the value of defined benefit plans. By 2012, however, defined contribution plans were more than 50 percent larger than the aggregate size of defined benefit plans.”).

[9] According to the Employee Benefit Research Institute, 74 percent of American workers have saved less than $100,000 for retirement. 2016 RCS Fact Sheet #3, Preparing for Retirement in

America, at Figure 3, https://www.ebri.org/files/RCS_16.FS-3_Preps.pdf.

[10] Federal Reserve Board, supra note 2.

[11] Bergstresser and Cohen, supra note 3 at Table 10.

Muni-Bond Investors Stick With Active Fund Managers Even as They Fall Short.

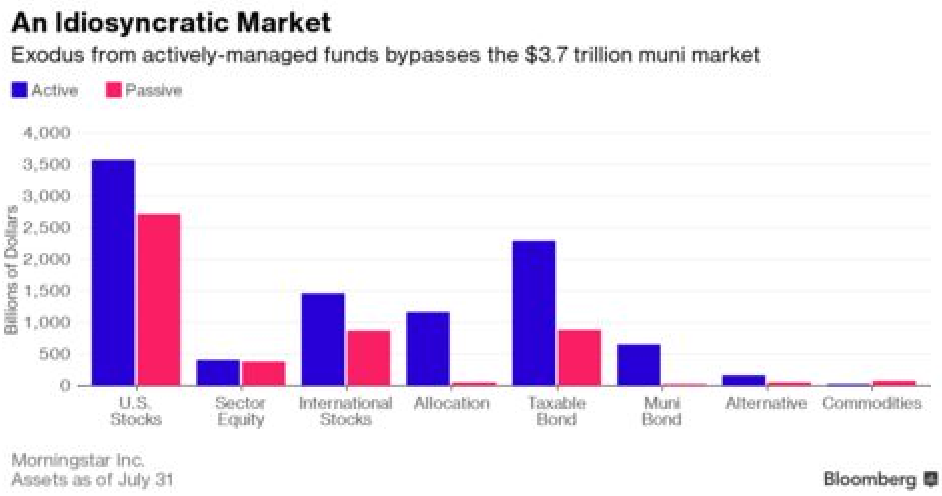
Municipal-bond buyers are sticking by their mutual-fund managers, even though the chance that many of them will beat the market is no better than a coin toss.

The broad shift into low-cost index funds, which have drawn cash away from those that buy and sell stocks and bonds in a quest for outsize returns, has largely stopped at the U.S. state and local securities market, a bastion of buy-and-hold investors looking for steady, tax-exempt income. And they're not necessarily being rewarded for their loyalty: About 50 percent of the actively-managed funds lagged a Bloomberg benchmark over the past five years, according to Morningstar Inc. data on those holding debt maturing from 5 to 12 years.

"You have some entrenched ways of investing here," said Chris Alwine, who oversees more than $167 billion in municipal-bond assets at Vanguard Group Inc., one of the biggest providers of index funds. "You had the belief that you couldn't index it. That's been thrown out."

The traditional way of investing hasn't gone with it. As cash flooded into municipals amid turmoil in global financial markets, actively run funds took in $48.7 billion in the 12 months through July — eight times more than those built to mimic the performance of an index, according to Morningstar. As a result, the managed investment vehicles had $653 billion of assets, compared with $27 billion held by their passive competitors.

That stands in contrast to other markets over the same time period. Souring on underperforming stock and taxable-bond managers, investors withdrew almost $380 billion and put $367 billion into index funds.



While passive municipal funds are growing at a faster rate than active ones — if only because they are relatively new and had far fewer assets to begin with — there are several reasons for their slow inroad to the $3.7 trillion market, said Karen Schenone, a San Francisco-based fixed-income strategist at BlackRock Inc.'s iShares unit, a provider of exchange-traded funds, or ETFs.

Some investors prefer buying bonds issued by their local governments or, if they live in high-tax states like New York and California, state-specific funds, instead of the nationally oriented ETFs. Investors also tend to focus on the indicated yield without considering total return, Schenone and Alwine said. Active funds generally yield more than ETFs.

"Most people think, 'I want a manager who's doing credit research, adjusting for duration, looking for blowups," Schenone said.

That also leads to bigger fees, though not necessarily better returns. The average expense for actively-managed open-end municipal funds is 0.91 percent, compared with 0.3 percent for ETFs, according to Morningstar. Yet over the past five years, only about half of the intermediate active funds tracked by Morningstar returned more than the Bloomberg Barclays Intermediate Index as of June 30. The index returned 6.48 percent for the 1-year period, 4.7 percent over three-years return and 4.47 percent over five.

Awaiting Opportunity

JPMorgan Chase & Co.'s $4.5 billion Intermediate Tax Free Bond Fund was among the laggards. Chloe Etsekson, a spokeswoman for JPMorgan, said more than 90 percent of the fund's holdings were in lower-yielding AAA and AA rated bonds, a higher percentage than the index.

"VSITX is a low volatility fund for asset allocators looking to use the municipal portion of their overall fixed income allocation as the anchor and source of cash when fixed income volatility spikes," she said in an e-mail. "It is structured to provide liquidity when other opportunities arise."

BlackRock's $7.6 billion, iShares National Muni Bond ETF, the biggest municipal ETF, outperformed 77 percent and 72 percent of national intermediate active managers, over 1 and 3 years, according to data compiled by Bloomberg.

The rise of "robo advisers," that use software programs to build portfolios could give a boost to ETFs, said Schenone. Web-based financial advisers Wealthfront Inc. and Betterment are using BlackRock's as its only municipal holding, she said.

Vanguard, a pioneer in mutual fund indexing, has been a later entrant than BlackRock to passive municipal management. The world's largest mutual fund manager started its first fund last year. Vanguard's $460 million index fund pales in comparison to its actively managed $52 billion intermediate fund.

This year, the passive fund's ETF shares returned 4.13 percent, beating the 3.92 percent posted by Vanguard's actively managed intermediate fund.

"We believe fully in low-cost active but we also believe in indexing," Alwine said. "Ultimately, it comes down to investor preferences."

Bloomberg Business

by Martin Z Braun

August 29, 2016 — 2:00 AM PDT

Dallas' Statler Hotel Sells City's Incentives in Unheard Of Bond Offering.

Commerce Statler Development LLC — the company created by developer Mehrdad Moayedi to redevelop the landmark hotel — sold the tax increment finance grant the city of Dallas provided for the huge downtown deal.

The Statler developer used the almost $46.5 million in city incentives that helped fund the project to back a unique $26.5 million public bond offering, filings for the bond offerings show.

Securities firm Jefferies LLC underwrote the public debt offering, which was made through the Wisconsin Public Finance Authority.

The sale of the tax-free bonds allowed the Statler developer to access funds that wouldn't be provided from the city's tax increment financing for years.

"This is an innovative funding tool that will allow Dallas taxpayers to realize immediate benefit of the TIF money the city of Dallas is investing," Moayedi said in a statement. "It made sense to us to be able to utilize funds now to enhance the quality of the project.

"We are thrilled with the outcome and the citizens of Dallas are going to be impressed with the new Statler."

The City of Dallas approved the sale of the debt based on the future payout from the TIF district.

"The city had to approve this deal because the municipal bond issuer in Wisconsin required the consent of the municipality in which the project is located," said Karl Zavitkovsky, who heads Dallas' economic development office.

He said other developers may have have sold their incentives in the private markets without requiring the city's consent.

"I've never heard of anyone doing this," said John Crawford with the economic development group Downtown Dallas Inc. "It's a very unique creative concept to getting your money on the front end.

"Typically it's paid out over several years, and you have to wait your turn because of the amount of money available," Crawford said. "It makes a lot of sense for the developer to do this and expedites the project and reduces the liability."

The cost of the Statler redevelopment has grown to more than $221 million, according to the SEC filings.

The original budget for the ambitious project was estimated about $175 million in early 2014 when the Dallas City Council approved redevelopment plans for the landmark downtown building.

Opened 58 years ago as one of the country's most modern hotels, the 19-story building on Commerce Street had been empty for a decade when construction work started to transform the building in a mixed-use development.

The current construction — which is scheduled to wrap up early next year — will remake the old

Statler Hotel into 219 apartments, 150 hotel rooms, and retail and office space. Originally the project had been expected to open in late 2016.

To qualify for the $46.5 million in city economic incentives, the developers must have completed the Statler redo by October of next year and have invested a minimum of $120 million in the project, according to the prospectus for the bond offerings.

The massive redevelopment has been financed in part with an $85 million EB-5 loan and $51.2 million in bridge loans based on the value of tax credits promised on the project by the federal and state governments, according to details provided to the bond buyers.

Financial data provided for the Statler project indicates that the redevelopment will cost almost $150 million. There's more than $63 million additionally in "soft costs" for the developer's fee, architectural and engineering fees and other items.

New York-based bond rating firm Moody's assigned a Baa3 rating to the bonds, which pay an interest rate of about 3.8 percent.

Investors who purchased the Statler bonds were warned that the project must be completed and meet all city requirements before the public incentives will be paid.

Developer Moayedi also warned bond investors of his ties to United Development Funding, a Grapevine-based investor and lender that is being investigated by federal prosecutors.

About 40 percent of Moayedi's projects have previously been developed with UDF funding.

"UDF is not associated with funding" of the Statler, according to the information supplied to bondholders.

The Statler developer said that it couldn't predict what impact the federal investigation of UDF "may have on the developer or the developer's ability to complete the project or continue funding the project."

Other developers who have redone downtown historic buildings say they know of no other cases where the city economic incentives have been sold as a bond to investors.

It's creative — it may set a trend," said Larry Hamilton, whose firm has done more downtown historic building conversions than any other company. "What a great idea."

The Dallas Morning News

By Steve Brown

Real Estate Editor

Published: 31 August 2016 12:52 PM
Updated: 01 September 2016 01:55 PM

SEC's Investor Advocate Talks Municipal Bonds.

The U.S. Securities and Exchange Commission's Investor Advocate Rick Fleming recently gave a speech discussing the state of the the municipal securities market.

Fleming noted approximately 41 percent of municipal bonds are owned by individual investors, while another 29 percent are owned by investors indirectly through mutual funds or other pooled investments.

However, there are some “disturbing” patterns beginning to emerge. Specifically, Fleming noted a “mere” 2.4 percent of households hold any form of municipal debt, which is half of what it was in 1998. On the other hand, the “wealthiest households” own an “increasing share” of total municipal debt, as the top one-half percent of U.S. households own 42 percent of all municipal bonds.

“Given the favorable income tax treatment of muni bonds, households in higher tax brackets have always had more incentive to invest in muni bonds — this is not news to this audience,” Fleming continued. “However, the shift from defined benefit pension plans to defined contribution retirement plans seems [sic.] to have significantly deteriorated the incentive for less wealthy persons to invest in munis.”

Naturally, interest on municipal bonds is exempt from federal income tax, and in many cases, state and local taxes. However, the yield on municipal bonds is often less than other taxable fixed-income securities.

The lower yield could be attractive for certain investors but it does lose its appeal within the context of a tax-advantaged retirement account where all holdings are tax-deferred. As such, it makes “little sense” for investors to hold tax-exempt municipal bonds in an IRA, 401(k) or 403(b).

This leads Fleming to question if the tax benefits of municipal bonds designed to encourage investment dollars are actually accomplishing the objective.

“Competing tax policies that favor retirement savings may actually drive most investors away from muni bonds, given their traditionally lower yields,” Fleming expanded. “But whatever the cause, if the current trends continue and we see fewer and fewer investors holding an ever-larger proportion of muni bonds, the traditional retail-oriented muni market will change dramatically in the not-to--distant future.”

Jayson Derrick, Benzinga Staff Writer

September 01, 2016 11:12am

Do you have ideas for articles/interviews you’d like to see more of on Benzinga? Please email feedback@benzinga.com with your best article ideas. One person will be randomly selected to win a $20 Amazon gift card!

An Obscure, Outrageous Reason Your Property Taxes Are So High.

In many parts of the country, they supply our water, fight our fires and help us get to work, but “special districts” are a form of government that receives very little attention. The lack of media scrutiny and public interest in special districts provides opportunities for insiders to feast on the billions of tax dollars these entities collect each year. One such group of insiders are the intermediaries who help districts issue their bonds.

The Census Bureau counted over 38,000 special districts in its 2012 enumeration of local governments (the next count will be in 2017). The Census also found that these districts had aggregate revenue of $206 billion and debt of $370 billion, representing about 10 percent of the municipal bond market.

In an amusing and informative piece in March, HBO's John Oliver showed viewers the ups and downs of these special districts. One inspiring scene in Oliver's report shows two officials of a New Hampshire mosquito control district conducting a fully by-the-book public meeting with precisely zero members of the public attending.

Less inspiring was the case of a Texas special district formed when a company wheeled a mobile home onto a vacant plot of land and then rented it to a married couple for $150 per month short term. Those two individuals held the entire voting power of the special district – a power they used to authorize $500 million in new bonds to be issued by the district. Those bonds will finance water, sewer and other infrastructure for a new subdivision to be built on the vacant land.

But an electorate of two short-timers lacks the ability and incentive to ensure that the new bonds are issued in a cost-efficient manner. And it appears that underwriters, lawyers, financial advisors and other service providers are raking in outsized shares of these new bond proceeds.

On Aug. 20, James Drew of the *Houston Chronicle* reported on two special districts in Fort Bend County that paid issuance costs of between 9 percent and 11 percent of the face value of the bonds issued (Drew also reported that one of the special districts, MUD 187, was formed when a Houston developer arranged for two people to move their trailer onto what was then an empty field).

The issuance costs paid by these two special districts is well above the national average of 1.02 percent that I calculated in a 2015 study published by the Haas Institute for a Fair and Inclusive Society at UC Berkeley. Issuance costs are to local governments like points are to a consumer taking out a home mortgage. In both cases, the goal should normally be to minimize them.

Subsequently I looked at several bonds issued by special districts in the Dallas suburbs for the Texas Public Policy Institute. Costs of issuance ranged from 11 percent to 15 percent of the face value of the securities. In a number of the Texas cases (both those near Houston and those around Dallas) underwriting fees alone accounted for 3 percent of face value – compared to a national average of about 0.5 percent reported by Bloomberg.

Late last year, the California State Treasurer's Office released a comprehensive database of bonds issued in the Golden State with cost of issuance details. While my study provides data for a nationwide sample of bonds, the California State Treasurer's Office has now posted issuance cost details for all municipal bonds issued statewide. This impressive data set can be found here. The data were collected by the California Debt and Investment Advisory Commission (CDIAC), a unit of the State Treasurer's Office. Under state law, California local governments must report their debt data to CDIAC. The commission had been publishing some of this data, but Treasurer John Chiang, an advocate for transparency, recently decided to publish everything, including details on issuance costs.

A review of the California data shows numerous issuance cost ratios in excess of 10 percent of the issued amount – and even some exceeding 20 percent. Many of the higher issuance cost levels were associated with small bond issues from special districts. Since some of the issuance costs don't vary with issuance size, they can hit small issuers relatively hard.

In 2013, San Jacinto special districts (called Community Facilities Districts) issued two special tax bonds totaling $985,000 and $925,000 respectively. In each case, costs of issuance exceeded 20 percent.

According to the Official Statement for the $925,000 bond, the district received a mere $532,066 of the bond proceeds. The Estimated Sources and Uses of Funds on page 6 of the document show $90,428 being deposited into a reserve fund and a total of $295,890 going to the underwriter, attorneys and other service providers. The remaining $6,616 reflected an original issue discount, arising from the bonds being sold below face value.

The debt service schedule on page 10 of the Official Statement shows that the district will pay $1,240,252 in interest on the $925,000 of bonds through 2043. Total debt service of $2,165,252 over the life of the bond issue is four times the net proceeds received by the district.

Whether high-cost bonds are issued in Texas, California or another state, the victims are homeowners living in or moving into the special district; their property taxes must be increased to service the bonds. Higher tax rates must be levied over the life of these securities – often as long as 30 years – and can lead to depressed property values.

While special district voters may be unable or uninterested in protecting themselves from excessive bond fees, other levels of government can. More states can follow California's lead by making issuance cost data public and readily accessible, facilitating the type of research I have reported here (Texas has a similar resource here).

Also, regulators can take action against unscrupulous bond market providers. Earlier this year, the Financial Industry Regulatory Authority (FINRA) fined a securities firm for charging a 4.3 percent underwriting fee to a Colorado school district, concluding that the fee "was inappropriate given the underwriting work performed." Hopefully FINRA will turn its attention to special districts, thereby protecting the property taxpayers of tomorrow.

The Financial Times

By Marc Joffe

September 2, 2016

S&P Global Ratings' Public Finance Podcast (Policy Shift on Federal Prisons & Illinois Higher Education)

Jenny Poree discusses how a provides a policy change by the US Department of Justice regarding federal prisons will negatively impact our rated prison portfolio and Ashley Ramchandani provides an update on higher education rating actions in Illinois.

Listen to the podcast.

Aug. 30, 2016

Bloomberg Brief Weekly Video - 09/01

Taylor Riggs, a contributor to Bloomberg Briefs, talks with Joe Mysak about this week's municipal market news.

Watch the video.

September 1, 2016

Fitch Teleconference: 2016 Median Ratios for Nonprofit Hospitals and Healthcare Systems.

Fitch Ratings is hosting a teleconference on Thursday, September 8, 2016 at 2:00pm EDT to discuss 2016 Median Ratios for Nonprofit Hospitals and Healthcare Systems.

There will be a question and answer session at the end of the call. Questions can also be emailed in advance to: danielle.riles@fitchratings.com.

Contact:
Michele O'Brien
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michele.obrien@fitchratings.com

Click here to register.

Fitch: US Public Pension Amortization Practices Remain a Problem.

Fitch Ratings-New York-29 August 2016: The chances of a near-term improvement in funded ratios for many state-wide pension systems are remote, Fitch Ratings says, even as annual pension contributions made by state governments continue to rise. In particular, state systems that employ 30-year rolling amortization or similar methods to calculate their annual required contributions (ARC) are at greater risk of having pension sustainability problems over the long run.

Actual pension contributions have risen rapidly in recent years as governments have attempted to stem the erosion of their systems' funded ratios and catch up with rising ARCs, the contribution benchmark calculated by actuaries as necessary to eliminate the unfunded pension liability over time. The average actual contribution in fiscal 2014 is roughly 89% greater than in 2008, the year the global financial crisis began, while the ARC has risen an average of 72% since then.

However, actual contributions remain inadequate relative to the ARC. Based on Fitch's last state pension update, a little more than half of major state-wide systems received an annual contribution in fiscal 2014 at or above their ARC. The remaining systems received lower contributions. A shortfall in actual contributions, relative to the ARC, deprives a system of investable resources, increases its unfunded liability and elevates the future ARC that will be calculated at subsequent funding valuations.

Inadequate contributions relative to the ARC are not the only weak contribution practice. In many cases, a system's ARC itself is a poor benchmark of contribution adequacy. The ARC is a product of multiple, separate assumptions reflecting the disparate policy priorities of each system. These priorities include cost stability, equity and certainty of achieving full funding. For many systems, progress in achieving full funding is sacrificed for short-term cost stability. This is particularly true for major systems employing 30-year rolling amortization or other amortization assumptions that create a similar outcome.

Under a 30-year rolling amortization, the ARC is an inadequate measure of contribution sufficiency because at each successive annual funding valuation the ARC is recalculated based on a new 30-year open period, much like refinancing a home mortgage loan year after year. The resulting ARC is likely to provide a higher degree of contribution stability at a lower cost than if it were calculated based on more conservative, alternative methods, such as a consistently fixed, closed-period amortization, various layered amortization approaches, or even a shorter rolling period, such as over 20-years.

For systems using a 30-year rolling amortization, the resulting ARC may too low to cover the cost of new benefits each year plus the accrued interest on the pre-existing unfunded liability — hence the unfunded liability can rise each year, even when the full ARC is paid and other assumptions are achieved. Many governments using 30-year rolling amortization while consistently paying their full ARC each year have still seen their funded ratios languish well below prerecession levels.

Implementation of GASB 67 and 68 standards, which created a new, parallel "accounting" valuation for financial reporting purposes, has not altered the challenges associated with weak pension funding practices. Although similar assumptions inform both funding and accounting valuations for the pension liability, the funding valuation remains how systems arrive at an ARC, the rough equivalent of the actuarially determined employer contribution (ADEC) under the new standards.

Given legal protections that limit the near-term positive impact of reforms and other trends affecting pensions, we expect liabilities will remain elevated and ARC increases to continue. Most governments have been able to absorb higher pension contributions, and Fitch expects this to remain the case, especially as past reforms begin to have an impact. In a smaller number of cases, pensions may result in downward rating pressure, particularly as past contribution shortfalls and limited reforms continue to drive the unfunded liability and ARC higher, reducing expenditure flexibility and straining operations.

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Puerto Rico's Fiscal Affairs Will Be Overseen by 7 Experts in Finance and Law.

The White House said it had chosen seven experts in finance and the law to supervise Puerto Rico's fiscal affairs in the coming months under a law enacted this summer intended to help the island restructure its $72 billion debt.

Four of the supervisory board members are Republicans and three are Democrats, chosen from lists provided to the White House by the party leaders of both houses of Congress. And four of the members are Puerto Ricans, which is three more than required under the new debt-restructuring law.

The Republicans named to the board are:

■ Andrew G. Biggs, a resident scholar at the American Enterprise Institute.

■ José B. Carrión III, president of Hub International, an insurance brokerage in Puerto Rico.

■ Carlos M. García, founder and chief executive of BayBoston Managers, a private equity firm.

■ David A. Skeel Jr., a University of Pennsylvania law professor with expertise in bankruptcy.

Multimedia Feature: How Puerto Rico Debt Is Grappling With a Debt Crisis
The Democrats are:

■ Arthur J. Gonzalez, a senior fellow at the New York University School of Law and a former chief judge of the United States Bankruptcy Court for the Southern District of New York.

■ José Ramon González, president and chief executive of the Federal Home Loan Bank of New York.

■ Ana J. Matosantos, president of Matosantos Consulting and a former director of the California Department of Finance.

In addition, the governor of Puerto Rico, Alejandro García Padilla, will hold a position on the board. He is not seeking a second term as governor, so whoever is elected to succeed him in November will take his seat on the board.

"These officials have the breadth and depth of knowledge that is needed to tackle this complex challenge," President Obama said in a statement on Wednesday.

The board was created as part of a new legal framework to shelter Puerto Rico from creditor lawsuits while it seeks to reduce its debt as its financial crisis intensifies. The law was necessary because federal law prohibits Puerto Rico from entering bankruptcy, which is what mainland cities and counties could do in similarly dire straits. It gives the island some restructuring powers normally available only in bankruptcy, but it also requires it to submit to federal oversight. The board is intended to remain in place until Puerto Rico regains the ability to raise money in the capital markets, which could take years.

On the island, public opinion about federal oversight has been mixed, and protesters turned out in San Juan on Wednesday to call for repeal of the new law. Many Puerto Ricans resent Washington oversight, and see the board as an unwelcome vestige of colonialism. But at the same time, many Puerto Ricans have lost faith in their own elected officials, and they harbor some hope that the oversight board will help show the way out of the legal and financial maze in which they are lost.

Mr. Obama acknowledged their hopes and misgivings on Wednesday, saying that for the board to succeed, it "will need to establish an open process for working with the people and government of Puerto Rico." He said the members would also "have to work collaboratively to build consensus for their decisions."

Senior administration officials said the board's first substantive task would be to review the multiyear fiscal plan that Governor García Padilla's administration is preparing, make sure it meets all requirements under the law and propose revisions as needed. Ultimately the board must certify the soundness of the fiscal plan, which is to be the bedrock of Puerto Rico's debt restructuring and other important measures to revive its economy.

"Time is of the essence," Secretary Jacob J. Lew of the Treasury said in a statement on Wednesday. "The Puerto Rico government should bring together all of its resources to develop and submit a plan to the Oversight Board as soon as possible."

Unsound fiscal policies in the past have contributed greatly to Puerto Rico's oversize debt. The government failed for many years to balance its budget, and borrowed money to plug the holes. Even as its creditworthiness crumbled, it could still borrow with ease by issuing municipal bonds. As a United States territory, it could offer interest on the bonds that was exempt from federal, state and local taxes, in all 50 states.

THE NEW YORK TIMES

By MARY WILLIAMS WALSH

AUG. 31, 2016

GASB Proposes Guidance for Debt that is Extinguished Early Using Only Existing Resources.

Norwalk, CT, August 29, 2016 — The Governmental Accounting Standards Board (GASB) today proposed guidance that state and local governments would apply when extinguishing debt prior to its maturity. Specifically, the Exposure Draft, *Certain Debt Extinguishment Issues,* proposes guidance for transactions in which only existing resources are placed in a trust for the purpose of extinguishing debt.

Current GASB standards provide guidance on how to account for and report when the proceeds of refunding bonds are placed in a trust for the future repayment of outstanding debt. However, the standards do not apply when only existing resources (in other words, other than bond proceeds) are placed in a trust for the future repayment of outstanding debt. Consequently, governments could account for what is essentially the same transaction in two different ways.

The Exposure Draft proposes uniform accounting and financial reporting guidance for debt that is "defeased in substance," regardless of the source of the resources that are placed in a trust.

"Whether you borrow the money to extinguish the debt or use cash you already have, the treatment ought to be the same because the economic substance of the transaction is the same," said GASB Chair David A. Vaudt. "From a government's perspective, the source of the money that is being used to refund debt should not matter as long as the requirements for in-substance defeasance are met."

In this context, in-substance defeasance refers to a situation in which the debt remains outstanding but sufficient resources—in the form of essentially risk-free monetary assets—have been placed into an irrevocable trust to make payments on the debt when they come due. When debt is defeased in substance, the debt and the resources placed in trust are no longer reported in the financial statements. Governments are required, however, to disclose information in the notes to the financial statements about debt that has been defeased in substance.

The Exposure Draft also proposes guidance relating to prepaid insurance on debt that is extinguished and notes to the financial statements for certain defeased debt. One proposal would require disclosure if a government is not prohibited from subsequently exchanging the essentially risk-free monetary assets in the trust with monetary assets that are not essentially risk-free.

The Exposure Draft is available on the GASB website, www.gasb.org. Stakeholders are encouraged to review and provide comments by October 28, 2016.

IRS Issues Final Price Regulations to Be Addressed in Fall.

The IRS priority guidelines released this month include two regulations of importance to many GFOA members: Issue price regulations and proposed rules on the definition of political subdivisions. The priority guidelines specify regulations that the U.S. Department of the Treasury will work on through June 30, 2017.

According to the guidelines, the final regulations on the definition of issue price for tax-exempt bonds will be released this year. GFOA expressed core concerns including safe harbors for competitive sales in testimony before Treasury and IRS officials in 2015. The priority guidelines also include the proposed regulations defining political subdivisions for purposes of the tax exemption, but are not likely to progress, given the extensive response from the issuer community on the topic. GFOA also spoke in opposition to these proposed rules in 2016, specifically emphasizing that the proposed rules question the legitimacy and authority of the bodies enacting the enabling legislation that created the political subdivisions in the first place.

GFOA's Federal Liaison Center will continue to monitor and report the progress of these projects and communicate GFOA's concerns to IRS and Treasury officials throughout the process.

Government Finance Officers Association

Wednesday, August 31, 2016

[MSRB Seeks Mark-up Disclosure for Municipal Securities Transactions.]

Washington, DC – In an effort to improve investors' ability to assess the cost of transacting in municipal bonds, the Municipal Securities Rulemaking Board (MSRB) today advanced a plan to require dealers to provide retail investors information about compensation dealers receive when buying municipal bonds from, or selling them to, investors.

Currently, retail investors in municipal securities receive less information about the cost of their transactions than investors in the equity market. The MSRB's plan, which was submitted to the Securities and Exchange Commission (SEC) for approval, seeks to provide municipal retail investors with meaningful and useful pricing information to help them better evaluate the overall cost of their transactions.

"The concept of providing this type of transparency of transaction costs for municipal securities was first floated 40 years ago," said MSRB Executive Director Lynnette Kelly. "Changes in technology and in the municipal market have made it possible for investors to receive similar transaction information as investors in the equity market. This is a meaningful and historic shift for the municipal market."

If approved, the MSRB's proposal will require a dealer to make the new disclosure when, for example, it sells a municipal bond in a principal capacity (for the dealer's own account) to a retail customer and on the same day buys the same security from a third party. In this case, the dealer would disclose on the customer's confirmation its compensation, or "mark-up," from the "prevailing market price" of the security. In addition to providing the dollar value and percentage of the dealer's compensation on a trade, the confirmation would include a reference to trade price data about the security on the MSRB's Electronic Municipal Market Access (EMMA®) website.

"Our proposal will provide dealer compensation information on an estimated 8,000 retail investor municipal securities transactions each day," Kelly said. "That's a significant number of people who will have additional information about the cost of their transactions."

The [MSRB's rule filing] includes guidance for dealers on establishing the prevailing market price of a security for the purpose of calculating their compensation. Because of the significance of the proposed rule, the MSRB wants dealers to understand its intent with respect to how the rule would apply to different trading situations and the practical realities of the unique municipal market, which has more than one million individual bonds, the majority of which do not trade frequently. The MSRB's guidance specifically addresses establishing the prevailing market price for contemporaneous customer transactions; the ability of dealers to calculate their compensation at the time of disclosure to a customer; the frequent absence of pricing information for sufficiently comparable municipal securities; and the implications of transactions with affiliated dealers.

If approved, the proposed mark-up disclosure rule will be effective no later than one year following SEC approval.

Date: September 2, 2016

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TAX - NEW YORK

Joon Management One Corp. v. Town of Ramapo

Supreme Court, Appellate Division, Second Department, New York - August 17, 2016 - N.Y.S.3d - 2016 WL 4371715 - 2016 N.Y. Slip Op. 05795

Property owner brought action against town seeking a judgment declaring that property's tax assessment was overstated and erroneous.

The Supreme Court, Rockland County, granted town's motion for summary judgment and denied property's owner's motion for leave to amend or to enforce settlement agreement. Property owner appealed.

The Supreme Court, Appellate Division, held that:

- Statute of limitations for tax certiorari proceedings applied to action;
- Town's motion for summary judgment was not premature;
- Supreme Court properly denied property owner's motion for leave to amend; and
- Supreme Court properly denied property owner's cross-motion to enforce alleged settlement agreement.

Statute of limitations for tax certiorari proceedings, which required such proceedings to be commenced after exhaustion of administrative grievance remedies and within 30 days after filing of the final assessment roll, applied to property owner's against town seeking judgment declaring that its property's tax assessment was overstated and erroneous, where gravamen of property owner's claim was that its property was overtaxed.

Town's motion for summary judgment on property owner's claim that its property tax assessment was overstated and erroneous was not premature, despite property owner's assertion to the contrary, where property owner failed to demonstrate how discovery might have lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the town.

Supreme Court properly denied property owner's motion for leave to amend its complaint against town challenging tax assessment, where property owner's proposed amendments, which were to add causes of action to recover money had and received and to recover damages pursuant to § 1983 for violation of constitutional rights, were devoid of merit.

Supreme Court properly denied property owner's cross-motion to enforce alleged settlement agreement between owner and town with regard to owner's action against town challenging its property tax assessment, where stipulation of settlement was never approved by town board, thus never becoming binding upon town.

- SEC Announces MCDC Issuer Enforcement Actions.

- SEC: Issuer Settlements Show Widespread, Pervasive Disclosure Problems.
- Democratizing Tax Increment Financing through Participatory Budgeting – A Tool Kit.
- The Lowdown On Enhancement Programs For School District Bonds.
- Hawkins Advisory: 2016 Final Arbitrage Regulations.
- IRS Issues New Safe Harbors for Management Contracts to Facilitate P3s.
- Rev. Proc. 2016-44 Greatly Expands Rev. Proc. 97-13 Safe Harbor for Management Contracts, Opening the Door for Long-Term Management Contracts.
- Some Lawyers Have Questions About New Management Contract Safe Harbors.
- New IRS Management Guidance is Flexible, Furthers P3s: Ballard Spahr Webinar.
- And finally, Huggies on Conveyance (2nd ed.) this week brings you *City of Jackson v. Jordan*, in which the Supreme Court of Mississippi informs us that, "An infant's avoidance of a conveyance of property may be evidenced by any act clearly demonstrating a renunciation of the contract." We would now like to invite you to close your eyes and envision the infantile act your particular infant would use to demonstrate the renunciation of a contract. Your tool kit includes – but is certainly not limited to – soggy diapers, crayon fragments, curdled mush, miscellaneous choking hazards, regurgitated peas, and a Black's Law Dictionary covered in drool. Enjoy!

IRS Issues New Safe Harbors for Management Contracts to Facilitate P3s.

WASHINGTON – The Internal Revenue Service on Monday released a revenue procedure containing safe harbors for management contracts that allows them to more easily be used in bond-financed infrastructure and other projects involving public-private partnerships.

Rev. Proc. 2016-44 extends terms of long-term management to up to 30 years from the previous 15 years that market participants had complained was too restrictive. It also removes the formulaic fixed fee requirements for manager compensation, allowing for more incentive compensation.

"These safe harbors aim to give municipalities tools to allow more flexible and efficient incentives for longer-term private management of tax-exempt bond financed projects to facilitate infrastructure initiatives," said John Cross, the Treasury Department's associate tax legislative counsel.

The revenue procedure will be published in an Internal Revenue Bulletin on Sept. 6.

The safe harbors apply to any management contract that is entered into on or after Aug. 22, but issuers can also apply the safe harbors to any management contract that was entered into before that date.

Issuers also have the option of applying the more restrictive safe harbors in Rev. Proc. 97-13, issued in 2013, to a management contract that is entered into before Feb. 18, 2017 and not materially modified or extended after that date.

Rev. Proc. 97-13 established safe harbors for long-term management contracts, providing safe harbors under which a contract of up to 10 years would require at least 80% of the manager's annual compensation to be based on a fixed fee. Fifteen-year contracts would require at least 95% of the annual compensation be based on a fixed fee.

But bond lawyers and other market participants complained that the safe harbors were too restrictive and had not kept pace with recent market practices, such as attempts to use bonds to help finance projects with P3s, where private parties join together with state or local governments to develop, build, and operate infrastructure projects. P3s involve long-term management contracts.

Historically, the IRS has found that bond-financed projects have private business use that may jeopardize the tax-exempt status of bonds if there is private ownership or a private lease of a building or other facility.

This new Rev. Proc. 2016-44 contains three provisions containing limits that ensure there is no private ownership or leases.

The first is that a state or local government "must exercise a significant degree of control of the use of the managed property." Second, the state or local government "must bear the risk loss upon damage or destruction of the managed property."

Third, the private party "must agree that it is not entitled to, and will not take any tax position that is consistent with the state or local government with respect to the managed property. The private party must not take any depreciation or amortization, investment tax credit, or deduction for any rent payment for the property.

The revenue procedure also carries over some restrictions from the previous one such as that there must be no net profit-sharing arrangements.

The procedure is receiving praise from many bond and tax lawyers, some of whom had submitted suggestions to Treasury and IRS on how to how to liberalize management contract safe harbors and clear up points of confusion.

Stefano Taverna, an attorney with McCall, Parkhurst & Horton in Dallas, and the chair of the American Bar Association's tax-exempt financing committee, called the new safe harbors "very significant," adding that they may help facilitate P3s. "I think Treasury did a terrific job at understanding the industry and what it will require in the future and tried to address these concerns," Taverna said. "All in all, I think the industry will welcome what Treasury put forward. It seems to be a lot more flexible and very reasonable."

Carol Lew, a shareholder at Stradling at Newport Beach, Calif., said the prior time limits and compensation structure for management contracts were "too rigid" and called the new rules "much more practical and pragmatic." The new revenue procedure is more representative of how the municipal bond industry has evolved, she said.

"It looks like Treasury and the IRS listened to comments from the industry on how to make the rules achieve IRS objectives and meet the needs of state and local governments," Lew said.

"I think this a helpful rule that can facilitate more public-private partnerships," she said. "It should be a good thing for issuers."

A management contract is defined by the IRS as a "management, service or incentive payment contract between a qualified user and a service provider under which the service provider provides services for a managed property." The contract term limit does not include the portion of a contract for services before a managed property is placed in service, such as construction design or management.

In Jan. 2015, the IRS released Notice 2014-67, which expanded the type of productivity rewards that could be used in management contracts. The notice also said that a management contract would not result in private business use if it is five years or less and compensation for services is based on a stated amount, periodic fixed fee, capitation fee, per-unit fee or any combination.

David Caprera, an attorney with Kutak Rock in Denver, said that this most recent update to management contracts acknowledges that a property manager is not supposed to be the economic equivalent of an owner of the bond-financed property, which he called a "fundamental principle."

"An owner is one who shares in the profits and losses of the business," Caprera said. "If the manager's compensation is reasonable and not tied to profits or losses, the Rev. Proc. recognizes that the manager is not an owner."

"The new rules allow long-term contracts for long-lived projects, and short-term contracts for short-lived assets so long as the compensation is reasonable and not tied to profits or losses," he added. "In particular, the '4 H's' of housing, healthcare, highways and hotels are going to be the beneficiaries, in that long-term assets can now be managed properly on a long-term basis."

Monday's revised Rev. Proc. comes one week after Treasury and IRS released their 2016-17 priority guidance plan, which included six projects for tax-exempt bonds the agencies plan to allocate resources toward through June. Asked about the plan, Cross had said that the most immediate short-term projects were to update management contract safe harbors and issue final regulations on issue price.

The Bond Buyer

By Evan Fallor

August 22, 2016

[SEC Approves MSRB's Shorter Period for Resolving Interdealer Failures.]

WASHINGTON — Dealers will have 10 calendar days to close out failed inter-dealer transactions now that the Securities and Exchange Commission has approved the Municipal Securities Rulemaking Board's amendments to one of its rules.

The amendments to MSRB Rule G-12 on uniform practice require the 10-day closeout period and include an option for a one-time, 10-day extension if the buyer of the municipal security consents. The SEC approved the changes on Thursday and they will take effect on Nov. 16.

The MSRB's current rules for closeout procedures are included in a years-old portion of Rule G-12 and do not mandate a closeout time period. They instead recommend that a dealer who fails to deliver securities to another dealer by the agreed upon settlement date close out the interdealer trade failure within 90 days of the settlement date.

The MSRB said when it first proposed the changes that they would help to lessen the effect of interdealer transaction failures on the market. The self-regulator's first proposal would have set the closeout timeframe at 30 days.

The Securities Industry and Financial Markets Association responded to that proposal by asking the MSRB to instead move forward with a 15-day time period with the possibility of a 15-day extension.

The MSRB, citing concerns about small dealers being overburdened by a shorter timeframe, then proposed having a 20-day closeout time period. SIFMA, with the support of the Bond Dealers of America, responded again, saying the MSRB's concerns were unwarranted and that the time frame should be further shortened to the ultimate 10-day period with the possibility of a 10-day extension.

"Market support for this rule change reflects the extent to which dealers are committed to improving efficiencies in the municipal market," said MSRB executive director Lynnette Kelly after the SEC approved the amendments. "Dealers share the MSRB's desire for prompt resolution of open transactions. A shortened close-out period provides investors with additional certainty about their purchases and reduces risks for dealers."

In addition to the changes to the timeline for resolving interdealer failures, the SEC also approved MSRB proposals to allow the purchasing dealer to start close-out procedures within three business days of the settlement date, a change from the current 10-business-day window. The amendments will also change the earliest day for execution to four days after electronic notification instead of the rule's current 11 days after notice by telephone.

While the time period for close-outs will be significantly shortened, the three interdealer options for remedying a failed transaction will remain the same through the transition. The purchasing dealer could choose a "buy-in" and go to the open market to purchase the securities. It could also choose to accept securities from the selling dealer that are similar to the originally purchased securities in a number of areas. Lastly, the purchasing dealer could require the seller to repurchase the securities along with payment of accrued interest and the burden of any change in market price or yield.

The Bond Buyer

By Jack Casey

August 19, 2016

PUBLIC UTILITIES - CALIFORNIA
Desoto Cab Company, Inc. v. Picker
United States District Court, N.D. California - July 20, 2016 - F.Supp.3d - 2016 WL 3913643

Owner and operator of taxicab company filed § 1983 equal protection claim against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that operators of companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies. The Commission moved to dismiss.

The District Court held that:

- Suit was not barred by the Johnson Act;
- Action was ripe for adjudication; and
- Non-parties were not necessary and required to be joined in action.

Equal protection claim asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies, was not barred by Johnson Act, which precluded federal court jurisdiction over certain state utility rate cases. Although taxicab company owner effectively conceded that companies providing prearranged transportation services were public utilities, and rules and regulations imposed by Commission did not necessarily interfere with interstate commerce, the claim did not challenge order affecting rates charged by a utility, but rather challenged the larger act of the Commission's regulation of companies providing prearranged transportation services, but not taxicab companies.

Equal protection claim asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies, was ripe for adjudication. Even if all of the rules and regulations applicable to the companies providing prearranged transportation services had not been finalized, taxicab company owner challenged the overall regulatory scheme that differentiated between regulations governing the two types of transportation providers.

Companies that provided prearranged transportation services, other traditional taxicab companies, and municipalities that regulated traditional taxicab companies were not necessary parties required to be joined in equal protection action asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies. Disposing of action in absence of traditional taxicab companies, providers of prearranged transportation services, and municipalities would not impede or impair their ability to protect their interests, as the positions of those entities were represented by the parties to the action.

PARKING FEES - ILLINOIS

Franklin v. Parking Revenue Recovery Services, Inc.

United States Court of Appeals, Seventh Circuit - August 10, 2016 - F.3d - 2016 WL 4248035

Plaintiffs brought putative class action against debt collector, alleging violations of Fair Debt Collection Practices Act (FDCPA) in relation to collection of public parking fees and nonpayment penalties.

The United States District Court granted debt collector's summary judgment motion. Plaintiffs appealed.

The Court of Appeals held that plaintiffs' obligations arose from contract law, and thus were debts covered by FDCPA.

Plaintiffs' obligations for public parking fees and nonpayment penalties arose out of contract law, and thus those obligations constituted debts covered by Fair Debt Collection Practices Act (FDCPA), even though parking lot was owned by municipal agency, and even though contract between agency and contractor that operated lot sometimes referred to nonpayment penalty as "fine," where no municipal ordinance or regulation imposed nonpayment penalty, agency's contract with contractor stated that disputes with parking patrons would be handled as matter of contract law, and, by parking in lot, plaintiffs accepted contractor's offer to park at stated cost, which formed contract obligating them to pay stated price or pay higher price if they left lot without paying.

IMMUNITY - INDIANA

Birge v. Town of Linden

Court of Appeals of Indiana July 25, 2016 - N.E.3d - 2016 WL 3976353

Property owners brought action against town after modifications to a farm drainage system caused flooding on their property, asserting claims for nuisance, civil conspiracy, and inverse condemnation.

The Circuit Court granted town's motion to dismiss, and property owners appealed.

The Court of Appeals held that:

- Town failed to demonstrate that it was entitled to discretionary function immunity under the Tort Claims Act, and
- Property owners' allegations were sufficient to state a claim for civil conspiracy.

Town failed to demonstrate in motion to dismiss property owners' claims for nuisance and inverse condemnation that it was entitled to discretionary function immunity under the Tort Claims Act. Accepting as true the allegations in property owners' complaint as to whether town's actions constituted a nuisance, the question of immunity required additional factual development with regard to whether or not town consciously weighed competing interests in reaching its decision to modify farm drainage system, and the immunity provisions of the Act did not apply to claims for inverse condemnation.

Property owners' allegations that town conspired with drainage board to improperly utilize existing right-of-way and construct new components for municipal storm drainage system, which caused water to accumulate on property owners' farmland was sufficient to state a claim for civil conspiracy, even if property owners did not allege town acted unlawfully or to accomplish an unlawful purpose. The allegation of civil conspiracy was just another way of asserting a concerted action in the commission of a tort causing damages to the property owners.

HIGHWAYS - MINNESOTA

J & W Asphalt, Inc. v. Belle Plaine Tp.

Court of Appeals of Minnesota - August 1, 2016 - N.W.2d - 2016 WL 4069244

Landowner brought action against township, seeking declaratory and injunctive relief, arguing that township was responsible for maintaining road used to access property.

Parties filed cross-motions for summary judgment. Landowner's motion was granted in part, and the trial court ordered the Department of Transportation be joined as a party. The Department moved to dismiss. The District Court granted the motion, concluding that township, not Department, was responsible for road's maintenance. Township appealed.

The Court of Appeals held that:

- Statute allowing Department to convey to a political subdivision road that was a necessary part of an upgrade to a trunk highway system does not require that the subdivision's acceptance for the conveyance to be effective;

- Road was a public road rather than a cartway; and
- Township was responsible for maintaining road.

Land for road was acquired through condemnation and road was constructed as part of trunk highway upgrade, and therefore, road was a "public road" rather than a "cartway"; there was no petition for establishment of cartway, nor was there a dedication of land to public use.

Township was responsible for maintaining road conveyed to it by Department of Transportation, despite fact that township did not open the road and had not authorized expenditure of funds for its maintenance; road was a necessary part of an upgrade to a trunk highway system and conveyed to township after its creation.

MUNICIPAL ASSESSMENTS - MINNESOTA

First Baptist Church of St. Paul v. City of St. Paul

Supreme Court of Minnesota - August 24, 2016 - N.W.2d - 2016 WL 4446310

Churches brought action challenging city's right-of-way (ROW) assessment.

The District Court entered summary judgment in city's favor, and churches appealed. The Court of Appeals remanded. On remand, the District Court entered summary judgment in city's favor, and churches appealed. The Court of Appeals affirmed, and churches appealed.

The Supreme Court of Minnesota held that:

- City's ROW assessment was "tax," rather than fee for services, and
- Fact issues remained as to extent of special benefits to churches' properties attributable to right-of-way services.

City's right-of-way (ROW) assessment was "tax," rather than fee for services, even though many services provided addressed conditions that, if left unabated, would have become nuisances, and funds collected through ROW assessment were kept in segregated accounts used only to pay for right-of-way maintenance services, where city charter provided assessments were for "the cost of improvements as are of a local character," that "in no case shall the amounts assessed exceed the benefits to the property," and that one basis to appeal ROW assessment was that it "is in an amount in excess of the actual benefits to the property," city code provisions implementing ROW assessment system made repeated reference to property "benefited," city's policy resolution governing ROW assessments recited that "[t]he law requires that the properties assessed must receive a special benefit from the assessment," ROW assessment functioned as revenue measure, benefiting public in general, and each property owner paid annual assessment without regard to whether owner had violated any ordinance or undertaken any activity requiring regulation.

EMINENT DOMAIN - MISSISSIPPI

City of Jackson v. Jordan

Supreme Court of Mississippi - August 18, 2016 - So.3d - 2016 WL 4398971

Condemnee brought action against condemner, alleging that condemner violated his constitutional rights by depriving him of his property without due process of law.

Following a bench trial, the Circuit Court entered judgment in favor of condemnee and denied condemner's motion for reconsideration. Condemner appealed.

The Supreme Court of Mississippi held that:

- Condemnee had standing to file claim, even though condemnee acquired property from minor-grantor;
- Ten-day statutory limit in which to appeal decision rendered by municipal authorities was inapplicable to condemnee, and thus, condemnee's failure to timely appeal decision did not deprive Circuit Court of jurisdiction;
- Condemner's immunity from tort claims based on administrative action or inaction of a legislative or judicial nature did not protect it from condemnee's claim; and
- Condemner waived issue of proper method of determining damages by failing to preserve the issue at trial and on appeal.

Condemnee had standing to file claim against condemner alleging that he was deprived of his property without due process of law, even though condemnee acquired property from minor-grantor, where grantor did not seek to avoid deed, but ratified the deed by affidavit upon reaching the age of majority.

Ten-day statutory limit in which to appeal decision rendered by municipal authorities was inapplicable to condemnee who filed action against city-condemner after it ordered his house demolished as menace to public health, and thus, condemnee's failure to timely appeal decision did not deprive Circuit Court of jurisdiction, where condemner's notice of condemnation hearing did not provide the statutorily required two-weeks notice, and condemnee did not become aware of the condemnation until after time to appeal condemner's decision had expired.

City-condemner's immunity from tort claims based on administrative action or inaction of a legislative or judicial nature did not protect city from condemnee's claim, alleging that city failed to give him notice of condemnation as required by statute in violation of his due process rights. City's immunity against tort claims did not encompass claims of constitutional violations.

Condemner waived issue of proper method of determining damages in action brought by condemnee, alleging that condemner deprived him of his property without due process of law, by failing to preserve the issue at trial and on appeal, where condemner failed to object that condemnee's receipts for home repairs were improper method for calculating damages, and did not make argument on appeal with citations to relevant legal authority.

PUBLIC CONTRACTS - MISSOURI

Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.

Supreme Court of Missouri, en banc - August 23, 2016 - S.W.3d - 2016 WL 4444039

Sub-subcontractor brought mechanic's lien claim against county, county's agent for construction of property development project, general contractor, and subcontractor.

The Circuit Court granted summary judgment to defendants. Sub-subcontractor appealed.

The Supreme Court of Missouri held that:

- Public policy did not prohibit sub-subcontractor from perfecting lien against leasehold interest in property held by agent;
- Genuine issue of material fast as to last date that sub-subcontractor worked on project, as would determine whether sub-subcontractor's mechanic's lien was filed within six months of such date, as required by statute, precluded summary judgment in favor of agent;
- Genuine issue of material fact regarding whether sub-subcontractor's mechanic's lien statement contained a just and true account of demand due, despite statement's alleged inclusion of nonlienable items, precluded summary judgment in favor of agent; and
- Agent was not a "contractor" of whom a bond would be statutorily required to be furnished to county.

Sub-subcontractor could not perfect mechanic's lien against county, after sub-subcontractor allegedly failed to receive payment for glass and glazing work done on county's property development project, where county owned property at time sub-subcontractor began working on building, and contract between county and county's agent for construction of project provided that any improvements installed in building immediately became property of county.

Public policy did not prohibit sub-subcontractor from perfecting its mechanic's lien against leasehold interest in property held by county's agent for construction of development project regarding property. County's contract with agent authorized, under certain circumstances, agent to assign its leasehold interest without county's prior written consent, and thus county anticipated circumstances that would end its control over the leasehold.

Genuine issue of material fast as to last date that sub-subcontractor worked on property development project, as would determine whether sub-subcontractor's mechanic's lien was filed within six months of such date, as required by statute, precluded summary judgment in favor of holder of leasehold interest in property, in sub-subcontractor's action to enforce lien.

Genuine issue of material fact regarding whether sub-subcontractor's mechanic's lien statement contained a just and true account of demand due, despite statement's alleged inclusion of nonlienable items, precluded summary judgment in favor of holder of leasehold interest in property, in sub-subcontractor's action to enforce lien.

Entity with which county contracted regarding property development project was not a "contractor" of whom a bond would be statutorily required, where entity did not provide construction services under its contract with county but rather merely contracted to be county's agent and arranged for construction services to be provided by others.

Sovereign immunity doctrine barred sub-subcontractor's action against county alleging county failed to require purported contractor to furnish a bond for property development project, where sub-subcontractor sued only the county and not any individual public official.

MUNICIPAL ORDINANCE - NEBRASKA

Malone v. City of Omaha

Supreme Court of Nebraska - August 19, 2016 - N.W.2d - 294 Neb. 516 - 2016 WL 4411311

Resident brought action against city challenging an ordinance requiring the licensure of contractors.

After summary judgment was granted to city on all but one claim, the District Court conducted a bench trial and found for city. Resident appealed.

The Supreme Court of Nebraska held that:

- City was not required to recommence notice process after city amended ordinance's title;
- Legislature authorized city to pass ordinance;
- Ordinance was not invalid for monopolistic tendencies;
- Ordinance was not preempted by state laws; and
- Ordinance did not violate resident's constitutional right to conduct lawful business or his right to privacy and property.

EMINENT DOMAIN - NORTH DAKOTA

In re 2015 Application for Permit to Enter Land for Surveys and Examination

Supreme Court of North Dakota - August 18, 2016 - N.W.2d - 2016 WL 4395434 - 2016 ND 165

County water resource district filed applications for permission to enter landowners' properties to conduct surveys, mapping, and examinations in connection with a proposed flood control project.

The District Court granted applications. Landowners appealed, and the appeals were consolidated.

The Supreme Court of North Dakota held that:

- Trial court had subject matter jurisdiction over district's applications, and
- Statute allowing district to "enter upon the land and make examinations, surveys, and maps thereof" entitled district to perform soil borings.

Trial court had subject matter jurisdiction over county water resource district's applications for permission to enter landowners' properties to conduct surveys, mapping, and examinations required for evaluating and designing a proposed flood control project, even though district did not serve eminent domain summonses and complaints on landowners. Proceedings on district's applications were special statutory proceedings exempt from the rules of civil procedure, and such proceedings were preliminary to condemnation proceedings, rather than being condemnation proceedings requiring eminent domain summonses and complaints.

Eminent domain statute authorizing a preliminary proceeding in which the condemning authority may "enter upon the land and make examinations, surveys, and maps thereof" entitled county water resource district to perform soil borings on land in connection with a proposed flood control project, and thus such soil borings did not themselves constitute a compensable taking. Proposed soil borings constituted "examinations" under the statute and were minimally invasive, as district was forbidden to enter or damage buildings or cut trees without the landowners' permission, and was required to restore the affected property to its original condition as nearly as practicable.

MUNICIPAL GOVERNANCE - OHIO

State ex rel. Bates v. Smith

Supreme Court of Ohio - August 23, 2016 - N.E.3d - 2016 WL 4486241 - 2016 -Ohio- 5449

Prosecuting attorney sought peremptory writ of quo warranto to prohibit two township trustees from removing third trustee from office and appointing another trustee.

The Supreme Court of Ohio held that:

- Office of township trustee held by trustee on active military duty was not vacant, and
- Meeting at which trustees removed other trustee from office and appointed trustee violated Open Meetings Act.

Office of township trustee held by trustee who was on active military service was not vacant, and therefore other trustees were not statutorily authorized to remove trustee from office and appoint another trustee. Although applicable statute provided that, when a township officer was absent for more than 90 days, the office was deemed vacant, statute expressly excepted active military service from that provision.

Meeting during which two township trustees removed third trustee from office and appointed another trustee did not qualify as an emergency meeting, and therefore failure to give sufficient notice of meeting violated Open Meetings Act, where trustees had held another meeting less than 24 hours before meeting at issue, with no suggestion of any emergency, let alone one that would have compelled another meeting in less than 24 hours.

PUBLIC RECORDS - PENNSYLVANIA

Clearfield County v. Bigler Boyz Enviro, Inc.

Commonwealth Court of Pennsylvania - July 28, 2016 - A.3d - 2016 WL 4063054

County brought action challenging Office of Open Records' (OOR) determination that handwritten notes made by county commissioner concerning two unsolicited telephone calls she received from private individuals were "records" under Right–to–Know Law (RTKL).

The Court of Common Pleas reversed, and requestor appealed.

The Commonwealth Court held that notes were not "records" subject to disclosure pursuant to RTKL.

Handwritten notes made by county commissioner concerning two unsolicited telephone calls she received from private individuals were not produced with county's authority and were not ratified, adopted, or confirmed by county, and thus were not "records" subject to disclosure pursuant to Right–to–Know Law (RTKL), where commissioner did not rely on information to make decision, did not discuss or otherwise share information contained in her notes with other commissioners, and was not authorized to speak for or bind county regarding matter at issue.

TAX - MICHIGAN

United States v. Detroit Medical Center

United States Court of Appeals, Sixth Circuit - August 17, 2016 - F.3d - 2016 WL 4376431

United States brought action against not-for-profit hospital corporation to collect Federal Insurance Contributions Act (FICA) taxes on stipends that hospital corporation paid to medical residents.

The United States District Court for the Eastern District of Michigan granted summary judgment to United States. Hospital corporation appealed. The Court of Appeals affirmed in part, vacated in part, and remanded.

IRS issued administrative ruling that medical residents were students who were exempt from FICA taxes, and issued refunds to hospital corporation.

Hospital corporation sought $9.1 million in additional interest on employer portion refunds, contending it was not "corporation" subject to lower interest rate on refunds.

The District Court granted summary judgment to United States. Hospital corporation appealed.

The Court of Appeals held that hospital corporation was "corporation" subject to lower interest on refund of employer portion of FICA taxes.

Not-for-profit hospital corporation was "corporation" under Internal Revenue Code that was subject to lower interest on refund of employer portion of Federal Insurance Contributions Act (FICA) taxes it paid for medical residents whom IRS subsequently determined were students exempt from FICA taxes. In keeping with common-law definition of "corporation," Internal Revenue Code consistently used "corporation" to include nonprofit corporations organized under state law as well as for-profit corporations, and, contrary to hospital corporation's contention, refund provision's cross-reference to subsection dealing with tax payments by C corporations was to define "taxable period," not corporations subject to lower interest rates on refunds.

[The Crumbling Assumptions of US Public Pension Plans.]

The governor's office for Illinois, a state with notoriously weak finances, this week issued a stark warning about what might happen if it reduced the assumed rate of return for its Teachers' Retirement System.

"If the board were to approve a lower assumed rate of return taxpayers will be automatically and immediately on the hook for potentially hundreds of millions of dollars in higher taxes or reduced services," the state's senior adviser for revenue and pensions wrote in a memo.

Unlike corporate pensions, US public pensions discount their liabilities using the rate of return they expect to generate on their investments. Some experts complain that these rates have been set unrealistically high. Lower return expectations would push up the cost of liabilities on their balance sheet, and force Illinois to make higher contributions. If costs to the pension were to increase by $250m it would nearly equal an entire year's appropriation for six universities.

[Continue reading.]

Financial Times

Last updated: August 26, 2016 5:27 pm

Nicole Bullock in New York

The Lowdown On Enhancement Programs For School District Bonds.

Key Points

- Municipal bonds issued by school districts can be part of the stable foundation of a municipal bond portfolio, in our view.
- School district bonds in some states come with extra protection from state enhancement programs that can make missed interest and principal payments.
- The strength of the different enhancement programs varies by program.

It’s that time of year when students wind down their summer breaks and start to turn their thoughts to school. Municipal bond investors may want to follow their lead.

Bonds issued by school districts—along with other highly rated general obligation bonds from cities and states and revenue bonds backed by essential services—can serve as the stable foundation of a municipal bond portfolio. School districts in most states tend to have high credit ratings, boasting A-level ratings or better. Why? One reason is that school district bonds in most states are backed by property taxes, which can be a stable and reliable revenue source. A strong property tax pledge can help support the credit quality of school district bonds, in our view.

Continue reading.

FINANCIAL ADVISOR

AUGUST 24, 2016 • COOPER J. HOWARD AND ROB WILLIAMS

Program Available: What Municipal Analysts Need to Know about Governmental Accounting.

Are you looking for a refresher on governmental accounting, or are you new to the field?

Join SIFMA, MAGNY and GASB’s Dean Mead for an in-depth session on:

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SIFMA Conference Center, NYC

Meet the Instructor:
Dean Mead
Senior Research Manager, Governmental
Accounting Standards Board (GASB)
Author, “An Analyst’s Guide”

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

VIEW THE PROGRAM.

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Rev. Proc. 2016-44 Greatly Expands Rev. Proc. 97-13 Safe Harbor for Management Contracts, Opening the Door for Long-Term Management Contracts.

The IRS has released new management contract safe harbors that profoundly change the prior rules under Rev. Proc. 97-13. The new revenue procedure, Rev. Proc. 2016-44, which was released August 22 by the IRS, appears on first glance to have brought many favorable changes to the safe harbor rules. Unlike the prior guidance under Rev. Proc. 97-13, Rev. Proc. 2001-39, and Notice 2014-67, the new safe harbor under Rev. Proc. 2016-44 applies more principles-based tests rather than mechanical tests based on the length of the contract.

The new safe harbor takes effect immediately, but during an initial transition period running until February 18, 2017, issuers and borrowers can apply either the prior safe harbors or the new safe harbor. More specifically, the new safe harbor of Rev. Proc. 2016-44 applies to management contracts entered into on or after August 22, 2016. In addition, issuers may elect to apply the new safe harbor to management contracts entered into earlier. The prior safe harbors may continue to be applied to any contract entered into before February 18, 2017, that is not materially amended or modified on or after February 18, 2017, except pursuant to certain renewal options.

The safe harbor provided by Rev. Proc. 2016-44 is generally available to management contracts that satisfy the following six requirements:

1. General financial requirements. A contract (i) must provide only for "reasonable compensation" (ii), must not give the service provider "a share of net profits," and (iii) must not impose the burden of sharing any of the net losses on the service provider. 5.02.
2. Term of the contract. The contract term, including renewal options, must not be longer than the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the "managed property" (the portion of the project to which the services relate). If contract terms relevant to the safe harbor analysis are "materially modified," the contract must be retested as a new contract. § 5.03.
3. Control over the managed property. The "qualified user" (depending on the project, this is either a governmental person or a 501(c)(3) organization) must exercise a "significant degree of control" over the managed property. § 5.04.
4. Risk of loss of the managed property. The qualified user must bear the risk of loss upon damage or destruction of the property. § 5.05.
5. Consistent tax positions. The service provider must agree "not [to] take any tax position that is inconsistent with being a service provider," e.g., by claiming depreciation with respect to (and presumably, ownership of) the managed property, or by claiming a deduction for a payment as rent (and presumably classifying itself as a lessee of some or all of the managed property). § 5.06.
6. No circumstances substantially limiting the qualified user's ability to exercise its rights. The service provider must not have any role or relationship with the qualified user that acts to substantially limit the qualified user's ability to exercise its rights under the contract. This safe harbor requirement may be satisfied by its own mini-safe harbor that requires showing: (i) that certain individuals affiliated with the service provider (e.g., directors and officers) do not control 20% or more of the vote of the qualified user's governing body, (ii) the qualified user's governing

body doesn't include the service provider's chief executive officer ("CEO") or its chairperson (or the equivalents), and (iii) the CEO of the service provider is not the CEO of the qualified user (or CEO of any entity related to the qualified user). § 5.07.

Management contracts also do not result in private business use if they are an "eligible expense reimbursement arrangement." § 5.01. An "eligible expense reimbursement arrangement" means "a management contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the service provider to unrelated parties and reasonable related administrative overhead expenses of the service provider." § 4.01.

Also, use by a service provider that is "functionally related and subordinate to" a management contract that meets the safe harbor requirements does not result in private business use. The functionally related/subordinate use rule is clarified by an example: Storage areas to store equipment used to perform activities required under a management contract that complies with Rev. Proc. 2016-44 does not result in private business use (and presumably would mean that such space would not be treated as leased to the service provider).

A few key points to note:

- The new safe harbor may require certain special provisions that might not otherwise appear in a management contract and might not have been required under 97-13. Where does the service provider have to memorialize its agreement not to take inconsistent tax positions? The logical place is in the text of the management contract itself. Likewise, the qualified user must document its control over the managed property through budgetary control and rate-setting powers – these also may require special contract provisions.
- Under the new safe harbor, we no longer have to examine the termination provisions of a management contract.
- We also no longer have to categorize compensation into various buckets (per unit fee, periodic fixed fee, etc.).
- The greatly expanded permitted term opens the door to tax-exempt financing for a whole new world of P3 projects with long-term concession contracts

The summary above does not include all of the specifics. The summary also does not include the full definitions of various terms in Rev. Proc. 2016-44 (most of which are in Section 4 of Rev. Proc. 2016-44).

Squire Patton Boggs

by Alexios S. Hadji

USA August 24 2016

Democratizing Tax Increment Financing through Participatory Budgeting – A Tool Kit

In 2014 Chicago was the site of the country's first participatory budgeting (PB) process to allocate tax increment financing (TIF) funds. The community organization Blocks Together worked with residents and businesses in the neighborhood of West Humboldt Park to engage residents in a pilot PB process to directly decide how to spend $2 million in TIF funds for projects that might never have received funding through the usual channels. This process resulted in deep engagement of residents, and five community-developed projects will be implemented over the next few years.

As part of this historic process, Blocks Together, UIC's Great Cities Institute and the Participatory Budgeting Project developed a tool kit that will provide information, resources, and lessons learned from using PB with TIF funds.

The final report, *Democratizing Tax Increment Financing through Participatory Budgeting – A Tool Kit*, is available here.

New IRS Management Guidance is Flexible, Furthers P3s: Ballard Spahr

Ballard Spahr to Conduct Webinar at 12 p.m. ET on September 14, 2016

State and local governments and 501(c)(3) organizations have been given very flexible guidance by the IRS for longer-term private management of tax-exempt bond financed projects to facilitate general operations and major infrastructure initiatives. These safe harbors apply to any management contract that is entered into on or after August 22, 2016.

The maximum term of a qualifying contract is now the lesser of 30 years or 80 percent of the economic life of the managed property. Prior guidance had placed limits on the term of the contract based on the extent to which the compensation was a fixed fee or was variable (percentage of revenues or per unit fees, for example).

Compensation under a qualifying contract must meet the following requirements:

- It must be reasonable compensation for services rendered.
- It must not provide the service provider with a share of net profits from the operation of the managed facility. No element of the compensation can take into account or be contingent upon either the managed property's net profits or both the revenues and expenses for any fiscal year. The Internal Revenue Service will look to the eligibility, the amount, and the timing of the payments to determine if the net profits prohibition is violated.
- Incentive compensation is permissible, so long as it is determined by the service provider's performance in meeting one or more standards that measure quality of services, performance, or productivity.
- It cannot require the service provider to bear the net losses from the operation of the managed property. This requirement is specifically defined for the purposes of the guidance, but would not, for example, limit a contract where the service provider's compensation is reduced by a stated dollar amount for failure to keep the managed property's expenses below a specified target.
- The state or local government or 501(c)(3) organization must exercise a significant amount of control over the use of the managed property, such as approval of the annual budget of the managed property, capital expenditures of the property, disposition of the property, rates charged for the use of the property, and the general nature and type of use of the property.
- The state or local government or 501(c)(3) organization must bear the risk of loss if the managed property is damaged or destroyed. This requirement is met if insurance is purchased from a third party or if a penalty is imposed on the service provider for failure to operate the property in accordance with the standards laid out in the management contract.
- The state and local government/501(c)(3) entity and the service provider must treat the service contract consistently for federal tax purposes. The service provider could not, for example, take depreciation or tax credits with respect to the managed property, which would be inconsistent with

the state or local government being the owner having entered into a contract for services.
- The service provider must not have any role or relationship through overlapping boards or executives which limits the ability of the state or local government or 501(c)(3) to exercise its rights under the contract. The safe harbor for determining what might limit the ability to exercise rights is essentially the same as the 1997 guidance.
- Contracts to provide services before the managed property is placed in service (such as pre-operating services for construction design or construction management) are not management contracts that must be analyzed under the rules.
- Contracts that provide for compensation solely to reimburse eligible expenses (reimbursement of actual and direct expenses paid by the service provider to unrelated parties and reasonable related administrative overhead expenses of the service provider) are not management contracts that must be analyzed under the rules.

If a contract is a qualifying contract, other uses of the managed property, such as on-site office or storage space to perform services, will not be treated as private business use.

These safe harbors essentially replace the prior 1997 and 2014 guidelines. Because the prior guidance was more restrictive, contracts complying with the 1997 and 2014 guidelines would likely continue to be qualifying, but the Revenue Procedure goes on to specifically state that the prior guidelines can be applied to contracts entered into before February 18, 2017.

Our attorneys will continue to do an in-depth analysis of these revisions and how they will impact your organization. On September 14, 2016, at 12 p.m. ET, Ballard Spahr will host a webinar where we will explore how these flexible guidance rules will impact negotiations with service providers, how they can be used in combination with the mixed-use allocation rules, the influence this guidance can have on furthering public-private partnerships (P3), as well as what the guidance means for upcoming bond financings. The webinar registration form is available here.

Attorneys in Ballard Spahr's Public Finance Group have participated in every kind of tax-exempt bond financing and have extensive experience with the rules and regulations set by the IRS and U.S. Treasury. Working closely with attorneys in Ballard Spahr's P3/Infrastructure Group, they routinely monitor and report on new developments that impact federal and state infrastructure programs related to transportation and other types of projects.

by the Public Finance Group

August 25, 2016

Some Lawyers Have Questions About New Management Contract Safe Harbors.

WASHINGTON – While the Internal Revenue Service's revenue procedure on management contracts received widespread praise from many bond and tax lawyers who felt it would help facilitate bond financing in public-private partnerships, several attorneys also had questions or concerns about it.

Rev. Proc. 201644, released by the IRS on Monday, contains safe harbors for long-term management contracts of up to 30 years from the previous 15-year limit and also removes the formulaic fixed fee requirements for manager compensation.

The new safe harbor under which a management contract does not result in private business use allows for the contracts to be more accessibly used in funding bond-financed infrastructure projects and public-private partnerships as well as for more incentive-based compensation.

Dave Caprera, an attorney with Kutak Rock in Denver, said the revenue procedure is "simpler, [and] easier to understand and apply" than the prior one. He felt the previous formulaic approach involving fixed fees under Rev. Proc. 9713 released in 2013 was ineffective in addressing compensation and term length. The new safe harbors allow longer-term contracts for long-lived projects and short-term contracts for short-lived assets as long as the compensation is reasonable and not tied to profits or losses.

"The deal guys in my office are partying in the hallway," he said.

Still, Caprera wanted to know if the term or economic life of a contract is retested when a contract is modified or a new contract is entered into.

The new revenue procedure adopts the existing tax law that treats a term which exceeds 80% of the reasonably expected economic life of a facility as being the equivalent of ownership.

"So, I have a 40-year property and I entered into a 30-year contract," Caprera said hypothetically. "But the contract is terminated at the end of 15 years. I want a new contract. Can it be 30 years? 20 years, something else? What if the property is in bad repair and is only going to last 10 more years?"

Section 5.03 of the new revenue procedure under "Term of the Contract and Revisions" states that, "[a] contract that is materially modified with respect to any matters relevant to this section 5 is retested under this section 5 as a new contract as of the date of the material modification."

The new revenue procedure amends Rev. Proc. 9713, which provided safe harbors under which a contract of up to 10 years would require at least 80% of the manager's annual compensation to be based on a fixed fee. Fifteen-year contracts under Rev. Proc. 9713 required at least 95% of annual compensation to be based on a fixed fee.

The new guidance will supersede the safe harbors under Rev. Proc. 9713, which Michael Bailey, a partner with Foley and Lardner in Chicago, said will "raise many questions regarding whether certain contracts that were within the Rec. Proc. 9713 safe harbors will continue to be within the new safe harbors."

The new rules generally require state or local governments to control rates, but many contracts under the existing safe harbors do not have that requirement, Bailey said. A major example of this is the separate billing arrangements that are often used in hospital management contracts.

Section 7 of the revenue procedure states that the new safe harbors apply to any "management contract that is entered into or after Aug. 22, 2016 and an issuer may apply these safe harbors to any management contract that was entered into before Aug. 22, 2016."

But it adds that issuers also have the option of applying the safe harbors in Rev. Proc. 9713 "to a management contract that is entered into before Feb. 18, 2017 and that is not materially modified or extended on or after [that date]."

"For contracts entered into after that date, there could be problems," Bailey said.

While the new guidance is more liberal than Rec. Proc. 9713 in some cases, such as long-term management contracts for public infrastructure projects, it is "not necessarily true in many other cases," Bailey said.

He called this a "major issue" that he said will likely need to be addressed in comments submitted to the IRS and the Treasury Department.

Scott Lilienthal, a partner at Hogan Lovells in Washington, said on Wednesday that the new rules are helpful in allowing longer terms and greater flexibility for variable compensation, but had a similar analysis as Bailey.

"The revenue procedure also introduces some new conditions, such as requiring a certain amount of control over the managed facility by the qualified user, and it may take some time to see whether those new conditions may be problematic when applied to specific types of agreements," Lilienthal said.

The new revenue procedure includes several requirements that must be met under a safe harbor in order for a management contract to avoid resulting in private business use. Similar to 9713, payments cannot be based on a share of net profits.

But the procedure also includes three new requirements to ensure there is no private ownership or lease of a project. A state or local government "must exercise a significant degree of control of the use of the managed property" and "must bear the risk of loss upon damage or destruction of the managed property." In addition, the private party "must agree that it is not entitled to, and will not take any tax position that is consistent with the state or local government with respect to the managed property. The private party must not take any depreciation or amortization, investment tax credit, or deduction for any rent payment for the property.

Christie Martin and Maxwell Solet, attorneys with Mintz Levin in Boston, said that Rev. Proc. 2016-44 "substantially increases flexibility" for an issuer to work with private parties without jeopardizing the tax-exempt status of bonds.

In a post published on the firm's website Wednesday, Martin and Solet wrote, "The overall impact of Rev. Proc. 201644 would seem to be an increase in the ability of bond issuers and tax-exempt users of bond-financed facilities to use for-profit contractors at bond-financed facilities. However, practitioners have already noted that the increased flexibility comes with less certainty and more facts and circumstances analysis with respect to many aspects of the safe harbor."

"One area in which flexibility may be diminished is in the conditions under which payments may be subordinated or deferred, as the guidance indicates that timing of payment may not be conditioned on tests involving both the managed property's revenues and expenses for any fiscal period," they added.

Several other bond attorneys also told The Bond Buyer on Monday that it is clear the IRS and Treasury listened to industry concerns in constructing the new rules, which they said will foster more public-private partnerships.

Many market participants felt the prior rules were too restrictive regarding their ability to use tax-exempt bonds to help finance P3s, where private parties join with state or local governments to develop infrastructure projects under long-term management contracts.

The Bond Buyer

By Evan Fallor

August 24, 2016

Hawkins Advisory: 2016 Final Arbitrage Regulations

Read the Advisory.

Hawkins Delafield & Wood LLP

August 23, 2016

An Interesting Summer for PACE.

Property Assessed Clean Energy (PACE) financing can be a powerful tool for building owners. Financing an energy efficiency or renewable project in this manner enables the work to be done without immediate payment. The obligation is paid over a period of time – generally as long as 20 years – through an assessment on the property's tax bill. If the building is sold, the obligation is assumed by the new owner.

It can be a win/win. The vendor gets the work and the home or business owner gets the upgrade. That work presumably lowers building expenses, increases performance and/or makes the structure more environmentally sound. PACE funding structures must be approved at the state and local jurisdictions.

Continue reading.

Energy Manager Today

By Carl Weinschenk

August 23, 2016

The State Pension Funding Gap: 2014

New accounting rules help provide a clearer picture

Overview

The nation's state-run retirement systems had a $934 billion gap in fiscal year 2014 between the pension benefits that governments have promised their workers and the funding available to meet those obligations. That represents a $35 billion decrease from the shortfall reported for fiscal 2013. The reduction in pension debt was driven primarily by strong investment results, with public plans in fiscal 2014 averaging a 17 percent rateof return.1

This brief focuses on the most recent comprehensive data from all 50 states and does not reflect the impact of weaker investment performance in fiscal 2015, which averaged 3 percent.2 Performance has been even weaker in the first three quarters of fiscal 2016, with negative average returns. Preliminary data from fiscal 2015 point to increases in unfunded liabilities for the majority of states. Total pension debt is expected to be over $1 trillion for state plans, an increase of more than 10 percent from fiscal 2014.

Continue reading.

The Pew Charitable Trusts

August 24, 2016

A Threat to City Fees?

The Minnesota Supreme Court this week ruled that fees St. Paul was charging property owners for street maintenance amounted to a tax and therefore should be subject to the city's constitutional limits on taxing authority.

The case was brought by two churches who argued they were asked to pay for a service that benefitted the public, not just the property owner. The fee applied to routine street services including street sweeping, snow plowing, streetlight maintenance and litter pick-up. It affects more than 81,000 St. Paul homes, churches, nonprofits, universities and businesses.

St. Paul's city attorney framed the loss as a technical one, telling the *Twin Cities Pioneer Press* that "it's not a question of if the city can collect assessments but how it goes about doing so."

The Takeaway: This case is more than a technical debate. St. Paul is like many cities and counties across the country in that it's seen an increasing share of its budgeted income come from fees rather than taxes in recent decades. Simply put, it's easier to raise a fee — or create a new one — than it is to raise a tax.

It's important to note that this ruling only immediately applies to St. Paul. But it could spark copycat suits in other municipalities. At a minimum, it might give municipalities pause when instituting a new fee — to consider whether they are actually charging for an individual service or a public good.

GOVERNING.COM

BY LIZ FARMER | AUGUST 26, 2016

Big Transit Plans Go Before Voters in November.

The proposals could reshape several large U.S. cities for decades to come — if they pass.

Transit agencies in Atlanta, Detroit, Los Angeles and Seattle are appealing to voters this fall to fund new services that the cities hope could transform their metropolitan areas for decades to come.

By going to voters in a presidential election year, the agencies are betting that big turnouts will help their cause. But even though local transportation measures generally fare well at the ballot box, each of these particular metropolitan areas has had a tricky history with transit. In fact, just getting the proposals on the ballot took significant effort in Atlanta and Detroit, and opponents are already organizing to block the far-reaching efforts in Los Angeles and Seattle.

The ballot measures push for new rail lines, better bus service and more connections to destinations such as airports, universities, hospitals and job centers.

Here's a rundown of each.

Going Regional (Finally) in Detroit

Voters in four Detroit-area counties will vote on whether to increase their property taxes by an average of $95 a year to vastly improve transit in the region. If approved, the proposal would cost $4.6 billion over 20 years.

The plan calls for building commuter rail between Detroit and Ann Arbor, adding four new bus rapid transit routes among major traffic arteries, creating bus routes that cross county borders and increasing regular bus service throughout the area. It also ensures that the region's four existing transit providers integrate services to share a fare card and a common call center.

It would be a major development for Detroit, which, until 2012, was the only major metropolitan area without a regional transportation authority. Michigan lawmakers OK'd the authority in order to get federal funding for Detroit's new streetcar line.

Warren Evans, the executive of Wayne County, which includes Detroit, praised the decision to put the tax hike and plan before the voters. That decision means "progress on an intractable problem that has dogged this region for 50 years," he said.

"This is an important decision for the citizens of this region," he added. "They will have to ask themselves a question: Should we join virtually every other urban area in the country in recognizing the importance of an efficient and effective public transportation system?"

Boosting Service in Atlanta

In another transit-starved area, Atlanta voters will decide whether to increase their sales taxes by 0.5 percent over 40 years to get better bus service, expanded rail routes and better incorporation of technology.

MARTA, Atlanta's transit system, hasn't specified exactly how the $2.4 billion raised would be spent. But its leaders have proposed a menu of possibilities that also includes circulator buses, new rail stations on MARTA's existing subway lines and improvements to existing stations. The money would only come from within the city itself, not the rest of the three-county area MARTA now serves.

The vote in November, however, is complicated by the fact that the city council put another sales tax hike of 0.4 percent on the ballot for other transportation measures. That initiative would devote money to acquiring the remaining land to complete the so-called BeltLine, a 22-mile loop of parks, bicycle trails and other amenities around the city. In addition, it would pay for more bike trails, make roads more pedestrian- and bike-friendly, fix up sidewalks, and help coordinate traffic signals.

If both measures pass, it would raise Atlanta's sales tax to 8.9 percent, far higher than it is in other counties in the metropolitan area.

Expanding Farther and Wider in Seattle

Seattle's Sound Transit agency wants to double the size of its light rail network and expand its ability to reach the far-flung areas of Puget Sound. It's asking voters to approve $54 billion in new funding over 25 years. The plan, known as ST3, would pay for seven light rail extensions, which would help grow the network from 54 miles to 116 miles; add commuter rail and bus rapid transit; and reach 37 new communities, bringing ridership up to 700,000 passengers a day.

All of that would cost a pretty penny, about $169 a year for an individual taxpayer or $326 annually for a typical household. It would be paid for through increases in property, sales and car-tab taxes.

Peter Rogoff, Sound Transit's CEO and a former head of the Federal Transit Administration, said the ballot measure could change the nature of the Seattle-area transit agency. "Right now, we are a commuter bus operator with a single light rail line," he told *Progressive Railroading* magazine. "The big transformation will be moving this from a light rail line to a true regional network."

But opponents say the improvements would do little to alleviate congestion in the Seattle area. Even by Sound Transit's own estimates, the agency would only provide 1 percent of trips in the region, according to the group Smarter Transit. "Today innovative ideas around ride sharing, driverless cars and bus rapid transit are being developed. But ST3 has little or none of these," the group says on its website.

Doubling Down on Taxes in Los Angeles

Transportation planners in Los Angeles County want to build on previous wins at the ballot box. They'll ask voters in November to make permanent a previous sales tax hike for transportation, plus add another half-cent sales tax hike to pay for both highway improvements and new transit projects. The tax increases would raise the cumulative sales tax in L.A. County to 9.5 percent.

The proposal, called Measure M, is expected to generate $860 million a year if it passes with the required two-thirds majority. It could be a close call. A similar measure in 2008 barely squeaked by with 67.2 percent of the vote, but a related bonding proposal fell just short in 2012. This year, Measure M will appear on a crowded ballot alongside 17 statewide ballot measures.

County supervisors voted 11-2 to put the put the proposal on the ballot, but many city officials, particularly in the southern part of the county, oppose it.

GOVERNING.COM

BY DANIEL C. VOCK | AUGUST 23, 2016

The Story Behind San Bernardino's Long Bankruptcy.

Unlike Detroit or Stockton, this California city's insolvency can't be blamed on debt or pensions.

Four years ago this month, San Bernardino, Calif., filed for Chapter 9 protection. Today, it's still in Chapter 9 — the longest municipal bankruptcy in recent memory.

Why so long? Many blame it on San Bernardino's lengthy and convoluted charter, a document that gives so much authority to so many officials that it's completely ineffective. "It gets everybody in everybody else's business," said City Manager Mark Scott. "And it keeps anybody from doing anything."

As a result, officials have spent the last two years trying to ensure the current charter is not part of the city's future. A specially appointed committee is proposing to completely overhaul it.

At issue is that unlike many California cities that either have a strong mayor/council form of management or a strong city manager government, San Bernardino's is a hybrid, doling out authority to both sides. For example, fire and police chiefs are appointed by the mayor and subject to approval by the council, but report to both the mayor and city manager. This confusing structure played a role in the city's road to insolvency. "You'd have to say," Scott said, "the charter made it almost impossible to succeed."

The cause of the city's bankruptcy obviously can't be pegged to just one thing. But other municipal bankruptcies have tended to falter thanks to major ticket items. For instance, Stockton, Calif., can largely blame its bankruptcy on bond debt and retiree health-care costs. Detroit had loads of municipal and pension debt.

But in the case of San Bernardino, an inland city of about 200,000 people, insolvency was sneakier. "It was simply an accumulation of spending more than the revenues they had to support it," said Andrew Belknap, who is regional vice president of Management Partners and has worked with other struggling California cities.

Belknap said the city's overly complicated system of checks and balances in its 48-page charter and extreme turnover essentially created a stalled government: Between 2004 and 2014, the city cycled through five city managers, five police chiefs, four finance directors and five public works directors. The situation was so disorganized that by the time officials realized the full magnitude of the city's finances, it was too late to declare a financial emergency. Instead, San Bernardino officials had to declare insolvency or they weren't going to make payroll. "They didn't have the political and management systems in place to see this coming or act ahead of time," Belknap said.

About two years into the court proceedings, officials realized that they needed to address the management confusion in order to give the city a fighting chance after it emerged from bankruptcy. The current document needs so much explanation it has been supplemented over the years by more than 100 city attorney opinions. Even rules on personnel management had made it into the charter, like directions on how to compensate police and fire fighters and defining which public safety positions had to be filled in by sworn officers.

So for a little more than a year, a charter committee has been developing a new proposal based on the charters of similarly sized California cities and incorporating recommendations made by the National Civic League. The proposed charter– now whittled down to 11 pages — includes a key change: moving to a council-manager form of government. If approved, the city manager will have executive authority that's held in check by the council. The mayor will still be elected but will act as the legislative head of the council. The charter also would make the city clerk and attorney appointed positions instead of elected.

Residents will vote on the proposed charter this November. It's not a requirement that voters approve it for the city to exit bankruptcy. Even without that change, officials expect to emerge from Chapter 9 protection sometime in the spring. But some believe the city doesn't have much of a future in a post-bankruptcy world without it. "I don't foresee the city coming out of all this with this charter," said Scott. "Recruiters don't want to recruit anybody [here] until we fix it."

GOVERNING.COM

BY LIZ FARMER | AUGUST 25, 2016

Cities and Drones: What Cities Need to Know About Unmanned Aerial Vehicles (UAVs).

National League of Cities' municipal guide, Cities and Drones, is designed to serve as a primer on drones for local officials, providing insight into the recently released federal rules relating to drone operation, as well as offering suggestions for how local governments can craft their own drone ordinances to encourage innovation while also protecting their cities.

Drones have the potential to revolutionize many industries and city services, particularly as their technology advances. There are many applications for drones within the public sector at the local and state level. Drones can be used for law enforcement and firefighting, as rural ambulances, and for inspections, environmental monitoring, and disaster management. Any commercial arena that involves outdoor photography or visual inspection will likely be experimenting with drones in the near future, as will retailers who want to speed up package delivery.

However, drones also present challenges. There are some safety issues, for instance, when operators fly their drones over people or near planes. City residents often have privacy concerns when any small device hovering nearby could potentially be taking photos or video. The FAA's final rule on drones left some opportunity for city governments to legislate on this issue. Rather than ban them outright, city officials should consider how this new technology might serve residents or enhance city services.

Read the Report.

TAX - ILLINOIS

State ex rel. Schad v. National Business Furniture, LLC

Appellate Court of Illinois, First District, First Division - August 1, 2016 - N.E.3d - 2016 IL App (1st) 150526 - 2016 WL 4126773

Relator brought qui tam action under False Claims Act (FCA) against retailer, alleging that retailer knowingly failed to collect and remit use taxes on shipping charges for internet and catalog sales.

Following bench trial, the Circuit Court entered judgment in favor of retailer. Relator appealed.

The Appellate Court held that determination that retailer did not act with reckless disregard in failing to collect and remit tax was not against manifest weight of the evidence.

Trial court's determination that retailer did not act with reckless disregard in failing to collect and remit use taxes on shipping charges for internet and catalog sales was not against manifest weight of evidence in relator's qui tam action under False Claims Act (FCA). Retailer's employees testified regarding their practices in ensuring retailer's compliance with law, audit by Illinois Department of Revenue (IDOR) did not indicate that retailer's policies and practices regarding use taxes were not in compliance with law, and relator presented no evidence to show that retailer's employees were anything other than forthright with auditor.

NABL: IRS Issues New Management Contract Safe Harbors.

The IRS has released Rev. Proc. 2016-44, which provides revised management contract safe harbors under which a private management contract does not result in impermissible private business use of projects financed with tax-exempt bonds. Rev. Proc. 2016-44 will be published in Internal Revenue Bulletin Number 2016-36, dated September 6, 2016.

These revised safe harbors give State and local governments the ability to enter into management contracts with private entities to manage or operate tax-exempt bond financed projects with more flexibility for incentives in reasonable compensation arrangements and longer terms of up to 30 years (subject to an economic life limit). The revised safe harbors remove the previous requirements for prescribed percentages of fixed compensation for management contracts for different time periods.

The revised safe harbors continue a longstanding existing prohibition against sharing of net profits. The revised safe harbors add certain new principles-based constraints (governmental control, governmental risk of loss, and no inconsistent tax positions by private service providers).

The revised safe harbors are effective for any management contract that is entered into on or after August 22, 2016, and an issuer may apply these safe harbors to any management contract that was entered into before August 22, 2016. In addition, an issuer may apply the safe harbors in Rev. Proc. 97-13, as modified by Rev. Proc. 2001-39 and amplified by Notice 2014-67, to a management contract that is entered into before February 18, 2017 and that is not materially modified or extended on or after February 18, 2017 (other than pursuant to a renewal option as defined in § 1.141-1(b)).

Revenue Procedure 2016-44 is available here.

NABL: IRS Issues Corrections to Final Regulations on Non-Issue Price Arbitrage Regulations.

The Internal Revenue Service (IRS) published today in the Federal Register two documents relating to the final regulations on arbitrage restrictions under section 148 of the Internal Revenue Code that were published July 18, 2016. One document makes two corrections to the preamble and the other corrects two dates in the regulation itself.

The corrections are available here.

SEC Announces MCDC Issuer Enforcement Actions.

The Securities and Exchange Commission (SEC) today announced enforcement actions against 71 issuers for violations in municipal bond offerings. The cases are the first brought against issuers under the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative since the deadline for issuers to self-report on December 1, 2014.

The SEC's press release announcing the enforcement actions is available here.

The orders are available here.

Not-For-Profits and the New Revenue Recognition Standard.

In May 2014, the Financial Accounting Standards Board (FASB) issued ASU 2014-09 – Revenue from Contracts with Customers. The Standard was originally effective for annual reporting periods beginning after December 15, 2016 for public entities, and for annual reporting periods beginning after December 15, 2017 for all other entities. However, during August of 2015, the FASB issued ASU 2015-14, which deferred the effective date by one year. Public business entities, certain not-fo--profit entities and certain employee benefit plans should apply the guidance in Update 2014-09 to annual reporting periods beginning after December 15, 2017. All other entities should apply the guidance in Update 2014-09 to annual reporting periods beginning after December 15, 2018.

Is a not-for-profit organization considered a "public entity?" Possibly. A not-for-profit organization that has issued, or is a conduit bond obligor for, securities that are traded, listed or quoted on an exchange or an over-the-counter market is considered a public entity and is therefore required to implement the new standard at the earlier implementation date.

Under the new standard, an entity should recognize revenue to reflect the transfer of goods or services to customers in the amount that represents the consideration to which the entity expects to be entitled for those goods or services. An entity should apply a five-step process to determine when revenue should be recognized:

1. Identify the contract(s) with a customer.
2. Identify the performances obligations in the contract.
3. Determine the transaction price.
4. Allocate the transaction price to the performance obligations in the contract.
5. Recognize revenue when (or as) the entity satisfies a performance obligation.

Specific guidance about these steps is outside the scope of this article.

Does the new revenue recognition standard affect not-for-profit organizations? It does, if the not-fo--profit receives revenue or support that is considered to be a contract. A contract is defined as an agreement between two or more parties that creates enforceable rights and obligations. Based on this definition, donations and contributions are not within the scope of the new standard. However, not-for profit organizations have many other types of revenue and support that may qualify as contracts, such as program service revenue, membership dues and tuition, to name a few examples.

Although specific guidance of how this new standard affects certain types of organizations has not yet been finalized, the AICPA is working towards publishing audit guides for various industries to assist in determining when to recognize revenue.

On June 5, 2016, the AICPA's Financial Reporting Executive Committee (FinREC) published working drafts of interpretive guidance to address specific implementation issues for the FASB's revenue recognition standard. The implementation issues are the result of work performed by 16 industry task forces assigned by the FinREC with the task of developing guidance for a revenue recognition guide the AICPA plans to publish in January 2017. Included in the 16 task forces is the Not-for-Profit Revenue Recognition Task Force, which has issued three exposure drafts to date: 1) tuition and housing revenue, 2) contributions and 3) bifurcation of transactions between contribution and exchanges components. These exposure drafts are out for comment until September 1, 2016. The FinREC is also working on an exposure draft to provide guidance for revenue recognition related to subscriptions and membership dues, which has not yet been released.

Last Updated: August 24 2016
Article by Barbara Miller

Ostrow Reisin Berk & Abrams

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

SEC: Issuer Settlements Show Widespread, Pervasive Disclosure Problems.

WASHINGTON – The Securities and Exchange Commission's settlements with 71 issuers announced on Wednesday under a voluntary continuing disclosure enforcement initiative showed "a widespread and pervasive problem" with continuing disclosure in the municipal bond market but have led to some improvements, the SEC's enforcement chief said Wednesday.

The settlements, which include large and small issuers as well as non-profit borrowers from 45 states, were part of the SEC's Municipalities Continuing Disclosure Cooperation initiative, which promised underwriters and issuers would receive lenient settlement terms if they self-reported instances over the last five years where issuers falsely said in offering documents that they were in compliance with their continuing disclosure agreements.

The settlements included disclosure failures that occurred between 2011 and 2014 and were the first ones with issuers under the initiative since the first MCDC action was announced against California's Kings Canyon Joint Unified School District in July 2014.

Andrew Ceresney, director of the SEC's enforcement division, said the commission has seen a dramatic uptick in the number of disclosure filings with the Municipal Securities Rulemaking Board since the MCDC initiative was announced in 2013.

"We think that … market participants are much more focused on [disclosure] issues and [there are many] more that are complying at a much greater rate than they were prior to the initiative," said Andrew Ceresney, director of the SEC enforcement division. "Having said that, we are obviously going to monitor the market closely to make sure that these types of violations are not continuing, but signs are that the market has gotten the message."

However, Ceresney made clear that the scope and diversity of the 71 issuers and borrowers that settled "demonstrate that continuing disclosure failures were a widespread and pervasive problem in the municipal bond market."

Ceresney refused to comment on whether the initiative's findings warrant SEC regulation of issuers' disclosures, saying this is a policy rather than an enforcement matter. He also declined to comment on whether the SEC is investigating any issuer officials in connection with the settled cases.

The enforcement chief said the SEC believes it is important to hold individuals accountable and that he can't rule out actions against individuals in the future.

Ceresney also refused to comment on whether there will be more rounds of issuer settlements under the initiative or how many reporting issuers the SEC reviewed under the program. The underwriter settlements came out in three rounds. The SEC fined 72 muni underwriting firms, comprising 96% of the market share for muni underwritings a total of $18 million.

One lawyer speculated that the SEC did not disclose whether there would be more settlements because of a disagreement within the commission about whether to proceed with the initiative.

The lawyer said it would not be surprising if this is the only round of issuer settlements because the SEC had decided to only go after the most egregious examples of issuers not meeting their disclosure obligations.

"The point is that they clearly were trying to get a representative [group], at least one from each state, and trying to show it was across-the-board," the lawyer said, adding there's "a good likelihood" the SEC "may just declare victory and go home."

Another lawyer said the wording of the SEC's announcement seems to indicate there may be more rounds. The SEC's release said, "Today's actions are the first against municipal issuers since …."

LeeAnn Gaunt, chief of the SEC enforcement division's public finance abuse unit, said in the release that because the issuers voluntarily agreed to take steps to prevent future violations, both they and their investors have benefited from the initiative.

Each of the issuers settled without admitting or denying the SEC's findings and agreed to establish appropriate written policies and procedures as well as conduct periodic training regarding continuing disclosure obligations to ensure compliance with federal securities laws. They each also agreed to designate an individual or officer responsible for ensuring they are compliant with their policies and procedures, which must be adopted within 180 days of the settlement. The designated individual will also be responsible for implementing and maintaining a record of the issuer's disclosure training.

Additionally, the issuers agreed to bring themselves into compliance with all of their continuing disclosure undertakings, including past delinquent filings, within 180 days of the settlement if they are not currently in compliance. They will have to disclose their settlements in future offering documents and cooperate with any subsequent SEC investigations.

The issuer settlements bring the total number of settlements under the initiative to 142 actions against 143 respondents. Although there were 71 issuers named in the actions the SEC announced Wednesday, two Connecticut-based issuers, Lawrence & Memorial Hospital Inc. and its parent corporation Lawrence & Memorial Corp. were combined into one action. The 71 issuers include two states: Minnesota and Hawaii. Seven of the issuers were state authorities, including several focused on transportation, and 29 were localities, which ranged from small towns to larger counties. Additionally, there were seven local authorities, nine school districts or charter schools, and six colleges or universities. Also included were five healthcare providers, five utilities, and one retirement community.

The issuer settlements were somewhat similar to the ones for underwriters in that they included both negotiated and competitive bond deals, although negotiated transactions were more heavily represented.

The SEC also listed each issuer or obligated person's violations in bullet-point form as it did for underwriters. Numerous issuers only had one bullet point listing violations in their settlements and the majority had three or fewer. However, some, like the Andover, Kan. and the Township of East Brunswick, N.J., had five. Berrien County, Mich. had the most bullet points listed, with seven.

The conduct the SEC cited in the settlements ranged from instances where issuers failed to disclose that they had not made continuing disclosures at all to those where the disclosures were very late or incomplete. They also included situations where issuers made false statements that they were in compliance with their continuing disclosure agreements as well as those where issuers were silent about their continuing disclosure and misled investors by omission.

Failure to file a material event notice was also mentioned for example in the settlement with Missouri-based Ascension Health Alliance, which the SEC found failed to file certain notices of defeasances before a 2012 negotiated offering.

The settlements were unlike those with underwriters in that the issuers and borrowers were not fined.

Bond Dealers of America and the Securities Industry and Financial Markets Association each said in releases that MCDC has been a difficult process for the market and urged the SEC to revise and update its Rule 15c2-12 on disclosure.

Citing its recent study of disclosure in the 50 states, SIFMA added it believes "states are in a unique position to improve municipal disclosure" and it would like to see states "adopt policies to insure that local government issuers, at a minimum, meet all federal and contractual requirements."

The settlements may provide fuel for the National Federation of Municipal Analysts' recent disclosure recommendations, including one calling for the SEC to regulate issuers' disclosure practices.

The Bond Buyer

By Jack Casey

August 24, 2016

IRS TE/GE Advisory Committee Requests Applications.

The IRS has requested applications for members to serve on its Advisory Committee on Tax Exempt and Government Entities, which will have vacancies in June 2017; applications are due by

September 26, 2016.

Click here to learn more and to apply.

NABL Submits Suggested Revisions to the Internal Revenue Manual.

On August 26, 2016, The National Association of Bond Lawyers submitted comments and recommendations for further revisions to the provisions of the Internal Revenue Manual regarding bond examinations and technical advice in an attempt to make those provisions more clear, efficient and useful both for the Internal Revenue Service and for municipal bond issuers.

The comments were prepared by an ad hoc task force of NABL members, led by Thomas Vander Molen, Dorsey & Whitney LLP, with substantial input from individual members of the NABL Board of Directors.

SEC Aims to Exclude Municipal Advisors from its Pay-to-Play Rule.

WASHINGTON – The Securities and Exchange Commission has announced it intends to issue an order that will allow municipal advisors to be excluded under its pay-to-play rule for investment advisers because they are now covered under a revised Municipal Securities Rulemaking Board rule.

The SEC's pay-to-play rule, which is found in Rule 206(4)-5 under the Investment Advisers Act of 1940, prohibits an investment advisor from providing advisory services for compensation to a government client for two years after the advisor or certain of its executives or employees make a contribution to elected officials or candidates who can influence the award of advisory business.

According to the SEC filing, the order will be issued unless the commission holds a hearing. Any interested individuals can request a hearing by writing to the commission's secretary by 5:30 p.m. on Sept. 19.

Municipal advisors, which are now included in the MSRB's pay-to-play rule, can only be excluded under the SEC's rule if the commission finds, by order, that the MSRB's revised Rule G-37 on political contributions imposes substantially equivalent or more stringent restrictions on municipal advisors as the SEC pay-to-play rule imposes on investment advisors. It also must find that the revised MSRB rule is consistent with the objectives of the SEC pay-to-play rule.

Under the MSRB's revised rule, municipal advisors, similarly to dealers, are now barred from engaging in municipal advisory business with an issuer for two years if the firm, one of its professionals, or a political action committee controlled by either the firm or an associated professional, makes significant contributions to an issuer official who can influence the award of municipal advisory business.

The revised rule contains a de minimis provision like the original rule for dealers. It allows a municipal finance professional or municipal advisor professional to give a contribution of up to $250 per election to any candidate for whom he or she can vote without triggering the two-year ban.

The SEC's filing lists six examples of how the rules are substantially similar, including the two-year ban on engaging in muni business after a contribution and the prohibition on MAs and their professionals from soliciting contributions, or coordinating contributions, to certain municipal officials with which the MA is engaging or is seeking to engage in muni business.

The SEC and MSRB are currently in a legal dispute with three Republican state groups after the groups claimed the revised MSRB rule violates securities professionals' constitutional rights to free speech by making them choose between contributing to candidates and doing their jobs. The SEC has filed a motion to have the case dismissed during the last two months but a judge has not issued an order on the commission's motion yet.

The SEC's pay-to-play rule was also subject to a legal challenge from two of the three groups but that lawsuit was thrown out after a three-judge panel ruled the Republican groups failed to follow proper appeals procedures.

The Bond Buyer

By Jack Casey

August 26, 2016

City Should Consider Using P3s to Bolster Pension Plan and Water System, Observer Says.

In addition to providing the financing, technical expertise and labor cities need to maintain and improve vital infrastructure projects, P3s can produce revenues that could keep municipal pension plans solvent, suggested a resident of one Florida city that is facing this dilemma.

A solid pension plan should be 80 percent to 90 percent funded but Sarasota's general plan is only 71 percent funded and is projected to incur a $54 million unfunded liability in the years ahead, wrote Lewis Solomon, a professor emeritus at George Washington University Law School in an Aug. 8 Herald Tribune op-ed.

To keep its underfunded pension plan afloat, the city is reducing cost-of-living adjustments and other plan benefits and limiting the number of workers who can enroll. The city should instead consider investing the plan's funds in a P3 project that can serve the dual purpose of producing good returns for the plan while rehabilitating Sarasota's struggling water and wastewater system, Solomon suggested.

"Rather than these palliatives, Sarasota could monetize its water and sewer system by entering into a public-private partnership for these assets. By providing access to private capital, this approach would quickly help the municipality achieve the general plan's 80 percent funding target and substantially lessen the millions in current, annual contributions to pay down the plan's unfunded liabilities," he wrote.

Robert Poole of the Reason Foundation recently made a similar suggestion, pointing out that pension funds looking for relatively safe investments would do well to consider buying into existing or "brownfield" infrastructure P3 projects than in new "greenfield" ones.

By leasing its water system — representing more than $100 million in water and sewer projects — to a private developer for 20 to 30 years, Sarasota could obtain private financing for and rehabilitation of 175 miles of water pipes and its deteriorating lift stations, Solomon estimated.

More than 2,000 communities use P3s to fund and conduct vital water-related infrastructure projects, Michael Deane, executive director of the National Association of Water Companies has noted.

One example is the Bayonne (N.J.) Municipal Utilities Authority, which leased its ailing water and wastewater system to Kohlberg Kravis Roberts and United Water in 2012 for 40 years, Solomon pointed out. Through the deal, the authority received $150 million from the developer, which also agreed to invest $107 million in the city's water system and provide technical expertise to rehabilitate it.

"This infusion of capital was critically important to the city because it eliminated $130 million of existing debt and improved both the authority's finances and Bayonne's credit rating," according to a June 10, 2015, article on two successful municipal water P3s published by the Wharton School at the University of Pennsylvania.

Although it is not yet common for pension plans in this country to invest in public infrastructure projects, interest is growing. For instance, the California Public Employees Retirement System announced recently its purchase of a 10 percent share — at least $330 million — of the company that operates and maintains the Indiana Toll Road.

Pension fund managers in Canada have figured this out. Several are invested in such projects internationally and the Trudeau government is encouraging them to do so domestically.

NCPPP

August 22, 2016

S&P Public Finance Podcast (MCDC Initiative & Pennsylvania Local Governments)

Geoff Buswick provides an overview of the MCDC initiative and Carol Spain discusses current economic factors impacting Pennsylvania local governments.

Listen to the Podcast.

Aug. 23, 2016

Flood-Ravaged Louisiana Facing Biggest Cash Crunch Since 1980s.

Add a short-term cash squeeze to the list of woes besetting Louisiana, suffering already from historic flooding and the collapse of oil prices.

The state is considering the sale of as much as $500 million in revenue anticipation notes — its first cash-flow borrowing in nearly 30 years — because it no longer has reserves available that officials once tapped to pay its bills while awaiting tax collection. Such short-term borrowing gives the state money to pay bills until it collects enough tax revenue used for repayment.

“The state has used internal funds for liquidity in the past,” said Sussan Corson, analyst with S&P Global Ratings in New York. “Now that they can’t it’s a sign of weakness and deterioration.”

The state paid a price for its financial pressures when it borrowed about $275 million in April. Investors demanded yields of as much as 2.51 percent on 13-year securities, about a full percentage point more than top-rated debt, according to data compiled by Bloomberg. That gap was was 0.2 percentage point higher than it was when Louisiana sold similar bonds in May 2015, before Moody’s Investors Service and Fitch Ratings cut their credit ratings. That premium has since declined as borrowing rates in the municipal-bond market dropped to generational lows.

The short-term borrowing is just the start. Louisiana plans to sell $186.7 million in bonds next week and another $265.6 million of general-obligation debt a few weeks later to repay bond-anticipation notes. The state’s bond commission will consider final approval of the revenue-anticipation notes at its Sept. 15 meeting. The cash flow borrowing could be placed with a bank, though a final decision hasn’t been made, said Lela Folse, director.

The state has about $3.25 billion of outstanding general-obligation debt. Louisiana may further boost borrowing in coming years as the increased tax revenue approved by lawmakers this year raises the state’s debt capacity, which is limited to 6 percent of revenue.

Louisiana, like other states dependent on energy production, has been forced to cut spending and raise taxes to close $2 billion of budget deficits in its current fiscal year as the price of oil has fallen to less than half the value it was two years ago, reducing state revenue. Alaska, Oklahoma and North Dakota are are among those contending with budget deficits since prices tumbled.

Crude Collapse

But Louisiana’s pressures began building before the oil price collapse as lawmakers used one-time revenue sources, including reserves, to balance its budget and put restrictions on some internal borrowing. The state is rated AA with a negative outlook by S&P, AA- by Fitch with a stable outlook and Aa3 with a negative outlook by Moody’s.

“The amount of money available for borrowing is a lot less,” said Treasurer John Kennedy at a state Bond Commission meeting last month. “It’s gone.”

Meanwhile, the state still faces revenue pressure as fiscal year 2016 receipts through June 30 were $388 million, or 5 percent, below the same period a year earlier, according to S&P. When the numbers for fiscal 2016 are in the state may end the year with a deficit, which could force midyear spending adjustments in fiscal 2017, S&P said.

The state balanced its $9.6 billion fiscal 2017 budget with about $1.4 billion of new tax revenue and cutting expenses, according to S&P. The state’s negative employment growth and slowing income growth have contributed to weakness in sales and corporate tax revenue, S&P said. S&P said the amount of available cash in the general fund for internal borrowing had declined to $1.2 billion as of June 30, 2016, from more than $1.7 billion in November 2015.

Revenue Collections

“It wouldn’t take a very big error in the forecast to need these funds,” said Renee Boicourt, managing director with Lamont Financial Services Corp., the state’s financial adviser, at the July bond commission meeting.

Though revenue collections did strengthen in July, according to Kennedy, it’s too soon into the new

fiscal year to know how much borrowing may be needed, though the flooding of thousands of homes and businesses in and around Baton Rouge may put additional financial pressures as the state absorbs some recovery costs.
President Barrack Obama is visiting the flood zone in the state Tuesday, four days after Republican Donald Trump toured the area and nearly 11 years after Hurricane Katrina struck the state. Federal support for the victims has reached $127 million, Obama said.

Two feet of rain that began Aug. 12 in some areas led rivers and creeks to back up, causing flooding in at least 20 of the state's parishes and damaging an estimated 60,000 homes and contributing to the deaths of 13 people. The storm closed businesses and government offices and forced thousands of people to relocate to shelters and hotels. The storm has been called the worst since Hurricane Sandy in 2012.

"We view the use of such borrowing to be a negative credit event which should place pressure on the state's already low ratings," wrote Court Street Group Research LLC in its weekly municipal market newsletter Aug. 19.

Bloomberg Markets

by Darrell Preston

August 23, 2016 — 2:00 AM PDT Updated on August 23, 2016 — 11:23 AM PDT

Rhode Island Reaches Settlements Over Curt Schilling Bonds.

Rhode Island struck a settlement with Wells Fargo & Co. and Barclays Plc, agreeing to accept about $26 million to drop litigation over a municipal-bond sale that benefited the video-game startup led by former baseball pitcher Curt Schilling that later failed.

The deal with the banks, who deny wrongdoing, must be approved by Rhode Island Superior Court, according to a statement by the state's Commerce Corporation. The economic development agency is still pursuing lawsuits with other defendants over the $75 million bond offering.

This settlement is the biggest and brings the total garnered through such deals to more than $42 million, the agency said.

"It's our job to be as aggressive as we can in recovering as much taxpayer money as possible," Governor Gina Raimondo said in a statement. "Rhode Islanders understandably feel hurt by this deal — and I do too — but I want everyone to know that we are demanding accountability, getting money back, and moving the state forward."

SEC Litigation

The Commerce Corporation, formerly known as the Rhode Island Economic Development Corp., and Wells Fargo still face a lawsuit by the U.S. Securities and Exchange Commission. The SEC said in March that the agency and bank mislead investors about how much money was needed by Schilling's video-game company, called 38 Studios LLC, after his Boston Red Sox uniform number.

In 2010, Schilling's company was developing a multi-player online game that it estimated it would need at least $75 million to complete, according to an SEC statement in March. When 38 Studios couldn't obtain additional financing following the bond sale, it failed to produce the game and defaulted on the loan.

The state had sold the debt for 38 Studios as a way to lure the company to Providence from Massachusetts. 38 Studios entered bankruptcy in 2012, leaving taxpayers on the hook.

"We are pleased to have reached an agreement in this case. We are not admitting liability, nor did we do anything improper," Gabriel Boehmer, a spokesman for Wells Fargo, said in a statement. "It is simply in our shareholders' best interest to minimize the risk that accompanies lengthy litigation."

Barclays spokesman Marc Hazleton declined to comment.

Bloomberg Business

by Romy Varghese

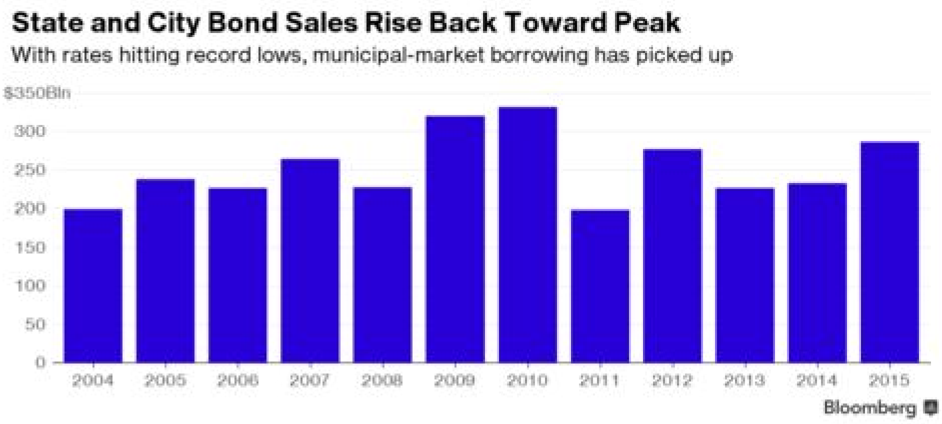
August 23, 2016 — 12:46 PM PDT Updated on August 23, 2016 — 2:21 PM PDT

Long-Awaited U.S. Infrastructure Spending Comes to Fruition.

America's states and cities are finally seizing on record-low interest rates to finance needed work on roads, bridges and schools.

After borrowing costs tumbled worldwide as central banks sought to jump-start their economies, agencies from New York to California have sold about $272 billion of bonds this year and are funneling more into construction projects, instead of just paying off higher-cost debt. That's put the municipal market on track to approach the record level of sales reached in 2010, when the federal government was seeking to hasten the nation's recovery by footing some of the bills on debt issued for public works.

"That's going to be the story for the year — rebuilding infrastructure," said Mikhail Foux, head of municipal strategy in New York for underwriter Barclays Plc, which forecasts that issuance may reach $400 billion this year.



The spree shows how local U.S. agencies are benefiting from turbulence in global financial markets that's kept the Federal Reserve from raising interest rates since its initial increase in December — a move that at the time spurred speculation states and cities were missing an opportunity. The need for such spending has been injected into the U.S. presidential campaign, with both Democrat Hillary Clinton and Republican rival Donald Trump promising hundreds of billions of dollars for the country's fraying infrastructure.

While localities for years pocketed savings by refinancing, this year they've stepped up borrowing for planned public works — many of which were put on hold as officials struggled with budget shortfalls that persisted long after the recession ended in 2009. So-called new-money deals — which fund projects instead of paying off old debt — accounted for 40 percent of the sales through early August, compared with 35 percent for the same period last year, according to Bank of America Merrill Lynch.

The new issues this year included those for a terminal at New York's LaGuardia Airport, improvements at Chicago's schools and work on Texas's roads. Next month, Alabama plans to offer $550 million of debt backed by highway funding it's set to receive from the federal government, allowing it to begin work without waiting on Washington.

Irvine Ranch Water District, an agency serving 380,000 customers in California's Orange County, this month issued its first new-money bonds since December 2010. The timing of its $117 million deal, some of which retired older securities, was driven partly by the market, said Rob Jacobson, the district's treasurer. The proceeds are being used for a facility to treat waste-water remnants called biosolids, which are currently processed elsewhere.

"It turned out to be an excellent time," Jacobson said. "The market is fantastic."

The longest-maturing securities, which come due in March 2046, yielded 2.23 percent, 0.74 percentage point above benchmark munis. The 10-year securities yielded 1.29 percent, 0.64 percentage point less than top-rated bonds, data compiled by Bloomberg show.

The pace of new bond deals is expected to stay brisk. There were $16 billion scheduled over the next month, an increase from the $6.9 billion that were planned for 30 days out at the start of July, data compiled by Bloomberg show.

On Friday, Fed Chair Janet Yellen said the case for raising interest rates is getting stronger, and speculation has increased that the central bank will tighten monetary policy: the futures market predicts a 56 percent chance that rates will be increased in December, compared with the 45 percent odds given a month ago.

The increased supply hasn't diminished the municipal market's rally, which has driven yields — which move in the opposite direction as prices — to record lows. With negative rates in Japan and Germany, even the diminished payouts have been a draw to investors looking. U.S. state and local-government debt funds have taken in cash for almost a full straight year, according to Lipper US Fund Flows data.

Barclay's Foux said more bonds may be on the way if either Trump or Clinton follow through on their promises to fix crumbling roads and bridges.

"It's going to be a massive boost," he said.

Bloomberg Business

by Romy Varghese

August 26, 2016 — 2:00 AM PDT Updated on August 26, 2016 — 7:24 AM PDT

Lowest-Rated State Now Has $573 Million of AAA Bonds to Issue.

Illinois's next big bond deal sounds like a municipal-market oxymoron: the worst-rated state in the nation is offering more than half a billion dollars of AAA debt.

The $573 million of securities the state plans to sell Thursday are secured by a stream of sales-tax revenue that's diverted to investors, earning the deal the highest ranking from S&P Global Ratings. That's seven steps above the state's general-obligation debt, which is backed only by the government's guaranty to pay what it owes.

"We expect the state of Illinois's sales-tax bonds to fare better than the state of Illinois's GO bonds, primarily due to the substantial support from the designated sales tax," said Richard Ciccarone, the Chicago-based president of Merritt Research Services LLC, which analyzes municipal finances. "However, they will suffer. It will extract a higher borrowing penalty than would normally be expected for such a high-rated bond issue because of the chronic financial pressures."

Governor Bruce Rauner, a Republican, and the Democratic-led legislature only recently emerged from a record-long fight over the budget, agreeing on June 30 to a six-month plan that will avert a shutdown through the end of the year. Without revenue increases or deep spending cuts needed to eliminate the government's deficit, Illinois is still on track to end the fiscal year at least $5.5 billion in the red and even the top-rated debt has a negative outlook from S&P — indicating it's not immune to a downgrade.

The political discord has cast ripples throughout Illinois, leaving universities and other municipal borrowers there with more downgrades in the second quarter from Moody's Investors Service than those in any other U.S. state. Illinois's rating was slashed to Baa2, two levels above junk, the lowest Moody's has graded a state since 1992. Moody's isn't rating Thursday's deal.

Despite the fiscal strain, Illinois has continued to pay investors on time and its law provides for "an irrevocable and continuing appropriation" for bonds, according to disclosure documents for the sale. The primary source of payment for Thursday's deal is a share of Illinois's 6.25 percent sales tax, which provides even more security.

"It's one of the strongest revenue streams that the state has," said Dennis Derby, a money manager in Menomonee Falls, Wisconsin, at Wells Fargo Asset Management, which holds Illinois bonds among its $39 billion of municipal debt and may buy Thursday's deal. "It'll be interesting to see where these price. Almost every issuer in the state of Illinois has some type of issuance penalty."

While investors demand yields on Illinois bonds that are higher than any of the other 19 states tracked by Bloomberg, the interest penalty has fallen since the stopgap budget was passed. Illinois's 10-year debt yields about 3.1 percent, or 1.7 percentage point more than benchmark securities, according to data compiled by Bloomberg. That gap was 1.9 percentage point on June 30.

The agreement between Rauner and Democrats failed to eliminate the deficits that were left after temporary tax hikes expired last year. And Rauner wants his agenda, including curbs on labor unions and property taxes, to come with any budget fix — something Democrats have steadfastly resisted.

With municipal-market interest rates holding near the lowest in more than half a century, the political turmoil is likely to prove a draw to investors looking for higher yields, said Dan Heckman, a senior fixed-income strategist in Kansas City at U.S. Bank Wealth Management, which oversees $133 billion and may buy some of the AAA securities. He said the yields will likely be higher than other top-rated bonds.

"There's been a real lack of quality issuance in Illinois," Heckman said. "There's a lot of pent-up demand. You'll see that if it's priced right."

Catherine Kelly, a spokeswoman for Rauner, declined to comment on speculation about how the bonds will be priced.

It won't be the last chance for buyers looking for highly rated Illinois debt. The Illinois Finance Authority plans to sell $500 million of bonds next week for the state's clean-water program, which makes loans to local governments for projects. The grade from S&P and Fitch Ratings? AAA.

Bloomberg Business

by Elizabeth Campbell

August 24, 2016 — 2:00 AM PDT

[SEC Says 71 Muni Borrowers Lied About Disclosure Histories.]

The U.S. Securities and Exchange Commission said it reached settlements with 71 state and local borrowers for lying to investors about their compliance with disclosure requirements when they sold bonds in the $3.7 trillion municipal market.

Issuers from New York's Syracuse University to Boulder County, Colorado, to Hawaii voluntary self reported "materially false statements or omissions about their compliance with continuing disclosure obligations" in bond offering documents from 2011 to 2014, the SEC said in a statement. Muni issuers are required to provide investors with annual financial reports and other material event information that could affect the value of their debt.

"Continuing disclosure failures were a widespread and pervasive problem in the municipal bond market," Andrew Ceresney, director of the SEC enforcement division, said in the statement. The actions will bring attention to disclosure problems in the market and lead to increased compliance, he said.

The actions came under an SEC initiative to crack down on disclosure failures by offering issuers favorable settlement terms in exchange for self-reporting material misstatements and omissions about their compliance with disclosure requirements. Under terms of the settlement the issuers will "cease and desist" from future violations and establish procedures to ensure compliance in the future. The SEC has brought 143 actions over disclosure in the market, according to the release.

Minnesota Example

In 2012, the SEC said in a report that failure to properly comply with disclosure requirements was "a major challenge" for investors trying to find information about their municipal-bond holdings. In February, 14 underwriters agreed to settle allegations by the SEC that they issued bonds for municipalities that failed to make adequate disclosures.

Minnesota, for example, told investors that it hadn't failed to comply with disclosure requirements in bond issues in 2011 and 2013, when in fact it had failed to file required audit reports in 2008 and 2010 for previous bond issues, according to the SEC's order.

The state's commissioner of management and budget failed to comply "in all material respects with its commitment to provide certain types of continuing disclosure," the order says.

S&P Expectations

The settlement has afforded Minnesota the opportunity to improve its disclosure, said Myron Frans, the commissioner, who joined the agency in January 2015, in a statement in response to the SEC order.
"Transparency is a critical function of government and I am glad to report that our agency published these required disclosures last August, almost one year in advance of the SEC's order," Frans said in the statement.

Meanwhile, when the state sold nearly $799 million of general-obligation bonds earlier this month for highways, economic development and higher education, it detailed its disclosure failures in 2012 and some prior years, according to the official statement.

S&P Global Ratings, in a report Aug. 15 in anticipation of the disclosure settlements, said it would consider the potential credit implications of each agreement on a case-by-case basis, but that it would expect limited impact on the credit quality of issuers.

Bloomberg Business

by Darrell Preston

August 24, 2016 — 9:52 AM PDT Updated on August 24, 2016 — 12:25 PM PDT

Bloomberg Brief Weekly Video - 08/25

Taylor Riggs, a contributor to Bloomberg Briefs, talks with Joe Mysak about this week's municipal market news.

Watch the video.

August 25, 2016

Fitch: US Transit Woes Will Continue Until Funding Is Clear.

Fitch Ratings-New York-19 August 2016: Maintenance problems that halted two of the US's largest transit systems will likely spread to other systems unless funding needs are addressed and adequately managed, Fitch Ratings says, noting that long-term planning will help manage maintenance and capital requirements.

Although Washington Metropolitan Area Transit Authority's (Metro) funding process has begun, Metro demonstrates that successful funding requires effective planning and oversight.

Following an accident in 2009, the National Transportation Safety Board recommended that Metro implement a series of costly safety improvements. In 2010, Metro began a $5 billion, six-year capital-improvement plan to address those recommendations and others. As of January 2016, the authority had spent approximately $3.7 billion of the capital plan. Despite the expenditures, safety issues remain due to lack of planning and oversight. Last month, Metro began a project that will last for the rest of the year and shut down some train lines for as long as 24 days at a time to address emergencies.

In June, Southeastern Pennsylvania Transportation Authority (SEPTA) removed one-third of its train fleet due to a defect. Last week, it announced a plan to bring some of the cars back into service on Aug. 21. The defect's source appears to have been attributable to the manufacturer. However, SEPTA's significant long-term capital improvement backlog could contribute to maintenance issues that may interrupt its service.

Between fiscal 2011 and 2014, SEPTA's capital program funding fell to approximately $300 million per year on state funding cuts. In 2013, the authority estimated its repair backlog to be $5 billion, dwarfing the amount of the capital program. A rise in state funding is projected to nearly double the annual capital program by fiscal 2018. However, at that rate, the repair backlog will take many years to address, raising the likelihood of additional costly service disruptions.

The knock-on effects of the downtime to these systems will affect an increasingly large number of people and businesses. For many transit systems, increased demand has been rising as migration to US cities has increased. According to the US Census Bureau, the population of 19 of the 20 largest cities rose in 2015, while New York City saw the largest number of new residents. Reflecting the city's growing population, the Metropolitan Transportation Authority, New York's largest transit system, reported that it provided 1.7 billion annual rides in 2015 — the highest since 1948.

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SEC Charges 71 Muni Issuers for Misleading Investors.

(Reuters) – (Story corrects paragraph 4 to show a Minnesota county municipal finance official did not immediately respond to a request for comment and a state municipal finance official could not immediately be located for comment, not that an official in Minnesota's finance department did not return a call for comment.)

The U.S. Securities and Exchange Commission has charged 71 municipal bond issuers, including the states of Hawaii and Minnesota, as well as related entities, for using offering documents that misled investors, the agency said on Wednesday.

The actions, brought under an SEC initiative that encouraged municipal bond issuers to self-report certain violations, involved conduct that occurred between 2011 and 2014, the SEC said. The initiative offered favorable settlement terms in exchange for self-reporting, the SEC said.

All of the entities involved settled with the SEC without admitting or denying the SEC's findings, the agency said.

A county municipal finance official in Minnesota did not immediately return a call requesting comment. A state municipal official could not immediately be located for comment. A Hawaii finance department spokesman could not be reached for comment.

The action covers a wide range of other issuers and entities, including the Ohio State University, the city of Memphis, the town of Hilton Head Island, South Carolina, and the Delaware Transportation Authority, according to the SEC.

The SEC said that issuers in the case sold municipal bonds using offering documents that contained materially false statements or omissions about their compliance with continuing disclosure obligations.

Continuing disclosure provides municipal bond investors with important information, such as annual financial reports, on an ongoing basis. Failure to comply with continuing disclosure mandates is a "major challenge for investors seeking information about their municipal bond holdings," the SEC said.

Settlements in the cases require the parties to reform their policies, procedures and staff training related to continuing disclosure obligations and to update past filings, among other things, the SEC said.

The cases raised hackles at the Securities Industry and Financial Markets Association (SIFMA), a trade group, which on Wednesday called for broad changes in regulation and practices, given the widespread nature of the enforcement actions by the SEC, first against dealers and now against issuers.

SIFMA supports a “robust disclosure regime” in the municipal market, but has “serious concerns” about how the SEC carried out the self-reporting initiative for municipal bond issuers, SIFMA said in a statement.

By REUTERS

AUG. 26, 2016, 11:51 A.M. E.D.T.

(Reporting by Suzanne Barlyn; Editing by Frances Kerry and Meredith Mazzilli)

U.S. Public Universities Turning to Private Sector to Meet Campus Needs.

NEW YORK — U.S. public universities are increasingly turning to public-private partnerships to develop student housing and other campus projects, sometimes using the structure to transfer borrowing and liability risks to the private sector.

Over the last five years, there has been an “uptick” in universities and colleges leveraging the private sector to deliver housing needs, said Kevin Wayer, an international director and co-president of the Public Institutions group at commercial real estate firm Jones Lang LaSalle.

“The notion of having the private sector deliver student housing is something that has been going on for many years, but I think it has definitely increased in utilization since the financial crisis,” Wayer said.

The financing structure, known as “P3,” is being employed both by schools that are fiscally strapped and those with healthier balance sheets.

Brailsford & Dunlavey, a project management firm, has seen on average a 50 percent year-over-year growth since 2011 in P3 transaction values it has consulted on for higher education institutions, said Brad Noyes, senior vice president.

In 2011, the transaction value for such P3 projects was $320 million, he said. Year-to-date the firm “has $2.5 billion worth of transactions we’re providing advisory work on,” Noyes said.

Use of P3s can contribute to reduced debt on universities’ balance sheets, said Todd Duncan, assistant vice president of housing, food and retail services at the University of Cincinnati’s main campus.

While still only a “fraction” of the U.S. municipal infrastructure market, the P3 market is building, Moody’s Investors Service said in a report issued in March.

“Universities are also expanding their use of different types of P3s beyond privatized student housing to include other university facilities,” Moody’s said. The report added: “More local governments and higher education institutions are exploring different types of P3s with more hybrid P3s and DBF (design, build, finance) structures.”

Universities might engage in P3s for a number of different reasons, including the efficiency that developers can bring to projects, Duncan said.

Increased operating costs for institutions and decreased state contributions have led to a financing gap, said Kurt Ehlers, managing director at Corvias Campus Living, a development group.

From fiscal 2008 to fiscal year 2016, state spending per student at public two- and four-year colleges decreased 18 percent, according to Michael Mitchell, a senior policy analyst at the Washington, D.C.-based Center on Budget and Policy Priorities.

The National Council for Public-Private Partnerships, a non-profit that advocates for P3s, lists 18 types of P3 partnership structures on its website. The council did not have a national figure for how much money is being spent on higher education P3 projects.

A newer P3 structure gaining in popularity has the developer not only help finance, build or renovate a project, but also maintain the facility, sometimes for decades, Ehlers said. In return for maintaining standards, the developer can count on a fixed incentive fee.

"From a sustainability standpoint, these properties, these assets become self-sustaining," Ehlers said.

At the University of California in Merced, developer group Plenary Properties Merced will finance, build and maintain project areas that include student housing, academic facilities and recreation spaces.

The four-year $1.3 billion project will be financed through payments from the university and through funds contributed by the developer. UC Merced plans to fund its contribution of roughly $600 million by issuing bonds, said Stuart Marks, senior vice president at Plenary Group and a leader on the 2020 Project.

The developer will fund the difference via Plenary equity and privately placed notes, he said.

The university will pay the developer over 35 years while it provides continued maintenance of the facilities, Marks said.

"You get the economies of scale and efficiencies through having one developer responsible," he said.

By REUTERS

AUG. 26, 2016, 2:18 P.M. E.D.T.

(Reporting by Stephanie Kelly; Editing by Daniel Bases and Dan Grebler)

[Post-Implementation Review Concludes GASB's Pollution Remediation Statement Achieves Purpose.]

Norwalk, CT—August 23, 2016—A Post-Implementation Review (PIR) of Governmental Accounting Standards Board (GASB) Statement No. 49, *Accounting and Financial Reporting for Pollution Remediation Obligations* (issued 2006), concluded that Statement 49 accomplished its objectives of providing more consistent, timely, and complete reporting of pollution remediation obligations by state and local governments.

“The PIR report on Statement 49 tells us that, overall, the standard provides creditors and other users of financial statements with useful information,” said GASB Chair David A. Vaudt. “The GASB acknowledges the issues raised by some governments in applying certain provisions of the Statement, and will consider those issues when addressing the provisions in the future.”

The PIR team developed its final report based on input from financial statement users, preparers, and auditors. The Statement 49 PIR team reached the following overall conclusions:

- Statement 49 resolved the primary issues underlying its stated need. In particular, it achieved the objective of reporting pollution remediation obligations that is more consistent, timely, and complete.
- Statement 49 provides creditors and other users of financial statements with useful information. Users of financial statements incorporate information about pollution remediation liabilities in their analyses when pollution remediation obligation amounts are significant. For most governments, however, pollution remediation obligation amounts are not significant.
- Statement 49 is operational because it is understandable, can be applied as intended, and enables information about pollution remediation obligations to be reported reliably. The measurement of a pollution remediation liability requires judgment as with any other accounting estimate.
- The changes made to financial and operating practices as a result of Statement 49 are not significant or unexpected.
- There were no significant unanticipated consequences as a result of the adoption of Statement 49.
- Overall, implementation and ongoing application costs associated with Statement 49 were not significant and were consistent with the GASB’s expectations.
- Statement 49 achieved its expected benefits.

The PIR team had no standard-setting process recommendations as a result of the review.

The review of Statement 49 was undertaken by an independent team of the Financial Accounting Foundation (FAF), the parent organization of the GASB and the Financial Accounting Standards Board (FASB). The team’s formal report is available here. The GASB’s response letter to the report is available here.

With the completion of the GASB Statement 49 review, the PIR team has begun its review of GASB Statement No. 54, *Fund Balance Reporting and Governmental Fund Type Definitions*. For more information on the PIR process and to express an interest in participating in a review, visit the FAF website.

SIFMA Statement on SEC MCDC Enforcement Action.

New York, NY, August 24, 2016 – SIFMA today released the following statement from Kenneth E. Bentsen, Jr., president and CEO of SIFMA, on the MCDC enforcement action announced today by the Securities and Exchange Commission:

“SIFMA supports a robust disclosure regime in the municipal market to ensure that investors have timely access to the information they need to evaluate their investments. We have serious concerns about how the SEC executed the MCDC Initiative. Given the widespread nature of the enforcement actions by the SEC, first against dealers and now against issuers, we believe that broad changes in regulation and practices are warranted.

"To that end, as outlined in our June 2016 letter to SEC Chair White and in our April 2016 white paper, we urge the SEC to revise and update Rule 15c2-12 to improve interpretive guidance with respect to compliance. We also encourage the MSRB to leverage its existing infrastructure and technology to improve investor access to disclosures. In addition, as found in our recent 50-state review of state policies governing local government bond issuance, information disclosure and financial audits, we believe the states are in a unique position to improve municipal disclosure and would like to see states adopt policies to insure that local government issuers, at a minimum, meet all federal and contractual requirements."

Release Date: August 24, 2016

Contact: Katrina Cavalli, 212.313.1181, kcavalli@sifma.org

NFMA Advanced Seminar on Public Power.

The National Federation of Municipal Analyst's Education Committee has opened registration for its Advanced Seminar on Public Power, to take place at the W Seattle, Seattle, Washington, on October 27 & 28.

To view the program, click here.

To register, click here.

- MSRB to Shorten Time Frame for Resolving Open Inter-Dealer Transactions.
- S&P: What Will A Continuing-Disclosure Settlement Mean For Muni Credit?
- Issuers Structure Deals to Meet Retail Demand for Lower Coupons.
- CDFA Intro Public-Private Partnership (P3) Finance WebCourse.
- SIFMA Municipal Bank Loans and Direct Placements Seminar.
- California practitioners and eminent domain aficionados (and who isn't?) will want to take a look at *City of Perris v. Stamper*.
- Both Sherman & Howard and Kennedy & Graven are in the market for public finance attorneys and have placed ads in our Classifieds section. Although we prefer to advertise used futons, I suppose that certain exceptions can be made. Please feel free to avail yourselves of this service. There's no charge.
- And finally, Delusions of Leverage is brought to you this week by *Bingman v. City Of Dillingham*, in which taxpayers negotiated to redeem their foreclosed property by offering the city a tax-free promissory note that matured in 20 years. "We're gonna make them an offer they can easily refuse."

IMMUNITY - ALABAMA

Ex parte Harris

Supreme Court of Alabama - July 29, 2016 - So.3d - 2016 WL 4204837

Community entertainment center owner brought action against town and town's police chief, in his individual capacity, asserting claims of malicious prosecution, false arrest, false imprisonment, harassment, intentional infliction of emotional distress, libel, and slander, after owner was arrested for allegedly selling alcohol without license.

The Circuit Court denied defendants' motion for summary judgment. Defendants separately petitioned for writ of mandamus directing trial court to enter summary judgment in their favor on basis of immunity. Petitions were consolidated.

The Supreme Court of Alabama held that:

- Chief carried burden, in seeking state-agent immunity, of showing that he was engaged in discretionary function for which such immunity would be available;
- Chief had at least arguable probable cause to arrest owner and, thus, exception to state-agent immunity applicable to willful, malicious, fraudulent, or bad faith actions did not apply;
- Chief was immune from malicious prosecution claim under doctrine of state-agent immunity; and
- Town was statutorily immune from suit as to all claims.

LIENS - CALIFORNIA

Mechammil v. City of San Jacinto

United States Court of Appeals, Ninth Circuit - June 30, 2016 - Fed.Appx. - 2016 WL 3619398

San Jacinto Municipal Code § 1.28.110(C) allows the city to "place a lien on property that is the subject of a citation if the citation has been issued to the current property owner of record." "[T]he amount of the proposed lien may be collected as a special assessment at the same time and in the same manner as property taxes are collected." SJMC § 1.28.110(C)(3).

Property owner argued that these city ordinances are inconsistent with California state law.

The Court of Appeal agreed, holding that cities in California cannot attach liens or impose special assessments to collect outstanding nuisance fines or penalties.

EMINENT DOMAIN - CALIFORNIA

City of Perris v. Stamper

Supreme Court of California - August 15, 2016 - P.3d - 2016 WL 4268627

City filed eminent domain action to acquire land for truck route though light industrial land, and appraised the take as undevelopable agricultural land on theory that it would not approve any development unless landowners gave or dedicated truck route land to the city.

After bifurcation and court trial on legal issues, the Superior Court entered judgment for city regarding dedication issue. Following stipulated judgment as to appraisal, landowners appealed. The Court of Appeal reversed and remanded. City petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- Requirements of "essential nexus" and "rough proportionality" were questions for the court, not a

jury, disapproving *City of Hollister v. McCullough*, 26 Cal.App.4th 289, 31 Cal.Rptr.2d 415, and
- Project effect rule generally applies when it is probable at the time a dedication requirement is put in place that the property subject to the dedication will be included in the project for which condemnation is sought.

The questions of "essential nexus" to a valid public purpose and "rough proportionality" to the impact of the proposed development, for a dedication requirement alleged to reduce the fair market value of condemned property to satisfy the Fifth Amendment, were questions for the court rather than a jury, since they were mixed questions of law and fact in which the legal issues predominated, and they were analytically prior to any factual dispute as to whether the condemner would actually have reduced the value of the property by requiring the dedication as a condition for development; disapproving *City of Hollister v. McCullough*, 26 Cal.App.4th 289, 31 Cal.Rptr.2d 415.

The project effect rule generally applies to an agency's expectation for property to be dedicated as a condition of development of adjacent properties, and thus the dedication requirement is not considered in valuing the property in an eminent domain proceeding, when it is probable at the time a dedication requirement is put in place that the property subject to the dedication will be included in the project for which the condemnation is sought.

MUNICIPAL ORDINANCE - CALIFORNIA

Weiss v. City of Los Angeles

Court of Appeal, Second District, Division 4, California - August 8, 2016 - Cal.Rptr.3d - 2016 WL 4183951

Motorist filed petition seeking a writ of mandate directing city and its processing agency to provide a legally sufficient initial review of parking violation.

The Superior Court issued the writ and awarded attorney's fees, and city and processing agency appealed.

The Court of Appeal held that:

- Motorist lacked any beneficial interest in outcome of mandamus proceeding, as motorist had paid fine;
- Motorist had standing under the "public interest" exception to pursue mandamus relief;
- City was required by statute to conduct initial review of tickets and could not delegate that duty to processing agency;
- Home rule doctrine did not apply to allow charter city to override statute and allow processing agency to review citations;
- Action resulted in the enforcement of an important right affecting the public interest as required for award of private attorney general fees; and
- Writ relief conferred a significant benefit on a large class of persons as required for award of fees under the private attorney general statute.

Motorist lacked any beneficial interest in outcome of mandamus proceeding seeking writ directing city and its processing agency to provide a legally sufficient initial review of parking violations, and thus lacked general standing to pursue the writ, where motorist unsuccessfully challenged his own parking citation at the initial review, then elected to pay the fine rather than pursue further appeal.

Motorist had standing under the "public interest" exception to pursue mandamus relief seeking writ directing city and its processing agency to provide a legally sufficient initial review of parking violations. Ensuring that city followed the proper procedure for processing and collecting parking tickets was a matter of public right, and given the burden of mounting a challenge to the initial review procedure and the typically minimum fine, it was unlikely an individual motorist would do so.

City, as agency issuing parking tickets, was required by statute to conduct initial review of tickets and could not delegate that duty to processing agency, notwithstanding statutory provision stating that an issuing agency may elect to contract with a private vendor for the processing of notices of parking violations prior to filing with the court.

Home rule doctrine did not apply to allow charter city to override statute and allow processing agency to review municipal parking citations, rather than city as required by statute. While administration of parking citations was a core municipal function for purposes of the home rule doctrine, city outsourced its duty to perform initial review of parking citations by way of a contract, not pursuant to a municipal ordinance, regulation or provision of the city charter.

Motorist's action for writ of mandate directing city and its processing agency to provide a legally sufficient initial review of parking violation resulted in the enforcement of an important right affecting the public interest warranting award of private attorney general fees. Motorist was successful in obtaining injunctive and declaratory relief ending processing agency's unlawful but longstanding practice of conducting initial reviews and compelling the city to comply with its statutory duty to perform that task, and public had fundamental right to review by a tribunal properly convened under the law and authorized by law to conduct the review.

Grant of writ relief requiring city, rather than its processing agency, to provide initial review of parking violations conferred a significant benefit on a large class of persons as required for award of fees under the private attorney general statute. Motorists who parked their cars in the city and received a parking ticket would have the initial review of their parking tickets performed by the city as the issuing agency, rather than the private processing agency, and benefit was significant, as it increased city's accountability and accessibility and city and processing agency had argued that writ would necessitate a "complete changeover."

LIABILITY - CONNECTICUT

Giannoni v. Commissioner of Transp.

Supreme Court of Connecticut - August 9, 2016 - A.3d - 322 Conn. 344 - 2016 WL 4124295

Parents brought highway defect action on behalf of their child, who was injured when he fell into a stream culvert while riding his bicycle on the sidewalk along a state highway, which ended at a private driveway and lawn shortly before the culvert.

The Superior Court denied Commissioner of Transportation's motion to dismiss, and Commissioner appealed.

The Supreme Court of Connecticut held that parents demonstrated that child was a traveler and that culvert was highway defect, as was required to state highway defect claim.

Parents of child, who was injured when he fell into a stream culvert while riding his bicycle on the sidewalk along a state highway, which ended at a private driveway and lawn shortly before the culvert, demonstrated that child was a traveler and that culvert was highway defect, as was required to state highway defect claim. Child retained his status as a traveler on the highway when he moved from the shoulder of the road to the sidewalk along highway because his travel over the sidewalk was incidental to and for a purpose connected with his travel over highway, state reasonably should have expected the public to traverse the culvert area, which would render the culvert a highway defect actionable under statute, sidewalk led directly to the culvert, the sidewalk was an area intended for public travel, and bicyclists were invited and reasonably expected to utilize the sidewalk, when necessary, in connection with their travel over highway.

IMMUNITY - MAINE

Day's Auto Body, Inc. v. Town of Medway

Supreme Judicial Court of Maine - August 2, 2016 - A.3d - 2016 WL 4088076 - 2016 ME 121

Auto body business brought negligence action against town and contractor that assisted town fire department in responding to fire at business location.

The Superior Court granted summary judgment in favor of defendants, and business appealed.

The Supreme Judicial Court held that:

- Town's actions in responding to fire did not fall within the Tort Claims Act's immunity exception for negligent acts or omissions in its ownership, maintenance, or use of vehicles, machinery, and equipment;
- Contractor was a government employee for purposes of the Tort Claims Act;
- Contractor was absolutely immune from personal civil liability for any intentional act or omission within the course and scope of its employment; and
- Tort Claims Act provision that governed the defense and indemnification of government employees by their employers in certain suits arising out of the use of motor vehicles did not apply to hold contractor liable for damages to business to the extent of any private liability insurance contractor held.

Town's actions in responding to fire did not fall within the Tort Claims Act's immunity exception for negligent acts or omissions in its ownership, maintenance, or use of vehicles, machinery, and equipment, regardless of the fact that vehicles or equipment were involved in the conduct that allegedly caused harm, because the gravamen of business's claim was that the town made imprudent tactical decisions in the course of fighting fire at business location.

Contractor that assisted town fire department in responding to fire at business location was a government employee for purposes of the Tort Claims Act. On the day of the fire, town's fire department summoned one of contractor's employees to assist at fire scene with an excavator, employee acted only at the direction of the town, no contract existed for performance of the work performed at a fixed price, and the type of work, fire suppression, was the regular business of the town.

Contractor, that under the Tort Claims Act, was an employee of town when, at the direction of town, it responded to a business fire and used its excavator in an attempt to minimize fire damage, was absolutely immune from personal civil liability for any intentional act or omission within the course and scope of its employment. Contractor's actions were intentional, they were within the scope of its employment, and there was no allegation that they were taken in bad faith.

Tort Claims Act provision that governed the defense and indemnification of government employees by their employers in certain suits arising out of the use of motor vehicles did not apply to hold contractor that assisted town in responding to business fire liable for damages to business to the extent of any private liability insurance contractor held, when contractor, as a government employee, was otherwise immune from suit pursuant to the Act.

IMMUNITY - NEW JERSEY

Parsons v. Mullica Tp. Bd. of Educ.

Supreme Court of New Jersey - August 17, 2016 - A.3d - 2016 WL 4370011

Student, by her parents, brought negligence action against township board of education and nurse who conducted a visual acuity test on student, arising out of delay in reporting results of test to student's parents.

Board and nurse moved for summary judgment. The Superior Court denied motion. Board and nurse appealed, and the Superior Court, Appellate Division, reversed and remanded. Student sought leave to appeal, which was granted.

The Supreme Court of New Jersey held that:

- Visual acuity test of student was a "physical examination" within scope of provision of Tort Claims Act providing immunity to public entities for failing to conduct an adequate physical examination, and
- An "adequate physical examination" includes reporting the results of the examination.

ANNEXATION - NORTH DAKOKA

New Public School Dist. No. 8 v. State Bd. of Public School Educ.

Supreme Court of North Dakota - August 17, 2016 - N.W.2d - 2016 WL 4379223 - 2016 ND 163

School district appealed State Board of Public School Education's decision approving annexation of certain real properties to another school district.

The Northwest Judicial District Court affirmed the Board's decision, and school district appealed.

The Supreme Court of North Dakota held that eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard.

Statutory eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard. The properties to be annexed were contiguous to other property which was contiguous to the school district, to which annexation had previously been approved, and annexation of all of the properties became effective on the same date.

REFERENDA - OKLAHOMA

[Save the Illinois River, Inc. v. State ex. rel. Oklahoma State Election Board]

Supreme Court of Oklahoma - August 8, 2016 - P.3d - 2016 WL 4189500 - 2016 OK 86

Concerned citizen group filed petition urging that a legislatively proposed constitutional amendment was facially unconstitutional.

Defendants filed a motion to dismiss, submitting that the challenge was untimely. The District Court granted the motion finding the challenge was untimely and was not facially unconstitutional. Citizen group appealed.

The Supreme Court of Oklahoma held that district court properly dismissed citizen group's petition but should have done so on basis that it should abstain from addressing a legislative referendum before voted on by the people.

EMINENT DOMAIN - PENNSYLVANIA

[In re Sunoco Pipeline, L.P.]

Commonwealth Court of Pennsylvania - July 14, 2016 - A.3d - 2016 WL 3755774

Pipeline service operator sought to condemn property, and condemnees filed objections.

The Court of Common Pleas overruled the objections. Condemnees appealed.

The Commonwealth Court held that:

- Collateral estoppel did not bar action;
- Operator was public utility corporation empowered to exercise eminent domain;
- Operator had power to condemn property for construction of pipeline; and
- There was no basis for the Court of Common Pleas to review the Public Utility Commission's (PUC) determination of public need.

Issue decided in previous case regarding pipeline service operator's plans to construct interstate natural gas pipeline was not same issue raised in operator's petition to condemn property after pipeline was repurposed to be interstate and intrastate pipeline, and therefore collateral estoppel did not bar action. Prior case addressed only whether operator was public utility corporation because it was subject to regulation as public utility by Federal Energy Regulatory Commission (FERC), and did not decide whether operator was public utility corporation because it was subject to regulation as public utility by Public Utility Commission (PUC).

Service to be provided by natural gas pipeline involved both interstate service, subject to Federal Energy Regulatory Commission (FERC) regulation, and intrastate service, subject to Public Utility Commission (PUC) regulation, and therefore pipeline service operator was public utility corporation empowered to exercise eminent domain, despite contention that pipeline was solely in interstate commerce. Pipeline was to consist of physical structure with access points in Ohio, West Virginia, and Pennsylvania, product was to be placed into pipeline and removed at multiple points within Pennsylvania, and pipeline operator had filed, and received PUC approval, of multiple tariffs applicable to operator's provision of intrastate service.

Public Utility Commission (PUC) regulated intrastate shipments of natural gas liquids, including service provided by pipeline that was authorized expansion of existing service, and therefore pipeline service operator had power of eminent domain to condemn property for construction of pipeline. Operator's certificates of public convenience applied to both existing service and to planned expansion, and operator's approved tariffs proposed to add new origin point for west-to-east intrastate movements of propane, based on the certificates issued.

There was no basis for court of common pleas to review Public Utility Commission's (PUC) determination that public need was demonstrated by pipeline service operator in application to condemn property to construct natural gas pipeline. PUC followed its statutory mandate and evaluated issues within its purview, and allowing such review would have permitted collateral attacks on PUC decisions and would have been contrary to statute that placed review within authority of Commonwealth Court.

PUBLIC UTILITIES - TENNESSEE

Tennessee v. Federal Communications Commission

United States Court of Appeals, Sixth Circuit - August 10, 2016 - F.3d - 2016 WL 4205905

States of Tennessee and North Carolina petitioned for review of an order of the Federal Communications Commission (FCC) which purported to preempt state statutory provisions that either forbade or put onerous restrictions on expansion of broadband service networks by municipal telecommunications providers.

The Court of Appeals held that:

- Clear statement rule applied in determining whether state statutes that either forbid or restricted expansion of broadband service networks by municipal telecommunications providers were preempted by Telecommunications Act, and
- Telecommunications Act provision relating to promotion of competition in broadband marketplace did not preempt state statute regulating expansion of municipal broadband service networks.

Clear statement rule applied in determining whether state statutes that either forbid or restricted expansion of broadband service networks by municipal telecommunications providers were preempted by Telecommunications Act provision relating to promotion of competition in broadband marketplace, as federal preemption of state law threatened to trench on the states' arrangements for conducting their own governments.

Telecommunications Act provision relating to promotion of competition in broadband marketplace did not contain a clear statement authorizing preemption of Tennessee and North Carolina statutes that either forbid or put onerous restrictions on expansion of broadband service networks by municipal telecommunications providers, and, thus provision did not authorize such preemption. Telecommunications Act provision's directive to remove barriers and promote competition could not be read to limit a state's ability to trump a municipality's exercise of discretion otherwise permitted by Federal Communications Commission (FCC) regulations.

TAX - MAINE

Petrin v. Town of Scarborough

Supreme Judicial Court of Maine - August 16, 2016 - A.3d - 2016 WL 4367255 - 2016 ME 136

Taxpayers filed a complaint appealing the decision of the town board of assessment review denying taxpayers' applications for abatements.

The Superior Court concluded that taxpayer did not have standing to assert one of their challenges but otherwise affirmed the board's decision. Taxpayers appealed.

The Supreme Judicial Court of Maine held that:

- Taxpayers established sufficient particularized injury for standing;
- Allowing abutting properties to be treated as a single parcel violated equal protection and the state constitution;
- Allowing abutting properties to be treated as a single parcel violated statutory requirement that each parcel of real estate must be assessed separately;
- Assessing portions of larger single lots at a rate that is lower than the rate applied to the "base" portion of the lots did not violate equal protection and the state constitution; and
- Board of assessment acted within its discretion in finding that partial revaluation of waterfront and water-influenced property improved equity of town's assessments.

Municipal Utility Districts in Texas Have Sweeping Power to Sell Bonds, Levy Taxes.

MUD 187 came to be when a Houston developer arranged for two people to move their trailer onto a 519-acre site on the edge of Richmond in Fort Bend County, which at the time was an empty field.

As the only "residents" within the municipal utility district's boundaries, the couple headed for the polls in November 2008. The ballot asked whether the state's approval of MUD 187 should be confirmed and whether the district should be authorized to sell up to $188 million in bonds for water and sewage systems, drainage, parks, recreational facilities, roads and a fire station.

The vote was unanimous – 2-0.

"That's not how democracy is supposed to work," said Clifford Gay, a retired construction superintendent who now lives in Del Webb Sweetgrass, a retirement community that owes its existence to MUD 187 – and the taxes it is levying to pay off $24 million in bonds.

Gay and his neighbors wonder how high those taxes might go as more bonds are sold, especially with extraordinary bond issuance costs of 9 percent, according to IRS documents. MUD 187's bonds are rated Baa3 by Moody's, which says they may have "certain speculative characteristics."

Across bright-red Texas, where many politicians tout small government and low taxes, MUDs and other so-called special purpose districts are proliferating – and selling bonds – at a rate many experts inside and outside government find increasingly problematic. They cite high indebtedness, insufficient state oversight, cozy relationships with developers, a lack of responsiveness to citizens and potential conflicts of interest. MUDs can be created either by the Texas Commission on Environmental Quality or the Legislature.

Continue reading.

The Houston Chronicle

By James Drew

August 20, 2016 Updated: August 21, 2016 1:38pm

FHA Issues Final Guidelines on PACE Assessments: Dechert

The U.S. Federal Housing Administration (FHA) issued final guidance in the form of Mortgagee Letter 2016-11 regarding the subordination of Property Assessed Clean Energy (PACE) assessments on Tuesday, July 19, 2016. As originally announced in August of 2015, the guidelines are part of a broader initiative to expand the accessibility of clean energy financing options while simultaneously preserving the value of underlying property with PACE assessments.1 Most PACE programs permit the PACE assessment to generate a lien on the property that is pari passu with real estate taxes and other assessments on real property and comes ahead of any mortgage lien on the property; a structure for which both the FHA and the Federal Housing Finance Agency (FHFA), the conservator of Fannie Mae and Freddie Mac, have expressed concerns. To address these concerns, the FHA announced that it will begin insuring mortgages on properties with PACE assessments that meet five conditions.

FHA Guidance on PACE Assessments

Super-Priority Lien Status

The paramount condition in the FHA guidance is centered around the concern that PACE assessments could take super-priority lien status over a mortgage in the event of default or foreclosure. Under this condition, PACE assessments cannot have superior priority lien status to the mortgage, except in the event of a default. Even in the event of default, a PACE assessment can only take priority over an FHA-insured mortgage to the extent of the installment of the PACE assessment that is delinquent. The guidelines also indicate that an event of default cannot accelerate full repayment of the PACE assessment; although, the guidelines permit a notice of lien with respect to the full PACE assessment amount to be filed in the public records.2

Special Assessment Treatment

A second condition requires that PACE assessments are collected and secured in the same way as a special assessment against the property (i.e. the PACE obligation must be escrowed by the lender).3 Essentially, this condition clarifies that the FHA will insure mortgages with PACE assessments attached if such assessments are treated like a property tax under state law, but will not do so if the PACE assessment is given first priority lien status in a manner other than described under the first condition.4 Legally, the FHA cannot accept PACE assessments that would treat the entire PACE assessment as a priority lien over the mortgage, except in circumstances of default or delinquency similar to other property tax assessments.5 This condition should please mortgage lenders, however, it does raise a concern about what would happen in a scenario where the FHA-insured mortgage enters into default and the defaulted assessment amount exceeds the escrow amount. It is unclear whether the FHA would be required to pay the remaining amount owed or whether that amount would be passed along to the purchaser of the foreclosed property.

Free Transferability

A third condition requires that there are no terms or conditions of the PACE assessment that would limit the transfer of the encumbered property to a new homeowner. This requirement includes a prohibition against a restriction that could require third-party consent to transfer the property, unless such restriction could be terminated at no cost by the homeowner.6

Public Record

A fourth condition requires that the PACE assessment be readily apparent in public records to all parties involved in the mortgage transaction and must: (i) state the loan amount; (ii) include the expiration date and cause of expiration; and (iii) specify that a default cannot accelerate the expiration date.7 It is not clear how this requirement will affect PACE programs that allow for a delay in the filing of the assessments in the public records.

Continue with the Property

A fifth and final condition requires that the PACE assessment attach to the property upon sale, including foreclosure.8 This requirement ensures that, in the event of a foreclosure or deed in lieu thereof, the balance of the PACE assessment will transfer to the new property holder instead of becoming immediately due and interfering with payment of the mortgage loan.

Disclosure and Appraisal Requirements

The FHA guidance further includes disclosure and appraisal requirements.

The disclosure requirement specifies that, in the event of sale of a property with a PACE assessment, the sales contract must specify whether the PACE assessment will remain attached to the property or if it will be satisfied by the seller at or before closing.9 If the PACE assessment will remain attached, all terms and conditions of the PACE assessment must be disclosed to the buyer and further made part of the sales contract.

Lastly, if the PACE assessment will remain with the property, any appraiser must include in its analysis the impact of the PACE-related improvements (i.e. solar panels) on the value of the property, irrespective of whether such impact is positive or negative.10

Lingering Questions and Concerns

While the FHA’s guidance is certainly a step in the right direction, there are still loose ends that need to be tied up. First, it is unclear from the guidelines who will be charged with enforcing the various conditions and requirements therein. For example, who will ensure that an appraiser is considering the impact of the PACE-related improvements on the value of the property? Will someone at the FHA scrutinize the appraisal, or will the program administrators be stuck with this task?

Second, the FHA’s previously-issued guidance in 2015 stated that the FHA intended to coordinate with the Consumer Financial Protection Bureau (CFPB) to address consumer disclosure requirements, yet the final guidance does not refer to any such collaboration. Additionally, though the Department of Energy’s Best Practices Guide for Residential PACE Financing (Best Practices Guide) stresses the importance of property owner education and disclosures,11 the utilization of the Best Practices Guide is not mandatory. The FHA explicitly states that it may be used to align state and county PACE programs with consumer protection goals; however, state and local legislatures are not required to utilize the Best Practices Guide.

Lastly, we note that under the “Fair Housing and Equal Opportunity” resources section at the end of the Best Practices Guide, there is a link to the U.S. Department of Housing and Urban Development's website for the purpose of providing more information on "program structure, operation and evaluation to ensure equal access under the Fair Housing laws."12

FHFA's Position Remains Unchanged

The FHFA, the conservator of Fannie Mae and Freddie Mac (who collectively represent roughly 80% of the residential mortgage market), has a long-standing objection towards the "super-priority lien" status of PACE assessments, citing lack of knowledge on behalf of lenders as well as the lenders' inability to account for additional risk and potential decline in the value of the property.13 Indeed, the FHFA recently stood by its objection to PACE assessments receiving super-priority lien status, stating that it does not intend to allow Fannie Mae or Freddie Mac to purchase mortgages on properties encumbered by PACE assessments.14

Conclusion

The guidelines promulgated by the FHA are a positive development and will allow property owners with existing PACE obligations—or those who wish to obtain them— to receive FHA-insured mortgage loans. Any positive impact will be mitigated, however, by the fact that the guidelines will affect roughly only 15% of the residential mortgage market. To have a more resounding and pervasive impact, the FHFA would have to release similar guidelines, yet it remains unclear whether they will do so.

Footnotes

1) U.S Department of Housing and Urban Development, Guidance for Use of FHA Financing on Homes with Existing PACE Liens and Flexible Underwriting through Energy Department's Home Energy Score, (August 2015).
2) U.S Department of Housing and Urban Development, Mortgagee Letter 2016-11, (July 2016).
3) Id.
4) U.S. Department of Housing and Urban Development, FHA to Insure Mortgages on Certain Properties with PACE Assessments, Real Estate Rama, (July 2016).
5) Id.
6) U.S. Department of Housing and Urban Development, Mortgagee Letter 2016-11, (July 2016).
7) Id.
8) Id.
9) Id.
10) Id.
11) See Department of Energy, Best Practices Guidelines for Residential PACE Financing, Page 5 (July 2016).
12) Id. Page 14.
13) U.S Department of Housing and Urban Development, Statement of Alfred M. Pollard, General Counsel, FHFA, before the California Legislature, Keeping Up with Pace, (June 2016).
14) FHFA Won't Budge on PACE LOANS, Asset-Backed Alert, (July 29, 2016).

Dechert LLP – Patrick D. Dolan, Kira N. Brereton and Noah Tischler

USA August 17 2016

[Sun Burn: Solar Tax Credits Scorch State Budgets.]

Solar power can burn a hole in a state's budget, but a well-designed plan can bring benefits

When it comes to solar power policy, the line from "Field of Dreams" is worth taking into account: "Build it, and they will come."

Demand for residential or rooftop solar power, spurred in part by state incentives, is growing rapidly. But if incentives are not well-designed, they can overwhelm a state's budget.

Regulators and utility officials in several states have been surprised – not always in a positive way – by the effects of their solar power policies.

Louisiana is one of the more recent, and more dramatic, examples.

In mid-July, Louisiana's Department of Revenue said it was almost $30 million short of funds to pay already submitted claims for rooftop solar systems and that there were no funds to pay future claims, even though the program is not scheduled to end until Dec. 31, 2017.

A 2015 law capped the state's solar tax credit program at $10 million each for 2015-16 and 2016-17 and at $5 million for 2017-18. The state already has $9.3 million in approved credits and $29.6 million in estimated pending claims for 2015-16.

The credit, put in place in 2008, was one of the more generous among state solar tax credits, covering 50% of system costs and capped at $25,000 for an individual system.

That credit has been one of the drivers of solar power in Louisiana. According to the Solar Energy Industries Association, 32 MW of solar power – almost all of its residential – was installed in Louisiana in 2015, a 3% increase over the previous year, and the trade organization expected another 208 MW of installations over the next five years.

Industry experts say part of the reason Louisiana implemented such a generous 50% tax credit was as an effort to compensate for a residential rate structure that did not make solar power attractive.

Louisiana has a declining block rate structure, meaning that the first increment or tier of power used costs the most, with rates then dropping for customers who use more electricity.

In states like California, which has an inclining block rate structure, customers who use the least electricity pay the lowest rates. That structure creates an incentive for customers in the higher tiers to install solar panels in order to reduce their usage and rates. In states, such as Louisiana, with a declining block rate, that rate reduction strategy is not as compelling.

Louisiana's solar tax credit also had a provision that allowed a cash payment for customers who did not have enough income to use all their credits. The state's incentives were very attractive, but when lawmakers moved to rein them in, they went as far to the other side, reducing the cap while the program was still under way and by making the reduction retroactive.

Those sort of policy decisions, and resulting market disruptions, are becoming increasingly common nationwide.

Tax credits fuel Western solar boom

The sudden removal of Louisiana's tax credits may have made things worse for homeowners there, but it is not the only state where booming solar power is creating problems in the state capital.

New Mexico has also ended its solar tax credit. The state implemented its tax credit in 2008 with a 2016 sunset date. But the state set a $3 million a year cap on the program, and has hit that limit in each of the last four years, according to Mark Gaiser, a clean energy program manager with the state's Energy, Minerals and Natural Resources Department.

"New Mexico's tax credit has been running out of money every year at a faster and faster pace," said Noah Long, western energy project director with the National Resources Defense Council.

There have been two attempts to bring the tax credit back, but both have failed in the legislature. And, with the lower house of the legislature controlled by Republicans and the upper house controlled by Democrats, the chances of passing a new solar tax credit into law are slim, Long said.

In retrospect, it looks like putting a cap on the program "was kind of wise," Gaiser said. "It didn't allow for over reach."

Another western state is facing similar problems, but for now the solar tax credit program is still running in Utah, where solar power is booming.

The state saw 3,000 rooftop solar installations in 2015, and the Governor's Office of Energy Development expects to process 12,000 applications this year. If all those applications turn into installations, it would mean more rooftop solar would be installed in 2016 than in all prior years combined.

The boom has been driven by the falling costs of solar panels, as well as at least three different state solar incentives. In addition to a state solar tax credit, Utah has a net metering program and the state's largest utility, Rocky Mountain Power, until recently offered a rebate on the cost of installing solar power.

The utility rebate was about 1.5 cents per watt of installed rooftop solar. The program was set up as a lottery under a five year program and was very popular. Over four years, the utility provided $40 million in rebates.

But in March the state legislature signed off on Rocky Mountain Power's proposal to end the program in its fourth year and switch it to a broader initiative, the Sustainable Energy and Transport Program, which includes incentives for transportation and energy storage, as well as for solar power.

"We think the solar industry is no longer an unknown quantity," Rocky Mountain Power spokesman Paul Murphy said. "So, we don't think it needs additional incentives. We would rather use the funds for all customers."

Utah also provides a solar tax credit equal to 25% of the cost of a system, capped at $2,000 per system. But the rapid growth of rooftop solar in the state is raising concerns among lawmakers.

When the tax credit was created in 2012, it was a $1 million program, this year it is going to hit $25 million or $40 million, Jeffrey Barrett, deputy director of the Governor's Office of Energy Development, said. "The word 'exponential growth' was created for this sort of thing."

"The legislature is worried as hell about the fiscal impact," Barrett said. "I think new legislation is being drafted right now."

What form that legislation will take is still unknown, he said. It could be a cap or a cap and a phase out, but “in the future, it will be a completely different program.”

By law, Utah’s the tax credit comes up for review in 2017.

State funding struggles a trend

Overall, the expiration of state solar tax credits has become a national trend.

“I think that it is due in part to budgetary problems, but also due to solar’s increasing maturity,” Autumn Proudlove, senior policy analyst at NC Clean Energy Technology Center at North Carolina State University, said.

Many of the tax credit programs were put in place to help solar power get off the ground, but with the growing penetration of solar, some states are letting those programs expire.

At the beginning of 2015, 15 states had residential solar tax credits. Now, 11 states have them, and programs are set to expire in Iowa at the end of 2016, in Louisiana and Oregon at the end of 2017, and in Maryland at the end of 2018, according to the Database of State Incentives for Renewables and Efficiency (DSIRE).

In part this a reflection of the natural life span of a tax credit. Tax credits are often put in place to help a technology transit to commercial viability. In some states, legislators are letting them expire because they believe the technology has advanced far enough that tax credits are no longer necessary.

North Carolina is an interesting example, Proudlove said. The state tax credit really helped develop the state’s utility-scale solar market, but the residential and commercial solar markets are still small and have really dropped off since the tax credit expired, she said.

According to a survey conducted by the Utah Solar Energy Association, 80% of the respondent said that the tax credit was “important” of “very important” in their decision to install solar panels on their rooves, Ryan Evans, president of the trade group said.

Reducing or capping Utah’s solar tax credit “would not send the right message right now,” Evans said. “After all, there are only so many Utahans. The boom can’t last forever.” Eventually everyone who wants solar power will have it or all the roofs will have solar panels, he said.

The other factor that needs to be considered, Evan said, is that tax credits bring in business. “My guess is that the state gets their money back” through increased sales tax and corporate taxes.

According to a report by the North Carolina Sustainable Energy Association, North Carolina energy projects generated $1.54 of state and local government tax revenue for every $1.00 taken in tax credit.

But, as Evans pointed out, “Not all tax credits are created equal.” And there is a fair amount of variety when it comes to solar tax incentives. California uses a tax exemption for solar equipment instead of a credit on a tax return. Other states also give an adjustment or deduction on property taxes, but can lead to problems.

Not only do property values change, they are very local, and “it is difficult for developers to know the value,” said Sean Gallagher vice president for state affairs at the Solar Energy Industries Association.

Gallagher noted that most tax credits are designed with sunset dates or budget caps. "It is not unusual for them to have a limit,"

In a well-designed system, there needs to be a recognition of the importance of planning, from the perspective of the state, as well as that of the homeowner and the developer. The simplest way to do that is to have a clear expiration date for the tax credit and clear definitions of qualifying factors such as construction start dates.

Other features, such as reserve funds and triggers, can also be helpful tools. They let consumers know when the credits are close to expiration or near capacity.

It's best to design programs with a budget cap or an expiration date, "people need to be able to plan for it," Gallagher said. The worst thing to do, though, is to change the tax credit or lower the cap retroactively. In those situations people stand to lose their investment, Gallagher said.

Utility Dive

By Peter Maloney | August 17, 2016

PACE Guidance from HUD/FHA is an Important Step Forward.

PACENation applauds and strongly supports guidance for residential PACE issued today by the U.S. Department of Housing and Urban Development (HUD). The guidance clearly shows the Obama Administration's strong commitment to Property Assessed Clean Energy financing, a bipartisan initiative adopted by 18 states thus far that encourages home owners to make energy efficiency and renewable energy upgrades to their properties. To date, over 100,000 households have made their homes more valuable, healthier and comfortable using PACE. The nearly $2.25 billion spent has created 22,000 jobs, many of them in the communities that offer PACE, and will save the equivalent of 12.5 billion kWh's over the life of the measures.

The guidance issued today by HUD's Federal Housing Administration (FHA) sets standards that will allow qualifying homes with PACE assessments to be purchased or refinanced with mortgage products provided by FHA.

"This is another critical step forward to make PACE financing available for more home owners so we can achieve our nation's energy goals", said Jeff Tannenbaum, PACENation's founder.

PACE uses a financing mechanism that state and local governments have relied on for decades to promote improvements to private property that meet a public purpose. With PACE, home owners work with local contractors to decide which measures make sense. Funding is provided by private sector investors and repaid by each participating home owner as a charge on their property tax bill. PACE is completely voluntary and only impacts home owners who choose to participate.

Today's release also includes an update to the U.S. Department of Energy's PACE best practices guidelines. Strong consumer protection policies already adopted by PACENation and its members may make PACE financing the safest way for households to pay for investments they need and want to make in their homes.

David Gabrielson, PACENation's Executive Director, said "We are thrilled by today's announcement and appreciate the hard work that went into producing this guidance. We look forward to continued work with all market stakeholders on solutions that will make PACE available for more homes."

PACENation is a national not-for-profit organization that is supported by foundations and in part by its members: organizations and individuals that recognize the power of PACE financing and seek to make it available as a financing option for all property owners that want to make clean energy (and in many places, water conservation) upgrades to their buildings. To learn more and find out how you can get involved, visit us at www.pacenation.org

PACENation

July 19, 2016

S&P: What Will A Continuing-Disclosure Settlement Mean For Muni Credit?

The Securities and Exchange Commission (SEC) is expected to soon start releasing Municipal Continuing Disclosure Cooperation (MCDC) initiative settlements with governmental entities. The MCDC initiative was offered to issuers and underwriters of municipal debt during a defined period in 2014 as a voluntary way to notify the SEC of potential continuing disclosure violations, in exchange for pre-defined settlements. The violations are related to SEC rule 15c2-12. (More background on the MCDC initiative is available on the SEC's website, www.sec.gov.)

As settlements are announced we expect to consider the potential credit implications of each on a case-by-case basis. Disclosure practices are an important part of our assessment of management, but we do not expect the settlements themselves to translate into rating downgrades if settling issuers respond with proactive approaches to addressing any identified deficiencies in their disclosure practices. Our expectation is that there would be very limited credit impact as ratings determinations would still come down to the individual credit fundamentals.

The MCDC Initiative

The MCDC initiative encouraged issuers and underwriters to report in 2014 violations of 15c2-12 which had occurred over the prior five years. The SEC offered the MCDC initiative as it believed that there were "potentially widespread violations" and that the general attitude toward adherence to the disclosure rules needed to be heightened throughout the market. The SEC has not revealed who self-reported.

Types Of Settlements

Underwriters
The SEC's enforcement division was charged with reviewing each case reported in the MCDC initiative. It has so far made public settlements entered into with underwriters and is now expected to start releasing settlements with issuers. The underwriter settlements did not require the underwriters to admit or deny any findings, but along with other provisions the underwriters would need to hire an independent consultant (approved by the SEC) to review internal practices and then implement any recommendations to further enhance compliance with 15c2-12. The underwriter settlements to date have included civil penalties, referred to as fines by those who have paid. The MCDC initiative included a maximum fine of up to $500,000 for the largest underwriters, and there have been 72 firms paying various-sized civil penalty fines to date. The fines have ranged from $40,000 to the maximum, according to the SEC.

Issuers
As the SEC actions are shifting to the issuer, we expect settlements to address disclosure violations in a different way. The primary difference, per the MCDC guidelines, is that the issuer settlements will not come with civil penalty fines. According to the SEC's standardized settlement terms, the focus of the issuer settlements will be on establishing management practices within the municipal issuer to ensure remediation of past violations and to avoid future violations.

Increased 15c2-12 Compliance Expected

The increased focus by the underwriter on compliance requirements and improved issuer filings per the 15c2-12 rules is expected to improve overall disclosure practices and enhance the quality and quantity of information available to the marketplace. We believe increased transparency is important in order to track and analyze credits, particularly those that do not come to market frequently. Notwithstanding the credit impact of individual settlements, we view the MCDC initiative as positive for the muni market, but we do not believe the initiative, in and of itself, is likely to result in changes to any current credit ratings.

Materiality Or Malfeasance

Even though the settlements are related to SEC securities law (albeit without admitting any violations), they are unlikely in our view to trigger any immediate rating actions. In our analysis of credit, we assess disclosure issues relative to their materiality to credit. Thus, we anticipate looking at each case on its own, taking into consideration the materiality of the violation in relation to the rating, based on the applicable rating criteria. That said, should the violation be malfeasance, then there could be a more immediate impact on the rating.

Assessment Of Management

We anticipate that, in general, the major credit consideration relating to the MCDC initiative will be around the capabilities of the management team. Management is an important component of our rating criteria in each sector of U.S. public finance. However, we note that management is only one input to the total rating, which underscores why we don't expect significant rating volatility if there are disclosure deficiencies identified, all other factors being equal. Management's plan, however, to remediate any violations would be an important component of our analysis of the capabilities of the management team.

Only a rating committee may determine a rating action and this report does not constitute a rating action.

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15-Aug-2016

Philadelphia Business Taxes: Incentives and Exemptions.

Like many cities, Philadelphia does not regularly evaluate whether tax breaks achieve their goals

Overview

Philadelphia business tax rates are among the highest of any large city in the nation, and the tax structure is frequently cited as one reason for the city's relatively weak job-creation record over the past several decades. A key element of that structure is the business income and receipts tax (BIRT), which taxes profits and revenue of businesses located in the city. Only 11 of the nation's 30 largest cities impose levies on corporate profits or revenue, and only Philadelphia does so on both.

To make these business taxes less onerous, Philadelphia's leaders have created a large and varied group of tax incentives and exemptions. Known as tax expenditures, they constitute an integral but little-understood aspect of the city's business tax policy. Supporters view the expenditures—which do not appear in the city's budget or financial statements—as investments in growing, maintaining, and attracting businesses, thereby enhancing the tax base. Critics see them as drains on public resources that have little accountability, haphazard goals, and scant proof that they pay off in business growth or future tax revenue.

To help policymakers and the public better understand the role that these measures play in Philadelphia's overall tax policy, The Pew Charitable Trusts sought to quantify the city's tax expenditures and compare them with those of other major cities. In Philadelphia, the analysis looked at two types of tax expenditures: incentives to spur companies to take specific actions, such as hiring more workers or investing in neighborhoods; and industrywide exemptions to support particular business sectors deemed by policymakers to merit special treatment. The study covered two periods, 2001-03 and 2010-12, in order to show change over time; the 2010-12 data were the most recent for which information was complete.

The research found that Philadelphia has 21 city-approved business tax reduction programs or provisions, the most among the nation's 30 largest cities. Eight of those reductions took effect after 2012, too late for their impact to be included in this analysis.

The research also found that from 2010 to 2012, the tax incentive programs resulted in an average of $109.6 million per year in forgone revenue for the city and the school district—a 634 percent increase from 2001- 03, when the average annual inflation-adjusted amount was $14.9 million. This report describes revenue as "forgone" rather than "lost," in part because repealing the tax incentives would not necessarily restore an equivalent amount of money to local coffers; businesses probably would alter their operations to reduce their tax liabilities.

The vast majority of the $109.6 million stemmed from two programs: the 10-year property tax abatement on new construction and building improvements for commercial and industrial property, and the Keystone Opportunity Zone initiative, which exempts businesses within designated areas from state and local business taxation. Like all tax incentives, both of these programs require companies to commit to making new investments in the city and are in effect for limited periods of time.

The other main source of tax expenditures—industrywide exemptions primarily for finance, insurance, utilities, and port-related firms—produced at least $106.2 million in forgone revenue annually from 2010 to 2012. The amount was 18 percent less than in 2001-03, adjusted for inflation. Unlike tax incentives, exceptions are granted to individual companies without any time limits. Companies determine their eligibility in tax filings, which city auditors can challenge. (See Figure 1.)

Figure 1

Forgone Business Tax Revenue in Philadelphia

Annual average, in millions

From 2001-03 to 2010-12, Philadelphia's forgone business taxes grew primarily as the result of expanded use of tax incentives meant to retain and attract businesses and to spur real estate development, hiring, community reinvestment, and other commercial activity. The average annual amount of forgone revenue from tax incentives increased by 634 percent. Industry-specific exemptions declined 18 percent. All figures are inflation-adjusted to 2012 dollars.

Note: See Appendix D for list of credits, abatements, and exceptions.

Source: Pew analysis of Philadelphia Department of Revenue and Office of Property Assessment records

Whether these tax expenditures have paid off for Philadelphia is hard to say. There is no question that there have been benefits, in terms of jobs created and buildings constructed. The issue is whether those benefits outweigh the costs.

Philadelphia reports on some of its smallest tax-expenditure programs but does not conduct comprehensive analyses of how much all the tax expenditures cost or whether they achieve their purposes—and is not required by law to do so. Only a few cities, including New York and Washington, require that kind of reporting. For those reasons, this report does not compare forgone revenue for the city of Philadelphia and the school district with other jurisdictions.

In 2012, the staff of the Pennsylvania Intergovernmental Cooperation Authority (PICA), a state agency that oversees Philadelphia's finances, called on the city to clarify and evaluate specific tax expenditures, concluding: "A lack of detailed accounting prevents a systematic process of evaluating whether the costs of these policies are justified in relation to their benefits."

This study does not attempt to determine whether Philadelphia business tax expenditures have met their goals, but it does look at ways that cities can design programs to include evaluations. According to public finance and policy analysts, measuring the impact of tax benefits and setting clear rules for receiving them are key steps toward an effective and equitable tax system that fosters economic development and generates needed revenue.

Conclusion

For several decades, business leaders and tax experts have called for transformation of the city's entire tax structure in order to improve Philadelphia's competitiveness with its suburbs and other large cities. The recent overhaul of the city's property tax system, the Actual Value Initiative, was viewed as an important first step in laying the groundwork for comprehensive change.

Given the increase in forgone taxes over the past decade, tax expenditures merit a place in Philadelphia's tax policy discussion. Knowing how much these tax exceptions cost, and whether they are meeting their goals, is a key component of a coherent and equitable city tax policy.

Download the full report.

The Pew Charitable Trusts

TAX - ALASKA

Bingman v. City Of Dillingham

Supreme Court of Alaska - August 12, 2016 - P.3d - 2016 WL 4257176

City petitioned for foreclosure of taxpayer's property. Taxpayer intervened.

The Superior Court entered judgment and decree of foreclosure, and taxpayer appealed.

The Supreme Court of Alaska held that:

- City did not accept taxpayer's proposal to redeem his foreclosed property, and
- Taxpayer did not satisfy statutory requirements for repurchasing his foreclosed property.

City did not accept taxpayer's proposal to redeem his foreclosed property by offering city promissory note for amount due, without interest, that would mature 20 years later, even though proposal stated that silence would be treated as acceptance, and city did not reject offer in manner outlined in taxpayer's proposal, where city sent letter rejecting offer, never recorded taxpayer's redemption, and did not issue certificate indicating that he had redeemed property, but instead published notice of expiration of redemption period, and moved for properties to be transferred by tax deed.

Taxpayer did not satisfy statutory requirements for repurchasing his foreclosed property by offering city promissory note for amount due, without interest, that would mature 20 years later, where offer was made before tax deeds transferred property to city, and failed to meet statutory provisions for calculating purchase price.

CDFA Intro Public-Private Partnership (P3) Finance WebCourse.

September 28-29, 2016
Daily: 12-5pm Eastern

The Intro Public-Private Partnership (P3) Finance Course examines this emerging development finance model with a focus on how development finance agencies can adopt P3 principles to address a variety of projects. This course will cover basic P3 concepts, key players involved in transactions, asset valuation, contract negotiation, risk assessment, revenue stream development, and feasibility analysis. In addition, several P3 projects from across the country will be presented, and P3 experts will analyze the successful elements in each deal.

Interest in P3 financing is growing as state and local governments face tough budget decisions along with declining federal investment in infrastructure. Several state and local agencies have used P3 to finance real estate developments, schools, parking garages, public transit, affordable housing, water facilities, and more. During the Intro P3 Finance Course, industry experts will discuss the common characteristics and drivers of P3 financings throughout the country and explain the various structures of these deals.

To learn more and to register, click here.

GFOA: Your Action Requested on Senate-Side High Quality Liquid Assets Legislation.

On February 1, 2016, the House of Representatives voted unanimously to approve HR 2209, bipartisan legislation that would require federal regulators to classify all investment-grade, liquid, and readily marketable municipal securities as high quality liquid assets (HQLA). This important legislation is necessary to amend the liquidity coverage ratio rule approved by federal regulators last fall, classifying foreign sovereign debt securities as HQLA while excluding investment grade municipal securities in any of the acceptable investment categories for banks to meet new liquidity standards.

Some members of the Senate Banking Committee are seriously considering the introduction of companion legislation to HR 2209, and GFOA urges our members to send letters to Senate members asking them to sign on as cosponsors of the bill, especially from the following jurisdictions. A draft letter is available here.

Richard Shelby, Chairman (R-AL)
Sherrod Brown, Ranking Member (D-OH)
Tom Cotton (R-AR)
Bob Corker (R-TN)
Mike Crapo (R-ID)
Joe Donnelly (D-IN)
Heidi Heitkamp (D-ND)
Dean Heller (R-NV)
Mark Kirk, (R-IL)
Robert Menendez, (D-NJ)
Jeff Merkley (D-OR)
Jerry Moran (R-KS)
Jack Reed (D-RI)
Mike Rounds, (R-SD)
Ben Sasse (R-NE)
Charles E. Schumer (D-NY)
Tim Scott (R-SC)
Jon Tester (D-MT)
Patrick J. Toomey (R-PA)
David Vitter (R-LA)
Mark R. Warner (D-VA)
Elizabeth Warren (D-MA)

Background

In September 2014, the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency (OCC) approved a rule establishing minimum liquidity requirements for large banking organizations. The liquidity coverage ratio rule was designed to ensure that large banks maintain liquid assets that can easily be converted to cash during times of national economic crisis. The rule identifies HQLA to meet this requirement, but fails to include municipal securities in any of the acceptable investment categories—despite including foreign sovereign debt.

Following approval of the new rule, GFOA and our state and local association partners have urged the Federal Reserve, FDIC, and OCC to amend the rule to classify investment-grade, liquid, and readily marketable municipal securities as HQLA. On May 21, 2015, the Federal Reserve Board issued a proposed rule that would designate certain investment grade municipal securities as HQLA. While the GFOA is extremely grateful for the Federal Reserve's recognition of the liquidity features of municipal securities, we have some concerns with the proposal, which we raised in our comment letter. Such concerns include the proposal's failure to include revenue bonds as HQLA, and the limit on the total amount of general obligation securities that a financial institution can hold of no more than 5% of the institution's total amount of HQLA.

Meanwhile, the FDIC and OCC refuse to modify the rule for municipal securities. In the absence of cooperation from these agencies, GFOA is working with bipartisan champions in Congress to change the rule through legislation (HR 2209) and preserve low-cost infrastructure financing for state and local governments and public-sector entities.

Not classifying municipal securities as HQLA will increase borrowing costs for state and local governments to finance public infrastructure projects, as banks will likely demand higher interest rates on yields on the purchase of municipal bonds during times of national economic stress, or even forgo the purchase of municipal securities. The resulting cost impacts for state and local governments could be significant, with bank holdings of municipal securities and loans having increased by 86% since 2009.

GFOA

Wednesday, August 17, 2016

Public Finance Associate

Sherman & Howard L.L.C. seeks an associate attorney to join its busy public finance practice in Denver, Colorado. We are active in Colorado, Nevada, New Mexico, Idaho, Montana, Arizona and other Western States and our firm maintains eleven offices in six states.

Our attorneys work as bond counsel, underwriter's counsel, disclosure counsel, lender's counsel and in other roles on a wide range of transactions including governmental bonds of all types, housing bonds and qualified private activity bonds. Our associates take on substantial responsibility for conducting due diligence, attending meetings, preparing bond documents and advising clients.

Our ideal candidate would have one to three years of experience in public finance, however, experience in other transactional practice areas will also be considered, particularly relating to securities. Bar admission to Colorado is preferred but not required. We offer a competitive salary and full benefits.

Please apply to recruit@shermanhoward.com, including a resume, transcript and a cover letter stating your qualifications for this position and why you are interested in public finance work in the Rocky Mountain West.

Deloitte: Competing for Talent in the Public Sector.

Talent shortages are looming large on the horizon and the public sector is bracing particularly hard for impact. State agency HR departments have always had a hard time competing with private employers, but there are concrete steps you can—and should—be taking to improve your ability to attract and retain talented employees.

Whether you're looking for "quick hit" ideas or considering moving to a centralized model, Competing for talent in the public sector elaborates on the following guideposts for moving forward with a talented and thriving workforce:

1. Prepare for change with your existing workforce
2. Consider the full range of options for filling talent gaps
3. Get creative about talent attraction and recruitment
4. Modernize everything about talent engagement and retention
5. Take a close, hard look at existing roles

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Public Finance Attorney

Kennedy & Graven, Chartered, a law firm in Minneapolis that represents local governments, cities, counties, school districts, townships, port authorities, economic development authorities, housing and redevelopment authorities and other public purpose entities, seeks a public finance associate to practice in the areas of general obligation tax-exempt bonds, conduit tax-exempt bonds for 501(c)(3) entities and affordable housing, and economic development and redevelopment.

Qualifications: 2 year or more years of legal experience and a career interest in local government law and public finance. Experience with transactional legal work is helpful but not required. Experience in commercial loan financing, tax credit financing, real estate or land use, affordable housing or 501(c)(3) organizations is helpful but not required.

To apply: send resume, transcript and cover letter to Neil Simmons, Administrator, Kennedy and Graven, Chartered, at nsimmons@kennedy-graven.com; or mail to 470 U.S. Bank Plaza, 200 South Sixth Street, Minneapolis, MN 55402.

Please apply by September 30, 2016 to ensure consideration.

Questions can be directed to Neil Simmons by email above or 612-337-9200.

Kennedy & Graven, Chartered gives equal consideration to all qualified applicants, regardless of their race, color, creed, religion, national origin, sex, disability, age, marital status, ancestry, sexual orientation, or status with regard to public assistance.

Firm Offers Issuers Chance to Win a Free Bond Financing.

PHOENIX Public finance startup Neighborly is offering municipal issuers a chance to win a free bond financing.

The San Francisco-based financial services company is launching what it calls the "Neighborly Bond Challenge," which will offer winning municipalities the opportunity to sell up to $10 million of bonds on Neighborly's platform free of charge. Orrick, Herrington & Sutcliffe will be bond counsel. Applications will be accepted through Sept. 9, and the winners will be announced Sept. 21 at The Bond Buyer's California Public Finance Conference.

Neighborly, which has a registered broker-dealer arm, aims to "democratize" the muni market be encouraging local investment from millennials and others who wouldn't typically invest in muni bonds directly.

"In modernizing public finance, Neighborly is looking forward to financing innovative public projects being conceived right now by governments throughout the United States," said Jase Wilson, Neighborly's chief executive officer. "We are extremely excited about the opportunity to work with municipal finance thought leaders and to have Orrick as bond counsel for the Neighborly Bond Challenge. Neighborly's goal is to reduce complexity and use data to create transparency in the municipal finance industry. Neighborly provides the same market accessibility for a parent buying a $100 muni bond for their child's graduation as the world's
largest bond funds. "

James McIntyre, Neighborly's head of public finance, cited the success of Denver, Colo.'s 2014 "mini-bonds," which were sold in $500 denominations, and said Neighborly is looking to produce more small-investor triumphs like that.

"We just want to build upon their success and get people thinking about muni bonds," he said.

Issuance of the five winning selections is targeted for between the fourth quarter of this year and the fourth quarter of 2017. Interested municipalities can apply on Neighborly's website, where they are invited to fill out information about their proposed financing including how the bonds would be used, what their current ratings are, and who is on their finance team. Neighborly says ideal projects for the challenge would be those with a direct positive impact on the issuer's local community.

"Ideal financings include those that support schools, create microgrids, tackle water scarcity, create resiliency, or benefit those in need," the company's website reads. "Think sustainable or green projects that would benefit from our technological economies of scale."

Burlington, Vt. Mayor Miro Weinberger said he is strongly considering applying to the challenge as the city is planning some financings to improve its infrastructure.

"We are regular participants in the municipal bond market," Weinberger said. "I think there's a quite good chance we're going to put in an application."

Weinberger said he is often struck by the cost of a bond issuance, and feels that what Neighborly is offering could offer significant savings. He said he also likes the idea of the company's mission of fostering more direct and local muni investment.

"It would be great if more of the public would get to participate," he said.

The Bond Buyer

By Kyle Glazier

August 11, 2016

Why a Judge Allowed a Challenge to a Private Activity Bond Allocation.

BRADENTON, Fla. — Two Florida counties can move forward with the first lawsuits ever to challenge a private activity bond allocation from the U.S. Department of Transportation.

In a 39-page ruling late Tuesday, U.S. District Judge Christopher R. Cooper sided with Martin and Indian River counties, both of which objected to the USDOT's award of $1.75 billion in private activity bonds for the All Aboard Florida passenger train project.

The planned passenger trains would pass through the two counties on their route between Miami and Orlando.

Cooper said that the counties proved that the bond allocation should have been considered in a federal environmental review process. He denied motions to dismiss the case by the USDOT and All Aboard Florida.

"Martin County is very pleased with the decision and believes that the public will have more information as a result of the court action than they've ever had before about the project," said Stephen Ryan, a partner with McDermott Will & Emery LLP, which represents Martin County.

Cooper said that the counties had legal standing to proceed with their challenges because they demonstrated that the $3.5 billion train project likely will not be built without tax-exempt financing — a reversal from a decision in June 2015.

Cooper said information produced during discovery raised "legitimate questions" about All Aboard Florida's commitment to completing the second phase of its project, from West Palm Beach to Orlando, without the use of private activity bonds.

"First of all, PAB-based financing is not just the 'current financing plan' for the project – it appears to be the only financing plan," Cooper wrote. "This strikes the court as unusual given the uncertainty surrounding the PAB issue, particularly for a company that has expressed its concern" about keeping the project on schedule and avoiding losses due to delays.

Cooper said the issue "casts some doubt as to whether AAF is truly serious about moving forward with phase 2 of the project regardless of the outcome of this lawsuit."

“It also indicates that AAF may have simply assumed that alternative financing would be available,” he said.

The ruling is a “really significant victory,” said Indian River County Attorney Dylan Reingold.

He said that information the counties produced in discovery convinced the judge to change his mind about whether AAF needed bond financing for Phase 2 of the project.

“The judge told us we have standing, and we met that burden,” he said.

USDOT referred questions to the U.S. Department of Justice, which did not immediately respond to requests for comment.

All Aboard Florida did not immediately respond to requests for comment.

AAF, which is owned by Fortress Investments Group, is attempting to create a privately funded and operated passenger train service, the nation’s first in decades.

Private financing is in place for its first phase, linking Miami, Fort Lauderdale and West Palm Beach, where stations are under construction, according to court documents.

In Phase 2, Martin and Indian River counties have cited potential harm to public services and archaeological sites from 32 planned high-speed trains daily in separate suits filed in the District of Columbia.

Both cases contended that USDOT’s December 2014 allocation of bonds should have been considered as part of federal agency reviews under the National Environmental Policy Act.

USDOT and All Aboard Florida argued that the approval of private activity bonds was not a major federal action that would trigger a NEPA review.

The judge disagreed.

Cooper compared the benefits of the $1.75 billion PAB allocation with a $1.6 billion low-interest loan that All Aboard Florida applied for from the Railroad Rehabilitation and Improvement Financing program.

Under federal rules, the RRIF loan is considered a major federal action that triggered a NEPA review, although AAF has not completed the loan process.

“In the court’s view, then, if the amount of federal assistance conferred by the RRIF loan can support a finding of major federal action, so too can the amount of federal assistance conferred by the PAB-allocation decision,” Cooper said.

Cooper also said the fact that USDOT, as a condition of receiving the PAB financing, required All Aboard Florida to comply with an “extensive” list of mitigation measures imposed by the final environmental impact statement indicated that USDOT had “the requisite degree of control called for by NEPA and related statutes so as to implicate major federal action.”

Cooper refused to dismiss claims by the counties that the bond allocation violated NEPA, the National Historic Preservation Act and the Department of Transportation Act.

“I see this as a big game changer as to where this case proceeds,” Reingold said.

Ryan and Reingold said they would confer on the next stage of the litigation, which could be a trial or a ruling on summary judgment.

All Aboard Florida has said it plans to begin the first phase of train service – which it has branded as "Brightline" — next year.

The company tried and failed to privately place the unrated, uninsured bonds after the Florida Development Finance Corp. agreed to be the conduit issuer last year.

The company blamed the tight bond market, as volatility increased and high-yield investor demand dried up in the months before the Fed increased the borrowing rate 25 basis points in December.

The delayed sale led the USDOT in December to grant AAF an extension of time to issue the bonds and agree to allow the debt to be sold in multiple offerings, rather than issuing all $1.75 billion at one time.

In Tuesday's ruling, Cooper examined difficulties AAF had issuing the PABs as part of his analysis about whether the company could avail itself of other types of financing.

AAF's first tried to sell the PABs in August at an interest rate of 6% for a single tranche of up to $1.75 billion, Cooper said, adding, "AAF found that it could not sell all its PABs at that rate on the terms it wanted."

In September, deal was structured at a higher 7.5% interest rate with bonds in two tranches, one for $1.35 billion and the other for $400 million.

"Again, there was insufficient interest from investors for AAF to close on the sales on AAF's terms," Cooper said.

In November, after issuing a third supplement to the offering memorandum, AAF kept the projected interest rate at 7.5% but added additional terms "that were arguably more favorable to investors," he wrote.

"Each time [AAF] was either unable to conclude a deal or chose not to do so, depending on whose framing of the issue one prefers," Cooper said. "Either way, the fact remains that the AAF project repeatedly did not generate sufficient interest to result in a sale of all bonds at the 7.5% rate."

All Aboard has argued that it would use other forms of financing for the project, including taxable bonds, but the judge was skeptical of its ability to do so.

"It strikes the court as reasonable that a full sale of the PABs would require an interest rate of at least 8% in the present market, which would bump the interest rate for taxable bonds into the range that AAF acknowledged is unacceptable."

A banker familiar with the PAB deal, who asked not to be identified, said he was told that AAF decided to postpone the offering until all legal issues were cleared up.

All Aboard Florida has until Jan. 1 to issue the bonds, according to the USDOT.

In a statement Wednesday, CARE FL, a local anti-train organization, said that although AAF claims that it is a privately funded project the court ruling proves that AAF is dependent on public support from the tax benefit provided by allowing tax-exemption on its bonds.

The group's steering committee chairman, Brent Hanlon said AAF would travel through heavily populated Treasure Coast areas and require residents to bear additional financial burdens and safety risks.

"We especially applaud the Martin County and Indian River Board of County Commissioners and legal teams for their leadership and steadfast commitment in the fight against AAF," Hanlon said.

The Bond Buyer

By Shelly Sigo

August 17, 2016
