Decades of Regulatory Exemptions Have Been to the Detriment of the Municipal Bond Market.

Two municipal market veterans, David Dubrow and Kent Hiteshew, delve into the history and current state of disclosure practices in the municipal bond market, highlighting the flaws in the current system. In a follow up, the authors will explore potential paths to reform and key components of a uniform standard of disclosure for municipal securities.

While consistent with applicable securities laws, the customs and practices for preparing offering statements for tax-free municipal securities are functionally and practically flawed. This reality is to the detriment of the municipal bond market and its investors.

The four trillion dollar United States municipal bond market comprises a dizzying array of governmental issuer types and credit structures. These range from simple general obligation bonds of state and local governments to revenue bonds issued by government conduits and secured by real estate projects or certain other private enterprises granted access to tax-free debt by the federal tax code. Other than the applicability of the anti-fraud provisions of federal securities laws, however, offering statements for new municipal securities are exempt from uniform disclosure standards. This is distinctly different from corporate securities which are regulated under federal law. Consequently, while disclosure is required to be materially accurate, it is too often not user friendly and negatively affected by motivations of critical market participants. Inconsistent and confusing disclosure contributes to market opacity and illiquidity and prevents investors from being able to properly evaluate the full risks of their potential purchases.

Unregulated municipal disclosure practices can be adversely influenced by a number of factors. Issuers may view their disclosure as a marketing device to promote the sale of their bonds rather than an objective description of the security and its risks. Underwriters may not be sufficiently critical of proposed disclosure for fear of losing future business opportunities with the issuer. Appraisers and market experts hired by issuers or conduit borrowers may produce overly-optimistic reports to satisfy the needs of those that hire them. And lawyers, who draft offering statements, may be overly motivated by protecting themselves from legal liability thereby quoting dense legal documents rather than summarizing such documents in plain English. Overly legalistic document drafting is reinforced by cost pressures and over-reliance on precedent.

Continue reading.

promarket.org

By David Dubrow and Kent Hiteshew

October 22, 2024

Impact of Shorter T+1 Settlement Cycle on US Markets More Severe than Expected, Citi Survey Finds.

The transition to a shorter settlement cycle for US securities transactions has had a more profound impact than anticipated, according to a recent Citigroup survey.

Implemented in May, the new timeline reduced the settlement period for equities, corporate bonds, and municipal bonds from two business days to one, known as T+1.

While this acceleration was designed to enhance market efficiency, it has introduced unforeseen challenges for global market participants.

Citigroup's Securities Services Evolution survey, conducted in June with nearly 500 institutions, reveals that 44% of buy- and sell-side firms found the shift to T+1 to be "more impactful than expected."

This finding highlights the broader implications of the accelerated settlement cycle on the trading ecosystem.

Continue reading.

msn.com

Story by Vatsala Gaur

NFMA Comments on FDTA.

On October 21, 2024, the National Federation of Municipal Analysts submitted comments to the SEC on the proposed rule, FDTA, the Financial Data Transparency Act Joint Data Standards. To read the NFMA's comment letter, click here.

To view the comment letters from other industry stakeholders, go to SEC.gov and/or the Federal Register.

MSRB Advances Important Initiatives at Quarterly Board Meeting.

Washington, D.C. – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met on October 23-24, 2024, holding the first quarterly meeting of fiscal year 2025 and the first meeting under the direction of Board Chair Warren "Bo" Daniels and Vice Chair Jennie Bennett. The Board discussed its FY2025 regulatory agenda and priorities, key market structure and market transparency initiatives, and other actions necessary to advance its FY 2022-2025 Strategic Plan.

"The progress the Board made during our first quarterly meeting—not only setting our priorities but also taking several key actions—establishes a robust regulatory agenda for the year ahead," Daniels said. "MSRB's highest priority is to fulfill our congressional mandate to protect investors, issuers and the public interest by promoting a fair and efficient municipal market, and I am confident this

Board will do just that."

Market Regulation

The Board discussed regulatory matters and acted on several ongoing initiatives including:

- **Rate Card:** Discussed the forthcoming Request for Information (RFI) regarding MSRB's rate card and fee-setting process to evaluate potential modifications to the model.
- **Rule D-15:** Approved the issuance of a Request for Comment on the definition of sophisticated municipal market professionals (SMMPs).
- **Rule A-12:** Approved filing an amendment with the SEC to enhance the collection of information related to bank dealer associated persons.
- **Rule G-27:** Discussed industry feedback in connection with remote supervisory obligations.

Market Structure
The Board continued its on-going discussion of pre-trade municipal market data. The Board discussed feedback received in a series of meetings with market participants following its initial approval of the publication of a concept release in July and agreed to continue an open dialogue with stakeholders as the concept release is finalized.

Market Transparency
The Board received a live demonstration of a "beta" version of the modernized Electronic Municipal Market Access (EMMA) website. The modernized EMMA features myriad stakeholder-driven enhancements to the user interface and experience, including a more powerful search engine and the ability to customize user-generated dashboards, among other improvements.

MSRB Leadership Update
Tangie Davis was promoted to serve as the MSRB's Chief of Staff, having served MSRB most recently as Deputy Chief of Products and Services. Tangie has been with MSRB since 2011. In her new role, she reports to MSRB CEO Mark Kim and oversees the organization's information technology services, finance, human resources, and administration functions.

"I am delighted to welcome Tangie to MSRB's senior leadership team," Kim said. "Tangie is a trusted partner who brings deep experience and knowledge of MSRB and our technology operations in particular, and I look forward to working closely with her in her new role."

Date: October 25, 2024

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GASB Issues Guidance on Disclosure of Certain Capital Assets.

Norwalk, CT, October 17, 2024 — The Governmental Accounting Standards Board (GASB) issued guidance today that establishes requirements for certain types of capital assets to be disclosed separately for purposes of note disclosures.

GASB Statement No. 104, *Disclosure of Certain Capital Assets*, also establishes requirements for capital assets held for sale and requires additional disclosures for those capital assets.

Recent GASB pronouncements like Statement Nos. 87, *Leases,* 94, Public-Private and *Public-Public Partnerships and Availability Payment Arrangements*, and 96, *Subscription-Based Information Technology Arrangements*, created certain types of capital assets, which are described as "right-t--use" assets. In light of the recognition of those new types of assets, the Board decided to consider whether existing disclosure requirements for capital assets should be more prescriptive.

Based on input from financial statement users during the research phase of the project, Statement 104 requires certain types of assets be disclosed separately in the note disclosures about capital assets. This is designed to allow users to make informed decisions about these and to evaluate accountability.

Guidance Requires Separate Disclosure of Four Types of Capital Assets

Statement 104 addresses four types of capital assets that would be disclosed separately in the notes:

1. Lease assets reported under Statement 87, by major class of underlying asset
2. Intangible right-to-use assets recognized by an operator under Statement 94, by major class of underlying asset,
3. Subscription assets reported under Statement 96, and
4. Intangible assets other than those listed in items 1-3, by major class of asset.

Capital Assets Held for Sale

Statement 104 establishes requirements for capital assets held for sale. Under the guidance, a capital asset is a capital asset held for sale if: (a) the government has decided to pursue the sale of the asset, and (b) it is probable the sale will be finalized within a year of the financial statement date. A government should disclose the historical cost and accumulated depreciation of capital assets held for sale, by major class of asset.

The requirements of Statement 104 are effective for fiscal years beginning after June 15, 2025, and all reporting periods thereafter. Earlier application is encouraged.

GASB Statement 104 is available on the GASB website, www.gasb.org.

MSRB Announces Discussion Topics for Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet on October 23-24, 2024, holding the first quarterly meeting of fiscal year 2025. The Board will discuss its priorities for the next fiscal year to advance its FY 2022-2025 Strategic Plan. This will be the first meeting under the direction of MSRB's new Board Chair Warren "Bo" Daniels. Highlights of the Board discussion will include:

Rate Card RFI

The Board will discuss issuing a Request for Information (RFI) regarding MSRB's rate card and fee-setting process to evaluate potential modifications to the model.

Market Regulation

The Board will discuss regulatory matters and receive updates on several ongoing initiatives

including:

- Rule D-15: Defining a sophisticated municipal market professional (SMMP).
- Rule A-12: Enhancing information related to bank dealer associated persons.
- Rule G-27: Discussing industry feedback in connection with remote supervisory obligations.

Market Transparency and Market Data

The Board will also receive an update on the modernization of the Electronic Municipal Market Access (EMMA) website, including a demonstration of stakeholder-driven updates that will enhance the user interface and experience on EMMA, as well as preview a newly redesigned EMMA website which is scheduled to be launched before the end of 2025.

Date: October 16, 2024

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The Municipal Securities Rulemaking Board (MSRB) protects and strengthens the municipal bond market, enabling access to capital, economic growth, and societal progress in tens of thousands of communities across the country. MSRB fulfills this mission by creating trust in our market through informed regulation of dealers and municipal advisors that protects investors, issuers and the public interest; building technology systems that power our market and provide transparency for issuers, institutions, and the investing public; and serving as the steward of market data that empowers better decisions and fuels innovation for the future. MSRB is a self-regulatory organization governed by a board of directors that has a majority of public members, in addition to representatives of regulated entities. MSRB is overseen by the Securities and Exchange Commission and Congress.

GASB Requests Input on Infrastructure Assets Proposals.

Norwalk, CT, October 10, 2024 — The Governmental Accounting Standards Board (GASB) has issued a Preliminary Views (PV) for public comment on proposals associated with accounting and financial reporting for infrastructure assets.

The PV, *Infrastructure Assets*, is intended to set forth and seek comments on the Board’s current views at a relatively early stage of the project. The objective of the project is to reexamine issues associated with accounting and financial reporting for infrastructure assets and consider improvements to existing guidance. These improvements relate to recognition and measurement, note disclosures, and required supplementary information.

Pre-agenda research showed that financial statement users want better information about the condition of infrastructure assets and how the government is maintaining those assets than what is currently available in financial statements. The PV presents the Board’s current thinking on how to provide users with that information.

The Board’s Early Views

Under the Board's preliminary views, *infrastructure assets* would be defined as individual assets that may consist of multiple components that are part of a network of long-lived capital assets that are utilized to provide a particular type of public service, that are stationary in nature, and that can be maintained or preserved for a significant number of years. Typical examples include roads, bridges, and tunnels.

The PV proposes to carry forward existing recognition and measurement requirements for infrastructure assets that allow for governments to measure infrastructure using historical cost net of accumulated depreciation unless the government elects to use the modified approach. The document proposes that governments reporting infrastructure assets measured at historical cost net of accumulated depreciation periodically review estimated useful lives and salvage value. The document also proposes that governments separately depreciate each component of an infrastructure asset that is significant to the total cost of the asset if the useful lives of these components are different.

The PV also proposes that governments electing to report infrastructure assets using the modified approach have processes in place to document that the condition of the assets is being preserved at a level established by the government.

The document proposes to remove some of the existing note disclosures related to infrastructure assets. It also proposes to add four new note disclosures, including a disclosure of maintenance or preservation expenses and another disclosure of assets reported using historical cost net of accumulated depreciation that have exceeded 80 percent of their estimated useful lives. A related schedule of maintenance expenses over the past 10 fiscal years is also proposed to be included in required supplementary information.

Share Your Views

Stakeholders are asked to review and provide input on the document by January 17, 2025. Comments may be submitted either through a comment letter or an electronic input form.

A series of public hearings and user forums on the PV has been scheduled to enable stakeholders to share their views with the Board. Additional information on the public hearings and user forums is available in the document.

Third Quarter 2024 Municipal Securities Market Summary.

View the Market Summary.

10/9/24

The SEC's Recent Off-Channel Communications Settlements Create More Uncertainty: Morgan Lewis

Since December 2021, the US Securities and Exchange Commission (SEC) and Commodity Futures

Trading Commission (CFTC) have been conducting a sweep of Wall Street's "off-channel" communications—such as text messages, iMessages, WhatsApp messages—sent and received by employees of registered entities using their personal devices. Despite more than 80 SEC-settled orders in the off-channel space (and nearly as many with the CFTC), the path to compliance for broker-dealers, investment advisers, and other financial institutions is still far from clear and numerous questions remain.

BACKGROUND

The SEC's sweep first focused on the largest broker-dealers, then quickly expanded in scope. Over the last four years, more than 100 entities have settled off-channel recordkeeping charges, including broker-dealers, dually registered broker-dealer/investment advisers, standalone investment advisers, credit ratings agencies, and municipal advisors.

These firms have been charged with, among other things, violations of the recordkeeping rules promulgated under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. [1] Until recently, the settlements have included civil penalties ranging from five to nine figures (with nearly all in the many millions). The vast majority of settling respondents have also been required to retain independent compliance consultants (ICC) for multiyear engagements, a further significant expense. Additionally, in nearly all the settlements to date, the respondents were required to admit to the alleged conduct—typically a rarity in SEC settlements.

Continue reading.

Morgan, Lewis & Bockius LLP – Michael A. Hacker, Caitlin S. Onomastico, Emily E. Renshaw and Alyse J. Rivett

October 1 2024

SEC Resolution Spotlights Implications of Self-Reporting and Violations of Firm Communications Policies: Sullivan & Cromwell

Read the Article.

Sullivan & Cromwell LLP

September 26 2024

MSRB Publishes FY 2025 Budget.

Washington, D.C. – The Municipal Securities Rulemaking Board (MSRB) today published its annual budget to report on the allocation of its resources as it fulfills its congressional mandate to protect investors, issuers and the public interest by promoting a fair and efficient market. MSRB publishes its budget annually to meet the highest standards of financial transparency.

For FY 2025, the MSRB Board approved a $48.8 million budget, representing a modest increase of approximately 2.9% over the prior year. The budget provides the necessary funds to modernize the

MSRB rulebook, engage in key regulatory initiatives and make strategic investments in technology and data to promote the transparency and efficiency of the $4 trillion municipal securities market.

Over the past year, MSRB has welcomed the opportunity for increased dialogue with its stakeholders including broker-dealers, municipal advisors, investors, issuers and other market participants through a series of industry town hall meetings focused on its budget. These town halls not only helped to inform and enhance MSRB's budgeting process but also how it communicates its budget and regulatory priorities to the public.

"We have taken to heart stakeholder requests for more clarity around our budget, particularly regarding our investments in technology, which represent our largest expense and approximately half of our annual budget," MSRB Chair Warren "Bo" Daniels and MSRB CEO Mark Kim said in a letter to stakeholders. "We've reorganized our technology functions into more discrete units, which enabled us to provide more relevant budgetary information about these functions."

In 2025, MSRB will celebrate 50 years since Congress established it as a self-regulatory organization for the municipal securities market. It also marks the final year of MSRB's four-year strategic plan to deploy the tools of regulation, technology and data in impactful ways that strengthen the municipal securities market and serve the public interest. Major initiatives for FY 2025 include:

Modernizing EMMA

MSRB will launch a modernized Electronic Municipal Market Access (EMMA®) website beginning with a beta version in early 2025. This has been a multi-year endeavor driven by extensive feedback from a wide variety of market participants. Stakeholder comments and insights continue to inform MSRB's major technology initiatives, and the beta site will be another opportunity for industry stakeholders to provide feedback on the upcoming version of EMMA.

Modernizing Market Regulation

MSRB will also continue its retrospective rule review and rulebook modernization initiative. This work will include implementing changes to MSRB's trade reporting rule to increase the timeliness of price transparency for investors and harmonizing MSRB's supervisory rule for broker-dealers with those of fellow regulator FINRA in light of changing work patterns. It will also include reviewing MSRB's rules, including its body of municipal advisor rules adopted since the Dodd-Frank Act was enacted nearly 15 years ago, to ensure that they remain operationally effective, allow for varying business models, and maintain appropriate investor and municipal entity protections.

"We hope that the additional detail provided in this report continues to bolster confidence and trust in MSRB's commitment to financial stewardship and stakeholder engagement," Daniels and Kim said. "After all, giving America the confidence to invest in our communities through the municipal securities market remains our vision and highest priority, and together with stakeholders and the public we serve, we look forward to doing just that in 2025 and beyond."

Read the budget.

Date: October 01, 2024

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ESG Pseudo-Science Gets Brutally Debunked.

Many states have passed legislation to protect their economies and their retirees, requiring that public funds be invested with financial institutions focused solely on financial performance, not environmental, social and governance or "ESG" goals.

ESG activists oppose such laws. They would prefer to steer investments toward favored causes and away from disfavored ones, such as fossil energy producers and gun manufacturers.

When confronted with retirees' rights to have their money managed to maximize returns, not for political causes, the ESG activists have a stock response. They typically cite two studies that supposedly showed increased costs from laws that rule out investing based on ESG concerns.

Continue reading.

THE HILL

by Paul Fitzpatrick, opinion contributor – 09/24/24

Remarks – California Debt and Investment Advisory Commission: Municipal Debt Essentials Seminar (Responsibilities of Regulated Entities to Municipal Issuers)

Dave A. Sanchez, Director, Office of Municipal Securities
California Debt and Investment Advisory Commission: Municipal Debt Essentials Seminar
Pomona, CA
Sept. 26, 2024

Good morning, everyone:

As is customary, my comments today are provided in my official capacity as Director of the Office of Municipal Securities, but do not necessarily reflect the views of the Commission, the Commissioners, or members of the staff.

I want to start by thanking the California Debt and Investment Advisory Commission ("CDIAC") for inviting me to speak here today. I also want to thank all the panelists and moderators for their time and effort and to everyone involved with putting together this incredibly important program on municipal debt essentials. I started my public finance career in California and consulted the CDIAC debt primer constantly to learn about how debt offerings work in California. And throughout my career, but especially lately, CDIAC educational offerings have been invaluable to me and other municipal market participants as they address the most timely and meaningful topics in the market. We are lucky to have such a great resource here in California.

I also want to thank all of you for attending this program. As government officers, you play a crucial role in the municipal securities market and are in the unique position of being able to influence the practices of the various professionals that you may choose to hire when issuing bonds. As such, it is also important that you understand the federal protections that exist to help ensure that some of those professionals you may hire fulfill their regulatory duties, including fair dealing and acting in

your best interests, particularly when it comes to advising you on big picture decisions such as when and how much to borrow, method of sale and the amount of interest you have to pay on your bonds.

When doing a deal, you may find yourself employing the services of a municipal advisor, various other legal counsel and advisors, and an underwriter. Today, I will be focusing on the duties of municipal advisors but will also touch briefly on the duties of underwriters. For those who may be unfamiliar, a municipal advisor – sometimes imprecisely referred to as a financial advisor – is often engaged by the borrower/issuer (i.e., you) to provide advisory services as to municipal financial products and issuance of municipal securities, and the structuring of such transactions.[1] Currently, there are over 400 registered municipal advisors, ranging from large firms with national coverage to sole proprietorships.[2] An underwriter is typically a firm, or one of a group of firms, that purchase securities from the issuer and then offer them to investors.[3]

1. the Municipal Advisor Rule and Accompanying Protections

Keeping track of the different categories of regulated entities and corresponding regulators can be confusing, so let me start with a brief explanation of who the regulators are and the types of entities that they regulate. Municipal advisors are primarily regulated by the Securities and Exchange Commission (SEC). The SEC also regulates broker-dealers and regulates municipal issuers with respect to disclosure through the operation of the antifraud provisions.[4] In 2010, Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) amended Section 15B of the Securities Exchange Act of 1934 (Exchange Act) to add a new requirement that "municipal advisors" register with the SEC.[5] In 2013, the SEC approved what is known as the Municipal Advisor Rule and it has been effective since 2014.[6] The Municipal Advisor Rule establishes a registration regime for professionals who engage in municipal advisory activities[7] and, among other things, provides that municipal advisors and any person associated with such municipal advisor are deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor.[8]

The Municipal Securities Rulemaking Board (MSRB) (a self-regulatory organization) was established by Congress in 1975 and charged with a mandate to protect investors, municipal entities, obligated persons, and the public interest.[9] Congress initially authorized the MSRB to regulate the activities of broker-dealers and banks that buy, sell, and underwrite municipal securities.[10] In 2010, Congress expanded the MSRB's authority to include the regulation of municipal advisors.[11] The MSRB does not regulate municipal entities, including issuers of municipal securities.[12] The MSRB is overseen by Congress and the SEC, and MSRB rules generally must be approved by the SEC before becoming effective.[13] The MSRB does not carry out the enforcement of its rules or conduct compliance examinations.[14] Instead, the SEC and the Financial Industry Regulatory Authority (FINRA) share responsibility for enforcement and compliance examinations.[15]

But back to the Municipal Advisor Rule which, for me, is first and foremost a consumer protection rule, with the consumers being all of you who utilize the services of a municipal advisor. For example, the Municipal Advisor Rule requires any firm that engages in municipal advisory activities to file an initial registration with the SEC to disclose information such as the firm's direct and indirect ownership, other business activities, and any prior regulatory or criminal actions.[16] Each municipal advisory firm must also file an annual update that includes any changes to any previously filed information.[17] Additionally, the municipal advisory firm must also file a form for each person associated with the firm who is engaged in municipal advisory activities which discloses information on that person's education and employment history as well as information on any criminal or regulatory actions, investigations, terminations, and customer complaints.[18] These important disclosures are publicly available on the SEC's EDGAR website,[19] and I encourage all of you to consult that site as you interact with different municipal advisors throughout your business. We

continue to see a concerning number of unregistered entities engaging in what appears to be municipal advisory activity[20] and urge you to confirm that any professional providing municipal advisory services to you is properly registered. If you believe someone is not properly registered, please consider submitting a tip on the SEC's website at https://www.sec.gov/submit-tip--r-complaint or reaching out to the Office of Municipal Securities at munis@sec.gov.

Accordingly, you should also be aware of the robust rules in place that municipal advisors must adhere to when providing municipal advisory services to their municipal entity clients. For example, municipal advisors are required to follow certain standards of conduct when engaging with their municipal entity clients.[21] The Exchange Act establishes standards of conduct for municipal advisors engaging in municipal advisory activity.[22] MSRB Rule G-42 also articulates standards of conduct for municipal advisors engaging in municipal advisory activities.[23] When performing municipal advisory activities for a municipal entity client or an obligated person client, a municipal advisor must act in accordance with a duty of care.[24] A municipal advisor acting with a duty of care must, among other things:

- Possess the degree of knowledge and expertise needed to provide a client informed advice;
- Make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action, such as the issuance of securities;
- Make a reasonable inquiry as to the facts that form the basis for any advice the municipal advisor provides to a client; and
- Have a reasonable basis for any advice provided to a client.[25]

Additionally, and very importantly, municipal advisors to a municipal entity client are also subject to a duty of loyalty.[26] The duty of loyalty requires a municipal advisor to deal honestly and with the utmost good faith and act in its municipal client's best interests without regard to the financial or other interests of the municipal advisor.[27]

Municipal advisors are also required to disclose material conflicts of interest to their clients, and those disclosures are some of the most important protections issuers have in evaluating whether their municipal advisor is acting in the client's best interest.[28] Rule G-42 requires a municipal advisor to make a full and fair disclosure, in writing, of all material conflicts of interest and all legal and disciplinary events that are material to a client's evaluation of a municipal advisor or the integrity of its management and advisory personnel.[29] These disclosures must be provided to the municipal client by the municipal advisor prior to or upon engaging in municipal advisory activities for the municipal client or on the municipal client's behalf.[30]

Municipal advisors are also required to document their municipal advisory relationship with their municipal clients in writing, and the documentation must be dated and delivered to the municipal client prior to, upon, or promptly after the municipal client and the municipal advisor establish their municipal advisory relationship.[31] This also helps ensure that both the municipal issuer client and the municipal advisor have clear expectations about the activities to be performed by the municipal advisor.

2. The Municipal Advisor Rule and Key Decisions in the Issuance Process

The protections just discussed apply to all of the advice provided to you by a municipal advisor. But, I wanted to discuss how these protections work in the context of several key points in the issuance process. First, these protections apply to advice given as to whether to proceed with a bond issuance.[32] In many instances, but particularly in the case of a refunding, one of the first decisions you would have to make is whether it is even necessary or advisable to do the deal. Many times, your municipal advisor (as well as other professionals) will have an inherent conflict of interest because

they will only get paid if a deal is done, thus giving them an incentive to recommend borrowing. The SEC recently brought an action against a municipal advisor for recommending a borrowing when the municipal entity had sufficient reserves to cash fund a project.[33] In that case the recommendation to borrow was based on an analysis that led to inaccurate conclusions regarding the relative costs of different options.[34] Commentators have also raised question about the economics of taxable advance refundings and tenders that take the place of traditional refundings.[35] Particularly when the idea to borrow money or refund bonds is not your own, your municipal advisor or underwriter should be presenting you with recommendations that are not based on materially inaccurate or incomplete information.[36] This analysis could include items such as a cost analysis of different funding options.

Another major decision you will face is whether to do a competitive or negotiated sale.[37] A competitive sale occurs when multiple underwriters compete by submitting purchase bids consisting of coupons, yields, and the underwriter's discount, with the issuer generally selecting the underwriter with the lowest true cost.[38] By contrast, in a negotiated sale, the issuer selects the underwriter at the outset of the financing, well in advance of the sale of the bonds, usually after an RFP process.[39] Numerous studies[40] suggest that competitive sales are more efficient for the issuer in the majority of transactions. In the last few decades, however, the majority of deals have been negotiated sales.[41] From 2018 through 2022, 46.4% of deals nationwide (representing 26.8% of total par value) were competitive sales.[42] In California, during that same period, the number was even lower: a mere 12.8% of deals were competitive sales.[43] By contrast, in New York, 84.5% of deals during that period were competitive sales.[44] Given that independent research suggests that competitive sales are more efficient with a lower true interest cost (TIC) for the borrower in the majority of transactions,[45] I am concerned about the number of municipal entities still choosing to do negotiated sales and question whether this may be due to municipal entities not being given enough information to make the best decision for themselves on what method sale to utilize. I am not the only one concerned about this issue; just last year the State of California Treasurer's Office gave a presentation to the California Society of Municipal Finance Officers to offer a "fresh look" at competitive sales.[46]

There are a few possible reasons why negotiated sales remain the dominant method of sale despite evidence that competitive sales may result in interest cost savings for issuers in a large number of cases.

The first is that municipal entities are accustomed to doing negotiated sales and are hesitant to stray from their past, established practice.[47] It is just a matter of habit. However, one recent paper from the Chief Economist of the MSRB affirmed that negotiated offerings tend to trade at higher prices than competitive offerings in the secondary market,[48] which suggests that issuers could get lower interest rates on their debt with a competitive sale, depending on the particular facts and circumstances. Given that, I urge you all to not fall into the trap of choosing one method of sale simply because that is the way things have always been done at the expense of the potential interest savings that could be achieved by evaluating your options each time you go to market. To be clear, there is nothing preventing a municipal entity from continuing to prefer negotiated sales. We recognize that issuers may have policy reasons to prefer a negotiated sale, and negotiated sales may continue to be preferable in certain circumstances.[49]

The second possible reason why negotiated sales remain the dominant method of sale is that municipal advisors are failing to even raise with issuers the possibility of a competitive sale. As I mentioned earlier, municipal advisors who provide advice on the issuance of bonds have a fiduciary duty to their clients. But, given the continued prevalence of negotiated sales,[50] it is important to remind municipal advisors of how that duty is implicated when they are providing advice on the

method of sale. Municipal advisors should carefully evaluate the sufficiency of the information they provide to issuers before issuers make a choice about what method of sale to use. A municipal advisor may claim that a deal comes to them where this decision is already made, but a non-binding agreement to do a negotiated sale does not absolve a municipal advisor of its fiduciary duty to explore and present alternatives to you.[51] You may worry that municipal advisors will take advantage of this obligation as an excuse to prepare extra, unnecessary reports and run up costs. But remember that it is you – the issuer – who remains in control of the municipal advisor relationship and the bond issuance process. Our goal is simply to make sure that your municipal advisor fulfills its duties to you in the context of that relationship.

In sum, when I see the continued prevalence of negotiated sales, I ask myself whether the appropriate gatekeepers (i.e., municipal advisors) are fulfilling their responsibilities. None of these responsibilities are new. Dodd-Frank[52] was passed almost 13 years ago, the MSRB Rule G-42 standards of conduct are from 2016, and the Municipal Advisor Rule was adopted 10 years ago.[53] In addition to the two major issues raised above, we will continue to focus on price movement and trading immediately after issuance in negotiated sales and remind municipal advisors and underwriters of their regulatory responsibilities with respect to pricing. This could include comparing the results of negotiated sales not only to other comparable negotiated sales but also to comparable competitive sales. For municipal advisors these responsibilities could also include appropriate responses to oversubscription rates during pricing as well as monitoring post-issuance sales activity.[54] We are not the only ones monitoring price movement and trading; the Chief Economist of the MSRB recently looked at data from January 2019-December 2021 and found that the median trade spread for offerings that trade in the first 30 days post-issuance is -1 basis points for competitive offerings but 11.4 basis points for negotiated offerings.[55] This could reflect that the negotiated sale resulted in a higher than necessary cost of borrowing for the issuer. We encourage you to remain vigilant against decision inertia, and especially to ask questions of your municipal advisor about the major decisions you will make during the issuance process, and know the protections available under the Municipal Advisor Rule.

Again, thank you again to the staff at CDIAC and our municipal market participants for putting this seminar together and thank you for attending.

Lastly, I invite you to visit OMS's (sec.gov/municipal), MSRB's, and FINRA's websites for regulatory and compliance information and helpful updates. Our website in particular contains a host of information and guidance on the Municipal Advisor Rule, and frequently updates its information for market participants. My hope is that you will consult those resources now and throughout your careers to understand the protections afforded to your municipal entities. Our Office also runs a help line and email inbox which can be found on our website. If you ever have any questions at all, please don't hesitate to call or email our Office.

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[1] See 15 U.S.C. 78o-4(e)(4).

[2] See SEC, Information About Registered Municipal Advisors, available at https://www.sec.gov/about/foiadocsmuniadvisors. See also MSRB, MSRB-Registered Municipal Advisor Firms and Qualified Representatives and Principals, available at https://www.msrb.org/Municipal-Advisors.

[3] See 15 U.S.C. 78c(a)(20); 15 U.S.C. 80b-2(a)(20). See also MSRB, The Underwriting Process, available at https://www.msrb.org/Underwriting-Process.

[4] See 15 U.S.C. 77q(a)(1)-(3), 15 U.S.C. 78j(b), and 17 CFR 240.10b-5.

[5] See 15 U.S.C. 78o-4(a)(1)(B).

[6] See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013).

[7] See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013). Pursuant to Rule 15Ba1-1(e) (15 CFR § 240.15Ba1-1(e)), "municipal advisory activities" include, but are not limited to, "[p]roviding advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues").

[8] See 15 U.S.C. 78o-4(c)(1). Exchange Act Section 15B(c)(1) does not provide that municipal advisors are deemed to have a fiduciary duty insofar as their advice is to non-municipal entity obligated person clients. MSRB Rule G-42 establishes the core standards of conduct and duties of municipal advisors when engaging in municipal advisory activities. See MSRB Rule G-42(a)-(e).

[9] See 15 U.S.C. 78o-4(b)(2). See also MSRB, The Role and Jurisdiction of the MSRB, pg. 2, available at https://www.msrb.org/sites/default/files/2022-09/Role-and-Jurisdiction-of-MSRB.pdf.

[10] See 15 U.S.C. 78o-4(b)(2). See also MSRB, The Role and Jurisdiction of the MSRB, pg. 2, available at https://www.msrb.org/sites/default/files/2022-09/Role-and-Jurisdiction-of-MSRB.pdf.

[11] See 15 U.S.C. 78o-4(b)(2). See also MSRB, The Creation of the MSRB, available at https://www.msrb.org/MSRB-News/Creation-MSRB.

[12] See 15 U.S.C. 78o-4(d).

[13] See 15 U.S.C. 78s(b).

[14] See 15 U.S.C. 78o-4(b)(4).

[15] See MSRB, The Role and Jurisdiction of the MSRB, pg. 2, available at https://www.msrb.org/sites/default/files/2022-09/Role-and-Jurisdiction-of-MSRB.pdf.

[16] See SEC, Instructions for the Form MA Series, available at https://www.sec.gov/files/formmadata.pdf.

[17] See SEC, Instructions for the Form MA Series, available at https://www.sec.gov/files/formmadata.pdf.

[18] See SEC, Instructions for the Form MA Series, available at https://www.sec.gov/files/formmadata.pdf.

[19] See SEC, Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system, available at https://www.sec.gov/edgar/search.

[20] See SEC, Unregistered Municipal Advisor Enforcement Actions, available at https://www.sec.gov/about/divisions-offices/office-municip-
l-securities/unregistered-municipal-advisor-enforcement-actions.

[21] See MSRB Rule G-42.

[22] See 15 U.S.C. 78o-4(c)(1).

[23] See MSRB Rule G-42.

[24] See MSRB Rule G-42(a).

[25] See e.g., MSRB Rule G-42(a), Supplemental Material .01; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[26] See e.g., MSRB Rule G-42(a)(ii), Supplemental Material .02; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[27] See e.g., MSRB Rule G-42(a)(ii), Supplemental Material .02 and .03; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[28] See e.g., MSRB Rule G-42(b), Supplemental Material .05; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[29] See e.g., MSRB Rule G-42(b), Supplemental Material .05; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[30] See e.g., MSRB Rule G-42(b)-(c), Supplemental Material .05 and .06; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[31] See e.g., MSRB Rule G-42(c), Supplemental Material .06; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf.

[32] See In the Matter of Fieldman Rolapp & Assoc., Inc., and Anna Sarabian (settled action), Exchange Act Release. No. 98510 (September 25, 2023). See also MSRB Rule G-42.

[33] See In the Matter of Fieldman Rolapp & Assoc., Inc., and Anna Sarabian (settled action), Exchange Act Release. No. 98510 (September 25, 2023).

[34] See In the Matter of Fieldman Rolapp & Assoc., Inc., and Anna Sarabian (settled action), Exchange Act Release. No. 98510 (September 25, 2023).

[35] See generally Andrew Kalotay, Taxable Advance Refundings: A Critical Examination, 39 J. Tax'n Inv. 49 (2021); Kalotay, Andrew and Luby, Martin, Savings Lost: The Damage of Taxable Advance Refundings to Taxpayers (September 28, 2023), available at https://ssrn.com/abstract=4586951.

[36] See e.g., MSRB Rule G-42, Supplemental Material .01; MSRB, Municipal Advisors Understanding Standard of Conduct, (April 2016) available at https://www.msrb.org/sites/default/files/2022-08/MSRB-Rule-G-42-for-Municipal-Advisors.pdf (setting forth the “reasonable basis” requirement that a municipal advisor must fulfill when making a recommendation to a client).

[37] See 15 U.S.C. 78o-4(c)(1). See also Rule 15Ba1-1(e) (15 CFR § 240.15Ba1-1(e)) which defines "municipal advisory activities" to include "[p]roviding advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues").

[38] See CDIAC, Understanding Methods of Sale (October 28, 2016), available at https://www.treasurer.ca.gov/cdiac/seminars/2016/20161026/day3/2.pdf.

[39] See CDIAC, Understanding Methods of Sale (October 28, 2016), available at https://www.treasurer.ca.gov/cdiac/seminars/2016/20161026/day3/2.pdf.

[40] See, e.g., Liu, Gao, Self-Selection Bias or Decision Inertia? Explaining the Municipal Bond 'Competitive Sale Dilemma' (March 2018), available at https://ssrn.com/abstract=3014183; Cestau, Dario and Green, Richard C. and Hollifield, Burton and Schuerhoff, Norman, The Cost Burden of Negotiated Sales Restrictions: A Natural Experiment Using Heterogeneous State Laws (November 2017), available at https://www.brookings.edu/wp-content/uploads/2017/11/wp363.pdf; Moldogaziev, Tima and Tatyana Guzman, Which Bonds Are More Expensive? The Cost Differentials by Debt Issue Purpose and the Method of Sale: An Empirical Analysis (Fall 2012), available at https://doi.org/10.1111/j.1540-5850.2012.01013.x.

[41] See Wu, Simon, Competitive Bidding for Primary Offerings of Municipal Securities: More Bids, Better Pricing for Issuers? (July 2020), available at https://www.msrb.org/sites/default/files/MSRB-Competitive-Bidding.pdf; Bergstresser, Daniel and Cohen, Randolph, Competitive Bids and Post-Issuance Price Performance in the Municipal Bond Market (March 2015), available at https://people.brandeis.edu/~dberg/papers/competitive_20150303.pdf (Table 1).

[42] See CSMFO, Competitive vs. Negotiated Methods of Bond Sale: A Fresh Look (Feb. 1, 2023), available at https://cdn.ymaws.com/csmfo.org/resource/resmgr/conference/presentations/2023/Competitive-vs-Negotiated-Me.pdf.

[43] See CSMFO, Competitive vs. Negotiated Methods of Bond Sale: A Fresh Look (Feb. 1, 2023), available at https://cdn.ymaws.com/csmfo.org/resource/resmgr/conference/presentations/2023/Competitive-vs-Negotiated-Me.pdf.

[44] See CSMFO, Competitive vs. Negotiated Methods of Bond Sale: A Fresh Look (Feb. 1, 2023), available at https://cdn.ymaws.com/csmfo.org/resource/resmgr/conference/presentations/2023/Competitive-vs-Negotiated-Me.pdf.

[45] See, e.g., Liu, Gao, Self-Selection Bias or Decision Inertia? Explaining the Municipal Bond 'Competitive Sale Dilemma' (March 2018), available at https://ssrn.com/abstract=3014183; Cestau, Dario and Green, Richard C. and Hollifield, Burton and Schuerhoff, Norman, The Cost Burden of Negotiated Sales Restrictions: A Natural Experiment Using Heterogeneous State Laws (November 2017), available at https://www.brookings.edu/wp-content/uploads/2017/11/wp363.pdf; Moldogaziev, Tima and Tatyana Guzman, Which Bonds Are More Expensive? The Cost Differentials by Debt Issue Purpose and the Method of Sale: An Empirical Analysis (Fall 2012) available at https://doi.org/10.1111/j.1540-5850.2012.01013.x.

[46] See Competitive vs. Negotiated Methods of Bond Sale: A Fresh Look (Feb. 1, 2023), available at

https://cdn.ymaws.com/csmfo.org/resource/resmgr/conference/presentations/2023/Competitive-v--Negotiated-Me.pdf.

[47] See, e.g., Liu, Gao, Self-Selection Bias or Decision Inertia? Explaining the Municipal Bond 'Competitive Sale Dilemma' (March 2018), available at https://ssrn.com/abstract=3014183.

[48] See, e.g., Wu, Simon and Ostroy, Nicholas, Primary Offerings of Municipal Securities: Impact of COVID-19 Crisis on Competitive and Negotiated Offerings (October 2022), available at https://www.msrb.org/sites/default/files/2022-10/Competitive-and-Negotiated-Offerings.pdf. This study considered data from January 2019-December 2021 which included the disruptive "COVID Period" of March-May 2020.

[49] But see Competitive vs. Negotiated Methods of Bond Sale: A Fresh Look (Feb. 1, 2023), available at https://cdn.ymaws.com/csmfo.org/resource/resmgr/conference/presentations/2023/Competitive-vs-Negotiated-Me.pdf (debunking some of the common situations where issuers might believe a negotiated sale is preferable); Cestau, Dario and Green, Richard C. and Hollifield, Burton and Schuerhoff, Norman, The Cost Burden of Negotiated Sales Restrictions: A Natural Experiment Using Heterogeneous State Laws (November 2017), available at https://www.brookings.edu/wp-content/uploads/2017/11/wp363.pdf.

[50] See Wu, Simon, Competitive Bidding for Primary Offerings of Municipal Securities: More Bids, Better Pricing for Issuers? (July 2020), available at https://www.msrb.org/sites/default/files/MSRB-Competitive-Bidding.pdf; Bergstresser, Daniel and Cohen, Randolph, Competitive Bids and Post-Issuance Price Performance in the Municipal Bond Market (March 2015), available at https://people.brandeis.edu/~dberg/papers/competitive_20150303.pdf (Table 1).

[51] See generally Comer Capital Group, LLC and Brandon L. Comer, SEC, Lit. Rel. No. 25945, Jan. 31. 2024, available at https://www.sec.gov/enforcement-litigation/litigation-releases/lr-25935 (Comer Capital Group, LLC and Brandon L. Comer consented to entry of a final judgment without admitting or denying the allegations in the SEC's complaint); see also SEC v. Comer Cap. Group et al, No. 19-civ-04324 (N.D. Ill.) filed June 27, 2019.

[52] Pub. L. 111-203, 124 Stat. 1376.

[53] See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468 (Nov. 12, 2013).

[54] These responsibilities may be agreed to or accepted through a course of conduct. See generally, MSRB, Considerations for Assessing Written Supervisory Procedures for Municipal Advisory Services (including the Process for New Issue Pricing), (November 2022) available at https://www.msrb.org/sites/default/files/2022-11/MA-Pricing.pdf. This guidance resource is not a rule, has not been filed with SEC, and has not been approved nor disapproved by the SEC. Regulated entities, examining authorities and others should not interpret this resource as a rule or establishing new or additional obligations for any person. See also MSRB Rule G-42(a), Supplemental Material .01.

[55] See, e.g., Wu, Simon and Ostroy, Nicholas, Primary Offerings of Municipal Securities: Impact of COVID-19 Crisis on Competitive and Negotiated Offerings (October 2022), available at https://www.msrb.org/sites/default/files/2022-10/Competitive-and-Negotiated-Offerings.pdf (examining data from January 2019–December 2021 which included the disruptive "COVID Period" of March-May 2020). See also MMA, Municipal Strategist (June 20, 2024) (comparing secondary

trade breaks in competitive sales versus negotiated sales for the years 2018-2024).

Orrick Summary Guide: Campaign Spending and Activity Rules for School District Employees

Introduction

School district employees and officers must adhere to strict rules regarding any campaign spending and activities, especially in the context of promoting a school district bond measure. The use of public funds and resources for partisan campaigning is heavily regulated to prevent an unfair advantage and to ensure compliance with legal standards.

View the Summary Guide

September.19.2024

SEC Texting Sweep Hits 12 Muni Advisors.

The Securities and Exchange Commission's crackdown on texting and the use of unauthorized messaging apps continued Tuesday with 12 municipal advisors being charged more than $1.3 million in combined fines for failures by the firms and their personnel to maintain and preserve certain electronic communications.

The actions included employees at multiple levels of authority — including supervisors — communicating with regard to municipal advisory activities both internally and externally by text messages.

The firms admitted the facts set forth in their respective SEC orders, acknowledged that their conduct violated recordkeeping provisions of the federal securities laws, have begun implementing improvements to their compliance policies and procedures to address the violations, and agreed to pay the following civil penalties:

- Acacia Financial Group Inc., $52,000
- Caine Mitter and Associates Inc., $94,000
- cfX Inc., $42,000
- CSG Advisors Inc., $40,000
- Kaufman Hall & Associates LLC, together with Ponder & Co., $324,000
- Montague DeRose & Associates LLC, $40,000
- PFM Financial Advisors LLC, $250,000
- Phoenix Advisors LLC, $40,000
- Public Resources Advisory Group Inc., $184,000
- Specialized Public Finance Inc., $250,000
- Zions Public Finance Inc., $47,000.

"The books and records requirements are critical to facilitating Commission inspections and examinations of municipal advisors and in evaluating a municipal advisor's compliance with the applicable federal securities laws," said Rebecca Olsen, deputy chief of the SEC's Division of

Enforcement Public Finance Abuse Unit, in a statement.

"Municipal advisors are encouraged to assess their recordkeeping practices relating to off-channel communications. Firms that believe their practices do not comply with the securities laws are encouraged to self-report to the SEC's Enforcement staff."

As described in the SEC's orders, the firms admitted that, during the relevant periods, they failed to maintain and preserve communications sent and/or received by their personnel relating to municipal advisory activity and that these communications were records required to be maintained and preserved under the federal securities laws.

ThinkAdvisor

By Melanie Waddell

September 17, 2024

US SEC Fines 12 Municipal Advisors for Recordkeeping Violations.

(Reuters) – The U.S. Securities and Exchange Commission on Tuesday fined 12 municipal advisors more than $1.3 million to settle civil charges that they failed to preserve electronic communications such as text messages.

All 12 firms were charged with violating recordkeeping provisions of the Securities Exchange Act and rules of the Municipal Securities Rulemaking Board, with supervisors responsible for some of the failures, the SEC said.

The largest fines included $324,000 against Kaufman Hall & Associates, together with Ponder & Co; $250,000 against PFM Financial Advisors, and $250,000 against Specialized Public Finance.

By Thomson Reuters

Sep 17, 2024 | 12:01 PM

(Reporting by Jonathan Stempel in New York)

Unregistered Municipal Advisory Activity in Public-Private Partnerships.

Good afternoon everyone. I want to thank The Bond Buyer for organizing this Infrastructure Conference and for inviting me today to talk about some important regulatory safeguards that were put in place a decade ago to help state and local governments make effective infrastructure investments.

But before I begin, I must remind you that my remarks are in my official capacity as Director of the Securities and Exchange Commission's Office of Municipal Securities, but do not necessarily reflect the views of the Commission, the Commissioners, or other members of the staff.

These types of events give me a unique opportunity to speak directly to the municipal securities

market about an issue that has framed my tenure with the Commission, first as a staff attorney serving as a principal drafter of the municipal advisor rules and now as the Director of the Office charged with overseeing municipal advisor regulation, namely unregistered entities engaging in municipal advisory activity.[1]

Filling a Gap in the Regulatory Landscape

To begin, I thought I would spend a few moments laying out the municipal advisor regulatory framework.

Until the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank"), advisors[2] to municipal entities[3] and obligated persons[4] were largely unregulated and were generally not required to register with the Commission or any other federal, state, or self-regulatory entity with respect to their municipal advisory activity.[5]

Leaving the activities of these advisors generally unchecked, however, led to several cases of market abuses and economic damage to municipal entities and obligated persons.[6] For instance:

- Congress found that a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries;[7]
- The Commission brought action against a financial institution alleging payments by the financial institution to local firms whose principals or employees were friends of public officials in connection with a bond underwriting and interest rate swap agreement;[8] and
- The Commission settled several actions against major financial institutions for their role in a series of complex, wide-ranging bid rigging schemes involving derivatives utilized by municipalities and underlying obligors as reinvestment products.[9]

Dodd-Frank was enacted to generally strengthen oversight of the municipal securities market and to broaden current municipal securities market protections to cover, among other things, previously unregulated market activity.[10] Section 975 amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") creating a new class of regulated person required to register with the Commission: municipal advisors.[11]

Who Are Municipal Advisors?

So, who are municipal advisors? Broadly speaking, municipal advisors assist municipal entities and obligated persons on the terms of bond offerings, investment of bond proceeds, and the structuring and pricing of related products.

A "municipal advisor" is any person (who is not a municipal entity or an employee of a municipal entity) that:

provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or obligated person.[12]

Key here is advice. As you may suspect, "advice" is not subject to a bright-line definition.[13] Instead, the determination of whether a person provides advice to, or on behalf of, a municipal entity or an obligated person regarding municipal advisory activity will depend on all the relevant facts and circumstances.[14] For purposes of the municipal advisor definition, advice includes, without limitation, recommendations that are particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person with respect to municipal financial products

or the issuance of municipal securities, based on all the facts and circumstances.[15] Advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities.[16]

The focus of the advice standard is whether or not, under all of the relevant facts and circumstances, the information presented to a municipal entity or obligated person is sufficiently limited so that it does not involve a recommendation that constitutes advice.[17]

The Exchange Act provides that municipal advisors and any person associated with such municipal advisor has a fiduciary duty to their municipal entity clients, prohibiting municipal advisors from engaging in any act, practice, or course of business that is not consistent with their fiduciary duty.[18] Although the Exchange Act does not provide that municipal advisors are deemed to have a fiduciary duty insofar as their advice is to non-municipal entity obligated person clients, some state fiduciary or agency laws may, depending on the facts and circumstances, apply to municipal advisor engagements with such obligated persons.[19] Municipal advisors do have other obligations to obligated person clients, such as a duty of fair dealing and a duty of care under current Municipal Securities Rulemaking Board ("MSRB") rules.[20]

Now that I have laid out the regulatory framework, I want to summarize the key takeaways:

First, the Commission applies the term "municipal advisory activities"[21] to a range of activities, including, but not limited to developing financing plans, assisting in evaluating different financing options and structures, and evaluating and negotiating terms.[22]

Second, advice is not subject to a bright-line definition. Advice includes a recommendation regarding municipal financial products or the issuance of municipal securities. The determination of whether a recommendation has been made is an objective inquiry and a key factor that the Commission will consider is whether the recommendation reasonably would be viewed as a suggestion to take action or refrain from taking action.[23]

Third, any person engaging in municipal advisory activity will be considered a municipal advisor and have a fiduciary duty to their municipal entity client, unless an exclusion or exemption applies.

Finally, under federal securities law, a person must register with the Commission and the MSRB prior to engaging in municipal advisory activities. Any person that engages in municipal advisory activity prior to registering with the Commission and the MSRB as a municipal advisor violates Section 15B(a)(1)(B) of the Exchange Act.[24]

Observations on Public-Private Partnerships

The roughly $4 trillion[25] municipal securities market provides critical support to our nation's infrastructure. The funds raised by our states and local governments in the municipal securities market have helped remove lead from water pipes; built roads and bridges; modernized hospitals; built clean-energy infrastructure, and so much more to ensure that we have the infrastructure needed to access critical services. But for decades now, observers have noted that tight fiscal conditions and rising costs associated with maintaining and building infrastructure have prevented our states and local governments from investing in infrastructure at the levels needed.[26]

Recently enacted legislation has made funding and incentives available for a broad range of infrastructure development[27] and may also serve as a potential catalyst for the private sector to help in closing infrastructure gaps, including through public-private partnerships ("P3").[28]

As everyone in the room is aware, leveraging private capital to finance public infrastructure is not a

new tool. Much of our nation's early infrastructure was built through partnerships between the public and private sectors.[29] More recently, P3s have been used as a delivery option for complex highway projects throughout the nation[30] and have been presented as a tool to finance projects in other sectors, such as energy infrastructure, affordable housing, school facilities, and telecom.[31]

Despite their widespread use, there is no universally accepted definition of a P3.[32] P3s are broadly described as any contractual agreement between a public entity and a private entity for the purpose of financing, constructing, operating, managing, and/or maintaining a public asset and related services.[33]

Let's break that down a bit: P3s are long-term contractual arrangements between a public entity and private entity, where the private entity makes a financing commitment expecting to be repaid with future tax revenue or user fees or similar arrangement. The private entity signing and managing the P3 contract is typically a special purpose vehicle (SPV) created for the purpose of the P3 project and having equity investors.[34]

Pretty straightforward: instead of using public resources that may be limited by budget or debt restrictions, private financing steps in as an alternative to building much needed infrastructure, potentially using the same taxes and fees that the municipal entity or obligated person would have used to finance the project if it had decided to finance on its own.

Well, there is more to the story. Definitionally, P3s exist on a spectrum as an alternative form of procurement[35] but also on a spectrum as an alternative form of financing. Financing packages come in all types of configurations: equity, debt, or a combination sourced from both public and private sources, including private activity bonds ("PABs"), federal credit assistance, state, or local funding, which may include the issuance of municipal securities.[36]

Compared to more traditional financings of infrastructure – that is, using federal, state, or local funding, which more likely than not includes the issuance of municipal securities – P3s and other non-traditional methodologies that have been developed to deliver and finance infrastructure needs are a bit more complex.

This complexity has brought with it a range of concerns regarding the use of P3s. Public officials and state and local inspector generals and auditors have studied individual transactions and have issued findings identifying key areas of concern. These concerns include transferring too little or too much risk between the public and private sectors; not using the most efficient and lowest cost financing available to the municipal entity or obligated person; and having very costly long-term impacts to fix short-term budgetary issues.

Public entities have also been exposed to all sorts of contingent liabilities, including compensation clauses, non-compete clauses, and availability payment escalation clauses, leading to potential increased financial and political burdens on the public entity. Uncontrollable external events, oftentimes impacting anticipated revenues, have seen public entities having to make the choice to either terminate, suspend, or take full control over a project, even though the risk of such events was supposed to be borne by other parties.[38]

Pathways to Public-Private Partnerships

In light of these potential hurdles, how does a municipal entity or obligated person go about deciding to finance an infrastructure project using a non-traditional form of procurement?

One way would be for municipal entities and obligated persons to rely on individuals and firms –

advisors, consultants, banks, engineers, accounting firms, developers, real estate managers, investment specialists, diversified financial services groups – collectively, what I will be referring to as "P3 Consultants" that have positioned themselves as financial, legal, and technical experts on P3s. Individual or groups of P3 Consultants are purportedly capable of providing tailored advice to municipal entities and obligated persons on the entire P3 lifecycle. However, various reports[39] have identified that P3 Consultants have engaged in concerning behavior, including:

- Failure by P3 Consultants to disclose conflicts of interest between the P3 Consultant and subcontractors hired to provide a VfM analysis, leading to the skewing of project costs in favor of a P3 procurement.
- P3 Consultants with no experience in municipal financing, failing to include a public sector comparator as part of the VfM analysis and resultingly being unable to demonstrate that the procurement would be maximizing VfM.
- P3 Consultants advising municipal entities or obligated persons that P3s that only used private debt and equity funding sources would be considered an "off-balance sheet" financing, despite the fact that projects procured with a mix of public and private funding sources would, under accounting standards be required to be includable on the municipal entities balance sheet.[40]

Soliciting a P3 Consultant

In staff's review of P3s in the municipal securities market, one of the first questions that we asked ourselves is how does the process get started – how does a municipal entity or obligated person connect with a P3 Consultant and does that raise any regulatory issues?

Municipal entities and obligated persons often solicit a P3 Consultant through a competitive request for proposal/qualification ("RFP/Q") process, where the municipal entity or obligated person has defined the infrastructure project scope; completed a preliminary VfM, or other process, which compares[41] the costs and benefits of a P3 or other non-traditional procurement method against a traditional procurement method; defined requirements related to construction, operation, and management of the project; and assessed potential financing arrangements. But P3 Consultants may also approach the municipal entity (or obligated person) through an Unsolicited Proposal ("USP") process.[42]

So, how does the RFP/Q process tie back to our municipal advisor regulatory framework?

Well, responses to requests for RFP/Qs alone do not constitute municipal advisory activity.[43] Persons providing a response in writing or orally to a RFP/Q from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities is exempt from the definition of municipal advisor provided that such person does not receive separate direct or indirect compensation for advice provided as part of such response.[44] However, Unsolicited Proposals that broadly seek input on any infrastructure project may not be a process that is consistent with the RFP exemption to the municipal advisor definition.[45]

We have previously spoken about the parameters and level of formality of the RFP/Q process that would be needed to qualify for the RFP exemption.[46] Staff is of the view that the USP process would need to meet the same standards to qualify any responses for the exemption. Municipal entities, obligated persons, or registered municipal advisors acting on their behalf, should apply a similar degree of formality by identifying a particular objective for the USP process. Otherwise, any person responding to a USP would need to consider if the substance of their proposal requires registration as a municipal advisor.

We have seen instances where P3 Consultants are originating an infrastructure project by

identifying public asset gaps, proposing project design recommendations, providing project affordability analyses, and/or discussing the viability of a public infrastructure project in general terms. Without including material specifically tailored to the needs, objectives, or circumstances of the municipal entity or obligated person, this may not rise to the level of municipal advisory activity. However, some Unsolicited Proposals have included subjective qualitative and quantitative criteria specially tailored to the municipal entity or obligated person that includes descriptions of proposed business arrangements (i.e., ground lease, management agreements); market studies that support revenue assumptions and financial, economic and social benefits; advice with respect to sizing and structuring of the financing package, which may include consideration or use of municipal securities or municipal financial products; and models allocating risk transfer between the public and private entity. P3 Consultants should be aware that, depending on the facts and circumstances, such submissions could constitute municipal advisory activity.

Regardless of whether a P3 Consultant has been retained through an RFP/Q process or through a USP process, our overarching observation has been that municipal entities and obligated persons seem to rely heavily on the content of the proposals – and the implied expertise – of the P3 Consultant.

The Role of the P3 Consultant

What services do P3 Consultants provide? Well, services run the whole gamut.

We have observed instances where the P3 Consultant analyzes and makes recommendations on the most cost effective and appropriate financing package for the delivery of the project, including:

- Considering various financing alternatives to raise the necessary capital, which may include, without limitation: federal, state, or local funding, including the use of municipal financial products or the issuance of municipal securities; equity and lender commitments; and/or special facility financing; and
- Assisting with the sizing and structuring of the financing package, which may include consideration or use of municipal securities or municipal financial products and participating in the preparation of disclosure documents.

P3 Consultants should be aware that considering various financing alternatives and assisting with the sizing and structuring could constitute municipal advisory activity.

We have seen P3 Consultants be asked to independently, or in collaboration with the staff of the municipal entity or obligated person and other advisors, draft RFP/Qs for the solicitation of financial and/or technical private sector project delivery partners ("Private Sector Partners"). Assisting a municipal entity or obligated person with drafting – or simply drafting – an RFP/Q is municipal advisory activity requiring registration with the Commission, absent an available exclusion or exemption, because the P3 Consultant (or any other entity) could be providing advice with respect to the parameters of such RFP/Q which includes the issuance of municipal securities or the use of municipal financial products.[47]

Takeaways

The SEC's mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The Office of Municipal Securities remains dedicated to providing information to the municipal securities market to help persons and entities active in the market comply with the important safeguards that were put in place after the last financial crisis by Congress. The Exchange Act makes it unlawful for any municipal advisor to provide advice to or on behalf of, or to undertake

a solicitation of, a municipal entity or obligated person without registering with the Commission.[48]

As you continue your partnerships to help meet the nation's infrastructure needs, I would like you to remember that addressing the risks that unregistered municipal advisory activity pose to municipal entities and obligated persons is a challenge that requires a whole municipal securities market approach.

P3 Consultants and Private Sector Partners who advise municipal entities or obligated persons on the issuance of municipal securities, the use of municipal financial products, and/or the use of debt financing alternatives that are tailored to the specific needs, objectives, or circumstances of the municipal entity during any stage of the P3 lifecycle should remember that they may be engaging in municipal advisory activity requiring registration as a municipal advisor with the Commission and the MSRB. The relevant timeline for advice to obligated persons is slightly different but still includes advice prior to the issuance of municipal securities until they are no longer outstanding.[49]

For other market participants, engaging persons acting as unregistered municipal advisors may have far-reaching consequences for themselves and others,[50] including eroding public trust, significant financial losses and inefficiencies, and undermining the legitimacy of the P3 process.

More information about the Commission's regulation of municipal advisors is available at the Office of Municipal Securities website.[51] The MSRB also provides educational material on various topics related to municipal advisors at its Education Center website that may be helpful to municipal entities, obligated persons, P3 Consultants, and Private Sector Partners and any other market participant seeking additional information.[52]

Thank you again to The Bond Buyer for the invitation to address you today. I look forward to working with all of you toward our shared goal of regulatory compliance in furtherance of protecting the integrity of the municipal securities market.

Dave Sanchez, Director, Office of Municipal Securities
The Bond Buyer Infrastructure Conference
Philadelphia
Sept. 17, 2024

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[1] See Dave Sanchez, Director, Office of Municipal Securities, U.S. Securities and Exchange Commission, Closing Remarks – Compliance Conference (Dec. 7, 2023), available at https://www.sec.gov/newsroom/speeches-statements/sanchez-remarks-complia-ce-conference-120723.

[2] See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 23, 2013), 78 FR 67468, 67472 (Nov. 12, 2013) ("Municipal Advisor Adopting Release"), available at https://www.govinfo.gov/content/pkg/FR-2013-11-12/pdf/2013-23524.pdf.

[3] See Exchange Act Section 15B(e)(8) [15 U.S.C. 78o-4(e)(8)] defining "municipal entity."

[4] See Exchange Act Section 15B(e)(10) [15 U.S.C. 78o-4(e)(10)] defining "obligated person."

[5] See Municipal Advisor Adopting Release 78 FR at 67472.

[6] Id. at 67475.

[7] Id. at 67475 n.102 (citing S. Rep. No. 111-176, at 38 (2010)).

[8] Id. at 67475 n. 104 and accompanying text.

[9] Id. at 67475 nn. 105-106 and accompanying text.

[10] Id. at 67626.

[11] See Section 975(a)(1)(B) of the Dodd-Frank Act [15 U.S.C. 78o-4(a)(1)(B)].

[12] See Exchange Act Section 15B(e)(4)(A) [15 U.S.C. 78o-4(e)(4)(A)]. The definition of municipal advisor includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors that provide municipal advisory services, unless they are statutorily excluded. See 15 U.S.C. 78o-4(e)(4)(B). The statutory definition of municipal advisor excludes a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 77b(a)(11) of this title), any investment adviser registered under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.], or persons associated with such investment advisers who are providing investment advice, any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps, attorneys offering legal advice or providing services that are of a traditional legal nature, or engineers providing engineering advice. See 15 U.S.C. 78o-4(e)(4)(C). The Commission exempts the following persons from the definition of municipal advisor to the extent they are engaging in the specified activities: accountants; public officials and employees; banks; responses to requests for proposals or qualifications; swap dealers; participation by an independent registered municipal advisor; persons that provide advice on certain investment strategies; certain solicitations. See Exchange Act Rule 15Ba1-1(d)(3)(i) through (viii) [17 CFR 240.15Ba1-1(d)(3)(i) through (viii)].

[13] Municipal Advisor Adopting Release, 78 FR at 67479.

[14] Id.

[15] Id. at 67480. See also Exchange Act Rule 15Ba1-1(d)(1)(ii) [17 CFR 240.15Ba1-1(d)(1)(ii)] (advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues)).

[16] See Exchange Act Rule 15Ba1-1(d)(1)(ii) [17 CFR 240.15Ba1-1(d)(1)(ii)]. See also Municipal Advisor Adopting Release, 78 FR at 67479-67480 (Commission providing clarifying guidance regarding "advice" only with respect to municipal advisors and solely for purposes of the municipal advisor definition).

[17] See Municipal Advisor Adopting Release, 78 FR at 67480. See generally Answer to Question 1.1 The General Information Exclusion from Advice versus Recommendation from the Registration of Municipal Advisors Frequently Asked Questions ("MA FAQ"), available at https://www.sec.gov/info/municipal/mun-advisors-faqs.

[18] See 15 U.S.C. 78o–4(c)(1).

[19] See, e.g., Arthurs Lestrange & Co., Inc., Exchange Act Release No. 42148, 1999 WL 1038053 at

* 4 (Nov. 17, 1999) (financial advisor also a fiduciary under Pennsylvania state law).

[20] See MSRB Rules G-17 (fair dealing) and G-42(a)(i) (duty of care).

[21] See Exchange Act Rule 15Ba1-1(e) [17 CFR 240.15Ba1-1(e)].

[22] See Municipal Advisor Adopting Release, 78 FR at 67472.

[23] Municipal Advisor Adopting Release, 78 FR at 67480 and accompanying note 165 (citing FINRA Notice to Members 01-23 (Mar. 19, 2001), and Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718A (Aug. 20, 2010), 75 FR 52562 (Aug. 26, 2010); FINRA Regulatory Notice 11-02 (Know Your Customer and Suitability), Jan. 11, 2011, available at https://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf).

[24] See 15 U.S.C. 78o-4(a)(1)(B).

[25] Federal Reserve Board, Financial Accounts of the United States – Z.1, Table L.212 (First Quarter 2024), available at https://www.federalreserve.gov/releases/z1/20240607/html/l212.htm.

[26] While the federal government contributes with funding, states and local governments carry most of the burden for maintaining and building infrastructure. See generally U.S. Dep't of the Treasury, Infrastructure Investment in the United States (Nov. 15, 2023), available at https://home.treasury.gov/news/featured-stories/infrastructure-investment-in-the-united-states; American Society of Civil Engineers, Failure to Act, Economic Impacts of Status Quo Investment Across Infrastructure Investment Across Infrastructure Systems (2021), available at https://infrastructurereportcard.org/wp-content/uploads/2021/03/FTA_Econ_Impacts_Status_Quo.pdf and Bridging the Gap, Economic Impacts of National Infrastructure Investment, 2024-2043 (2024), available at https://bridgingthegap.infrastructurereportcard.org/wp-content/uploads/2024/05/202--Bridging-the-Gap-Economic-Study.pdf.

[27] The Infrastructure Investment and Jobs Act ("IIJA") and the Inflation Reduction Act ("IRA") make funding available for an array of projects. See Infrastructure Investment and Jobs Act, Pub. L. 117-58 (2021) and the Inflation Reduction Act of 2022, Pub. L. 117-169 (2022).

[28] In terms of private sector involvement in infrastructure development, the IIJA, for instance, provides planning grants for jurisdictions seeking to utilize P3 project procurement, requires projects with an estimated total cost of $750 million or more seeking either Transportation Infrastructure Finance and Innovation Act ("TIFIA") or Railroad Rehabilitation and Improvement Financing ("RRIF") funding to conduct a value-for-money ("VfM") analysis, and increased the federal cap on tax-exempt private activity bonds ("PABs") for highway or surface freight transfer facilities. See e.g., IIJA §§ 71001; 70701; 80403 [23 U.S.C. 611; 23 U.S.C. 601; 26 U.S.C. 142(m)(2)(A)].

[29] See John Forrer, James Edwin Kee, Kathryn E. Newcomer and Eric Boyer, Public Administration Review, Public-Private Partnerships and the Public Accountability Question (May/June 2010), 475-484, available at https://www.jstor.org/stable/pdf/40606405.pdf.

[30] See Congressional Budget Office, Report on Public-Private Partnerships for Transportation and Water Infrastructure (Jan. 2020), available at https://www.cbo.gov/system/files/2020-01/56003-C-O-PPP.pdf (discussing trends in public-private partnerships for transportation and water utilities); U.S. Dep't of Transp., Report on Highway Public-Private Partnership Concessions in the United States (Dec. 2016), available at https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3-toolkit_rep

ort_on_highway_p3s_122916.pdf.

[31] See, e.g., N.J. Senate Bill No. 3565 (introduced Feb. 9, 2023) (proposed establishment of the Energy Infrastructure Public-Private Partnership Program); Colo. Senate Bill No. 23-035 (June 2, 2023) (CO housing authority has power to contract with private entities to facilitate P3s for affordable housing projects); Md. Prince George's County Public Schools, First-of-Its-Kind Public-Private Partnership Delivers New Schools for 8K+ Students (Sept. 18, 2023), available at https://www.pgcps.org/offices/communications-and-communi-y-engagement/newsroom/news/newsroom-archives/20-3-2024/news-release-first-of-its-kind-public-private-partnership-delivers-new-schools-for-8k-students; Brenton Foundation and Coalition for Local Internet Choice, The Emerging World of Broadband Public-Private Partnerships: A Business Strategy and Legal Guide (May 2017), available at https://www.benton.org/sites/default/files/partnerships_0.pdf; National Science and Technology Council, National Artificial Intelligence Research and Development Strategic Plan May 2023, available at https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intellige-ce-Research-and-Development-Strategic-Plan-2023-Update.pdf.

[32] In 1999, the U.S. General Accounting Office issued a glossary of the most commonly used terms in P3s to facilitate a better understanding of the terms as they are used. See U.S. General Accounting Office, Public-Private Partnerships, Terms Related to Building and Facility Partnerships (Apr. 1999), available at https://www.gao.gov/assets/ggd-99-71.pdf.

[33] See generally National Conference of State Legislatures, Report, Building-Up: How States Utilize Public-Private Partnerships for Social & Vertical Infrastructure (Feb. 16, 2017) ("NCSL Report"), available at https://www.ncsl.org/transportation/building-up-how-states-utilize-p-blic-private-partnerships-for-social-ver-ical-infrastructure#:~:text=The%20Legislative%20Role%20in%20Public,policy%20is%20the%20next%20step; U.S. Dep't of Transp., Build America Bureau, Public-Private Partnership Concessions for Highway Projects: A Primer ("DOT Primer") (for an overview of the various contracting, project delivery and financing arrangements of P3s), available at https://www.fhwa.dot.gov/ipd/p3/toolkit/publications/primers/primer_highway_concessions_p3/.

[34] See generally U.S. Dep't of Transp., Federal Highway Administration, Guidebook on Financing of Highway Public-Private Partnerships Projects (Dec. 2016) ("DOT Guidebook on Financing"), §2.4, available at https://www.fhwa.dot.gov/ipd/pdfs/p3/p3-toolkit_p3_project_financing_guidebook_122816.pdf.

[35] See, e.g., Dominique Custos & John Reitz, Public-Private Partnerships, 58 Am. J. Comp. L. 555 (2010); NCSL Report; DOT Primer.

[36] See generally DOT Primer; DOT Guidebook on Financing.

[37] See, e.g., Denver International Airport, Great Hall After-Action Report (Aug. 9, 2022), https://www.flydenver.com/app/uploads/2024/06/greathall_AfterActionReport-2.pdf; Office of the Inspector General, City of Chicago, Report of Inspector General's Findings and Recommendations: An Analysis of the Lease of the City's Parking Meters (June 2, 2009), https://igchicago.org/wp-content/uploads/2011/03/Parking-Meter-Report.pdf; State of Texas, State Auditor's Office, Audit Report on The Department of Transportation and the Trans-Texas Corridor, Report No. 07-015 (Feb. 2007), available at https://sao.texas.gov/reports/main/07-015.pdf.

[38] See generally supra note 37. See also Denver International Airport (Great Hall Project), City

and County of Denver Auditor, Audit Report Denver International Airport Great Hall Construction (Apr. 20, 2023), available at https://www.flydenver.com/app/uploads/2023/09/greathallconstruction_Auditapril2023-1.pdf; Kevin DeGood, American Progress, When Public-Private Partnerships Fail: A Look at Southern Indiana's I-69 Project (Feb. 15, 2018), available at https://www.americanprogress.org/article/public-privat--partnerships-fail-look-southern-indianas-69-project/; Hearing, California Senate Transportation and Housing Committee, Tolls, User Fees, and Public-Private Partnerships: The Future of Transportation Finance in California? (Jan. 17, 2007), available at https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2015-16/stran.senate.ca.gov/sites/stran.senate.ca.gov/files/01-17-07Background.doc; Texas State Auditor's Office, An Audit Report on The Department of Transportation's Purchase of the Camino Colombia Toll Road (June 2, 2006), available at https://sao.texas.gov/reports/main/06-041.pdf. Concerns regarding P3s have been raised outside of the United States as well. See, e.g., Office of the Auditor General of Ontario, Annual Report 2014, available at https://www.auditor.on.ca/en/content/annualreports/arreports/en14/2014AR_en_web.pdf; Canadian Centre for Policy Alternatives | Nova Scotia, Many Dangers of Public-Private Partnerships (P3s) in Newfoundland and Labrador (Sept. 2020), available at https://policyalternatives.ca/sites/default/files/uploads/publications/Nova%20Scotia%20Office/2020/10/HiddendangersofP3s.pdf.

[39] See generally supra notes 37 and 38.

[40] See generally Governmental Accounting Standards Series, Statement No. 94 Public-Private and Public-Public Partnerships and Availability Payment Arrangements (03/20), available at https://gasb.org/page/ShowPdf?path=GASBS94.pdf&title=GASB%20Statement%20No.%2094,%20Public-Private%20and%20Publi--Public%20Partnerships%20and%20Availability%20Payment%20Arrangements.

[41] See U.S. Dep't of Transp., Federal Highway Administration, Value for Money Assessment for Public-Private Partnerships: A Primer, 2-1, https://www.transportation.gov/buildamerica/sites/buildamerica.dot.gov/files/2019-08/p3_value_for_money_primer_122612.pdf.

[42] A USP process refers to a proposal submitted by an offeror (often a P3 Consultant but can be any private entity) for a P3 project that is not in response to any RFP/Q issued by a municipal entity, obligated person, or municipal advisor on their behalf.

[43] See Municipal Advisor Adopting Release, 78 FR at 67509.

[44] See Exchange Act Rule 15Ba1–1(d)(3)(iv) [17 CFR 240.15Ba1-1(d)(3)(iv)]. See also Municipal Advisor Adopting Release for a discussion on the RFP exemption. Municipal Advisor Adopting Release, 78 FR at 67508-67509.

[45] See generally Answer to Question 2.1 of the MA FAQ.

[46] Id.

[47] See Municipal Advisor Adopting Release, 78 FR at 67509.

[48] See Exchange Act Section 15B(a)(1)(B) [15 U.S.C. 78o-4(a)(1)(B)].

[49] Whether a person that advises clients about conduit financings or other financing options would be required to register as a municipal advisor is dependent on certain facts and circumstances. See

Municipal Advisor Adopting Release, 78 FR at 67485. For conduit financings, a person will not be a municipal advisor to an obligated person until (among other things) the obligated person has begun applying to, or negotiating with, a municipal entity to issue conduit bonds on behalf of the obligated person. Id.

[50] As part of its toolbox, the Commission brings enforcement actions against individuals and firms engaging in unregistered municipal advisory activity. A list of unregistered municipal advisor enforcement actions is available at https://www.sec.gov/about/divisions-offices/office-municip-l-securities/unregistered-municipal-advisor-enforcement-actions.

[51] See U.S. Securities and Exchange Commission, Office of Municipal Securities, available at https://www.sec.gov/about/divisions-offices/office-municipal-securities.

[52] See Municipal Securities Rulemaking Board, available at https://www.msrb.org/.

SEC Warns Advisors: Play By the Rules.

The Securities and Exchange Commission's Office of Municipal Securities director Dave Sanchez has a warning for advisors working on municipal market-adjacent deals like public-private partnerships or workforce housing: we're watching you.

Issuers, though not responsible for their municipal advisors, should be proactive in ensuring the firms are playing by the rules, said Sanchez, speaking Tuesday during a regulatory panel at The Bond Buyer's infrastructure conference in Philadelphia.

"Double check you're really playing by the rules; there are a lot of potential pitfalls," he said. The mere consideration of a municipal bond borrowing as any part of project financing requires registration as a municipal advisor. "The rules still apply," he said.

The SEC is set to post formal comments on the topic this week, he said.

The warning comes the same day that the SEC announced charges against 12 municipal advisory firms for failing to maintain and preserve certain electronic communications.

Commenting on the charges, Sanchez said "it will be a continued message from our office over the next few months for issuers to know what a municipal advisors' responsibilities are to them," while adding that it's not an issuer's responsibility to ensure that an MA is qualified.

"But it is important for an issuer to know how they're supposed to be protecting [them] and what they should be looking out for," he said.

On the P3 front, Sanchez said the office has received complaints, many from within the municipal bond community, about advisors not playing by the rules. The workforce housing sector is another area the SEC is keeping an eye on, he said.

"If you're looking at ways to cobble together grants and private activity bonds and you're considering bonds – that is municipal advisory activity, and this is the place where we're seeing a high volume of unregistered activities," he said. Some global P3 experts and accounting firms and others are not registered but are still "engaged in this type of activity," he said.

Leslie Norwood, managing director and associate general counsel of the Securities Industry and Financial Markets Association, who was also on the panel, said some firms "are just ignorant of the rules" while others are knowingly trying to sidestep registration.

"The rule is quite complex and it's an activity-based rule, not a contractual-based rule, and there a lot of different provisions and exemptions for firms to comply with," Norwood said. "Issuers should really be taking a proactive stance that the people they work with should be registered – and if [the firms] say they don't need to be, that should raise a red flag."

The SEC is attuned to other P3-related unlawful activity like recommending issuers take on more expensive debt than needed, conducting a value-for-money analysis that "puts the thumb on the scale for the P3 procurement" and inaccurate statements to governments about risk transfer, Sanchez said.

The SEC is also watching for violations of federal securities laws, particularly when it comes to workforce housing deals, he said.

"Every government issuer has heard this ? pitches where people promise things that are too good to be true and that can be a violation of securities laws," he said. "It's great people are thinking about creative solutions, but don't forget the rules still apply."

By Caitlin Devitt

BY SourceMedia | MUNICIPAL | 09/18/24 02:55 PM EDT

MSRB Receives SEC Approval to Shorten the Timeframe for Trade Reporting to One Minute.

Amendments Include Exceptions for Manual Trades and Firms with Limited Trading Activity

Washington, D.C.– The Municipal Securities Rulemaking Board (MSRB) today received approval from the Securities and Exchange Commission for amendments to MSRB Rule G-14, shortening the time for municipal securities trades to be reported to MSRB. The amendments change the current 15-minute standard to as soon as practicable, but no later than one minute after the time of trade, subject to certain exceptions, including new exceptions for manual trades and firms with limited trading activity.

"Today's approval order represents the culmination of our rulemaking initiative to amend MSRB Rule G-14 to establish a new one-minute standard of trade reporting," MSRB Chair Meredith Hathorn said. "I want to acknowledge the invaluable feedback we received from our stakeholders during the comment period, which resulted in a rule that is not only more fair and equitable but also one that advances the public interest in a more transparent municipal securities market."

MSRB will announce the effective date of the rule change in a future MSRB notice. Manual trades will be subject to a phase-in period to an eventual 5-minute standard over the course of several years.

MSRB initially sought comment from stakeholders on its one-minute trade reporting proposal in August 2022, which resulted in a robust response from market participants. After reviewing the

comments, MSRB engaged in additional analysis and extensive engagement with market stakeholders to understand why certain types of voice-brokered, block and other trade types might not currently be readily reportable within one minute, and to understand potential resource or other barriers to meeting a new one-minute timeframe that might exist for some firms, including smaller or less active firms.

"As we strive to enhance transparency in the municipal securities market, it is important to acknowledge the critical roles served by firms of all types and different manners of trading," MSRB Chief Regulatory and Policy Officer Ernesto Lanza said. "The amendments approved today represent a significant modernization of the trade reporting paradigm. They allow investors and other market participants to have access to more contemporaneous prices, while ensuring firms executing manual trades and those with limited trading volumes can continue to effectively serve the diverse range of customers participating in this market."

Trades reported to MSRB's Real-time Transaction Reporting System (RTRS) are made available for free to the public via the Electronic Municipal Market Access (EMMA®) website, providing investors, dealers, municipal advisors and other market participants with the information they need to make informed decisions about the pricing of municipal securities.

Read the notice.

Date: September 20, 2024

Contact: Aleis Stokes, Chief External Relations Officer
202-838-1500
astokes@msrb.org

Get Caught Up on the August Issue of GFOA's Government Finance Review.

The latest magazine features in-depth articles on GFOA's Rethinking Financial Reporting initiative, Direct Pay, solutions for property tax foreclosures, tax tools for local economic development, tips for balancing budgets, AI updates, member spotlights, and much more.

Read the publication.

Ballard Spahr: Proposed Joint Standards for Financial Regulatory Data Under FDTA by SEC and Agencies

Summary

The Financial Data Transparency Act (FDTA), passed as part of the National Defense Authorization Act for fiscal year 2023, aims to enhance the interoperability of financial regulatory data across nine federal agencies, including the U.S. Securities and Exchange Commission (SEC). By December 2024, these agencies are required to develop and implement a set of shared data standards for certain "Collections of Information" reported by financial entities and data collected on behalf of the Financial Stability Oversight Council (FSOC).

The SEC and other agencies recently proposed joint standards, which include common identifiers, principles-based standards for data transmission and structuring, and alignment with the Paperwork Reduction Act of 1995 (PRA). These standards will impact various aspects of the financial and municipal securities markets.

Continue reading.

Ballard Spahr LLP

by David Atlas & Kimberly Magrini

September 11, 2024

SIFMA T+1 After Action Report.

On May 28th, the United States securities market moved to an accelerated settlement cycle of one day after trade date (T+1) for equities, corporate bonds, municipal bonds, unit investment trusts, and financial instruments comprised of these security types. After more than three years of rigorous and coordinated activities to plan for — and ultimately implement — a shortened settlement cycle, the industry is recognizing reduced settlement risk across the U.S. capital markets. Firms are now able to make better use of their capital while promoting financial stability. Ultimately, T+1 has provided the appropriate balance between increasing efficiencies and successfully mitigating risk for the industry.

View the Report.

Federal Agencies Begin to Implement the Financial Data Transparency Act: Covington

Off To A Slow Start, But Don't Take Your Eyes Off This Space

As directed by Congress in the Financial Data Transparency Act (FDTA or the Act), nine federal financial regulators[1] have proposed standards for making the data they collect "machine-readable," that is, specially coded so a computer can process it without human intervention.[2] The agencies are further directed to "seek to promote inter-operability" of the data – that is, make it capable of being collated and analyzed across agencies. Once fully implemented, the data standards will affect publicly traded companies, regulated financial institutions and other entities that file reports with or otherwise submit information to the federal financial regulators and, in some cases, self-regulatory organizations. Depending on the standards ultimately chosen, the resulting reporting burden will increase, potentially substantially, for some entities. And, if the SEC's machine-readable data project is any guide, there will likely be lingering data quality issues.

The Act specifies a timeline for a series of rulemakings over the next two and a half years; affected entities may want to start paying attention now.

The Financial Data Transparency Act

Congress passed the FDTA as part of a much larger defense funding bill in December 2022.[3] The FDTA amends the Financial Stability Act of 2010 (Title I of the Dodd-Frank Act) to improve data collection and use for the Financial Stability Oversight Council by requiring the agencies to jointly adopt data standards. It also amends the organic statutes of the respective agencies, directing them to implement the joint data standards for their own "collections of information."

Although some agencies, like the SEC, have already begun to require some data they collect to be machine-readable, the Act directs the SEC to vastly expand the universe of such data, including information submitted to the Financial Industry Regulatory Authority and the Municipal Securities Rulemaking Board.

Finally, to the extent an agency has identified "open data assets" – data it collects and makes available to the public – the Act directs each agency to make that information freely downloadable, rendered in human-readable format, and accessible in a form that enables two or more software programs to use the data.

What's in the Current Joint Rulemaking?

The current rulemaking has two components. First, the agencies propose "common identifiers" for commonly used critical data – legal entities, financial instruments, dates, locations, and currency. These are the digital building blocks for identifying relationships in the financial regulatory eco-system, and, hopefully, risks. Second, the agencies propose four principles to guide the adoption of any data standard. Those principles are:

- Data should be fully searchable and machine-readable;
- The standard should clearly define the data element and its relationship to other data elements;
- Data should be consistently identified in accordance with its regulatory requirement; and
- The data standard should be non-proprietary or available under an open license.

The joint rulemaking will not create any new reporting requirements. (Indeed, the Act specifies that it does not create any obligation to collect more information than was collected before the Act passed.) However, any entity subject to these requirements will want to pay attention to how the rulemaking develops, as new data standards will likely change how such entities collect and report data to their regulators.

Once the proposal is published in the Federal Register, a 60-day comment period will commence. Congress directed the agencies to complete this stage of the rulemaking by December 2024.

What Happens After This Rulemaking?

Once the nine agencies settle on joint data standards, each agency is directed to "incorporate, and ensure compatibility with (to the extent feasible)" the joint data standards for the information it collects under its regulatory regime. The Act gives agencies some flexibility to tailor their own rules to scale them for smaller entities and minimize disruptive changes.

These agency-specific rules must take effect within two years of the joint agency standards being finalized. This two-year period will require entities that submit information to financial regulators to monitor the rulemakings, participate as appropriate, and begin the process of evaluating and modifying their reporting systems as necessary.

If you have any questions concerning the material discussed in this client alert, please contact members of our Financial Services and Securities and Capital Markets Groups.

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[1] The nine agencies are: Commodity Futures Trading Commission, Office of the Comptroller of the Currency, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Board of Governors of the Federal Reserve System, National Credit Union Administration, Securities and Exchange Commission, and Department of the Treasury.

[2] Financial Data Transparency Act Joint Data Standards, 89 Fed. Reg. 67890 (Aug. 22, 2024). 2024-18415.pdf (govinfo.gov)

[3] Pub. L. No. 117-263, 136 Stat. 3421 (2022).

Covington & Burling LLP – Bruce Bennett

August 26, 2024

MSRB Analysis of Primary vs. Recently Issued and Competitive vs. Negotiated Municipal Securities Markets.

View the MSRB Publication.

Aug, 2024

Faster US Settlement Hit Harder Than Expected, Citi Survey Says.

NEW YORK (Reuters) -A shift to shorter settlement for U.S. securities transactions earlier this year had a greater-than-anticipated impact on market participants across the board, with Europe reporting the greatest hit, a Citigroup survey showed.

The United States sped up its settlement cycle in May, requiring that equities, corporate and municipal bonds and other securities transactions settle one business day after the trade, instead of two, or T+1.

The transition "was more impactful than expected" for 44% of buy- and sell-side firms, the Securities Services Evolution survey said.

Europe saw the most impact because of the challenges of managing settlement and funding issues in the middle of the night, it added. Overseas investors use currency trades to fund their U.S. securities transactions.

The poll of nearly 500 institutions, conducted in June, gives an insight into how the industry managed the transition globally, and highlights how T+1 was felt across the trade cycle.

"Every area appears to have been more impacted than originally anticipated, from funding to headcounts, securities lending and fail rates," the survey said.

Securities lending, the loan of stocks or other securities to investors, saw the greatest impact across organizations, rising to 50% from 33%. Funding or margin requirements, headcounts and funding costs were also affected.

"Funding has also been at the center of this impact — albeit with an imbalance across the sell-side and buy-sides," the survey stated.

Some 56% of sell-side firms said their securities lending and recalls activities were "significantly impacted" by the move. That had been one of the major concerns voiced by market participants ahead of T+1 being implemented.

Additionally, 52% of banks and brokers saw their headcounts and staffing levels affected, indicating that a preference for hiring instead of using automation has left the sell-side "exposed to large volumes of manual processing and exception handling triggered by their clients," the survey stated.

Citi said more time is needed before the "true, deeper" impact of the accelerated settlement cycle is understood.

The Depository Trust and Clearing Corporation, the Securities Industry and Financial Markets Association and the Investment Company Institute led the move to T+1. DTCC and Sifma did not immediately respond to a request for comment.

An ICI spokesperson said that daily margin requirements decreased by nearly $4 billion in the immediate aftermath of T+1, which over a year "adds up to almost a trillion dollars that managers can put to use elsewhere, which represents a huge win for investors."

Reuters

By Laura Matthews

Sep 4, 2024

(Reporting by Laura Matthews in New York; Editing by Alison Williams and Mark Porter)

Institutional Investors Pay Half Price of Retail Buyers in Muni Trades.

- **Smaller trades, a proxy for retail, paid average spread of $10**
- **Retail buyers rely heavily on the secondary market: report**

Retail investors, who hold the largest share of municipal bonds, pay roughly twice the spread that major institutional investors pay when trading recently issued debt.

The Municipal Securities Rulemaking Board measured the spread between prices on deals in the primary market and recent trades in the secondary market. Results showed trades of $100,000 or less, a proxy for retail buyers, paid an average spread of about $10, while trades of $1 million or more paid a spread of $4.42, according to a report published Monday. Institutional investors include major Wall Street firms, insurance companies, regional banks and foreign buyers, among others.

Retail buyers adding bonds to their portfolios rely heavily on the secondary market, where a flurry of trading occurs in the weeks following a new issue before trades tend to drop off. The price an investor secures can dictate the yield they receive for decades.

The report found only 8% of par purchased through large trades occurred in the secondary market, while the share for smaller transactions was closer to half. Researchers used data over a five-year period spanning 2019 to 2023, and measured spreads on purchases that took place in the first seven days of secondary trading.

Spreads varied year to year and were considerably different between competitive and negotiated deals. For competitive deals, the average spread was $4.16, and the spread on negotiated deals was $11.30.

"We don't think this means issuers should flock to the competitive market," said John Bagley, chief market structure officer at the MSRB and one of the authors of the report. In general, competitive deals tend to come from larger, more well-known issuers.

Investors placing larger orders are able to command more attractive prices, narrowing the profit underwriters make bringing bonds to market. In competitive deals, the average spread on large deals was only 27 cents, and in 2022 and 2023 when rates were rising, the spread was negative.

"If you bought a competitive deal and you didn't sell it right away, and rates went against you, you likely had to cheapen up the deal to get it sold," Bagley said.

Bloomberg Markets

By Nic Querolo

August 26, 2024

— With assistance from Amanda Albright

Hawkins: The Regulatory Impact of Jarkesy, Loper Bright, and Corner Post

Introduction

This Hawkins Update reviews three recent Supreme Court decisions – *Jarkesy, Loper Bright, and Corner Post.*[1] Although these decisions are likely to substantially affect the rulemaking and enforcement activities of federal administrative agencies generally (including the Department of the Treasury and the Internal Revenue Service), we discuss the cases more specifically with respect to certain potential impacts on the Securities and Exchange Commission (the "SEC").

No Civil Penalties in Administrative Proceedings

In Jarkesy, the Supreme Court considered the manner in which the SEC brings enforcement actions and, more specifically, whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud.

In 2011, the SEC commenced an enforcement action against Jarkesy and his investment advisory firm, Patriot28, LLC ("Patriot28"). The SEC alleged that Jarkesy and Patriot28 misled investors in connection with the launch and management of two investment funds by: (i) misrepresenting the funds' investment strategies; (ii) hiding the identity of the funds' auditor and prime broker; and (iii) inflating the funds' claimed value to generate larger management fees. In initiating the enforcement action, the SEC alleged that these actions violated the antifraud provisions of the Securities Act, the

Securities Exchange Act, and the Investment Advisers Act. The SEC sought remedies that included civil penalties. The SEC adjudicated the matter in-house, found that Jarkesy and his firm had committed securities violations, and levied a civil penalty of $300,000. Jarkesy and Patriot28 appealed.

Continue reading.

by Brian Garzione & Kenneth Roberts

08.22.2024

Hawkins Delafield & Wood LLP

Profiting From Financings for Charter Schools: SEC Sues Unregistered, Fee-Splitting Municipal Advisor - Norris McLaughlin

The public education system in the United States has experienced a series of fits and starts since the time of the American Revolution. Although many of the Founders (think Adams, Jefferson, and Madison, for example) were staunch advocates for education, believing that a democratic government requires citizens who are not only literate, but who can understand and assess matters confronting a government "by the People," and support intelligent efforts to resolve problems. That said, there was no national consistency in the availability of schooling, with some communities and/or churches (particularly in New England) offering education to America's young people, funded mainly by the families of those attending classes. The U.S. Constitution lacks any provision mandating education, so the question of government sponsorship for schools remains to this day primarily a state law issue. By the 1830s, American states began to address public education, including requiring some minimum years of school attendance paid for by taxes imposed on residents.

Public education was seen as particularly important in aiding the assimilation of successive waves of immigrants from the 1850s and again at the turn of the century, education being especially important for improving the language skills of newcomers. Building on those experiences and the legal acceptance of public unionism for teachers, America's public schools were seen by many as hampered by conventional thinking, especially in a world confronting the risks of thermo-nuclear war and competition with the Soviet Union. The creation of Advanced Placement courses was a response to those perceived threats. Another was the beginning of a movement, once again in New England and led this time by Ray Budde, to create local schools by contract, or charter, among a group of teachers and a municipality. The expectation was that the resulting schools would be more experimental and progressive. This notion of an "innovative institution" harkened back to educational developments in Ireland in the 1700s, sponsored by the Catholic Church, but not just religious schools.

In America the so-called "Charter School Movement" grew slowly until the late 1980s, when the idea was embraced by Albert Shanker, President of the American Federation of Teachers, who saw an opportunity both to expand the scope and style of schools and to create more jobs for teachers. The first charter school law was passed in the typically progressive State of Minnesota in 1991, followed by New Jersey and Delaware in 1995 and Pennsylvania in 1997. According to one national report, as of 2015 there were over 6700 charter schools in America, enrolling almost 3 million students. Charter schools are publicly funded, but operate independently from local school districts. Funding

for their operations depends upon the particulars of state law where the school is located; frequently such schools must first obtain some form of licensure from the state (or a state or local education body), and then function pursuant to a contract with that entity. This arrangement allows charter schools to raise funds by issuing municipal securities, much like a public school, although some of the risks of repayment and the scope of disclosure required vary materially from those in regular public school financings.

As depicted in the 2024 case of the *Securities and Exchange Commission v. Choice Advisors, LLC and Matthias O'Meara*, U.S. District Court for the Southern District of California, Case No.3:21 CV-1669-JO-MSB ("*Choice Advisors*"):

> [Two charter schools] retained Defendants to assist them in the process of issuing municipal bonds so that they could raise money to build new school facilities. … As first-time issuers of municipal bonds, these schools sought Defendants' help in structuring a deal with a bank underwriter to raise the funds at the lowest cost possible… To facilitate the municipal bond offering the borrower selects a bank underwriter to market and sell the bonds to investors. … The borrower negotiates the terms of the municipal bond offering with the underwriter, which typically involves the school paying a "fee," "spread", or "discount" – usually a percentage of the total value of the bond issued – to its bank underwriter in exchange for the bank purchasing the school's bond and "lending" the school money. … After purchasing the bonds from the school, bank underwriters resell these bonds to third-party investors for a profit. … This financing structure essentially enables the school to "borrow" the money needed for building projects or operations by issuing bonds that the schools ultimately repay with interest.

As explained at length in my Sept. 22, 2020 Blog "SEC Focus on Municipal Securities," the regulation of disclosure in the area of municipal securities is (to use my word) "peculiar." Congress, in an attempt to better deal with some of those "peculiarities," in 1975 amended the Securities Exchange Act of 1934 to create a new body, the Municipal Securities Rulemaking Board ("MSRB"), to strengthen the regulation of the structure of the municipal securities market and of the participants in that market. The MSRB is subject to SEC oversight. Then in 2010, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress expanded the scope of the MSRB to require registration of municipal securities advisors. As the Court said in *Choice Advisors*:

> The municipal advisor's role in …complex financial transactions [like the ones described in *Choice Advisors*] is to act as the school's "skilled representative in the bond offering transaction" and help it negotiate favorable financial terms in the school's best interest.

I wrote about the role of municipal securities advisors in my Sept. 29, 2020 Blog "What if the Advice is Suspect?" In *Choice Advisors*, the Court was presented with a classic case of abuses of that role. In that case, the investigation of these abuses was conducted by a special part of the SEC's Division of Enforcement, the Public Finance Abuse Unit. As I explained in my June 27, 2022 Blog "Serving the Public," the Public Finance Abuse Unit was created in 2010 to provide a more systematic and unified approach to dealing with the increasing incidence of significant neglect of professional obligations and downright fraud in the municipal securities market.

The "bank underwriter" involved in *Choice Advisors* was BB&T, originally named Branch Bank & Trust, founded in 1872 by Alpheus Branch. Over the years, it grew from its North Carolina roots to

become, by 2018, a major regional bank with operations all across the country. Two key employees in BB&T's investment banking subsidiary were Matthias O'Meara of Denver, Colorado, and Paula Permenter of Houston, Texas. In 2019, BB&T merged with SunTrust Bank of Florida to form Truist, the 9th largest American bank, with assets of $514 billion. According to the *Choice Advisors* Court, "O'Meara worked as an underwriter at investment bank BB&T" … "[b]efore becoming a municipal advisor for schools and school districts." Because O'Meara was fundamentally a salesman for the underwriting services of BB&T, he "became acquainted with various schools" including future Choice Advisors clients Bella Mente of Vista, California, and Liberty Tree of Colorado Springs, Colorado. Sometime in January or February 2018, "O'Meara and another BB&T employee, Paula Permenter, decided to leave their jobs at BB&T to start" Choice Advisors. On May 1, 2018, O'Meara resigned from BB&T, giving two weeks' notice. Permenter followed suit.

During the two-week notice period, O'Meara negotiated a deal with BB&T concerning Bella Mente and Liberty Tree, as well as three other California schools identified by O'Meara (so long as the schools selected BB&T as their respective underwriter). The deal was to split the 2% underwriter fee with BB&T: BB&T to get ¾ of the fee, and O'Meara's firm to be formed, Choice Advisors, LLC, to get ¼ of the fee. For example, the $20 fee on a $1 million bond would be divided $15 to BB&T, and $5 to Choice. Choice Advisors, LLC, registered with the SEC as an investment advisor on Aug. 27, 2018,and registered with the MSRB as a municipal securities advisor on Oct. 16, 2018. On May 8, 2018, O'Meara sent Bella Mente an engagement letter to serve as its municipal securities advisor. However, the letter failed to disclose to the school that i) he was still employed by BB&T; and ii) the fee splitting agreement, including the fact that it might pose a conflict of interest for Choice. Similarly, on May 14, 2018, O'Meara's second to last day with BB&T, he sent a parallel engagement letter to Liberty Tree. Both letters stated that:

> [There existed] no known actual or potential material conflicts that might impair [Choice's] ability to render unbiased or competent advice or fulfill its fiduciary duty… And there are "no Other Engagements or Relationships Impairing [Choice's] Ability to Provide Advice.

In addition, the Defendants **completed** the two bond offerings "on the schools' behalf" and received payment for their services **before** they were registered. Choice was paid $157,000 by Bella Mente (on July 11, 2018) and $53, 437.50 by Liberty Tree (on Sept. 21, 2018). Given these facts, the SEC sued Choice on the following grounds:

1. Performing municipal advisory service without being registered;
2. Agreeing to split fees with BB&T;
3. "Deceptively operating in a dual capacity" as both a BB&T underwriter and a municipal securities advisor; and
4. Failing to disclose material conflicts of interest.

It should be emphasized that the two principals of Choice were experienced participants in financial transactions, including the municipal securities market. O'Meara earned a B.A. in finance from the University of Notre Dame and holds a Series 50 municipal advisor license. Permenter, with her B.A.A. from the University of Houston and M.B.A. from the University of St. Thomas, worked for over 20 years in finance, holding a Series 7,66, 79 and 53 before starting Choice, where she, like O'Meara, holds a Series 50 license. Yet they acted as though either asleep or engaged in fraudulent concealment. It is no wonder that the SEC charged them and Choice with breaching their fiduciary duties to the schools and entering illegal arrangements without even being appropriately registered. Most particularly, the SEC charged the Defendants with violating MSRB Rule G-42, and to the extent

they dealt unfairly with their clients and engaged in deceptive practices, violating Rule G-17.

The Court, in an April 22, 2024 decision in *Choice Advisors*, granted Summary Judgment to the SEC for failing to timely register with the SEC and with the MSRB, which in turn was the basis for granting Summary Judgment for committing acts in violation of MSRB Rules. Defendants argued that fee splitting was not prohibited because the terms were agreed to before payment, so the 25% payable to Choice was paid directly and not "split" after receipt by BB&T. The Court, however, granted Summary Judgment against the Defendants on this count, as well as for breach of fiduciary duty, including failure to disclose potential conflicts of interest and the lack of required registration. The Court did not grant Summary Judgment concerning the alleged concealment of the dual employment and fee splitting only because Defendants claimed the schools knew of the Choice arrangements, but reserved for further proceedings on this issue. Finally, Summary Judgment was granted against the Defendants for engaging in "Deceptive, Dishonest, or Unfair Practices" in violation of MSRB Rule G-17.

The Court set Aug. 7, 2024, for the SEC to submit its proposal for the Court order imposing sanctions on Defendants, whose objections were due Aug. 16. Were the two Charter Schools injured by Choice? One cannot be certain, but the appearances suggest that Choice and its principals were in this only for personal profit, and not with any concern about the educational exigencies that make Charter Schools an attractive alternative for parents concerned about the quality of education for their children.

by: Peter D. Hutcheon of Norris McLaughlin P.A. – Business Law Blog

Monday, August 26, 2024

Proposed Rule Change Consisting of Amendments to MSRB Rule G-14 and to Amend FINRA Rule 6730: SIFMA Comment Letter

Summary

SIFMA and SIFMA AMG provided comments to the U.S. Securities and Exchange Commission (SEC) and reiterated comments made in their previous letters, the Commission, FINRA, and the MSRB should reconsider if a one-minute trade reporting requirement is appropriate for fixed-income markets in the first place. If a decision is made to proceed with this proposal, then FINRA and the MSRB should allow for an appropriate implementation period (e.g., two years) and:

- Include a broad exception for manual trades;
- Examine impacts to liquidity, depth, concentration, and transparency prior to decreasing reporting times to shorter intervals to ensure markets are not harmed;
- Provide relief for certain electronic trades where system processing limitations prevent ne-minute reporting, including post-trade allocations; and
- Implement the proposed de minimis exception.

Read the SIFMA Comment Letter.

GASB Chair: SEC's Financial Data Transparency Rule Aligns with Expectations, but Raises Industry Concerns

Governmental Accounting Standards Board (GASB) Chair Joel Black told trustees on August 13, 2024, that the SEC's proposed rule on financial data transparency was largely in line with expectations, but has sparked concerns in the municipal securities industry over the fate of financial securities identifiers.

The SEC's proposal, issued last week, aims to improve transparency and accountability in government financial data, but has already drawn attention for its impact on the industry. Black said the proposal was as largely expected, but noted that the industry is likely to push back on the use of bond identifiers.

The surprise in the rule is the elimination of QSIPs (Qualified Statistical Information Providers) in reporting to the Municipal Securities Rulemaking Board (MSRB), Black said. "That I think is going to have a lot of the municipal securities world in somewhat of a reactive phase."

The proposed SEC rule is part of the Federal Data Transparency Act (FDTA), which seeks to standardize government financial reporting. While the GASB has been monitoring the rule-making process, Black said the industry is still digesting the implications of the proposal.

"They stayed pretty broad and so I think the impact on us and what ultimately may come to the municipal securities environment from the SEC specifically when they do their more specific rule making say two years from now hasn't been impinged upon," said Black. "So I think that we haven't been impacted yet," he said. "That more future rule-making will probably be much more impactful."

Black's remarks were response to a question from FAF Trustee Beth Pierce, who inquired about the SEC's proposal and its potential impact on the GASB's work. She noted that the FDTA was frequently raised in the past by the GASB, which has been working on a taxonomy to make financial information filed with financial regulators standardized for digital use.

The FDTA was passed in 2022 to make it easier for agencies to share and analyze data, and for the public to access and understand government financial information. To achieve this, the law requires federal agencies to adopt standardized data formats and identifiers for reporting financial information.

The implementation of the FDTA is being carried out through a phased approach, with different agencies and stakeholders playing a role in its implementation. The SEC is one of the key agencies involved in implementing the FDTA, and its proposed rule on financial data transparency is part of this effort.

Specifically, the SEC's proposal aims to make it easier for agencies to share and analyze data, and businesses will need to align their reporting practices with the new standards. (See SEC Issues Joint Proposal Under Financial Data Transparency Act in the August 6, 2024, edition of Accounting & Compliance Alert.)

Thomson Reuters

Denise Lugo Editor, Accounting and Compliance Alert

August 14, 2024

Orrick: FINRA Fines Firm for Bond Markups and Failure to Comply with Fair Pricing Regulations

On July 26, a financial firm accepted a Letter of Acceptance, Waiver, and Consent (AWC) from FINRA for allegedly charging unfair prices in corporate and municipal bond transactions and for allegedly failing to establish a supervisory system to comply with fair pricing rules. According to the AWC, between April 2020 and June 2023, the firm was found to have charged unfair prices on 98 bond transactions, resulting in customers paying over $112,000 in excess costs in violation of FINRA Rules 2121 and 2010 and Municipal Securities Rulemaking Board (MSRB) Rules G-30 and G-17. For example, the AWC alleged that the firm sold 250 bonds with a 1.714 percent mark-up that used an incorrect prevailing market price, which resulted in a customer paying $695 more than if the firm had used the correct prevailing market price. These failures allegedly violated FINRA Rules 3110 and 2010 and MSRB Rule G-27.

Under the AWC, the firm agreed to pay a $125,000 fine, including $110,000 for violations of MSRB rules. The firm will also provide restitution to affected customers of $112,932.02 and must implement a supervisory system that complies with fair pricing regulations.

Orrick, Herrington & Sutcliffe LLP

August 6, 2024

Arizona Supreme Court Holds Agreement Violates Gift Clause: What Gilmore v. Gallego Teaches Us About Multi-Party Service Contracts Between Public and Private Parties

Economic incentive agreements are tools used by city, county, and state actors to facilitate public goals with the help of private actors. States that provide incentives to developers to promote economic growth have a comparative advantage over other states. In Arizona, these transactions are tested by the Constitution's Gift Clause that essentially asks: (1) does the transaction serve a real public purpose; and (2) does the public party get something in return for what it gives to the private party to incentivize the deal?

The Arizona Supreme Court has issued several recent decisions that define the parameters of the Gift Clause. In *Gilmore v. Gallego*, the Arizona Supreme Court considered a deal struck between the City of Phoenix (City) and a Labor Union regarding "release time" provisions in a Collective Bargaining Agreement that allowed police officers to work for the union while on paid time for the City. The Court concluded that the arrangement violated the Gift Clause.1 In doing so, the Court provided valuable lessons regarding the scope of a Gift Clause analysis, especially when there are more than two (direct or indirect) parties to the transaction.

Facts of the Case. In 2019, the City and the American Federation of State, County, and Municipal Employees, (AFSCME), Local 2384 (Union) entered into a memorandum of understanding (MOU) regarding "release time" provisions.2 Release time provisions generally fund the use of City employees to be "released from their normal job duties" for other purposes.3 The release time provisions were specifically excluded from the members' compensation package.4

The MOU provided for (a) four full-time release employees, (b) banks of release hours for union members to engage in "union activities," and (c) a fund to reimburse the Union for member attendance at various trainings and conferences.5 The full-time release employees are authorized to spend time on a variety of Union tasks, including activities like Union recruitment.6 Under the MOU, release employees are also required to participate in various City task forces and committees, but "because serving on these committees takes time away from the expected Union tasks" the MOU provides additional banked hours to compensate for these commitments.7 The MOU also authorizes stewards to represent employees in grievance proceedings.8 Although the "City ordinarily controls and supervises employee activities, it does not control or supervise how released employees spend their time and released employees do not report their activities to the City."9

Continue reading.

Snell & Wilmer LLP – Nicholas J. Wood, Joyce K. Wright , Brett W. Johnson and Tracy A. Olson

August 5 2024

CUSIP Returns Fire Over Plan to Use FIGI as Identifier.

The Federal Deposit Insurance Corporation board shocked the municipal bond market on Tuesday with a proposal that would switch out CUSIP numbers with Financial Instrument Global Identifiers, a marker based on standards developed by Bloomberg.

"It was an opaque process, but we did hear of efforts behind closed doors to expand the scope of FDTA to include security-level identifiers, even though they are not mentioned once in the actual text," said Matthew Bastian, senior director, CUSIP Global Services.

The FDIC is collaborating with seven federal agencies including the Securities and Exchange Commission, Treasury, the Governmental Accounting Standards Board, and the Municipal Securities Rulemaking Board on figuring out how the new rules imposed by the Financial Data Transparency Act will be implemented.

Per a statement from CUSIP, the proposed change of identifiers contains, "a fatal flaw that undermines the intent of the law and risks creating a costly and distracting operational challenge for financial market participants."

The change could also have a profound effect on the municipal bond market.

"It would be a painful and chaotic change," said Bastian. "The Municipal Securities Rulemaking Board embraced CUSIP in 1983 and since then the muni market has depended on the reliability of the CUSIP system."

"This includes granular features that may go unrecognized, such as our use of different base issuer numbers depending on the revenue stream and how we treat partial pre-refundings. These details are an intrinsic part of how the municipal bond market operates."

The FDTA is designed to bring more transparency to financial markets by making disclosures machine readable which would prompt a move away from relying on PDFs.

FIGI was developed under the auspices of the Object Management Group, a computer industry

standards consortium.

“OMG is pleased that the FDIC, in yesterday’s joint Notice of Proposed Rulemaking, proposed to adopt the FIGI as the common identifier for financial instruments,” said David Blaszkowsky, financial sector domain task force co-chair, OMG.

“FIGI provides an innovative data management approach for identifying financial instruments, and like other OMG specifications, is based on open data principles and rigorous technical methodologies.”

OMG also noted their belief that “FIGI fulfills the requirements for identifying the full range of financial instruments, including municipal securities.”

CUSIP outlined what it considers to be additional major downsides to the industry moving to FIGI including its lack of fungibility. Per their statement, “Fungibility means that a specific financial instrument is represented by the same identifier regardless of the venue where it is traded.”

The SEC is leading the charge on implementing the FDTA which was signed into law in 2022. The early stages have been dedicated to developing a taxonomy, including identifiers that work for all parties.

The implementation is now in the public comment segment of the process. Determining the standards is set for December 2024, with specific rulemaking to be in place by 2026.

Added costs for issuers has been cited as a reason to curtail the FDTA since it was originally proposed.

The corporate side of the securities industry has been required to use machine readable format since 2009, which the regulators frequently cite as proof the system can be implemented, even in the complex world of munis.

By Scott Sowers

BY SOURCEMEDIA | MUNICIPAL | 08/02/24 02:09 PM EDT

MSRB Announces New Board Members for FY 2025.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) announced today that it has elected three new Board members for Fiscal Year 2025 who will serve four-year terms, which begin on October 1, 2024.

The announcement follows news from MSRB’s fourth quarterly Board meeting of FY 2024 where Warren “Bo” Daniels was elected to serve as Board Chair and Jennie Bennett was elected to serve as Vice Chair. Their terms begin on October 1, 2024.

“We are delighted to welcome our new Board members, who will bring fresh perspective to our important work,” Chair-elect Daniels said. “Their diverse experience in the field of public finance will be invaluable to MSRB as we work to advance our Congressional mandate to protect investors, issuers and the public interest by promoting a fair and efficient municipal securities market.”

The Board includes eight public members and seven regulated members. New public members

joining the MSRB Board in FY 2025 are Ahmed A. Abonamah, former Chief Financial Officer & Director, Department of Finance, City of Cleveland, and Daniel L. Wiles, Assistant Treasurer and Tax Collector, County of Los Angeles. The new regulated member joining the Board is Heather E. Grzanka, Executive Director, Compliance Director, Fixed Income, Public Finance, JPMorgan Chase & Co., New York.

New Board members were selected from a pool of 48 applicants this year. “We also thank all of the highly qualified candidates who demonstrated their commitment to give back to the municipal market by applying to serve on the MSRB’s Board,” said Vice Chair-elect Bennett, who is also Chair of the Nominating Committee. Biographical information for Abonamah, Wiles and Grzanka can be found below.

Ahmed A. Abonamah will be taking on the role of Executive Vice President and Chief Financial Officer of Rock Entertainment Group and the Cleveland Cavaliers. Most recently, he served as Chief Financial Officer & Director, Department of Finance, City of Cleveland, overseeing the general operations, fiscal affairs and debt program of the City of Cleveland. Prior to that role, Abonamah worked for the Securities and Exchange Commission, serving as director in the Office of Credit Ratings and in various positions in the Office of Municipal Securities, including Deputy Director of the office. Before joining the SEC, among other roles, Abonamah worked as a public finance attorney at a global law firm where he served as bond counsel, underwriter’s counsel, and disclosure counsel on a wide variety of public finance transactions. Abonamah has a bachelor’s degree in political science from the University of Dayton and a JD degree from Case Western Reserve School of Law.

Daniel L. Wiles is Assistant Treasurer and Tax Collector for the County of Los Angeles, where, as member of the Treasurer’s executive team, he oversees the public finance activities of the county, as well as the Treasury Pool deferred compensation investment teams. Prior to the County of Los Angeles, Wiles served in various public finance-related roles over a 17-year period with Fieldman, Rolapp & Associates, Inc. in Irvine, CA. His long career in public finance spans over 40 years and includes positions with a number of law firms and financial institutions in Missouri, Minnesota and Colorado. Wiles has a bachelor’s degree in economics from the University of Minnesota and a JD degree from the University of Minnesota Law School.

Heather E. Grzanka is Executive Director, Compliance Director, Fixed Income, Public Finance for JPMorgan Chase & Co. in New York, where she manages compliance for the Public Finance business including, banking, syndicate, sales and trading, debt capital markets, investor marketing, and infrastructure direct lending. Prior to JP Morgan Chase, Grzanka held fixed income compliance roles in New York with Jeffries LLC as Senior Vice President, UBS Investment Bank as Director, and First Albany Capital Inc., where she started her career. She has a Bachelor of Science in Finance from Siena College and completed the Certified Regulatory Compliance Professional Program at the NASD Institute at the Wharton School. She holds the Series 7, 24, 53, 55, 79, and 63 registrations.

Date: August 02, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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MSRB Hosts Muni Finance Day for New York City Students.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today hosted its 12 th Muni Finance Day in partnership with the Municipal Forum of New York's Urban Leadership Fellows (ULF) Program for New York City students interested in careers in public finance.

"It is a privilege to partner again with the Municipal Forum of New York's Urban Leadership Fellows Program to showcase potential career opportunities for the next generation of public finance professionals," MSRB CEO Mark Kim said. "I am grateful to each of our distinguished speakers for sharing their personal stories and career advice with these promising students."

Muni Finance Day speakers included:

- Rick Erkel, Deputy Chief of Staff for Rep. Nydia Velázquez (D-NY) and Senior Policy Advisor, Minority Staff, House Committee on Small Business
- Pamela Frederick, Chief Financial Officer and Treasurer of the Battery Park City Authority in New York, NY and MSRB Board Member
- Mark Kim,Chief Executive Officer, MSRB
- Glen M. Lee, Chief Financial Officer, Government of the District of Columbia
- Dave Sanchez, Director, Office of Municipal Securities, Securities and Exchange Commission
- Deena Tauster,Chief of Staff for Rep. Andrew Garbarino (R-NY)

About the Urban Leadership Fellow Program

In 1992, the Municipal Forum of New York initiated the ULF Program, a paid summer internship program for graduating high school students. The purpose of the program was to introduce talented young people from diverse backgrounds to the municipal finance industry and inspire them to pursue careers in the field. In 1996, Futures and Options was hired by the Municipal Forum to manage the ULF Program to expand and deepen its educational component. This year, 30 interns have been matched to internships at a range of government, financial and legal sites. In addition to the internship and mentorship components, participants take part in supplemental training and workshops to develop specific industry skills.

"We thank MSRB for its continued engagement and support of our summer internship program," Sasha-Lee Lewin, program manager with Futures and Options said. "Today's event included valuable perspectives from industry leaders from various corners of the public finance industry, all of which helped students gain a broader understanding of how a career in finance can be a meaningful and impactful career choice in the years ahead."

Date: July 30, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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The Devil Is In the (Financial Reporting) Details.

States and localities don't have the manpower to handle the current load of burdensome financial reporting requirements—let alone the series of new ones announced yearly. They're pushing back.

"Our 2023 financial report is 311 pages long," says Ken Guy, finance director for King County,

Washington. “I compare that to Boeing’s 2023 financial report, [which] is 141 pages. Our financial report is twice as large, and I have to ask, why is that?”

Guy is one of a growing number of state and local financial officials who are distraught over what they see as an avalanche of new accounting requirements every year for their annual comprehensive financial reports. This vast sea of data and documentation is required by the Governmental Accounting Standards Board, or GASB, to receive a clean audit based on generally accepted accounting principles.

“GASB has been hitting us hard,” says Sharon Edmundson, director of municipal finance programs for the North Carolina League of Municipalities. “They’ve had some significant statements roll out practically every year, which require a great deal of work.”

What’s more, the annual reports aren’t the only financial documents that states and localities must prepare. “The state of California requires an additional report—as do other states—for the state comptroller to oversee governments’ fiscal health,” says Jennifer Becker, financial services director of Burbank, California. “We have the Federal Data Transparency Act coming out, which will have more requirements. And every grant we get has its own financial reporting requirements.”

The detailed disclosures called for by some GASB standards can be enormously time consuming to assemble. For example, one recent requirement about leasing stipulated that a government keep close track of an expansive list of contracts, including those for leased copiers, Microsoft Office 365 subscriptions and agreements for cellphones.

As a result of this reporting burden, “many governments use a third-party vendor to track their leases,” Edmundson explains. “It can be expensive, especially for little towns.”

Who are these disclosures helping? Some argue that they are for the benefit of the public, which should be able to know in full detail how their tax dollars are being spent. But it’s pretty clear that few residents actually read these documents. Of those that do, most do so online. As for the actual hard copies, “our chief accountant has said that in the last five years, he’s only been aware of one resident asking for a hard copy of the financial statement,” says King County’s Guy.

What’s more, there’s general agreement that even if the public was reading the reports, they are so dense and complicated that even CPAs struggle with them.

Elected official and their staffs, who, in the best of worlds, would take on the task of forging their way through these reports, grapple with them as well. “Elected officials, I suspect, often don’t understand the reports,” says Edmundson.

“If most elected officials don’t read and/or can’t understand financial reports, it is likely a safe bet that financial reports are not widely read or understood by the public,” a May report from the Government Finance Officers Association concluded. “Furthermore, financial reports may not actually report what the public wants to know.”

That leaves the credit rating agencies, which doubtless have the greatest desire to dig into every crack and cranny of an entity’s financial standing. But, according to the GFOA report, the agencies are given far more information than they need. “Moody’s Rating Service is known for their quantitative approach to analyzing the creditworthiness of local governments. The Moody’s system relies on seven measures—when combined use a small fraction of the total information available in a financial report.”

Joel Black, GASB chairman, is aware of these issues and points to some steps that the board is

taking address the situation. “The first thing,” he says, “is that our agenda is smaller. We have created a higher bar before we [explore] a new standard, so the number of standards we’re looking at is half the size of what it was a few years ago.”

Additionally, GASB is implementing a policy that requires that disclosures that appear in notes to financial statements—and there can easily be hundreds of them—have to meet a “high bar of essentiality,” says Black. “So, if we require a note statement, we have to explain how users have told us they would use them. In addition, we’re going back through existing note disclosures over time to see if they are essential.”

Clearly, GASB’s efforts to slow down the pipeline of new standards may help over the long haul. The prospect of using artificial intelligence to ease the process of creating financial reports has the potential to make a big difference as well. “The advent of AI can help with financial reporting, as long as the data is available,” says Shakeel Yusuf, chief financial officer of the Prince William County Public School System.

Route Fifty

By Katherine Barrett & Richard Greene

JULY 22, 2024

MSRB Approves FY 2025 Budget, Elects Board Leadership and Advances Strategic Priorities at Quarterly Board Meeting.

Washington, D.C. – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met on July 24-25, 2024, holding the final quarterly meeting of fiscal year 2024. The Board approved the FY 2025 budget, held FY 2025 officer elections for MSRB Board Chair and Vice Chair, and discussed priorities to advance its FY 2022-2025 Strategic Plan.

FY 2025 Budget

The Board approved a $48.8 million budget to fund the activities of the MSRB for FY 2025, which begins October 1, 2024, representing a 2.9% increase over the prior year’s budget. A more detailed budget summary, which presents MSRB’s projected expenses, revenues and reserve levels, will be published in October at the beginning of the fiscal year. The FY 2025 budget follows extensive stakeholder outreach and engagement.

“Funding the future of regulation for the municipal securities market while demonstrating budget transparency and accountability remains of paramount importance,” MSRB Board Chair Meredith Hathorn said. “Our meetings with stakeholders throughout 2024 have given us valuable feedback and perspective as we approved this budget.”

Board Leadership for FY 2025

The Board held FY 2025 officer elections and considered candidates to fill vacancies on the Board. The Board elected Warren “Bo” Daniels, Managing Director and Head of Public Finance of Loop Capital Markets, to serve as FY 2025 Chair of the Board. Jennie Bennett, Associate Vice President for Finance, University of Chicago, will serve as Vice Chair. Officer terms are for one year and begin on October 1, 2024. The terms of MSRB’s outgoing Chair Meredith Hathorn and Vice Chair Angelia

Schmidt end on September 30, 2024.

“I am pleased to announce the election of Bo and Jennie as our incoming Chair and Vice Chair,” MSRB CEO Mark Kim said. “I want to express my deep appreciation and gratitude to Meredith and Angelia for their outstanding leadership and unwavering commitment to advancing the public interest in a fair and efficient municipal securities market.”

“It has been an honor to serve as Chair for two terms while serving on MSRB’s Board throughout the past five years,” Hathorn said. “I am immensely proud of what we have accomplished and appreciate the important contributions of our stakeholders, who have positively impacted our work to fulfill our Congressional mandate and uphold the public trust.”

FY2022-2025 Strategic Priorities

In addition to the FY2025 budget and Board elections, the Board discussed the following initiatives:

Market Regulation

- Authorized staff to develop a Request for Information to solicit feedback and perspectives on various topics to shape the MSRB’s fee structure.
- Rule G-12(c): Approved codifying certain interpretive guidance pertaining to inter-dealer trade confirmations into the rule and consolidating remaining guidance into FAQs.
- Rule D-15: Discussed potential modifications to the definition and threshold for determining what is a sophisticated municipal market professional (SMMP).
- Rule G-27: Engaged in a discussion of broker/dealer and municipal advisor supervisory obligations in the post-pandemic workplace environment.

Market Transparency and Market Structure

- Authorized the publication of a concept release regarding the collection of pre-trade municipal market data following additional stakeholder outreach to inform its development.
- Received an update on the modernization of the Electronic Municipal Market Access (EMMA) website and related market transparency systems.

“MSRB’s commitment to stakeholder engagement on these important initiatives will remain front and center as we move forward,” Kim said.

Date: July 26, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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MSRB Meeting Will Address Contentious Regulations.

The Board of Directors of the Municipal Securities Rulemaking Board will try to iron out some thorny issues when they meet on July 24-25, for their final quarterly gathering this fiscal year.

Establishing priorities for the next fiscal year and approving the FY 2025 budget to advance its strategic plan are among the agenda items. Of interest to the municipal bond market, the agenda

includes key regulatory matters, including updates on Rule G-12(c), Rule D-15, and Rule G-27.

Rule G-12(c) remains a contentious subsection that seeks to codify transaction confirmation requirements for certain inter-dealer trades. Negotiations between the regulator and the industry over the rule have been going on since December 2023.

The Securities Industry and Financial Markets Association has gone on record labeling the rule as "obsolete" and asking for it to be deleted.

Rule D-15 deals with proposed modifications to the definition of a sophisticated municipal market professional that would affect broker dealers and municipal advisors.

Rule G-27 is trying to align MSRB rules for broker-dealers and municipal advisors working from home with similar regulations imposed by the Financial Industry Regulatory Authority. Finessing the fine points of G-27 was called into question by industry reps in June.

The Bond Dealers of America believes the ruling limits flexibility regarding remote work and applies only to supervisory functions for an individual firm as opposed to extending to investment bankers or traders involved in order execution or market making.

The board is considering the publication of a request for information regarding potential modifications to the rate card model for assessing fees on regulated entities.

In addition to the proposed rule changes, the board also plans to address its efforts on market transparency and structure via a progress report on EMMA website updates.

The MSRB is looking at an initiative that would collect pre-trade municipal market data to enhance market transparency and whether to publish a concept release on the topic for industry feedback.

An information session on blockchain and the emerging use of the technology in the municipal bond market is also planned.

The Board will also hold FY 2025 officer elections for the chair and vice chair positions. Meredith Hathorn, a managing partner at Foley & Judell, L.L.P., currently serves as chair and Angelia Schmidt, managing director and head of underwriting at UBS is the current vice chair.

By Scott Sowers

BY SOURCEMEDIA | MUNICIPAL | 07/19/24 12:37 PM EDT

MSRB Announces Discussion Topics for Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet on July 24-25, 2024, holding the final quarterly meeting of fiscal year 2024. The Board will discuss its priorities for the next fiscal year and approve the FY 2025 budget to advance its FY 2022-2025 Strategic Plan. The Board will also hold FY 2025 officer elections for MSRB Board Chair and Vice Chair. Additional highlights of the Board discussion will include:

Market Regulation

The Board will discuss regulatory matters and receive updates on several ongoing initiatives

including:

- Rule G-12(c): Potential codification of confirmation requirements for certain inter-dealer trades.
- Rule D-15: Potential modifications to the definition of a sophisticated municipal market professional (SMMP).
- Rule G-27: Industry feedback in connection with supervisory obligations in the post-pandemic workplace environment.
- Rate Card: Consider the publication of a request for information regarding potential modifications to the rate card model for assessing fees on regulated entities.

Market Transparency and Market Structure

The Board will receive updates on the following areas related to market transparency and structure:

- The modernization of the Electronic Municipal Market Access (EMMA) website and related market transparency systems. This will include a demonstration of stakeholder-driven updates that will enhance EMMA's interface and user experience.
- A potential initiative to collect pre-trade municipal market data to enhance market transparency and whether to publish a concept release on the topic for industry feedback.
- An information session on blockchain and the emerging use of this technology in the municipal bond market.

Date: July 18, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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SEC Approves Amendments to Rule G-47 to Add Three New Time of Trade Disclosure Scenarios, Codify and Consolidate Existing Guidance, Delete Certain Guidance, and Make Technical Amendments.

View the MSRB Notice.

The Demise of Chevron: End of an Era or More of the Same? - Quarles & Brady

In a pair of 6-3 decisions issued Friday and Monday, the U.S. Supreme Court dealt back-to-back blows to the administrative state. First, it ruled on Friday in *Loper Bright* that federal courts can no longer defer to federal agencies' interpretations of statutes, overruling forty years of precedent under the "*Chevron* doctrine."1 Second, it ruled on Monday in *Corner Post* that the six-year statute of limitations on claims challenging final agency action under the Administrative Procedure Act (APA) does not begin to run until the plaintiff is injured by the agency's action.2

Taken together, these rulings make it easier to challenge federal agency action in federal courts:

now, even agency actions from more than six years ago can be challenged upon a showing of more recent injury (*Corner Post*), and once in court there will be no thumb on the scale for the federal agency when it comes to interpreting statutes (*Loper Bright*). But how much these changes in the law will alter agency litigation in practice remains to be seen.

Loper Bright marks the end of what Justice Gorsuch called the Supreme Court's "forty-year misadventure" under Chevron, a 1984 decision holding that when a federal statute is ambiguous, the interpretive tie goes to the agency, whose interpretation will be sustained as long as it is reasonable.3 No more, said Chief Justice Roberts, writing for the majority. Now, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."4

Continue reading.

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7/2/24

SEC, MSRB, FINRA to Hold Hybrid Compliance Outreach Program.

WASHINGTON, July 01, 2024–(BUSINESS WIRE)–The Securities and Exchange Commission (SEC), Municipal Securities Rulemaking Board (MSRB) and FINRA announced today that registration is now open for both in-person and virtual attendance of their Compliance Outreach Program for municipal market professionals. The event is open to the public and will take place on Wednesday, Nov. 20, and Thursday, Nov. 21, 2024, in Denver, Colorado.

The program will provide municipal market participants an opportunity to hear from SEC, MSRB and FINRA staff on timely regulatory and compliance matters for municipal advisors and dealers. Panel topics will include compliance pain points for municipal advisors and broker-dealers, exam and enforcement priorities, a regulatory outlook, net capital requirements, federal fiduciary duty, post-trade monitoring and other municipal market key topics.

"The SEC looks forward to co-hosting this meaningful Compliance Outreach Program for municipal market participants," said SEC Director of the Office of Municipal Securities Dave Sanchez. "These panel discussions address important regulatory and guidance information—much of which includes novel ideas and perspective—that municipal market participants will find valuable both in their roles and as industry leaders."

"We are pleased to continue coordinating with the SEC and FINRA to continue an open dialogue with municipal advisors and dealers to address their top concerns and interests," said MSRB Chief Regulatory and Policy Officer Ernesto Lanza. "This year's program devotes time to both municipal advisors and dealers in the form of breakout sessions that will address unique issues and needs for all types of municipal market professionals, including small firms."

"The Compliance Outreach Program is a great opportunity to engage in dialogue that fosters effective regulation, improves compliance and strengthens everyone's understanding of the industry," said Michael Solomon, Executive Vice President, Examinations and Membership Application Program at FINRA. "We are pleased to partner with the SEC and MSRB to offer a forum where municipal market participants not only hear from their regulators but also work with them."

Registration is being administered by FINRA. The program is free and open to the public. For those unable to attend in-person or via the livestream, a recording of the program will be archived on the SEC's webpage following the event.

To submit questions and topics of interest in advance of the event, please email: gergana.sellers@finra.org.

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Register for the program.

Date: July 01, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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SIFMA: Life in the (Fixed Income) Fast Lane

A Cautionary Tale About Recent Proposals to Shorten Fixed Income Post-Trade Reporting Timelines

In a speech regarding fixed income markets in early 2022, SEC Chair Gary Gensler noted that current FINRA and MSRB rules require that (most) fixed income trades must be reported as soon as practicable but no later than within 15 minutes of the time of execution and wondered "why couldn't the outer bound be shortened to no later than, for example, 1 minute?"

Later that year FINRA and the MSRB published requests for comment on instituting an across-th--board requirement that most fixed income trades (including most corporate bond, ABS, and municipal securities transactions) be reported in one minute. Welcome to life in the fast lane – but instead of Walsh, Frey and Henley, we're running with the SEC, FINRA and the MSRB.

SIFMA and its Asset Management Group filed a joint response to FINRA and MSRB strongly objecting to a one-minute requirement, noting that "moving directly to a significantly shortened trade reporting timeframe…is destined to be rife with problems…and we strongly oppose the Proposals outlined by the SROs for this reason."

Probably most significantly, such a requirement would destroy the so-called voice markets, which involve transacting by phone, chat, or other non-automated methods, which are very important for fixed income generally, and particularly so for smaller participants in the fixed income markets. It is not practical that these kinds of trades be consistently reported in one minute, especially considering that multiple bonds are commonly traded at the same time, that hedges are put on simultaneously with trades, and other reasons. Firms would either have to stop transacting in voice markets, or severely slow down their activity to ensure that regulatory reporting requirements are met.

FINRA and the MSRB saw the stop signs thrown up by the responses from SIFMA (and many others) to their request for comment, and things didn't take a turn for the worse (at least yet). In 2023, rules were proposed by each regulator that would implement a one-minute reporting requirement, but these new proposals included two exemptions – one for trades with a manual component (e.g., voice trades) and one for firms with low transaction volumes. SIFMA and SIFMA AMG also responded to this proposal. These proposals, and the comments submitted in response, currently await final action from the SEC.

SIFMA's View

While this 2023 proposal is an improvement, it is not a cure for the ills that plagued the original proposal, and the warning lights are still turning red.

SIFMA and its AMG support improvements to post-trade transparency that balance costs and benefits. We believe the existing transparency framework balances timely reporting, benefits to market participants, and burdens related to liquidity and cost. Given that FINRA-member broker-dealers are required to report trades as soon as is practicable, and given that there is no history of

widespread violation of this provision of the rules, one should conclude that broker-dealers are currently reporting trades as soon as is practicable, in other words, as quickly as they can.

We do not believe the transition to one-minute reporting has been adequately examined or justified, nor do we believe that the proposed one-minute reporting rule can be adopted without exposing the broker-dealer community to significant regulatory risk and their clients to diminished liquidity and service.

The over-the-counter fixed income markets, including the municipal securities market, are fundamentally different than the centralized and exchange-based equity market. Significant amounts of trading and post-execution processing in the fixed income markets rely on manual or only partially automated processes such as phone calls or chat, or other processes that require human intervention. Full automation of these processes to enable consistent reporting in one minute in some cases is impossible, and in other cases is prohibitively expensive, particularly for smaller firms.

Notwithstanding this, if the Commission intends to move forward with a reduction in trade reporting timelines in the fixed-income markets, the SROs' Proposals to create a manual trade exception and a de minimis exception to protect smaller broker-dealers are a bare minimum component to allowing broker-dealers to achieve a reasonable chance of compliance. However, a mandatory one-minute requirement remains unworkable even for certain fully-electronic trades, and the application of any final rules should reflect this.

As we discussed in our letter to FINRA and the MSRB, they should reconsider if a one-minute trade reporting requirement is appropriate for fixed income markets in the first place, but if a decision is made to proceed with this proposal, then FINRA and the MSRB should:

- Implement a broad exception for manual trades;
- Examine impacts to liquidity, depth, concentration, and transparency prior to decreasing reporting times to shorter intervals to ensure markets are not harmed;
- Provide relief for certain electronic trades where system processing limitations prevent one-minute reporting, including allocation trades; and
- Implement the proposed de-minimis exception for smaller-volume dealers.

With apologies to the Eagles, we should not be so "eager for action and hot for the game" that we hurt the markets that serve U.S. businesses, state and local governments, and consumers in an effort to nominally improve transparency.

Authors
Chris Killian is Managing Director, Securitization and Corporate Credit at SIFMA.

Leslie Norwood is Managing Director & Associate General Counsel, Municipal Securities at SIFMA.

July 2, 2024

Credit Rating and Geography: Examining the Timeliness of Municipal Bond Audits

Abstract

Credit Rating and Geography: Examining the Timeliness of Municipal Bond Audits overviews audit

time trends since 2011. Then, it recognizes the timeliest audits for the 2022 fiscal year, grouped by municipal credit sector, from more than 11,000 municipal bond audits in the Merritt Research Services database found in CreditScope. In addition, the report conducts correlational analysis to examine the potential connection between credit rating and audit timeliness, as well as provides a geographical illustration of median audit times across the U.S. states for governmental bond issuers.

Read the full report here.

University of Illinois Chicago

Government Finance Research Center

Published: May 15, 2024.

SIFMA State Disclosure Review Highlights.

SIFMA has conducted a thorough, 50-state review of laws and regulations that govern local government disclosure, issuance and audit practices in an effort to better understand the financial reporting and municipal bond disclosure laws in place. In its review SIFMA looked at questions like whether states require the submission of and make public official statements (OSs) when bonds are issued, audited annual financial statements and other information relevant to investors.

View Study

Lies and Half-Truths and Omissions, Oh My! Considering Rule 10b-5(b) after Macquarie Infrastructure Corp. v. Moab Partners L.P. from a Public Finance Perspective - Bowditch

SEC Rule 10b-5(b) makes it unlawful, in connection with the offer and sale of securities, for any person to make any untrue statement of material fact or omit to state a material fact when the omission renders any statements made misleading. In *Macquarie Infrastructure Corp. v. Moab Partners L.P.*, No. 22-1165, 601 U.S. ___, slip op. at 2 (Apr. 12, 2024), Moab Partners sued Macquarie Infrastructure Corporation, alleging that Macquarie violated Rule 10b-5(b) in failing to disclose certain information under Item 303 of SEC Regulation S-K. Item 303 requires companies to disclose known trends or uncertainties that are reasonably likely to have a materially positive or negative financial impact on operations. Moab Partners claimed that Macquarie's omission negatively affected Macquarie's stock price.

In April of 2024, a unanimous United States Supreme Court issued a decision in Macquarie, holding that a "pure omission" does not support a private cause of action under Rule 10b-5(b), settling a long-standing federal circuit split in the process. Although the background of the case deals with the SEC filings submitted by a public company, the decision offers a window into the Court's thinking relative to Rule 10b-5(b) generally. This is significant, as the statements made by municipal issuers, if those statements are likely to be heard and relied upon by the securities market, are also subject to regulation by the SEC under Rule 10b-5. As such, Macquarie can serve as a useful practice pointer for municipal issuers and their attorneys in preparing offering documents and making public statements in connection with the offer and sale of municipal securities.

SUPREME COURT'S DECISION

In issuing its decision, the Court focused on the narrow issue of whether the failure to disclose information required by Item 303 is actionable under Rule 10b-5(b). The Court stated that the Rule only requires disclosure of information when it is necessary to ensure that statements already made are clear and complete. Therefore, a claim of a "pure omission" of information, absent a showing that the omission rendered any affirmative statements to be materially misleading, is not actionable under Rule 10b-5(b).

RULE 10B-5

Rule 10b-5 is designed to combat fraud in the offer or sale of securities. Specifically, Rule 10b-5(b) provides a private cause of action for investors by making it unlawful for a public company or governmental issuer to either: (i) make an untrue statement of a material fact or (ii) omit to state a material fact that is necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As determined by the Court in *Stoneridge Inv. Partners v. Sci-Atlanta, Inc.*, the six elements necessary to claim a Rule 10b-5 violation are: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Regarding the first element, although Rule 10b-5(b) expressly prohibits the making of material misrepresentations (i.e., an untrue statement of a material fact), its prohibition on omissions of material facts has caused confusion and mixed results in the lower courts. Where there is no material misrepresentation but rather an omission at issue, the Court in Macquarie held that the omission cannot exist in a vacuum. Rather, the omission must be tied to an affirmative statement that was already made by the defendant. Thus, in bringing forth a Rule 10b-5 claim on an omission theory, the plaintiff must identify at least one underlying statement that was made misleading by the omission.

PURE OMISSIONS VS. HALF-TRUTHS

In its decision, the Court distinguished between "pure omissions," which are not actionable under the Rule, and "half-truths," which are actionable under the Rule. A pure omission occurs when a speaker says nothing and, under the circumstances, the silence itself is not particularly meaningful. In other words, the failure to disclose information (i.e., the "silence") does not otherwise render any underlying affirmative statements materially misleading. In contrast, a half-truth states the truth but omits critical qualifying information, rendering the statement, although technically true, to be also substantively misleading. Justice Sotomayor, writing for the Court, distinguished the two concepts as follows: "…the difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake [a pure omission] and telling them he had dessert [a half truth]." In contrast to the first statement (the pure omission), the second statement (the half truth) requires disclosure of additional information necessary to ensure that the statement that was already made is clear and complete.

Therefore, to bring a successful cause of action for a violation of Rule 10b-5(b), the plaintiff must first identify the defendant's affirmative statements (the "statements made" component of the Rule) and then show how other facts were omitted that rendered the statements materially misleading. In Macquarie, the defendant's silence in omitting certain information from its Item 303 filing, without an underlying affirmative statement rendered misleading by that silence, was therefore not actionable under Rule 10b-5(b).

As noted above, the Court's decision was narrowly focused, leaving open to lower courts related questions regarding what constitutes "statements made," when a statement is misleading as a half-truth, or whether a pure omission is actionable under Rules 10b-5(a) and 10b-5(c) (i.e., "scheme liability").

TAKEAWAYS FOR MUNICIPAL ISSUERS AND PUBLIC FINANCE PROFESSIONALS

Although addressing the SEC filings of a public company, the Macquarie decision can serve as a useful tool for municipal issuers and public finance professionals. First, any statements (whether included in an issuer's offering document, available in investor presentations or on an investor website, or otherwise released publicly) that are reasonably expected to reach investors can potentially expose an issuer to liability under Rule 10b-5, regardless of the intended audience or delivery method. Second, in evaluating the accuracy or completeness of such statements, the omission of certain information, without a causal link to those statements, would not necessarily lead to a Rule 10b-5 violation. Nevertheless, in light of *Macquarie*, prior to making any such statements, issuers, in consultation with their attorneys, should carefully consider the possibility for half-truths and identify any qualifying facts that could cause the statements being made to be materially misleading. Such increased scrutiny will only improve the issuer's disclosures in any event.

BY NEAL R. PANDOZZI • JUNE 13, 2024

BOWDITCH & DEWEY

GASB Publishes Post-Implementation Review Report on Pension Standards.

Norwalk, CT, June 3, 2024 — The Governmental Accounting Standards Board (GASB) today published a Post-Implementation Review (PIR) report on the Board's pension standards.

The report focuses on GASB Statement No. 67, *Financial Reporting for Pension Plans*, and GASB Statement No. 68, *Accounting and Financial Reporting for Pensions*.

The report, issued by GASB staff, concludes that Statements 67 and 68 met the three PIR objectives:

- The standards accomplish their stated purpose,
- Costs and benefits are in line with expectations, and
- The Board followed its standard-setting process.

Furthermore, the report concludes that GASB Statements 67 and 68 significantly enhanced the accounting and financial reporting for pensions by pension plans and governmental employers with key provisions including the recognition of the net pension liability on the face of the government-wide statement of net position and the measurement of the liability using a blended discount rate.

After the issuance of each GASB standard, the GASB provides educational support, responds to technical inquiries, and often issues questions and answers about the standard through implementation guidance. More complex standards—like Statements 67 and 68—are eligible to undergo more extensive PIR procedures culminating in a final report.

More information about the PIR process, including other projects for which the GASB is currently conducting PIR activities, is available by visiting the GASB PIR web portal.

Why GFOA is Rethinking Financial Reporting.

In a time of decreasing trust in government, we should ask if lengthy, technical financial reports published many months in arrears are the most effective way to build trust with government's most important constituency: citizens. In a time of declining resources, we should ask if the finance officer's time is well spent producing these reports.

This report presents GFOA's vision for updating financial reporting. It critiques the current approach for not meeting the needs of its audiences, highlighting issues such as complexity and the time required to prepare the reports. The report also discusses the opportunity costs of financial reporting and outlines strategies to make financial reports more user-friendly, streamlined, and better aligned with users' needs.

Read New Research.

MSRB Publication: Timing of Annual Financial Disclosures by Issuers of Municipal Securities

Read the MSRB publication.

5/29/24

Wall Street Trade Failure Rate Rise in Third Day of Faster Settlement.

NEW YORK (Reuters) -The U.S. trade failure rate rose on Thursday, the fourth day of the newly launched faster settlement cycle, according to data released by the Depository Trust and Clearing Corporation on Friday.

The fail settlement rate stood at 2.71% on Thursday versus an average of 1.90% in the previous two days. The average for May before the shorter settlement cycle was 2.01%.

U.S. trading of equities, corporate and municipal bonds and other securities moved on Tuesday to a one-day settlement cycle (T+1) from two days (T+2), to comply with a rule change the SEC adopted in February.

DTCC did not immediately comment on the reasons for the spike in the fail rate.

Despite a higher failure, U.S. Securities and Exchange Commission Chair Gary Gensler said on Friday he considers the overhaul of the settlement cycle for U.S. securities has gone well this week.

"The historic conversion from T+2 to T+1 has gone smoothly thus far," Gensler said in an emailed statement. "We remain in close contact with the clearinghouses and other market participants as we continue to monitor the transition ahead of increases in trading volumes expected this afternoon."

Market participants have said the transition was going smoothly, despite some expected bumps.

Research firm ValueExchange said on average market participants expected the fail rate to increase to 4.1% after T+1 implementation, from 2.9%, according to a survey released prior to the implementation of the faster settlement.

May 31, 2024

(Reporting by Carolina Mandl and Chris Prentice; Editing by Josie Kao)

MSRB Amends Rule G-27 to Allow Dealers to Conduct Remote Inspections, Consistent With Recent FINRA Amendments.

Read the MSRB notice.

5/31/24

GASB 100 "Ghost Columns"

If your government reports more than one fund in your financial statements, you need to take a look at this TAD before June 30, 2024. GASB 100 added new requirements for the presentation of funds in the year they are reclassified between major and nonmajor. The new requirements extend into the format of note disclosures and combining statements. Stay informed and compliant to ensure your financial statements meet the new standard.

Watch Video.

GASB Issues Guidance to Improve Key Components of Government Financial Reports.

Norwalk, CT, May 28, 2024 — The Governmental Accounting Standards Board (GASB) today issued guidance designed to improve key components of the financial reporting model—the blueprint for governmental financial reports.

GASB Statement No. 34, *Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments*, which established government financial statements as we know them today, was issued almost 25 years ago in 1999. It represented perhaps the most significant and far-reaching change in governmental accounting since the establishment of the GASB in 1984.

GASB Statement No. 103, Financial Reporting Model Improvements, builds on Statement 34 by providing key targeted improvements to the financial reporting model. Its requirements are designed to:

- Enhance the effectiveness of governmental financial reports in providing information essential for decision making and assessing a government's accountability, and
- Address certain application issues.

The targeted improvements contained in Statement 103 establish or modify existing accounting and financial reporting requirements related to:

- Management’s discussion and analysis
- Unusual or infrequent items (previously known as extraordinary and special items)
- Presentation of the proprietary fund statement of revenues, expenses, and changes in fund net position
- Major component unit information, and
- Budgetary comparison information.

Targeted Improvement Areas

The Board periodically reexamines existing standards to learn whether the standards are accomplishing their intended purpose and if the informational benefits to financial statement users justify the cost to governments in complying with the standards. GASB research found that Statement 34 continues to be highly effective but did identify certain opportunities for improvement.

The requirements in Statement 103 improve financial reporting in a number of ways. While the overall requirements do not substantially change management’s discussion and analysis, the modifications are meant to improve the analysis included in this section and provide details about the items that should be discussed as currently known facts, decisions, or conditions expected to have a significant financial effect in the subsequent period.

With respect to unusual or infrequent items, the new Statement simplifies GASB literature by eliminating the separate presentation of extraordinary and special items. Under the requirement of Statement 103, applicable items will either be identified as unusual or infrequent, or both.

The changes to the presentation of the proprietary fund statement of revenues, expenses, and changes in fund net position are designed to improve consistency around the classification of items in those statements by better defining what should be included in operating revenues and expenses and nonoperating revenues and expenses including, for example, the addition of subsidies received or provided as a new category of nonoperating revenues and expenses.

Statement 103 is designed to improve the consistency of the reporting of major component unit information and budgetary comparison information by specifying required placement of that information. GASB Concepts Statements, issued after Statement 103, provide guidance that was used to determine where to report this information in a government financial report. Furthermore, GASB research found that optionality of placement could lead to inconsistency in practice in the reporting of that information.

The requirements of Statement 103 are effective for fiscal years beginning after June 15, 2025, and all reporting periods thereafter. Earlier application is encouraged.

Key Steps for Fund Managers to Avoid Scrutiny Under the SEC’s Pay-to-Play Rule: Proskauer Rose

The SEC’s recent settlement involving a “pay-to-play” rule violation by a private equity firm is a timely reminder for fund managers, especially with the November elections approaching.

As a refresher, Rule 206(4)-5 of the Investment Advisers Act – known as the "pay to play" rule – prohibits investment advisers from receiving compensation for providing advisory services to state and municipal entities for two years after the adviser or one of its "covered associates" makes certain political contribution to candidates for public office. Note that the SEC Enforcement Division staff periodically reviews public campaign contribution reports (which are publicly available online) to identify donations by individuals associated with investment advisers.

In the recent SEC settlement, an employee and covered associate of an SEC-registered investment adviser contributed $4,000 to the political campaign of a state government official, whose position had the ability to influence the selection of investment advisers for the state board of investment. The state had a pre-existing investment in private equity funds managed by the firm. This contribution triggered the pay-to-play rule restrictions and as a result, the entity was fined as part of a cease and desist order.

Continue reading.

Proskauer Rose LLP – Joshua M Newville, Robert Pommer and Julia M. Ansanelli

May 29 2024

Financial Reporting Model - Reexamination of Statements 34, 35, 37, 41, and 46, and Interpretation 6: GASB Current Projects

Project Description

The objective of this project is to make improvements to the financial reporting model, including Statement No. 34, Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments, and other reporting model-related pronouncements (Statements No. 35, Basic Financial Statements—and Management's Discussion and Analysis—for Public Colleges and Universities, No. 37, Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments: Omnibus, No. 41, Budgetary Comparison Schedules—Perspective Differences, and No. 46, Net Assets Restricted by Enabling Legislation, and Interpretation No. 6, Recognition and Measurement of Certain Liabilities and Expenditures in Governmental Fund Financial Statements). The objective of these improvements would be to enhance the effectiveness of the model in providing information that is essential for decision-making and enhance the ability to assess a government's accounting and to address certain application issues, based upon the results of the pre-agenda research on the financial reporting model.

Learn More.

Classification of Nonfinancial Assets: GASB Current Projects

Project Description

The objective of this project would be to reconsider the existing classification of nonfinancial assets and other related sub-classifications (for example, capital assets or intangible assets) to ensure that (1) assets are classified in a way that provides the most relevant financial information and (2) the

definitions of the classifications are understandable and appropriate to meeting financial reporting objectives. The project also will consider how any classification changes would affect financial statement presentation and disclosure of nonfinancial assets. The project will not, however, reexamine recognition or measurement of nonfinancial assets.

Learn More.

MSRB to Retire Selective Interpretive Guidance Regarding Inter-Dealer Confirmation Disclosures.

Read the MSRB Notice.

May 22, 2024

SEC Instituting Proceedings on FINRA and the MRSB's Proposals to Shorten Trade Reporting Timelines in Fixed-Income Markets: SIFMA Comment Letter

SIFMA and SIFMA AMG provided further comments to the U.S. Securities and Exchange Commission (SEC) in light of the SEC's instituting proceedings on FINRA and the MRSB's (together, the "SROs") proposals to shorten trade reporting timelines in fixed-income markets.

See related: Proposed Rule Change to Amend MSRB Rule G–14 and FINRA Rule 6730 (SIFMA and SIFMA AMG)

Read the SIFMA Comment Letter.

MSRB Amends Rule G-27 to Harmonize with FINRA and Adopt the Residential Supervisory Location Classification.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) a proposed rule change to MSRB Rule G-27 on dealer supervision. The proposed rule change will allow Financial Industry Regulatory Authority (FINRA)-member dealers to designate an associated person's private residence where supervisory activities are conducted as a residential supervisory location (RSL), which will harmonize Rule G-27 with recently adopted amendments by FINRA. The rule change was filed today for immediate effectiveness and becomes operative on June 1, 2024.

"This amendment is an important milestone in the modernization of the regulatory framework for dealer supervision of municipal securities activities," MSRB Chief Regulatory and Policy Officer Ernesto A. Lanza said. "We recognize that the adopted amendments by FINRA are a sea change for the industry and are mindful of the need to promote regulatory consistency for dealers."

The RSL classification allows FINRA-member broker-dealers (dealers) the option to treat a private residence at which an associated person engages in specified supervisory activities, subject to

certain safeguards and limitations, as a non-branch location. As a non-branch location, the newly defined RSL will be subject to inspections on a regular periodic schedule instead of the annual inspection currently required for offices of municipal supervisory jurisdiction (OMSJ) and supervisory branch offices.

To utilize the optional RSL classification, a dealer and the associated person assigned to each location must meet specified conditions and eligibility requirements, pursuant to Rule G-27. Additionally, the dealer must develop a reasonable risk-based approach to designating an office or location as an RSL and conduct and document a risk assessment for the associated person assigned to each office or location. Dealers must also provide a list of designated RSLs to FINRA, with the first list due to FINRA by October 15, 2024, covering all locations designated between June 1, 2024, and September 30, 2024.

"MSRB acknowledges that the way dealers conduct business has changed over recent years with an increasing move to hybrid workplace models," Lanza said. "We will continue to engage with stakeholders to better understand ongoing burdens and balance those burdens against the need for robust protection of investors."

In the coming weeks, MSRB expects to file an additional amendment to Rule G-27 with the SEC, allowing certain dealers to fulfill their office inspection obligations remotely for a pilot period through participation in FINRA's Remote Inspections Pilot Program.

Read the notice.

Date: May 10, 2024

Contact: Aleis Stokes, Chief External Relations Officer
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GFOA: GASB 102 and More Disclosure for You

Following the issuance of the Governmental Accounting Standards Board (GASB) Concepts Statement No. 7, *Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*—an amendment of GASB Concepts Statement No. 3 (GASB CS7) in June 2022, GASB has undertaken several projects focused exclusively or primarily on required note disclosures, providing an opportunity to put GASB CS7's new, more rigorous criteria for note disclosure content to the test.

The recently issued GASB Statement No. 102, Certain Risk Disclosures (GASB 102), is the first of these projects to become a final standard. This article will provide a brief overview of GASB 102 and some background on the other disclosure-focused projects on GASB's current technical agenda.

DOWNLOAD

Publication date: April 2024

Author: Michele Mark Levine

Proposed Rule Change To Amend MSRB Rule G-47, on Time of Trade Disclosure, To Codify and Retire Certain Existing Interpretive Guidance and New Time of Trade Disclosure Scenarios: SIFMA Comment Letter

SUMMARY

SIFMA provided comments to the U.S. Securities and Exchange Commission (SEC) on the Municipal Securities Rulemaking Board's (MSRB) Notice of Filing of a Proposed Rule Change To Amend MSRB Rule G– 47, on Time of Trade Disclosure, To Codify and Retire Certain Existing Interpretive Guidance and New Time of Trade Disclosure Scenarios.

View the SIFMA Comment Letter.

See related: Request for Comment Regarding a Retrospective Review of the MSRB's Time of Trade Disclosure Rule and Draft Amendments to MSRB Rule D-15, On Sophisticated Municipal Market Professionals

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MSRB: Possible Redemption of Build America Bonds

Read the MSRB publication.

4/26/24

Muni Regulator Flags Risks of Buying Build America Bonds,

- **Refinancings can saddle investors with losses as bonds called**
- **MSRB says a number of the bond issues trading above par value**

The municipal-bond market's regulator published a note highlighting the risks of buying Build America Bonds that are trading at more than 100 cents on the dollar, which expose investors to potential losses as governments increasingly buy them back under refinancings.
The securities were sold in 2009 and 2010 through a federal program that was aimed at helping to pull the economy out of its slump by increasing state and local government spending on infrastructure. The federal government subsidizes some of the interest bills on the bonds instead of making the interest tax-exempt, as is the case with traditional municipal securities.

But those subsidies were cut over a decade ago, and governments have been refinancing them by exercising their right to buy the bonds back from investors. That call price can be below where the bonds have been trading.

In guidance published Friday, the Municipal Securities Rulemaking Board said it has seen "a number of BABs trading in the secondary market at a significant premium to par," and said investors should be aware of the risk of buying them. If called, it could "result in a loss, particularly for investors who purchase the BABs at a premium."

The group also said that the likelihood of an individual security being called will depend on a range

of factors like the rate environment, the government's cash position and the specifics of the call provisions.

Bank of America Corp. said Friday that Build America Bond refinancings have helped to boost the pace of overall debt sales, which picked up this year as markets recovered from the impacts of the Federal Reserve's rate hikes.

Bloomberg Markets

By Nic Querolo and Amanda Albright

April 26, 2024 at 7:06 AM PDT

GFOA' April Issue of Government Finance Review.

This month's magazine highlights how to architect a budget process, budgeting transparency initiatives, overcoming fear and resistance to create positive organizational change, payroll processing, GASB 102, ERP contracts, members spotlights and much more.

The full issue of the April 2024 Government Finance Review is available to read electronically. Individual articles are available for download below.

READ FULL ISSUE

MSRB Announces Discussion Topics for Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet on April 17-18, 2024, holding the third quarterly meeting of fiscal year 2024 to advance its FY 2022-2025 Strategic Plan.

Market Regulation

The Board will discuss regulatory matters and receive updates on several on-going Market Regulation initiatives including:

- Notice 2023-11: Review of public comments to Request for Information on Impacts of MSRB Rules on Small Firms.
- Rule G-12(c): Potential codification of confirmation requirements for certain inter-dealer trades.
- Rule G-14: Pending rule proposal to shorten the timeframe for trade reporting.
- Rule D-15: Potential modifications to the definition of a sophisticated municipal market professional (SMMP).
- Form G-32: Review of recent changes to the submission process for primary market disclosures to the MSRB's EMMA website.

Market Transparency

The Board will receive an update regarding work to modernize the Electronic Municipal Market Access (EMMA) website and related market transparency systems.

Additionally, the Board will review recent and upcoming research and education publications and discuss potential opportunities for future pieces.

MSRB to Seek Comment on Form A-12.

The Municipal Securities Rulemaking Board has approved a request for comment for amendments to its Form A-12 under its registration rule A-12, which would collect information on associated persons from bank dealers for display on MSRB.org.

That step was approved during the MSRB's second quarter meeting that concluded Thursday. The meeting also discussed a bevy of other regulatory efforts concerning its rule book, in addition to discussing the outcomes of its stakeholder meeting, also held this week.

The forthcoming request for comment on Form A-12 aims to make similar information available for bank dealers as it already does for municipal advisors, in addition to adding certain technical amendments to the rule.

"Modernizing MSRB rules and technology is a key focus for the Board as it works to provide greater transparency while protecting and strengthening the municipal securities market," said MSRB chair Meredith Hathorn. "We continue to make progress on our strategic objectives, while also identifying important ways to enhance our broader outreach to the industry and stakeholders to hear their diverse perspectives."

The MSRB also approved the issuance of a concept proposal, seeking input on the potential for creating a standalone rule requiring dealers to deliver primary offering disclosures to customers for municipal fund securities, including 529 plans and ABLE programs.

For other rules, the MSRB discussed its pending rule proposal for G-14 on customer transaction reporting, or its switch to a one minute trade reporting window. The board discussed comments received as part of its January 2024 rule filing and discussed next steps around final approval by the Securities and Exchange Commission.

"The SEC does have to take action on the MSRB and FINRA's rule filings before the end of this month," said Mark Kim, chief executive officer of the MSRB.

The board also discussed Rule G-12(c) the subsection of its uniform practices rule concerning inter-dealer confirmations and the potential codification of confirmation requirements, potential modification modifications to its sophisticated municipal market professional definition as part of Rule D-15, and reviewed changes to the submission process for primary market disclosure on Form G-32.

The board further discussed public comments received as part of its request for information on small firms and received a briefing on the muni market impact of the SEC's newly adopted Rule 192 on conflicts of interest on certain securitizations.

Finally, the board discussed its second stakeholder meeting on its budgeting process. The board, as well as much of the market waits to hear what the Commission will do in response.

"We look forward to continued engagement with our stakeholders as we advance the MSRB's mission of protecting and strengthening the municipal securities market," Kim said.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 04/19/24 12:03 PM EDT

MSRB Advanced Regulatory and Technology Modernization Initiatives; Discussed Enhanced Stakeholder Outreach at Quarterly Board Meeting

Washington, D.C. — The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met on April 17-18, 2024, for the third quarterly meeting of fiscal year 2024, where it discussed several market regulation and market transparency initiatives to advance its FY 2022-2025 Strategic Plan. The Board also discussed recent outreach efforts to enhance stakeholder understanding of the MSRB's rate card model, budget and technology investments.

"Modernizing MSRB rules and technology is a key focus for the Board as it works to provide greater transparency while protecting and strengthening the municipal securities market," said MSRB Chair Meredith Hathorn. "We continue to make progress on our strategic objectives and to identify important ways to enhance our broader outreach to the industry and stakeholders to hear their diverse perspectives."

Market Regulation

The Board approved issuing a request for comment on proposed changes to MSRB Form A-12 to collect associated person information from bank dealers for subsequent display on MSRB.org, similar to information made available by the MSRB on associated persons of municipal advisors, as well as on certain potential technical amendments to Rule A-12.

The Board also authorized issuing a concept proposal seeking input on the potential modernization of requirements for dealers to deliver primary offering disclosures to customers for municipal fund securities, which include 529 plans and ABLE programs. The concept proposal would also seek input on potentially creating a new standalone rule similar to Rule G-47 on time of trade disclosure, which would include codifying existing interpretive guidance related to disclosure for municipal fund securities.

Additionally, the Board received an update on:

- Rule G-14: Pending rule proposal to shorten the timeframe for trade reporting. The Board discussed certain key aspects of the proposal in light of comments received on its January 2024 rule filing and considered next steps toward potential final approval of the proposal by the SEC.
- Rule G-12(c): Potential codification of confirmation requirements for certain inter-dealer trades.
- Rule D-15: Potential modifications to the definition of a sophisticated municipal market professional (SMMP).
- Form G-32: Review of recent changes to the submission process for primary market disclosures to the MSRB's Electronic Municipal Market Access (EMMA) website.
- Public comments to MSRB's Request for Information on Impacts of MSRB Rules on Small Firms.

Finally, the Board received briefings on the potential impact on the municipal securities market of the SEC's recently adopted Rule 192 on conflicts of interest relating to certain securitizations as well as on recent press reports regarding extraordinary optional redemptions of Build America Bonds.

Market Transparency

The Board received an update on efforts to modernize the EMMA website, and related market transparency systems. This includes leveraging cloud computing and new technologies such as artificial intelligence and machine learning to improve the quality of data available on the EMMA website.

Additionally, the Board reviewed recent and forthcoming research publications, including a report indicating that an increase in pre-trade quote volume was correlated with trade price improvement in the municipal securities market.

MSRB Stakeholder Meeting

The Tuesday prior to its quarterly meeting, MSRB Board leadership and Finance Committee members, along with several other members of the Board and MSRB senior staff, met with industry stakeholders including broker-dealers, municipal advisors, issuers and investors. This was the second of two meetings, the first of which was held in March with regulated entities to discuss the MSRB's 2024 rate card and fee-setting process. Tuesday's meeting, which focused on the MSRB's budget and technology initiatives, provided greater transparency and insight into these areas, while providing an opportunity for various stakeholder groups to come together and share their perspectives.

"We look forward to continued engagement with our stakeholders as we advance the MSRB's mission of protecting and strengthening the municipal securities market," said MSRB CEO Mark Kim.

Date: April 19, 2024

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SIFMA Update on The Guidelines on Funds' Names Using ESG or Sustainability-Related Terrms

SUMMARY

SIFMA AMG provided comments to the Investor Protections and Sustainable Finance Department on the Guidelines on funds' names using ESG or sustainability-related terms regarding their concerns about the impact of the proposed timing for implementation as well as some of the details of the final guidelines.

See related: ESMA Consultation Paper regarding Guidelines on funds' names using ESG or sustainability-related terms

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FINRA Facts and Trends: March 2024 - Bracewell

Welcome to the latest issue of Bracewell's FINRA Facts and Trends, a monthly newsletter devoted to condensing and digesting recent FINRA developments in the areas of enforcement, regulation and dispute resolution. This month, we report on FINRA's focus on uses of artificial intelligence as an emerging risk, oral argument in the Alpine Securities case that has broad implications for FINRA, a pair of enforcement matters that shed light on FINRA's concerns with off-channel communications, and much more.

FINRA Proposes Expanding Category of Persons Who May Receive Projections and Targeted Returns

In our December 2023 issue, we discussed a FINRA proposal that would amend Rule 2210 (Communications with the Public), which generally prohibits projections of performance or targeted returns in member communications, subject to certain exceptions. The amendment would allow member firms to provide projected performance or targeted returns in institutional communications and in communications to qualified purchasers.

FINRA has now filed Partial Amendment No. 1, which "marginally expand[s]" the category of persons who can receive projected performance or target returns to include "knowledgeable employees." As defined in Rule 3c-5 of the Investment Company Act, the term "knowledgeable employees" generally includes officers, directors, trustees, general partners and advisory board members, or persons serving in similar capacities of the fund or certain of its affiliates, as well as other employees that participate in the investment activities of the fund or certain of the fund's affiliates. As for why FINRA elected to include "knowledgeable employees," it noted that these employees typically have sufficient knowledge of the operations of the private funds with which they are associated. As a result, they are "less likely not to understand the risks and limitations of projections or targeted returns associated with such funds." Comments on the original amendment and Partial Amendment No. 1 are due by March 20, 2024. Anyone who wishes to file a rebuttal to a comment must do so by April 3, 2024.

FINRA Zeroes in on Vendor Use of Generative AI and Large Language Models

In its 2024 Annual Regulatory Oversight Report, which we reported on earlier, FINRA classified artificial intelligence as an "emerging risk," noting that deploying AI in the industry could affect virtually all aspects of a broker-dealer's operations. Now, in a recent episode of the FINRA podcast "FINRA Unscripted," three prominent executives at FINRA offered further insight into two particular risks: vendor use of generative AI and large language models. Generative AI, which gained popularity with the launch of ChatGPT in November 2022, refers to a category of artificial intelligence systems that are designed to generate new, original content rather than simply analyze existing data. While generative AI has the ability to create new content, including text images and even audio, based on patterns and information that it learns from extensive training data, large language models are specifically designed for tasks revolving around natural language generation and comprehension. Large language models have been trained on immense amounts of text data that allow them to learn patterns and relationships between words and phrases and generate natural language and other types of content to perform a wide range of tasks.

Generative AI and large language models, while providing efficiencies that help member firms better serve customers, also present serious vendor management questions. From time to time, FINRA has made a point of cautioning firms and their registered representatives on the potential pitfalls when relying on these third-party vendors. During the COVID-19 pandemic, for example, FINRA observed that firms were increasingly leveraging vendors to perform risk management functions and to assist in supervising sales and trading activity and in customer communications. To address this concern, in 2021, FINRA published Regulatory Notice 21-29 on the topic of supervisory obligations related to

outsourcing to third parties.

Now, however, vendor use of artificial intelligence presents another, albeit less predictable, layer of concern about accuracy, privacy, bias and intellectual property. According to Andrew McElduff, Vice President with Member Supervision's Risk Monitoring team, when it comes to supervising a vendor's use of these technologies, firms must do their diligence and ask the necessary questions to determine where their information is being stored and whether it is restricted only for the firm's use. When it comes to firms' use of vendors, Haimera Workie, Vice President and head of FINRA's Office of Financial Innovation, cautions firms and their registered representatives: "You can delegate a function, but you can't delegate ultimate responsibility." As a result, firms should make sure to have in place written compliance and operational policies and procedures concerning the supervision of artificial intelligence systems and ensure that all contracts with third-party vendors protect the information of the firm and its clients.

Oral Argument Held in Challenge to Constitutionality of FINRA Enforcement Powers

The landmark case brought by Alpine Securities Corporation against FINRA continues to make its way toward a decision in the DC Circuit Court of Appeals, with an oral argument held last month. As we have reported previously, the case has potentially monumental implications for FINRA's future.

Alpine, a firm that was expelled from FINRA membership following a 19-day hearing by an extended FINRA hearing panel, has sought to enjoin this so-called "corporate death penalty" by challenging the constitutionality of FINRA's enforcement powers based on an argument that FINRA wields those powers in violation of the Appointments Clause of the US Constitution. This argument was applied by the US Supreme Court, in Lucia v. Securities and Exchange Commission, decided in 2018, to hold that the SEC's Administrative Law Judges (ALJs) are subject to the Appointments Clause. In its briefs, FINRA has characterized the challenge to its own powers as an "existential threat."

While there is always danger in attempting to read into a court's comments at oral argument, the three-judge panel of the DC Circuit expressed a fair degree of skepticism concerning the constitutional challenge brought by Alpine.

Counsel for Alpine argued that the "existential threat" runs both ways, and that the remedy Alpine seeks is the "ability to continue to run its business, while it pursues its claims, free from summary imposition of the corporate death penalty by an unaccountable enforcer of federal law."

But Judge Millett pushed back on the phrase "corporate death penalty," pointing out that FINRA cannot actually close Alpine's (or any firm's) business, but only expel Alpine from its private organization. Still, Judge Millett acknowledged that "the consequence of that, thanks to Congressional statute, may be that it's going to be very hard to stay in business." Chief Judge Srinivasan also provided some clarification as to whether FINRA is truly "unaccountable," asserting that any FINRA decision is immediately appealable to the SEC, which has the authority to issue a stay, such that the decision does not "irrevocably take effect immediately." Judge Millett, however, leveled the harshest criticism of Alpine's position, stating: "I think it would be the first time . . . that a court would be declaring someone an officer of the United States when they are hired by, employed by, and paid by a private entity."

Counsel for FINRA took up this argument, telling the Court that: "No court in any jurisdiction has ever held that the Appointments Clause applies to employees of a private corporation. Alpine has not identified any reason for this Court to be the first to reach that unprecedented conclusion."

The judges had difficult questions for FINRA's counsel too. Chief Judge Srinivasan appeared

concerned that FINRA's position was overly formalistic, and would allow the SEC to avoid the Appointments Clause problem identified in Lucia by doing nothing more than retaining a private contractor to perform the function of its ALJs. Judge Millett, however, argued that "historically, that was how the federal government did prosecutions . . . . It would contract out lawyers to prosecute cases. . . . Lincoln prosecuted cases for the federal government." Of the three-judge panel, Judge Walker appeared most troubled by the implications of FINRA's arguments, telling FINRA's counsel, "I think where we part ways is that you . . . disagree with this statement: significant executive power cannot be exercised by private citizens at all."

Bracewell continues to monitor this case and will report on its progress and potential implications for FINRA.

Notable Enforcement Matters and Disciplinary Actions

Off-Channel Communications. In its 2024 Annual Regulatory Oversight Report (which we highlighted in our January newsletter), FINRA emphasized its growing concern surrounding off-channel communications — those that occur on non-firm platforms or devices. FINRA has backed up its warning with a series of fines and suspensions stemming from brokers' engagement in such off-channel communications. In a recent enforcement action in February, FINRA imposed a $75,000 fine on a brokerage firm, alleging that it failed to adequately supervise employees' use of personal email for business-related communications. The firm also allegedly failed to retain these emails, contravening both Securities Exchange Act and FINRA rules. Despite being alerted to at least one representative regularly using personal email for business purposes, the firm took insufficient action and merely issued automated warnings with respect to some of the off-channel communications. As a result, correspondence between representatives' personal email addresses and customers remained unpreserved. In a separate enforcement action, a broker agreed to fines and a two-month suspension from the industry for allegedly exchanging hundreds of securities-related text messages with 14 firm customers via his personal cell phone. Since the device was not sanctioned by his firm, none of these messages were captured or maintained, as required by the Exchange Act and FINRA rules. These actions, and others, underscore FINRA's continuing commitment to enforce its rules concerning off-channel communications.

Municipal Securities. FINRA recently concluded what appears to be its first disciplinary case involving the close-out requirements outlined in the Municipal Securities Rulemaking Board (MSRB) rules. An investment bank was fined $1.6 million for its failure to promptly close out failed inter-dealer municipal securities transactions. According to FINRA, the bank had neglected to cancel or close out 239 failed inter-dealer municipal transactions — amounting to approximately $9 million — within the mandated 20-calendar-day period following the settlement date. In fact, some transactions remained unresolved for nearly three years. Moreover, the bank allegedly failed to take necessary steps to acquire timely possession or control over 247 short positions in municipal securities valued at approximately $9.4 million. It remains to be seen whether this enforcement action resulted from the severity of FINRA's allegations in this particular case, or whether it signifies a heightened focus on enforcement efforts within the municipal securities market.

Municipal Securities. In another municipal bonds case, FINRA expelled an underwriter and barred its principals from the industry for making fraudulent misrepresentations in the sale of municipal bonds. In a comprehensive 133-page decision, the OHO found that the underwriter made fraudulent misrepresentations concerning a $6 million municipal bond offering in Alabama, and negligent misrepresentations with respect to separate $2.2 million bond offering in Illinois. Both offerings failed shortly after closing, and the bondholders — many of whom were elderly — lost most of their investments. As a result of their misconduct, the underwriter and its principals (who had previously run afoul of FINRA rules) were barred indefinitely from the industry and were ordered to pay more

than $4.7 million in restitution, plus interest and costs.

Securities Lending. In separate actions, four broker-dealer firms agreed to pay a combined $2.6 million in fines and restitution to settle claims that they failed to properly supervise fully paid securities lending programs. The Letters of Acceptance, Waiver, and Consent (AWCs) detailing FINRA's findings in these matters are available here, here, here and here. Fully paid securities lending programs permit investors to lend out securities they already own to clearing firms, which in turn lend the securities to third parties for a fee. The fee is generally shared among the various participants: the customer, the broker-dealer and the clearing firm. When the investor chooses to sell the borrowed securities, the clearing firm is responsible for recalling them from the borrower. In each of the four cases, FINRA alleges that the broker-dealers automatically enrolled new customers in fully paid securities lending programs upon account opening, irrespective of suitability, and then pocketed the revenue they received from the clearing firms, in violation of written disclosures. Additionally, some customers who received cash payments in lieu of dividends allegedly suffered adverse tax consequences, for which the companies agreed to pay more than $1 million in restitution.

FINRA Notices and Rule Filings

Regulatory Notice 24-02 – FINRA has adopted new FINRA Rules 3110.19 (Residential Supervisory Location) and 3110.18 (Remote Inspections Pilot Program). FINRA also announced the end of the pandemic-era relief issued under Regulatory Notice 20-08. Rule 3110.19, which will become effective on June 1, 2024, establishes a new framework for inspections of private residences at which an associated person engages in specified supervisory activities. These private residences will be treated as non-branch locations — defined as "residential supervisory locations (or RSLs)" — and will be subject to inspections at least every three years, instead of the annual inspections currently required for a supervisory branch office. Firms must meet specified conditions to qualify for an RSL designation, including conducting and documenting a risk assessment. Rule 3110.18, which will become effective on July 1, 2024, establishes a voluntary, three-year remote inspections pilot program, which will allow member firms to fulfill their inspection obligations for qualified branch offices remotely (without an on-site visit). Firms must meet certain specified terms to participate, and must opt in to the pilot program no later than June 26, 2024. Finally, FINRA ended the relief provided under Regulatory Notice 20-08. A measure extended during the COVID-19 pandemic, Regulatory Notice 20-08 temporarily suspended the requirements for member firms to maintain updated U4 information with respect to the employment address for certain employees who temporarily relocated during the pandemic. The Notice also suspended the requirement to report newly opened temporary office locations or space-sharing arrangements. FINRA announced that these relief measures will expire on May 31, 2024.

Regulatory Notice 24-03 – FINRA has amended its Code of Arbitration Procedure to reflect changes to the arbitrator list selection process. The changes include:

- Randomly generated lists of arbitrators for each proceeding will now incorporate a manual review for conflicts of interest that are not identified in the list selection algorithm, with the Director empowered to exclude arbitrators from lists based on its review of current conflicts of interest;
- The Director is now required to provide a written explanation with respect to any decision to grant or deny a party's request to remove an arbitrator; and
- The time for a party to request removal of an arbitrator for conflict of interest or bias (or for the Director to remove an arbitrator on its own initiative) will be from when arbitrator ranking lists are generated, to no later than the date on which the first hearing session begins.

FINRA also amended its Codes of Arbitration Procedure to make numerous clarifying and technical

changes to the requirements for holding prehearing conferences and hearing sessions, initiating and responding to claims, motion practice, claim and case dismissals, and providing a hearing record.

Regulatory Notice 24-04 – FINRA has adopted amendments to its rules pertaining to securities settlement including by shortening the timeframes for delivery or settlement, consistent with the SEC's recent adoption of final rules that changes the settlement cycle for most U.S. securities transactions from T+2 to T+1. The Regulatory Notice also amends 17 related FINRA rules with respect to transaction reporting, trade report processing, dates of delivery, and other similar matters.
Regulatory Notice 24-05 – FINRA announced the adoption of new Rule 6151 (Disclosure of Order Routing Information to NMS Securities). The new rule will go into effect on June 30, 2024, and will require member firms to submit to FINRA order routing reports for NMS securities, as required under SEC Rule 606(a). The reports will be required on a quarterly basis and will be publicly reported on a free website for at least three years.

Regulatory Notice 24-06 – In consultation with the Department of the Treasury, FINRA announced that, on March 25, 2024, it will begin disseminating an end-of-day file that includes information on individual transactions in US Treasury securities that are "on-the-run nominal coupons." FINRA will also provide a new Historic TRACE data set for Treasury securities, which will contain transaction information on a six-month delayed basis. These reports will be publicly available and free of charge on FINRA's website for non-professionals' personal, non-commercial purposes, on a next-day basis.

SR-FINRA-2024-004 – FINRA has proposed a rule change that would amend FINRA Rule 6730 to reduce the 15-minute TRACE reporting timeframe to one minute, with exceptions for member firms with de minimis reporting activity and for manual trades.

Bracewell LLP – Joshua Klein, Keith Blackman and Russell W. Gallaro

March 19 2024

Issuers On Notice For Climate Risks.

Municipal issuers who've yet to make a habit of disclosing material climate-related risks may be at risk of violating the Securities and Exchange Commission's antifraud provisions, following the rollout of its newly updated climate rule last week.

The SEC's new climate rules, reviled by many on both sides of the aisle for either doing too much or not doing enough, represent a compromise from the original 2022 proposal and drops that initial provision requiring corporate issuers to disclose emissions from supply chains. Now, registered companies are on the hook for reporting emissions from their operations and energy purchases, or Stage 1 and Stage 2, respectively.

The rule does not directly touch the municipal bond market but some have long feared that this model will eventually be applied to the muni market, either directly or through enforcement and could eventually see Rule 15c2-12 (which lays out specific material events that need to be disclosed) include climate risk events.

"The regulation assumes that investors want more robust and consistent information to assess climate-related risks to make informed investment decisions and price securities," wrote Lisa Washburn, chief credit officer at Municipal Market Analytics. "This may render such climate-related

information ‘material’ under its definition for purposes of the antifraud law.”

“Municipal participants should expect that, over time, many of the disclosures outlined in the new rule will be expected from municipal issuers too,” Washburn added, expecting that climate related enforcement will follow in the footsteps of issues such as the disclosure of bank loans and enforcement related to MCDC as the Commission’s new enforcement strategy du jour.

“Given the keen interest in addressing climate-related disclosure gaps and the rising effects of both acute and chronic climate perils, MMA expects that one of the enforcement approaches is likely to be its first course of action,” Washburn wrote.

The disclosures the SEC generally expects from corporate issuers can generally be put into such buckets as the disclosure of climate-related risks and impact on business strategy, financial condition and outlook; governance and risk management of climate-related risks, mitigation and adaptation strategies; scope 1 and scope 2 greenhouse gas emissions; climate goals or targets and the related impact on expenditures; financial impacts from severe weather events or the use of carbon offsets.

The rule also states that the Commission will provide a safe harbor that all information, except for historical fact, will be treated as forward looking.

MMA recommends that municipal issuers begin disclosing information on climate-related risks that have a material impact on finance or operations, a discussion of mitigation or adaptation efforts and related material costs, as well as if and how climate-related risks are identified, assessed and managed.

But there is a chance that the final rules will never be rolled out as proposed. A coalition of states including West Virginia, Georgia, Alabama, Alaska, Indiana, New Hampshire, Oklahoma, South Carolina, Wyoming and Virginia have already sued the Commission, in hopes of showing that the final rule “exceeds the agency’s statutory authority and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with the law,” the lawsuit said.

“Although not directly applicable, it is an exemplar potentially in our sector,” said Chuck Samuels, member at Mintz Levin and counsel to the National Association of Health & Educational Facilities Finance Authorities. “It’s considerably less burdensome than as proposed. But, there is a substantial possibility this will never be effective between court challenges, the Congressional Review Act, and possible change in Administrations.”

The rule will become effective sixty days after publication in the federal register and compliance dates differ depending on the size of the firm, with the earliest date for large accelerated filers beginning in 2025.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 03/12/24 02:28 PM EDT

Cybersecurity Disclosure Considerations for Municipal Issuers.

In the Closing Remarks of a Compliance Conference on Dec. 7, the Director of the Office of Municipal Securities of the U.S. Securities and Exchange Commission noted the SEC recently

finalized its cybersecurity rule for public companies.

The Director then suggested that “everyone take a minute to review the Adopting Release for the rule because there are some good points on how corporations can handle cybersecurity disclosures that may be useful for municipal market participants.”

While the Commission’s cybersecurity rule does not apply to municipal issuers, below we summarize a few points discussed in the Adopting Release that may be useful for municipal market participants.

If a municipal issuer chooses to voluntarily disclose a material cybersecurity incident, it should consider various factors.

First, the municipal issuer should consider disclosing the nature, scope, and timing of the material cybersecurity incident. Municipal issuers should avoid specific or technical information about a planned response to the incident, its cybersecurity systems, related networks and devices, or potential system vulnerabilities in such detail that it would impede a response or remediation of the incident.

Second, the municipal issuer should consider disclosing the material impact or reasonably likely material impact of the incident (e.g., impact on the financial condition or operations of the municipal issuer), as opposed to the details regarding the incident itself.

Third, the municipal issuer should consider timing of any voluntarily disclosure. Municipal issuers should consider disclosing after it determines the incident is material, as opposed to immediately after the incident occurred.

Fourth, the materiality determination of the incident should be made without unreasonable delay. That said, a reasonable delay could occur, for example, if an incident poses a substantial risk to national security or public safety.

Lastly, the materiality analysis should take into consideration all relevant facts and circumstances surrounding the cybersecurity incident, including both quantitative and qualitative factors. The materiality standard is the traditional notion of materiality that has been articulated by the Supreme Court, as well as in Commission rules (e.g., information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision).

If a municipal issuer chooses to disclose cybersecurity information in connection with an offering, it should consider disclosing certain matters.

First, the municipal issuer should consider disclosing the process that it may have for assessing, identifying and managing material risk from cybersecurity threats, as opposed to the specifics on how a cyberattack will be remediated.

Second, the municipal issuer should consider disclosing risks from cybersecurity threats, including those resulting from previous incidents, that may have materially affected or are reasonably likely to materially affect the municipal issuer (e.g., operations or financial condition).

Lastly, the municipal issuer should consider whether to disclose consultants or other third parties that may assist with cybersecurity and who is responsible for oversight of risks from cybersecurity threats.

Any cybersecurity disclosure should allow for a reasonable investor to ascertain the cybersecurity practices of the municipal issuer with sufficient detail to understand the municipal issuer’s

cybersecurity risk profile. Municipal issuers should tailor disclosures so that they provide meaningful cybersecurity information, as opposed to overly descriptive or boilerplate disclosure.

The SEC recognizes that public companies will have differing approaches to cybersecurity disclosure based on their particular facts and circumstances. We hope such recognition will also extend to municipal issuers.

By Sarah Tahir

BY SOURCEMEDIA | MUNICIPAL | 03/14/24 09:39 AM EDT

Cybersecurity Disclosure Considerations for Municipal Issuers: Bracewell

In the Closing Remarks of a Compliance Conference on December 7, 2023, the Director of the Office of Municipal Securities of the US Securities and Exchange Commission noted the SEC recently finalized its cybersecurity rule for public companies. The Director then suggested that "everyone take a minute to review the Adopting Release for the rule because there are some good points on how corporations can handle cybersecurity disclosures that may be useful for municipal market participants."

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Bracewell LLP – Edward Fierro and Sarah Tahir

March 14 2024

A Refresher on Selective Disclosure and Anti-Fraud Rules: Frost Brown Todd

What Is Selective Disclosure?

The desire of investors to obtain additional information regarding issuers and conduit borrowers of municipal securities must be weighed against what can be provided to them without violating the U.S. Securities and Exchange Commission's (SEC) rules. While there is no direct guidance on the application of selective disclosure rules to municipal securities, guidance may be drawn from SEC enforcement actions in this area and how the law is applied to other types of securities.

Selective disclosure may occur when only certain investors are provided material non-public information. Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and view it as having significantly altered the information currently available. SEC Rule 10b-5 prohibits organizations, including municipalities, from making false statements and omitting material information and applies both during and after the issuance of securities. It is imperative for issuers and conduit borrowers of municipal securities to understand what disclosures could result in selective disclosure or violate the anti-fraud rules.

Selective Disclosure and Violation of Anti-Fraud Rules Scenarios

A violation of the anti-fraud rules occurs when an organization provides inaccurate information

about financial conditions to investors with the hope of obtaining favorable results. An organization also violates anti-fraud rules when it fails to provide adequate information to investors and leaves them to rely on potentially inaccurate public statements. The following are examples of violations of anti-fraud rules:

Continue reading.

Frost Brown Todd LLP – Glorify Batsirai Mandima, Carrie J. Cecil

March 14 2024

MSRB Research Examines Trading Patterns in the Municipal Securities Market.

Washington, D.C. — The Municipal Securities Rulemaking Board (MSRB) today published a new research report that examines trading patterns in the municipal securities market. The analysis reviews the fragmentation in the market and the depth and breadth of data available to market participants.

"While there are nearly a million securities outstanding in the municipal securities market today, only about 2% of those securities traded on an average day in 2023, while only 1% traded in 2021," said Marcelo Vieira, MSRB Senior Director of Research and Market Transparency. "This is important information for market participants to be aware of as they navigate this unique market."

The MSRB's analysis reviewed municipal securities trade data from two contrasting years, 2023, which had record-high trade count, and 2021, which had a record-low number of trades. The report reveals that about two-thirds of the securities that trade on an average day do so only once or twice. Additionally, almost 40% of the trades that occur on an average day have no prior trades in that security on the same day. This means that investors may have limited information to reference at the time of trade for the security they want to buy or sell.

"With a limited number of trades per individual bond, and a small percentage of outstanding securities trading daily, investors may want to review similar securities to inform their investment decisions," said Vieira.

In the report, the authors note that the municipal market is heavily reliant upon market tools such as yield curves and evaluated pricing to function efficiently. Often the entities that provide these market tools eliminate trades smaller than $500,000 or even $1 million from consideration. This means that many of the market tools market participants may rely upon are based on only 4-6% of the trades reported to the MSRB.

The MSRB offers free access to several municipal yield curves and other investor tools on its MSRB's Electronic Municipal Market Access (EMMA®) website. One of the most used tools is one that allows users to compare different securities.

Read the report.

Date: March 05, 2024

Contact: Aleis Stokes, Chief External Relations Officer

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[In Surprise Move, Rand Paul Targets Fed's Municipal Liquidity Facility.]

The Federal Reserve's dormant emergency lending program for state and local governments set up during the COVID-19 pandemic had a surprise return to the spotlight last Friday when Sen. Rand Paul, R-Ky., introduced a measure banning the central bank from reviving the program or buying municipal bonds in the future.

"It was never intended that Congress give the Fed the power, and we should make sure that it is explicit that the Federal Reserve cannot buy the debt of individual states," Paul said Friday from the Senate floor when introducing the provision as an amendment to the fiscal 2024 continuing appropriation.

The measure appears aimed at the Fed's Municipal Liquidity Facility established in spring 2020 at the onset of the COVID-19 pandemic. His office did not return calls for comment. A press release said the measure "would prevent government bailouts of mismanaged states" and "prevents the central bank from circumventing Congress to unilaterally provide a financial bailout of profligate states, the costs of which would be borne by the taxpayers through the form of forced subsidized losses or through the hidden tax of inflation."

Muni advocates including the Government Finance Officers Association were taken by surprise, said GFOA federal liaison Emily Brock.

"No one in our coalition was aware this would be introduced," Brock said. The amendment failed, but could pop up again, Brock warned. The GFOA has asked to meet with Rand's office to discuss the measure.

"As long as there's a permanent spending bill still lingering out there, I think it will come up again," she said.

The Fed launched the MLF in April 2020 as part of the CARES Act, the first of three rounds of federal rescue aid packages. The emergency program was aimed at bolstering cash-strapped issuers who might have a tough time entering a volatile market that had seen base municipal bond index yields rise by more than 225 basis points in nine trading days.

The MLF was able to purchase up to $500 billion of three-year notes from states, counties with a population of at least 500,000 residents, and U.S. cities with a population of at least 250,000 residents.

Only Illinois and New York's Metropolitan Transportation Authority ended up tapping the program, with Illinois borrowing $3.2 billion in two installments and the MTA borrowing $3.5 billion in two installments.

The MLF expired in December 2020, although former U.S. Treasury Secretary Steven Mnuchin said at the time that the facilities could be reestablished by "having the Federal Reserve request approval from the Secretary of the Treasury and, upon approval, the facilities can be funded with Core ESF (Exchange Stabilization) funds, to the extent permitted by law, or additional funds appropriated by Congress."

Rand’s amendment would prohibit the central bank from establishing “any emergency lending program or facility ? that purchases or sells any security issued by a state or a municipality, including a bond, note, draft or bill of exchange,” and block the bank from buying or selling any of the same securities.

Paul – a well-known anti-national debt hawk – reportedly insisted that his amendment be considered before he would support the fiscal 2024 short-term funding bill to avert a government shutdown. Congress this week is set to approve the appropriation legislation and then will take up a second package before March 22.

“We now know that the Federal Reserve is not only buying the federal debt; they are buying the debt of profligate, large-spending states like California, New York, and Illinois,” Paul said on the floor when introducing the amendment. “My amendment would make it explicitly illegal for the Federal Reserve to buy the debt of these big-spending, profligate individual states.

Minnesota Democratic Sen. Tina Smith responded that “tying the Fed’s hands” would be dangerous.

“Congress has given the Fed the flexibility to transact in state and local bonds because we knew that it could be an important and helpful tool in times of an emergency,” Smith said. “Preventing emergency programs outright would be dangerous and unnecessary.”

The amendment garnered 37 yes votes, all from Republicans. Supporters included Senate Majority Leader Mitch McConnell, R-Ky., as well as Sen. John Thune, R-S.D., and Sen. John Cornyn, R-Texas. The nays totaled 53, and 10 senators did not vote.

Paul’s comments on the Senate floor were “hyperbolic” as well as “curious and disturbing,” said Kent Hiteshew, former deputy associate director of the Fed’s Division of Financial Stability.

“The Fed has used its emergency statutory authorities to make loans to municipal governments only twice in its more than 100-year history – both back-stopped by Congressional appropriations during COVID,” Hiteshew said, noting that both loans were repaid on or before their due dates.

“In my view, it is doubtful that the Fed would use such powers again in the future absent similar existential threats to the economy and capital markets,” he said. “Nevertheless having such authority and independence would be crucial in such circumstances.”

Issuers groups like the National Association of State Treasurers have in the past advocated for the MLF to become permanent. NAST declined to comment on Paul’s amendment, as did the Bond Dealers of America. The GFOA never lobbied for an extension of the program, Brock said, but doesn’t want to see the Fed prohibited from emergency lending programs.

“We saw it as an infusion that was necessary at the time that was designed as a temporary stopgap and it was effective – it was very clear that our market has determined it was effective,” Brock said.

By Caitlin Devitt

BY SOURCEMEDIA | ECONOMIC | 03/06/24 10:17 AM EST

Sen. Rand Paul Proposes Ban on Federal Reserve's Municipal Bond

[Purchases, Sparking Debate]

Sen. Rand Paul introduces a measure to ban the Federal Reserve's municipal bond emergency lending, igniting debate on its economic role.

On a recent Friday, Sen. Rand Paul, R-Ky., introduced a controversial measure that could significantly impact the Federal Reserve's ability to support state and local governments during financial crises. Paul's amendment seeks to ban the central bank from reviving its emergency lending program for municipal bonds, established during the COVID-19 pandemic, or engaging in future municipal bond purchases. This move has reignited discussions on the Fed's role in stabilizing the economy, with implications for states and municipalities nationwide.

Background and Immediate Reactions

The Federal Reserve's Municipal Liquidity Facility (MLF), created as part of the CARES Act in spring 2020, was designed to aid cash-strapped states, counties, and cities by purchasing up to $500 billion of three-year notes. This emergency measure, which expired in December 2020, was only utilized by Illinois and New York's Metropolitan Transportation Authority. Paul's amendment, framed as a safeguard against government bailouts of "mismanaged states," has surprised many, including municipal bond advocates like the Government Finance Officers Association (GFOA), who were unaware of the proposal's introduction.

Legislative Responses and Debates

Despite the amendment's failure, with 37 yes votes exclusively from Republicans, the proposal has stirred a bipartisan debate on the Federal Reserve's flexibility in times of crisis. Critics, including Minnesota Democratic Sen. Tina Smith, argue that restricting the Fed's emergency powers could be dangerous, emphasizing the necessity of such tools in unforeseen emergencies. Proponents of the amendment, however, view it as a crucial step towards fiscal responsibility and preventing unchecked bailout powers.

Implications for the Future

The debate over the Federal Reserve's emergency lending capabilities raises important questions about the balance between fiscal responsibility and the need for robust economic safety nets. While the amendment did not pass, its introduction and the subsequent discussions underscore the ongoing tension between different visions of economic governance. As the GFOA and other organizations seek dialogue with lawmakers, the future of the Federal Reserve's role in state and municipal finance remains uncertain, highlighting the need for a nuanced approach to economic policy in times of crisis.

bnnbreaking.com

BNN Correspondents

06 Mar 2024

[MSRB Publishes 2023 Fact Book of Municipal Securities Data.]

Washington, DC — The Municipal Securities Rulemaking Board (MSRB) today published its [annual]

Fact Book, the definitive compilation of the most recent five years of statistics on municipal securities market trading, interest rate resets and disclosures. The 2023 Fact Book includes monthly, quarterly and yearly aggregate market information from 2019 to 2023, which can be analyzed to identify market trends.

"This is the 16th year the MSRB has published its annual Fact Book, which municipal market participants continue to rely upon to better understand emerging and long-term trends within the municipal securities market," MSRB Senior Director, Research and Market Transparency Marcelo Vieira said. "We are pleased to release this information to the market annually as it provides added context and transparency for market participants, policymakers and the public."

Statistics provided in the 2023 Fact Book validate trends highlighted in the MSRB's 2023 Municipal Market Year in Review. Most notable of these trends are the significant interest rate volatility and the record trading volume driven by strong demand from individual investors.

In addition to compiling quarterly and annual statistics, the MSRB regularly conducts independent research and analysis to support the understanding of municipal securities market trends. Much of this research is based on real-time municipal securities trade data the MSRB collects, along with primary market and secondary market disclosures, which it makes available for free to the public on its Electronic Municipal Market Access (EMMA®) website.

Date: February 29, 2024

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Solicitor Municipal Advisors On Watch With New MSRB Rule G-46 In Place.

After years of soliciting market feedback, new Municipal Securities Rulemaking Board Rule G-46 on the duties of solicitor municipal advisors is in effect as of March 1, setting the stage for closer scrutiny from both municipal advisors and the Securities and Exchange Commission.

Solicitor municipal advisors are a much smaller crowd than traditional municipal advisors and only solicit for pension funds, though some MAs do both kinds of work. For those that do, new policies and procedures will need to be put into place.

"While the rule is especially important for those professionals that solicit for pension funds, it could potentially impact MAs and other regulated entities," said Susan Gaffney, executive director of the National Association of Municipal Advisors. "If MA firms are engaging in solicitor MA activity, as outlined in the rule, it will be important for firms to develop necessary policies and procedures to comply with the Rule's standard of conduct and recordkeeping requirements."

Specifically, the rule defines solicitor MA activity as an entity in direct or indirect communication with a municipal entity or obligated person, for direct or indirect compensation, on behalf of an MA or investment advisor that is a third party and not controlled by the MA firm, for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a municipal advisor, and if the engagement does not include excluded communications, as defined in Rule G-46.

It could also include recommending another MA or investment advisor for compensation, directly or

indirectly and encompassing quid pro quo arrangements or unrequested gifts to a municipal entity involved in an issuance, NAMA said in a compliance release.

If applicable, solicitor MA activity would also have to include disclosures to solicitor clients, documentation of the solicitor relationship, representations to solicited entities, disclosures to solicited entities, timing and manner of disclosures and certain prohibitions.

MAs and solicitor MAs came under the MSRB's purview following the passing of Dodd-Frank more than a decade ago, but this is the first time specific solicitor MA standards of conduct will also be scrutinized by the SEC. In its 2024 exam priorities, the SEC made a particular point of drawing attention to the new rule.

"Examinations of solicitor municipal advisors during the second half of fiscal year 2024 will focus on compliance with new MSRB Rule G-46," the SEC said. That will be part of its efforts to look at MAs as a whole and whether they've fulfilled their fiduciary duty to clients, "particularly when providing advice regarding the pricing, method of sale and structure of municipal securities," the Commission added. "Examiners will review whether municipal advisors are complying with their obligations to document municipal advisory relationships and disclose conflicts of interest and requirements related to registration, professional qualification, continuing education, recordkeeping and supervision."

On the Form MA, or the application for municipal advisor registration, solicitor MAs is just another box that may have been checked if a registering MA wasn't exactly clear on the definitions. NAMA suggests going back to review those materials, now that there are new and clear definitions.

"We've also been telling our members if you're not a solicitor, uncheck the box because we've heard from exams that they will be looking at the population of solicitor MAs that are self identified on Form MA and focus exam efforts on that in this year," Gaffney said.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 03/01/24 11:40 AM EST

Financial Accounting Foundation Trustees Name New Vice Chair and Two New Members to the Governmental Accounting Standards Advisory Council (GASAC).

Read the News Release.

February 27, 2024

SIFMA Comments on Request for Information on Impacts of MSRB Rules on Small Firms.

SUMMARY

SIFMA provided comments to the Municipal Securities Rulemaking Board (MSRB) on their Request

for Information on Impacts of MSRB Rules on Small Firms as part of the MSRB's retrospective review of its rule book.

View the SIFMA request.

SEC Answers Questions on New Tailored Shareholder Report Requirements: Proskauer Rose

The staff of the Division of Investment Management (the "Staff") has issued a FAQ pertaining to the rule and form amendments adopted by the Securities and Exchange Commission (the "SEC") in October 2022, which require open-end mutual funds and exchange-traded funds ("ETFs", and together with open-end mutual funds, "funds") registered on Form N-1A to transmit concise and visually engaging annual and semi-annual shareholder reports, and amend the advertising rules for all regulated investment companies, including closed-end funds and business development companies, to ensure fee comparability in fund advertising.[1]

Overview of Amendments to Shareholder Report Requirements

Purpose of Amendments. The amendments require shareholder reports to highlight key information deemed crucial by the SEC for retail investors to assess and monitor their fund investments. Shareholder reports must be made available online and filed on Form N-CSR semi-annually using Inline XBRL tags.

Content of Reports. The reports may only include information permitted or required by new Item 27A of Form N-1A, such as:

- fund/class name,
- ticker symbol,
- principal U.S. markets (for ETFs only),
- an expense table,
- concise disclosure of management's discussion of fund performance,
- a comparison of fund performance to relevant indices,
- performance graphs and tables,
- net assets,
- portfolio holdings, and
- material changes impacting various aspects of the fund.

Requirements. Incorporation by reference is not permitted for required information, and all data must be tagged using Inline XBRL. Further, if the report references online information, it must include a hyperlink for immediate access. One of the more potentially burdensome requirements is that each fund much produce individual shareholder reports, separate from other series of the same registrant, and a separate report for each class of a multi-class fund, ensuring shareholders only receive reports relevant to their specific class and/or series.

Exclusion from Rule 30e-3. Importantly, funds subject to these shareholder report requirements may not take advantage of Rule 30e-3, the rule that currently permits funds to use a "notice and access" approach to transmitting shareholder reports. Shareholders must directly receive tailored shareholder reports either in paper form or electronically (if a shareholder affirmatively elects).

The Staff's FAQ

The Staff published an FAQ specifically addressing questions about the tailored shareholder report amendments, and the following provides an overview of the key points addressed in it, organized into five broad categories.

1. **Appropriate Broad-Based Securities Market Index.** When comparing fund performance, funds must select an "appropriate broad-based securities market index" that accurately reflects the market in which a fund invests. The appropriate broad-based index must represent the overall applicable domestic or international equity or debt markets relative to a fund's investments, providing investors with insights into the fund's performance relative to the applicable broader market.

Examples. The following examples could qualify as broad-based indexes: (i) those covering the equity or fixed income market of groups of countries (e.g., Europe and Asia), groups of countries excluding a specific country (e.g., Asia excluding Japan), or groups of countries with shared characteristics (e.g., emerging markets); and (ii) for funds investing primarily in non-U.S. equity, those representing the overall equity market of the representative non-U.S. country. These examples could qualify as an appropriate broad-based index provided that the index represents the overall applicable market relative to the fund's investments (emphasis added). In addition, the Staff notes that given the tax-exempt status of municipal bonds, an index representing the national municipal securities market is considered a standalone overall market opposed to a subset of the fixed income market (and, by extension, such an index would qualify as a broad-based index).

The following indexes do not qualify as they, according to the Staff, do not represent the overall market in which a fund invests: (i) indexes focused solely on a specific industry sector (e.g., an index consisting only of healthcare companies) or (ii) indexes characterized by specific attributes like "growth", "value", "ESG", or "small- or mid-cap".

2. **Form N-CSR and Website Availability Requirements**

Combined Items for Form N-CSR. Funds may prepare combined financial statements for multiple series or portfolios in a trust to satisfy Item 7 of Form N-CSR, as long as it aligns with Regulation S-X.

The Staff notes that funds have the option to satisfy website availability requirements by posting the most recent Form N-CSR report in its entirety on the website specified in the report. This option permits Form N-CSR information to be grouped by type of materials and/or by series as long as certain presentation requirements are met, including that the grouped information: (i) is presented in a format that effectively communicates the information, (ii) clearly distinguishes between different types of materials and/or series, and (iii) provides easy navigation for shareholders, like through a table of contents with hyperlinks. Relying on this framework, the Staff believes that a combined response to multiple Form N-CSR items would generally be appropriate if the combined Form N-CSR response adheres to the three requirements identified above.

Compliance with Regulation D. Posting Form N-CSR information online under amended Rule 30e-1 does not violate the prohibition on general solicitation and advertising in Regulation D as long as the fund posts only the information required by Rule 30e-1 and does not use its website to offer or sell its securities in violation of Regulation D.

3. **Binding Individual Shareholder Reports of Multiple Funds.** Funds are permitted to bind, staple or stitch together multiple individual shareholder reports for

investors who have invested in multiple funds or share classes. The Staff's concern about multi-series/class reports does not apply to this approach as the investor is still only receiving reports specific to the investments it holds. The Staff recommends that a fund consider including a table of contents when combining shareholder reports in this manner.

4. Electronically Provided Shareholder Reports

Hyperlinking Requirements. Shareholder reports delivered electronically must comply with hyperlinking requirements outlined in Instruction 9 to Item 27A(a) of Form N-1A. The Staff notes that if a hyperlink becomes stale or inaccurate, Rule 30e-1 provides a safe harbor for temporary noncompliance, provided the fund has reasonable procedures in place and takes prompt action to correct any issues.

Electronic Delivery Approaches. In addition to sending an email that includes the full shareholder report, funds can email, or otherwise electronically notify investors, with direct links to specific shareholder reports or direct investors to a website landing page with links to the shareholder reports for specific fund(s) and/or share classes(es) owned by the investor. Any other methods that adhere to the requirements of Instruction 4 to Item 27A(a) of Form N-1A for delivering fund and share class specific shareholder reports directly to investors in an electronic format are permissible.

5. Compliance Date and Inline XBRL Issues

Transmittal Timing and Form N-CSR Filing. Shareholder reports for funds registered on Form N-1A must adhere to the new amendments if transmitted to shareholders on or after the compliance date of July 24, 2024. Regardless of when filed, Form N-CSR should include the report actually transmitted to shareholders.

Tagging Requirements and Compliance Date. Tailored shareholder reports included in Form N-CSR transmitted to shareholders on or after July 24, 2024, must be tagged using Inline XBRL.

Amended Form N-CSR and Tagging. In cases where an issuer submits an amended Form N-CSR (N-CSR/A), and the originally filed N-CSR contained multiple tailored shareholder reports but only one is being amended, the Form N-CSR/A filing need only contain a complete version of the report being amended with all elements of that report tagged in Inline XBRL (not only the amended elements).

Variable Annuity or Variable Life Insurance Company Products

The FAQs also offer guidance specific to variable annuity and variable life insurance issuers (collectively, "variable contract issuers"), which is outlined below.

Online Hosting of Fund Materials. Materials required to be posted to a specified website pursuant to Rule 30e-1 may appear on either the variable contract issuer's website or the fund's website for funds offered as an investment option in variable contracts. If multiple variable contract issuers offer the same underlying fund, the Staff notes that it may be most efficient for that fund's required materials to be hosted on its website.

Binding Individual Shareholder Reports of Multiple Underlying Funds. Funds can bind, staple or stitch together multiple individual shareholder reports for variable contract investors who have allocated value to multiple underlying funds. The Staff's concern about multi-series/class reports

does not apply to this approach as the variable contract investor is still only receiving reports specific to the funds to which it has allocated contract value. The Staff recommends that a fund consider including a table of contents when combining shareholder reports in this manner.

Optional Online Tools in Electronically Provided Shareholder Reports. Variable contract issuers only need to transmit reports containing information required under Rule 30e-2 and Rule 30e-1. They do not need to include any optional content an underlying fund may elect to include under Item 27A(a) of Form N-1A. If necessary, variable contract issuers may avail themselves of the safe harbor under Rule 30e-1 for temporary noncompliance with the hyperlinking requirements.

[1] Tailored Shareholder Reports for Mutual Funds and Exchange Traded Funds; Fee Information in Investment Company Advertisements, SEC Rel. No. IC-34731 (Oct. 26, 2022).

Proskauer Rose LLP – William T. MacGregor and Adrianna Vallee

February 23 2024

Existing MSRB Dealer and Municipal Advisor Fees Maintained Upon Withdrawal of 2024 Annual Rate Card.

View the MSRB notice.

2/16/24

Proposed Rule Change to Amend MSRB Rule G-14 and FINRA Rule 6730: SIFMA Comment Letter

SUMMARY

SIFMA and SIFMA AMG provided comments to the U.S. Securities and Exchange Commission (SEC) on SR-MSRB-2024-01 (the “MSRB Proposal”) filed with the SEC by the Municipal Securities Rulemaking Board (the MSRB) and SR-FINRA-2024-04 (the “FINRA Proposal” and together with the MSRB Proposal, the “Proposals”) filed with the SEC by the Financial Industry Regulatory Authority (FINRA).

Read the SIFMA Comment Letter.

Feb 15, 2024

GASB Issues Guidance on Disclosure of Certain Risks.

Norwalk, CT, January 8, 2024 —T he Governmental Accounting Standards Board (GASB) issued guidance today that requires governments to disclose information about certain risks.

Although governments are required to disclose information about their exposure to some risks, such

as interest and credit risk associated with investments, essential information about certain other risks that are prevalent among state and local governments is not routinely disclosed because it is not explicitly required. The new Statement is meant to provide financial statement users with information about certain risks when circumstances make a government vulnerable to a heightened possibility of loss or harm.

GASB Statement No. 102, *Certain Risk Disclosures*, requires governments to disclose essential information about risks related to vulnerabilities due to certain concentrations or constraints.

1. The Statement defines a concentration as a lack of diversity related to an aspect of a significant inflow or outflow of resources—for example, a small number of companies that represent a majority of employment in a government's jurisdiction, or a government that relies on one revenue source for most of its revenue.
2. The Statement defines a constraint as a limitation imposed on a government by an external party or by formal action of the government's highest level of decision-making authority—such as a voter-approved property tax cap or a state-imposed debt limit. Based on input from financial statement users during the research phase of the project, GASB is proposing that certain types of assets be disclosed separately in the note disclosures about capital assets. This would allow users to make informed decisions about these and to evaluate accountability.

Concentrations and constraints may limit a government's ability to acquire resources or control spending.

Disclosure Criteria

The Statement generally requires a government to disclose information about a concentration or constraint if all of the following criteria are met.

1. The concentration or constraint is known to the government prior to issuing the financial statements.
2. The concentration or constraint makes the government vulnerable to the risk of a substantial impact.
3. An event or events associated with the concentration or constraint that could cause a substantial impact have occurred, have begun to occur, or are more likely than not to begin to occur within 12 months of the date the financial statements are issued.

Note Disclosures

The disclosures should include a description of the following:

1. The concentration or constraint,
2. Each event associated with the concentration or constraint that could cause a substantial impact if the event has occurred or has begun to occur prior to the issuance of the financial statements, and
3. Actions taken by the government to mitigate the risk prior to the issuance of the financial statements.

The requirements of Statement 102 are effective for fiscal years beginning after June 15, 2024, and all reporting periods thereafter. Earlier application is encouraged.

The Statement is available on the GASB website, www.gasb.org.

Small Firms Describe Frustrations in Response to MSRB Request.

Small muni market firms are being overburdened by an excessive regulatory environment that favors the large Wall Street firms, with small firms feeling overwhelmed by the recent amendments to Municipal Securities Rulemaking Board Rule G-14 on time of trade that reduces the trade reporting window to one minute.

Those complaints are being expressed as part of the MSRB's request for information on small firms, which encouraged all muni market participants to respond to eleven specific questions, such as what rules have had a disproportionate impact on smaller regulated entities, what makes a regulated entity small, medium or large, and whether there are circumstances in which the application of an MSRB rule has required firms to spend additional resources that have had a negative impact on the firm.

Mark Kim, chief executive officer of the MSRB, in announcing the effort late last year, noted that he believes that "an impactful way to support the efforts of regulated entities to comply with our rules is to assess whether a rule is no longer achieving its intended purpose or if there are disproportionate costs or burdens associated with compliance for certain types of firms."

Many of the commenters have noted not only the extremely difficult task of having to comply with the one-minute reporting window, but also the strenuous costs associated with establishing systems to make them comply with it, in addition to the challenges small firms face generally in having to comply with the "pile on" of regulations.

"Although I believe that the MSRB has good intentions, I strongly feel that the current regulatory environment disproportionately penalizes small broker-dealers who most likely don't have large compliance teams and the seemingly unlimited resources of larger firms," wrote Mike Petagna, president, Amuni Financial. "Since our small firm lacks a large dedicated compliance department, we spend precious time responding to regulatory inquiries and complying with new regulations; time that could otherwise be spent serving our clients," he added. "Often, we face unrealistic turnaround times, only to wait months for the next round of questions after our responses."

Petagna went on to note that the municipal market differs significantly from the taxable and equity markets, and that the one-minute reporting window will likely consolidate the marketplace further.

Matthew Kamler, president of Sanderline Securities said that the one-minute reporting window requires smaller firms to invest in order entry software, such as Bloomberg's TOMS system, which carries an annual price tag of $250,000.

But outside of the one-minute reporting requirement coming soon, there are other issues that continue to burden some firms that don't fit squarely into being characterized as a municipal securities dealer.

"Despite our many years of employment and experience in the industry, MSRB required us to pass two new exams in order to continue to be employed," wrote Elaine Philbrick, principal at Derivative Advisors, a swap broker. "Both the new exams, Series 50 and 54, covered material unrelated to our firm or work. We estimate only 5% of the questions were related to interest rate derivatives, and the rest pertained to credit analysis and issuance of municipal debt which is unrelated to our firm and has nothing to do with us or our services."

Uniform fees across all players in the market was also noted as a sore spot.

“Fees for small firms should not be the same as for larger firms, but lower,” wrote Dennis Dix, Jr., principal at Dixworks. “Using the SEC risk-based protocol for examinations, small firms require less monitoring than large firms. Large fees represent a substantial burden for small firms and should be reduced.”

Others took aim at smaller requirements that aren’t questioned as often. Dimitry Semenov, principal at Ridgeline Municipal Strategies, wrote that the requirement to develop written supervisory procedures “can be easily mitigated by provisioning an easy-to-use template with regular updates and notifications that smaller firms could utilize to develop and update their WSPs without having to hire outside consultants,” he said.

The MSRB is continuing to accept comments on this topic.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 02/13/24 02:34 PM EST

Finra Fines Morgan Stanley $1.6M Over Muni Transaction Shortfalls.

Broker-dealer self-regulator finds pattern of gross supervisory failure involving municipal securities over a five-year period.

Finra has imposed a $1.6 million fine on Morgan Stanley for significant lapses in handling municipal securities transactions.

In a statement Thursday, the broker-dealer self-regulatory organization announced the landmark action, highlighting it as the first disciplinary case in which it “charged a firm with violating the close-out requirements of Municipal Securities Rulemaking Board (MSRB) Rule G-12(h) and related supervisory failures.”

“Member firms must establish and maintain controls and procedures for detecting, resolving and preventing the consequences of municipal short positions and fails to receive,” Bill St. Louis, executive vice president and head of enforcement at Finra, said in the statement.

In its decision, Finra underscored the firm’s gross negligence as shown by its “repeated failures to timely close out failed inter-dealer municipal securities transactions.”

Under MSRB Rule G-12(h), broker-dealers must cancel or close out failed inter-dealer transactions in munis within 20 days after the settlement date. Finra found that between December 2016 and August 2021, Morgan Stanley filed to cancel or close out in a timely manner 239 inter-dealer municipal transactions with a total value of roughly $9 million.

The financial industry regulator said the financial giant also fell short in its obligation to “obtain physical possession or control of municipal security positions that are short more than 30 calendar days,” as required under Rule 15c3-3(d)(2) of the Securities Exchange Act of 1934.

Finra said that from January 2016 through August 2021, Morgan Stanley neglected to take the necessary steps to obtain possession or control of 247 municipal securities, valued at about $9.4 million, which it had failed to receive for an average of approximately 177 days.

While Morgan Stanley did take steps to improve how it addresses municipal fails-to-receive, those efforts were too little and too late. The firm only revisited its systems and processes in June 2021, and updated its written supervisory procedures in September 2021.

The financial giant has consented to Finra's findings without admitting or denying the allegations.

investmentnews.com

By Leo Almazora

February 15, 2024

Morgan Stanley to Pay $1.6-Mln Over Municipal Securities Violations: Finra

The Financial Industry Regulatory Authority has fined Morgan Stanley $1.6 million based on findings that the wirehouse repeatedly failed to abide by rules set by the Municipal Securities Rulemaking Board for processing and settling municipal securities transactions.

From 2016 to August 2021, Morgan Stanley failed to close out 239 failed inter-dealer municipal securities transactions and to promptly take physical possession or control of 247 municipal securities that were short more than 30 calendar days, Finra said in a Thursday morning announcement. The 30 days exceeded by 10 days the window for closing out allowed under the MSRB rules, according to Finra.

Finra said that Morgan Stanley violated its requirements to maintain a reasonably designed supervisory system to comply with MSRB rules.

Finra noted that this action marked its first time imposing a fine based on the violation of the MSRB's close-out requirements, but it was the second time it had sanctioned Morgan Stanley for supervisory failures regarding short positions in municipal securities, as it had done so in 2015.

"Member firms must establish and maintain controls and procedures for detecting, resolving and preventing the consequences of municipal short positions and [any] fails to receive," Bill St. Louis, Finra's executive vice president and head of enforcement, said in a statement.

A spokesperson for Morgan Stanley, which consented to FINRA's findings without admitting or denying the charges, said: "Morgan Stanley has enhanced its policies and procedures for closing out municipal short positions and is pleased to resolve this matter."

Morgan Stanley will pay its $1.2 million of its $1.6 million fine to the MSRB and also had, as of September 2021, resolved all outstanding municipal bond positions that violated MSRB rules, Finra said.

In March 2015, Finra censured Morgan Stanley and imposed a $675,000 fine based on findings that it had violated MSRB rules "by failing to implement adequate supervisory procedures to address short positions in tax-exempt municipal bonds," Finra said.

The regulator also found at that time that Morgan Stanley failed "to provide adequate guidance or oversight on covering municipal short positions" and "inaccurately" represented "to customers that the interest they received on municipal bonds that the firm did not hold was non-taxable when it was

paid by the firm and thus taxable as ordinary income," Finra said.

by AdvisorHub Staff

February 15, 2024

SEC Expands Dealer Definition to Capture Large Traders Regularly Providing Liquidity to the Markets: Goodwin

High-frequency traders, private funds, decentralized exchange automated market makers, and even state pension plans should consider whether the expanded dealer definition triggers the need to register as a securities dealer with the SEC and with an SRO like FINRA.

On February 6, 2024, the SEC adopted rules to greatly expand the Exchange Act definitions of "dealer" and "government securities dealer" by further defining the phrase "as a part of a regular business." In doing so, the SEC has significantly narrowed the existing dealer/trader distinction long recognized by the SEC through staff guidance and interpretations. The rulemaking is likely to require dealer registration by proprietary trading firms (PTF) and certain large private funds that regularly provide liquidity in the securities markets. Even state pension plans and their managers could be swept into the SEC's dealer regime if they trip into the new qualitive standards discussed below.

Policy Underlying the Expanded Dealer Definition

The Exchange Act definition of "dealer" historically excluded from its scope a trader who "buys or sells securities…for such person's own account…but not as a part of a regular business." The SEC, under Chair Gensler grew concerned with certain market participants whose activity and market share in providing liquidity to the equities and government securities markets was significant and existed outside of the dealer regime and in a mostly unregulated way. The SEC has expressed particular concern that investors and the markets have lacked important protections that, in the view of a majority of the commissioners, would otherwise result from such an entity's registration and regulation under the Exchange Act. The adopting release also pointed to the absence of obligations and regulatory oversight that would otherwise promote market resiliency and stability. All of this culminated in the adoption of two new rules requiring dealer registration and FINRA or other SRO membership for these large and active market participants.

New Exchange Act Rules 3a5-4 and 3a44-2

New Exchange Act Rules 3a5-4 and 3a44-2 further define the phrase "as a part of a regular business" in Exchange Act Sections 3(a)(5) and 3(a)(44) using certain qualitative standards that, if tripped, would require dealer or government securities dealer registration under Exchange Act Sections 15 and 15C, respectively, along with SRO membership (likely with FINRA, although exchange membership could be a viable path). The rules also define trading in one's "own account" to mean an account held in the name of that person or held for the benefit of that person.

Top 10 Takeaways (And Dozens More Requiring Consideration)

1. The SEC's focus is on market participants that "engage in a regular pattern of buying and selling securities (or government securities) that has the effect of providing liquidity to other market participants." However, the scope of the proposal is vast—all securities, including equities, fixed

income, treasuries, **municipal securities**, and, wait for it…crypto assets that are securities.

2. Any person, firm, or even a private fund that has or controls total assets of at least $50 million and satisfies one of two new qualitative standards must register as a dealer. The new qualitative standards that the SEC considers to be “dealer-like” and, in Chair Gensler’s view, are “de facto market making,” are:

> a. *Regularly expressing* trading interest that is at or near the best available prices on both sides of the market for the same security that is communicated and represented in a way that makes it accessible to other market participants; or
>
> b. Earning revenue *primarily from* capturing bid-ask spreads, by buying at the bid and selling at the offer, or from capturing any incentives offered by trading venues to liquidity-supplying trading interest.

3. Investment companies registered under the 40 Act are exempt, as are central banks, sovereign entities, and international financial institutions (with new definitions to match).

4. Private funds with at least $50 million of AUM that trip either of the qualitative standards would need to register as dealers. This topic drew significant attention from Commissioner Peirce during the SEC open meeting and raises significant questions for large PE, VC, hedge, and state pension funds. For example, commenters sought from the SEC, but were refused, clarification that the new rules would not apply to governmental plans, including public pensions, nor to state administrators managing state funds or to city administrators managing the city pension funds through an exclusion from the proposed rules. One particular commenter expressed concerns that the proposed standards could subject state boards and similar investment fiduciaries and/or administrators of state pension funds to the rules. The SEC chose not to exempt these arrangements because, in the SEC’s view, the final rules “should not” capture these arrangements. Unfortunately, the stakes are too high to casually rely on such a flimsy assurance. As a result, each of these funds and plans will likely need to conduct an analysis of their market activity and revenue streams to determine whether they need to register as dealers.

5. The introduction of “qualitative” standards essentially gives the SEC limitless ability to subjectively determine who’s in and who’s out. And many likely fear that the SEC will use the much lamented “regulation by enforcement” approach in this area (a topic that came up during the open meeting). For example, what does “regularly” mean? What does “primarily” mean? Another easy example worth highlighting is the crypto market and the compounding uncertainty of whether these new rules sweep in DEX AMMs or DEXs themselves and other liquidity providers. Commissioner Peirce asked the Director of the Division of Trading and Markets several questions about scope and applicability, including about potential distinctions between software coders, the software itself, and those who eventually utilize the software to provide liquidity or otherwise contribute to a pool of assets. In typical fashion, however, the rulemaking devotes little to this important discussion.

6. The SEC’s use of “regularly” is designed to capture market participants “expressing trading interest that is at or near the best available prices on both sides of the market for the same security and is communicated and represented in a way that makes it accessible to other market participants.” A market participant will be “regularly” expressing the requisite trading interest if doing so both within a trading day and over time. Regularly is not defined, though the SEC states that it is not intended to capture “isolated or sporadic” expressions of trading interest. The SEC does make clear that “a market participant does not need to be continuously expressing trading interest

to be engaging in a 'regular' business." "Regularity" will also depend on the depth and liquidity of the underlying security. The SEC states that for a market as deep and liquid as U.S. treasuries, "expressing trading interest on both sides of the market for the same security as part of an investment strategy on a one-off basis would not be sufficiently regular to be caught by the expressing trading interest factor." The activity would have to occur in "more frequent periods." How frequent? Well, that is unclear, but the fact that the SEC used "one-off" as an example for the U.S. treasuries markets – the largest and deepest markets in the world, is slightly concerning. The SEC does note that that this factor also "would include market participants that, for example, employ passive market making strategies involving the submission of non-marketable resting orders (bids and offers) that provide liquidity to the marketplace at specified prices."

7. Regarding the second qualitative standard and earning revenue "primarily from," the proposing release stated that deriving a majority of revenue from the activity would likely trigger the "primarily" factor. In the adopting release, the SEC notes that earning more revenue "from an appreciation in the value of [] inventory of securities than from capturing bid-ask spreads or incentive payment for liquidity provision" would be unlikely to be "considered to earn revenue 'primarily' from capturing bid-ask spreads or trading incentives." Ultimately, the SEC notes that the analysis turns on the "totality of the particular facts and circumstances," including in crypto asset security markets, despite the novel structures, products, and activities inherent therein.

8. The final rules dropped several aspects from the original proposal from early 2022, including:

a. A proposed qualitative standard of making roughly comparable purchases and sales of the same or substantially similar securities in a day.

b. A proposed "aggregation" provision that would have otherwise considered "own account" to include accounts "held in the name of a person over whom that person exercises control or with whom that person is under common control." Instead, the final rules include an anti-evasion provision that prohibits persons from evading the registration requirements by: (1) engaging in activities indirectly that would satisfy the qualitative factors; or (2) disaggregating accounts.

c. A bright line quantitative standard under which persons engaged in certain levels of activity in the U.S. Treasury market would be defined to be buying and selling securities "as part of a regular business," regardless of whether they met any of the qualitative factors.

9. A knock-on concern for any private funds captured by the expanded dealer definition is the likely loss of the ability for their personnel to rely on the so-called "issuer's exemption" in Exchange Act Rule 3a4-1 when engaging in sales activity. Rule 3a4-1 is not available to an associated person of an issuer if such person is an "associated person of a broker or dealer." The scope for this limitation covers situations of common control with a broker or dealer. That said, because the expanded dealer definition would only apply to a fund with at least $50 million AUM, it is less likely that the personnel of funds of that size would be relying on Rule 3a4-1 (instead, they would likely be using third party placement agents or their salespeople would be registered with an affiliated broker).

10. Another interesting point to consider is that certain public exchanges give execution priority to "customer" orders (provided the customer is not classified as a professional customer). One of the key definitions of customer is that the person is not a broker or dealer. Market

participants caught up by the expanded dealer definition should consider the potential loss in priority and how that would affect their strategies and routing decisions.

Compliance Date + Implementation Challenges

The rulemaking effective date will be 60 days after the adopting release is published in the Federal Register (potentially out as far as June depending on the FR publication date). Compliance will be required within one year after that period has expired, but that is only for those already engaging in covered activity prior to the compliance date. Those who begin engaging in this activity one day later could not do so until registering as a dealer and becoming a FINRA or other SRO member, which, as noted below, that could take the better part of a year.

Implementation challenges are likely, although SEC staff indicated that FINRA has committed to expedite its new membership process. Unfortunately, even on an expedited basis, it could take applicants a month or longer to complete the application and several months to receive FINRA's approval. This is particularly true if FINRA receives a deluge of several dozen or more applications all around the same time (including applications to register as a broker-dealer and ATS if the Commission adopts the expanded meaning of what it means to be an exchange under Exchange Act Rule 3b-16). Registrants will need to address such matters as examinations for supervisors and other registered persons, supervisory policies and procedures, business continuity plans and, perhaps most importantly, minimum net capital and aggregate indebtedness standards. Individual traders caught by the definition will find themselves in the position of having to register as dealers in their individual capacity or forming an entity to be the registered dealer. The SEC removed the aggregation provision from the final rule, but included an anti-evasion provision that prohibits persons from evading the registration requirements by: (1) engaging in activities indirectly that would satisfy the qualitative factors; or (2) disaggregating accounts. The release is unclear, however, about potential cases where a fund group has multiple funds that trigger the registration requirement and whether each fund has to register, or about whether the adviser, fund itself, or both must register.

Closing Thoughts

The expanded dealer definition continues the SEC's trend of broad rulemaking that expands the agency's oversight in existing areas and into new areas, often with unforeseen and unintended consequences. Coupled with the SEC's pending proposal to amend the meaning of what it means to be an exchange, this rulemaking is central to the SEC's plans to regulate additional market participants (like "communication protocol systems" and this broader universe of securities dealers), both in traditional financial markets and beyond (including crypto and DeFi).

Christopher Grobbel, Peter LaVigne, Nicholas Losurdo

February 12, 2024

Goodwin

Aon Pays $1.5M SEC Penalty Over Key Return Rate Discrepancies.

The Pennsylvania pension fund "repeatedly raised questions" about Aon's return rate calculations, noting a 37 basis point discrepancy, the SEC found.

Dive Brief:

The Securities and Exchange Commission announced Friday it settled charges against Aon Investments USA, a Chicago-based investment adviser, and its former partner, Claire Shaughnessy, for misleading the Pennsylvania Public School Employees' Retirement System about "the reason for a discrepancy between two different calculations for the large pension fund's investment returns."

The case centered on questions raised by the pension fund regarding a discrepancy that Aon failed to "adequately investigate" related to reports on an investment return rate for a nine-year period ending June 30, 2020. The rate was tied to a "risk-share" provision that required public-school employees to contribute more to their pensions if it fell below 6.36%.

Without admitting or denying the findings, Aon agreed to pay a civil penalty of $1 million and disgorgement and prejudgment interest of $542,187 and Shaughnessy agreed to pay a $30,000 civil penalty. "Investment advisers must be scrupulously honest with their clients. Pension funds and other municipal entities should be able to trust that their investment advisers are telling them the truth," said LeeAnn G. Gaunt, chief of the SEC's public finance abuse unit.

Continue reading.

CFO Dive

by Maura Webber Sadovi

Published Jan. 29, 2024

Governmental Accounting, Auditing, and Financial Reporting (GAAFR) | 2024 Blue Book

What's new since the 2020 GAAFR:

- Updates for 10 GASB Statements issued since the 2020 GAAFR, including: Subscription-Based Information Technology Arrangements (SBITAs), Public-Private and Public-Public Partnerships and Availability Payment Arrangements (PPPs), Accounting Changes and Error Corrections, and Compensated Absences
- New chapter dedicated to leases, SBITAs, and PPPs (Chapter 26) with expanded discussion of the accounting for each arrangement, including determining the terms (length) of the agreements and measuring assets, liabilities, deferred inflows and outflows of resources, and inflows and outflows of resources recognized for each type of arrangement
- A new chapter on the internal control component Information and Communication (Chapter 42)
- A new discussion of pledged revenues not received by the pledging government has been added to Chapter 28

Click here to learn more and to purchase.

Current Dealer and Municipal Advisor Fees Upon SEC Suspension of 2024

Annual Rate Card Fees.

View the MSRB notice.

1/30/24

Financial Accounting Foundation Launches Redesigned Website for the Financial Accounting Standard Board; Additional Sites Premiere Soon

Norwalk, CT, January 23, 2024 — The Financial Accounting Foundation (FAF) today announced the launch of a completely redesigned website for the Financial Accounting Standards Board (FASB). Users can access the new FASB site immediately at www.fasb.org.

New websites for the Governmental Accounting Standards Board (GASB) and the Financial Accounting Foundation itself are scheduled to debut in the coming weeks. The new websites feature streamlined navigation, a simpler menu structure, more attractive and intuitive design, a more robust search algorithm, and more prominent placement of the most important information stakeholders are looking for.

“We are pleased to provide to FASB stakeholders the first of our three new websites,” said FAF Executive Director John W. Auchincloss. “We are confident that they will appreciate the many improvements we made and how much easier it is to access important information.”

Auchincloss gave credit for the success of the project to the cross-organizational team that worked throughout most of 2023 to create the new sites. The group included representatives from the FASB, the GASB, and the FAF’s Publishing, IT, Legal, Administration, and Communications teams.

“We know how much our stakeholders want to get the information they need from us as quickly as possible. We believe our redesigned websites will deliver a better, faster, and more intuitive experience to all our users,” Auchincloss said.

SEC Releases New Guidance on Tailored Shareholder Reports: Troutman Pepper

On January 19, 2024, the Division of Investment Management staff at the Securities and Exchange Commission (SEC), released several responses to frequently asked questions (FAQs) related to the adoption of rules and form amendments for registered open-end funds (i.e., mutual funds and ETFs) that will substantially alter the form and content of fund shareholder reports. In October 2022, the SEC adopted amendments (Adopting Release) to rules under the Securities Act of 1933 and Investment Company Act of 1940, as well as Forms N-1A and N-CSR, in an effort to require funds to, among other things, transmit “concise and visually engaging” shareholder reports.

The FAQs address what an appropriate broad-based securities market index is, Form N-CSR and website availability requirements, binding individual shareholder reports of multiple funds, electronically provided shareholder reports, and compliance date and Inline XBRL issues. The full text of the new FAQs can be found here.

Continue reading.

Troutman Pepper – Joseph V. Del Raso, John P. Falco, John M. Ford, Terrance James Reilly, Theodore D. Edwards, Joseph A. Goldman and Barbara H. Grugan

January 23 2024

Accelerating EMMA: Time and Price in Municipal Securities Transactions

Settlement Time

One of the great truisms is "Time is Money," and there is no better exposition of the factors that demonstrate the truth of this statement than "The Price of Time: The Real Story of Interest" by the British financial historian Edward Chancellor (2022). In that book, Chancellor addresses both the history of interest (since the Babylonian Empire) and the critical importance of understanding the costs of future repayment. Perhaps nowhere else in the experience of Americans does the price of things to be done in the future have more currency than in the purchase of a dwelling place or some other major asset (automobile, boat, etc.).

Another area of life where time particularly matters is in the purchase or sale of securities. In the days of paper stock certificates and physical (as opposed to electronic) delivery, disturbing things could happen between the purchase or sale and the time of settlement.

The New York Stock Exchange dates back to 1792 and the Buttonwood Tree Agreement, while the "Curb Exchange" (American Stock Exchange) was in organized operation by the 1840s. But everything was done by hand, with pieces of paper and in-person delivery.

Continue reading.

by Peter D. Hutcheon

January 29, 2024

Norris McLaughlin P.A.

MSRB Discussed Public Comments on 2024 Rate Card and Advanced Strategic Initiatives During Quarterly Board Meeting.

Washington, D.C. –The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met in Washington, D.C., on January 24-25 for its second quarterly meeting of fiscal year 2024. At the meeting, the Board approved amendments to MSRB Rule G-27, received updates on the MSRB Rule G-14 and 2024 rate card filings, and discussed pre-trade market transparency. The Board also met with U.S. Securities and Exchange Commission (SEC) Chair Gary Gensler and members of Commission staff to discuss the MSRB's market regulation and market transparency priorities.

2024 Rate Card

The Board discussed public comments received by the SEC in response to the MSRB's 2024 rate

card filing, which established dealer market activity fees and the municipal advisor fee for the 2024 calendar year.

"I want to reaffirm the MSRB's long-standing commitment to transparency and accountability to the public we serve," said Meredith Hathorn, MSRB Board Chair. "One of our strategic goals is to uphold the public trust, and there is no better way to do that than to be good fiscal stewards of the resources the industry provides to us. We sincerely appreciate the comments we received on our fee filing, particularly regarding requests for more information related to our technology expenses, and we look forward to engaging with our stakeholders to inform the budgeting process."

The MSRB expects to file its response to the public comments with the SEC shortly.

Market Regulation

The Board authorized filing amendments with the SEC that would modernize MSRB Rule G-27, on dealer supervision, including the creation of a residential supervisory location (RSL) designation to reflect changing work patterns since the COVID-19 pandemic and further harmonize MSRB dealer supervisory requirements with FINRA's supervisory rules.

The Board received an update on industry feedback on its request for comment on draft amendments to MSRB Rule G-12(c) to consolidate existing guidance on certain inter-dealer confirmation requirements into a single streamlined rule provision. The Board decided to conduct further discussions with stakeholders prior to finalizing the proposed amendments.

The Board also received an update on the status of its recently filed amendments to MSRB Rule G-14 to shorten the timeframe for the reporting of trades from 15 minutes after the time of trade to as soon as practicable but no later than one minute, subject to exceptions for firms with limited trading activity and for manual trades. The G-14 rule filing was published in the Federal Register by the SEC today.

Market Transparency

The Board continued its discussion of pre-trade market transparency and directed MSRB staff to develop a concept proposal outlining the collection of pre-trade data in the municipal securities market for the Board to consider at a future date.

The MSRB published a new issuer case study as part of its Structured Data Lab in EMMA Labs, the MSRB's free innovation sandbox for transparency enhancements to the municipal securities market. The Structured Data Lab, originally launched in 2023 to foster a common understanding of structured data, now features three case studies telling the stories of municipal issuers who have prepared their financial statements in a machine-readable format. This latest case study provides additional issuer perspectives on the costs and benefits of structured data in the municipal bond market.

MSRB Leadership Update

The Board was introduced to Aleis Stokes, the MSRB's new Chief External Relations Officer, who will oversee the organization's corporate communications, stakeholder engagement and government relations functions.

"I am delighted to welcome Aleis to lead the MSRB's external relations team," said Mark Kim, MSRB CEO. "Aleis comes to us with a wealth of experience and knowledge within the financial services industry, having led critical communications and stakeholder initiatives at key banking trade

associations over the past two decades. We look forward to leveraging her expertise and keen ability to build and strengthen our stakeholder relationships."

Prior to joining the MSRB, Stokes was senior vice president of communications for the Independent Community Bankers of America (ICBA). Stokes holds a BA in advertising and public relations from Pennsylvania State University and earned Accreditation in Public Relations (APR) from the Public Relations Society of America.

Date: January 26, 2024

Contact: Bruce Hall, Director, Communications
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OCC Advises Banks on How to Prepare for Shortening the Standard Securities Settlement Cycle: Troutman Pepper

On January 17, the Office of the Comptroller of the Currency (OCC) issued a bulletin advising banks on how to prepare for the upcoming shortening in the standard securities settlement cycle for most U.S. securities transactions. This is in response to the Securities and Exchange Commission (SEC) adoption of final rules that shorten the standard settlement cycle for most broker-dealer transactions from the second business day after the trade date (T+2) to the first business day after the trade date (T+1). The SEC has approved a similar rule change by the Municipal Securities Rulemaking Board (MSRB) to the settlement cycle for municipal securities, which has shortened the regular-way settlement for municipal securities transactions to T+1. The OCC expects banks to be prepared to meet T+1 standards as of May 28, 2024.

Banks should evaluate their preparedness for the accelerated settlement cycle and employ effective change management processes for all trades related to banks' securities activities. These include activities related to banks' investment and trading portfolios and securities settlement and servicing provided to banks' custody and fiduciary accounts. Banks that offer retail nondeposit investment products through a broker-dealer are also expected to assess the broker-dealer's preparedness for the new settlement time frames.

Continue reading.

Troutman Pepper – Jason L. Langford, Gregory Parisi and Zayne Ridenhour Tweed

January 18 2024

What All Municipal Bond Issuers Should Know About Cybersecurity Risk Disclosure in 2024.

Over the last fifteen years, the Securities and Exchange Commission (SEC) has increased its focus on inadequate disclosure relating to governmental debt issues. Although municipal bond issuers are largely exempt from federal requirements for securities, they are required to comply with the antifraud provisions of the Securities Act of 1933 and Rule 10b-5 of the Securities Exchange Act of

1934 (the Exchange Act). These laws prohibit the making of material misstatements, or omissions of material facts if those facts are necessary to avoid a misleading statement. Issuers who fail to comply with disclosure requirements may be subject to regulatory actions and/or monetary fines. Primary market disclosure practices for municipal securities have developed as a result of these antifraud provisions and the regulatory actions brought by the SEC.

Cybersecurity Risk Disclosure

With a drastic increase in cyberattacks impacting municipal governments and the increased scrutiny on cybersecurity by rating agencies, cybersecurity risk disclosure has become increasingly more important for municipal bond issuers. There is no official guidance from the SEC about what municipal bond issuers should disclose about cybersecurity risks. The SEC has indicated that many principles applicable to the registered market provide guidance and can be applied to the municipal market.

1. On July 26, 2023, the SEC adopted a new rule to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incidents by public companies that are subject to the reporting requirements of the Exchange Act (the "Final Rule"). In summary, the Final Rule requires: disclosure of material cybersecurity incidents within four (4) business days of the company's determination that the cybersecurity incident is material;
2. new annual disclosures regarding the company's cybersecurity risk management and strategy, including with respect to the company's processes for managing cybersecurity threats and whether risks from cybersecurity threats have materially affected the company; and
3. new annual disclosures regarding the company's cybersecurity governance, including with respect to oversight by the board and management.

Best Practices for Municipal Bond Issuers

Although municipal bond issuers are not required to comply with the Final Rule, it provides guidance to municipal bond issuers in preparing cybersecurity risk disclosure. Such issuers should consider the following points for inclusion in their disclosures:

1. Cybersecurity attacks, if material;
2. Existence and description of policies and procedures for cybersecurity risk management;
3. In the absence of a formal policy, develop a framework related to cybersecurity preparedness to institute centralized responsibilities and a transparent strategy on how to proceed if cybersecurity incidents occur;
4. How and when the policies are reassessed to ensure the practices are up to date;
5. Note the risks unique to the particular infrastructure and how to best protect the issuer's financial condition, operations, reputation and relationships;
6. Existence of cybersecurity insurance, what it covers and the deductible.

Pullman & Comley, LLC

by Jessica Grossarth Kennedy

January 18, 2024

Proposed Rule Change To Amend MSRB Rule G-12 To Promote the

[Completion of Allocations, Confirmations, and Affirmations by the End of Trade Date: SIFMA Comment Letter]

SUMMARY

SIFMA provided comments to the U.S. Securities and Exchange Commission (SEC) on the Municipal Securities Rulemaking Board's (MSRB) filing. SIFMA applauds the MSRB's goal to modernize its rule book and align municipal securities settlement with regular-way settlement on T+1 for equities and corporate bonds under Exchange Act Rule 15c6-1, as amended.

Read the SIFMA Comment Letter.

MSRB Announces Members of 2024 Advisory Groups.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today announced the members of its advisory groups. In all, 30 experienced market professionals will share their municipal market and regulatory perspectives while serving on the Compliance Advisory Group (CAG) and Municipal Fund Securities Advisory Group (MFSAG).

For the seventh consecutive year, CAG will inform the MSRB's compliance initiatives by providing feedback on compliance resources and tools to enhance dealers' and municipal advisors' understanding of MSRB rules and areas where compliance clarification and assistance may be warranted. "We are fortunate that such a diverse class of municipal market participants have volunteered their time and expertise to help inform the MSRB's important work," said Liz Sweeney, Board member and FY 2024 CAG Chair. "It is especially helpful that issues of particular interest and concern to small firms can be effectively communicated to the MSRB by hearing directly from CAG's small firm representatives, in addition to the MSRB's other outreach and engagement channels with smaller regulated entities."

Reinstated in FY 2024 following a gap year, MFSAG will provide input on industry practices, guidance and investor education related to 529 savings plans and Achieving a Better Life Experience Act of 2014 (ABLE) programs. "For MFSAG, we are pleased to welcome market participants operating within the 529 and ABLE spaces to lend their experience and perspectives on current market practices — such thoughtful discussions will inform the MSRB's work as it explores regulatory efforts within this market," said David Belton, Board member and FY 2024 MFSAG Chair.

Continue reading.

Date: January 18, 2024

Contact: Bruce Hall, Director, Communications
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MSRB Announces Discussion Topics for Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will

meet on January 24-25, 2024, holding the second meeting of fiscal year 2024 to advance its FY 2022-2025 Strategic Plan.

Annual Rate Card

The Board will discuss comments received in response to the MSRB's 2024 rate card filing with the SEC, establishing market activity fees and the municipal advisor fee for the 2024 calendar year. The MSRB's new rate card process annually adjusts rates assessed on regulated entities to ensure a timelier return of any excess revenue (i.e., surplus) to regulated entities and to better manage the organization's reserve funds.

Market Regulation

The Board will consider whether to modernize MSRB Rule G-27, on dealer supervision, to reflect changing work patterns since the COVID-19 pandemic and to further harmonize MSRB dealer supervisory requirements with FINRA supervisory rules.

The Board also will receive an update on industry input on its request for comment on draft amendments to MSRB Rule G-12(c) to consolidate existing guidance on certain inter-dealer confirmations requirements into a single streamlined rule provision.

Additionally, the Board will continue its discussions on a potential pre-trade market transparency initiative.

Date: January 17, 2024

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MSRB Publishes 2023 Annual Report and Audited Financial Statements.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today published its annual report for the 2023 fiscal year. The report summarizes the MSRB's key accomplishments over the past year and provides detailed information about its core operations and financial position. Congress established the MSRB with the mission to protect investors, issuers and the public interest by serving as the principal regulator of the $4 trillion municipal securities market.

"The value the MSRB delivers to the municipal securities market rests on the independence and expertise that are the defining features of our SRO model," said MSRB Chair Meredith Hathorn and MSRB CEO Mark Kim in their letter to stakeholders. Noting that MSRB Board members are municipal market experts whose knowledge and perspectives are essential to ensuring that the MSRB's rules are necessary, fair and balanced, Hathorn and Kim added: "The MSRB also delivers value to the market through our market transparency products and services… and by consistently engaging with market stakeholders as we advance key initiatives."

Highlights from the report include:

Modernizing Market Regulation

- Advancing a rule proposal to shorten the timeframe for trades to be reported to the MSRB;
- Facilitating the transition to T+1 settlement for municipal securities transactions in coordination with other financial regulators;
- Creating a new rule establishing the core standards of conduct for solicitor municipal advisors; and
- Enhancing compliance by advancing the codification or retirement of approximately 20% of the MSRB's body of interpretive guidance since launching the rulebook modernization initiative in 2021.

Enhancing Market Transparency through Technology and Data

- Releasing user-driven enhancements to the EMMA platform to improve the accuracy and quality of the information available on EMMA and to provide additional market transparency for market participants, such as adding an hourly municipal yield curve and retiring individual user accounts to give issuers greater control of their information.
- Launching a new structured data lab in the MSRB's innovation sandbox, EMMA Labs, to educate municipal market participants about structured data. The lab defines key concepts and terms, provides informative case studies from municipal issuers and demonstrates a possible application of structured data in a future state version of EMMA.

Advancing the Public Trust

- Implementing a new rate card model, which takes into account both actual and projected market activity to adjust rates assessed on regulated entities each year. The rate card model provides greater transparency into the rate-setting process as well as greater accountability to the regulated entities that pay those fees by automatically returning any operating surplus in one year in the form of lower rates the following year.
- Issuing a request for information to consider the perspectives of small firms operating in the municipal securities market to better inform our market regulation and market transparency priorities.

The annual report includes audited annual financial statements for the fiscal year that ended September 30, 2023, ensuring transparency and accountability to the public around how the MSRB advances its mission.

[Read the report.]

Date: January 16, 2024

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[Beyond 'Boring Bonds': SEC Settles with Former Executive Over Risky Investment Recommendations - Sherman & Howard]

The Securities and Exchange Commission (SEC) has reached a settlement with the former head of the municipal bond desk at Aegis Capital Corporation (Aegis) Alan Appelbaum.

The SEC alleged Appelbaum violated customer-specific suitability requirements in both recommending and selling variable interest rate structured products ("VRSPs") to seven retail

investors. The SEC stated in the complaint that Appelbaum either, “knew, was reckless in not knowing, or should have known that these securities were unsuitable for those customers.” Appelbaum was obligated under both suitability requirements and internal Aegis policy to make recommendations only after considering a customer’s risk tolerance, age, and investment time horizons.

VRSPs are high-risk structured products and pay interest at a fixed rate for an initial period, usually 1-3 years. After that, they are not guaranteed to pay any interest. The recovery of the principal at maturity is based on the operation of derivative features connected to equity indices like the Standard and Poor’s 500 and the Russell 2000. Additionally, there is no assurance of liquidity. A secondary market may not exist for VRSPs, and if a secondary market does exist, it can be at a great discount to face value.

The complaint alleged Appelbaum made “over 140 unsuitable recommendations and purchases of highly complex structured products for [the] retail investors.” All seven retail investors had a “moderate” risk tolerance, meaning they were unwilling to lose their entire investment principal. Additionally, the customers included in the complaint all had investment time horizons of up to 11 years. In contrast, the majority of VRSPs Applebaum recommended or purchased for customers did not mature for 15 years.

Aegis policy required customers to sign a disclosure form prior to purchasing any VRSPs; however, Appelbaum failed to provide such form to any of the seven customers presented in the complaint. Additionally, Appelbaum did not attend the Aegis mandatory training on structured products. The complaint also alleged Appelbaum engaged in unauthorized trading. All the accounts managed by Appelbaum were “non-discretionary.” Aegis policy required Appelbaum to obtain customer authorization before every transaction in a “non-discretionary” account. The SEC claimed Appelbaum failed to obtain the mandatory consent needed from customers before purchasing and selling VRSPs in their accounts.

Customers noticed losses and confronted Appelbaum about his investment strategies. The complaint alleged Appelbaum continued to make material misrepresentations to his customers, assuring them that he was investing in “boring bonds,” and they would see a return on their investments in time. One customer lost over $1 million, and another lost over $200,000; in contrast, Appelbaum received at least $1 million in compensation for the VRSP trades.

Without admitting or denying the allegations, Appelbaum and the SEC reached a settlement. The United States District Court for the Southern District of Florida entered final judgment on November 14, 2023. The final judgment permanently restrained and enjoined Appelbaum from any further violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Appelbaum was also ordered to pay $42,000 in disgorgement, (representing net profits gained as a result of the conduct alleged in the complaint), $5,500 in prejudgment interest, and a civil penalty of $50,000. The SEC also settled an administrative proceeding against Aegis and another against former Aegis broker Paul Gallivan, both for the improper recommendation and trading of VRSPs.

VRSPs are not, in fact, “boring bonds,” as Appelbaum put it. As indicated in the complaint; “Retail investors often rely on the recommendations of broker-dealers and their associated registered representatives when purchasing or selling securities. Registered representatives are required under, inter alia, FINRA and SEC Rules to recommend only securities transactions that are suitable for their customers…” The SEC views VRSPs as complex and risky structured products that are not suitable for retail investors with moderate risk tolerances, incompatible investment time horizons, and an unwillingness to lose their entire invested principal.

———————————————————-

[Litigation Release: SEC.gov](#) | [Alan Z. Appelbaum](#)

[Complaint: Alan Z. Appelbaum (sec.gov)](#)

[Final Judgment: judg25895.pdf (sec.gov)](#)

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Sherman & Howard L.L.C.

by Jessie Salas

January 9, 2024

GASB Proposes Guidance on Disclosure of Certain Risks.

Norwalk, CT, January 8, 2024 — The Governmental Accounting Standards Board (GASB) issued guidance today that requires governments to disclose information about certain risks.

Although governments are required to disclose information about their exposure to some risks, such as interest and credit risk associated with investments, essential information about certain other risks that are prevalent among state and local governments is not routinely disclosed because it is not explicitly required. The new Statement is meant to provide financial statement users with information about certain risks when circumstances make a government vulnerable to a heightened possibility of loss or harm.

GASB Statement No. 102, *Certain Risk Disclosures*, requires governments to disclose essential information about risks related to vulnerabilities due to certain concentrations or constraints.

1. The Statement defines a concentration as a lack of diversity related to an aspect of a significant inflow or outflow of resources—for example, a small number of companies that represent a majority of employment in a government's jurisdiction, or a government that relies on one revenue source for most of its revenue.
2. The Statement defines a constraint as a limitation imposed on a government by an external party or by formal action of the government's highest level of decision-making authority—such as a voter-approved property tax cap or a state-imposed debt limit. Based on input from financial statement users during the research phase of the project, GASB is proposing that certain types of assets be disclosed separately in the note disclosures about capital assets. This would allow users to make informed decisions about these and to evaluate accountability.

Concentrations and constraints may limit a government's ability to acquire resources or control spending.

Disclosure Criteria

The Statement generally requires a government to disclose information about a concentration or constraint if all of the following criteria are met.

1. The concentration or constraint is known to the government prior to issuing the financial

statements.
2. The concentration or constraint makes the government vulnerable to the risk of a substantial impact.
3. An event or events associated with the concentration or constraint that could cause a substantial impact have occurred, have begun to occur, or are more likely than not to begin to occur within 12 months of the date the financial statements are issued.

Note Disclosures

The disclosures should include a description of the following:

1. The concentration or constraint,
2. Each event associated with the concentration or constraint that could cause a substantial impact if the event has occurred or has begun to occur prior to the issuance of the financial statements, and
3. Actions taken by the government to mitigate the risk prior to the issuance of the financial statements.

The requirements of Statement 102 are effective for fiscal years beginning after June 15, 2024, and all reporting periods thereafter. Earlier application is encouraged.

The Statement is available on the GASB website, www.gasb.org.

MSRB Files to Shorten Timeframe for Trade Reporting to One Minute.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission amendments to MSRB Rule G-14 to shorten the timeframe for trades to be reported to the MSRB. The amendments change the current 15-minute standard to as soon as practicable, but no later than one minute after the time of trade, subject to exceptions for manual trades and firms with limited municipal trading activity.

"With this rule filing, the MSRB achieved a milestone on the way to improving the transparency of the municipal securities market," said MSRB CEO Mark Kim. "We look forward to working with the SEC to finalize this rulemaking. I also want to acknowledge FINRA, with whom we worked closely to harmonize our respective rule proposals to provide clarity and consistency in trade reporting across fixed income markets."

The MSRB initially sought comment from stakeholders on its one-minute trade reporting proposal in August 2022, which resulted in a robust response from market participants. Thereafter, the MSRB engaged in additional analysis and extensive engagement with market stakeholders to understand why certain types of voice-brokered, block and other trade types might not currently be readily reportable within one minute, as well as to understand potential resource or other barriers to meeting a new one-minute timeframe that might exist for some firms, including smaller or less active firms.

"We have considered this feedback and recognize the critical roles that all types of firms and differing manners of trading play in the municipal securities market," said Ernesto Lanza, Chief Regulatory and Policy Officer. "The proposal filed today represents a carefully crafted modernization of the trade reporting paradigm that we believe will result in substantial improvements in making more contemporaneous prices available to investors and other market participants. It also will

ensure firms with limited trading volumes can continue to participate in this market and the many legitimate uses of manual trades are not unnecessarily impeded."

Trades reported on RTRS are made available for free to the public via the Electronic Municipal Market Access (EMMA®) website, providing investors, dealers, municipal advisors and other market participants with the information they need to make informed decisions about the pricing of municipal securities.

Read the SEC Filing.

Date: January 12, 2024

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MSRB 2023 Municipal Bond Market in Review.

View the MSRB publication.

1/11/24

MSRB Prepares to Change the Market for Dealers in 2024.

The Municipal Securities Rulemaking Board is gearing up to change how broker-dealers operate in 2024, as the controversial move to a one-minute trade reporting window will come into effect, a change to a T+1 settlement cycle, in addition to a new proposal aimed at soliciting market feedback on pre-trade data.

The board's last few years have been dominated by its self-described focus on pre-trade, time of trade, and post-trade regulations and in the new year, those efforts will begin to shape the market.

"Most likely in the first quarter of 2024, we will see the MSRB file amendments to our Rule G-14 on trade reporting," said MSRB Chief Executive Officer Mark Kim. "This is the culmination of a years-long effort to look at market structure, examine post-trade transparency and to look specifically at shortening the trade reporting requirements from the current 15 minutes to the proposed one-minute timeline."

"The rule filing the MSRB is anticipating to make early next year will include two important exemptions to the one-minute trade reporting requirement," Kim said. "They focus around an exemption for de minimis market activity, or firms that do not trade a significant amount in the municipal securities market, as well as an exemption for manually-executed trades."

In addition to amendments to Rule G-14 on time of trade, the MSRB will also move to a T+1 settlement cycle, with the compliance date set for equities and corporate bonds May 28, 2024, and launch a new proposal on pre-trade reporting.

"The MSRB has systematically been examining market structure and our rules thereunder," Kim

said. “Rule G-14 is an example of post-trade transparency and looking at how long it takes the market to report the trades once they happen. Earlier this year, the MSRB examined time of trade disclosures in proposing amendments to its Rule G-47,” he added. “In the year ahead, I would expect the MSRB to continue its examination of pre-trade market transparency in the form of soliciting feedback from the industry.”

The Financial Data Transparency Act will upend the way in which most issuers present and submit financial information and has received a heavy dose of criticism since it passed a year ago. Rulemaking from the SEC is coming in 2024 and the board looks forward to the opportunity to comment.

“I think the market is looking forward to the data standards that will be coming from the Treasury and SEC as mandated by Congress under the FDTA,” Kim said. “We’re expecting those standards to come out for public comment sometime in the middle of this next year, sometime perhaps in the summer of 2024.”

The MSRB has already put in some effort to educate the market. Within the last year the board has published its structured data lab on its own EMMA Labs platform and within that, has published case studies that show how some issuers have dealt with structured data so far.

Early in the new year the MSRB plans to publish another case study from what it calls a “prominent issuer” to give market participants even more information ahead of the regulations.

The board also plans, early next year, to publish a 2023 year in review research piece, which analyzes many of the ups and downs of 2023. But as far as what can be predicted for the new year, the MSRB is keeping an eye on the new rate environment for 2024. Rates are widely expected to drop and that expectation is already being priced into the market, Kim said.

“We’ve seen a very rapid rise in interest rates over the last two years and if you believe some of the projections for the coming year, the interest rate cycle may have peaked, and we may be expecting the Fed to begin lowering interest rates. Of course, if that doesn’t happen, we will see a lot more volatility across our markets which have already priced in that expectation.”

The SEC’s Best Execution rule, proposed at the end of 2022, has been controversial due to the fact that there are already Best Execution rules on the books at the MSRB and FINRA. Once that’s finalized, the MSRB will likely have to reexamine its own rule.

“If the SEC adopts a new Best Execution standard, that almost certainly would require the MSRB to pivot and re-examine our own Best Execution rule to make sure that our rules are harmonized across markets,” Kim said.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 01/02/24 10:48 AM EST

Outlook: SEC In for a Dizzying Year.

The year 2024 is shaping up to be a landmark one for the Securities and Exchange Commission, not only through their own rigorous enforcement agenda but the regulator is in for continued industry backlash and a Supreme Court case that could test its enforcement powers and change how the SEC

operates.

Through its own enforcement agenda, the SEC has made clear its muni market focus in 2024 will be to scrutinize solicitor municipal advisors and compliance with Regulation Best Interest. Dave Sanchez, director of the SEC's Office of Municipal Securities, also said during a panel during at regulator's Compliance Outreach Program in early December that issuers should keep an eye on the Government Finance Officer's Association's best practices for climate and ESG risk disclosure.

But outside of its normal examination priorities, the Commission has received intense backlash in recent years for what many market participants view as an unprecedented regulatory agenda, and with many of these proposals coming into effect in 2024, even more backlash is expected.

"Next year is going to be the year of the lawsuit for the SEC," said Chris Iacovella, chief executive officer of the American Securities Association. "This administrative state chairman (SEC chairman Gary Gensler), who is an unelected partisan, has decided to use his influence to demand that the MSRB write rules, when there is no market failure, is a threat to our marketplace and quite frankly, it's a threat to democracy and the freedom to operate because you have somebody coming in and telling the MSRB that they have to change what works, because that's what he thinks is best."

Top of mind for the broker-dealer community are the post-trade and time-of-trade reporting rules, which change the trade reporting window to one minute and the settlement date to T+1, respectively. The MSRB has also indicated in the new year that it will be soliciting feedback on pre-trade reporting.

"We're very concerned that he's not going to stop with post-trade reporting, and that he intends fully to lean on them to try to change to some pre-trade mechanism to force everything onto an electronic platform because he's predisposed to trying to do that, based upon his time at the CFTC, implementing the swaps regime," Iacovella said of Gensler.

"It's come to our attention that the current chair of the SEC has called the MSRB a glorified trade association," Iacovella said. "We obviously disagree with that but we're also concerned that the government is using its authority to lean on and pressure the SRO (self-regulatory organization) to do things that are unnecessary, because there's no market failure."

"My view is that 2024 is going to continue to be a difficult environment for the broker-dealer community," said Leslie Norwood, managing director, associate general counsel and head of municipal securities at the Securities Industry and Financial Markets Association. She noted a mix of factors such as the interest rate environment, expected to come down in 2024, that has caused new issue volume to decrease, and capital rules such as the Basel III End Game proposal, on which comments are due Jan. 16.

"There's also direct costs that are at play, such as the increase in MSRB fees," Norwood said. The MSRB recently filed its new rate card with the SEC and comments on that are due Jan. 2, though the rates were effective immediately.

"The rate card was put in place to try to create more certainty in terms of the fees and to try and smooth out some of the swings," Norwood said. "However, the swings within each of the buckets of this new rate card model have been pretty dramatic this round, including a reduction in the trade count fees of 48% and an increase in the underwriting fees of 25%. The increase in underwriting fees was only 25% because they hit the cap," she added. "I think that's something that continues to be an issue for the broker dealer community."

Gensler has made it clear that he's trying to bring the Commission up to speed with the large technological and societal changes over the last several decades and has made strong efforts to issue regulations, not just enforcement actions.

"We've all seen complaints that they're doing regulation through enforcement, and now they're doing regulation through regulation so I guess we can't have it both ways," said Teri Guarnaccia, partner at Ballard Spahr, co-leader of the firm's public finance group and co-leader of the firm's municipal securities regulation and enforcement team.

But for the SEC's Public Finance Abuse Unit, new ground has been broken on enforcement as well. Beginning at the end of 2022, the Office of Municipal Securities has begun enforcing nonadherence to the limited offering exemption, and so far, it's had a positive effect on the habits of the market.

"I think that it is one of those areas like MCDC was, where the regulatory or the enforcement activities have forced better practices from broker dealers," Guarnaccia said. "Where now, certainly at least the big banks, most of whom the SEC has already looked at, have policies and procedures in place and it's received such attention that I think its people are really looking at it."

Others have already noted the MCDC-like nature of the SEC's look at the limited offering exemption, where the Commission takes a specific offense and offers lenient settlements with firms that self-report their offenses. The Commission has so far charged seven firms for violating the exemption.

"I don't know that they're done, because maybe they haven't finished all of their started actions," Guarnaccia said. "But I think going forward, people understand what they were looking at and are more cognizant of how to comply."

But all will be eager to watch what happens in SEC v. Jarkesy, the case that will test whether the Commission's statutory provisions which allow them to seek civil penalties have been violating the Seventh Amendment. The decision is expected in 2024.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 12/27/23 11:32 AM EST

Dealers Want Subsection of Rule G-12 Eliminated.

The Municipal Securities Rulemaking Board's proposal on Rule G-12(c), the subsection of its uniform practices dealing with inter-dealer confirmations, which would simplify some existing guidance, retire some others and merge much of it into Rule G-15, should go further and eliminate the subsection altogether, dealers say.

MSRB Rule G-12 on uniform practice establishes the industry standards for the processing, clearance and settlement of transactions between municipal securities dealers. The MSRB's current proposal is focused solely on Rule G-12(c) and would codify existing interpretive guidance on inter-dealer disclosure requirements that are ineligible for automated comparison.

Since the vast majority of transactions are eligible for automated comparison, Rule G-12(c) doesn't touch a large swath of the market but for those it does, paper confirmations among dealers are outdated and new requirements to simplify these disclosures would only streamline a process largely out of sync with the rest of the market.

“Rule G-12(c) should be deleted as electronification of systems has rendered it obsolete,” Leslie Norwood, managing director, associate general counsel and head of municipal securities at the Securities Industry and Financial Markets Association wrote in the proposals’ only comment letter. “Rule G-12(c) had value when it was originally adopted, and it served a valid purpose in an operational environment where there were a significant number of trades that were ineligible for automated comparison. However, Rule G-12(c) has been made obsolete in large part to the speed of computers as settlement cycles have continued to shrink from T+3 to the current T+2 and the planned move to T+1 in May 2024.”

The draft amendments, proposed as part of the MSRB’s retrospective rule review, would reorganize the content of Rule G-12(c) on inter-dealer confirmation to align with the format for similar provisions in Rule G-15(a) on written confirmations. The amendments would also regroup requirements into the three buckets of transaction information, securities identification information and securities descriptive information.

The proposal would also require inter-dealer confirmations to include confirming party’s name, address and telephone number, contra party identification, designation of purchase from or sale to, par value of the securities, trade date, settlement date, yield and dollar price, amount of concession, final monies, delivery of securities and “additional information about the transaction,” the proposal said.

They would also have to include the name of the issuer, CUSIP number, maturity date, interest rate and dated date and descriptive information such as credit backing, features of the securities, information on status of securities, and tax information. Some of this may be worth disclosing to customers but not for dealers.

“While Rule G-15 customer confirmations still have value, paper interdealer transactions do not,” the SIFMA letter said. “Currently industry practice is to evidence interdealer trades with Bloomberg screen captures, VCONs, or trade blotters. These are also the types of items that FINRA examiners ask for as evidence of interdealer trades.”

Harmonizing Rule G-12(c) with Rule G-15 would be unnecessary, as disclosures of information as such would “merely create a web of potential regulatory foot-faults without any benefit,” SIFMA said.

The scope of the proposal is also overwhelming and if the board chooses to proceed with the proposal, the amount of guidance being amended, codified, merged and retired should be significantly reduced, as the sheer scope makes it difficult to gauge any unintended consequences, SIFMA said.

SIFMA also recommends that the MSRB should prioritize guidance not being incorporated into the rule before taking further action, and should address the guidance being retired or codified in a FAQs page before being codified into the rule.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 12/18/23 01:52 PM EST

Proposed Rule Change to Establish the 2024 Rate Card Fees for Dealers and

Municipal Advisors Pursuant to MSRB Rules A-11 and A-13 (Joint Trades): SIFMA Comment Letter

SUMMARY

SIFMA, American Securities Association (ASA), Bond Dealers of America (BDA), and National Association of Municipal Advisors (NAMA) provided comments to the U.S. Securities and Exchange Commission (SEC) on the MSRB's Proposed Rule Change to Establish the 2024 Rate Card Fees for Dealers and Municipal Advisors Pursuant to MSRB Rules A-11 and A-13.

Read the SIFMA Comment Letter.

Proposed Rule Change to Establish the 2024 Rate Card Fees for Dealers and Municipal Advisors Pursuant to MSRB Rules A–11 and A–13: SIFMA Comment Letter

SUMMARY

SIFMA provided comments to the U.S. Securities and Exchange Commission (SEC) on the Municipal Securities Rulemaking Board's (MSRB) filing to establish its 2024 Rate Card Fees.

Read the SIFMA Comment Letter.

MSRB Designation Information Regarding Mandatory Participation in Business Continuity and Disaster Recovery Testing.

Read the MSRB Notice.

1/4/24

Cybersecurity Disclosure Guidance for Municipal Bonds: Cozen O'Connor

Cyberattacks against municipal entities and 501(c)(3) organizations are becoming increasingly sophisticated and severe. The potential impact of these cyberattacks on entities is significant in both the time required to address the impact of the attack and the costs of any liability and remediation. Credit rating agencies have emphasized that cyberattacks pose a credit risk to municipal bond issuers and may result in a lower credit rating, which increases borrowing costs.

On July 26, 2023, the Securities and Exchange Commission (the SEC) adopted final rules (the Rules) requiring public companies to disclose material cybersecurity incidents and to annually disclose material information regarding their cybersecurity risk management, strategy, and governance.1 Although the Rules only apply to public companies subject to the reporting requirements of the Securities Exchange Act of 1934, the SEC has frequently urged the municipal markets to look to the disclose requirements imposed on public companies. Accordingly, the Rules provide guidance to

municipal issuers and 501(c)(3) organizations on how they may consider disclosing cybersecurity matters in offering documents and on the formulation of policies and strategies to combat cyberattacks.

Disclosure of a Material Cybersecurity Incident

Commencing on December 18, 2023, the Rules require public companies to publicly disclose any "cybersecurity incident" they determine to be material and describe the material aspects of its

1. nature, scope, and timing; and
2. impact or reasonably likely impact on the company, including its financial condition and results of operations.

A "cybersecurity incident" is defined as "an unauthorized occurrence on or conducted through a [company's] information systems that jeopardizes the confidentiality, integrity, or availability of a [company's] information systems or any information residing therein." The Rules emphasize that the term "cybersecurity incident" is to be construed broadly.

Disclosure of a cybersecurity incident will generally be due within four business days after the affected company determines that a cybersecurity incident is material.2 This requirement is similar to the disclosure of certain reporting events the municipal market is accustomed to under Rule 15c2-12.3

Annual Disclosure

In addition, commencing with its annual report for the fiscal year ending on or after December 15, 2023, public companies will be required to provide annual disclosures related to the companies' processes for the management and governance of cybersecurity threats.

In the annual disclosure, companies must describe the following:

1. The process, if any, for assessing, identifying, and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes. In providing such disclosure, the company should address:

- whether and how any such processes have been integrated into the company's overall risk management system or processes;
- whether the company engages assessors, consultants, auditors, or other third parties in connection with any such processes; and
- whether the company has processes to oversee and identify such risks from cybersecurity threats associated with its use of any third-party service provider.

2. Whether any risks related to cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the company, including its business strategy, results of operations, or financial condition, and if so, how.

3. The board of directors' oversight of risks from cybersecurity threats. If applicable, identify any board committee or subcommittee responsible for the oversight of risks from cybersecurity threats and describe the processes by which the board or such committee is informed about such risks.

4. The management's role in assessing and managing the company's material risks from cybersecurity threats, including:

- whether and which management positions or committees are responsible for assessing and managing such risks and the relevant expertise of such persons or members in such detail as necessary to fully describe the nature of the expertise;
- the processes by which such persons or committees are informed about and monitor the prevention, detection, mitigation, and remediation of cybersecurity incidents; and
- whether such persons or committees report information about such risks to the board of directors or a committee or subcommittee of the board of directors.

Guidance for Municipal Market Participants

Although the municipal market is not subject to Rules, they offer helpful insight and guidance to its participants. The Rules provide municipal issuers and 501(c)(3) organizations with a valuable framework for drafting cybersecurity risk disclosure in offering documents. Additionally, the Rules provide guidance on drafting and implementing policies and procedures for responding to cyberattacks.

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1 SEC Release Nos. 33-11216 and 34-97989.

2 The cybersecurity incident disclosure may be delayed if the United States Attorney General determines that immediate disclosure would pose a substantial risk to national security or public safety and notifies the SEC of such determination in writing.

3 17 CFR § 240.15c2-12.

Cozen O'Connor – Scott R. Mehok

December 7, 2023

Apply to Serve on GFOA's Executive Board.

Put your leadership skills and knowledge of public finance to work to help members continue to build thriving communities. Applications are open to serve on GFOA's Executive Board. Board members serve a three-year term and are expected to participate in all meetings, including three on-site meetings per year, plus GFOA's committee meetings. Applications are due by February 2.

LEARN MORE

MSRB Seeks Feedback on Impact of Municipal Market Regulation on Small Firms.

Washington, D.C.– The Municipal Securities Rulemaking Board (MSRB) today issued a request for information (RFI) to solicit feedback from market participants and the public on the impact of

municipal market regulation on small firms operating in the municipal securities market. The MSRB is seeking this input as part of its broader stakeholder engagement to hear directly from municipal market participants on how the MSRB's rules, or the absence thereof, may create undue regulatory, compliance, operational or administrative burdens or other negative unintended impacts.

"By seeking to understand the impact of our rules on market participants, we strive to ensure that the municipal securities market is both fair and efficient," said Mark Kim, MSRB CEO. "I believe that an impactful way to support the efforts of regulated entities to comply with our rules is to assess whether a rule is no longer achieving its intended purpose or if there are disproportionate costs or burdens associated with compliance for certain types of firms."

The MSRB is soliciting responses and information on a range of topics, including:

- Factors that should be considered in identifying a firm as small versus mid-sized or large, such as revenue, market participation (i.e., trade and underwriting volume), number of employees or type of regulated entity;
- Rules or market practices that may have unintended and disproportionate impacts on the ability of small firms to compete in the municipal securities market;
- Rules or market practices that may unintentionally limit small firm participation in the municipal securities market;
- Potential revisions to rules or changes to administrative processes that could be made to better address specific challenges uniquely faced by small firms; and
- Compliance resources or guidance the MSRB could produce that would be useful for small firms.

The MSRB's request for information directs a number of questions to small municipal advisor firms and dealers, but the MSRB welcomes responses from all market participants on any aspect they wish to address. Comments are due to be submitted by February 26, 2024.

Read the Request for Information.

Date: December 04, 2023

Contact: Bruce Hall, Director, Communications
202-838-1500
bhall@msrb.org

MSRB Seeks Board of Directors Applicants.

Washington, D.C. – The Municipal Securities Rulemaking Board (MSRB), the self-regulatory organization (SRO) established by Congress to safeguard the $4 trillion municipal securities market, is soliciting applications for three positions on its Board of Directors for the 2025 fiscal year. Selected candidates will be elected to four-year terms beginning October 1, 2024, where they will have the opportunity to oversee the advancement of the organization's Strategic Plan.

"Ensuring the MSRB Board is a diverse and inclusive decision-making body that reflects the wide variety of perspectives in the municipal market is essential to our ability to advance initiatives that support a fair and efficient market," said Meredith Hathorn, MSRB Board Chair. "We are particularly interested in applicants with compliance experience and an understanding of the role of technology in the municipal securities market to help provide oversight of the MSRB's market transparency and regulatory initiatives," added Jennie Huang Bennett, MSRB Board member and

Chair of the Board's Nominating Committee, which leads the process of identifying new Board members. "That said, we encourage all individuals with municipal securities experience from all regions of the United States to apply for membership on the Board."

The Board is charged with setting regulatory policy, authorizing rulemaking, enhancing market transparency systems and overseeing operations for the organization. The Board is currently overseeing the execution of the MSRB's FY 2022-2025 strategic goals, with a focus on modernizing the MSRB rule book, enhancing municipal market transparency through technology and data, and upholding the public trust through fiscal transparency as well as a commitment to social responsibility, diversity, equity and inclusion. Board members are compensated for their service.

Board Composition

The Board is composed of 15 total members, which includes eight members who are representatives of the public, including investors, municipal entities and other individuals not regulated by the MSRB, and seven members from firms that are regulated by the MSRB, including representatives of dealers and municipal advisors. During the current nominating process, the Board will elect two public representatives and one regulated representative to join the Board on October 1, 2024. All applicants must be knowledgeable of matters related to the municipal securities market.

Application Details

Applications are made through the MSRB Board of Directors Application Portal and will be accepted from January 2, 2024 through February 9, 2024. At least one letter of recommendation must be submitted with the application. Additional details on the Board application process, including a copy of the application form for preview, information about Board service requirements and FAQs are available on the MSRB's website. Questions regarding the application and selection process should be directed to Jake Lesser, General Counsel, at 202-838-1395 or jlesser@msrb.org.

Date: December 05, 2023

Contact: Bruce Hall, Director, Communications
202-838-1500
bhall@msrb.org

MSRB Files 2024 Rate Card for Dealers and Municipal Advisors.

Washington, D.C. – The Municipal Securities Rulemaking Board (MSRB) today filed its 2024 rate card for dealers and municipal advisors with the Securities and Exchange Commission (SEC). The 2024 rate card adjusts rates for the three market activity fees assessed on municipal securities dealers and the professional fee assessed on municipal advisors. The new rates will be effective as of January 1, 2024.

"Under the rate card model, the MSRB annually adjusts fees to better manage the organization's revenue and reserve levels needed to deliver value to the municipal market through regulatory protections, technology infrastructure and data services," said Mark Kim, MSRB CEO. "This formulaic rate-setting process reflects feedback we have received from stakeholders regarding our reserve management. It is more transparent and predictable for the MSRB's stakeholders, while also allowing us to quickly adapt to changing market conditions and ensuring the MSRB does not collect more fees than it needs to operate."

Each fee rate in the 2024 rate card was determined based on the amount of revenue each fee was expected to contribute and the anticipated volume of activity underlying the fee. The amount of revenue each fee contributes is designed to be a fair and equitable balance, in line with recent historical precedents. The 2024 rate card includes a 15% reduction in the transaction fee and a 48% reduction in the trade count fee to reflect surplus revenue collected from dealers resulting from record-high trading volume in 2023. It also includes increases of 25% in the underwriting fee and 9% in the municipal advisor professional fee to make up for a deficit last year in these two fees relative to budget. Together, these fee changes would return a net $3 million in surplus revenue to regulated entities. The rate card model stipulates caps on rate increases, including a 25% cap on rate increases in a given year, but no floor on rate reductions.

"The tough year in underwriting along with the higher-than-expected trade volume are the reasons we are raising some fees while lowering others," said Bo Daniels, MSRB Board member and Chair of the Finance Committee. "While our new rate card approach does not fully cure the challenge of having to make predictions about market activity volume in the year ahead, it does help ensure that excess revenue collected is returned to dealers and municipal advisers timelier and with more predictability."

For a more detailed explanation of the MSRB's rate card, fees and funding philosophy see:

- 2024 Rate Card FAQs
- MSRB Annual Rate Card
- MSRB Funding Policy
- MSRB Notice 2023-10

Date: November 30, 2023

Contact: Bruce Hall, Director, Communications
202-838-1500
bhall@msrb.org

FAF Reappoints Carolyn Smith to GASB and Appoints Robert Hamilton as Chair of GASAC.

Norwalk, CT, November 14, 2023 — The Board of Trustees of the Financial Accounting Foundation (FAF) today announced the reappointment of Carolyn Smith to the Governmental Accounting Standards Board (GASB) for a second five-year term. Her service on the GASB continues through December 31, 2029.

The Trustees also announced the appointment of Robert W. Hamilton to the role of chair of the Governmental Accounting Standards Advisory Council (GASAC) for the term of one year beginning January 1, 2024, and ending December 31, 2024. At that time, Mr. Hamilton will be eligible for reappointment for an additional two-year term.

Carolyn Smith's Reappointment to GASB

Ms. Smith is the former chief audit executive for the Columbus, Ohio City School's Office of Internal Audit. In that role, she led all audits and advised the Board of Education on matters of risk, control, and compliance for Ohio's largest school system.

She previously served as director of audit and business services at the Council of Aging of Southwestern Ohio where she established and managed the audit and contract division.

Regarding Ms. Smith's reappointment, Edward C. Bernard, chair of the FAF Board of Trustees, said, "Carolyn's many years of leading the audit team at the Columbus City Schools lend an invaluable perspective to her service on the GASB. We're delighted she will continue to share that perspective with the Board during a second term."

GASB Chair Joel Black said, "Carolyn's real-world insights and depth of knowledge are vital to the Board's work. We are very pleased Carolyn has elected to serve a second term on the GASB."

Robert Hamilton Appointed Chair of GASAC

Mr. Hamilton has served as the vice chair of the GASAC since August 2022, and as the National Association of State Auditors, Comptrollers and Treasurers (NASACT) representative to the GASAC for the last three years. He currently serves as a manager for the Department of Administrative Services, Statewide Accounting and Reporting, for the state of Oregon.

Previously, he was a public accountant in Oregon for Michael L. Piels CPA LLP, where he served both governmental and not-for-profit clients, among others.

Of Mr. Hamilton's appointment, GASB Chair Black said, "We look forward to working with Robert in his new role as chair of the GASAC. As vice chair, he has been an engaged member of the Council and given generously of his time and talents."

About the Financial Accounting Foundation

Established in 1972, the Financial Accounting Foundation (FAF) is an independent, private-sector, not-for-profit organization based in Norwalk, Connecticut. Its Board of Trustees is responsible for the oversight, administration, financing, and appointment of the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB).

The FASB and GASB (collectively, "the Boards") establish and improve financial accounting and reporting standards—known as Generally Accepted Accounting Principles, or GAAP—for public and private companies, not-for-profit organizations, and state and local governments in the United States. Both Boards set high-quality standards through a process that is robust, comprehensive, and inclusive. The FASB is responsible for standards for public and private companies and not-for-profit organizations, whereas the GASB is responsible for standards for state and local governments.

The Foundation's Board of Trustees comprises 14–18 members from varied backgrounds—users, preparers, and auditors of financial reports; state and local government officials; academics; and regulators. The Trustees direct the effective, efficient, and appropriate stewardship of the FASB and GASB in carrying out their complementary missions; select and appoint FASB and GASB members and their advisory councils; oversee the Boards' activities and due process; and promote and protect the independence of the Boards. For more information, visit www.accountingfoundation.org.

About the Governmental Accounting Standards Board

Established in 1984, the GASB is the independent, private-sector organization based in Norwalk, Connecticut, that establishes accounting and financial reporting standards for U.S. state and local governments that follow Generally Accepted Accounting Principles (GAAP). These standards are recognized as authoritative by state and local governments, state Boards of Accountancy, and the American Institute of CPAs (AICPA). The GASB develops and issues accounting standards through a

transparent and inclusive process intended to promote financial reporting that provides useful information to taxpayers, public officials, investors, and others who use financial reports. The Financial Accounting Foundation (FAF) supports and oversees the GASB. For more information, visit www.gasb.org.

The Reach Too Far: SEC Sues Over Botched School Audit - Norris McLaughlin

As I have written recently, accounting firms that "reach" for more business and/or for types of business that "exceed their grasp" court disaster – in terms of the quality of the professional services rendered, the damage to the firms' professional reputations, and the financial losses the firms suffer as a result.

My July 24, 2023 blog "Why 'Ask Marcum'?" tells the tale of an accounting firm aggressively seeking to grow, which became the "go to" firm for Special Purpose Acquisition Companies ("SPAC") deals only to fail mightily in trying to keep up with the workload, and ended up settling an enforcement action brought by the U.S. Securities and Exchange Commission ("SEC") including payment of a civil penalty of $10 million to the SEC and $3 million to the Public Company Accounting Oversight Board ("PCAOB"), as well as material restrictions on its ability to take on new work. Then, as recounted in my Aug. 29, 2023 blog "Eating Crowe," the SEC sanctioned one of the world's largest accounting firms for trying to provide audit services in a SPAC financing that resulted in a total loss for investors, for which the accounting firm paid $11.5 million in damages to the investors, in addition to disgorging its fees and paying a civil penalty of $750,000. The accounting firm also forfeited its registration with PCAOB and accepted the imposition of major conditions to be met before it could reapply to register with PCAOB. As a consequence, the accounting firm is not eligible to audit public companies traded on the American capital markets.

A particular area of audit malperformance involves municipal entities, especially school districts. I have previously written extensively about the regulatory structure of the municipal security market, e.g., in my Sept. 22, 2020 blog "SEC Focus on Municipal Securities," which includes quite a number of enforcement actions arising out of the inadequacy of disclosure by municipal issuers and their advisors. In my June 27, 2022 blog "Serving the Public?" not only do I discuss a number of violative failures and misstatements, including some involving school systems, but also the creation in 2010 of the Public Finance Abuse Unit within the SEC's Division of Enforcement, reflecting both the growing volume of cases and the seriousness of the misdeeds.

Continue reading.

by Peter D. Hutcheon of Norris McLaughlin P.A.

Tuesday, November 21, 2023

SEC Announces Record-Setting Enforcement Results for Fiscal Year 2023: Holland & Knight

The SEC's Division of Enforcement recently announced its Fiscal Year (FY) 2023 results, touting a record-setting year. Rather than repeat Enforcement's detailed report available here, we boil the data down to give our readers a sense of the scale and magnitude of Enforcement's efforts and

outcomes between Oct. 1, 2022, and Sept. 30, 2023. And though Enforcement does not publicly report statistics relating to the investigations it closed without action, the actions it did file – and the themes the Report highlights – underscore that the agency is committed to using all the tools at its disposal to enforce the law, from offering and accounting fraud, insider trading and disclosure cases to pioneering forays into environmental, social and governance (ESG), cybersecurity and crypto enforcement.

Continue reading.

Holland & Knight SECond Opinions Blog

Brandon Len King | Kayla Joyce | Jessica B. Magee | Scott Mascianica

Nov 21, 2023

Chester, PA Chapter 9 Court Confirms Certain Municipal Financing Techniques, Raises Concerns About Others: Cadwalader

On November 3, 2023, the Court in the Chapter 9 bankruptcy case of the City of Chester, Pennsylvania issued its ruling in an adversary proceeding challenging the perfection of the liens securing certain revenue bonds issued by the City.1 Confirming the municipal bond market's longstanding understanding, the Court concluded that the liens on revenues were properly perfected by the filing of UCC financing statements.

However, the Court also held that the liens had ceased to attach to postpetition revenues by virtue of Section 552(a) of the Bankruptcy Code, which generally provides that prepetition liens cease to attach to property acquired after the commencement of a bankruptcy case. The Chester Court concluded that no relevant exception to Section 552(a) applied, in the process analyzing issues related to statutory liens, the nature of postpetition "proceeds," and the nature of "special revenues."

BACKGROUND

Chester, Pennsylvania is a city of around 30,000 residents located near Philadelphia. In 2017, the City issued two series of revenue bonds pursuant to (i) an ordinance authorizing the issuance of the bonds and (ii) a Trust Indenture. The bonds were secured primarily by liens on three major revenue streams:

> "Harrah's Revenues," which consist of an annual slot machine license operation fee that the State of Pennsylvania collects pursuant to the Pennsylvania Race Horse and Development Gaming Act (the "Gaming Act") from a Harrah's casino located in Chester, and a portion of which the State then pays to the City;
>
> "Harrah's Table Game Revenues," which consist of a "local share assessment" that the Harrah's casino is required to pay to the State, equivalent to 2% of daily gross revenue from the casino's table games, and a portion of which the State distributes to the City; and
>
> "Host Community Revenues," which consist of fees paid to the City by a waste

incinerator operator ("Covanta") pursuant to an agreement that authorized Covanta to operate a waste incinerator in the City.

In November 2022, following decades of financial difficulties, the City filed for Chapter 9 bankruptcy protection. In the bankruptcy case, the City commenced an adversary proceeding against the bondholders and their trustee, alleging, among other things, (i) that the bondholders' liens on the revenues were unperfected and could therefore be avoided, and (ii) that the bondholders' liens did not extend to postpetition revenues because of Section 552(a) of the Bankruptcy Code.

The Court ultimately ruled for the bondholders on the perfection and avoidance issues, holding that the bondholders' liens were properly perfected by the filing of UCC financing statements and therefore unavoidable. The Court ruled for the City on the Section 552(a) issue, however, holding that Section 552(a) had terminated the bondholders' liens as to postpetition revenues because none of the relevant exceptions applied.

ANALYSIS

UCC Financing Statements Can Perfect Liens on Municipal Revenues

Under the Uniform Commercial Code ("UCC"), the method of perfecting a lien depends on the nature of the collateral and how it is characterized under the UCC. In Chester's case, the City argued that the pledged revenues constituted "money," a security interest in which can be perfected only by "possession." Because the City alleged that the bondholders did not have "possession" of postpetition revenues as of the petition date, the City argued that their liens could be avoided under Section 544 of the Bankruptcy Code.

The bondholders countered by arguing that the pledged revenues were properly characterized as either an "account" or a "payment intangible" for UCC perfection purposes. The UCC defines an "account" as "a right to payment of a monetary obligation," and defines a "payment intangible" as a "general intangible under which the account debtor's principal obligation is a monetary obligation." *See* 13 Pa.C.S.A. § 9102. Unlike a security interest in "money," a security interest in an "account" or a "general intangible" (including a "payment intangible") can be perfected through the filing of a UCC financing statement, and the trustee for the bonds had in fact filed such UCC financing statements.

The Court agreed with the bondholders that the pledged revenues were "more akin to an 'account' or 'payment intangible' than 'money' for purposes of perfection." This holding was consistent with prior cases addressing security interests in "revenues" under other types of agreements, such as where hotel revenues serve as collateral under a private loan agreement.2 The Chester Court's ruling appears to be one of the first to expressly hold revenues to constitute "accounts" or "payment intangibles" in the case of a municipal revenue bond. Financing statements are routinely filed to perfect liens on revenues in the municipal finance context, so the Chester Court's perfection holding was consistent with the practices and expectations of the municipal bond market.

Section 552(a) of the Bankruptcy Code

Section 552(a) of the Bankruptcy Code generally cuts off most security interests in property acquired by a debtor after the date of the bankruptcy petition.3 There are three main exceptions to Section 552(a), which permit a prepetition lien to continue to attach to property acquired after the commencement of the bankruptcy case if:

- the prepetition lien is a "statutory lien";

- postpetition collateral constitutes “proceeds” of prepetition collateral; or
- the postpetition collateral qualifies as “special revenues” as defined in the Bankruptcy Code.

The Chester bondholders argued that each of these exceptions to Section 552(a) applied, but the Court rejected the bondholders’ arguments, ultimately holding that no relevant exception to Section 552(a) applied and that the bondholders’ liens therefore did not attach to the City’s postpetition revenues. Certain of the Court’s rulings with respect to Section 552(a) undermine fundamental principles of the municipal financing of revenue-generating projects.

Statutory Lien Analysis

Because Section 552(a) by its terms applies only to a “lien resulting from a security *agreement*,” Section 552(a) does not apply to a *statutory* lien that results from a statute rather than an “agreement.” The Bankruptcy Code defines a “statutory lien” as one “arising solely by force of a statute on specified circumstances or conditions.” 11 U.S.C. § 101(53). The Chester bondholders argued that they had such a statutory lien arising from the below provision of the ordinance authorizing the issuance of their bonds:

> Pledge of, and Security Interest in, Pledged Revenues. The City hereby irrevocably pledges the Pledged Revenues for the payment of the principal of, premium, if any, and interest on the Bonds and grants a security interest in and to all such Pledged Revenues which shall be perfected as provided in the [Debt] Act and the Pennsylvania Uniform Commercial Code (the ‘UCC’), as applicable, for the benefit and security of the Trustee . . . on behalf of the owners of the Bonds. The Trustee is hereby authorized to file a financing statement under the UCC reflecting the foregoing pledge and security interest. Such pledge and security interest shall be subject, as appropriate, to those existing pledges and security interests securing existing obligations of the City described in the recitals hereto.

The Court rejected the bondholders’ statutory lien argument, holding that because the bondholders had a consensual security interest arising from the applicable Trust Indenture, they did not have a statutory lien. In reaching this conclusion, the Court relied on language from the legislative history of the Bankruptcy Code indicating that statutory liens and consensual security interests are “mutually exclusive.” *See* S. Rep. No. 95-989, 95th Cong, 2d Sess. 26 (1978); H.R. Rep. 95-595, 95th Cong., 1st Sess. 313-14 (1977). The Court seemed to take this legislative history to mean that a statutory lien and a consensual security interest can never coexist, but that is by no means a consensus reading of the legislative history. A significant number of courts have instead read the “mutually exclusive” language in the legislative history simply to mean that a *single* lien cannot be both a statutory lien and a consensual security interest.4 This does not necessarily mean that a statutory lien and a consensual lien cannot exist simultaneously if they arise from two different sources (i.e., one is created by a statute and the other is *separately* created by a security agreement). Indeed, the Court’s approach leads to the illogical conclusion that a cautious creditor trying to create a lien regardless of which of the two sources applies, instead runs the risk that *no* lien will be created.

The Chester bondholders argued that the applicable ordinance does create a statutory lien, because the ordinance itself “hereby irrevocably pledges” the “Pledged Revenues,” and the term “Pledged Revenues” is defined within the ordinance itself without reference to the Trust Indenture. Furthermore, the bondholders argued that an ordinance qualifies as a “statute” under Pennsylvania law, and the City did not meaningfully dispute that argument.

Section 552(b) "Proceeds" Analysis

The bondholders also argued that the Section 552(b) "proceeds" exception to Section 552(a) applies. Section 552(b) permits prepetition liens to continue to attach to property acquired by the debtor after the commencement of the bankruptcy case if the postpetition collateral constitutes "proceeds" of prepetition collateral.5

The bondholders argued that Section 552(b) applied because their prepetition collateral package included a security interest in the City's "right to receive" the pledged revenues, such that postpetition revenues were the "proceeds" of the City's "right to receive" those revenues. The Court rejected the bondholders' argument based on its reading of the applicable Trust Indenture, holding that the Indenture just defined the applicable collateral as the "Pledged Revenues" themselves, without expressly granting a security interest in the City's "right to receive" the revenues.

Not only is the Court's reading of the Trust Indenture inconsistent with creditors' expectations, it also runs counter to the Court's own holding that the relevant collateral qualified as an "account" for UCC purposes, because the UCC *defines* an "account" as "**a right to payment** of a monetary obligation." See 13 Pa.C.S.A. § 9102 (emphasis added). A more internally consistent analysis therefore might have concluded that the collateral included the City's "right to payment" both for purposes of the UCC's perfection requirements and for purposes of the Section 552(b) "proceeds" exception.

Special Revenues Analysis

Section 928(a) of the Bankruptcy Code overrides Section 552(a) with respect to security interests in "special revenues."6 Section 902(2) of the Bankruptcy Code in turn defines "special revenues" to include "special ***excise taxes*** imposed on particular activities or transactions," among other categories of "special revenues." See 11 U.S.C. § 902(2)(B) (emphasis added).

The Chester bondholders argued that the "fees" and "assessments" that the State of Pennsylvania imposed on Harrah's slot machine and table game operations under the Gaming Act qualified as "special excise taxes" and therefore "special revenues," but the Chester Court rejected this argument by drawing a distinction between "taxes" and "fees." Specifically, the Court relied on a Sixth Circuit case stating that "a tax is an exaction for public purposes while a fee relates to an **individual privilege or benefit** to the payer,"7 as well as a Third Circuit case similarly stating that "a situation in which a payment is exchanged for a **government benefit** not shared by others indicates that the debt is not for a tax."8 Based on these definitions, the Court concluded that the "fees" and "assessments" imposed on the casino under the Gaming Act were more like "fees" than "taxes," because those fees and assessments were imposed only on specific entities operating gaming enterprises, and were imposed as a precondition to the "privilege" or "benefit" of operating such gaming enterprises.

To date, there has been limited authority interpreting the phrase "special excise taxes" specifically in the context of the Bankruptcy Code's "special revenues" definition. Although the Chester decision surely will not be the last word on this issue, participants in the municipal bond market should be aware of the Court's distinction between "fees" and "taxes" as potentially relevant to their assessment of how likely particular revenue streams are to qualify as "special revenues."

CONCLUSION

The Chester Court's holding that a revenue pledge can be perfected through the filing of a UCC financing statement is consistent with the municipal bond market's longstanding practice and

expectations, and therefore serves to strengthen the foundations of the municipal bond market. However, other aspects of the Court's decision demonstrate that bankruptcy courts continue to struggle with some of the unique features of municipal revenue bonds and issue rulings that contradict market expectations. In part, bankruptcy courts' lack of familiarity with some of the nuances of municipal finance may result from the fact that Chapter 9 municipal bankruptcy cases have been relatively rare historically as compared to other types of bankruptcy cases. One might hope that, as the Chapter 9 case law continues to develop, bankruptcy courts may gradually become more equipped to interpret municipal revenue bonds in a manner more consistent with the expectations of market participants.

In the interim, certain aspects of the Chester Court's Section 552(a) rulings may provide fertile ground for a bondholder appeal.

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1 See *In re City of Chester*, Adv. Proc. No. 22-00084-AMC, 2023 WL 7274750 (Bankr. E.D. Pa. Nov. 3, 2023).

2 See, e.g., *In re Northview Corp.*, 130 B.R. 543, 547 (9th Cir. BAP 1991) (characterizing hotel revenues as "accounts"); *In re Ocean Place Dev. LLC*, 447 B.R. 726, 732 (Bankr. D.N.J. 2011) (characterizing hotel revenues as "accounts" or "payment intangibles").

3 Section 552(a) provides: "Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a).

4 *See, e.g., In re Holmes*, 603 B.R. 757, 775 (D.N.J. 2019) ("Assume, then, that under the Code, any single lien must be either a security interest or a statutory lien. Even so, there is no text or even legislative history suggesting that a single claim cannot be supported by more than one category of lien. Two liens—one statutory, and the other a security interest—can coexist and support the same claim without violating the principle that any particular lien must be one thing or the other. To say that a single claim may be supported by both a statutory lien and a separate consensual security interest is not to say that the two merge, or are the same thing.")

5 Section 552(b) provides that "[I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, **then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case** to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." 11 U.S.C. § 552(b).

6 Section 928(a) provides: "Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 928(a).

7 *See United States v. River Coal Co.*, 748 F.2d 1103, 1106 (6th Cir. 1984) (emphasis added).

8 *United Healthcare Sys., Inc. v. New Jersey Dept. of Labor (In re United Healthcare System, Inc.)*,

396 F.3d 247, 260 (3d Cir. 2005) (emphasis added).

Cadwalader, Wickersham & Taft LLP

Nov 17, 2023

SEC Announces Enforcement Results for Fiscal Year 2023.

Commission filed 784 enforcement actions, obtained orders for nearly $5 billion in financial remedies, and distributed nearly $1 billion to harmed investors

Washington D.C., Nov. 14, 2023 — The Securities and Exchange Commission today announced that it filed 784 total enforcement actions in fiscal year 2023, a 3 percent increase over fiscal year 2022, including 501 original, or "stand-alone," enforcement actions, an 8 percent increase over the prior fiscal year. The SEC also filed 162 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders and 121 actions against issuers who were allegedly delinquent in making required filings with the SEC.

The stand-alone enforcement actions spanned the securities industry, from billion-dollar frauds to emerging investor threats involving crypto asset securities and cybersecurity, and charged violations by diverse market participants, from public companies and investment firms to gatekeepers and social media influencers. The SEC also brought numerous enforcement actions addressing conduct that undermines oversight of the securities industry, including actions to protect whistleblowers and actions to enforce recordkeeping requirements and other investor protection requirements applicable to industry participants, including broker-dealers and investment firms.

"The investing public benefits from the Division of Enforcement's work as a cop on the beat," said SEC Chair Gary Gensler. "Last fiscal year's results demonstrate yet again the Division's effectiveness—working alongside colleagues throughout the agency—in following the facts and the law wherever they lead to hold wrongdoers accountable."

Continue reading.

The Coming Fight Over Municipal Financial Data.

Rapidly developing AI-powered technology is making it easier to appropriate the public sector's financial information for proprietary uses. Businesses that slice and dice this data should be renters, not owners.

Earlier this year, I explained how a new federal law, the Financial Data Transparency Act (FDTA), will require states and localities to prepare financial information in machine-readable forms. Since then, there has been a lot of back-and-forth between the FDTA bill's sponsors and some of the professional associations about implementation, the role of the federal agencies assigned to receive this information, the implementation timetable, and the scope of what's to be covered. Critics call it

a Procrustean solution in search of a problem.

While all that's been going on, however, a tectonic shift in information technology has taken place featuring generative artificial intelligence systems, machine learning and rapidly evolving large language models that surpass the buzzy ChatGPT facility that is now so familiar to many. It's now a sprint for these AI systems to develop superior capabilities to ingest information of all kinds, including images, and to create and manipulate databases, compile information in user-friendly formats for analysts and decision-makers, and deliver actionable analytics that are increasingly faster, cheaper and more insightful. Literally billions of dollars will be invested in this new AI technology in coming years.

The ownership of databases, analyses and related intellectual property scarfed up and refabricated by these systems is a burning issue that will spill into the governmental finance arena in short time. There is a non-trivial risk of concentrated monopoly or oligopoly control over powerfully AI-curated versions of what starts out as public information but quickly becomes private intellectual property when compiled, dissected, analyzed and commercialized by a proprietary machine learning system.

Continue reading.

governing.com

by Girard Miller

Nov. 14, 2023

Muni Defaults: Just One in 2022

Resilient and liquid: Moody's annual report offers an overall picture of strength and stability for munis. We explore the key findings.

Toward the end of July, Moody's Investors Service released its annual municipal bond market snapshot, US municipal bond defaults and recoveries, 1970-2022, with updates through 2022. In addition to noting that the muni sector remained resilient and strongly liquid in 2022, the report continued to affirm two hallmark benefits muni bonds offer. First, defaults and bankruptcies remain rare overall: just one in 2022. Second, municipal credits continue to be highly rated compared to corporates, and, indeed, in 2022, in general, the sector saw ratings continue to "drift up," and global corporates' ratings drift down. And according to Moody's: "The five-year average defaulter position was 97% for municipals and 84% for global corporates."

An important observation, noted, once again, in this year's report, was that over the 53-year study period: "Any one default may only reflect the idiosyncrasies of that individual credit, and may not represent a general sector trend."

Continuing a theme noted in the previous year's report, in relation to the effects of the pandemic, Moody's observed that, in addition to "lingering effects with downstream credit consequences including escalating inflation" and the acceleration of remote learning and work, there are not only "potential longer-term effects for K-12, higher education and the mass transit sector…", but also changes "in municipal revenue structures from shifts in commercial real estate or other consumer preferences." An eye should be kept on all of these in the context of the municipal bond market.

Muni Bond Defaults Remain Rare

The report illustrated the fundamental difference between municipal and corporate credits and drew attention to the sector's "infrequent rated defaults" and its "extraordinary stability."

While the average five-year municipal default rate since 2013 has been 0.08%, this figure also matches that for the entire 53-year study period from 1970 to 2022. In contrast, the comparable figures for global corporates were 7.8% since 2013 and 6.9% since 1970, respectively.

Puerto Rico remains " … a reminder of the power of credit fundamentals, such as leverage, operational balance, and economic capacity, over ostensible security features written on paper. While legal security will influence recovery, credit fundamentals drive defaults."

This year's report once again notes that " … we have yet to see a rated default due to natural disasters." And that, although the small town of Paradise in California was nearly destroyed, it has continued to make its bond payments.

Continuing Stability for Muni Bonds

In 2022, in addition to rating upgrades outnumbering rating downgrades, there was less rating volatility and were fewer rating changes than in prior years. And, when compared to that of global corporate bonds, rating volatility has been "significantly lower." (The stability and strength of the municipal sector's credit quality in the last 10 years has benefited from " … accelerated economic recovery and growth across many parts of the US over the two years leading into 2020" and after that from a combination of federal stimulus support and an influx of liquidity.)

According to the report, municipal credits remain, typically, very strong, and "their rating distribution is substantially skewed toward the investment-grade, where ratings tend to be more stable."

The report added that the municipal sector overall remained highly rated, with approximately 91% of all Moody's-rated municipal credits falling into the A category or higher as of the end of 2022, the same as in both 2020 and 2021. Further, at the end of 2022 (as in 2021 and 2020), the median rating for U.S. municipal credits remained at Aa3. This continued to stand in stark contrast to the median rating for global corporates, which was, once again, at Baa3 (2021: Baa3).

Muni Bond Market Exhibits Soundness and Resilience

As we mentioned last year, while we continue to argue that municipal bonds still offer a fiscally sound vehicle for generating an income stream free from federal and some state taxes, it remains challenging to obtain the same level of timely disclosure from issuers as one sees in other asset classes. Despite this, the muni market's behavior not only during the COVID crisis in 2020 and 2021 but also after that is prima facie evidence of both its (and muni bonds') solidity and resilience.

According to Moody's report, there were only 115 distinct Moody's-rated defaults, representing a little over $72 billion, across the whole universe of more than 50,000 different state, local, and other issuing authorities between 1970 and 2022.

As Moody's states, while the U.S. public finance sector remains remarkably stable and experiences infrequent rated defaults, there remain caveats, especially as a result of how it has evolved. In the first instance: "There is a growing evidence that legal security, while important in recovery, is a weak shield against default when credit fundamentals are poor."

In the second, as noted last year, the challenges associated with demographic shifts (aging and relocating populations—affecting tax receipts), substantial increases in pension and retirement healthcare leverage, and "the associated heightened exposures to equity markets."

Finally, it is important to note that, with reference to both this study and Moody's ratings in general, its rated universe is, actually, exceeded by that of the U.S. municipal debt market: the company estimates it covers around a third of municipal bond issuers, "but a substantially larger proportion of outstanding debt."

Looking at the rated and unrated market together, Moody's noted that: "Disclosures reveal that much of the risk in the US municipal debt market after Puerto Rico's defaults lurks in two sectors: senior living and local government special districts. These two sectors represented nearly 60% of the 191 missed payments we observed in 2022, with Puerto Rico representing much of the remainder." Going forward, therefore, it will be interesting to monitor both these sectors.

Despite this, we still believe that municipal bonds remain important to the core strategy of constructing an individual portfolio.

VANECK

By Tom Butcher
Director of ESG

NOVEMBER 19, 2023

[SEC Attempts to Calm Muni Market Over FDTA Implementation.]

As the timeline for implementing the Financial Data Transparency Act grows shorter, the Securities and Exchange Commission is teaming up with other federal regulators in an attempt to allay fears about implementation.

"There's no new disclosure requirements, standards or timelines, it's just about structured data," said Dave Sanchez, director of the SEC's Office of Municipal Securities.

The comments came during a panel discussion produced by XBRL US on Thursday. The FDTA was passed last year as a remedy for providing more transparency to the financial markets by introducing machine-readable formats into the Municipal Securities Rulemaking Board's EMMA system, which tracks the muni market.

The SEC is in charge of developing the standards for how the data will be submitted to the MSRB. The upcoming deadlines include publishing proposed rules by June 2024, which will kick off the public comment period. Determining the standards is set for December 2024, with specific rulemaking to be in place by 2026.

Sanchez is especially interested in hearing from industry stakeholders. "We're happy to hear from anybody who thinks they have a good idea about how this should work," he said. "We really encourage people to come in and talk. We've had a lot of conversations with various stakeholders, and we really appreciated the input."

Detractors to the mandated changeover point to the widely divergent nature of the muni market, a

point not lost on the MSRB. “Creating a unified database of all the issuers, all the obligors in the muni market, is much harder than it sounds,” said Liz Sweeney, president of Nutshell Associates, and board member of the MSRB. “There are roughly 40,000 issuers.”

Sweeney revealed that the current system has limitations on accuracy. “Everybody in the muni market who does research knows exactly what I’m talking about. Having a unified database that says, ‘nope, all these fourteen iterations of the same entity is one entity’ is really important.”

Issuer representatives have largely been opposed to the FDTA including the Government Finance Officers Association which believes the implementation will impose financial hardship and require additional labor to implement the system while not offering any new data.

Emily Brock, director of the GFOA’s federal liaison center, was cheered by the call for input by the regulators.

“Both Joel Black, chair Government Accounting Standards Board, and Dave Sanchez said several times, ‘you need to send in your comments’ and I don’t think that was necessarily aimed at the technology providers. I think they are saying it especially to the issuers,” she said.

The regulators are wrestling with a number of issues including which machine-readable language will replace the PDFs currently serving as EMMA’s backbone. Which data gets converted is another sticking point. “The muni market has thousands of nonprofit issuers, hospitals, charter schools, and universities,” said Sweeney. “It’s a very large, heterogenous market so you really want to think about that breadth of information submitted to the MSRB.”

Entities that do not follow Generally Accepted Accounting Principles, including the state of New Jersey, provide another wrinkle to the plan. “We know there are a number of non-GAAP accounting states,” said Sanchez. “To figure out exactly what portion of those are actually issuers is something that’s actually useful to do.”

The tech industry is already jockeying for support positions, but the SEC is advising patience.

“A lot of messaging for us has been ‘Wait until the standards are out,’ because unfortunately a lot of people will be scared into spending money and taking steps that were way too soon,” said Sanchez.

By Scott Sowers

BY SOURCEMEDIA | MUNICIPAL | 11/10/23

NFMA Municipal Analysts Bulletin.

The November issue of the Municipal Analysts Bulletin is available.

Click here to read about NFMA and Constituent Society activities.

SEC Exempts Brokers and Dealers from Rule 15c2-11 Review and Recordkeeping Requirements for Quotations on 144A Fixed Income

Securities: Cadwalader

On October 30, 2023, the Securities and Exchange Commission issued an order (the “Order”) that grants exemptive relief under Rule 15c2-11 under the Securities Exchange Act of 1934 to brokers and dealers that publish quotations with respect to fixed income securities sold in compliance with Rule 144A. This order is the latest attempt to quell the fixed income market distress created in 2021, when the SEC staff took the position that Rule 15c2-11 is applicable to quotations published with respect to fixed income securities. During the five decade period prior to that point, the markets, as well as FINRA, understood the rule to apply only in the context of the equity securities markets.

The first attempt to calm the market came on December 16, 2021, when the SEC staff issued a no-action letter making clear that the rule does not apply to exempted securities (such as securities issued by Freddie Mac and Fannie Mae), municipal securities and SEC-registered fixed income securities and providing a phased-in implementation schedule for other types of fixed income securities. Under that phased-in approach, quotations relating to Rule 144A securities could be published without regard to Rule 15c2-11 until January 3, 2023. However, beginning on that date, brokers and dealers seeking to publish quotations with respect to Rule 144A securities would have been required to assure that certain “current” and “publicly available” information was available with respect to those securities.1 In response to market participant concerns regarding the need to make that sort of information publicly available, the staff of the SEC staff granted no-action relief pursuant to a letter dated November 22, 2022 (the “November Letter”) for Rule 144A securities, among other securities However, that no-action relief was set to expire on January 4, 2025.

All of the relief provided to date includes asset-backed securities sold in compliance with Rule 144A. The Order does not appear to affect the November Letter to the extent it relates to non-Rule 144A fixed income securities. We also note that the Order by its terms is subject to modification or revocation at any time by the SEC “but will be in effect unless and until the Commission determines that modification or revocation is necessary or appropriate in furtherance of the purposes of the Exchange Act, or the relief is otherwise superseded by future Commission action such as a rulemaking addressing the Rule 144A safe harbor or issues pertaining to the fixed income markets more generally.”

1 Subsequent to January 4, 2024, hyperlinks relating to the required information also would have been required.

Cadwalader Wickersham & Taft LLP – Michael S. Gambro and Maurine Bartlett

November 01, 2023

MSRB Seeks Input and Volunteers for Advisory Groups.

View the MSRB Notice.

11/2/23

MSRB: Use of External Liquidity in the Municipal Market - 2023 Update

Read the MSRB Report.

10/31/23

Thorough Exam: SEC's Division of Examinations Announces Fiscal Year 2024 Priorities - Holland & Knight

Amid ongoing federal government shutdown risks and the close of its fiscal year, the U.S. Securities and Exchange Commission's (SEC) Division of Examinations (Exams) recently announced its fiscal year (FY) 2024 priorities. According to Exams, "this year's examinations will prioritize areas that pose emerging risks to investors or the markets in addition to core and perennial risk areas." In addition to key focus areas outlined based on the types of entities subject to examination, Exams identified the following risks to various market participants as FY 2024 priorities:

- **Information Security and Operational Resiliency:** Firms need to have systems, policies and people in place to maintain service during volatile events.
- **Crypto Assets and Emerging Financial Technology (FinTech):** Firms must ensure rigorous compliance with applicable professional standards, statutes, and rules even as their business models involve cutting edge products and technology.
- **Regulation Systems Compliance and Integrity (Reg SCI):** Firms must ensure they invest in and maintain systems that adequately support key market functions and improve resiliency.
- **Anti-Money Laundering (AML):** Firms must understand and adhere to the Bank Secrecy Act and tailor programs to meet their particular risk profiles.

Of note, although Exams identified environmental, social and corporate governance (ESG) as a key priority in FY 2022 and FY 2023, it did not explicitly identify it as a priority for FY 2024.

Continue reading.

Holland & Knight LLP – Jessica B. Magee and Scott Mascianica

October 26 2023

U.S. SEC Division of Exams Announces 2024 Examination Priorities: Sidley Austin

On October 16, 2023, the U.S. Securities and Exchange Commission (SEC) Division of Examinations (EXAMS or Division) issued its annual examination priorities, which, for the first time, was published at the start of the SEC's fiscal year to "better inform investors and registrants of key risks, trends, and examination topics" the Division intends to focus on in the coming year.1

Our Take

The October 16 publication of the priorities represents the earliest publication to date in the 10-year

history of the publication of examination priorities, which will help registrants better prepare for upcoming exams. EXAMS acknowledged that the short time period since publication of the 2023 priorities, only eight months ago2, means that “several initiatives and focus areas from last year remain” priorities for 2024. Against that backdrop, the Division focused on the need to demonstrate compliance with all of its new regulations, and we note that many of the areas of examination priorities also align with areas in which additional or amended regulations have been proposed or may be under consideration.

The priorities for the upcoming year underscore that investment advisers are fiduciaries and, therefore, EXAMS will focus on the identification and disclosure of conflicts of interest. Broker-dealers are especially reminded of their obligations under Regulation Best Interest (Reg BI). While EXAMS has focused for several years on duties owed to clients and investors, the fact that next year’s priorities lead with a discussion of EXAMS’ focus on duties owed to clients and investors suggests that registrants should expect even greater focus on this aspect of an examination. Further, as demonstrated by recent enforcement actions for marketing rule and custody rule violations, the SEC staff is providing little, if any, “grace period” for the implementation of new rules; that is, rather than giving registrants an opportunity to correct deficiencies, the SEC is proceeding (at least in some cases) directly to enforcement.3 For both investment advisers and broker-dealers, the Division is also focused on complex, costly, and illiquid products, such as derivatives, leveraged exchange traded funds (ETFs), variable annuities, and nontraded real estate investment trusts (REITs).

In addition, the Division highlighted its general focus on crypto assets and new technology, the need for security, resilience, and systems integrity for registrants and markets, and anti-mone--laundering (AML) for broker-dealers and other financial institutions, specifically including compliance with Office of Foreign Asset Control (OFAC) sanctions (including for advisers). Notably missing from the specifically identified risk areas were environmental, social, and governance (ESG)–related issues.

This Sidley Update provides a summary of upcoming examination priorities and perennial issues registrants can anticipate in this year’s examinations. Based on the full scope of EXAMS priorities, registrants should note the following themes for 2024:

i) The Division’s core priorities remain the same as in prior years.

ii) Registrants should be ready to show how they have implemented compliance controls for new rules.

iii) ESG remains a challenging area to both regulate and examine, with ESG not only slipping down, but off, the priority list (although registrants should continue to be mindful of the overlap between the Division’s priorities and ESG-related products and services).

Continue reading.

Sidley Austin LLP – W. Hardy Callcott, Kevin J. Campion, Stephen L. Cohen, Ranah Esmaili, Elizabeth Shea Fries, David M. Katz, Laurin Blumenthal Kleiman and John I. Sakhleh

October 26 2023

2024 SEC Division of Examinations Priorities Summary: Venable

The SEC's Division of Examinations got a head start this fiscal year, announcing its 2024 Examination Priorities (2024 Priorities) at the beginning of the fiscal year for the first time. This novel approach likely signifies the Division's intent to be very active over the next 12 months and a desire to give registrants and other market participants more time to shore up areas of concern.

Not surprisingly, the 2024 Priorities emphasize that conflicts of interest will remain a priority for the Division's examiners. For investment advisers, that means examiners will scrutinize not only how advisers identify and disclose conflicts to clients, but also their processes for mitigating or eliminating those conflicts where appropriate. Key areas of focus will include:

- The adviser's processes and practices for allocating investments to accounts where clients have multiple accounts (e.g., allocating between accounts that are adviser fee-based, brokerage commission-based, and wrap fee, and between taxable and non-taxable accounts)
- Investment advice regarding complex products (derivatives and leveraged ETFs), high-cost and illiquid products (such as variable annuities and non-traded REITs), and unconventional strategies (including ones purporting to address rising interest rates)
- The economic incentives an adviser and its professionals may have to recommend certain products, services, or accounts over others; and
- The adviser's disclosures of all material facts relating to conflicts of interest.

Continue reading.

Venable LLP – Adrienne Dawn Gurley, Daniel J. Hayes, George Kostolampros, Eric R. Smith and Xochitl S. Strohbehn

October 24 2023

SEC Announces 2024 Exam Priorities: Mayer Brown

Read the Mayer Brown Legal Update.

Mayer Brown – Leslie S. Cruz , Steffen Hemmerich, Adam D. Kanter, Marc Leong, Timothy B. Nagy and Anna T. Pinedo

October 23 2023

SEC Adopts New Securities Lending Reporting Rule: Proskauer Rose

On October 13, 2023, the Securities and Exchange Commission (the "SEC") adopted new Rule 10c-1a (the "Securities Lending Rule"), requiring the reporting of certain securities lending transactions. Certain material terms of securities lending transactions relating to "reportable securities" are required to be reported to a registered national securities association ("RNSA") by the end of the day on which the loan is agreed or modified. The RNSA is required to make the information – other than that deemed confidential as defined below – public on the morning of the next business day. The amount of the loan is to be made public on the 20th business day following submission of the report. Of note, currently the Financial Industry Regulatory Authority ("FINRA") is the only registered RNSA and is expected to accept the securities lending reports once the Securities

Lending Rule is effective.

The SEC states that the purpose of the new rule is to increase the transparency and efficiency of the securities lending market. The Securities Lending Rule will provide market participants with access to pricing and other material information in a timely manner, as well as aid regulators in their oversight of the securities lending market.

What Securities Are Covered by the New Rule?

All loans of "reportable securities" (with a few exceptions noted below) are required to be reported to an RNSA. Reportable securities is defined as any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail (CAT) as required by Rule 613 and the CAT National Market System Plan, FINRA's Trade Reporting and Compliance Engine (TRACE), the Municipal Securities ***Rulemaking Board Real-Time Transaction Reporting System***, [emphasis added] or any reporting system that replaces one of these systems. Reportable securities include equity securities (both exchange traded and those traded OTC), debt securities subject to TRACE reporting, and digital asset securities that meet the definition of "reportable security" (each a "Reportable Security"). It is important to note that the definition of Reportable Securities is not limited to U.S. exchange traded securities or securities issued by U.S. public companies, and there may be overlap with EU or UK SFTR reporting requirements.

Continue reading.

Proskauer Rose LLP – Elanit Snow, Frank Zarb and Louis Rambo

October 26 2023

SEC Adopts Share Lending Disclosure Rules: Paul, Weiss

The SEC has adopted new Rule 10c-1a, which will require disclosure to a registered national securities association ("RNSA")[1] of specified details regarding securities loans on a same day basis. The RNSA will then publish certain information regarding such loans. Rule 10c-1a will become effective 60 days after its publication in the Federal Register, and disclosure will be required on the first business day 24 months after Rule 10c-1a becomes effective.

Who will be required to disclose share lending activity?

Under new Rule 10c-1a, securities loan intermediaries, or, where there are none, lenders themselves, and brokers and dealers where borrowing fully paid or excess margin securities, must disclose any loan of "reportable securities." "Reportable securities" are defined as any security or class of an issuer's securities for which information is reported or required to be reported to the consolidated audit trail pursuant to the CAT NMS Plan, the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine or the Municipal Securities Rulemaking Board's Real-Time Transaction Reporting System (or any reporting system that replaces one of these systems). The disclosure requirements do not attach to the use of margin securities by a broker or dealer unless the broker or dealer lends such margin securities to another person.

There are no reporting thresholds – all loans will trigger the disclosure requirement.

What information must be provided?

The following information must be disclosed, and will, as noted below, be mostly subject to publication by the RNSA:

Modifications to any of these terms will also need to be communicated on a same day basis.

When must the information be reported?

Loan participants must provide this information on a same day basis to the RNSA. The RNSA must publicize the required information (see above) by morning of the following business day, except for the amount of the loan, which must be publicized by the 20th business day. The RNSA must also publicize aggregate transaction activity and distribution of loan rates for those securities it determines appropriate.

When will these disclosure requirements become effective?

Rule 10c-1a will become effective 60 days after the release is published in the Federal Register. Rules to implement Rule 10c-1a must be proposed by the RNSA within four months of the effective date of Rule 10c-1a and must become effective no later than 12 months after the effective date of Rule 10c-1a. Disclosure will be required starting on the first business day 24 months after the effective date of Rule 10c-1a (the “reporting date”); and the RNSA must make specified information publicly available within 90 calendar days of the reporting date.

Paul, Weiss, Rifkind, Wharton & Garrison LLP – Christopher J. Cummings, Manuel S. Frey, David S. Huntington, Brian M. Janson, Luke Jennings, Christodoulos Kaoutzanis and John C. Kennedy

October 23 2023

SEC Adopts Rule to Enhance the Transparency of Securities Lending Market: Ropes & Gray

On October 13, 2023, the SEC issued a release (the “Release”) adopting new Rule 10c-1(a) (the “Rule”) under the Exchange Act “to increase the transparency and efficiency of the securities lending market” by requiring certain persons to report information about securities loans to a registered national securities association (an “RNSA”). In addition, the Rule requires (i) certain confidential information to be reported to an RNSA to enhance its oversight and enforcement functions and (ii) an RNSA to make certain information it receives, including daily information pertaining to aggregate transaction activity and the distribution of loan rates for each reportable security, available to the public. Currently, FINRA is the only RNSA.

Summary Rule Requirements

- For each “covered securities loan,” the Rule requires a “covered person” to provide to an RNSA the material terms of the transaction – in the format and manner required by the RNSA – by the end of the day on which the securities loan is effected or the terms of the loan are modified.
- Covered persons may rely on reporting agents to provide the required information to an RNSA.
- An RNSA is required to make publicly available certain information about reported securities loans, either on a transaction-by-transaction basis or an aggregate basis.

Continue reading.

October 20 2023

GASB Standard-Setting Process Oversight Committee Meeting.

Meeting Notice.

10/27/23

Financial Accounting Foundation Board of Trustees Notice of Meeting.

Meeting Notice.

10/27/23

National Federation of Municipal Analysts FDTA Initial Recommendations.

The NFMA established the FDTA Working Group to make initial recommendations to the SEC on the process of creating and implementing the taxonomy required by the FDTA. A letter was prepared by the Working Group, with input from our Executive Committee and review by the full NFMA Board of Governors.

To read the letter, click here.

Introducing the GFOA's New GAAFR Plus.

Enhance your skills in governmental accounting, auditing, and financial reporting with our new GAAFR Plus subscription. Get peer support and guidance through an exclusive online forum, access to free webinars, Blue Book supplements, and helpful templates and guides. Take advantage of this enhanced approach to governmental finance today!

SUBSCRIBE

MSRB Board Approves 2024 Rate Card At Its First Quarterly Meeting of FY 2024.

The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met in Washington, D.C. on October 25-26, 2023, for its first quarterly meeting of fiscal year 2024. The Board voted to approve the 2024 rate card to adjust rates for the three market activity fees assessed on municipal

securities dealers and the municipal advisor professional fee. The Board also discussed the regulatory and technology initiatives underway to enhance market transparency.

2024 Rate Card

Under a new rate-setting process adopted last year, the MSRB annually adjusts fees to ensure a timelier return of any excess revenue to regulated entities and to better manage the organization's revenue needs and reserve funds. The 2024 rate card will be filed with the Securities and Exchange Commission (SEC) next month, and the new rates will be operative January 1, 2024.

"The annual rate card is designed to fund the organization with the revenue needed to deliver value to the municipal market through our regulatory protections, technology infrastructure and data services," said MSRB Chair Meredith L. Hathorn. "Importantly, any surplus beyond those funding needs is promptly returned to fee-payers in the form of reduced rates rather than accumulating in the MSRB's coffers. For 2024, the MSRB will be returning over $3 million in excess revenue collected from dealers as a result of record-high trading volume in 2023."

The MSRB provides a detailed explanation of the rate card and its funding philosophy in the FY 2024 budget, which provides transparency about projected revenues, expenses and reserve funds. As projected in the MSRB's budget, the formulaic rate-setting process will result in an increase to underwriting fees and municipal advisor professional fees to reflect less revenue assessed in FY 2023 relative to budget, and significant decreases in the transaction and trade count fees to return the surplus to regulated entities.

Market Regulation and Market Structure

The Board discussed progress toward filing proposed amendments to shorten the timeframe for trades to be reported to the MSRB from 15 minutes to as soon as practicable, but no later than one minute, subject to certain exceptions. The Board previously approved seeking SEC approval of the proposed amendments to MSRB Rule G-14 at its July 2023 meeting.

"The MSRB continues to closely coordinate with our fellow regulators on this impactful enhancement to post-trade transparency, with the goal of making a filing in the coming months," said MSRB CEO Mark Kim.

The Board also discussed comments received in response to the request for comment on MSRB Rule G-47, on time of trade disclosure, and approved submitting a rule filing with the SEC for approval. The Rule G-47 request for comment included a number of questions about potential amendments to Rule D-15, defining "sophisticated municipal market professionals," and the MSRB plans to seek additional information from stakeholders before determining next steps in this area.

Market Transparency Products and Services

The Board received an update regarding work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems, including user personalization and improvements to search and the disclosure submission process.

Date: October 27, 2023

Contact: Leah Szarek, Chief External Relations Officer
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Helpful GFOA Tool: Preexisting SBITA with Prepayment

This excel file contains two examples illustrating the effects of full or partial prepayments that had been made on preexisting subscription arrangements, when initially implementing **GASB 96**, *Subscription-Based Information Technology Arrangements.*

DOWNLOAD

SEC Adopts Rule to Enhance the Transparency of Securities Lending Market.

On October 13, 2023, the SEC issued a release (the "Release") adopting new Rule 10c-1(a) (the "Rule") under the Exchange Act "to increase the transparency and efficiency of the securities lending market" by requiring certain persons to report information about securities loans to a registered national securities association (an "RNSA"). In addition, the Rule requires (i) certain confidential information to be reported to an RNSA to enhance its oversight and enforcement functions and (ii) an RNSA to make certain information it receives, including daily information pertaining to aggregate transaction activity and the distribution of loan rates for each reportable security, available to the public. Currently, FINRA is the only RNSA.

Summary Rule Requirements

- For each "covered securities loan," the Rule requires a "covered person" to provide to an RNSA the material terms of the transaction – in the format and manner required by the RNSA – by the end of the day on which the securities loan is effected or the terms of the loan are modified.
- Covered persons may rely on reporting agents to provide the required information to an RNSA.
- An RNSA is required to make publicly available certain information about reported securities loans, either on a transaction-by-transaction basis or an aggregate basis.

Reporting Requirements for Covered Persons

In General. The Rule requires any "covered person" who agrees to or modifies a "covered securities loan" on behalf of itself or another person to provide to an RNSA the information specified in the Rule. This information (the "Rule 10c-1a information") must be provided in the format and manner required by the RNSA's rules no later than the end of the day on which a covered securities loan is effected or modified.

A covered person may rely on a "reporting agent" to satisfy its obligation to provide Rule 10c-1a information if the covered person (i) enters into a written agreement in which the reporting agent agrees to provide Rule 10c-1a information to an RNSA on behalf of the covered person in accordance with the reporting agent requirements specified within the Rule, and (ii) provides the reporting agent with timely access to Rule 10c-1a information.

Covered Person and Reporting Agent. A "covered person" is any of the following:

1. An entity that agrees to a "covered securities loan" on behalf of a lender (an "intermediary");1
2. A lender that agrees to a covered securities loan when an intermediary is not used; or
3. A broker-dealer when borrowing fully paid or excess margin securities pursuant to Rule 15c3-3(b)(3) of the Exchange Act.3

A “**reporting agent**” is any broker-dealer or registered clearing agency that enters into a written agreement with a covered person that satisfies the conditions described above.

- The Release states that the Rule “does not prohibit the use of third-party vendors by covered persons.” However, a covered person’s use of a third-party vendor that is not a reporting agent does “not relieve a covered person of its obligation to report Rule 10c-1a information to an RNSA, as reliance on a reporting agent would.”
- The Rule requires a reporting agent to establish, maintain and enforce written policies and procedures that are reasonably designed to provide Rule 10c-1a information to an RNSA as specified in the Rule.
- A reporting agent is required to provide an RNSA with a list naming each covered person on whose behalf it is providing Rule 10c-1a information, as well as providing that RNSA with an update to that list by the end of each day that the list changes. In addition, a reporting agent is required to maintain records of (i) Rule 10c-1a information obtained by the reporting agent from a covered person with the time of receipt and the time of transmission to an RNSA of that information and (ii) its written agreements with covered persons.

Reportable Security and Covered Security Loan. A “**reportable security**” is “any security or class of an issuer’s securities for which information is reported or required to be reported to the consolidated audit trail as required by [Rule 613 under] the Exchange Act and the [Rule 613-mandated] CAT NMS Plan (“CAT”), [FINRA’s] Trade Reporting and Compliance Engine (“TRACE”), or the Municipal Securities Rulemaking Board’s Real Time Reporting System (“RTRS”), or any reporting system that replaces one of these systems.”

- The Release notes that the Rule’s definition of reportable security aligns with “securities for which transactions are currently being reported to existing reporting regimes” (i.e., CAT, TRACE, and RTRS).

A “**covered securities loan**” is a “transaction in which any person on behalf of itself or one or more other persons, lends a reportable security to another person.”3

Rule 10c-1a Information and Reporting Deadlines

Rule 10c-1a information falls into one of the following three categories.

Data Elements. For each covered securities loan, Rule 10c-1a information includes 12 specific “data elements,” including the name and LEI of the security issuer, the amount of the reportable securities loaned and collateral to secure the loan, and information relating to fees and charges associated with the loans. The complete list of the 12 data elements that must be provided by a covered person or its reporting agent to an RNSA is reproduced in Appendix A.

Loan Modification Data Elements. Rule 10c-1a information also includes any modification to any of the 12 data elements that occurs after the original data elements are provided to an RNSA. The reportable loan modification data elements include each “specific modification and the specific data element” modified. The Release notes that the actual modification (not a description of the modification) must be reported.

Confidential Data Elements. The Release notes that making certain information publicly available “could be detrimental because it could identify specific market participants or reveal confidential information about the internal operations or investment decisions of specific market participants.” Accordingly, the Rule categorizes certain Rule 10c-1a information as “confidential data elements.” Rule 10c-1a information within this category includes (i) the legal name or certain other identifiers

of each party to the covered securities loan, (ii) if the person lending securities is a broker-dealer and the borrower is its customer, whether such person is the lender, the borrower, or an intermediary between the lender and the borrower, and (iii) whether the covered securities loan is being used to close out a "fail to deliver."

RNSA Collection and Public Distribution of Rule 10c-1a Information

An RNSA is required to establish rules regarding the format and manner of its collection of Rule 10c-1a information. An RNSA also must make certain Rule 10c-1a information publicly available according to a specified schedule. Some of this information is required to be made publicly available on a transaction-by-transaction basis, while other information is made available publicly on an aggregate basis only.

Transaction-By-Transaction Information. With respect to a covered securities loan's 12 data elements, the Rule requires an RNSA to make 11 of these data elements publicly available "not later than the morning of the business day after the covered securities loan is effected." The excepted data element is #6, the "amount, such as size, volume, or both, of the reportable securities loaned." An RNSA is required to make this excepted information publicly available 20 business days after the covered securities loan is effected. The same disclosure schedule applies to loan modification data elements (i.e., the morning of the next business day for modifications of 11 of the 12 items and 20 business days for modifications of #6 information).

An RNSA is required to maintain the confidentiality of each of a covered securities loan's confidential data elements. To prevent an RNSA from releasing confidential data elements, the Rule mandates that an RNSA must maintain and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the confidential data elements of Rule 10c-1a information.

Aggregate Transaction Activity and Distribution of Loan Rates. The Rule requires an RNSA, "not later than the morning of the business day after covered securities loans are effected or modified" to make publicly available "information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security."

- *Aggregate Transaction Activity.* The Release states that the term "aggregate transaction activity" is intended to help ensure that only aggregate information, rather than individualized information, is provided to the public. This is a response to "commenters' concerns about the potential exposure of proprietary information, while still providing volume transparency to market participants."
- *Distribution of Loan Rates.* The Release states that providing information about the distribution of loan rates for each security "recognizes that the cost-to-borrow for loans of securities is influenced by a number of factors (e.g., counterparty-creditworthiness)." Consequently, information about loan rates on a transaction-by-transaction basis would be an imperfect comparison of such rates between loans of the same security. Nonetheless, information regarding the distribution of loan rates for a given security "can give market participants information to help market participants compare the pricing of their covered securities loan against the pricing of other covered securities loans." In turn, the Release notes, the ability to compare "can facilitate conversations between beneficial owners and their lending agents or end borrowers with their brokers or dealers regarding the terms of their loan."

Compliance Date

The Rule's effective date is 60 days after publication of the Release in the Federal Register. As of the date of this Alert, the Release has not been published therein. Covered persons will be required to

report Rule 10c-1a information to an RNSA starting on the first business day that is 24 months after the effective date the Rule. An RNSA must begin publicly reporting Rule 10c-1a information within 90 calendar days following the 24-month period.

Observations

The Release states that the Rule "will result in the public availability of new information for investors and other market participants to consider in the mix of information about the securities lending market . . . to better inform their decisions."

Funds that engage in covered securities loans will presumably need to enter into written agreements with one or more reporting agents or plan to rely on third-party vendors that are not reporting agents. Each fund complex will need to consider whether there are reasons to rely on third-party vendors that are not reporting agents. The ultimate decision will impact the scope of required written policies and procedures covering reporting of Rule 10c-1a information for the funds' covered securities loans.

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1. The following are not deemed intermediaries under the Rule: a clearing agency when providing only the functions of a central counterparty pursuant to Rule 17Ad-22(a)(2) under the Exchange Act or a central securities depository pursuant to Rule 17Ad-22(a)(3) under the Exchange Act.
2. Rule 15c3-3 addresses a broker-dealer's borrowing of fully paid or excess margin securities of a customer.
3. There are two exclusions from the definition of covered securities loan: (i) a position at a clearing agency that results from central counterparty services pursuant to Rule 17Ad-22(a)(2) under the Exchange Act or central securities depository services pursuant to Rule 17Ad-22(a)(3) under the Exchange Act and (ii) the use of margin securities, as defined in Rule 15c3-3(a)(4) under the Exchange Act, by a broker-dealer (provided, however, if a broker-dealer lends the margin securities to another person, the loan to the other person is a covered securities loan under the Rule).

MSRB Board Announces Discussion Topics for Its Quarterly Board Meeting.

Washington, DC –The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet in Washington, D.C. on October 25-26, 2023, holding the first quarterly board meeting of fiscal year 2024 to advance its FY 2022-2025 Strategic Plan.

Market Regulation and Market Structure

The Board will receive an update on progress toward filing proposed amendments to MSRB Rule G-14, which the Board had previously approved, to shorten the timeframe for trades to be reported to the MSRB from 15 minutes to as soon as practicable, but no later than one minute, subject to certain exceptions. The Board also will discuss comments received in response to the request for comment on MSRB Rule G-47, on time of trade disclosure, and consider potential next steps.

Market Transparency Products and Services

The Board will receive an update regarding work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems, including user personalization

and improvements to search and the disclosure submission process.

Annual Rate Card

The Board will discuss and vote to approve the 2024 rate card to adjust rates for the three market activity fees and the municipal advisor professional fee. The MSRB's new rate card process annually adjusts rates assessed on regulated entities to ensure a timelier return of any excess revenue (i.e., surplus) to regulated entities and to better manage the organization's reserve funds.

Date: October 18, 2023

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SEC Widening Net In Municipal Bond Market Fraud Cases.

Recent Securities and Exchange Commission enforcement actions signal that regulators are widening their net to charge more types of municipal market participants as so-called gatekeepers against misconduct.

So said panelists Thursday at the National Association of Bond Lawyer's annual conference in Chicago.

The SEC's enforcement division and Public Finance Abuse Unit activities are "reaching all participants in the municipal market," said Drew Kintzinger with Hunton Andrews Kurth LLP. "Under the current chairman [Gary Gensler], they're taking an aggressive approach."

The SEC has made headlines recently for a number of audit-related charges, including a recent settlement with a Louisiana-based auditor for violating antifraud provisions in connection with a Louisiana school board's 2019 audit.

The enforcement actions show how the SEC is focusing on gatekeeper accountability for professionals such as auditors and lawyers, who regulators see as first lines of defense against misconduct.

"We've brought several cases in the recent past involving [auditors], and we consider them gatekeepers, so it's an important area for us to look at," said Brian Fagel, assistant director of the SEC's Public Finance Abuse Unit.

The notion of gatekeepers also applies to lawyers, said Fagel, echoing comments made Wednesday by David Sanchez, director of the SEC's Office of Municipal Securities.

"We definitely would consider, as a whole, lawyers to be gatekeepers and it's certainly something to think about," he said.

"Nothing is off the table in terms of looking at who we can potentially charge."

Gensler emphasized the commission's focus on the role that securities lawyers play as gatekeepers in a November 2022 speech to the Practising Law Institute, said Kintzinger.

Gensler said that the SEC "views lawyers as positions of trust in our process and if you have a client who's taking a course of action that brings them up to the line, keep them back from the line," Kintzinger said.

"It helps us understand over the past year how enforcement has been focused on gatekeeper activity, auditors in particular," Kintzinger said.

The Louisiana auditor settlement featured a broad injunction against participating on audits of any documents that may be posted to EMMA, Kintzinger noted. "It's a key auditor gatekeeper type of action, but it's very interesting to me that they really upped the ante on auditor behavior to include negligence and fraud," he said.

Fagel said the case illustrated a "parade of bad activity" and that the auditor's actions were "egregious."

Another trend Kintzinger is tracking is the public finance abuse agency's "more aggressive use" of Section 17(a)(2) and (3) – as in the Louisiana case – to "charge fraud on municipal market participants," he said.

"It's a distinct trend" that illustrates an "aggressive use of enforcement," he said.

The SEC's case against the city of Rochester marks a case in point, in which the SEC, after settling with the school district's CFO, is going after the city and the city finance director, which regulators argue either knew or should have known about the district's underlying financial problems that brought the case in the first place.

"It's a fascinating case," Kintzinger said. "It's a case on the responsibility the city has for the school district" when issuing bonds on its behalf.

By Caitlin Devitt

BY SOURCEMEDIA | MUNICIPAL | 10/20/23 01:33 PM EDT

Market Participants Can Improve Climate Disclosure, Says SEC's Sanchez.

Municipal market participants have had to get creative to manage the current market but should not get creative on the regulatory front, warned one of the market's key Washington regulators.

"Regulators often talk about when there is reduced issuance, this is where a lot of problematic deals come up," said David Sanchez, head of the Securities and Exchange Commission's Office of Municipal Securities, speaking Wednesday at the National Association of Bond Lawyers' conference in Chicago.

"That's not a surprise. People are trying to get creative, push the envelope to keep deal flow going on," said Sanchez. But participants should keep in mind that for regulators, "it boils down to the question: does this deal even need to be done?"

As gatekeepers, bond attorneys should always be asking themselves that question, Sanchez said.

From bespoke deals like tenders, which have grown in popularity with rising rates, and often-tricky limited offerings to "potentially questionable" affordable housing deals, regulators are keeping a

close eye on transactions as well as broader evergreen issues like disclosure and pricing.

On the disclosure front, the emerging issue of climate change-related risk should be fairly straightforward, Sanchez said.

“When there is a weather event and damage to a city and people are saying ‘What did the issuer say before?’ [sometimes] the answer is not good,” he said.

“It’s not hard,” he added. “If you’re a city within L.A. County and L.A. County is disclosing a particular issue, you should seriously consider whether you also should disclose it,” he said. “You have to look at your neighbors.”

“There’s very public information about flood risks, sea levels rising that affect specific areas,” he said. “It’s very well known so you can’t stick your head in the sand.”

He warned that climate risk disclosure is “very easy for us to check on – very easy.”

“I thought the market had done a better job but I think in the last year, after digging around, I have to hedge that a little bit,” Sanchez said.

Rising interest rates and the elimination of tax-exempt advance refundings have prompted a resurgence of tender offers as well as so-called creeping tenders, deals that are may be unfamiliar to some in the market.

“You have something that might have been more popular 15 or 20 years ago, it dies off, and comes back to life, people forget the rules that apply and forget to pay attention to what has changed in law have happened in the interim,” Sanchez said.

Like with all transactions, the key question for the issuer should be if it’s a good deal.

On the investor side, the SEC’s “sensitivity” is whether the investor is “getting a fair shake,” Sanchez said.

With creeping tenders, in which an issuer is buying back their debt on the secondary market, regulators want to see that the issuer is not “stepping over the line into a tender offer,” Sanchez said.

Private litigation such as class-action lawsuits over variable-rate demand bonds is another area that the SEC watches, and wants to see “people changing behavior,” he said. “If we don’t see the change happening to comply with applicable rules you can be sure the SEC will step in.”

“A lot of the rule infrastructure came about in Dodd-Frank,” he said. “These rules are in place and it’s very important that people take them seriously.”

By Caitlin Devitt

BY SOURCEMEDIA | MUNICIPAL | 10/19/23 02:28 PM EDT

MSRB FY 2024 Budget Provides Spotlight on Technology Expenses and New

Rate-Setting Process.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today published its annual budget to report on the allocation of the resources necessary to advance its mission of protecting investors and issuers and promoting the fairness and efficiency of the $4 trillion market that ensures access to capital for communities across the country.

For FY 2024, the Board approved a $47 million budget, which represents a 4.8% increase over the prior fiscal year. Since 2018, the MSRB has published an annual budget report to provide greater insight into its projected revenues, expenses and reserve funds. This year's report includes new sections spotlighting the MSRB's funding philosophy, market transparency and technology expenses, and the new rate-setting process for regulated entities.

"This FY 2024 report provides a closer look at the stewardship of our reserve funds and how we plan to allocate technology resources in the year ahead to deliver value to our stakeholders," wrote MSRB Chair Meredith Hathorn and MSRB CEO Mark Kim in a letter to stakeholders. "All of the key initiatives described in this report are aligned with the strategic goals we outlined in the long-term strategic plan we adopted two years ago. Now at the midpoint of that plan, we continue to make progress on our investment in modernizing municipal market regulation, providing transparency through technology, fueling innovation through data and upholding the public trust."

Modernizing Market Regulation

In the area of modernizing market regulation, the MSRB expects to move forward with an important change to its trade reporting rule, Rule G-14, to increase price transparency for investors while carving out exceptions that recognize the role of small firms and manual trades in the municipal securities market. The MSRB continues to review the entire body of interpretive guidance in the MSRB rule book and has completed or is in the process of proposing the codification or retirement of approximately 20% of the MSRB's interpretive guidance pieces since launching its rulebook modernization initiative in February 2021.

Providing Transparency Through Technology

As in prior years, technology remains a significant expense for the MSRB. The organization is in the midst of the largest investment in technology in the MSRB's history, starting with a migration to cloud computing, which began in 2018 and was completed without any system downtime or market disruption. In 2021, the MSRB launched the second and final phase of its journey to the cloud, which is to modernize its systems to leverage the power of cloud computing and provide greater availability, reliability and security to all market participants. The MSRB is on track to complete the system modernization initiative in 2025.

"In response to stakeholder comments, we are providing a more detailed breakdown of our investment in the technology systems that power our market and enable investors, issuers and market participants to make more informed decisions," wrote Hathorn and Kim, noting that the majority of the MSRB's technology-related expenses are dedicated to maintaining and continuously improving the public's access to real-time price transparency and hundreds of thousands of disclosure documents on its free Electronic Municipal Market Access (EMMA®) website.

New Fee-Setting Process

The MSRB's new fee-setting process, implemented in FY 2023, will automatically adjust rates to ensure a more timely return of any excess revenue (i.e., surplus) to regulated entities and to better

manage the organization's reserve funds. "Following an 18-month, 40% fee reduction that returned over $19 million to the industry, we have achieved our goal to reduce excess reserve levels that had accumulated over the years," said Hathorn and Kim. The MSRB is projecting to end the year with a reserves balance near its current target of $35 million, down from a high of $67 million in 2018. A detailed explanation of the MSRB's reserves and fee-setting process are included in the MSRB's budget report.

Read the budget.

Date: October 02, 2023

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GASB Proposes Guidance on Disclosure and Classification of Certain Capital Assets.

Norwalk, CT, September 28, 2023 — The Governmental Accounting Standards Board (GASB) today issued a proposal that would establish requirements for certain types of capital assets to be disclosed separately for purposes of note disclosures.

The Exposure Draft, *Disclosure and Classification of Certain Capital Assets*, also establishes requirements for certain capital assets to be classified as "held for sale."

Recent GASB pronouncements like Statement Nos. 87, Leases, and 96, Subscription-Based Information Technology Arrangements, created certain types of capital assets, which are described as "right-to-use" assets. In light of the recognition of those new types of assets, the Board decided to consider the effectiveness of existing classifications.

Based on input from financial statement users during the research phase of the project, GASB is proposing that certain types of assets be disclosed separately in the note disclosures about capital assets. This would allow users to make informed decisions about these and to evaluate accountability.

Four Types of Capital Assets Would Be Disclosed Separately

The Exposure Draft addresses four types capital assets that would be disclosed separately in the notes:

1. Capital assets held for sale, by major class of asset;
2. Lease assets reported under Statement 87, by major class of underlying asset;
3. Subscription assets reported under Statement 96; and
4. Intangible assets other than leases assets and subscription assets, by major class of assets.

Capital assets held for sale is a new classification proposed in this Exposure Draft. Under the proposal, a capital asset would be classified as held for sale if: (a) the government has decided to sell the asset, and (b) it is probable the sale will be finalized within a year of the financial statement date. Capital assets classified as held for sale would be evaluated each reporting period.

Stakeholders are asked to review the proposal and share their input with the Board by January 5, 2024. Comments may be submitted in writing or through an electronic input form. More information about providing comment in both ways can be found in the document, which is available on the GASB website, www.gasb.org.

SEC, MSRB, FINRA to Hold Virtual Compliance Outreach Program.

Washington, D.C. – The Securities and Exchange Commission (SEC), Municipal Securities Rulemaking Board (MSRB), and Financial Industry Regulatory Authority (FINRA) today announced that registration is open for a virtual Compliance Outreach Program for municipal market professionals. The free webcast is open to the public and will take place on **Thursday, December 7, 2023, from 10:30 a.m. to 4:30 p.m. ET**.

The program will provide municipal market participants an opportunity to hear from SEC, MSRB and FINRA staff on timely regulatory and compliance matters for municipal advisors and dealers. Panel topics will include a discussion of compliance concerns of small dealer and municipal advisor firms; credit rating agency compliance concerns including rules of the road for municipal market participants; unregistered municipal advisory and dealer activity; pricing compliance; and a forward look at regulatory and enforcement priorities.

“This year marks the 10th anniversary of the final municipal advisor registration rule and the 13th year since the passage of Dodd-Frank, and I think it is a great opportunity for the SEC, MSRB, and FINRA to expand the compliance conference to all municipal market participants,” said Dave Sanchez, Director of the SEC’s Office of Municipal Securities. “The conference allows the SEC, MSRB, and FINRA a chance to speak jointly to the municipal market on where the examination, enforcement, and regulatory framework currently stands and where we see it going in the future. It will be a great program, and I am really looking forward to the new expanded scope.”

MSRB Chief Regulatory and Policy Officer Ernesto Lanza said, “Open dialogue among regulators and market professionals is critical to achieving a shared understanding of the rules in place to protect municipal securities investors and issuers. We are pleased to coordinate with the SEC and FINRA to create this opportunity for municipal advisors and dealers to hear directly from regulators about matters top of mind. Importantly, our program this year devotes time to the unique compliance concerns of small firms, which is a priority for the MSRB following a series of discussions the MSRB and FINRA held with minority-and-women owned and veteran-owned firms in the municipal market.”

Yolanda Trottman-Adewumi, FINRA Vice President of Specialist Programs and Exams said, “We are pleased to partner with the SEC and the MSRB to offer this substantive program designed to help market participants better understand their compliance obligations.”

Registration is being administered by FINRA and is available here: Personal Information – 2023 Compliance Outreach Program For Municipal Advisors | VIRTUAL (cvent.com). The program is free and open to all. For those who cannot attend the live virtual program, the recording will be archived on the SEC’s Office of Municipal Securities’ webpage at https://www.sec.gov/municipal/municipal-sec-conferences, for later viewing. To submit questions in advance of the event, please email: gergana.sellers@finra.org.

Date: September 29, 2023

Contact: Leah Szarek, Chief External Relations Officer

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MSRB Seeks Comment on Streamlining Interpretive Guidance Related to Interdealer Confirmations.

Initiative Part of the MSRB's Rule Book Modernization Efforts

Washington, D.C. – The Municipal Securities Rulemaking Board (MSRB) today issued a Request for Comment (RFC) on draft amendments to MSRB Rule G-12, on uniform practice, to codify, retire and reorganize approximately 40 pieces of interpretive guidance related to interdealer confirmations, some of which date back more than 40 years. With this proposal, the MSRB will have advanced efforts to codify or retire approximately 20% of its body of interpretive guidance since launching the modernization initiative in February 2021.

"As part of our efforts to modernize municipal market regulation, we are seeking to streamline the MSRB rule book by retiring outdated or superfluous guidance and codifying the relevant investor and issuer protections established over decades of interpretive guidance directly into the rule text," said MSRB Chief Regulatory and Policy Officer Ernesto Lanza. "Our goal is to ensure our rules are reflective of current market practices, have not become overly burdensome, and are harmonized with the rules of other regulators, among other things."

Rule G-12(c) sets forth the confirmation disclosure requirements for interdealer municipal securities transactions that are ineligible for automated comparison in a system operated by a registered clearing agency (i.e., the Depository Trust & Clearing Corporation).

"The draft amendments to Rule G-12 do not seek to impose any new burdens on regulated entities. Rather, they seek to facilitate compliance and reduce unnecessary burdens while ensuring the rule continues to achieve its goals consistent with current market practices," said Lanza.

Comments should be submitted no later than December 15, 2023.

Read the request for comment.

Date: September 28, 2023

Contact: Leah Szarek, Chief External Relations Officer
202-838-1500
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MSRB Enhances Free Yield Curves Available on EMMA With Hourly Updates and Monthly Data.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today enhanced the free daily yield curves and indices available on its Electronic Municipal Market Access (EMMA®) website with hourly updates from Bloomberg's BVAL AAA Municipal Curve.

“The launch of this enhanced yield curve on EMMA represents a significant improvement in market transparency for investors, issuers and all market participants who now have free access to intra-day price movements in the $4 trillion municipal securities market for the very first time,” said MSRB CEO Mark Kim.

MSRB Chief Market Structure Officer John Bagley said, “The MSRB’s EMMA website brings together data, documents and tools to facilitate decision-making in the municipal market. Previously, yield curves available on EMMA reflected data from the day before. With EMMA’s new enhancements, the website now displays timelier pricing from BVAL’s AAA Municipal Curve.”

The enhanced website now shows curve updates hourly between 9:00 a.m. and 4:00 p.m. Eastern Time. Tables displaying monthly data points from BVAL’s AAA Municipal Curve have also been added, providing users with more information to guide their investment decisions. View the BVAL curve here.

The MSRB first added yield curves and indices to its suite of free tools on EMMA in 2017. These market indicators and tools help investors to evaluate bond prices and yields, measure market direction and performance, and determine pricing on new bond issues. Read more about understanding yield curves and indices in the MSRB Education Center.

The MSRB’s EMMA website serves as the free official source for municipal securities data and documents. The MSRB continues to enhance the EMMA website to bring greater transparency to the $4 trillion municipal market.

Date: September 19, 2023

Contact: Leah Szarek, Chief External Relations Officer
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JPMorgan, BofA, Wells Face Price-Fixing Suit Over Municipal Bonds.

Baltimore, Philadelphia and San Diego allege eight big banks conspired to raise the rates on more than 12,000 variable-rate demand obligations from 2008 to 2016.

A federal judge Thursday denied a request from eight major banks to dismiss class-action claims filed by cities alleging the banks conspired to increase the interest rates on a commonly used municipal bond, Reuters reported.

In a nearly decade-long dispute, Judge Jesse Furman of the U.S. District Court for the Southern District of New York granted the request for class certification instead of pursuing claims individually — a likely reason for reducing potential recoveries, according to the wire service.

Bank of America, Barclays, Citi, Goldman Sachs, JPMorgan Chase, Morgan Stanley, Royal Bank of Canada and Wells Fargo were accused of conspiring to raise rates on over 12,000 variable-rate demand obligations between 2008 and 2016.

Cities led by Baltimore, Philadelphia and San Diego claim the collusion reduced the available funding for hospitals, transportation, schools, power and water supplies, possibly leading to billions of dollars in damage.

The municipalities are seeking damages of $6.5 billion, said Elliott Stein, senior litigation analyst at Bloomberg Intelligence.

“This is an additional milestone that will push this case to settle eventually,” Stein told Bloomberg after the ruling was issued. He said he expects the case to go to trial next year with settlements amounting to roughly $600 million across the eight defendants.

The first class-action lawsuit was filed in February 2019 by Philadelphia, followed by Baltimore a month later and finally by the San Diego Regional Transportation Commission. The lawsuits have been combined.

The variable-rate demand obligations are long-term bonds with short-term rates that usually reset every week. Banks remarket the VRDOs that investors redeem at the lowest possible rates, Reuters noted. But the lawsuit alleges the banks, which acted as the remarketing agents, missed out on getting the best rates for the issuers.

However, the banks opposed the class certification, arguing that the differences among the bonds would necessitate numerous separate investigations into whether rate inflation occurred. This would make a single class-action lawsuit difficult to manage.

But Furman, in his decision, said the two financial market specialists whom the cities appointed to investigate found that the alleged conspiracy would have a broader impact on the class.

“Of course, it remains an open question whether, assuming plaintiffs paid supra-competitive interest, that payment was caused by defendants’ allegedly anti-competitive behavior,” Furman wrote. “Whatever the answer to this question may be, however, it is a common question.”

A lawyer for the cities, Dan Brockett, said they were pleased with the decision, according to Reuters.

Barclays, Citi and JPMorgan declined to comment to the wire service. The other banks and lawyers did not immediately respond to a request for comment.

The VRDOs market, which used to be more than $400 billion, declined to $72 billion by the end of last year, according to the Municipal Securities Rulemaking Board.

Banking Dive

by Rajashree Chakravarty

Published Sept. 22, 2023

Muni-Price Fixing Suit Inches Closer to Settlement With Wall Street.

- **Municipalities seek $6.5 billion in pre-trebled damages**
- **Illinois settled False Claims Act suit in July for $68 million**

An almost decade long dispute over price-fixing in the municipal bond market is one-step closer to a settlement after three municipalities secured a small win Thursday.

Judge Jesse M. Furman of the US District Court for the Southern District of New York granted the request for class certification from two cities and one transportation commission suing eight banks

— including Bank of America Corp. and Goldman Sachs — for conspiring to fix the rates on variable rate demand obligation bonds.

The municipalities are seeking pre-trebled damages of $6.5 billion, and the case could head to trial next year, according to Elliott Stein, senior litigation analyst at Bloomberg Intelligence.

“This is an additional milestone that will push this case to settle eventually,” Stein said in an email after the court denied the banks’ motions to bar plaintiffs’ experts, and granted plaintiffs’ motion for class certification, as expected.

Stein has been expecting settlements to amount to about $600 million across the 8 defendant banks which also include Barclays, Citigroup Inc., JPMorgan Chase & Co., Morgan Stanley, the Royal Bank of Canada and Wells Fargo.

The first of the class action lawsuits was filed by the city of Philadelphia in February of 2019, followed by the city of Baltimore in March of that year, and later by the San Diego Regional Transportation Commission. The lawsuits have since been consolidated.

These lawsuits followed a series of state False Claims Act lawsuits filed under seal in 2014 and unsealed in 2018, by a Minnesota financial adviser named Johan Rosenberg.

In July, the state of Illinois settled its lawsuit for $68 million, saying the case filed on its behalf “almost certainly” would have resulted in a loss, according to a filing by Attorney General Kwame Raoul.

The so-called VRDOs are long-term bonds that have their rates periodically reset and offer investors the opportunity to return the securities for cash if they think the yields are reset too low. The lawsuits alleged that the banks — acting as remarketing agents on the securities — failed to get the best rates for issuers.

The only bank that has responded to Bloomberg’s requests for comment on the ruling, JPMorgan, declined to comment.

Bloomberg Markets

By Joseph Mysak Jr

September 21, 2023

[Judge Denies Big Banks, Allowing San Diego, Other Cities to Push Bond Collusion Claim.]

A federal judge on Thursday said San Diego and other U.S. cities may pursue class-action claims accusing large banks of driving up interest rates on a popular municipal bond.

U.S. District Judge Jesse Furman in Manhattan rejected efforts by eight banks – Bank of America, Barclays, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, Royal Bank of Canada and Wells Fargo – to require cities to pursue claims individually, likely reducing potential recoveries.

In addition to San Diego, cities led by Baltimore and Philadelphia accused the banks of colluding to

raise rates on more than 12,000 variable-rate demand obligations (VRDOs) from 2008 to 2016.

They said this reduced available funding for hospitals, power and water supplies, schools and transportation, and likely caused billions of dollars in damages.

Once a more than $400-billion market, VRDOs are long-term bonds with short-term rates that typically reset weekly. Banks must remarket VRDOs that investors redeem at the lowest possible rates.

Cities accused the banks of conspiring not to compete for re-marketing services, and artificially inflating rates by sharing information about bond inventories and planned rate changes.

In opposing class certification, the banks said differences among the bonds would require many thousands of individualized examinations into whether rate inflation occurred, making a single class-action lawsuit unwieldy.

But in a 33-page decision, Furman said two financial market specialists who the cities hired as expert witnesses established that the alleged collusion could have a class-wide impact.

"Of course, it remains an open question whether, assuming plaintiffs paid supra-competitive interest, that payment was caused by defendants' allegedly anti-competitive behavior," Furman wrote. "Whatever the answer to this question may be, however, it is a common question."

Barclays, Citigroup and JPMorgan declined to comment. The other banks and their lawyers did not immediately respond to requests for comment.

Dan Brockett, a lawyer for the cities, said they were gratified by the decision.

The VRDOs market shrank to $72 billion by the end of 2022, according to the Municipal Securities Rulemaking Board.

The case is Philadelphia et al v Bank of America Corp et al, U.S. District Court, Southern District of New York, No. 19-01608.

by Reuters

(Reporting by Jonathan Stempel in New York; editing by Marguerita Choy)

SEC Approves Amended MSRB Rule G-3 Creating an Exemption for Municipal Advisor Representatives from Requalification by Examination and Related Amendments to MSRB Rule G-8.

Read the MSRB Notice.

NFMA Board is Accepting Applications for At-Large Seats.

If you are a Regular Member of the NFMA (this excludes Associate Members and Student/Faculty Members) you are eligible to apply for one of three At-Large Seats opening for two-year terms

beginning January 1, 2024. NFMA Board members are asked to attend three in-person meeting per year on the days preceding Advanced Seminars and the Annual Conference.

To apply for an At-Large seat, click here. The deadline for applications is midnight, September 30.

GASB Adds Project on Subsequent Events to Current Technical Agenda.

Norwalk, CT, September 7, 2023 — The Governmental Accounting Standards Board (GASB) recently added a project on accounting and financial reporting issues for subsequent events to the Board's current technical agenda.

The project will reexamine existing requirements in GASB Statement No. 56, *Codification of Accounting and Financial Reporting Guidance Contained in the AICPA Statements on Auditing Standards*, and evaluate ways to improve the accounting and financial reporting for subsequent events.

The reexamination will address issues that were identified in pre-agenda research, including:

1. Confusion about and challenges associated with applying the existing standards for subsequent events,
2. Inconsistency in practice in the information provided about subsequent events, and
3. The usefulness of the information provided about subsequent events, with a focus on clarifying how subsequent events are defined and what information should be provided.

The project will also consider relationships with other existing GASB standards and projects as they relate to transactions or other events that occur subsequent to the date of the financial statements.

Pre-agenda research conducted by the GASB staff found that subsequent events are generally prevalent among governments and related issues are relevant to a broad number of governments. Research indicated the presence of inconsistencies and misreporting in practice in the accounting and financial reporting for subsequent events. Guidance on subsequent events in Statement 56 dates back to audit literature from 1972 and has not been fully evaluated for its effectiveness or consistency with the GASB's conceptual framework.

The Board decided to add a project to the agenda focusing on subsequent events after carefully evaluating the staff's research findings and taking into account the level of interest from the Governmental Accounting Standards Advisory Council, the GASB's advisory council, which ranked the project highly during its annual project prioritization.

Three Takeaways for Municipal Bond Issuers From the New SEC Cybersecurity Disclosure Rules: McGuireWoods

State and local governments increasingly are becoming targets of cybersecurity attacks. According to CloudSEK, cyberattacks targeting the government sector increased by 95% worldwide in the second half of 2022, compared to the same period in 2021. With the rise of cybersecurity threats, S&P Global Ratings, a leading rating agency, noted that cyberattacks pose a growing credit risk to municipal bond issuers and warned that weak cybersecurity could lead to credit downgrades over

the next 12 months.

With the increased scrutiny on cybersecurity by S&P and the growing threat of cyberattacks, disclosure about cybersecurity risk has become increasingly common for municipal bond issuers. To date, there is no official guidance from the U.S. Securities and Exchange Commission (SEC) about inclusion of information on cybersecurity risks for municipal bond issuers.

This lack of official guidance is due in part to the SEC's limited ability to directly regulate municipal bond transactions. The SEC has indicated that many principles applicable to the registered market can be applied to the municipal market. Many municipal issuers also rely on guidance from the registered market when analyzing disclosure issues. Recent SEC rulemaking on cybersecurity disclosure is one instance where municipal issuers can apply these principles.

On July 26, 2023, the SEC adopted a final rule standardizing cybersecurity disclosure practices for public companies that offers guideposts for municipal issuers on disclosure about cybersecurity. Beginning in December 2023, public companies will have to make a timely materiality determination about cybersecurity incidents and, if an incident is determined to be material, disclose the same within four business days of such determination. Importantly, the SEC provided that an item is material if there is a "substantial likelihood that a reasonable shareholder" would deem the information meaningful to make an investment decision. Once a material cybersecurity incident determination is made, the company must disclose within four business days: (1) the nature, scope and timing of the cybersecurity incident; and (2) the incident's qualitative and quantitative impact (or the reasonably likely impact) on the company, including, but not limited to, its financial condition, operations, reputation and relationships.

Additionally, beginning with its annual report for the fiscal year ending on or after Dec. 15, 2023, public companies will be required to provide annual disclosures related to the companies' processes for the management and governance of cybersecurity threats. In the annual disclosure, companies must describe (1) the process for the assessment, identification and management of risks for cybersecurity threats; (2) whether any risks related to cybersecurity have materially affected (or are reasonably likely to materially affect) their business strategy, operations or financial conditions; and (3) the board's oversight and management of cybersecurity risks.

Although municipal bond issuers will not be required to comply with the new SEC rules, the rules provide valuable guidance for issuers on how to address cybersecurity risks in their disclosure documents and through cyberattack policies. In applying the principles found in the new rules, municipal bond issuers should make the following key considerations:

Implement and regularly reassess cybersecurity policies.

Municipalities are vulnerable to cybersecurity attacks without the proper assessment, response and management policies. An issuer that does not have a formal cybersecurity policy should consider developing a framework related to cybersecurity preparedness to institute centralized responsibilities and a transparent strategy on how to proceed if cybersecurity incidents occur. Even issuers that have formal policies should regularly reassess their policies to ensure the practices are up to date.

To create a workable policy, municipal bond issuers should consider the risks unique to their particular infrastructure and how to best protect their financial condition, operations, reputation and relationships. Municipalities also should consider whether cybersecurity insurance could be managed through an insurance policy as part of their overall risk management system.

For all issuers, ongoing management of cybersecurity risks through regular weakness testing will ensure that municipalities have an action plan in the event of a real cybersecurity attack.

Prepare a disclosure that addresses cybersecurity policy and procedures and material prior attacks.

Including cybersecurity attacks as a risk factor in offering document disclosure has become a best practice to address rating agency and investor questions. In preparing disclosures, issuers should consider their current risk posture, including policies and procedures for cybersecurity risk management, any past cybersecurity attacks and to what degree the board oversees this or delegates to management the day-to-day risk management. Issuers should work closely with legal counsel to craft disclosures on these points.

Disclosures still should be guided by materiality.

While the SEC has been reluctant to define "materiality," the new rules for the registered market demonstrate that disclosures regarding cybersecurity (as with most disclosure issues) should revolve around materiality. In response to comments from the market during the rulemaking process, the final rule requires disclosure of "management's role in assessing and managing the registrant's material risks from cybersecurity threats."

Further, the adopting release notes that certain actions are material by virtue of the level of attention provided by the board of directors and management. The final rule does not contain a materiality qualifier related to the requirement that registrants describe the oversight undertaken by their board of directors and any applicable committee responsible for this oversight because, by virtue of the board or a committee taking an active role in oversight, the SEC deemed that material to investors.

McGuireWoods LLP – Anna C. Horevay, Thomas William Bruno and Camille A. Pappy

September 6 2023

ESG Activity in the House Financial Services Committee (HFSC): K&L Gates

Prior to departing for the August recess, Chairman Patrick McHenry (R-NC) wrapped up the month-long series of hearings considering digital assets and environmental, social, and governance (ESG) legislation. In tandem markups held on 26 July and 27 July, HFSC advanced several bills on these issues, both on a bipartisan basis (digital assets and stablecoin) and along party lines (anti-ESG bills). Prior to the ESG markup, HFSC Republicans had released 18 bills that would be under consideration. However, these bills were then bundled into a few larger packages, which was done in a way that largely precluded Democratic support, as they were then tied to provisions that only Republicans would support.

More information on the legislation advanced during the 27 July ESG-related markup, as well as the vote outcomes, is detailed below.

Continue reading.

K&L Gates LLP – Daniel F. C. Crowley, Karishma Shah Page, Bruce J. Heiman, Ryan T.Carney, William A. Kirk, Lauren M. Flynn and Lauren E. Hamma

September 5 2023

[MSRB Enhances Free Yield Curves Available on EMMA With Hourly Updates and Monthly Data for BVAL Curves.]

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today enhanced the free daily yield curves and indices available on its Electronic Municipal Market Access (EMMA®) website with hourly updates for the Bloomberg® valuation (BVAL) curves.

"Investors, issuers and market participants will benefit from the free availability of timelier data to inform their assessment of bond pricing," said MSRB Chief Market Structure Officer John Bagley.

Previously, BVAL curves and other yield curves available on EMMA reflected the previous day's data. The enhanced BVAL curve will update hourly between 9:00 a.m. and 4:00 p.m. Eastern Time. Tables displaying monthly data points have also been added.

The MSRB first added yield curves and indices to the free tools available on EMMA in 2017. These market indicators can be useful for understanding the general level and direction of municipal bond interest rates and comparing the relative yields of specific municipal securities. Read more about understanding yield curves and indices.

The MSRB's EMMA website serves as the free official source for municipal securities data and documents. The MSRB continues to enhance the EMMA website to bring greater transparency to the $4 trillion municipal market.

MSRB Research Indicates Rise in Municipal Securities Transaction Costs for Individual Investors Amid Rising Rates and Market Volativity.

Washington, D.C. — The Municipal Securities Rulemaking Board (MSRB) today published a new research report that indicates a rise in customer transaction costs for municipal securities since early 2022, particularly for individual investor-sized trades.

"This increase in transaction costs is likely due to the steep decline in bond prices triggered by rising interest rates and market volatility starting in 2022, as those factors are often associated with higher effective spread," said Simon Wu, MSRB Chief Economist and lead author of the report. "Tax implications associated with buying discount bonds tend to make them less liquid, which in turn impacts the costs of trading these securities. Moreover, since dealers may be inclined to charge relatively fixed markups for customer trades, when bond prices decline, transaction costs as a percentage of the purchase price generally increase."

As previous MSRB research has shown, other than a sharp but brief spike in 2020 attributable to the COVID-19 crisis, transaction costs (as measured by effective spread) in the municipal market declined steadily between early 2009 and late 2021. However, starting in early 2022, that trend reversed. Bond prices suffered a steep decline as interest rates began to rise due to rising inflation, and market volatility increased. Declining bond prices resulted in more trading of discount bonds, which become less liquid the greater the discount from par value. This is because of the Internal Revenue Service's Market Discount Rule, which sets the threshold at which a discount municipal

bond should be taxed as a capital gain rather than as ordinary income, making bonds with deeper discounts less attractive.

During this time, the average effective spread for municipal securities trades began to rise. Since the effective spread is calculated as the difference between customer purchase price and customer sale price and expressed as a percentage of bond price, declining bond prices with a relatively fixed markup would make the effective spread on a customer purchase higher.

The rise in effective spread was especially pronounced for individual investor-sized trades. As of March 2023, the effective spread for the sub-$100,000 par value trades, a proxy for individual investors, was three times as large as the effective spread for the over $1,000,000 par value trades that are generally attributed to institutional investors. Whereas, as recently as 2021, the effective spread for individual-sized customer trades was only 1.7 times the effective spread for institutional-sized customer trades. Additionally, the authors found that customer trades flagged with non-transaction-based compensation typically tied to a fee-based customer account, such as separately managed accounts, received a 30-basis point lower effective spread than customer trades from a regular non-fee-based customer account.

“While we do not tell dealers how much markup they can charge a customer, we do have rules to ensure that they charge fair and reasonable prices and clearly disclose markups on customer confirmations,” said John Bagley, MSRB Chief Market Structure Officer. “In addition to writing rules designed to protect investors and ensure a fair and efficient market, monitoring market trends and publishing research reports is another way the MSRB supports market transparency and empowers investors to make informed decisions.”

Read the report.

Date: August 22, 2023

Contact: Leah Szarek, Chief External Relations Officer
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Transaction Costs for Municipal Bonds Rose for Retail Investors.

- **MSRB report says spreads surged as securities’ prices dropped**
- **Effective spread widened to 54.5 basis points from 40 in 2021**

Transaction costs for retail investors buying municipal bonds in the secondary market have jumped since 2021 as falling bond prices have made the securities riskier for dealers to hold, according to a study released on Tuesday.

The gap between the yield where dealers buy or sell a security, known as the effective spread, has widened to 0.545 percentage point, or 54.5 basis points as of March. That’s up from 52.9 bps in 2022 and 40.1 bps in 2021, according to the report from the Municipal Securities Rulemaking Board, an industry regulatory body.

The steady rise in interest rates since last year has broadly eroded the value of fixed-income securities. The Federal Reserve started increasing the so-called federal funds rate in March 2022 to combat inflation. After 11 increases, the top of the range for the rate stands at 5.50%.

That’s pushed down the price of bonds, with longer-term debt generally hit the hardest. Municipal bonds that trade at below their face value are often harder for dealers to sell, because any gains on the principal can be taxable, making the debt less attractive to the wealthy investors that often focus on tax-free bonds.

Dealers finding it harder to sell the bonds can translate to wider gaps between the prices at which brokerages will buy and sell securities, according to the MSRB. Also, brokers often charge fixed markups on securities, so when bond prices fall, transaction costs as a percentage of the purchase price will rise.

The report focused on trading costs for transactions in about the $25,000 to $100,000 range, often viewed as a proxy for retail trades. For institutional investors, trading costs moved much less. The effective spread on trades over $1 million rose from 17.4 basis points in 2019 to 17.9 in 2021 and 18.1 in 2023.

The kind of customers who engage in transactions of $1 million and above probably agree upon a price with their dealers before a trade goes through, said Simon Wu, MSRB chief economist and lead author of the report.

Bloomberg Markets

By Joseph Mysak Jr

August 22, 2023

Wall Street’s Most Hated 3 Letters Prove Too Risky to Ignore.

- **ESG risks have dragged down shares of TUI, UPS this month**
- **GOP attacks are leading bankers to avoid talking about ‘ESG’**

As the label “ESG” ends up among the most hated on Wall Street, the financial cost of ignoring it is making headlines.

In just the past few weeks, a string of textbook environmental, social and governance issues — spanning workers’ rights to extreme weather — erupted in a number of major stocks.

The world’s biggest publicly traded package courier, United Parcel Service Inc., was forced to issue a profit warning that drove down its shares, after it said a tentative labor agreement will add to its costs. The firm agreed to raise wages for some workers, bump up the amount of paid vacation and improve working conditions. That includes installing air conditioning in new vehicles rendered unbearably hot by extreme heat.

Continue reading.

Bloomberg Markets

By Saijel Kishan

August 16, 2023

Issuers Urge Supreme Court to Review BABs Subsidies Case.

A bevy of city, state and public finance advocates is urging the U.S. Supreme Court to take up a case challenging the subjection of Build America Bond subsidies to federal budget sequestration.

The amicus brief, filed by groups including the Government Finance Officers Association, the National Association of Bond Lawyers, the National League of Cities and the American Public Transportation Association, argues that allowing the BABs decision to stand would have "grave ramifications" for federalism and "significant and adverse practical consequences" for states and local government finances.

"It's frustrating that this has to go through the courts," said John Godfrey, senior director of government relations for the American Public Power Association, which is filing its own amicus brief in the case. "I think we have a strong legal case and the bottom line is, if we prevail in court, all the money stays in the communities and it's the communities where the bonds were issued that will benefit."

The case stems from a three-year-old lawsuit brought against the United States by six Midwestern public power agencies, led by the Indiana Municipal Power Agency. The agencies, which together had floated $4 billion in direct-pay Build America Bonds before 2011, argued that the federal government's reductions of the 35% direct-pay subsidies – under Office of Management and Budget's sequestration calculations – violated the American Recovery and Reinvestment Act and represented a breach of contract. The group was seeking the full 35% subsidy on interest payments from 2013 through 2030.

The Court of Federal Claims sided with the U.S. when it ruled that no statutory claim existed because sequestration applied to the payments and that ARRA did not create a contract.

The agencies appealed to the U.S. Court of Appeals for the Federal Circuit, which on Feb. 17 ruled that the BABs subsidies are subject to federal budget sequestration, and that the public power agencies are not eligible for refunds.

The power agencies on July 13 filed a petition asking SCOTUS to take up the case, saying it arises from a "multi-billion-dollar broken promise by the federal government." The questions presented are whether a payment obligation imposed by Congress can be reduced without congressional repeal by agencies and whether a statutory provision creates a contractual obligation.

For the issuer groups, the stakes are both constitutional and financial, according to its amicus brief.

"The import of this case extends far beyond the group of public power providers that have sued," the brief says. "If this court permits the Federal Circuit's reasoning to stand, it will have adverse long-term implications for state and local governance in the United States."

Allowing a federal agency like the Internal Revenue Service to interpret generic statutory language "raises constitutional alarm bells," the issuers argue.

The decision will undermine federal policies and programs that the federal government relies on locals to implement, the issuers said.

"This case is of acute concern not only to the thousands of state and local governmental entities that issued Build America Bonds but to the 40,000 state and local governments in the United States

cooperating with the federal government to implement critical programs and deliver essential services."

The GFOA's federal liaison Emily Brock notes that SCOTUS opts to review only a small number of the volume of requests it receives.

"That said, GFOA and our fellow Amici have a good feeling about this one due to the variety and expanse of interest here," Brock said. "Although preemption has been on the docket quite a bit in the last several years, it's been a while since it's been in the muni context, so fingers crossed."

By Caitlin Devitt

BY SOURCEMEDIA | MUNICIPAL | 08/16/23 02:27 PM EDT

Husch Blackwell Authors U.S. Supreme Court Amicus Brief in Public Finance Litigation.

Husch Blackwell prepared and filed an *amicus curiae* brief on behalf of 11 major state and local government organizations, including the International Municipal Lawyers Association, Government Finance Officers Association, and the National League of Cities, urging the U.S. Supreme Court to grant certiorari in *Indiana Municipal Power Agency v. United States*. The case addresses whether the federal government can renege on its binding commitments to state and local governmental entities under the Build America Bonds program—the first-ever direct federal subsidy program for general-purpose state and local borrowing.

In 2009, the Build America Bonds program was created by the American Recovery and Reinvestment Act (ARRA), a stimulus package in response to the Global Financial Crisis that began in 2007. The program was an unprecedented federal intervention in the municipal bond market that induced thousands of state and local entities to issue taxable bonds, giving up the considerable advantages of tax-exempt bonds. State and local issuers made this election in reliance on Congress's promise to refund 35% of the interest payments on the bonds.

The petitioners—Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency, American Municipal Power, Illinois Municipal Electric Agency, and Kentucky Municipal Power Agency—were among the 2,275 state and local governmental entities that issued over $181 billion in Build America Bonds in 2009 and 2010. These entities used the proceeds to invest in capital infrastructure projects that created thousands of new jobs, just as Congress intended.

In 2013, Congress had not repealed the ARRA, but federal agencies—specifically, the Office of Management of Budget, the Department of the Treasury, and the Internal Revenue Service—decided to stop making direct cash payments to issuers to cover the full 35% of interest payments, maintaining that these payments qualified as direct spending subject to sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985, Budget Control Act, and American Taxpayer Relief Act of 2012.

The Petitioners appealed to the Federal Circuit, which affirmed the trial court's ruling that the IRS did not improperly decrease the payments for sequestration.

Husch Blackwell's brief was written by attorneys Danny Solomon, Kate David, Sebastian Waisman,

Ben Stephens, and Spencer Tolson. The petition for writ of certiorari was filed on August 16, and the justices are scheduled to consider the petition shortly after returning from their summer recess next month.

August 18, 2023

Additional ESG Disclosure Requirements Coming for Public Debt Issuers?

In a world where deadly heat waves, droughts, storms, wildfires and floods are becoming more widespread and more frequent every year, investors want to know about environmental, social and governance (ESG) risks when buying securities. To ensure transparency, the U.S. Securities and Exchange Commission (SEC) has proposed rules on ESG disclosure for corporate securities. And, where the private sector goes, public finance is usually close behind.

The investment community's push for guidance on ESG came from two fronts: the desire to invest in ventures with a focus on environmental, social and governing sustainability, and a need to understand risks that these factors pose to the overall security of any investment. In 2021, the SEC announced priorities addressing climate-related risks, and proposed rules in 2022 regarding the corporate disclosure of environmental, social and governing risks and the impact on publicly traded securities.

The Government Finance Officers Association (GFOA),), a membership organization of government finance professionals, which provides resources, education and best practices, followed suit by releasing voluntary ESG disclosure guidelines in 2021, and we recommend that officers responsible for municipal debt disclosures take note to avoid the potential litigation risks of non-disclosure. It will only be a matter of time before the SEC issues ESG disclosure rules for the municipal sector. Public agency officers should review what's happening on the corporate side now to be ahead of the game. See "The Evolving Word of ESG Disclosure," webinar presented by Best Best & Krieger here.

What environmental risks municipal issuers should disclose

Environmental risks have significant material impact on municipal securities. If a community is located in a fire-risk area and the property taxes secure bonds, casualty loss of a group of houses in a wildfire could reduce the community's ability to collect sufficient property taxes to pay that debt. Investors want to know that risk.

A discussion of risks can be complex, but public entities would be wise to take the time to assess them during the early stages of planning public issuances. Such a discussion may appease investors, reduce the likelihood of claims that such risks were undisclosed in the event of some unforeseen event and ensure success of the agency in its ongoing communications with investors.

Issuers should identify physical risks that could impact a debt-financed project. Are there risks of wildfire, tornados, flooding, wind damage or coastal erosion? Could natural disasters wipe out the project itself, or the tax base that services the debt?

Some questions to address are: Could higher temperatures, changing climate, or the increased frequency and intensity of natural disasters disrupt power generation or farming? Could climate-related changes, such as the rise of sea level, change the consumer or tax base that will service the debt? Could these changes impact prices for real estate in the area? Will current residents leave as a result of the climate related change? How might these risks impact business operations or services?

Additionally, a discussion of resolution might be needed. How will the agency mitigate climate-related risks? Is there technology investment needed to offset such risk? What would be the cost of researching and developing these offsets? Has the agency implemented prevention measures, such as wildfire cameras or detection systems?

Comprehensive disclosure could also involve discussions about greenhouse gas emissions. The SEC's proposed rules identify three scopes of emissions. For example, if you have a toy factory in your city, Scope 1 includes direct emissions out of the factory's smokestack; Scope 2 includes indirect emissions, such as for purchasing energy to run the plant; and Scope 3 includes downstream emissions, such as those from transporting the toys to retailers.

Finally, for environmental risks, the GFOA recommends including cautionary language similar to what issuers include on financial projections in official statements for bond issuances. This language should reflect the importance that no one knows what the actual impacts of climate change will be, and these disclosures are forward-looking projections based on facts available to date. The issuer cannot guarantee any results from mitigation measures or impacts as assumed.

Recommendations for disclosure on social and governance risks

The GFOA recommends disclosing information about demographics, income level and wealth disparity, housing availability and affordability, the availability and affordability of services, access to and quality of education, and other resources. Investors want to know about employment statistics, labor relations and challenges for public entities, and the long-term costs related to labor such as pension and other post-employment benefit liabilities.

For example, investors want to know about social risks that could impact service to general obligation bonds, such as a sudden decline in population. Or, if a school district issues debt, investors want to know if a drop in enrollment will impact the ability to service bonds for a new facility.

Governance is the ESG factor that is already widely discussed in most offering documents. Issuers should include a description of the entity's organizational structure and offer transparency about debt management policies and how financial policies are implemented. Investors want to know when a budget is adopted each year and when financial reports are issued. They also want to know about budget controls and how an entity generates revenue assumptions.

Issuers should also disclose any governance instability that poses risk. For example, continuity in administration is important. Investors want to know the composition and term of board or council membership, and they want to know if there have been departures in executive management or significant turnover in operating staff.

Naturally, issuers should always be transparent about any lawsuits, federal or state investigations or other actions against the agency.

Increased investor scrutiny of ESG factors will force governmental agencies to improve their own due diligence for bond-financed projects. Public officials have a variety of resources at their disposal, such as regional climate change impact studies, local developers, real estate appraisers and economists, who can help evaluate the risks. Analyzing risk will help municipal issuers better plan their future projects and manage their finances over time. Environmental, social and governance factors impact everyone, and before long, issuers will need to provide comprehensive disclosure regarding these risks.

Reuters

Best Best & Krieger LLP

By Mrunal M. Shah and Kimberly A. Byrens

August 17, 2023

MSRB Demystifies Structured Data with Newest Addition to EMMA Labs.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today debuted its third entry on EMMA Labs – the MSRB's free innovation sandbox for transparency enhancements to the municipal securities market – with a new lab aimed at demystifying structured data. The lab explains what structured data is, features case studies from municipal issuers who have prepared their financial statements in a machine-readable format and illustrates potential future capabilities of the Electronic Municipal Market Access (EMMA®) website.

"Our goal with this Lab is first and foremost education," said Chief Product Officer Brian Anthony. "Issuers and other market participants need a common understanding of structured data as technology continues to evolve and new legislation is being implemented to require the greater use of structured data in regulatory filings with the MSRB."

The Lab features case studies from two early adopters of structured data for financial management: the City of Flint and the College of DuPage. The Lab also illustrates how the EMMA website could be enhanced with dynamic comparison tools leveraging structured data.

"Since EMMA Labs launched in 2022, it has served as a place for market participants to collaborate on innovative prototypes and ideas that have the power to improve transparency in our market," Anthony said.

EMMA Labs is free to use. The structured data lab is one of three "Active Labs" that serve as a proving ground for functional prototypes that could eventually be deployed on the EMMA website. The first Lab is a powerful search engine that the MSRB plans to bring to future-state EMMA to enable keyword searches across the hundreds of thousands of disclosure documents submitted to EMMA as unstructured PDFs. The second Lab is a dynamic dashboard for market data analysis that empowers users to discover and visualize market trends. An additional Idea Labs section provides a forum for users to submit and provide feedback on ideas for potential future Active Labs.

Date: August 07, 2023

Contact: Leah Szarek, Chief External Relations Officer
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Municipal Securities Regulation and Enforcement: 2023 Mid-Year Review - Ballard Spahr

In the first half of 2023, several rule changes have been proposed by the Municipal Securities Rulemaking Board (MSRB) and the U.S. Securities and Exchange Commission (SEC), including changes to "Best Execution" requirements and new data transparency requirements. The SEC's "Regulation Best Execution" proposal has been met with particularly strong pushback, with many in the municipal market encouraging that it be dropped altogether.

View the Ballard Spahr Mid-Year Review.

August 1, 2023

SEC Adopts Significant Money Market Fund Reforms; Enhances Private Liquidity Fund Reporting on Form PF: Dechert

View the pdf.

Dechert LLP – Brenden P.Carroll, Nicholas Carroll, Stephen T. Cohen , Jonathan Blaha , Kathleen Hyer, Austin G. McComb, Devon Roberson and Ashley N. Rodriguez

August 2 2023

BDA Forms Fixed Income Technology Clearinghouse to Facilitate Information Sharing, Tech Intel, and Deliverables for US-Focused Bond Dealers.

Today, the Bond Dealers of America – Washington DC's only dedicated Fixed Income Advocate – is pleased to announce the creation of the Fixed Income Technology Clearinghouse intended to help US focused bond dealers navigate their technology and back-office options including costs and deliverables.

The Fixed Income Technology Clearinghouse will bring together professionals at BDA full member firms with responsibility for and focus on technology decisions and adoption.

This group will be managed by BDA staff working alongside outside consultant Stephen Winterstein of SP Winterstein & Associates LLC, a long-time municipal market leader, previously as Head of Capital Markets at Alphaledger and as the Head of Municipal Fixed Income at MarketAxess.

Mission

To bring together fixed-income market leaders to address the most pressing fixed income technology issues of the day. Providing a platform to help facilitate solutions to technology and back office or operational challenges being faced by securities firms and banks active in the US bond markets.

Whether having a conversation with a vendor about issues with an existing product, or proposing a new idea, this group provides BDA members a forum to discuss issues, while working with industry professionals to identify and implement proper solutions.

The Fixed Income Technology Clearinghouse will also work with regulators where the membership sees fit, providing additional opportunities with dialogue with the MSRB, FINRA, and SEC to help

direct and better inform the respective staffs.

The main objectives of the Clearinghouse include:

- To collaborate and develop ideas to improve existing vendor products, or present new ideas
- Provide a unified voice and solutions to regulators on key issues such as the Financial Data Transparency Act and one-minute trade reporting
- Hold an annual Roundtable to discuss key technology topics and assist in drafting the agenda for key BDA events such as the NFIC to ensure proper topics are incorporated.

Membership

The BDA's Fixed Income Technology Clearinghouse will have cross-product representation from all BDA full member firms that wish to participate. Each full member interested in participating would select a delegate to represent them within the group.

We will also work to ensure BDA associate members are engaged while finding parity in representation from both the municipal and taxable markets and in sizes of firms.

If you or your firm is interested in participating in the BDA Fixed Income Technology Clearinghouse, please contact Mike Nicholas at mnicholas@bdamerica.org.

Bond Dealers of America

August 3, 2023

GASB Financial Accounting Foundation Board of Trustees.

Meeting Notice

07/28/23

GASB Standards-Setting Process Oversight Committee Meeting.

Meeting Notice

07/28/23

Join GFOA's Women's Public Finance Network.

WPFN is a voluntary association of women, elected and appointed officials, and other women finance professionals, formed within GFOA to develop a core network of women GFOA members to coordinate communications and to encourage participation in GFOA and WPFN. The purpose of the network is to foster the careers of women in public finance through education, networking, and mentoring opportunities. Membership in WPFN is free.

JOIN TODAY

MSRB Announces FY 2024 Board Leadership and New Members.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) announced today that it has elected Fiscal Year 2024 officers and five new members who will join the Board on October 1, 2023. The MSRB also announced that Ernesto A. Lanza would join the senior staff of the MSRB to lead the Market Regulation department.

Board Leadership

The Board re-elected public member Meredith L. Hathorn, Managing Partner, Foley & Judell, L.L.P. in Baton Rouge, LA, to serve a second one-year term as Chair of the Board.

Angelia Schmidt, a bank dealer representative on the Board, will serve as FY 2024 Vice Chair. Schmidt is Managing Director and Head of Underwriting at UBS.

"I am grateful for the opportunity to continue working alongside my fellow Board members to advance long-term initiatives that will profoundly shape the future of our market," said MSRB Chair Hathorn. "As we approach the midpoint of the organization's four-year strategic plan, we are making great strides toward modernizing our rule book, our technology systems and our data capabilities to better serve investors, issuers and the public interest."

Hathorn's and Schmidt's terms were set to end on September 30, 2023, but the Board tapped them, along with public member Thalia Meehan, to serve one additional year in the final phase of its transition plan to reduce the size of the Board from 21 members to its current size of 15 members.

Board Members

The Board includes eight independent public members and seven members from MSRB-regulated broker-dealers, banks and municipal advisors. Four new members will join the Board to serve four-year terms that will begin October 1, 2023. One new municipal advisor will join the Board on October 1 to serve the remaining three years of a vacancy created by the departure of a municipal advisor representative on the Board.

"Thanks to the tremendous efforts of the Nominating Committee, we have the pleasure of welcoming five individuals who will refresh our Board with new perspectives, relevant experience and a shared commitment to serving our market," Hathorn said.

New public members joining the MSRB Board in FY 2024 are Michael Craft, Senior Credit Analyst at Genworth Financial Inc. in Stamford, Connecticut; and Pamela M. Frederick, Chief Financial Officer and Treasurer for New York City's Battery Park City Authority. New regulated representatives are Alexander Chilton, Managing Director, Head of Municipal Securities, at Morgan Stanley's Municipal Bond Division in New York; and Christopher A. Kendall, Managing Director, Fixed Income Trading, at Charles Schwab and Company, Inc. in Denver, Colorado. Wendell G. Gaertner of Public Resources Advisory Group, Inc. in St. Petersburg, Florida is the municipal advisor representative joining the Board for a three-year term.

The new Board members were selected from more than 50 applicants this year.

MSRB Leadership

Ernie Lanza returns to the MSRB this month to serve as Chief Regulatory and Policy Officer. His career as a securities regulatory and public finance attorney includes more than 15 years in leadership roles at the MSRB, serving as acting director of the SEC's Office of Municipal Securities, and private practice.

"I am delighted to welcome Ernie back to the MSRB, and I am confident that he is the right person at the right time to advance our regulatory agenda," said MSRB CEO Mark Kim.

The MSRB also said today that it has named John Toye, a 13-year veteran of the MSRB who has held several IT leadership roles, to serve in the new role of Chief Information Officer. Brian Anthony, who originated the role of Chief Data Officer at the MSRB, will transition to the new role of Chief Product Officer.

About the New MSRB Board Members

Alexander Chilton is Managing Director, Head of Municipal Securities at Morgan Stanley's municipal bond division based in New York, NY, where he oversees municipal public finance, capital solutions, capital markets, and various sales and trading initiatives. Prior to joining Morgan Stanley in 2015, Chilton was a Partner at Whitehaven Asset Management working on an investment fund in the municipal market. Alexander began his career at Citigroup in the Municipal Bond Department. He holds bachelor's degrees in both economics and engineering, and a master's degree in engineering from the University of Pennsylvania.

Michael Craft evaluates and recommends municipal bond investments as Senior Credit Analyst at Genworth Financial, Inc., which provides guidance, products, and services that help people understand their caregiving options and fund their long-term care needs, and parent company of Enact, a leading U.S. mortgage insurance provider. Prior to joining Genworth Financial in 2017, Craft was Managing Director, Credit at Lumesis, Inc., and held several positions at Fidelity Investments. He began his career at Lehman Brothers researching and analyzing the municipal market. He holds a bachelor's degree in Economics and Russian Studies from Amherst College and an MBA from NYU Stern School of Business. He is a Chartered Financial Analyst.

Pamela M. Frederick is the Chief Financial Officer and Treasurer of the Battery Park City Authority in New York, NY, where she is responsible for all financial aspects, including directing a $1 billion investment portfolio, as well as structuring and negotiating $1 billion senior lien and junior lien tax exempt municipal bonds. Prior to Battery Park City Authority, Frederick's 30 years as an experienced financial executive includes positions at Citigroup, GE Capital, Fieldstone Private Capital, Overseas Private Investment Corp. and Chase Manhattan Bank. She holds a bachelor's degree in economics and an MBA in finance from the University of Michigan and a Certificat Scolarité from Hautes Etudes Commerciales (France).

Wendell G. Gaertner is Senior Managing Director of Public Resources Advisory Group, Inc. (PRAG) in St. Petersburg, FL, where he provides municipal advisory services to clients including cities, counties, states, utilities, transportation agencies, and special districts. Prior to joining PRAG in 2013, Gaertner served as Director, Public Finance at Bank of America Merrill Lynch and Vice President, Public Finance at Raymond James & Associates, Inc. He began his finance career at Barnett Bank of Tampa. Gaertner holds a bachelor's degree in chemistry from the University of Miami and an MBA from Stetson University.

Christopher A. Kendall is Managing Director, Fixed Income Trading at Charles Schwab &

Company, Inc. in Denver, CO, where he is responsible for all trading related activity related to fixed income products. In addition, he leads regulatory and compliance requirements that affect fixed-income products as well as development of electronic trading systems, including algorithmic pricing tools. Kendall has more than 30 years' financial experience, including serving on the MSRB's Retail Investor Advisory Group from 2018-2019 and Market Transparency Advisory Group in 2020. He began his career at Shawmut Bank. He holds a bachelor's degree in economics and psychology from St. Lawrence University.

Date: August 03, 2023

Contact: Leah Szarek, Chief External Relations Officer
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Anti-ESG Politicians Cost Their States and Cities Billions.

Supposed free-market champions are limiting the freedom of investment managers, leading to lower returns and higher interest rates on bonds.

In the face of fires, record heat, floods and other extreme weather events across the country, House Republicans are using much of July to oppose financial transparency related to climate risks and to attack investor freedoms. Their reckless course endangers not just the planet but also the financial stability of Americans' retirement savings and pensions. One Republican went so far as to say consideration of climate risk by asset managers is "Satan's plan."

On July 12, leaders of the House Financial Services Committee launched hearings to attack environmental, social and governmental (ESG) practices by financial firms. They are also crafting legislation that would outlaw long-standing risk assessment practices. Just as dangerously, House Republicans intend to restrict shareholders' ability to hold corporate executives accountable by restricting rights to vote proxies and curbing shareholder resolutions related to corporate governance.

It's hardly surprising that oil companies and other fossil fuel businesses have poured tens of millions of dollars into the campaign coffers of committee members and other anti-ESG politicians across the country.

Continue reading.

Bloomberg Opinion

By Brian Frosh and Nancy Kopp

July 25, 2023

NFMA Releases Draft Best Practices in Disclosure for State Revolving Fund Revenue Bonds.

The NFMA's Disclosure Committee is pleased to release the following draft best practices in disclosure for comment.

- Recommended Best Practices in Disclosure for State Revolving Fund Revenue Bonds, Draft Dated July 25, 2023. Comments due September 30, 2023
- Press Release, Dated July 25, 2023

MSRB Board Approves Shortening Timeframe for Trade Reporting at Quarterly Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) approved shortening the timeframe for trades to be reported to the MSRB at its July 26-27, 2023 quarterly meeting. The Board also approved the FY 2024 budget and discussed priorities for the next fiscal year, among other business.

Market Regulation

The Board approved seeking Securities and Exchange Commission (SEC) approval of amendments to MSRB Rule G-14 to shorten the timeframe for trades to be reported to the MSRB from 15 minutes to as soon as practicable, but no later than one minute, subject to certain exceptions for firms with limited trading volume in municipal securities and for manual trades.

"Moving to a one-minute standard for trade data reported to the MSRB will achieve greater price transparency for investors who rely on this information to make informed decisions when buying or selling municipal bonds," said MSRB CEO Mark Kim. "The proposal we plan to file with the SEC recognizes the role that small firms and manual trades play in the municipal securities market."

As a further step in its ongoing rulebook modernization, the Board approved seeking SEC approval of a proposal to amend Rule G-12, on uniform practice, to adopt requirements for the completion of allocations, confirmations and affirmations related to municipal securities transactions. The proposed amendments are consistent with those applicable to broker-dealers for other securities under newly adopted SEC Rule 15c6-2, which facilitates compliance with the transition to T+1 settlement.

Public Trust

The Board approved a $47 million budget to fund the activities of the MSRB for FY 2024, beginning October 1, 2023. A budget summary detailing the MSRB's projected expenses, revenues and reserve levels will be published at the beginning of the fiscal year. The Board also approved designating an additional $3.5 million of reserves for the Board's system modernization fund.

"The MSRB's FY 2024 budget effectively manages costs in an inflationary environment and reduces organizational reserves to within target levels, all while continuing to make the necessary investment in modernizing our rule book, our technology systems and our data capabilities to serve the market of the future," said MSRB Chair Meredith Hathorn. "Under the leadership of the Finance Committee and Committee Chair Angelia Schmidt, the Board has demonstrated the highest commitment to fiscal discipline and stewardship of industry dollars."

The annual budget is a factor in the MSRB's new fee-setting process, which is designed to ensure the MSRB's fees on regulated entities result in the collection of only the revenue needed to fund its

activities without accumulating excess reserves. The Board plans to file a new rate card in the first quarter of FY 2024 to establish rates effective January 1, 2024.

The Board also held FY 2024 officer elections and considered candidates to fill a vacancy on the Board. Board leadership and the incoming class of new Board members will be announced in the coming weeks.

Market Transparency

The Board received an update regarding work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems to implement user-driven enhancements to the website and to the disclosure submission process.

Market Structure and Data

The Board received a demonstration of a Structured Data Lab to be added to the EMMA Labs platform next month. Anyone who creates a free EMMA Labs account will be able to explore and provide feedback on the new Lab, which highlights the experiences of municipal issuers that have adopted structured data and features a prototype of what EMMA might be able to do in the future with additional structured data. The Lab also includes educational content to support market participants' common understanding of structured data.

Date: July 28, 2023

Contact: Leah Szarek, Chief External Relations Officer
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Financial Accounting Foundation Board of Trustees Notice of Meeting.

Meeting Notice

[07/28/23]

GASB Standards-Setting Process Oversight Committee Meeting Notice.

Meeting Notice

[07/28/23]

GFOA: Navigating the Talent Shortage

As demand for public finance officers grows, local governments are facing challenges in recruiting and retaining top talent. In this current environment, the use of virtual CFOs and just-in-time talent are becoming increasingly popular options.

LEARN MORE.

MSRB Board Announces Discussion Topics for Its Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet in Washington, D.C. on July 26-27, 2023 for its final quarterly meeting of the fiscal year. The Board will discuss its priorities for the next fiscal year and approve the FY 2024 budget to advance its FY 2022-2025 Strategic Plan.

Market Regulation

The Board will discuss proposed amendments to MSRB Rule G-14 to shorten the timeframe for trades to be reported to the MSRB from 15 minutes to as soon as practicable, but no later than one minute, subject to certain exceptions. The Board also will discuss a proposal to amend Rule G-12, on uniform practice, to adopt requirements for the completion of allocations, confirmations and affirmations related to municipal securities transactions that are consistent with those applicable to broker-dealers for other securities under newly adopted SEC Rule 15c6-2.

Market Transparency

The Board will receive an update regarding work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems, including user personalization and improvements to search and the disclosure submission process.

Market Structure and Data

The Board will receive a demonstration of a Structured Data Lab to be added to the EMMA Labs platform. The forthcoming Lab provides educational content on structured data, highlights the experiences of municipal issuers that have adopted structured data, and features a prototype of what EMMA might be able to do in the future with additional structured data.

Public Trust

The MSRB publishes its budget at the beginning of every fiscal year to report on the planned allocation of resources to advance the organization's multi-year Strategic Plan. The Board will discuss the FY 2024 budget proposal and its priorities for the next fiscal year, which begins October 1, 2023. The Board also will hold FY 2024 officer elections and consider candidates to fill a vacancy on the Board.

Date: July 19, 2023

Contact: Leah Szarek, Chief External Relations Officer
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SEC to Consider Cyber Rules Next Week.

According to a recently-released meeting agenda, the Securities and Exchange Commission's

(“SEC”) upcoming July 26, 2023 meeting will include consideration of adopting rules to enhance disclosures regarding cybersecurity risk management, governance, and incidents by publicly traded companies.

The SEC initially proposed these rules in March 2022. If adopted as proposed, the new rules would require publicly traded companies to publicly disclose a cybersecurity incident within four business days of determining that the incident is material, and to provide disclosure in periodic reports about certain cybersecurity governance practices. The proposed rule has been subject to two comment periods; after the original comment period ended in May 2022, the SEC re-opened the comment period between October-November 2022. The SEC is considering additional rules that implicate cybersecurity considerations and are in various phases of comment and revision for investment advisors, broker-dealers, clearing agencies, major security-based swap participants, the Municipal Securities Rulemaking Board, national securities associations, national securities exchanges, security-based swap data repositories, security-based swap dealers, and transfer agents.

Covington & Burling LLP – Micaela R.H. McMurrough, Ashden Fein, David H. Engvall, Caleb Skeath, Kerry Burke and Shayan Karbassi

July 20, 2023

MSRB Proposes One-Time Exemption for Municipal Advisors to Requalify for Certification.

The MSRB proposed amendments to MSRB Rule G-3 (“Professional Qualification Requirements”) to provide a one-time exemption for municipal advisors who allowed their qualification to lapse.

The MSRB proposed:

- creating a “one-time, criteria-based exemption” for former municipal advisor representatives who allowed their qualification to lapse; the exemption allows the advisor to requalify, without examination, no later than one year after a two-year lapse;
- removing language that allows the MSRB to waive the reexamination requirements under “extraordinary cases” for municipal advisor representatives and principals;
- clarifying an interpretive question regarding the lapse in qualification for individuals associated with dually registered broker-dealers and advisors; and
- specifying the means for electronic delivery of a requisite MSRB notice regarding satisfaction of the criteria-based exemption.

In addition, the MSRB proposed amending MSRB Rule G-8 (“Books and Records to be Made by Brokers, Dealers, and Municipal Securities Dealers and Municipal Advisors”) to require municipal advisors to keep books and records regarding the exemption.

The MSRB stated that it is proposing amendments to MSRB Rules G-3 and G-8 as part of its rule book modernization initiative and an “industry-wide continuing education (CE) initiative.”

The MSRB requested a compliance date of no more than 30 days following the SEC’s approval of the amendments.

Fried Frank Harris Shriver & Jacobson LLP

July 18, 2023

Replacement of London Interbank Offered Rate - GASB Update

Norwalk, CT, July 17, 2023 — In April 2022, the Government Accounting Standards Board issued Statement No. 99, *Omnibus 2022*, which stated that for purposes of applying paragraphs 35–38 of Statement No. 53, *Accounting and Financial Reporting for Derivative Instruments*, as amended, the London Interbank Offered Rate (LIBOR) is no longer an appropriate benchmark interest rate for a derivative instrument that hedges the interest rate risk of taxable debt when LIBOR ceases to be determined by the ICE Benchmark Administration using the methodology in place as of December 31, 2021.

As of July 1, 2023, the ICE Benchmark Administration ceased publishing any LIBOR setting using the methodology in place as of December 31, 2021. As a result, as of July 1, 2023, LIBOR is no longer an appropriate benchmark interest rate for a derivative instrument that hedges the interest rate risk of taxable debt for purposes of Statement 53.

More information on LIBOR is available on the ICE Benchmark Administration's website here.

Statements 53 and 99 are available on the GASB website, www.gasb.org.

Financial Accounting Foundation Issues 2022 Annual Report.

Norwalk, CT, July 12, 2023 — The Financial Accounting Foundation (FAF) today posted its 2022 Annual Report to its website. The report is available as a printable PDF file and as an enhanced digital version.

The annual report theme is "Standards That Work from Main Street to Wall Street," and it commemorates the 50th anniversary of the creation of the Financial Accounting Standards Board (FASB). The report provides a snapshot of the major milestones over the last 50 years of its Board and staff as they have worked to earn the responsibility entrusted to them: to develop and improve accounting and reporting standards that provide useful information to investors and other allocators of capital.

While much has changed since then, one thing that hasn't is the importance of stakeholder engagement in the independent standard-setting processes of both the FASB and the Governmental Accounting Standards Board (GASB). The 2022 Annual Report includes:

- Letters from FASB, GASB, and FAF leaders
- Milestones of the FASB's 50-year history
- Highlights of 2022 FASB and GASB standards and Exposure Drafts
- Complete 2022 management's discussion and analysis and audited financial statements (MD&A).

The annual report is available online as a downloadable PDF file, along with a mobile-friendly version at accountingfoundation.org.

About the Financial Accounting Foundation

Established in 1972, the Financial Accounting Foundation (FAF) is an independent, private-sector, not-for-profit organization based in Norwalk, Connecticut. Its Board of Trustees is responsible for the oversight, administration, financing, and appointment of the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB).

The FASB and GASB (collectively, "the Boards") establish and improve financial accounting and reporting standards—known as Generally Accepted Accounting Principles, or GAAP—for public and private companies, not-for-profit organizations, and state and local governments in the United States. Both Boards set high-quality standards through a process that is robust, comprehensive, and inclusive. The FASB is responsible for standards for public and private companies and not-for-profit organizations, whereas the GASB is responsible for standards for state and local governments.

The Foundation's Board of Trustees comprises 14–18 members from varied backgrounds—users, preparers, and auditors of financial reports; state and local government officials; academics; and regulators. The Trustees direct the effective, efficient, and appropriate stewardship of the FASB and GASB in carrying out their complementary missions; select and appoint FASB and GASB members and their advisory councils; oversee the Boards' activities and due process; and promote and protect the independence of the Boards. For more information, visit www.accountingfoundation.org.

MSRB Board Announces Discussion Topics for Its Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet in Washington, D.C. on July 26-27, 2023 for its final quarterly meeting of the fiscal year. The Board will discuss its priorities for the next fiscal year and approve the FY 2024 budget to advance its FY 2022-2025 Strategic Plan.

Market Regulation

The Board will discuss proposed amendments to MSRB Rule G-14 to shorten the timeframe for trades to be reported to the MSRB from 15 minutes to as soon as practicable, but no later than one minute, subject to certain exceptions. The Board also will discuss a proposal to amend Rule G-12, on uniform practice, to adopt requirements for the completion of allocations, confirmations and affirmations related to municipal securities transactions that are consistent with those applicable to broker-dealers for other securities under newly adopted SEC Rule 15c6-2.

Market Transparency

The Board will receive an update regarding work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems, including user personalization and improvements to search and the disclosure submission process.

Market Structure and Data

The Board will receive a demonstration of a Structured Data Lab to be added to the EMMA Labs platform. The forthcoming Lab provides educational content on structured data, highlights the experiences of municipal issuers that have adopted structured data, and features a prototype of what EMMA might be able to do in the future with additional structured data.

Public Trust

The MSRB publishes its budget at the beginning of every fiscal year to report on the planned allocation of resources to advance the organization's multi-year Strategic Plan. The Board will discuss the FY 2024 budget proposal and its priorities for the next fiscal year, which begins October 1, 2023. The Board also will hold FY 2024 officer elections and consider candidates to fill a vacancy on the Board.

Date: July 19, 2023

Contact: Leah Szarek, Chief External Relations Officer
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GASB Provides Guidance to Assist Stakeholders with Application of its Pronouncements.

Norwalk, CT, July 10, 2023 — The Governmental Accounting Standards Board has issued implementation guidance in the form of questions and answers intended to clarify, explain, or elaborate on certain GASB pronouncements.

Implementation Guide No. 2023-1, *Implementation Guidance Update*—2023, contains new questions and answers that address application of GASB standards on leases, subscription-based information technology arrangements, and accounting changes. The guide also includes amendments to previously issued implementation guidance on leases.

The GASB periodically issues new and updated guidance to assist state and local governments in applying generally accepted accounting principles (GAAP) to specific facts and circumstances that they encounter. The GASB develops the guidance based on:

- Application issues raised during due process on GASB pronouncements,
- Application issues identified during the first stage of the GASB's post-implementation reviews of the leases standards,
- Questions it receives throughout the year, and
- Topics identified by members of the Governmental Accounting Standards Advisory Council and other stakeholders.

The guidance in Implementation Guides is cleared by the Board and constitutes Category B GAAP. The guide is available to download free of charge on the GASB website, www.gasb.org.

ESG in the United States: A Complex Landscape

The United States is in the process of transitioning ESG disclosure from voluntary, market-led reporting to a regulatory-driven scheme, principally led by the US Securities and Exchange Commission's (SEC) anticipated (but delayed) disclosure requirements for public companies and investment advisers/companies, as well as evolving and divergent state legislation primarily aimed at those managing state assets.

This article recaps and provides an update for certain of the SEC's proposed rule-makings and

Congressional actions, as well as outlining the varying (and politicized) approaches adopted by state legislatures or administrative bodies to either restrict or encourage ESG measures.

Proposal to Enhance and Standardize Climate-Related Disclosures for Investors

On March 21, 2022, the SEC announced a proposed rule1 called "The Enhancement and Standardization of Climate-Related Disclosures for Investors" that would require public companies to provide certain climate-related financial data and greenhouse gas (GHG) emissions insights in public disclosure filings. These proposed SEC rules are intended to make US corporate ESG reporting more standardized and consistent with similar markets such as the European Union (EU).

The SEC final rules, which were initially anticipated to be released in April, are expected to require large filers to disclose material information about their climate risks, risk management approach, corporate ESG governance, and GHG emissions.2 Since publication, the SEC has received approximately 50,000 comments during an extended comment period.

Continue reading.

Eversheds Sutherland (US) LLP – Ed Winters and Ethan D. Corey

July 7 2023

Wall Street Banks Face $8 Billion in Municipal Bond Price-Fixing Claims.

- **BofA, JPMorgan, Citigroup among banks named in lawsuits**
- **Banks may settle FCA suits for about $1.5 billion, BI's Stein**

After almost a decade and untold millions of dollars in legal fees, some of Wall Street's biggest banks will finally get their day in court on allegations of price-fixing in the municipal bond market — that is if they don't settle first.

Bank of America, Barclays Capital Inc., BMO Financial Corp., William Blair & Co. LLC, Citigroup Inc., Fifth Third Bancorp, JP Morgan Chase & Co. and Morgan Stanley are expected to go to trial in Illinois next month to face allegations they inflated interest rates on bonds to finance public works to discourage investors from returning them for cash and colluded in setting the rates.

It is the first of four such cases originally filed under seal in 2014 by a Minnesota financial adviser, B.J. Rosenberg, saying that the banks caused a collective $1.5 billion in damages and seeking restitution for triple that amount. Another $6.5 billion in damages hangs in the balance in antitrust litigation in New York.

Continue reading.

Bloomberg Markets

By Joseph Mysak Jr

July 10, 2023

UBS Agrees to Settle Botched Muni Statements Suit for $2.5 Million.

- **Lawsuit claimed bank inflated muni investors' taxable income**
- **Hundreds of clients could qualify for payment under agreement**

UBS Financial Services agreed to pay $2.5 million to settle a class-action lawsuit claiming the bank provided inaccurate tax information to holders of taxable municipal bonds.

A federal judge in New Jersey gave preliminary approval to the deal Wednesday and scheduled a hearing in December to iron out details and make a final determination, according to a court filing.

Richard Goodman sued in 2021 on behalf of himself and other customers who bought taxable municipal bonds in accounts maintained by UBS. He claimed the bank, which was overseeing more than $90 billion of municipal bonds, didn't report amortizable bond premiums on forms clients used to prepare tax returns, resulting in overstatement of income and tax payments.

Continue reading.

Bloomberg Markets

by Madlin Mekelburg

Fri, July 14, 2023

Illinois Nears Settlement With Wall Street Banks Over Muni Price-Fixing Case.

Illinois reached a tentative deal to settle a nearly decade-long lawsuit that alleged about a dozen of the biggest US banks engaged in price fixing in the municipal bond market.

The banks have offered to pay the state $68 million, according to Todd Schneider, an attorney who is representing plaintiff side. The proposal comes as Bank of America, Barclays Capital Inc., BMO Financial Corp., William Blair & Co. LLC, Citigroup Inc., Fifth Third Bancorp, JPMorgan Chase & Co. and Morgan Stanley were expected to go to trial in Illinois next month to face allegations they inflated the interest rates on certain types of municipal bonds to discourage investors from returning them for cash and colluded in setting the rates.

Barclays, Citigroup, JPMorgan and Morgan Stanley all declined to comment on the proposed settlement. Representatives from Bank of America, BMO, William Blair and Fifth Third didn't respond to email requests for comment. A spokesperson for the Illinois Attorney General's Office declined to comment.

Continue reading.

Bloomberg Markets

By Joseph Mysak Jr

July 12, 2023

New Florida ESG Law Impacts Rating Agencies, Market Participants, Municipal Issuers: Holland & Knight

The Florida Division of Bond Finance published a notice (the Notice) on June 29, 2023, providing guidance on Florida House Bill 3 (HB 3), which was signed into law on May 2, 2023, by Gov. Ron DeSantis. HB 3, in part, restricts the use of environmental, social and corporate governance (ESG) factors in connection with municipal debt issuances within the state of Florida. For a more general look at HB 3, see Holland & Knight's alert, "New Florida Law Prohibits Use of ESG Factors in Government Investment and Procurement Decisions," June 30, 2023.

Florida's Prohibitions Against ESG

Pursuant to HB 3, issuers are prohibited from contracting with "any rating agency whose ESG scores for such issuer will have a direct, negative impact on the issuer's bond rating." The Notice clarifies that "current rating agency criteria indicates ESG scores are an output of a general credit analysis and *do not independently influence the credit rating of issuers*." According to the Notice, HB 3 "institutes taxpayer protections against government issuers contracting with rating agencies that attempt to transition to a paradigm that maps ESG scores directly to an issuer's credit rating." The Notice further provides that HB 3 does not prevent rating agencies from analyzing and discussing "credit risks they believe are relevant, such as providing feedback on potential risks from natural disasters, such as hurricanes, or other risks that are relevant or may potentially be relevant to an issuer's credit rating." Furthermore, the Notice states that any rating change following a natural disaster such as a hurricane is not considered an ESG metric under HB 3 and therefore such events or factors "independently do not trigger the contracting prohibition."

HB 3 also prohibits issuers from issuing ESG Bonds. ESG Bonds are defined as "bonds that have been designated or labeled as bonds that will be used to finance a project with an ESG purpose, including, but not limited to, green bonds, Certified Climate Bonds, GreenStar designated bonds, and other environmental bonds marketed as promoting a generalized or global environmental objective; social bonds marketed as promoting a social objective; and sustainability bonds and sustainable development goal bonds marketed as promoting both environmental and social objectives." HB 3 also prohibits the expenditure of public funds or bond proceeds to pay for the services of any third-party verifier related to the designation or labeling of bonds as ESG Bonds.

The Notice provides that bonds routinely issued for a specific purpose such as resiliency are not prohibited by HB 3. The Notice encourages issuers within the state to continue to disclose material risk factors.

The Notice also clarifies that HB 3 does not prevent financial institutions from underwriting bonds issued within the state.

We Can Help

Holland & Knight attorneys are working with issuers, borrowers, underwriters and lenders to address the impact of HB 3. If you have any questions regarding this alert, please contact the authors or another member of Holland & Knight's Public Finance Team.

Holland & Knight

by Vlad Popik | Michael L. Wiener

July 5, 2023

Upcoming Changes to EMMA User Accounts.

The Municipal Securities Rulemaking Board ("MSRB") is implementing changes to login accounts for its Electronic Municipal Market Access System ("EMMA") that may affect issuers and other obligors making continuing disclosure submissions to EMMA. The MSRB has announced that "individual accounts" will be deactivated on July 13, 2023. Thereafter, an "organization account" will be required for issuers and other obligors to make continuing disclosure submissions through the EMMA Dataport.

Instructions on how to determine whether a current account is an individual account or an organizational account, how to upgrade an individual account to an organizational account, and how to consolidate individual accounts into an organization account is available on the MSRB's website here.

Foster Garvey PC

June 23, 2023

GFOA and Rutgers University Announce Joint Project to Leverage the Power of AI.

This project aims to revolutionize the way financial data is extracted from financial reports and used to support decisions.

GFOA and Rutgers University are pleased to announce a groundbreaking joint project that leverages the power of artificial intelligence (AI) to extract select financial data from local government financial reports.

Download Full Press Release.

Publication date: June 2023

Florida HB-3: An Overview of ESG Factors Relating to Public Funds Investment and Financial Industry Impacts

On May 2, 2023, Florida Governor Ron DeSantis signed into law HB 3, also known as "An Act Relating to Government and Corporate Activism (the "Act"). The Act amends Florida Statute provisions relating to (i) deposits and investments of state money, (ii) state retirement systems and plans, (iii) state public funds, (iv) state bonds, (v) public deposits, (vi) government contracts, (vii) financial institutions, (viii) consumer finance companies, (viii) money services businesses, and (ix) deceptive and unfair trade practices.

Below is a summary of the provisions of the Act and its impact on the investment of public funds and

the new legislative provisions affecting financial institutions in Florida.

Investment Decisions

The Act prohibits applicable parties from taking into consideration "non-pecuniary" factors, including environmental, social and governance ("ESG") factors, when making investment decisions. Such investment decisions must be based solely on "pecuniary factors." A "pecuniary factor" is defined in the Act as "a factor that… is expected to have a material effect on the risk or returns of an investment based on appropriate investment horizons consistent with applicable investment objectives and funding policy. The term does not include the consideration of the furtherance of any social, political, or ideological interests." This requirement applies to the investment of public funds made by (i) the Chief Financial Officer, or other party authorized to invest on his or her behalf, (ii) a citizen support organization or a direct support organization on behalf of an agency, (iii) the plan administrator, named fiduciary, board, or board of trustees of the retirement system or plans, and (iv) the State Board Administration of the System Trust Fund or other trust funds administered thereby.

Continue reading.

by Tala Woods

June 13, 2023

Shutts & Bowen LLP

SEC Delays Cybersecurity Rules: Covington & Burling

Earlier this week, the Securities and Exchange Commission ("SEC") published an update to its rulemaking agenda indicating that it does not plan to approve two proposed cyber rules until at least October 2023 (the agenda's timeframe is an estimate). The proposed rules in question address disclosure requirements regarding cybersecurity governance and cybersecurity incidents at publicly traded companies and registered investment advisers and funds.

- **Cybersecurity Risk Governance Rule for Public Companies:** Proposed in March 2022, this proposed rule would require publicly traded companies to publicly disclose material cyber incidents within four business days and to provide disclosure in periodic reports about certain cybersecurity governance practices. The proposed rule has been subject to two comment periods; after the original comment period ended in May 2022, the SEC re-opened the comment period between October-November 2022.
- **Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies:** Proposed in February 2022, this proposed rule would require registered investment advisers and investment companies to adopt and implement "written cybersecurity policies and procedures reasonably designed to address cybersecurity risks." The rule would also require advisers to "report significant cybersecurity incidents affecting the adviser, or its fund or private fund clients" to the SEC as well as to implement certain recordkeeping practices. The proposed rule has also been subject to two comment periods; after the original comment period ended in April 2022, the SEC re-opened the comment period between March-May 2023.The SEC is also considering multiple other rules that implicate cybersecurity considerations and are in various phases of comment and revision for broker-dealers, clearing agencies, major security-based swap participants, the Municipal

Securities Rulemaking Board, national securities associations, national securities exchanges, security-based swap data repositories, security-based swap dealers, and transfer agents.

Covington & Burling LLP – Micaela R.H. McMurrough, Ashden Fein, Caleb Skeath and Shayan Karbass

June 15 2023

[Florida Law to Restrict the Use of Certain ESG Factors by Asset Managers and Financial Institutions: Latham & Watkins]

The legislation mirrors anti-"industry boycott" legislation introduced or passed in other US states and provides more explicit rubrics of prohibited factors.

On May 5, 2023, Florida Governor Ron DeSantis signed into law House Bill 3, a comprehensive antiESG bill that restricts consideration of environmental, social, and governance (ESG) factors in various contexts (HB 3). The law, scheduled to take effect on July 1, 2023, builds on the State Board of Administration's August 2022 resolution providing that its own investment decisions must be based only on pecuniary factors that do not include "the consideration of the furtherance of social, political, or ideological interests." HB 3 amends a variety of Florida statutes relating to: (i) retirement plans and investments of funds; (ii) financial institutions, including qualified public depositories; (iii) money services businesses; (iv) consumer finance companies; (v) trust fund assets and public funds; (vi) government contracts; (vii) government bonds; and (viii) deceptive and unfair trade practices.

HB 3 fulfills the promises of a 19-state alliance formed on March 16, 2023, by Governor DeSantis and the governors of Alabama, Alaska, Arkansas, Georgia, Idaho, Iowa, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, West Virginia, and Wyoming to push back against what they believe to be President Biden's ESG agenda. Pursuant to the alliance's policy statement, the governors have agreed to lead their respective state-level efforts to:

- protect taxpayers from ESG influences across state systems, such as by blocking the use of ESG in all investment decisions at the state and local level, so that only "financial factors are considered to maximize the return on investment … [and] eliminating consideration of ESG factors by state and local governments when issuing bonds or prohibiting state fund managers from considering ESG factors when investing taxpayer money"; and
  protect citizens from ESG influences in the financial sector, including "banning the sector from considering so-called "Social
- Credit Scores" in banking and lending practices … [as well as] including stopping financial institutions from discriminating against customers for their religious, political, or social beliefs, such as owning a firearm, securing the border, or increasing [America's] energy independence."

Continue reading.

Latham & Watkins LLP – Lawrence E. Buterman, Sarah E. Fortt, Joshua N. Holian, Betty M. Huber, Arthur S. Long, Andrea J. Schwartzman, Pia Naib, Charlie Beller, Karmpreet "Preeti" Grewal, Austin J. Pierce and Deric M. Behar

June 8 2023

Jerry Ford Joins the MSRB Board of Directors.

WASHINGTON, DC – The Municipal Securities Rulemaking Board (MSRB) announced today that municipal advisor Jerry W. Ford joined the Board of Directors and will serve through September 30, 2023. Ford will temporarily fill the position vacated by Jill Jaworski, who left earlier this month to assume the role of Chief Financial Officer for the City of Chicago.

To fill the remaining three years of Jaworski's term, the Board is seeking applications from non-dealer municipal advisors through June 16, 2023, via the MSRB's Board of Directors Application Portal. Additional details on the Board application process, information about Board service requirements and FAQs are available on the MSRB's website.

"We're grateful to welcome Jerry back to the Board at this pivotal time as we consider and adopt priorities and a supporting budget for the 2024 fiscal year," said MSRB Chair Meredith Hathorn. Ford previously served on the Board FY 2017-2020 and chaired the Board's Finance and Stakeholder Engagement Committees, among other responsibilities. For the remainder of FY 2023, Ford will serve on both the Audit and Risk Committee and Finance Committee.

Ford is president of Ford & Associates, where he advises clients on credit, structure, and sale of new-money and refunding issues, direct placement of bank loans, use and structure of interest rate swaps, and termination of existing swaps. Prior to founding Ford & Associates, Inc., Ford worked as a public finance underwriter/banker and financial advisor for a major southeast regional bank. Before entering investment banking, Mr. Ford was a senior consultant with Booz Allen Hamilton in Washington D.C. and worked in the Office of the Secretary at the U.S. Department of Health, Education, and Welfare. He has a bachelor's degree from California State University at Los Angeles and a master's in public administration from the University of Southern California.

Date: June 15, 2023

Contact: Leah Szarek, Chief External Relations Officer
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MSRB Adopts Amendments to Rules G-12 and G-15, Shortening Regular-Way Settlement for Municipal Securities Transactions to T+1.

View the MSRB Notice.

5/30/23

MSRB Adopts T+1 Amendments to Align Muni Trade Settlement with SEC Rules.

The MSRB adopted amendments to MSRB Rule G-12 ("Uniform Practice") and MSRB Rule G-15 ("Confirmation, Clearance, Settlement and Other Uniform Practice Requirements with Respect to

Transactions with Customers") to (i) "define regular-way settlement for municipal securities transactions as occurring one business day after the trade date" and (ii) align with recent SEC rule amendments to shorten the settlement cycle. (See previous coverage.).

Under amended Exchange Act Rule 15c6-1 ("Settlement Cycle"), the regular settlement cycle for most broker-dealer transactions was shortened from two business days after the trade date ("T+2") to one business day after the trade date ("T+1").

The effective date for the amendments is June 1, 2023 and the compliance date is May 28, 2024, which is consistent with the implementation date for amended Exchange Act Rule 15c6-1 ("Settlement Cycle").

May 31 2023

Fried Frank Harris Shriver & Jacobson LLP

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