SEC Identifies LIBOR Preparedness as an Examination Priority - Sherman & Sterling

On June 18, 2020, the Securities Exchange Commission's (SEC) Office of Compliance Inspections and Examinations (OCIE) announced the details of an examination initiative specifically focused on LIBOR preparedness.[1] OCIE has previously identified LIBOR preparedness of registrants (e.g., SEC-registered investment advisers, broker-dealers, investment companies, municipal advisors, transfer agents and clearing agencies) as a key examination priority for 2020, but the latest announcement offers specific insights into what information examiners will be seeking from registrants.[2]

Background

The expected cessation of LIBOR after 2021 is expected to significantly impact financial markets and present a multitude of financial, legal, operational, conduct and reputation risks for certain market participants. Preparing for the transition away from LIBOR to alternative rates is viewed as essential by a number of regulators, including the SEC. OCIE will be conducting examinations to facilitate an orderly transition.

Examination Process

According to OCIE's release, examiners will review whether and how a registrant has evaluated the potential impact of the LIBOR transition on the organization's: (i) business activities; (ii) operations; (iii) services; and (iv) customers, clients and/or investors (collectively, investors). Examiners will review the plans that registrants have developed and steps they have taken to prepare for the LIBOR discontinuation, including with respect to operational readiness and disclosures. OCIE also identified the types of information and documents that may be sought in these examinations, including:

- Information regarding any individuals or groups (e.g., internal committees, working groups or transition teams) assigned responsibility to oversee or manage the effects of the LIBOR transition on the registrant, including information regarding the frequency of any meetings on this topic and whether minutes are kept.
- The identity of any third parties the registrant has used or plans to use to assess the impact of the LIBOR transition on the firm or its investors.
- Documentation or descriptions of any analysis performed to identify contracts or obligations held and/or issued by the registrant or its investors that may be affected by the LIBOR transition and any remediation plans thereof.
- Information regarding any investors whose fee structure (e.g., performance-based fees) or performance reporting (e.g., use of LIBOR-linked benchmark) could potentially be affected by the LIBOR transition.
- Any written assessments, strategic plans (including remediation plans, as applicable), roadmaps or timelines prepared by or for the registrant regarding preparation for the LIBOR transition, including the consideration of alternative reference rates.

- Materials referencing the LIBOR transition provided to the registrant's board of directors, any committee thereof, any board member, the board or board member(s) of any investors, or the board, legislative body or member(s) thereof of any municipal entity or obligated person client, if applicable, or equivalent governing bodies or offices, if the registrant is not organized as a corporation.
- Information regarding any third-party vendors the registrant uses that may be impacted by the LIBOR transition, including the services provided (e.g., back office) and how the vendor may be impacted.
- Any implemented or planned changes to compliance procedures, controls or surveillance systems designed to monitor for LIBOR-linked instruments or contracts recommended or sold to clients.

What Registrants Should Be Doing Now

The foregoing list of information that will be sought by SEC examiners is not exclusive and should underscore the urgency of having both experienced counsel on LIBOR matters and a well-designed transition roadmap. Ideally, firms should not wait until an exam is scheduled or a request for information is received to start preparing. And, as a matter of best practice, firms should begin collecting information that would be responsive to the areas identified by OCIE.

Footnotes

[1] See SEC, "Examination Initiative: LIBOR Transition Preparedness" (June 18, 2020).
[2] See SEC, "Examination Priorities for Fiscal Year 2020" (Jan. 7, 2020).

Shearman & Sterling LLP – Donna Parisi, Geoffrey B. Goldman, Azam H. Aziz , Mark Chorazak, Lona Nallengara and Jennifer Oosterbaan

July 20 2020

U.S. Department of Labor Proposes New (Simpler) Fiduciary Rule Exemption.

On June 29, the U.S. Department of Labor (DOL) again waded into the financial services standard of care waters, only this time, it is staying in the shallow end. The DOL's proposed prohibited transaction exemption (Proposed Exemption), if finalized, offers financial advisors, subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), an opportunity to provide services to employee benefit plans (ERISA Plans), and individual retirement accounts (IRAs) that might otherwise be prohibited under the current regulatory scheme.

Introduction

Absent an exemption, a fiduciary may not deal with the income or assets of an ERISA Plan or IRA in his or her own interest or for his or her own account, and may not receive payments from any party dealing with an ERISA Plan or IRA in connection with a transaction involving assets of the ERISA Plan or IRA. Although existing DOL exemptions permit some related-party transactions, those exemptions are restrictive and have not kept up to date with current fee structures.

The Proposed Exemption would permit financial institutions, including broker-dealers and investment advisers, to receive a wide variety of fees that would otherwise violate existing prohibited transaction rules when providing investment advice to or facilitating securities transactions for fiduciaries, participants, and beneficiaries of ERISA Plans, and to owners and fiduciaries of IRAs. These fees include, but are not limited to, commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue-sharing payments from investment providers or third parties. The Proposed Exemption will permit a financial institution fiduciary to receive fees resulting from investment advice to ERISA Plan participants in connection with a rollover from an ERISA Plan to an IRA and allow financial institutions to engage in principal transactions with ERISA Plans and IRAs in which the financial institution purchases or sells certain investments from its own account.

To qualify for the Proposed Exemption, a financial institution must be an "investment advice fiduciary." In general, an investment advice fiduciary is subject to the duties and liabilities under ERISA that require it to act prudently and with undivided loyalty to ERISA Plans, participants, and beneficiaries. The Proposed Exemption embraces the long-standing five-part test used by the DOL to determine whether an investment adviser is an investment advice fiduciary for purposes of ERISA and the Code. The reaffirmation of the five-part test is important because the now-vacated fiduciary rule (temporarily) discarded the test in favor of a much more expansive definition of who is a fiduciary.

Under the five-part test, a financial institution is considered an investment advice fiduciary if it: (i) renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (ii) on a regular basis, (iii) pursuant to a mutual agreement, arrangement, or understanding with the ERISA Plan fiduciary or IRA owner that (iv) the advice will serve as a primary basis for investment decisions with respect to the ERISA Plan or IRA, and (v) the advice is individualized based on the particular needs of the ERISA Plan or IRA.

Proposed Exemption Requirements

To qualify for the Proposed Exemption, an investment advice fiduciary must:

1. Adhere to Impartial Conduct Standards (as described below).
2. Provide the retirement investor with a written description of the services to be provided and an acknowledgment that it and its investment professionals are acting as a fiduciary under ERISA and the Code, as applicable.
3. Establish, maintain, and enforce written supervisory procedures (WSPs) to comply with the exemption.
4. Create and maintain certain records.
5. Conduct an annual retrospective review of compliance with the exemption.

The Proposed Exemption is an attractive alternative to existing prohibited transaction exemptions, which are narrower and more restrictive. Also, investment advice fiduciaries are likely to find that the Proposed Exemption's litany of necessary qualifications is already met through existing regulatory obligations. The Proposed Exemption specifically excludes robo-advisers.

Impartial Conduct Standards Requirement

The Impartial Conduct Standards include: (i) a best interest standard, (ii) a reasonable compensation standard, and (iii) a no misleading statements standard. These standards largely replicate existing securities regulations and anti-fraud provisions.

1. *Best Interest Standard.* Financial services provided by investment advice fiduciaries are required to be in the best interest of retirement investors. To meet this standard, an investment advice fiduciary must (i) provide advice that reflects care, skill, and prudence based on the investment

objectives, risk tolerance, and financial circumstances of the retirement investor, and (ii) put the interests of its retirement investors ahead of its own interests. For instance, an investment advice fiduciary must determine, and document (as discussed further below), that rolling over employee benefit assets to an IRA is in the best interest of the retirement investor.

2. *Reasonable Compensation Standard.* Investment advice fiduciaries are prohibited from receiving excessive compensation for providing financial services. No single factor is dispositive in determining the reasonableness of compensation received, and both direct and indirect compensation should be taken into account when making an assessment. The proposal specifies that, as required by federal securities laws, investment advice fiduciaries must seek to obtain the best execution of the investment transaction reasonably available under the circumstances, analyzing best execution and third-party compensation arrangements.
3. *No Misleading Statements Standard.* Statements made by investment advice fiduciaries to a retirement investor about a recommended transaction and other relevant matters must not, at the time statements are made, be materially misleading.

Written Disclosure

An investment advice fiduciary must provide a retirement investor, prior toproviding any financial services, with a written document: (i) explicitly stating that the firm is operating as a fiduciary, (ii) describing the services to be provided, and (iii) disclosing any conflicts of interest.

Written Supervisory Procedures

An investment advice fiduciary's WSPs must be prudently designed to comply with the Impartial Conduct Standards. The WSPs must be designed to mitigate conflicts of interest and to avoid misalignment of the interests of the financial institution and its investment professionals and the interests of retirement investors, such as through incentive arrangements based on sales.

Documentation and Recordkeeping Requirements

Financial institution fiduciaries must create and maintain a record of their reasoning when recommending that a retirement investor rollover ERISA Plan or IRA assets. These records must be kept for six years.

Annual Retrospective Review

A financial institution fiduciary that is relying on the Proposed Exemption to provide financial services for retirement investors must review and test its compliance annually. This process is designed to detect and prevent violations of the Impartial Conduct Standards and to ensure the financial institution fiduciary complies with its policies and procedures. This review must be memorialized within six months of the review period's completion and provided to the chief executive officer (CEO) and chief compliance officer (or equivalent officers) at the investment advice fiduciary. The CEO must certify: (i) that they reviewed the report, (ii) that the WSPs are prudently designed to achieve compliance with the exemption, and (iii) that the financial institution fiduciary has a prudent process in place to accommodate any business or regulatory changes that may arise during the following year.

Principal Transactions

The Proposed Exemption would permit certain transactions between an investment advice fiduciary and an ERISA Plan or IRA that could otherwise be prohibited, such as engaging in a purchase or sale of an investment with a retirement investor and receiving a mark-up or a mark-down or similar payment on the transaction. The Proposed Exemption would extend to both riskless principal transactions and covered principal transactions. A riskless principal transaction is a transaction in which a financial institution, after having received an order from a retirement investor to buy or sell an investment product, purchases or sells the same investment product for the financial institution's own account to offset the contemporaneous transaction with the retirement investor.

Covered principal transactions are defined in the Proposed Exemption as:

1. For a sale to an ERISA Plan or IRA, a transaction that involves publicly traded equity or debt, Treasury bills, municipal securities, and certificates of deposit, and if the recommended investment is a debt security, the security is recommended pursuant to written policies and procedures adopted by the financial institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and has sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time;
2. For purchases from an ERISA Plan or IRA, a transaction that involves any securities or investment property.

Principal transactions that are not riskless and that do not fall within the definition of a covered principal transaction would not be covered by the Proposed Exemption.

Conclusion

The DOL stated in the Proposed Exemption that once the final form of the exemption is published in the Federal Register, following a comment period that ends on August 6, the exemption will be effective 60 days thereafter.

Overall, the Proposed Exemption seems a welcome modernization of the existing, narrow exemptions from the prohibited transaction rules available to financial institutions, ERISA Plans, and IRAs. Importantly, the proposal reaffirms the five-part test for determining fiduciary status, which many advisors will welcome. Private equity and hedge funds should also be relieved to see that the proposal does not resuscitate terms of the vacated fiduciary rule that purported to make fund managers ERISA fiduciaries with respect to many of their ERISA Plan and IRA investors.

Lowenstein Sandler LLP – Andrew E. Graw, Megan Monson and Alexander D. Zozos

July 16 2020

MSRB Announces Topics for Virtual Quarterly Board Meeting.

The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet virtually on July 29-30, 2020 to discuss the Fiscal Year 2021 budget, market transparency and other items. A detailed summary of Board decisions will be published on MSRB.org following the meeting to ensure all stakeholders are informed of the Board's priorities and decisions.

Find the meeting's discussion items here.

Customized EMMA Homepage.

A customized issuer homepage on EMMA® is a free, easy and quick way for issuers to enhance their investor relations.

Learn more about the benefits of an issuer homepage.

MSRB Weekly COVID-19-Related Event-Based Continuing Disclosures.

Weekly COVID-19-related event-based continuing disclosures submitted to the EMMA® website continue their downward trajectory.

Read this week's disclosure summary report.

UBS to Pay $10 Million to Resolve SEC Charges Related to Protecting Small Investors.

Cities and school districts issuing municipal debt for building projects can choose to give first priority to mom-and-pop investors

UBS Financial Services will pay more than $10 million to resolve charges that the firm broke rules aimed at giving mom-and-pop investors priority access in buying fresh municipal bonds, the Securities and Exchange Commission said Monday.

Cities and school districts issuing municipal debt for building projects can choose to give first priority to small investors. Governments sometimes want to help local residents, and retail-held bonds tend to change hands less frequently, often keeping prices stable. The Municipal Securities Rulemaking Board mandates that brokers the governments hire to sell the bonds follow issuers' wishes regarding priority.

The SEC found that between 2012 and 2016, when UBS distributed newly issued bonds for such brokers and was required to follow the priority rules, it instead placed bonds intended for non-professional investors with other firms, often referred to as flippers, who quickly resold the bonds for a profit.

Investigators also found that UBS got improper access to other newly issued bonds by buying them through flippers, which gave UBS a better spot in line for those bonds than the broker would have had if it had bought them directly. Nearly $7 million of UBS's fine was aimed at forcing the firm to give up "ill-gotten gains," the SEC said.

"Retail order periods are intended to prioritize retail investors' access to municipal bonds and we will continue to pursue violations that undermine this priority," said LeeAnn Gaunt, chief of the Public Finance Abuse Unit for the SEC Division of Enforcement.

UBS said it had adopted "enhanced systems and procedures" since the four-year period in question. It didn't admit to or deny the findings.

"After fully cooperating with the SEC, UBS is pleased to have resolved this matter," the firm said.

A Wall Street Journal investigation last year found that the brokers cities and school districts hire to sell bonds routinely award them to flippers—and then sometimes buy back the bonds themselves. About $60 billion in newly issued municipal bonds sold between 2013 and 2017 were sold to customers who turned around and sold them to dealers within a single day, usually for a profit, the Journal found.

The Wall Street Journal

By Heather Gillers

July 20, 2020 7:10 pm ET

UBS to Pay Over $10 million to Resolve SEC Charges on Municipal Bond Offerings.

WASHINGTON (Reuters) – A unit of UBS has agreed to pay more than $10 million to resolve charges it circumvented the priority given to retail investors in certain municipal bond offerings, the U.S. Securities and Exchange Commission said on Monday.

Over a four-year period, UBS Financial Services Inc improperly allocated bonds intended for retail customers to parties known in the industry as "flippers," who immediately resold the bonds to other broker-dealers at a profit, the agency said in a statement.

UBS registered representatives facilitated more than 2,000 trades with such flippers, allowing the firm to obtain bonds for its own inventory and improperly obtain a higher priority in the bond allocation process, according to the SEC.

The regulator also settled proceedings with UBS registered representatives William S. Costas and John J. Marvin, finding that they had "negligently" submitted retail orders for bonds on behalf of flipper customers. Costas also helped UBS traders improperly obtain bonds for the firm's own inventory through the flippers, the SEC said.

Costas agreed to pay disgorgement and interest totaling $16,585 and a civil penalty of $25,000. Marvin agreed to pay disgorgement and interest of $27,966 and a civil penalty of $25,000, the SEC said.

"Retail order periods are intended to prioritize retail investors' access to municipal bonds and we will continue to pursue violations that undermine this priority," said LeeAnn G. Gaunt, chief of the SEC Division of Enforcement's Public Finance Abuse Unit.

UBS and the two representatives did not admit or deny the agency's findings, the SEC said. A spokeswoman for the firm said UBS had fully cooperated with the agency and was pleased to resolve the matter.

Reporting by Chris Prentice; Editing by Leslie Adler, Dan Grebler and Tom Brown

JULY 20, 2020

UBS to Pay $10 Million for Retail Muni Bond Violations.

UBS Financial Services agreed to pay more than $10 million to resolve charges that it circumvented procedures aimed at giving retail investors priority allocations in certain municipal bond offerings, the Securities and Exchange Commission said on Monday.

UBS improperly allocated bonds intended for retail customers to so-called "flippers," traders who immediately resold the bonds to other broker-dealers at a profit. UBS' retail brokers who participated in the sales "knew or should have known" that flippers were not eligible for retail priority, the regulator said in a press release

The more than 2,000 trades given to flippers over four years also allowed UBS to obtain bonds for its own inventory, circumventing the priority of orders set by the issuers and improperly obtaining a higher priority in the bond allocation process, according to the settlement order.
"Retail order periods are intended to prioritize retail investors' access to municipal bonds and we will continue to pursue violations that undermine this priority," said LeeAnn G. Gaunt, chief of the SEC's Public Finance Abuse enforcement unit.

Without admitting or denying the findings, UBS consented to the penalties and a cease-and-desist agreement for violating Municipal Securities Rulemaking Board rules and of failure-to-supervise provisions of the Securities Exchange Act of 1934.

It will pay a $1.75 million penalty, disgorge $6.74 million of ill-gotten gains and pay over $1.5 million in prejudgment interest, the SEC said.

"After fully cooperating with the SEC, UBS is pleased to have resolved this matter related to conduct that occurred between 2012 and 2016 in its former distribution business of negotiated new issue municipal bonds," a company spokeswoman said. "The conduct predates the launch of UBS's new Public Finance business in 2017 and adoption of enhanced systems and procedures."

The regulator also announced related settlements with UBS brokers William S. Costas in Westlake Village, Calif., and John J. Marvin in Palm Beach Gardens, Fla. They "negligently submitted retail orders for municipal bonds on behalf of their flipper customers," the SEC said.

Costas, 55, who has spent 29 years of his 32-year career with UBS, according to BrokerCheck, also helped UBS traders improperly obtain bonds for the firm's inventory through one of his flipper customers, the SEC said. Marvin, 58, a rep for 34 years, joined UBS in February 2007 from Morgan Stanley.

Costas and Marvin agreed to settle the SEC charges without admitting or denying the findings. Costas will pay disgorgement and prejudgment interest totaling $16,585 and Marvin will disgorge $27,966. Each also agreed to pay a $25,000 penalty and consented to a 12-month limitation on trading negotiated new issue municipal securities.

The SEC in April settled charges against former UBS Executive Director Jerry E. Orellana for submitting retail orders to an underwriting syndicate from certain UBS customers who were flippers. He agreed to pay $284,080 in disgorgement, $15,128 in prejudgment interest, and a $75,000 civil penalty, and was barred for five years.

The SEC also in 2018 reached a settlement with former UBS bond salesman Chris D. Rosenthal for allegedly helping unregistered brokers posing as retail investors flip municipal bond offerings. He accepted a five-year industry bar and an order to pay $284,080 in disgorgement, $15,128 in prejudgment interest, and a $75,000 civil penalty.

The Financial Industry Regulatory Authority last year fined UBS $2 million for inaccurately representing to customers the tax status of municipal bond interest payments, and ordered it to pay any additional taxes the customers may have accrued because of the errors.

AdvisorHub

by AdvisorHub Staff

July 20, 2020

[Fed's Williams: SOFR Rate System Has Performed Well During Coronavirus Crisis]()

The New York Fed president said banks should stop pricing new deals using Libor now

Federal Reserve Bank of New York President John Williams said Monday that a replacement for the scandal-plagued Libor interest-rate reference regime has fared well amid the stresses seen in the financial system during the coronavirus pandemic.

“If the pandemic has confirmed one thing about financial benchmarks, it’s the resilience of robust reference rates,” including new ones like the Secured Overnight Financing Rate, or SOFR, Mr. Williams said in the text of a speech to be delivered by video.

SOFR, which is published by the New York Fed, provides a reference rate system to replace Libor, which is based on banks’ judgments and has been the source of manipulation in the past. Libor is scheduled to be phased out on Jan. 1, 2022, and regulators have been pushing financial firms to adopt SOFR to replace it.

Mr. Williams, who also serves as vice chairman of the rate setting Federal Open Market Committee, didn’t discuss the economic outlook in his prepared remarks.

The official said amid the market tumult seen during the spring, which saw an unprecedented support effort by the Fed, “SOFR was a dog that didn’t bark or bite.” He added, his bank “publishes a number of overnight secured and unsecured funding rates, and during this tumultuous period, they all moved in concert, anchored by the rates set by the Federal Reserve.”

Mr. Williams said progress is being made to move away from Libor. He added that it’s time for firms to stop using Libor, saying “let’s not make the existing hole we’re trying to climb out of even deeper.”

The Wall Street Journal

By Michael S. Derby

July 13, 2020 11:45 am ET

Department of Labor Proposes New Guidance for Fiduciaries: Paul Hastings

On June 29, 2020, the U.S. Department of Labor (the "DOL") issued a regulation reinstating its old rule defining when an investment advisor will be deemed to be a "fiduciary" under ERISA, and proposed a broad new prohibited transaction class exemption (the "Proposed Exemption") for financial institutions and investment professionals that are plan fiduciaries by virtue of providing investment advice for compensation to employee benefit plans and IRAs. The new regulation and the Proposed Exemption are intended to replace the so-called "fiduciary rule" that was issued by the DOL in 2016 (the "2016 Rule"), which was vacated by the Fifth Circuit Court of Appeals in 2018.

Key Take-Aways

- *Reinstatement of the Five-Part Test* – The "new" fiduciary regulation actually reinstates the old ERISA regulation defining who is an "investment advice fiduciary" (the "Five-Part Test") which had been revoked with the 2016 Rule, and also reinstates various class exemptions and Interpretive Bulletins (PTEs 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128 and Interpretive Bulletin 96-1 (relating to the provision of investment education to participants and beneficiaries in participant-directed individual account plans)) that had long been in effect prior to the adoption of the now-defunct 2016 Rule. The DOL also removed prohibited transaction exemptions issued contemporaneously with the 2016 Rule, including the controversial Best Interest Contract Exemption (the "BIC Exemption").
- *Broad Relief* – The Proposed Exemption is intended to provide relief from ERISA's prohibited transaction restrictions that is broader and more flexible than existing exemptions and will allow "Investment Advice Fiduciaries" (as defined below) to rely on one exemption, rather than several exemptions that cover specific types of transactions. The Proposed Exemption generally covers any advice to acquire, hold, dispose of, or exchange securities, as well as certain principal transactions and advice to plan participants to rollover assets from an ERISA plan to an IRA.
- *Alignment with Regulation Best Interest* – Reliance on the Proposed Exemption is conditioned on compliance with the "Impartial Conduct Standards," and certain disclosure and compliance requirements. The Proposed Exemption is generally designed to align with rules issued under federal securities law and state regulations, including the SEC's "Regulation Best Interest" and the fiduciary standards applicable to registered investment advisers so as to promote compliance efficiencies.
- *Extension of FAB 2018-02* – The DOL formally extended FAB 2018-02 (the "FAB"), which provides relief for fiduciaries that have complied with the impartial conduct standards set forth in the BIC Exemption. Accordingly, financial institutions that have implemented systems to comply with the FAB may continue to do so, subject to the other conditions of the Proposed Exemption.
- *No Private Right of Action* – The Proposed Exemption does not create any private right of action or expand legal claims beyond those provided under ERISA. However, entities relying on the FAB will continue to be subject to a private right of action as described under the FAB.

Five-Part Test

Under the Five-Part Test in the fiduciary regulation, a person will be considered to be a fiduciary to the extent that such person: (1) renders advice to a retirement plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary, or IRA owner, that; (4) the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and that; (5) the advice will be individualized based on the particular needs of the plan or IRA. This is the same five-part test that had been in effect since 1976. In reinstating the old regulation, the DOL has done away with the most controversial aspects of the 2016 Rule that would have made any person who makes a sales or marketing presentation to a plan an ERISA "fiduciary" subject to the fiduciary responsibility and prohibited transaction restrictions of ERISA.

The Five-Part Test is a facts-and-circumstances test. In the Preamble to the Proposed Exemption, the DOL elaborates on the application of the Five-Part Test in the rollover to IRA context.

- *Regular Basis* – Among other things, if the provider's relationship to the Retirement Investor is limited to advice regarding the rollover, the provider may not be a fiduciary because it is not providing advice to the Retirement Investor on a regular basis. However, if the parties anticipate that the provider will provide investment management services to the Retirement Investor on an ongoing basis after the rollover, the provider may satisfy the regular basis prong and, therefore, may be a fiduciary.
- *Mutual Understanding* – Whether an agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions exists will be based on the reasonable understanding of the parties if no mutual agreement or arrangement is demonstrated. Written statements disclaiming such a mutual understanding may be considered, but are not determinative.
- *Primary Basis* – The advice need not serve as "the" primary basis for an investment decision; rather, the relevant inquiry is whether the advice is "a" primary basis.

Finally, whether such advice is rendered "for a fee" as required under ERISA should be interpreted broadly and should include incident fees and compensation received from transactions involving rollover assets.

The Proposed Exemption

The Proposed Exemption generally covers prohibited transactions resulting from any advice to acquire, hold, dispose of, or exchange securities that is rendered by Investment Advice Fiduciaries (i.e., SEC or state registered investment advisers ("RIAs"), broker-dealers, banks, and insurance companies ("Financial Institutions") and their individual employees, agents, and representatives) to ERISA plan fiduciaries, participants and beneficiaries, and IRA owners and fiduciaries (collectively, "Retirement Investors").

The Proposed Exemption also covers "Riskless Principal Transactions" and "Covered Principal Transactions." A "Riskless Principal Transaction" occurs when a Financial Institution receives an order from a Retirement Investor to buy or sell an investment product and subsequently purchases or sells the same investment product for the Financial Institution's own account (or an account of certain of its affiliates) to offset the contemporaneous transaction with the Retirement Investor. A "Covered Principal Transaction" is the purchase of any securities or other investment property from a plan or IRA, or a sale to a plan or IRA of corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933, U.S. Treasury securities, debt securities issued or guaranteed by a U.S. federal government agency other than the U.S. Department of Treasury, debt securities issued or guaranteed by a government-sponsored enterprise, municipal bonds, certificates of deposits, and interests in Unit Investment Trusts.

Investment Advice Fiduciaries that comply with the Proposed Exemption may receive a wide array of compensation that might otherwise be prohibited under existing exemptions, including, without limitation, commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs and revenue sharing payments, provided the compensation is "reasonable compensation," as described in further detail below. In addition, Investment Advice Fiduciaries would be permitted to receive compensation relating to investment advice on proprietary products or investments that generate third-party payments.

Investment Advice Fiduciaries could choose to rely solely on the Proposed Exemption, existing class, statutory and administrative exemptions, or a combination thereof, depending on business needs. In order to rely on the Proposed Exemption, the Investment Advice Fiduciary must comply with the Impartial Conduct Standards, as well as certain other disclosure and compliance requirements.

Impartial Conduct Standards

Under the Impartial Conduct Standards, the Investment Advice Fiduciary (i) must provide advice that is in the “Best Interest” of the Retirement Investor, (ii) may receive no more than “reasonable compensation”, and (iii) may not make misleading statements to the Retirement Investor.

Best Interest Standard

The Best Interest Standard requires that such advice reflect the “care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.” The Best Interest Standard is intended to be an objective, principles-based standard, applied at the time the advice is provided.

Moreover, consistent with the SEC’s Regulation Best Interest and the fiduciary standards applicable to RIAs, the needs of the Retirement Investor must be paramount—any financial or other interests of the Investment Advice Fiduciary must be subordinate to those of the Retirement Investor. However, an Investment Advice Fiduciary is not required to seek out the single “best” option for the Retirement Investor and is not precluded from receiving fees from proprietary products or investments that generate third-party payments.

Reasonable Compensation

Any compensation received by the Investment Advice Fiduciary may not exceed “reasonable compensation,” and the Investment Advice Fiduciary is obligated to seek the best execution of the investment transaction reasonably available under the circumstances. Whether fees are reasonable is determined at the time of the transaction and is based on facts and circumstances. The essential question is whether the charges are reasonable in terms of what the investor receives, and, while no single factor is dispositive, relevant factors may include the market price of the service to be provided, the scope of monitoring, and the complexity of the product. The application of the “best execution” standards is intended to be applied in a manner consistent with similar requirements under federal securities laws.

No Misleading Statements

An Investment Advice Fiduciary may not make any “materially misleading” statements regarding the recommended transaction or other relevant matters (determined at the time such statements are made), including statements regarding fees and compensation, material conflicts of interest, and any other fact that could reasonably be expected to affect the Retirement Investor’s investment decisions.

Disclosures

Prior to engaging in the transaction, an Investment Advice Fiduciary must acknowledge its fiduciary status in writing and provide a written description of the services to be provided and material conflicts of interest that are accurate and not misleading in all material respects. The disclosures must be in plain English and take into account the Retirement Investors' level of expertise. The disclosures may be provided in one or a series of documents, including through disclosures required by other applicable regulators.

Compliance Requirements

An Investment Advice Fiduciary must maintain and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards. Such policies and procedures must mitigate any conflicts of interest so that the Investment Advice Fiduciary's incentive practices as a whole avoid misalignment of interests between the Investment Advice Fiduciary and the Retirement Investors.

Under the Proposed Exemption, a conflict of interest is "an interest that might incline a Financial Institution or Investment Professional – consciously or unconsciously – to make a recommendation that is not in the Best Interest of the Retirement Investor." For example, a Financial Institution's policies and procedures must be prudently designed to protect against recommendations to make excessive trades or buy investment products, annuities, or riders that are not in the best interest of the investor or that allocate excessive amounts to illiquid or risky investments.

A Financial Institution must perform an annual retrospective review that is designed to detect and prevent violations of the Impartial Conduct Standards and other relevant policies and procedures. The review must be documented in a written report to the Financial Institution's chief executive officer or chief compliance officer. The Financial Institution would also be required to maintain, and make available, records demonstrating compliance with the exemption for six years.

Exclusions

Transactions with an ERISA plan where the Investment Advice Fiduciary or one of its affiliates is either the employer of employees covered under the plan, or a named fiduciary or plan administrator, or an affiliate thereof, who was selected to provide advice to the plan by a fiduciary who is not independent of the Investment Advice Fiduciary or affiliate, are not eligible for relief under the Proposed Exemption.

In addition, the Proposed Exemption would not apply to pure "robo-advice" arrangements that do not involve interactions with an investment professional, as these arrangements are covered by statutory exemptions.

Finally, certain Financial Institutions and other investment professionals that have engaged in certain criminal conduct may be ineligible from coverage under the Proposed Exemption. The DOL may also find certain persons that have engaged in systematic violations of the exemption or provided materially misleading statements ineligible for relief under the exemption.

Effective Date

The reinstatement of the Five-Part Test and the exemptions listed herein is effective immediately upon publication in the Federal Register. The Proposed Exemption is currently open for comments.

Paul Hastings LLP – Christine Matott, Lawrence J. Hass and Joshua H. Sternoff

July 10 2020

MSRB: EMMA New Issue Calendar

Curious about the bonds coming to market? EMMA's new issue calendar displays relevant information about upcoming offerings.

Access the new issue calendar.

Read about how to use the new issue calendar.

GFOA: June 2020 Edition of Government Finance Review

The full issue of the June 2020 Government Finance Review is available to read electronically. Individual articles are also available for download below. This edition includes important information on how to navigate a financial crisis.

GASB Proposes Concepts for Recognition of Financial Statement Elements.

Norwalk, CT, June 30, 2020 — The Governmental Accounting Standards Board (GASB) today issued a proposed Concepts Statement addressing concepts for recognition of assets, liabilities, and other elements of state and local government financial statements.

The Exposure Draft, *Recognition of Elements of Financial Statements*, proposes a framework of interrelated objectives and fundamental principles that can be used by the Board to establish consistent accounting and financial reporting principles for recognition of elements of financial statements.

Recognition concepts encompass two aspects of financial statements:

- The measurement focus determines what items should be reported in a financial statement.
- The related basis of accounting determines when those items should be reported in a financial statement.

The Exposure Draft proposes a recognition framework for both (1) the economic resources measurement focus and accrual basis of accounting and (2) the short-term financial resources measurement focus and accrual basis of accounting. The proposed Concepts Statement also contains a recognition hierarchy that would be followed when evaluating an item for recognition in financial statements.

Although primarily intended to guide the Board in establishing standards, Concepts Statements may be used by preparers and auditors when applying the generally accepted accounting principles hierarchy in assessing transactions and other events for which the GASB does not provide authoritative guidance. Concepts Statements also may help stakeholders to better understand the fundamental concepts underlying future GASB standards.

The Exposure Draft is available for download at no charge on the GASB website, www.gasb.org. Stakeholders are encouraged to review and provide comments by February 26, 2021.

The Board tentatively has scheduled a series of public hearings and user forums to enable stakeholders to share their views directly with the Board on this Exposure Draft as well as two related proposals: a forthcoming Exposure Draft, Financial Reporting Model Improvements (approved by the Board on June 30) and a Preliminary Views, Revenue and Expense Recognition. Additional information is available in the Exposure Draft. The deadline for providing written notice of intent to participate is February 26, 2021.

GASB Requests Input on Revenue and Expense Recognition Proposals.

Norwalk, CT, June 30, 2020 — The Governmental Accounting Standards Board (GASB) today issued for public feedback a Preliminary Views (PV) on revenue and expense recognition model proposals.

The Board added this project to its technical agenda with the intent of:

- Developing guidance applicable to topics for which existing guidance is limited,
- Improving existing guidance that has been identified as challenging to apply,
- Considering inclusion of a performance obligation approach in the GASB's authoritative literature, and
- Assessing existing and proposed guidance based on the conceptual framework.

The PV, *Revenue and Expense Recognition*, is intended to present the Board's current thinking about the development of a comprehensive, principles-based model that establishes categorization, recognition, and measurement guidance applicable to a wide range of revenue and expense transactions, which, if adopted as standards, is expected to enhance the usefulness of information governments report on their revenues and expenses.

The Board introduced in the PV a new methodology for categorizing transactions, which is then used as a basis for applying recognition proposals. Determining the transaction category would be based on the assessment of specific characteristics that a binding arrangement may or may not contain. This categorization methodology is intended to identify transactions with performance obligations.

If a transaction is determined to have a performance obligation based on the categorization characteristics, the associated revenue or expense would be recognized based on the satisfaction of the performance obligation. For transactions that are determined not to have a performance obligation, the Board proposed specific recognition guidance based on the various subcategories of transactions (for example, derived taxes, such as income and sales taxes and imposed taxes, such as property taxes).

Stakeholders are asked to review and provide input on the document by February 26, 2021. A series of public hearings and user forums on the PV tentatively have been scheduled to enable stakeholders to share their views with the Board.

GASB Releases Accounting and Financial Reporting Guidance Related to the CARES Act and Coronavirus Diseases.

Norwalk, CT, July 2, 2020 — As part of its continuing efforts to assist state and local governments during the COVID-19 pandemic, the Governmental Accounting Standards Board (GASB) today released a Technical Bulletin containing guidance for applying existing standards to transactions related to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and certain outflows incurred in response to the coronavirus. The Technical Bulletin addresses specific questions raised by the GASB's stakeholders.

Technical Bulletin 2020-1, *Accounting and Financial Reporting Issues Related to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and Coronavirus Diseases*, clarifies the application of existing recognition requirements to resources received from certain programs established by the CARES Act. It also clarifies how existing presentation requirements apply to certain inflows of CARES Act resources and to the unplanned and additional outflows of resources incurred in response to the coronavirus disease.

COVID-19-related resources for stakeholders, including an emergency toolbox, are available on the GASB website at www.gasb.org/COVID19.

SEC and DOJ Sign Memorandum of Understanding: Sidley

On June 22, the SEC and the DOJ Antitrust Division signed a Memorandum of Understanding (MOU) to foster cooperation and communication with respect to promoting competitive conditions in the securities industry.1 Although the two enforcement agencies have worked together in recent years in relation to their respective enforcement responsibilities, this MOU is intended to foster even greater collaboration around law enforcement and regulatory matters.

SEC Chairman Jay Clayton and Antitrust Division Assistant Attorney General (AAG) Makan Delrahim announced the MOU at a conference hosted by MIT's Golub Center for Finance and Policy the day it was signed. AAG Delrahim's prepared remarks noted that the MOU contains two key provisions to facilitate interagency cooperation.2 First, the MOU establishes a twice-annual meeting between the SEC and the Antitrust Division, which will involve discussions and reviews of law enforcement and regulatory matters affecting competition in the securities industry. Second, it establishes guidelines facilitating the exchange of relevant and useful information—including nonpublic legal, economic and technical analyses. The MOU does not identify the subject matters that are likely to see increased interagency attention, but at a minimum, we expect that the agencies' joint efforts in the recent LIBOR and municipal bonds investigations will inform the path forward.

The MOU is noteworthy given that the two agencies have not always coordinated on areas of shared interest. For example, in the Credit Suisse v. Billing decision in 2007, the Supreme Court noted that the SEC and the Antitrust Division took conflicting positions in lower courts regarding whether antitrust laws applied to certain allegedly anticompetitive conduct in the securities markets.3 The MOU appears aimed in part at avoiding this type of conflict when possible.

Since Credit Suisse, the agencies have increasingly cooperated in investigations of shared interest. A notable example is the collaboration on cases involving manipulation of LIBOR and other interest-rate benchmarks, which focused on brokers and traders who allegedly profited by colluding to manipulate the benchmark interest rates. AAG Delrahim spoke at an event late last year and expressly acknowledged the efficiencies from interagency cooperation during these investigations, including the coordination of interview requests and document demands, and echoed these sentiments in his remarks last Monday.4

In addition, the agencies have recently worked together on the municipal bonds (munibonds) investigations. The munibonds investigations focused on alleged conspiracies to rig the bidding process on munibond investment contracts, and during Monday's conference, AAG Delrahim noted that the Antitrust Division "worked closely with the SEC [during the investigations] — which also brought its own actions."5

At the MIT conference, Chairman Clayton provided additional guidance as to the likely areas of future collaboration. For example, he highlighted both agencies' recent efforts to improve the SEC rules governing access to market data—i.e., data that historically has been disseminated by one market-data consolidator (or aggregator), known as the SIP. The SEC recently proposed a rule that seeks to displace the SIP model with a model that improves competition by "(1) accommodat[ing] multiple competing consolidators, and (2) … allow[ing] firms to process, or 'self-aggregate,' … market data feeds, in a way that is similar and consistent with the way in which firms self-aggregate proprietary data feeds today."6 DOJ submitted a comment letter in support of the SEC's proposed rule, commending the agency for seeking to introduce "greater competition and market forces into the collection, consolidation, and dissemination of market data for equities."7 Chairman Clayton also noted that the new MOU could help the SEC benefit from the Antitrust Division's views on theories of competitive harm as it works to determine whether the fees charged by exchanges for access to data are fair and reasonable.

In addition to these areas of potential collaboration, we expect that the MOU could further enhance collaborative efforts between the SEC and the Antitrust Division in the following areas:

- fraud in the merger and acquisition context, especially related to disclosures
- price-fixing conspiracies in a variety of financial contexts, including real estate, municipal securities and foreign currency exchange rates
- the role and conduct of exchanges and other trading venues
- the nature of certain fees charged by participants within the financial industry, including mutual fund advisory fees and hedge fund fees
- improving retail investors' access to information about equities and equity derivatives traded in the OTC markets

There is little doubt that meetings between the agencies to discuss their respective enforcement dockets will result in new investigations by both agencies. Accordingly, companies and financial services firms should be mindful of the potential for additional investigations when dealing with either of these agencies and assess the potential for follow-on or parallel investigations.

To view all formatting for this article (eg, tables, footnotes), please access the original here.

Sidley Austin LLP – Ike Adams, Stephen L. Cohen, Karen Kazmerzak, John I. Sakhleh, James Bowden, Jr. and Stewart Inman

July 2 2020

SEC Puts LIBOR Transition Testing in Focus: Latham & Watkins

In anticipation of LIBOR discontinuation, the SEC will begin examining transition progress.

Nearly a year after the US Securities and Exchange Commission's (SEC's) release of a Staff

Statement on LIBOR Transition, the SEC's Office of Compliance Inspections and Examinations (OCIE) appears ready to shift from passively monitoring LIBOR-transition risks to actively testing SEC-registered firms on their progress. OCIE previously mentioned LIBOR transition as an area to watch in its 2020 Examination Priorities, noting that "OCIE will be reviewing firms' preparations and disclosures regarding their readiness, particularly in relation to the transition's effects on investors."

OCIE released its latest Risk Alert on June 18, 2020 (Examination Initiative: LIBOR Transition Preparedness). The Alert provides registrants with specific information about the scope and content of OCIE's upcoming LIBOR-transition examinations and information requests. SEC registrants, including investment advisers, broker-dealers, investment companies, municipal advisors, transfer agents, and clearing agencies, may find the Alert helpful in reviewing and formulating their own plans and priorities.

Background

In its statement issued on July 12, 2019, the SEC noted that the risks associated with the transition away from LIBOR "will be exacerbated if the work necessary to effect an orderly transition to an alternative reference rate is not completed in a timely manner." To that end, the SEC affirmed that it was "actively monitoring the extent to which market participants are identifying and addressing" LIBOR-transition risks.

Planning Is Good, Progress Is Better

OCIE intends to review the extent to which registrants have evaluated the potential internal and external impacts of transitioning away from LIBOR, specifically as they relate to a firm's:

- Business activities
- Operations
- Services
- Customers, clients, or investors

Specifically, OCIE will review registrants' plans and progress with regards to:

- **Inventory:** Assessment of exposure to LIBOR-linked contracts with maturities beyond the expected discontinuation date of end-2021
- **Fallbacks**: Implementation of fallback language into impacted contracts
- **Operational readiness:** Enhancements or modifications to systems, controls, processes, and risk or valuation models
- **Communications:** Disclosures, representations, and reporting to investors regarding LIBOR transition efforts
- **Conflicts:** Identification and remediation of any potential conflicts of interest arising from LIBOR transition
- **Clients' efforts:** Clients' efforts to employ appropriate alternative reference rates

Appended to the Alert is an extensive (although not exclusive) list of potential documents and categories of information that OCIE may request from registrants during LIBOR transition examinations. While examinations may vary depending on the facts and circumstances of each registrant, requests for information may relate to:

- Organizational structure, particularly as it may be impacted by LIBOR transition
- Individuals or committees responsible for LIBOR transition oversight, and their related activities
- Impact assessments and results

- Strategic plans and timelines
- Risk management documentation
- Impacted risk and valuation models
- Communication made both externally to clients and internally to management, employees, or supervised persons
- Third parties or vendors that may be impacted by the transition away from LIBOR, or that a registrant may have employed to assist with LIBOR transition

Implications

Market participants have long been aware that the discontinuation of LIBOR would pose a complex set of operational challenges. The intervening COVID-19 pandemic, however, undoubtedly diverted resources and attention away from execution of LIBOR transition plans. Market participants, however, should keep LIBOR transition in focus and continue to address the array of challenges it presents, as regulatory authorities across the globe have communicated that LIBOR discontinuation remains on track.

On March 25, 2020, the UK Financial Conduct Authority (FCA), Bank of England, and members of the Sterling RFR Working Group issued a statement on the impact of COVID-19 on firms' LIBOR transition planning. The UK authorities acknowledged in that statement that COVID-19 had impacted the timing of some aspects of the transition programs, but confirmed that there is no change to the assumption that firms cannot rely on LIBOR being published after the end of 2021. The UK authorities reconfirmed this assumption on April 29, 2020. Subsequently, on May 13, 2020, the UK Prudential Regulation Authority (PRA) and FCA announced a resumption of full supervisory engagement with firms on their LIBOR transition progress beginning June 1, 2020, including data reporting at the end of Q2 (previously suspended at the end of Q1 due to the COVID-19 pandemic).

In its 2020 Examination Priorities, OCIE warned that "insufficient preparation could cause harm to retail investors and significant legal and compliance, economic and operational risks for registrants." Regulatory risk can be added to that list, as OCIE begins to incorporate LIBOR-transition readiness into its examinations. Registrants must now be prepared to evidence their transition efforts in preparing for the scheduled discontinuation of LIBOR.

For more information on LIBOR transition issues, see:

10 LIBOR Transition Focus Areas in 2020

LIBOR Discontinuation and Transition — What Investment Managers Should Know

FCA Indicates LIBOR Transition Deadline Will Not Be Extended Due to COVID-19

HM Treasury Announces Welcome Proposed Amendments to the UK Benchmarks Regulation

Latham & Watkins LLP – Vicki E. Marmorstein, Jane Summers, Yvette D. Valdez, Stephen P. Wink, Douglas K. Yatter and Deric M. Behar

June 30 2020

MSRB Modifies Rules to Align with Reg. BI: Cadwalader

The MSRB modified several rules to align with Regulation Best Interest (or "Reg. BI").

As previously covered, the MSRB-proposed rule changes will revise:

- Rule G-19 ("Suitability of Recommendations and Transactions") to limit its applicability to those matters when Reg. BI is not applicable;
- Rule G-48 ("Transactions with Sophisticated Municipal Market Professionals") to clarify that relief from conducting a customer-specific suitability analysis when making a recommendation to a Sophisticated Municipal Market Professional (or "SMMP") is only available for recommendations subject to MSRB Rule G-19; and
- Rule G-20 ("Gifts, Gratuities, Non-Cash Compensations and Expenses of Issuance") to align permissible non-cash compensation with related requirements under Reg. BI.

Additionally, the rule changes mandate all broker-dealers to maintain books and records consistent with Reg. BI and related Form CRS requirements.

The amendments will go into effect on June 30, 2020, which is also the compliance date for Reg. BI.

Cadwalader Wickersham & Taft LLP

June 29 2020

BDA Calls SEC's Municipal Advisor Exemption "Dangerous."

BDA today sent a letter to SEC Chairman Jay Clayton on the Temporary Conditional Exemption the SEC issued last month with regard to Municipal Advisors' role in bank placement transactions.

In our letter we highlight the risks associated with the TCE and critique the SEC's justifications. We cite testimony Chairman Clayton presented last week before a House Financial Services subcommittee where he discussed the prospect of making the exemption permanent.

BDA's letter is the latest step in a year-and-a half long advocacy campaign regarding the role of MAs in municipal private placements. We will continue to monitor SEC actions in this area, especially as the December 31 deadline for the TCE approaches, to ensure it is not expanded or extended. Please call with any questions.

Bond Dealers of America

July 2, 2020

Municipal Securities Firm Settles FINRA Charges for SHORT System Reporting Failures.

A municipal securities firm settled FINRA charges for reporting failures regarding the MSRB's

Short-Term Obligation Transparency ("SHORT") System. According to FINRA, the firm violated MSRB Rule G-34 ("CUSIP Numbers, New Issue, and Market Information Requirements") by failing in numerous instances to submit the correct minimum denomination and maximum interest rates to the SHORT System.

To settle the charges, the firm agreed to a (i) censure and (ii) $35,000 fine.

Cadwalader Wickersham & Taft LLP

June 29 2020

SEC and DOJ Antitrust Division to Increase Collaboration on Rulemaking and Investigations: Pepper Hamilton

On June 22, the Department of Justice Antitrust Division (the Division) and the Securities and Exchange Commission (SEC) announced a first-of-its-kind Memorandum of Understanding (MOU) between the two agencies. The MOU was announced by Assistant Attorney General Makan Delrahim during "A Discussion on Equity Market Structure," hosted by the MIT Golub Center for Finance and Policy.1 SEC Chairman Jay Clayton was also in attendance.

While the MOU itself has not been released, AAG Delrahim explained that the MOU establishes a framework for the Division and the SEC "to continue regular discussions and review law enforcement and regulatory matters affecting competition in the securities industry, including provisions to establish periodic meetings among the respective agencies' officials." The MOU also "provides for the exchange of information and expertise the agencies believe to be potentially relevant and useful to their oversight and enforcement responsibilities, as appropriate and consistent with applicable legal and confidentiality restrictions."

Increased Collaboration on Rulemaking

AAG Delrahim detailed recent work undertaken by both the SEC and the Division to bring enforcement efforts up to date. The SEC has primarily been focused on rulemaking activity, with a specific eye toward market data infrastructure and proxy voting rules. The first proposed rule, titled "Market Data Infrastructure" (commonly known as the "Market Data Proposal"), focuses on securities information processors, referred to as SIP Data, and exchange-specific Prop Data products. The rules governing content and distribution of SIP Data were implemented in the late 1970s, and technological changes have led to a shifting competitive landscape. The Division submitted a public comment on the Market Data Proposal, praising the SEC's efforts to "address potential shortcomings and to improve the regulatory system through modernization and the explicit introduction of competition." The Division concluded that the Market Data Proposal would lower the barriers to market entry, thus enhancing competition in the market.

The second rule AAG Delrahim highlighted is titled "Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice" (commonly known as the "Proxy Rules Proposal"). The goal of this proposed rule, according to the SEC, is to "help ensure that investors who use their proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions." Again, the Division submitted a public comment in support of the SEC's proposed rule and noted that "competition is well-served when consumers have better access to better information."

AAG Delrahim then addressed the Division's own efforts to keep regulations updated and relevant. He pointed to the 2018 launch of the Judgment Termination Initiative, which involves the review of close to 1,300 legacy judgments dating back nearly 70 years that "remain on the books unchanged for decades despite material changes to the competitive landscape brought upon by technological developments." The Division has been reviewing these settlements and either terminating or modifying them as appropriate. To date, courts have terminated nearly 800 legacy judgments.

While specific details are lacking, it appears that the MOU will formalize regular meetings at which the Division and the SEC will continue to identify regulations and legacy judgments that, because of technological advances and the passage of time, are ripe for an update. The formalization of their partnership may lead to an increase in activity from both agencies in this arena.

Closer Coordination in Investigations

AAG Delrahim also noted that the exchange of information and expertise between the agencies allowed for enforcement actions in complex markets, and he specifically pointed to recent investigations in the markets for foreign currency exchange, interest rate benchmarks, and municipal bonds. In the foreign exchange investigation, banks and individuals "were charged for coordinating their currency trades to manipulate benchmark exchange rates to increase their profits. They were also charged for agreeing to withhold bids or offers to avoid moving the exchange rate in a direction adverse to open positions held by their co-conspirators." Five major banks entered guilty pleas, two former traders also pleaded guilty, and another trader was convicted as a result of this investigation. The Division also prosecuted both banks and traders in connection with a scheme to manipulate the London Interbank Offered Rate (LIBOR). The LIBOR investigation resulted in six corporate convictions of banks and eight individual convictions. Finally, in the municipal bonds investigation, the Division worked closely with the SEC to convict one financial services firm and 17 individuals. The SEC brought its own civil actions as a result of this investigation.

AAG Delrahim's focus on these complicated finance-related investigations in connection with this announcement portends even closer cooperation through the MOU between the Division and the SEC to prosecute bad actors in this industry. Indeed, shortly after these remarks, The Wall Street Journal reported that the MOU may lead to antitrust scrutiny of the fees charged by stock exchanges for market data.2 Chairman Clayton specifically noted that "many Wall Street firms had complained about the cost of data" and that the Division "could help the SEC determine whether exchanges' data fees are subject to competition."

Takeaways

While the agencies have not provided specific details on what the future holds, AAG Delrahim's comments on the recent cooperation between the Division and the SEC provide several clues for what lies ahead:

- Expect both the Division and the SEC to continue to evaluate rules and regulations that may be outdated due to technological advances and shifting competitive landscapes.
- Both the Division, through the Judgment Termination Initiative, and the SEC, through the Market Data Proposal, have shown a willingness to respond to industry concerns as it relates to updating regulations. The Market Data Proposal appears to have its origins in complaints from Wall Street firms. If there are specific regulations you believe may be in need of updating, consider proactively reaching out to the agencies.
- Both agencies appear ready to share information more frequently, increasing the likelihood of investigations, particularly in the financial services markets.
- Given the increased cooperation, expect to see more parallel investigations from the Division and

the SEC.

Endnotes

1 "Changes in Latitudes, Changes in Attitudes," Enforcement Cooperation in Financial Markets, Makan Delrahim, June 22, 2020, https://www.justice.gov/opa/press-release/file/1287716/download.

2 Dave Michaels & Alexadner Osipovich, "SEC, Justice Department to Scrutinize Exchanges' Market-Data Business," The Wall Street Journal, June 22, 2020, https://www.wsj.com/articles/sec-justic--department-to-scrutinize-exchanges-market-data-business-11592864481.

Pepper Hamilton LLP

by, Jay Dubow, Barbara Sicalides & Dennie Zastrow

June 26, 2020

House Committee Discusses SEC Temporary MA Order.

The House Financial Services Committee Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets held a hearing this afternoon titled "Capital Markets and Emergency Lending in the COVID-19 Era." SEC Chairman Jay Clayton was the sole witness. The hearing focused on the US capital markets' response to the virus crisis and steps the SEC has taken to mitigate the effects of the virus. The hearing also focused on a number of capital markets bills pending before the Subcommittee.

Subcommittee member French Hill (R-AR) asked Chairman Clayton about the Temporary Conditional Exemption the SEC issued last week related to the role of Municipal Advisors in bank placement transactions. The TCE permits MAs to solicit bank investors in certain private placement transactions without registering as a broker-dealer.

Rep. Hill asked Chairman Clayton why the SEC did not consider the TCE as a rule change rather than as an exemptive order. Chairman Clayton said the TCE is ***"very narrow and temporary"***. He did not acknowledge that the SEC must conduct this type of change as a rulemaking under the Administrative Procedures Act. ***He did say, however, that if the SEC seeks to make this TCE permanent, they would undertake that as a proposed rule change under the APA.***

Rep. Hill also highlighted that the municipal market has largely recovered from the disruption in March, that there is no "lack of [market] access" for most municipal issuers, and there is little justification for executing the TCE as an emergency, COVID-motivated action. He said that the SEC was "using the pandemic to rationalize its actions."

Rep. Hill also referenced the requirement in the TCE for MAs using the TCE to report key transaction data information to the SEC. Rep. Hill asked Chairman Clayton of the SEC plans to make those data public. Clayton answered that he cannot commit today to releasing the data, but he committed to considering it.

In addition to today's hearing, we have also been in continuing discussions with the MSRB on TCE-related issues. We expect the MSRB to issue guidance soon specifying that MSRB Rule G-23 does not inhibit dealer MAs from using the TCE in bank placement transactions.

We will continue to engage with the SEC and other regulators on the issues raised by the TCE. As always, if you have any questions, please call or write.

Bond Dealers of America

June 25, 2020

MSRB Releases Guidance on Rule G-23 and the SEC's Temporary Conditional Order.

The MSRB this afternoon released guidance addressing the interaction of MSRB Rule G-23 and the SEC's Temporary Conditional Order related to the role of Municipal Advisors in bank placement transactions. The guidance is in the form of an addition to the MSRB's COVID-related frequently asked questions.

As you may recall, BDA reported last Friday that the MSRB believes that Rule G-23 does not prevent dealer MAs from using the TCE. Today's release confirms that position. This guidance has been approved by relevant SEC staff. The text of today's addition is:

To facilitate more timely and efficient access to bank financing alternatives by municipal issuers during this historic COVID-19-related market disruptions, the SEC issued an emergency temporary conditional order to permit registered municipal advisors to solicit a defined set of banks, wholly-owned subsidiaries of banks, and credit unions in connection with certain direct placements of municipal securities by their municipal issuer clients (the "Temporary Conditional Exemption"). In light of MSRB Rule G-23, on activities of financial advisors, which prevents role switching, is the Temporary Conditional Exemption available to registered municipal advisors that are also registered dealers?

Yes. MSRB Rule G-23(d)(i) prevents a dealer that has a financial advisory relationship with respect to the issuance of municipal securities from, among other things, switching to a role as placement agent for that issuance of municipal securities. A firm that is registered as both a municipal advisor and a dealer may rely on, and engage in, the activities contemplated by the Temporary Conditional Exemption in its role as a municipal advisor without role switching for purposes of MSRB Rule G-23, so long as the firm complies with the conditions set forth in the Temporary Conditional Exemption. The MSRB urges firms to be mindful of their obligations under MSRB rules concerning municipal advisory activity when acting in their capacity as a municipal advisor and engaged in activities contemplated by the temporary conditional exemption.

MSRB FAQ's found here.

The BDA will continue working with the SEC and others including Congress on the TCO ensuring expiration in December.

Bond Dealers of America

June 25, 2020

Hawkins Advisory: SEC Exemptive Order re Municipal Advisors

The attached Advisory describes the SEC's exemptive order of June 16, 2020, which provides a temporary exemption from registration as a broker for registered municipal advisors, subject to satisfaction of certain conditions.

The order is linked here.

Temporary Exemption From Broker Registration for Municipal Advisors: Jones Day

The U.S. Securities and Exchange Commission ("SEC") has granted a temporary exemption from broker registration for certain activities by municipal advisors.

On June 16, 2020, the SEC issued a temporary conditional exemption to allow registered municipal advisors to solicit banks, their wholly owned subsidiaries engaged in commercial lending and financing, and credit unions ("Qualified Providers") with respect to direct placements of securities issued by municipal issuer clients, and to receive transaction-based compensation without having to register as a broker under the Securities Exchange Act of 1934. The temporary exemption is effective until the end of the year.

The temporary exemption is meant to assist smaller municipal issuers that may be having difficulties meeting unexpected financing needs as a result of the COVID-19 pandemic by allowing municipal advisors to help these issuers obtain financing through direct placements. The temporary exemption does not apply with respect to public offerings of municipal securities or for sales to retail investors. Under the temporary exemption, a direct placement may not exceed $20 million and must be issued in denominations of at least $100,000 to limit the potential of resales to retail investors.

To protect investors, the SEC conditioned the temporary exemption on the municipal advisor:

- Obtaining a written representation from the Qualified Provider that it (i) meets the definition of "Qualified Provider"; (ii) is capable of independently evaluating the risks of the transaction; (iii) is not purchasing with a view to further distribution; and (iv) will not transfer any part of the direct placement for one year except to another Qualified Provider;
- Providing a written representation to the Qualified Provider indicating it (i) only represents the interests of the municipal issuer and not the Qualified Provider; (ii) is soliciting the Qualified Provider pursuant to the temporary exemption; (iii) has not performed due diligence on behalf of the Qualified Provider; (iv) has not (nor has the municipal issuer) engaged a broker-dealer as a placement agent for the direct placement; and (v) acknowledges that the Qualified Provider may choose to engage a broker-dealer; and
- Notifying the SEC staff when relying on the exemption.

The SEC previously proposed a broader exemption from broker registration for municipal advisors engaging in certain placement activities, which received significant opposition from industry members. While the SEC stated in its current order that it is not moving forward with that broader exemption at this time, it indicated that it may take its experience under this temporary conditional exemption into account in considering the broader proposal.

Jones Day – Margaret R. Blake (Peggy), Laura S. Pruitt, Sergio Alvarez-Mena and Michael R. Butowsky

June 26 2020

SEC Discussion of Secondary Market Municipal Securities Disclosure Practices.

Spotlight on Transparency: A Discussion of Secondary Market Municipal Securities Disclosure Practices

Tuesday, June 16, 2020

Opening Statements & Introduction

In his opening remarks, Securities and Exchange Commission (SEC) Chairman Jay Clayton summarized the notable changes in the municipal securities market since the last conference held by the Office of Municipal Securities, specifically referencing the increases in new issuances, retail ownership of municipal securities, and municipal inflows into managed products. He discussed the impact of the COVID-19 pandemic on the municipal securities market before announcing that in light of market conditions and to facilitate timely and efficient access by smaller municipal issuers to capital, the SEC decided to issue an order providing temporary conditional relief to municipal advisors from the potential application of broker-dealer registration requirements in connection with certain direct placement of municipal securities until December 31, 2020. Clayton noted that the intent of this relief is to assist smaller municipal issuers and the relief is only available in connection with a direct placement in the aggregate principal amount of $20 million or less. Clayton then turned to the importance of this conference, stating that the topic of secondary market disclosure practices is more important than ever given the recent period of economic uncertainty. He referenced the May joint statement issued in conjunction with Rebecca Olsen, Director of the Office of Municipal Securities, which recognized the effects and uncertainties created by COVID-19 and highlighted the importance of municipal issuers providing both current financial and operating status information in times of increased uncertainty. Clayton continued that the importance of disclosure was also recently highlighted by the Office of Municipal Securities in a Staff Legal Bulletin summarizing the staff's views on the application of the antifraud provisions to statements made by municipal issuers in the secondary market. Clayton concluded with a discussion of the two disclosure-related recommendations put forth by the Fixed Income Market Structure Advisory Committee (FIMSAC) at their February meeting and noted that the Office of Municipal Securities is currently considering such recommendations.

In her opening statement, Commissioner Hester Peirce said that the dislocations in the municipal markets over the past several months underscore the importance of disclosure. She emphasized that there is an increased need for investors to be granted sufficient access to transparency about pricing and underlying fundamentals. She concluded by reaffirming the importance of good disclosure practices in providing investor protection and facilitating capital formation by municipal issuers in both normal and stressed markets.

In his opening statement, Commissioner Elad Roisman noted that he is interested in exploring what lessons can be learned from this recent period of uncertainty in more broadly considering ways to improve the timeliness and quality of secondary market disclosures. He emphasized that the SEC should continue to pursue policies related to transparency that support the continued evolution of the municipal securities markets to ensure fair access for all investors. Roisman said that in this uncertain environment, municipal issuers could benefit from further understanding the type of information they should be disclosing to the market and when they should be disclosing that information.

In her opening statement, Commissioner Allison Herren Lee noted the benefit of the temporary conditional relief for municipal advisors, specifically referencing her support for the scope being narrower than the original proposed order.

Rebecca Olsen, Director, SEC Office of Municipal Securities, provided a summary of the agenda and noted the timeliness of a discussion regarding secondary market disclosure practices. She stated that the goals of these discussions are to: 1) gather information about disclosure practices in the secondary market; 2) discuss what, if any, changes in disclosure practices are needed to meet the needs of investors; 3) consider whether there are any opportunities for regulatory improvements to facilitate such changes in disclosure practice. She concluded that market participant feedback is essential in assisting the SEC in following developments in the municipal securities market and evaluating whether the regulatory framework is appropriate.

Discussion: Voluntary Disclosure Practices in the Secondary Market

- Moderator: Adam Wendell, Senior Special Counsel, Office of Municipal Securities, SEC
- Jennifer Brown, Director of Finance, City of Sugar Land, Texas
- James McIntyre, Director of Capital Markets, New York State Homes and Community Renewal
- Chris Meister, Executive Director, Illinois Finance Authority
- Stacey Lewis, Partner, Pacifica Law Group

Wendell kicked off the discussion asking for the panelists' perspectives on the various types of disclosures and the utility of how such disclosures are provided. Of note, McIntyre emphasized that his organization focuses on what is material, what investors need, and what the issuers can reasonably provide. He continued that in response to the COVID-19 economic environment, he took a "wait and see" approach in terms of portfolio impact and that he is now preparing current data, that is also most useful, to be released as voluntary disclosure on EMMA. Brown then provided her view, specifically noting that they provide a financial transparency section on their website where they post a monthly unaudited financial report. She said that she has also placed an emphasis on educating city residents to help them better understand municipal bonds and why they are being issued. Meister supplied the perspective of a state-based conduit issuer, highlighting their unique role and noting that they have observed an uptick in voluntary disclosures.

In response to a question regarding the benefits of increased disclosures, various panelists noted the importance of issuers coming together develop best practices and disclosing commonalities as opposed to focusing on differences. McIntyre and Meister specifically noted that they have viewed tangible benefits, such as additional investors and pricing benefits, from this best practice approach. Lewis said that from a legal perspective, many public entities have increased transparency as a general principal and that increased disclosure decreases the likelihood that one errant statement is viewed as material.

In conclusion, the panelists highlighted the importance of voluntarily putting forth as much information as possible, while ensuring that such information is relevant to investors, to increase transparency without overburdening staff.

Discussion: Perspectives from the Buy Side

- Moderator: Ahmed Abonamah, Deputy Director, Office of Municipal Securities, SEC
- Nicole Byrd, Senior Investment Professional, Nationwide Mutual Insurance
- Sandy Pae Goldstein, Director, Fundamental Credit Opportunities
- Hugh McGuirk, Portfolio Manager, T.Rowe Price
- Maryann Santos, Business Operations Manager, Capital One Public Funding, LLC

Abonamah solicited responses from the panelists as to their views on the May 5th Clayton/Olsen joint statement that encouraged issuers to provide current and forward-looking information. All praised the statement and noted its utility in helping them better analyze the pricing of bonds due to the subsequent increase in voluntary disclosure. Santos said that increased disclosure has granted critical insight to the true impact of COVID-19, specifically regarding how issuers are cutting their expenses and the impact on revenue streams. McGuirk stated that in essence, increased disclosure, both in terms of frequency and variety of information, makes for significantly more attractive investments.

Regarding the actual impact of COVID-related disclosure on business decisions (buy, sell or hold), Byrd asserted that weaker credits in the portfolio with weaker disclosures are the first to be offloaded. She continued that in the secondary market, if she is unable to adequately evaluate an offering, she will simply pass and that she would much prefer a weaker credit with enhanced disclosure as opposed to a higher credit with weaker disclosure. McGuirk echoed this sentiment and added that with such revenue shortfalls as can be observed as a result of the COVID-19 pandemic, if adequate disclosure is not present, he will pass on the investment.

In discussing the February 7th Office of Municipal Securities' Staff Legal Bulletin, Byrd and Goldstein stated that they did not observe significant movement in the market itself in terms of disclosure. Goldstein added that issuers must continue to receive the message that there is a need for timely and consistent disclosures. Turning more generally to ongoing disclosures writ large, McGuirk noted that unaudited financial disclosures are tremendously beneficial as long as they are not intended to deceive. All panelists agreed that the primary source of information is compiled through EMMA, as well as various investor websites, and added that there is a clear desire for information more frequent than the annual disclosure. Santos specifically outlined that increased insight as to why certain trends are occurring would go a long way in assisting the investing public. McGuirk echoed this sentiment and called for increased context and justification for the information and numbers that are being put forward.

In response to a question from Abonamah concerning the asymmetry of disclosure that exists between public bondholders and private lenders, Byrd noted that in her estimation, it is very important to know the terms and conditions of any agreement that issuers enter into. Santos added that she has observed a trend that issuers do not want to disclose anything to direct lenders that they are not also disclosing to the public market.

Discussion: Secondary Market Disclosure Hot Topics

- Moderator: Rebecca Olsen, Director, Office of Municipal Securities, SEC
- Patrick Brett, Managing Director, Citigroup
- Dan Deaton, Partner, Nixon Peabody LLP
- Mark Kim, Executive Vice President and Chief Operating Officer, MSRB
- Lisa Washburn, Managing Director, Municipal Market Analytics, Inc.

The third discussion of the day began with Kim presenting this deck on continuing disclosures from the MSRB's perspective. Of note, Kim highlighted the significant increase in the number of event 15 disclosures over the last three months due to issuers increasingly turning to the private markets in the COVID-19 environment. He concluded that the MSRB has been monitoring, and will continue to monitor, the impact of COVID-19 on market participants and market function. Following this presentation, Washburn presented this deck and noted that the outlook for the higher education, student housing and retirement facilities sectors is somewhat bleak with additional challenges ahead. Washburn recommended the ability to search for COVID-19 related disclosures directly on EMMA as a way to improve transparency.

Deaton discussed the May 5th Clayton/Olsen joint statement and the February 7th Office of Municipal Securities' Staff Legal Bulletin, asserting that both items have worked well together to increase the overall sensitivity to investors in the current marketplace and their pressing need for information. He continued that the joint statement provided critical guidance, in a plain-English fashion, that allowed issuers to better understand they should be putting forth whatever information they could despite the uncertainty. Deaton stated that the public statement encouraged issuers to approach COVID-19 related disclosure from an iterative perspective. Regarding the staff legal bulletin, Deaton said that it encouraged issuers to take control of their "credit narrative." Deaton concluded that while the joint statement has been much more impactful compared to the staff legal bulletin, both have served to promote the critical importance of voluntary disclosures.

In addressing how to make disclosure agreements more uniform and predictable, Kim noted that the challenge for the MSRB is validating the continuing disclosure agreement (CDA) due date and dealing with the various submission errors when information is entered incorrectly on Form G-32. Deaton expressed that the current CDA regime can obstruct quality disclosure in two ways: 1) it does not permit multiple, and varied, kinds of data being released when it is ready due to the annual report being fixated on one date and 2) by being tied to financial and operating information in a final official statement, the process is overly mechanistic and prevents issuers from providing the most useful information in a timely manner.

Brett discussed the impact of the COVID-19 pandemic on the LIBOR transition. He that while LIBOR is present in the municipal securities market on both the debt and derivatives side, the more complex issue in need of resolution is the derivatives problem due to the duration of exposures and the fact that municipal bonds tend to go out much longer. He continued that there is awareness of the issue amongst issuers but there are other things that need to happen before issuers can truly move towards the end of this process. Brett said that in terms of a path forward, the adoption of the ISDA protocol is most likely easier from an execution perspective when compared to bilaterally negotiating an exit. On this topic, he concluded that there will be a significant amount of market development over the next 18 months. Deaton concurred that issuers are aware that LIBOR is being phased out but that there are many questions that still need to be resolved.

The final question of the conference addressed the Municipal Liquidity Facility. Brett stated that pricing of the facility has been disappointing for many issuers but that investors assert that there is a psychological benefit to having this backstop intended to stop cash flow issues from snowballing into credit issues.

For more information on this event, please click here.

SEC Issues Temporary Order Exempting Municipal Advisors From Broker-Dealer Registration Requirements Under Certain Limited Conditions: Ballard Spahr

The U.S. Securities and Exchange Commission (SEC) on June 16, 2020, granted a temporary conditional exemption (Temporary Order) from broker registration under Section 15 of the Securities Exchange Act of 1934 (Exchange Act). The exemption allows registered municipal advisors to perform certain permitted activities for municipal issuers and obligors as defined in the Exchange Act (Municipal Issuers) in connection with direct placements of municipal securities.

Prior to the temporary order, registered municipal advisors were required to register under the Exchange Act as a broker to perform certain activities related to the placement of securities. Subject to the conditions described in the Temporary Order and summarized below, the Temporary Order exempts municipal advisors from the registration requirement by allowing them to solicit banks, their wholly-owned subsidiaries engaged in commercial lending and financing activities, and credit unions in connection with direct placements of securities issued by their Municipal Issuer clients.

The Temporary Order is narrower than the SEC's proposed exemptive order of October 2, 2019 (Proposed Order). The SEC stated that the Temporary Order is intended to address disruption in the municipal securities markets as a result of the COVID-19 pandemic. In its statements releasing the Temporary Order, the SEC stated that it decided not to move forward with the Proposed Order "at this time," and left open the possibility that it will be revived in some form in the future.

For municipal advisors to qualify for relief under the Temporary Order, the following conditions apply:

- Purchasers under the Temporary Order must be (i) a bank as defined in Section 3(a)(6) of the Exchange Act; (ii) a wholly owned subsidiary of a bank engaged in commercial lending and financing activities, such as an equipment lease financing corporation; or (iii) a federally or state-chartered credit union (each, a Qualified Provider). There appears to be no limitation on the number of Qualified Providers purchasing the securities in a given issuance.
- The municipal advisor must report to the SEC staff any instances of reliance on the Temporary Order within 30 calendar days of the sale date. The notification must identify the issuer or conduit, date of direct placement, principal amount of the placement, the purchaser(s), and the CUSIP number, if available.
- The municipal advisor must obtain written representations from the Qualified Provider that the Qualified Provider:
  – is a Qualified Provider as defined in the Temporary Order;
  – is capable of independently evaluating the investment risks of the transaction;
  – is not purchasing with a view to distribution; and
  – will not transfer any portion of the direct placement within one year of the date of issuance of the securities, except to another Qualified Provider.
- The municipal advisor must make a written representation to the Qualified Provider that the municipal advisor:
  – represents solely the interests of the Municipal Issuer and not the Qualified Provider;
  – is soliciting the Qualified Provider in connection with the direct placement pursuant to the Temporary Order;
  – has not conducted due diligence on behalf of the Qualified Provider;
  – has not, as of the date of the written representation, engaged—nor has the Municipal Issuer engaged—a broker-dealer as a placement agent in connection with the direct placement; and
  – acknowledges that the Qualified Provider may nonetheless choose to engage the services of a broker-dealer to represent the Qualified Provider's interests.
- The municipal advisor must receive a written acknowledgement of receipt of the disclosures by the Qualified Provider.

Other Limitations:

- The Temporary Order is effective from June 16, 2020, until December 31, 2020.
- The aggregate amount of the direct placement may not exceed $20 million. The Temporary Order does not state whether this aggregate limit applies for the duration of the Temporary Order or if more than one issuance of this size per Municipal Issuer is permissible.
- The minimum authorized denomination size for the securities being placed is $100,000.
- The municipal advisor must make and keep the records required by the Exchange Act Rule 15Ba--8(a)(1)

The Temporary Order will not be available to dealer-affiliated municipal advisors since MSRB Rule G-23–which applies only to dealer-affiliated municipal advisors—prohibits a dealer municipal advisor from acting as placement agent and a municipal advisor on the same transaction. This disparity will be of great concern to many dealer-affiliated municipal advisors.

Additionally, the potential consequences to the municipal advisor are unclear if the conditions of the Temporary Order are not met. Municipal advisors may be reluctant to rely on the exemption in the absence of more guidance from the SEC on the timing of the disclosures and other ambiguities such as the application of the $20 million limit.

The Temporary Order discusses that the now-permitted solicitation activity is in addition to the core advisory activities in which a municipal advisor might otherwise engage under the existing regulatory regime. These core activities include assisting municipal entity clients and or obligated person clients in (i) developing a financing plan; (ii) assisting in evaluating different financing options and structures; (iii) assisting in selecting other parties to the financing, such as bond counsel; (iv) coordinating the rating process, if applicable; (v) ensuring adequate disclosure; and/or (vi) evaluating and negotiating the financing terms with other parties to the financing including the provider of the direct placement. It is unclear to what extent these “core advisory activities” continue to be a condition to the now-permitted solicitation activities. Since municipal advisors are allowed to limit the scope of their activities (but not their core legal duties), we may see the emergence of municipal advisors set up solely to act as finders.

While the Temporary Order settles the question of whether soliciting investors is an activity subjecting people to broker-dealer registration, it leaves unaddressed the question of how to determine whether these direct placement instruments and the financing participants are subject to federal regulation as securities in the first place if they are unregulated loans and not securities. This ambiguity has been a critical, but as yet unresolved, issue for dealers and municipal advisors who need to know which laws to apply to their transactions.

by the Public Finance Group

June 23, 2020

are urged to consult your own attorney concerning your situation and specific legal questions you have.

Financial Accounting Foundation Appoints Dianne Ray to Governmental Accounting Standards Board.

Norwalk, CT—June 23, 2020 — The Board of Trustees of the Financial Accounting Foundation (FAF) today announced the appointment of Dianne Ray to a five-year term on the Governmental Accounting Standards Board (GASB). Ms. Ray currently serves as the state auditor of Colorado. Her GASB term begins July 1, 2020 and extends through June 30, 2025.

"The FAF Board of Trustees is very pleased to welcome Dianne to the GASB," said FAF Chair Kathleen L. Casey. "With more than 25 years of practice in governmental accounting and auditing, Dianne has extensive experience overseeing independent audits and reviews that promote greater transparency and accountability in government."

"Dianne will be a wonderful asset to the GASB," said David A. Vaudt, GASB chairman. "She has overseen performance, financial, and IT audits and evaluations as well as tracked independent audits of local governments within the state of Colorado. Ms. Ray understands the importance of the independent standard- setting process, having served a four-year term on the Advisory Council on Government Auditing Standards."

Ms. Ray succeeds outgoing GASB member Michael H. Granof, whose second term concludes on June 30, 2020.

"On behalf of the GASB, I want to thank Dr. Granof for his decade of service on the Board," added Vaudt. "His service on the GASB was informed by an impressive academic career, including serving from 1984 until his retirement in 2019 as the Ernst & Young Distinguished Centennial Professor of the McCombs School of Business at the University of Texas at Austin. We value both his dedication to improving accounting standards for state and local governments and his work to inspire the next generation of standard setters."

In her role as Colorado's state auditor, Ms. Ray has been recognized for her innovative leadership style. In 2012, the Colorado Society of Certified Public Accountants and the American Institute of Certified Public Accountants named Ms. Ray as one of three "Women to Watch" in the Experienced Leader category. In May 2015, the University of Colorado Denver's School of Public Affairs awarded her the 2015 Leo Reithmeyer Award for the Top Public Administrator in Colorado. In August 2016, the president of the National Association of State Auditors, Controllers, and Treasurers named Ms. Ray as recipient of the annual President's Award. Most recently, she was awarded the William R. Snodgrass Distinguished Leadership by the National State Auditors' Association.

Prior to becoming the state auditor, Dianne served as the Office of the State Auditor's (OSA) Deputy State Auditor primarily responsible for the financial audit of the State of Colorado. Dianne began her career at the OSA in 2002 as Director of the Local Government Audit Division. Prior to joining the OSA, Dianne worked in local governments for 15 years, including as Director of Finance and Administration for the city of Louisville, Colorado.

Dianne holds a Bachelor of Science degree in accounting from Arizona State University and a Master of Public Administration degree from the University of Colorado. She is a licensed certified public accountant in Colorado and Arizona.

GASB Issues Guidance on Certain Component Unit Criteria and Section 457 Deferred Compensation Plans.

Norwalk, CT, June 23, 2020 — The Governmental Accounting Standards Board (GASB) today issued new guidance designed to reduce costs and increase the consistency and comparability of reporting state and local governments' fiduciary component units.

A primary goal of the Board in issuing Statement No. 97, *Certain Component Unit Criteria, and Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans*, is to mitigate costs associated with reporting certain defined contribution pension plans, defined contribution other postemployment benefit (OPEB) plans, and other employee benefit plans, such as certain Section 457 plans. Another important goal of the Statement is to improve the reporting of Section 457 deferred compensation plans that meet the definition of a pension plan and for benefits provided through those plans.

Statement 97 requires that, for purposes of determining whether a primary government is financially accountable for a potential component unit (except for a potential component unit that is a defined contribution pension plan, a defined contribution OPEB plan, or other employee benefit plan), the absence of a governing board should be treated the same as the appointment of a voting majority of a governing board if the primary government performs the duties that a governing board typically performs. Appointment of a voting majority is a criterion in existing standards used to determine whether a legally separate entity should be incorporated into the government's financial statements.

Under certain circumstances, a financial burden on a government also is a criterion in existing standards used to determine whether a legally separate entity should be incorporated into the government's financial statements. After further considering the perceived costs associated with applying existing standards (specifically, paragraph 7 of Statement No. 84, Fiduciary Activities), the Board, in Statement 97, decided to limit the application of the financial burden criterion regarding contributions to postemployment benefit plans to only defined benefit pension plans and defined benefit OPEB plans that are administered through trusts.

Prior standards presumed that all Section 457 plans were not pension plans and, therefore, were not subject to pension plan reporting requirements; similarly, benefits provided through Section 457 plans were not reported as pension benefits. Under Statement 97, however, Section 457 plans should be classified as either a pension plan or other employee benefit plan, depending on whether the plan meets the definition of a pension plan. It also clarifies that Statement 84, as amended, should be applied to all arrangements organized under IRC Section 457 to determine whether those arrangements should be reported as fiduciary activities.

Statement 97 is available on the GASB website, www.gasb.org. Information on when the Statement takes effect is available on pages three and four of the document.

COVID-19-related resources for stakeholders, including an emergency toolbox, on the GASB website at www.gasb.org/COVID19.

NFMA Submits Comment Letter to GASB.

On June 25, 2020, the NFMA submitted a comment letter to GASB on the Exposure Draft relating to Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements.

To read the letter, click here.

MSRB On Inter-Dealer Municipal Trading.

Read the MSRB's updated fact sheet showing that trades executed on an ATS continue to account for more than half of all inter-dealer trade.

MSRB Enhances Transparency of Timing of Issuers' Annual Disclosures on the EMMA Website.

The MSRB has announced a July 1, 2020 operative date for changes to the EMMA website to enhance the transparency of the timing of issuers' annual financial disclosures.

Read the MSRB notice.

GASB to Hold July 28 Virtual Public Hearing on Proposal to Enhance Concepts for Notes to Financial Statements.

Norwalk, CT, June 18, 2020 — The Governmental Accounting Standards Board (GASB) has scheduled a July 28 virtual public hearing on its Exposure Draft of a proposed Concepts Statement. The public hearing will take place by videoconference.

The deadline for providing written notice of intent to participate in the virtual public hearing is June 30, 2020.

The Exposure Draft, *Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*, would enhance the guidance the Board follows when it establishes note disclosure requirements for state and local governments. The proposals set forth in the Exposure Draft would replace, in the GASB's existing conceptual framework, the criteria for disclosing information in notes to financial statements.

Stakeholders are encouraged to review the document and provide comments by June 30. The Board extended the original April 17, 2020 deadline to allow respondents additional time to provide feedback in light of the ongoing pandemic.

The notification of the intent to participate in the public hearing and comments on the proposals should be addressed to the Director of Research and Technical Activities, Project No. 3-34, and emailed to director@gasb.org. Additional information is available in the Exposure Draft.

SEC Grants Temporary Conditional Exemption for MAs.

Follows BDA Recommendations to Vastly Narrow Scope

Chairman Jay Clayton today announced that the Commission has issued an emergency order providing a "temporary conditional exemption" allowing Municipal Advisors to engage in certain small private placement activities without registering as broker dealers. The relief will expire on December 31, 2020.

****BDA SEC advocacy can be viewed here**

The temporary order can be viewed here
The BDA analysis of the temporary order can be viewed here

While it's been clear from day one the SEC wanted to grant relief to sought by PFM and NAMA, the BDA – with direct engagement from members – through 10 separate meetings at the SEC and 4 comment letters to the SEC was instrumental in this relief being very limited and temporary. We're unhappy the SEC moved ahead at all and we will continue working with the SEC and others to ensure it doesn't become permanent. This however is a much better outcome than has been expected from the start of this process.

Below is an outline of the Order:

The order states "In order to facilitate more timely and efficient access to bank financing alternatives by municipal issuers during this historic COVID-19-related market disruption, we are issuing this Order granting an emergency, temporary conditional exemption permitting registered municipal advisors to solicit a defined set of banks, wholly-owned subsidiaries of banks, and credit unions in connection with certain direct placements of municipal securities by their municipal issuer clients."

Today's emergency order imposes certain conditions on the relief provided.

These include:

- The investor or lender must be a bank or credit union;
- The maximum deal size is $20 million;
- Private placements only, no public offerings.

In addition, the investor or lender—the "Qualified Provider" in the parlance of the order—must make certain representations to the MA, including:

- That the firm is a bona fide "Qualified Provider";
- That the QP is capable of evaluating the risks of the transaction;
- That the QP is not purchasing the bonds with the intention of redistribution; and
- The QP will not transfer the bonds within one year of closing the transaction.

In addition, the order specifies the following additional restrictions:

- The minimum denomination for bonds place under the order is $100,000; and

- During the first year after closing the QP may sell the bonds only to another QP.

The order also imposes record-keeping and reporting rules for MAs relying on the exemption and specifies a December 31, 2020 expiration.

While the order is disappointing, we are encouraged that it applies to a narrow slice of transactions and that the restrictions imposed by the SEC track closely the restrictions BDA recommended in our advocacy with the SEC related to the 2019 draft Exemptive Order over the last 15 months. We continue to work with SEC commissioners and staff on issues related to bank placements and the 2019 draft EO.

Bond Dealers of America

June 16, 2020

MSRB Municipal Securities Market COVID-19-Related Disclosure Summary for the Week Ending June 14, 2020.

Interested in how COVID-19 is affecting the finances of state and local governments? Check out this week's report aggregating 9,000 financial and other disclosures submitted to EMMA since January that reference the pandemic.

SEC Commissioners Address Municipal Securities Disclosure Practices.

At the 2020 Municipal Securities Disclosure Conference, Chair Jay Clayton, Commissioners Hester Peirce and Elad Roisman and Office of Municipal Securities Director Rebecca Olsen solicited feedback on ways to improve municipal securities disclosure practices.

Mr. Clayton expressed concern over the lack of clarity regarding whether an issuer is in compliance with ongoing disclosure obligations. He requested feedback on a Fixed Income Market Structure Advisory Committee recommendation that the Commission consider the need for the creation of a disclosure framework, including timeframe obligations.

Mr. Roisman emphasized that municipal issuers would benefit from greater clarity on both the content and timing of the information. He noted that efforts to improve transparency within the municipal market are "daunting" as a result of the diversity of issuers. However, he stated, it is ultimately necessary to ensure regulations are evolving with markets "fairly and favorably for all investors."

Ms. Peirce cautioned against utilizing "one-size-fits-all directives" for municipal issuers. Ms. Peirce raised a number of questions regarding the role of the Commission in shaping those practices, among them:

- whether corporate issuer disclosure standards should be applied to municipal issuers;
- how to balance investor protection concerns and the "political implications of fact-checking government officials' public statements"; and
- how the Commission can provide assurance to issuers that are hesitant to make disclosures due to

potential legal liability.

Ms. Olsen described a recent Staff Legal Bulletin as to trading in municipal securities in the secondary market. She also called attention to recent statements on the importance of disclosures in light of COVID-19 (see previous coverage).

Cadwalader Wickersham & Taft LLP – Steven D. Lofchie

June 17 2020

SEC Says Municipal Bond Disclosures Should Be More Frequent, Forward-Looking in Light of COVID-19 - Barnes & Thornburg

Issuers of municipal securities are being urged by the chairman of the Securities Exchange Commission (SEC) and the director of the Commission's Office of Municipal Securities to communicate more with investors.

The SEC issued a statement entitled "The Importance of Disclosure for our Municipal Markets" on May 4. The statement is directed to issuers of municipal securities and investors and other participants in the municipal securities markets. It was prompted by the effects of COVID-19 raising uncertainties regarding the financial status of municipal bond issuers.

It specifically encourages issuers:

- To develop and provide "voluntary, unaudited, and non-routine disclosures regarding their current financial status and operating condition"
- To provide "forward-looking" information regarding the potential future impact of COVID-19 on their financial status and operations

The SEC statement applies to disclosure for both new bond issues and continuing disclosure to the secondary market for municipal bonds.

The statement acknowledges that developing and making these more frequent disclosures containing "forward-looking" information "may be challenging, particularly under the current circumstances" and that each issuer, in many cases in consultation with legal counsel, will have to assess the risk of making these additional disclosures.

Barnes & Thornburg LLP – Kirk E. Grable, Randolph R. Rompola, Anneliese V. Williams and Gregory W. Stype

June 15 2020

SEC Hosts Secondary Market Municipal Disclosure Virtual Conference.

Today, the SEC Office of Municipal Securities hosted a virtual conference titled, *Spotlight on Transparency: A Discussion of Secondary Market Disclosure Practices*. **The event, which was originally scheduled for March, was opened by Chairman Jay Clayton who announced the Commission will provide a "temporary conditional exemption" allowing Municipal Advisors**

to engage in certain small private placement activities without registering as broker dealers.

****The BDA analysis of the order can be viewed [here.](#)**

The conference included a wide range of market participants and featured discussions of current secondary market disclosure practices, including COVID-19 related disclosure and potential opportunities for regulatory and industry improvement.

The agenda can be viewed [here](#).

Voluntary Disclosure Practices in the Secondary Market

This panel focused on municipal issuer and conduit borrower voluntary disclosure practices in the secondary market. This discussion included the effects of changes in tax receipts received, changes and trends in disclosures due to COID-19, and expectations of disclosure throughout the remainder of 2020.

Perspectives from the Buy Side

The discussion focused on secondary market disclosure from the perspective of the buy-side. This included a review of initial disclosures following the outbreak of COVID-19, and how this has impacted buy-sell-hold decisions this spring. The panel also discussed the recent [SEC Staff Legal Bulletin](#) regarding antifraud provisions in municipal disclosure and how that was received in both the issuer and investor communities.

Secondary Market Disclosure Hot Topics

This panel featured a discussion of the new 15c2-12 events 15 and 16 and the dramatic uptick in event 15 notices filed with the MSRB in recent months. The panel also discussed disclosure trends by sector, and the uptick of financial obligations reported since the onset of COVID-19

Bond Dealers of America

June 16, 2020

[GASB Requires Public Entities to Make Room in the Debt Column for Availability Payment-Based P3 Projects: Ballard Spahr](#)

For those interested in availability payment (AP) or service payment structures for public-private partnerships (P3s), June 15, 2020, was an important day despite lack of fanfare. In a policy debate within the P3 space between those who view APs as contractual obligations versus those who view APs as "debt," the Governmental Accounting Standards Board (GASB) picked a side: APs constitute a debt obligation of the public sector participant in the P3.

In GASB's Statement No. 94, "[Public Private and Public-Public Partnerships and Availability Payment Arrangements](#)," the Board purports to "improve financial reporting" as it relates to AP arrangements, effective in June 2022. GASB refers to AP arrangements as "APAs," as distinguished from revenue- or user fee-type P3s, which GASB classifies as "service concession arrangements" or SCA-type P3s. GASB-94 requires that APs are to be "accounted for by a government as a financed purchase of the underlying nonfinancial asset."

More broadly, GASB-94 sets out to provide "accounting and financial reporting requirements for all other" P3s, specifically, those that aren't "leases" or SCAs. P3s that are structured similarly enough to leases are guided by a prior statement, GASB-87, from 2017, which essentially requires that a lessor similarly "recognize a lease receivable." An even earlier statement, GASB-60, from 2010, addresses SCAs and accounting and reporting requirements that are more complicated, given the transfer or sharing of revenue risk associated with the P3 asset, a topic we are not addressing today.

Taking the position that APs constitute debt is vitally important, as GASB promulgates the "generally accepted accounting principles" (GAAP), the accounting and financial reporting standards state and municipal governments observe, and require that many contractors do, as well, in many transactions.

Aligning APs more closely to leases than to SCAs also strikes an important policy position. Many public entities with a long history of procuring AP P3s have reasonably taken the opposite view – that APAs are more like SCAs. With SCAs, rather than taking a revenue or user fee risk (that is, payment for use of a facility, such as bridge toll), a private sector partner/concessionaire takes the underlying performance risk (that is, whether or not there is a toll, the private sector partner is paid if the facility is available for use and thus capable of assessing the toll/user fee). This opposing view holds that APAs and SCAs are more alike that different, and the nature of the transaction was to document the agreement about which P3 party would have more or less exposure to the users.

Accordingly, procuring public entities negotiated detailed, project-specific performance criteria – valuing those aspects of performance that were important to the public entity and its constituency. For example, if a transit line failed to keep its headways, then the public agency would pay the private sector/concessionaire less. The risk of variability of payments incentivized performance. In an effort to mediate what was left of the user-fee risk – for instance, despite a water works functioning properly, consumer use was down – procuring agencies were able to attract more competition and better prices for the P3 contracts.

With GASB's position, the variability of the payments is not relevant to whether those payments are a structured purchase (i.e., debt obligation). It takes a position that there will always be payments, which presumes that the private sector/concessionaire will consistently and fully perform. This is an optimistic view.

Now, public entity treasurers and CFOs are charged with recognizing "[g]overnmental fund revenue … in a systematic and rational manner over the P3 term," which is not a clear guide. And the public sector has to figure this out in the context of the payments as debt payments, albeit variable debt payments under circumstances in someone else's control. This will likely require, under other accounting practices and conventions, restatements and revisions as the performance (or lack of performance) of the facility or private sector partner/concessionaire plays out over the term of the P3.

For certain sectors and P3 projects, the ability to treat an AP P3 as an SCA and not as debt from an accounting standpoint is often a motivating factor in deciding whether to pursue the project from the outset. If the APs are not debt, then the obligation to pay the APs would not count towards the public entity's overall debt restrictions, including debt caps (whether statutory or via covenants) and debt-related covenants (including debt service coverage ratios). One result of GASB-94 is to remove an impetus for projects and programs. The APs will count as debt for these various calculations, which may result in potential AP P3s being less attractive to the public entity.

But the ultimate impact of GASB-94 is yet to be determined. It takes effect for those fiscal years beginning after June 15, 2022. P3s currently in procurement and predevelopment will likely undergo near-term reconsideration of their affordability.

Ballard Spahr's P3/Infrastructure Group advises government and private sector participants on all facets of projects, from highways, bridges, and other transportation projects to schools hospitals, courthouses, and the spectrum of social infrastructure. The Group's attorneys have helped design and implement some of the nation's largest and most innovative P3 projects.

June 18, 2020

GASB Proposes Application Guidance on CARES Act and Coronavirus Diseases Issues.

Norwalk, CT, June 11, 2020 — As part of its continuing efforts to assist state and local governments during the COVID-19 pandemic, the Governmental Accounting Standards Board (GASB) today released a proposed staff Technical Bulletin containing application guidance related to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 2020 and certain outflows incurred in response to the coronavirus. The Technical Bulletin is being proposed to address questions raised with the GASB by its stakeholders.

The Exposure Draft of the proposed Technical Bulletin, *Accounting and Financial Reporting Issues Related to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 2020 and Coronavirus Diseases*, clarifies the application of existing recognition requirements to resources received from certain programs established by the CARES Act. It also clarifies how existing presentation requirements apply to certain inflows of CARES Act resources and to the unplanned and additional outflows of resources incurred in response to the coronavirus disease.

The GASB is working to issue this guidance as quickly as practicable. The Exposure Draft is available on the GASB website, www.gasb.org, with a comment deadline of June 25. The Board is scheduled to review stakeholder feedback and consider clearing a final Technical Bulletin on June 30.

COVID-19-related resources for stakeholders, including an emergency toolbox, are available on the

GASB website at www.gasb.org/COVID19.

BDA Washington Weekly: Congress Waiting for Recess.

Following a surprising May jobs report in which the U.S economy gained over 2 million jobs, vastly higher than the projected 7 million job loss, odds of an immediate stimulus package took a direct hit. It's not time to rule out additional measures, but direct funding to state and local governments will have to wait beyond the upcoming two week Congressional July 4th recess.

While next steps have become murky, the White House has signaled they believe some further action will be required, however they remain in a wait and see posture. This follows aCongressional Budget Office report that found additional aid to state and local governments would provide a financial boom for the economy, helping offset the $350 billion decline in spending on goods and services from localities.

****The BDA's 2020 Policy Agenda can be viewed here.**

Legislative Recap:

House to Release Financing Details for Transportation Package

Last week, the House introduced a sprawling surface transportation infrastructure package. The legislation, the Invest in America Act, is part of the larger Moving America Framework, a document released in January laying out the House Majority's goals for infrastructure investment.

The initial draft does not include any bond provisions.

Following release of the legislation, the BDA learned that the House Committee on Ways and Means plans to release a tax title for the bill and will host a hearing in the coming weeks to discuss tax relief during stimulus, reviving talks of bond provisions being included in the larger package. While details remain unknown, the Moving America Framework called for:

- The Restoration of Advance Refundings;
- Expanding the use of PABs;
- Increase the BQ debt limit; and
- Development a new BABs program exempted from sequestration.

The BDA continues to press for inclusion of all noted muni provisions, and is partnering with our partners in the Public Finance Network to ensure Congressional leaders know the importance of bonds in infrastructure.

The BDA is also working alongside the Council of Development Finance Agencies in support of the Modernizing Agricultural and Manufacturing Bonds Act (MAMBA). The bill, sponsored by Reps. Stephanie Murphy (D-FL) and Darin LaHood (R-IL), would modernize the Internal Revenue Code as it relates to small issue bonds, specifically the private activity bond rules for first-time farmers and manufacturing bonds.

Elsewhere in the House, Financial Services Committee Chairwoman Maxine Waters (D-CA) continued to feud with the Office of the Comptroller of the Currency, pushing back on the Acting Comptrollers' recent letter to the National League of Cities and U.S Conference of Mayors.

In the letter, Mr. Brooks pressured state and local governments to reopen by criticizing cities for protracted stay-at-home policies that now pose risks to the economy that must be weighed against the benefits.

Chair Waters responded in kind:

> "With this inappropriate letter pressuring city and state officials to end important public safety measures put in place to combat the spread of the novel coronavirus, the new Acting Comptroller is transparently pandering to President Trump, who has made clear that he would prefer that we all pretend that there is no pandemic, that more than a hundred thousand Americans have not lost their lives already, and that many more are not at risk."

Senate Remains at Standstill

While the House moves forward with infrastructure stimulus packages, the Senate remains at a standstill and skeptical of the need for further action. McConnell, in conversations with the White House this week, indicated that any measure would have to be considered after the upcoming July 4th recess, pushing legislative action to at least July 20th.

The Majority Leader also expressed that he is not willing for the package to be any larger than $1 trillion, although the President continues to express the desire for a more robust package that includes infrastructure.

Senate Committee on Environment and Public works echoed the Presidents sentiment that infrastructure should be a priority for this legislative session, however simultaneously bashed the House Democrats efforts.

The Chairman stated in a recent op-ed:

> "The House Democrats have put out nothing other than a partisan outline calling for massive government spending over the next five years.The dollar amounts included in the plan accompany a laundry list of liberal priorities."

The House and Senate remain far apart on both infrastructure and stimulus with very few provisions to find compromise. However, the BDA believes another stimulus measure is a near certainty, with limited funding for state and local governments.

The BDA believes Surface Transportation reauthorization will likely be punted to 2021, opening the door for inclusion of bond provisions in the final package.

Federal Reserve Recap:

BDA Presses Fed to Expand Scope of Facilites

While the Fed has begun activity in both the Secondary Market Corporate Credit Facility and the Municipal Liquidity Facility, the BDA has continued to pressure the Fed to expand the scope of activity. The BDA submitted additional comments to the Federal Reserve on their continued intervention in the capital markets to discuss market structure, and the need to expand their emergency programs to include all banks and dealers who provide liquidity to the market.

The Fed also received pressure from Capitol Hill to continue intervention in the municipal market. Following BDA recommendations, and after the Fed slightly expanded program eligibility, a group of House legislators urged the Fed to further expand the scope of the MLF.

Regulation Recap:

FIMSAC Hosts Virtual Meeting

The SEC FIMSAC hosted a virtual last week, the first meeting since the COVID-19 pandemic began. The Committee considered several issues of interest including recommendations regarding pre-trade transparency and the TRACE Pilot.

The agenda and BDA overview can be viewed here.

Other Regulatory News

- BDA Submits Comments in Support of FIMSAC Rule 17a-7 Proposal
- MSRB Submits A-3 Comments to SEC
- BDA Survey Results: Muni MA Activity and the SEC Proposed Order

Bond Dealers of America

June 12, 2020

Top US SEC Officials Urge Voluntary Municipal Securities COVID-19 Disclosure: Have They Overstated Their Case? - Norton Rose Fulbright

On May 4, 2020, the Chair and the Director of the Office of Municipal Securities of the US Securities and Exchange Commission issued a statement urging municipal securities issuers to disclose as much information as practicable regarding the current and potential future impact of COVID-19 on their financial and operating conditions, regardless of whether they are then issuing securities in the primary market. Providing as much current and forward-looking issuer- and security-specific information as is practicable, they state, will benefit municipal securities issuers. That conclusion is certainly debatable, and it is our view that such issuers should consult with their advisors before acting on the recommendations in the Statement.

Read the full article.

GFOS PAFR Fellowship Program.

GFOA has partnered with ELGL to create the PAFR Fellowship program to connect graduate students with local governments looking to create a Popular Annual Financial Report (PAFR) for submission to the GFOA award program.

About the PAFR Fellowship Program

COVID-19 has made it difficult for graduate students to find meaningful summer professional work experiences (internships) – either due to hiring freezes or the inability to provide work projects that can be successfully completed while working remotely with limited supervision. This program connects graduate students with local governments that wish to develop a PAFR for submission to the GFOA award program.

ELGL and GFOA will work together to match up graduate students with local governments, and then support the students as they create a PAFR document. Local governments and students will complete an application to be considered for a match. Considerations like geographic location, organization size, and graduate student skills and abilities will be used to determine matches.

This program is "free" for local governments. Government's pay the regular $250 GFOA application fee for the PAFR program. GFOA then provides 100% of the fee to the graduate student as a stipend to produce the PAFR for the government. At the end of the program, the PAFR is submitted to GFOA for award consideration.

Applications are due July 3, 2020.

For more information and to apply, please see ELGL's website

What is a PAFR?

GFOA encourages governments to supplement their CAFR with simpler, "popular" reports designed to assist those who need or desire a less detailed overview of a government's financial activities. These Popular Annual Financial Reports or PAFRs provide information to the public and assist in promoting transparency, building trust, and helping inform on a government's financial condition.

GFOA Best Practice on Popular Reporting of Financial Information

GFOA PAFR Award Program

The GFOA established the Popular Annual Financial Reporting Awards Program (PAFR Program) in 1991 to encourage and assist state and local governments to extract information from their comprehensive annual financial report to produce high quality popular annual financial reports specifically designed to be readily accessible and easily understandable to the general public and other interested parties without a background in public finance and then to recognize individual governments that are successful in achieving that goal.

More information on Award Program

Other Resources

GFOA provides other resources to help governments develop a PAFR and recently developed a research paper as part of the Financial Foundations Framework.

How to Create an Excellent PAFR

For more information on the Fellowship program, please contact Mike Mucha. For more information on GFOA's PAFR Awards Program, please contact Diane Griffin.

MSRB Proposes Amendments to Board Selection Process.

The MSRB proposed rule amendments to Rules A-3 ("Board Membership") and A-6 ("Board

Committees") to improve MSRB governance and transparency. (See also previous coverage.)

The proposed amendments will, among other things:

- lengthen the required separation period to five years for public representatives who have prior industry associations;
- reduce the Board size to 15 members through a transition plan that includes an interim year in which the Board will have 17 members;
- establish a requirement that at least two members of the 15-member Board be municipal advisors;
- impose a six-year term limit for Board members; and
- require that committees responsible for governance functions be chaired by public representatives.

The effective date for the proposed rule change is October 1, 2020.

Cadwalader Wickersham & Taft LLP

June 8 2020

GASB Issues Guidance on Cloud Computing and Similar Subscription-Based IT Arrangements.

Norwalk, CT, June 5, 2020 — The Governmental Accounting Standards Board (GASB) today issued new accounting and financial reporting guidance for subscription-based information technology arrangements (SBITAs), which have become increasingly common among state and local governments in recent years.

Statement No. 96, *Subscription-Based Information Technology Arrangements*, is based on the standards established in Statement No. 87, *Leases*. The GASB in Statement 96:

- Defines a SBITA as a contract that conveys control of the right to use a SBITA vendor's IT software, alone or in combination with tangible capital assets (the underlying IT assets), as specified in the contract for a period of time in an exchange or exchange-like transaction.
- Requires governments with SBITAs to recognize a right-to-use subscription asset—an intangible asset—and a corresponding subscription liability (with an exception for short-term SBITAs—those with a maximum possible term of 12 months).
- Provides guidance related to outlays other than subscription payments, including implementation costs, and requirements for note disclosures related to a SBITA.

Although existing GASB literature addresses computer software that is internally developed or commercially purchased through perpetual licensing agreements, stakeholders have raised questions regarding cloud computing and other subscription-based forms of software applications and data storage. The new guidance should remedy existing inconsistencies in accounting and financial reporting for SBITAs.

The Statement is effective for fiscal years beginning after June 15, 2022, and all reporting periods thereafter. Early application is encouraged. In order to give state and local governments and other stakeholders additional time to deal with circumstances arising from the COVID-19 pandemic, this date is one year later than what the Board proposed in the Exposure Draft.

BDA Survey Results: Muni MA Activity and the SEC's Proposed Exemptive Relief

Over the past month, the BDA conducted a survey in response to the SEC proposed exemptive relief for MAs. The survey asked firms how they plan to adapt their business model if the order is enacted in its current form.

The results can be viewed here.

The survey addresses questions that have stemmed from the sweeping SEC proposal.

This includes:

- If proposal proceeds as-is, do you intend to register as municipal advisor and to begin to engage in municipal advisory activity?
- If currently a registered MA, do you intend to expand your municipal advisory activity?
- If your firm intends to become a municipal advisor, or expand its municipal advisory activities, as a result of any exemptive relief granted in favor of municipal advisors, how would you engage in the activity?
- If you engage in municipal advisory activities, do you restrict municipal advisory activities by dealer personnel as a means of avoiding conflicts?

The BDA appreciates your participation in this survey and we hope the information provided is useful.

Bond Market's Toughest Problems Go Unresolved.

Regulators leave issues of credit-rating conflicts and trade transparency largely untouched.

The U.S. Securities and Exchange Commission's Fixed Income Market Structure Advisory Committee met earlier this week by webcast. For those in the bond markets who might have missed it, it's worthwhile to briefly note the takeaways from the group's virtual get-together.

To make a long story short, regulators punted yet again on some of the credit market's thorniest issues. For one, don't expect significant changes anytime soon to longstanding complaints about conflicts of interest in the "issuer pay" model of the ratings business. Also, forget about experimenting with the right balance of liquidity and transparency in corporate-debt trading.

The idea that the credit-ratings industry needs an overhaul is hardly new. Earlier this year, a bipartisan group of U.S. senators wrote to the SEC asking why it didn't reshape the business after the 2008 financial crisis. I predicted in February that elected officials and the fixed-income advisory committee would take their time and raise a bit of a fuss but ultimately do little to fundamentally fix the perceived conflicts.

Sure enough, the preliminary recommendation from the credit-ratings subcommittee for how to mitigate conflicts of interest passed easily but offered almost nothing that would alter the current model substantively. The three recommendations boiled down to this: greater disclosure from the ratings companies; more insight into how issuers pick their preferred credit-rating firms; and a vote by investors in publicly issued bonds to ratify the rating agencies selected by each issuer.

The first two are straightforward enough — basically, just more paperwork on each side explaining the process. The bondholder vote, however, is a bit more puzzling:

The Subcommittee recommends that the SEC explore a "ratification" of issuer-selected NRSROs. Periodically, holders of publicly-issued bonds should vote to ratify — or simply confirm confidence in — the NRSROs chosen by each issuer. Like the vote to ratify the public auditor, the election would be a simple up/down vote. The risk of censure that these votes would place on credit rating agencies could provide additional discipline to the quality of their work.

To be clear, when discussing conflicts in credit ratings, it's always about the temptation for "grade inflation" and never the other way around. A company or municipality will shop around for the highest ranking from the likes of S&P Global Ratings, Moody's Investors Service and Fitch Ratings and advertise it to investors to lower borrowing costs.

Current bondholders have virtually identical incentives to the issuer itself. Why would self-interested investors who are satisfied with their current position elect to "censure" a credit-rating firm for assigning a grade that's too high? In theory, such an action would cause the securities to drop in price. But I could certainly imagine a scenario in which bondholders would go after a ratings company for being too punitive — think a company that has investment grades from two rating companies but is considered junk by another.

The subcommittee, for its part, said it "recognizes that, even with the implementation of these recommendations, issues remain." Interestingly, it highlighted that "some investors own bonds that strictly meet their guidelines (e.g., investment grade, or "IG"), but which market participants know should be high-yield bonds." While that's probably just shorthand for market pricing, it's still a striking acknowledgment of the grade inflation that's an open secret in the current system.

Meanwhile, the Financial Industry Regulatory Authority made clear what was readily apparent months ago: Its plan to test whether delayed disclosure of large block trades in the corporate-bond market would boost liquidity has stalled. I wrote in January that the flurry of comment letters against the proposal, which were unyielding in their criticism, would likely leave Finra with no choice but to cast the proposal aside.

In something of an understatement, Tom Gira, Finra's executive vice president for market regulation and transparency services, noted that "it doesn't seem that we have the commenters' support here that would usually carry us forward on an important policy initiative." He said the regulator would study the market swings of the past few months to further inform its views of balancing bond-trading transparency and liquidity.

This is a thorny topic. On the one hand, fixed-income giants like BlackRock Inc. and Pacific Investment Management Co. clearly stood to gain more than smaller competitors from the plan, which would have given bond traders 48 hours to disclose block trades of more than $10 million in investment-grade bonds and more than $5 million in high-yield, instead of the current 15 minutes. As it stands, brokers might hesitate to make such large trades because others in the market will quickly know exactly how much changed hands and at what price.

Yet few investors would say the system is flawless. The huge fluctuations in exchange-traded funds tracking investment-grade and high-yield bonds during the worst of March's market tumult suggest there was little ability to trade large amounts of actual securities when needed. Finra's pilot program probably wasn't perfectly designed, and it could have made things weird for a short time, but it might have been worth it to bring empirical evidence to the debate about debt-market liquidity. Instead, traders are left with the same set of information as before.

Obviously, it's not worth messing with the bond markets "just because." Thanks in no small part to the Federal Reserve's recent interventions, they're functioning about as smoothly as ever. But these two topics are critical and have nagged investors for years. That there's still no clear path forward makes it seem as if these problems have no solution.

Bloomberg Opinion

By Brian Chappatta

June 3, 2020, 2:30 AM PDT

CFPB Issues Proposals and Updated Guidance Ahead of LIBOR Discontinuation: McGuireWoods

On Thursday, June 4, the Consumer Financial Protection Bureau ("CFPB") issued guidance to address issues arising out of the pending discontinuation of LIBOR and the resulting need for creditors to transition to other benchmarks. As the CFPB has noted, at this time, the transition is expected after 2021, with the anticipated shift to the Secured Overnight Financing Rate ("SOFR") index supported by the Alternative Reference Rates Committee (ARRC), a public-private working group organized to address the transition. Ahead of an inevitable, challenging transition, the CFPB issued an extensive rulemaking proposal with request for public comment, a revised consumer handbook, and updated compliance guidance.

Notably, the CFPB has proposed several amendments to Regulation Z, which implements the Truth in Lending Act, to facilitate the LIBOR transition and "address the sunset of LIBOR." First, the CFPB proposed changes to open-end and closed-end credit provisions "to provide examples of replacement indices for LIBOR indices that meet certain Regulation Z standards." In relation to the open-end provisions, the CFPB proposed several technical edits to certain comments and to replace LIBOR references with references to SOFR.

Further, the CFPB proposes the permissible transition of certain existing accounts by creditors to a replacement index, if certain conditions are satisfied, and also addresses change-in-terms notice provisions for home equity lines of credit (HELOCs) and credit card accounts. Lastly, the CFPB proposed to add an exception from the rate reevaluation provisions applicable to credit card accounts.

While these proposals concern potential complications that may arise for creditors during the transition, the CFPB is also proactively identifying and addressing areas of potential confusion for consumers. The CFPB proposes that the final rule take effect on March 15, 2021, except for the updated change-in-terms requirements for HELOC and credit card accounts, which would apply as of October 1, 2021.

The CFPB has also examined the impact of the LIBOR transition on its Consumer Handbook on Adjustable Rate Mortgages ("CHARM booklet"). The revised booklet is intended to provide information to consumers and must be provided by mortgage lenders when a consumer applies for an adjustable rate mortgage ("ARM"). According to the CFPB, the CHARM booklet was revised to, among other things, “remove the historical comparison example that used LIBOR as an index for comparison.” The CFPB noted the revised booklet also contains a useful comparison table, consists of fewer pages, and utilizes enhanced design elements while removing references to the LIBOR benchmark index. Creditors may, at their option, “immediately begin using the revised CHARM booklet, or a suitable substitute” in their efforts to comply with Regulation Z.

As an added measure, the CFPB issued updated guidance in the form of LIBOR Transition FAQs to address consumer financial products and services potentially affected by the transition. The FAQs discuss ARM products, HELOCs , and specific regulatory or statutory requirements creditors need to consider as they prepare to transition impacted consumers. To promote compliance during this evolution in the area of variable-rate products, the CFPB’s guidance aims to address regulatory requirements for both existing accounts and new originations as the necessary steps are taken to discontinue use of LIBOR.

By Edward M. Nogay, Bryan M. Weynand, Susan Rodriguez, Joseph J. Reilly & Donald A. Ensing on June 8, 2020

McGuire Woods

MSRB Provides Temporary Fee Waivers for Transactions with the Federal Reserve's Municipal Liquidity Facility.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today filed a proposed rule change with the Securities and Exchange Commission (SEC) to temporarily waive market activity fees for municipal market transactions related to the Federal Reserve’s Municipal Liquidity Facility (MLF).

“The MSRB remains committed to supporting the industry during the COVID-19 crisis,” said MSRB Interim CEO Nanette Lawson. “Waiving fees for MLF transactions is a meaningful way to be helpful at a time of unprecedented financial strain around the country. Meanwhile, we continue to provide timely data, market expertise and responsive regulation to help states, communities and all municipal market participants.”

The MSRB recently loaned the expertise of Chief Market Structure Officer John Bagley to the Federal Reserve Bank of New York to help operationalize the MLF. The MLF was established to purchase certain short-term municipal securities of states, cities and counties and other governmental entities to help provide them with the funding needed to deliver essential public services as they grapple with the effects of the COVID-19 pandemic.

The MSRB is providing a temporary waiver of underwriting, transaction and technology assessments under its Rule A-13 for brokers, dealers and municipal securities dealers facilitating MLF transactions. The waiver is temporary and only applicable during the duration of time the MLF is purchasing municipal securities, which is currently scheduled to cease on December 31, 2020.

- Read the notice.
- Access additional information on the MSRB’s COVID-19 response, including data and regulatory relief efforts, on its dedicated information page.

Date: May 28, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

FAF Issues 2019 Annual Report, “Standards that Work for Everyone”

Norwalk, CT—May 26, 2020 — The Financial Accounting Foundation (FAF) today released its online 2019 Annual Report. The report is available in a downloadable PDF and a website friendly version. Both versions of the annual report are available at www.accountingfoundation.org/everyone.

The annual report theme is “Standards That Work for Everyone.” It provides an outline of how the Financial Accounting Standards Boards (FASB) and the Governmental Accounting Standards Board (GASB) work together to obtain fresh perspectives on effective approaches to standard-setting—and how the FAF supports that process. For the FASB and the GASB, the report includes leveraging expertise and resources, sharing research, and collaborating to educate stakeholders with joint webinars and CPE programs. For the FAF, the report includes providing the standard-setting Boards with the tools and support they need to serve our stakeholders.

The 2019 Annual Report includes:

- Letters from FASB, GASB, and FAF leaders
- Snapshots of 2019 outreach and other activities that contribute to making standards that work for everyone, and
- Complete 2019 management’s discussion and analysis and audited financial statements (previously posted to the FAF website).

The online version of the report also includes complete lists of all FASB and GASB advisory group members, including the Emerging Issues Task Force and the Private Company Council.

GASB Outlook E-Newsletter - Spring 2020

View the GASB Newsletter.

[05/26/20]

COVID-19: Voluntary COVID-19 Disclosures -- Time to Share Your Approach With the Marketplace?

On May 5, 2020, the Municipal Securities Rulemaking Board found that continuing disclosure references to the coronavirus pandemic (“COVID-19”) had jumped 25 percent in the course of a single week. After a statement by the Securities and Exchange Commission (“SEC”) encouraging issuers to make voluntary COVID-19 disclosures, one week later the number of disclosure references had jumped another 30 percent. Of 50,000 municipal issuers, currently approximately 5,000 have made voluntary COVID-19 disclosures.

The news cycle is dominated by events that are being interpreted through the lens of the pandemic, and municipalities are challenged to provide updates to the marketplace as to the impact of COVID-19 on governmental revenues, operations, and forecasts. Whether crafting your pandemic disclosure for an offering document, or evaluating what, if anything, to voluntarily disclose via EMMA, members of K&L Gates public finance team analyze in this alert the current guidance from the SEC and our thoughts on how to proceed with your pandemic disclosures.

The SEC Encourages Voluntary Supplemental COVID-19 Disclosure

On May 4, 2020, the SEC issued a statement encouraging municipal issuers to make voluntary disclosures describing their approach to the COVID-19 pandemic. The SEC noted that the vast majority of municipal securities are held by retail investors who benefit from the tax-exempt status and therefore may need additional information, as opposed to corporate securities more often held by large pension funds or retirement accounts.

The SEC's statement acknowledged the challenges of providing disclosure as the pandemic unfolds—the difficulty of describing current financial status and operating conditions in the midst of circumstances that may be changing on a daily and weekly basis; the lack of audited review; and the uncertainty of providing projections based on future circumstances based on changing estimates and assumptions. Nevertheless, the SEC recommended that issuers provide current issuer- and security-specific information for the benefit of investors and the marketplace.

With regard to projections, the SEC encourages issuers to disclose projections regarding the potential future impact of COVID-19 on their financial and operating conditions, despite uncertainty around future operating conditions, resource needs, and evolving strategies to respond to the pandemic that will be subject to change.

From the SEC's perspective, concerns about the liability from the voluntary disclosures were minimized when compared to the value of the information to the marketplace, by (1) the ability to wrap the disclosure in disclaimers and cautionary language, (2) the need to keep consistent with other required issuer disclosure, and (3) the SEC's expectation that it would not penalize issuers for good faith disclosure efforts.

Nonetheless, the SEC acknowledges that each issuer will need to make its own determination, and will need to evaluate its concerns about liability in consultation with its counsel.

Suggested Content for Voluntary COVID-19 Disclosure

The SEC statement suggested that issuers consider disclosure covering:

> (a) **Operations and Financial Condition.** Along with every sector of the economy, it is expected that COVID-19 is also materially adversely impacting municipal finances, operational availability, and ability to provide services at typical levels, and impacts to costs that municipalities must bear. Issuer disclosure could include information regarding: (1) current operational and financial status, including decreases in revenues and delays in collection of revenues; (2) impacts to operational and financial condition, including unbudgeted costs; and (3) how operational and financial condition may change the pandemic response evolves. The SEC notes that historic comparisons are unlikely to be informative in the context of the pandemic.
>
> (b) **Sources of Liquidity.** The SEC suggests municipalities disclose cash on hand, reserves or other funds or liquidity facilities the municipality has access to, what

liquidity limitations may exist, and whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments.

(c) **Federal, State, and Local Aid.** What aid sources the issuer has or is looking into and when such aid may be available, and what material terms or conditions are attached to the aid that may affect the finances or operations of the municipality.

(d) **Reports Prepared for Other Governmental Purposes.** Where existing reports are being created with material information on municipal finances and operations, they should be leveraged for disclosure, and/or made available to investors through EMMA rather than only being available on an entity's website.

Liability Concerns in Sourcing Information for Voluntary Disclosure

Given the SEC's recent history in carefully examining municipal disclosures, issuers may have liability concerns in making a voluntary disclosure where not required by existing continuing disclosure undertakings. We believe there are several options for creating meaningful disclosures to the marketplace without generating material additional risk of liability.

Choosing to create a voluntary disclosure is easier where it can be based on existing public records you have generated in response to the pandemic as it has evolved. Your entity may have already prepared and publicly discussed with your governing body items such as (a) interim budget updates, (b) updated revenue forecasts, (c) revised service or utilization expectations, (d) COVID-19 response plans for operations and staffing, or (e) communications to the public describing your situation. Historically, the SEC has deemed such public records as communications to the marketplace, and thus there may be little additional risk in sharing such data on EMMA, with appropriate disclaimers and cautions.

Your municipality may also consider providing general guidance that is descriptive of the COVID-19 impact without sharing specific figures and forecasts, in an effort to provide a more "evergreen" update that would not need to be updated with every new development related to the pandemic and in your, state, or federal responses. You may wish to discuss (a) general economic impacts to revenues and timing of receipts, as experienced to date and what is reasonably expected in the coming months; (b) changes undertaken, and that you reasonably expect to undertake, to respond to COVID-19 in your operations, staffing, safety measures, service levels, or availability; and (c) anticipated changes to budgets and your costs given both the demands and the limitations placed on your entity by COVID-19.

Where existing public records or general guidance is not available, we recommend consulting with your counsel and bond counsel to evaluate your situation and arrive at a tailored determination as to whether or not to create a disclosure.

K&L Gates

by Scott A. McJannet & Cynthia M. Weed

May 28, 2020

LIBOR Transition – Issue 5: Greenberg Traurig

Welcome to Greenberg Traurig's LIBOR Transition Newsletter, where we provide updates, analysis, and occasional commentary on the latest developments relating to the highly anticipated phasing-out of LIBOR at the end of 2021 – just 19 months from now.

Corporate Trust and Structured Finance

LIBOR is the reference rate found in many corporate trust transactions, and nearly all structured finance transactions. Floating rate notes (and swaps) in corporate and municipal bond issuances are tied to LIBOR, as are the certificates (and swaps) in residential mortgage backed securities (RMBS) and other asset-backed securitizations. What does the LIBOR transition mean for trustees and others who administer these transactions under the governing agreements for the benefit of investors?

Legacy trust agreements may pose the greatest challenge. The maturity of corporate and municipal bonds typically measures in decades. The same is true of the mortgages and other debt instruments that underlie asset-backed securitizations. Trustees are still administering deals dating back to the 2000s, or earlier, when no one contemplated the end of LIBOR. A typical trust agreement (e.g., pooling and service agreement, indenture, trust agreement) from the early-to-mid 2000s often requires the trustee to designate a new rate if LIBOR is temporarily unavailable. For example, the trustee (or securities administrator or paying agent) "shall designate an alternative index that has performed, or that the Trustee expects to perform, in a manner substantially similar to [LIBOR]." In the absence of manifest error, the trustee's designation and ensuing interest calculation "shall be final and binding."

However, making such a unilateral designation may bring litigation risk. A consensus is developing among the Alternative Reference Rates Committee (ARRC) that banks use the new Secured Overnight Financing Rate (SOFR) as an alternative to LIBOR. Investors may argue that SOFR – as a "risk free," overnight rate secured by U.S. Treasuries and calculated based on actual market transactions – inherently cannot be "substantially similar" or "comparable" to LIBOR, as may be contractually required. Even if the methodology for spread adjustments to make SOFR more comparable to LIBOR were agreed upon by all market participants, documentation signed many years ago never contemplated for the adjustment of the applicable margin. In practice, SOFR, even with a spread adjustment, may reduce interest payments to investors, to their detriment and the issuer's benefit. Litigation risk may also increase if the new reference rate would result in some classes of investors receiving comparably less under the cash flow waterfall, while others would receive more. With the agreement silent, a trustee may be put in the awkward position of exercising discretion regarding the "fairness" of applying a recommended spread adjustment methodology. Beyond that, any unilateral selection also may expose the trustee to charges of conflict of interest – for example, if the new reference rate would somehow increase the bank's compensation, or if a party questioned why the trustee in its banking capacity used one reference rate for its own deals and chose another for the trust or securitization.

For these reasons, and absent a provision delegating any such decision to an independent third party, a trustee may seek to further mitigate potential liability by putting it to the investors, or even a court, to approve or select a new reference rate. In charging the trustee with the choice of selecting a replacement rate, the legacy trust agreements may have envisioned a short-term disruption of LIBOR, like a technology failure, but not LIBOR's permanent cessation. As a result, a trustee may need to consider other methods, potentially in combination, to administer the transition away from LIBOR. Considerations include the following:

1. **Investor consent.** Legacy trust agreements in the United States typically do not expressly provide for investor consent as a means to insulate the trustee from liability in exercising its authority. Still, if all investors agreed to the new reference rate beforehand, the trustee may be well-positioned to avoid liability. But, obtaining unanimous investor consent presents significant challenges. First, the potential disparate impact of a new rate on different classes of investors may preclude unanimity. Second, a consent solicitation is an up-or-down vote, often without a forum for dialogue among competing interests. Third, the logistics may prove difficult: affirmative unanimous consent may require an actual response from every investor, numbering in the hundreds or thousands. If the governing trust agreement contained a negative consent provision, the trustee might be able to use an alternative reference rate if the requisite percentage of investors did not object within an established timeframe. Without this express provision, however, a negative consent solicitation may not be enough to shield the trustee from liability, since a later-dissenting investor may allege inadequate notice or another misstep that supposedly prevented its voice from being heard. Moreover, given the competing interests among different classes of investors, there may be dissent. Finally, amendments that alter the interest rate on a note or a bond typically require affirmative consent of every affected investor.
2. **Investor direction.** By contract, a trustee typically is not be liable for any action taken by it in good faith in accordance with the direction of a specified threshold of investors. For example, a fairly typical provision in a legacy trust agreement provides: "The Trustee shall not be personally liable with respect to any action taken, suffered or omitted to be taken by it in good faith in accordance with the direction of the Certificate-holders of any Class holding Certificates which evidence, as to such Class, Percentage Interests aggregating not less than 25% as to the time, method and place of . . . exercising any trust or power conferred upon the Trustee under this Agreement."Investor direction addresses most, but not all, of the issues with a consent solicitation. It is a contractual mechanism to shield the trustee from liability, and it does not require investor unanimity, or an affirmative response from all investors. Again, however, the potentially disparate impact of a new reference rate among different classes of notes, bonds or residual interests may prevent the trustee from reaching the threshold for direction across all classes. And, like a consent solicitation, a request for direction is an up-or-down vote that may not provide a forum to resolve differences.
3. **Trust instruction proceeding.** A trust instruction proceeding (TIP) may insulate a trustee from liability in selecting or designating a new reference rate. In a TIP, the trustee asks the court to resolve a question of trust administration, but only after all interested parties receive notice and have an opportunity to be heard. The court's final order is binding on all investors. Significantly, a TIP provides that the trustee has satisfied its duties to investors and is not subject to liability if it acts in accordance with the order. The final order also may provide for payment of the trustee's related fees and expenses. Statutory provisions governing TIPs are a key part of the Uniform Trust Code, which has been enacted in 34 states as of Jan. 1, 2020. New York has not adopted the code, but it provides for a similar "special proceeding" to resolve issues of trust administration. N.Y.C.P.L.R. 7701.

   A trustee may commence a TIP to, among other things, (1) confirm or ratify its conduct, (2) resolve an ambiguity in the trust documents, or (3) resolve disagreements with, or between, investors. Designating a new reference rate to replace LIBOR implicates these concerns. A consent solicitation or request for direction may be a prelude to a TIP, as each helps frame the issue and flesh out the competing positions. The trustee prepares a petition seeking judicial instruction or direction, and provides widespread notice to all beneficiaries and other interested persons. Any interested person who objects to the relief or wishes to be heard may appear in the TIP. If the petition is contested, the TIP proceeds as a traditional lawsuit, although ideally on a faster track, culminating in an evidentiary hearing and then a judicial decision that binds all parties and protects the trustee from liability.

Accordingly, a trustee may prefer the option of a TIP in which the court approves or otherwise designates the LIBOR replacement rate. But a TIP is not without its decision points and potential pitfalls, which a trustee should consider beforehand. For example:

- **Trustee's position.** Trustees may decide whether to take a position on the new reference rate, or simply ask that the court resolve a dispute among investors. If a trustee has a preference – for instance, a new reference rate that would best fit its own systems and operations in administering the trust for the benefit of investors – there may be little reason to remain neutral. Mechanical issues may arise when switching from a term-rate (like LIBOR), where the parties know the payment amount in advance of the interest period, to an average in-arrears rate as term SOFR may become, where the parties do not know the amount until the end of the interest period. Furthermore, the spread adjustment methodology may also lead to issues as to its sufficiency and as to its fairness in compensating for the lower SOFR rate. These types of changes may affect waterfalls and reporting obligations.
- **Consistency.** Trustees, securities administrators, and paying agents typically administer thousands of transactions. Their primary interest may be in a replacement rate that is consistent across transactions, no matter which reference rate ultimately is designated. A trustee may wish to explore structuring the TIP process across trusts to help achieve consistency and to reduce the legal fees borne by any single transaction.
- **Timing.** With LIBOR currently anticipated to end at the close of 2021, trustees may wish to move quickly. TIPs may be expedited, but recent TIPs to approve the settlements of RMBS loan repurchase actions have taken a year or more to resolve. The sheer volume of TIPs on the LIBOR transition may compound the time crunch.
- **Disclosure.** Throughout this process, a trustee should consider the disclosures it makes to investors about the process for selecting a new reference rate and transitioning from LIBOR, including anticipated steps and timing.

Recent Developments.

- **ISDA publishes report summarizing the final responses to its consultation on the implementation of pre-cessation fallbacks for derivatives referencing LIBOR.** On May 14, 2020, the International Swaps and Derivatives Association (ISDA) released a report about findings of its consultation launched on Feb. 25, 2020, which indicated that the majority of respondents supported including pre-cessation triggers in the amended 2006 ISDA Definitions for LIBOR for new derivative trades and including pre-cessation triggers for existing derivative trades in an ISDA Protocol to which market participants could adhere to amend their trades. The sole pre-cessation trigger would be the unrepresentativeness of LIBOR. This issue relates to the "zombie LIBOR" issue where LIBOR ceases to be representative of the London interbank offered rate because of a lack of quotations from banks, even though LIBOR is still being published. ISDA expects to publish amendments to the 2006 ISDA Definitions to incorporate the fallbacks for new trades in July 2020, which would align the derivatives market with pre-cessation triggers that had previously been proposed by the Alternatives Reference Rates Committee (ARRC). View the ISDA report here.
- **ARRC Announces Recommendation of a Spread Adjustment Methodology for Cash Products.** On April 8, 2020, the ARRC announced that it is recommending a spread adjustment methodology for USD LIBOR-indexed products to SOFR based on "a historical median over a five-year lookback period." This methodology is consistent with the methodology expected to be applied for derivatives products, and in theory will prevent any discrepancies between the cash and the derivatives markets. Any discrepancy between the cash and derivatives market may lead to

hedging issues for borrowers under loan facilities. In addition, for consumer products, the ARRC is recommending a one-year transition period to this five-year median spread adjustment methodology. View the ARRC press release here.

Parting Shot

LIBOR transition within the context of COVID-19

Amid the Coronavirus Disease 2019 (COVID-19) pandemic, “steady as she goes” seems the current position of the different regulators in charge of coordinating an orderly transition from LIBOR to alternative reference rates, in particular, after the UK’s Financial Conduct Authority (FCA) confirmed on April 29, 2020, that “firms cannot rely on LIBOR being published after the end of 2021”.

Notwithstanding that the FCA has extended the deadline for ending the use of the LIBOR interest rate benchmark in new loans until the end of March 2021 (from September 2020), giving more time to banks already dealing with COVID-19-related issues, the FCA has stayed course and not extended the use of LIBOR past the original deadline of end of 2021.

Meanwhile, authorities around the world are preparing for the discontinuation of LIBOR as originally announced. For example, regulators in Australia and South Korea have encouraged market participants to assess their exposure to LIBOR and begin their transition to alternative rates. In the United States, the ARRC continues to chart the course by providing its own list of objectives for 2020 and a list with recommended best practices for the cessation of U.S. dollar LIBOR, “doubling down” on its early decision to use SOFR as the alternative rate for the U.S. market after LIBOR is no longer quoted. In addition, questions persist in the United States about the viability of SOFR given recent volatility and the lack of a forward-looking term SOFR rate.

It is possible that the FCA will not further extend the use of LIBOR, and that the ARRC will not select a different rate as the recommended alternative reference rate. However, the FCA and/or ARRC may change their minds. For example, if SOFR spreads widen considerably from LIBOR during this economic crisis, as they did in a backtrack calculation during the 2008 Financial Crisis, pressure may grow from market participants to find an alternative rate. Further, some of the COVID-19 stimulus loan programs in the United States, intended to provide relief and liquidity during the crisis, are currently indexed in LIBOR (and not SOFR), because “quickly implementing new systems to issue loans based on SOFR would require diverting resources from challenges related to the pandemic.” (see question G.3 in the Federal Reserve’s FAQs in connection with The Main Street Lending Program).

The crisis created by COVID-19 has made market participants change priorities to address more urgent matters, and has placed transition efforts on the back-burner. As such, banks and other market participants may not be working to determine their exposure to existing contracts referencing LIBOR, outlining plans of action, changing internal models, modifying their operational systems, and further, engaging counterparties in renegotiating – when necessary – documentation that may not properly provide for a useful alternative reference rate.

COVID-19 disrupted the world as we know it. With economies around the world having to adapt to a new reality, financial institutions may wish to prioritize plans related to an orderly transition to alternative reference rates. Indeed, pre-cessation triggers may hit before 2021 if LIBOR becomes unrepresentative of London interbank offered rates. In such a case, the LIBOR disruption may occur well before it was planned by any market participant.

by Oscar Stephens, Sylvie A. Durham, Paul J. Ferak, Arleen A. Nand, Susan E. D. Neuberg & Michael M. Krauss

Friday, May 29, 2020

Checklist - Disclosures for Health Care Providers With Outstanding Tax-Exempt Bonds.

If your organization is a hospital, nursing home, life plan community, ambulatory surgery facility, or behavioral health provider with publicly held tax-exempt bonds outstanding, it is essential that you consider enhancing public disclosures of your organization arising from the COVID-19 pandemic. Although most municipal bond issuers are obligated to make periodic public disclosures as negotiated at the time of the bond issuance, the Securities and Exchange Commission (SEC) is urging conduit issuers, which commonly issue bonds through state and local public bond authorities, to enhance those disclosures by making more frequent voluntary disclosures regarding the impact of COVID-19 on the issuing organization. These disclosures should, at a minimum, include information relating to the impact of COVID-19 on the facility's employees, patients, the community at large, and perhaps on operations and revenue.

The SEC's statement on May 4, 2020 follows formal guidance released by the SEC for public issuers of securities. As the SEC does not have formal jurisdiction over municipal bond issuers, the statement was directed to underwriters, investors and market participants over which the SEC does maintain some oversight. Health care providers, a large subset of issuers in the municipal bond market, often utilize conduit authorities for the facilitation of tax-exempt debt, which is the major preferred source of capital for nonprofit providers of all types. As a result of the COVID-19 pandemic, health care providers that have issued tax-exempt bonds are facing many issues, such as care for vulnerable patients and protecting the community and employees from the further spread of COVID-19.

The SEC's advisory recognizes that there is much unknown about the impact of COVID-19, and stresses the importance of municipal bond issuers making at least minimum disclosures about its impact.

We have developed a checklist of disclosures below, which is specifically tailored for health care providers, to assist with preparing disclosures discussing the impact of COVID-19. You can utilize this checklist to make certain you have considered many of the ramifications you are facing as a result of COVID-19.

Disclosure Checklist

Describe the impact of COVID-19 on patients and staff in your organization. You should consider the following disclosures:

- The number of patients who have been infected with COVID-19, and any deaths of patients resulting from COVID-19
- The number of staff who have been infected with COVID-19, and any deaths of staff resulting from COVID-19
- Any measures taken by your organization to protect staff and patients from further infection, such

as screening, isolation
areas, testing, meal delivery and limitations on communal activities and outside visitors
- Communications by your organization with patients, families and the community

Describe the impact of COVID-19 on the procedural and financial operations of your organization. You should consider the following disclosures:

- Any operational interruption or loss of operational opportunities, for example reduced hours or services
- Any orders to halt normal and elective procedures or treatments
- Any increased expenses for additional personnel, increased housekeeping, payment of hazard pay or overtime, and cost of supplies, such as personal protective equipment (PPE)
- The impact of telehealth or other virtual services, such as virtual tours
- Any lost revenue, for example resulting from reduced capacity or services
- Any savings, for example resulting from reduced personnel or reduced lab costs
- Any state or local shutdown orders
- The impact on investment performance resulting from negative financial market performance

Describe any funding received from federal or state programs as a result of the impact from COVID-19. You should consider the following disclosures:

- The receipt of funds in connection with the CARES ACT and the Paycheck Protection Program
- The receipt of any provider relief funds, both targeted and general
- The ability to attest to federal government-required terms and conditions, such as:

– Limitations on abortions

– Caps on executive salaries

– Elimination of balance billing for presumptive or actual COVID-19 patients

– Whether calculations of amounts funded were accurate

– Whether the provider rejected the federal relief funds for health care providers

- The receipt of Medicaid or Medicare funding under programs designed to assist paying for COVID-19 expenses

Describe any donations received or partnerships formed as a result of the impact from COVID-19. You should consider the following disclosures:

- Donations of PPE supplies
- Purchase of needed equipment, such as ventilators
- Leasing of space for offsite facilities, such as testing areas in parking lots and use of ambulatory surgery centers for isolation or quarantine
- Contracting for needed personnel, such as infectious disease specialists, additional morgue space or refrigeration and nursing and ancillary personnel or temporary workers from partnering institutions
- Any coordination with local, state and federal health authorities

Some general cautions are in order relating to the disclosure of information about the impact of COVID-19.

- You should not rush to provide forecasted data on the future operations of your organization. “Safe harbors” for forward-looking statements that are provided to registered corporate issuers are not provided to municipal issuers. Municipal issuers have no obligation to forecast results.
- You should be absolutely certain that any public disclosure that is made is consistent with other certifications and filing requirements of federal programs, cost reports and financial reporting in audited statements.
- Please consult your legal and accounting advisers before filing disclosures.
- Consider making your disclosures on EMMA, even if you issue press releases or hold investor calls, since doing so will retain the information for historical purposes in one easily identifiable site.

Conclusion

While the SEC is attempting to enhance disclosures in the public tax-exempt bond market, many market participants, especially issuing authorities and underwriters that participated in the issuance of health care provider bonds, are clearly recommending that COVID-19 disclosures be made to demonstrate that these institutions are coping with the pandemic. We hope our checklist will assist health care providers in formulating relevant disclosures for their bondholders.

by Henry Fader and Ashleigh Reibach

May 28, 2020

Pepper Hamilton LLP

Issuers Look for More Clarity on Federal Spending and Disclosure.

Municipalities are seeking clarity from the Treasury on how to spend federal relief dollars and are seemingly disappointed by recent guidance on how to disclose their financial concerns related to coronavirus.

At a Government Finance Officers Association debt committee meeting held via conference call, issuer officials discussed Treasury’s guidance from earlier this month on how to spend federal money from the $150 billion from the Coronavirus Relief Fund stemming from the Coronavirus Aid, Relief and Economic Security Act.

“The Treasury put out some additional guidance that seemed to allow to open up more broadly the use of the funds to reimburse for public safety costs, but there were still a lot of questions around it,” said Kenton Tsoodle, Oklahoma City’s assistant city manager and chair of GFOA’s debt committee.

Issuers also wondered if the funds could be used as a revenue replacement given that many have been hard hit by losses of revenues due to less economic activity during the pandemic.

Some say Treasury’s intent was to open up the funds for public safety costs.

“But there seems to be a lack of clarity about if they’re actually going to update the guidance or the frequently asked questions,” Tsoodle said.

Tsoodle said it was also a quick turnaround for governments to figure out how to spend the money, given they received it on April 22, have had the Treasury’s guidance for about three weeks and have seven months to spend the funds.

A few bills have been proposed in recent weeks to give states and local governments more spending flexibility. The State and Municipal Aid for Recovery and Transition Fund would provide $500 billion in grants to state and local governments. It would be divided into thirds of $166.6 billion each based on population, COVID-19 cases and revenue losses at the state level.

The Health and Economic Recovery Omnibus Emergency Solutions, or HEROES Act would provide $915 billion in state and local aid, though it is unlikely to pass in the Senate.

Tsoodle wants to see the HEROES Act, SMART Act or other proposed bills loosen the strings on funding to be able to replace lost revenue.

A participant on the call also asked about how the Treasury defined sharing funds to utility customers.

"We feel like it says you couldn't pay your utility directly, but you can provide assistance directly to individuals," Tsoodle said.

"There is a lot of desire for more clarity," Tsoodle added.

During Wednesday's meeting, the Municipal Securities Rulemaking Board released resources for issuers to use to disclose financial and operational impacts caused by COVID-19. Debt committee members were frustrated that it did not include changes it had suggested.

"It appears the MSRB did not take any of the changes that GFOA Debt Committee offered, which is a little frustrating because their guidance uses terminology that is technical and doesn't match up with the real world use of terms that we use," said David Erdman, Wisconsin's capital finance director. "In other words, there is nothing in the guidance that talks directly about voluntary disclosures."

Voluntary disclosure has been a big topic for issuers as they try to figure out how to disclose financial impacts for certain credits and decide how often they need to disclose, while abiding by antifraud laws.

The MSRB did talk about disclosing in the "other" category on its site, while some analysts have asked for better organization of those miscellaneous filings, saying that category houses more than it should.

"The 'Other' category is intended for a disclosure or part of a disclosure for which no available category applies," the MSRB wrote. "If the 'Other' category is selected, submitters are asked to provide text in the 'Description' field that describes the disclosure. Selecting one or more descriptive categories and providing a detailed free-text description enhances the ability of EMMA users to locate a disclosure."

The MSRB also included resources such as selecting event disclosure categories, statements made by the Securities and Exchange Commission and a SEC Q&A webinar on continuing disclosures recorded in March.

The committee also discussed the Federal Reserve's Municipal Liquidity Facility, with many voicing that they did not presently have plans to use the progam.

Wednesday morning, the New York Fed released a sample purchase rates table for loans of six months to three years.

"It would not be a program that we would take advantage of," said Tim Ewell, chief assistant county administrator for Contra Costa county in California, on the MLF program," I haven't heard anything at the state level of California taking advantage of it either, even on behalf of smaller issuers. Hopefully, whatever comes out of the next stimulus bill, maybe a second version of the program through the Fed — is something that truly helps smaller issuers who are really, frankly, the ones that are going to need this."

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 05/27/20 02:32 PM EDT

Voluntary Disclosures and the SEC's Public Statement Regarding the Importance of Disclosure for Our Municipal Markets.

On May 4, 2020, the U.S. Securities and Exchange Commission (the "SEC") released a public statement from Chairman Jay Clayton and Rebecca Olsen, Director of the SEC's Office of Municipal Securities ("OMS"), titled, "*The Importance of Disclosure for our Municipal Markets*," wherein they encouraged issuers of municipal securities and obligated persons (conduit borrowers) to make voluntary disclosures regarding their current financial status and operations in response to the uncertainties created by the COVID-19 pandemic. The public statement only represents the views of the Chairman and the OMS Director. It is not a rule, regulation or statement of the SEC. This public statement does not alter or amend applicable laws and has no legal force or effect.

In compliance with SEC Rule 15c2-12 of the Securities Exchange Act (the "Rule") and under existing continuing disclosure agreements, issuers and obligated persons are required to provide (i) annual financial information and operating data and (ii) notices regarding certain listed events within ten business days of such event, in each case via the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA) system. Additionally, under existing continuing disclosure agreements, obligated persons are often required to provide financial information and operating data on a quarterly basis. Pursuant to these agreements, many issuers provide financial information and operating data to the municipal markets only once a year, and obligated persons typically provide financial information and operating data to the municipal markets five times per year. Issuers and obligated persons should consider adding in a required annual or quarterly filing a description of the impact of the COVID-19 pandemic upon their operating and financial data on a historical and forward-looking basis.

As a reminder, any statements posted on EMMA are subject to the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (commonly known as the 10b-5 standard) because they are "reasonably expected to reach investors and the trading markets." Therefore, issuers and obligated persons should follow the same policies and procedures they would follow for their required filings under any existing continuing disclosure agreements for any voluntary filings.

In the public statement, SEC Chair Clayton and OMS Director Olsen observed that "in today's markets, the typical practice of providing historic financial information in the form of an annual information filing or similar disclosure may not enable investors to make informed assessments of the municipal issuer's current and expected future financial condition." They acknowledged that “developing voluntary, unaudited, and non-routine disclosures regarding current financial status and operating conditions may be challenging, particularly under the current circumstances.” But they believe that “disclosure of the current financial and operating condition will not only aid investors in making informed investment decisions, but will also be important to the issuer-specific and more general functioning of the municipal securities market, including the ability to refinance existing obligations and raise new capital.”

COVID-19 Event Filings

During the March 19, 2020 MSRB webinar, Ahmed Abonamah, Deputy Director of OMS, stated that, under the Rule, there is no requirement that issuers and obligated persons provide a generic event filing on EMMA based solely on the fact that the COVID-19 pandemic is occurring. However, in the public statement, SEC Chair Clayton and OMS Director Olsen stated that “in light of the potentially significant effects of COVID-19 on the finances and operations” of many issuers and obligated persons, they “request that [issuers and obligated persons] provide investors with as much information about their current financial and operating condition as is reasonably practicable.” Prior to making these voluntary filings, issuers and obligated persons (conduit borrowers) should discuss them with bond counsel, disclosure counsel or general counsel.

Forward-Looking and Cautionary Language

SEC Chair Clayton and OMS Director Olsen believe that every voluntary filing should include “meaningful cautionary language,” including a statement that the financial information and operating data are “forward-looking,” and such cautionary language should include the following types of information:

- A description of the relevant facts and assumptions affecting the reasonableness of reliance on and the materiality of the information provided;
- A description of how certain important information may be incomplete or unknown; and
- The process or methodology (audited or unaudited) used by the issuer or obligated person to produce the information.

In the public statement, SEC Chair Clayton and OMS Director Olsen state, “[w]e would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.”

Examples of Voluntary Filings

In the public statement, SEC Chair Clayton and OMS Director Olsen provide examples of information that issuers and obligated persons could provide to investors via EMMA.

1. Information Regarding the Impact of the COVID-19 Pandemic on Operations and Financial Conditions. Issuers and obligated persons could provide information to investors regarding the impact of the COVID-19 pandemic on their operations and financial conditions, including:

- Their current operational and financial status, including decreases in revenues and delays in collection of revenues;
- Any impacts on their operational and financial condition, including unbudgeted costs; andHow their operational and financial condition may change as efforts to fight COVID-19 evolve.

Additionally, rating agencies routinely ask issuers and obligated persons to provide updated information as part of their ongoing reviews. Issuers and obligated persons should consider uploading any nonconfidential information provided to the rating agencies via EMMA.

2. Information Regarding Source of Liquidity. Issuers and obligated persons could provide information to investors regarding their sources of liquidity, including:

- A description of cash on hand;
- Access to reserves or other funds (and to what extent such access is limited);
- Access to liquidity facilities; and
- Whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments.

Additionally, SEC Chair Clayton and OMS Director Olsen suggest that if not otherwise disclosed, such information should include the material terms of any liquidity facility the issuer has used or expects to use.

Regardless of whether issuers and obligated persons are required under their existing continuing disclosure agreements to provide information via EMMA related to “Financial Obligations” (as defined under the Rule), issuers and obligated persons should consider disclosing information related to drawing on a line of credit or liquidity facility or having access to lines of credit or liquidity facilities to ensure timely debt service payments. For more information, please see our Client Alert on Implications of COVID-19 Pandemic for Municipal Bond Transactions.

3. Information Regarding Availability of Federal, State and Local Aid. Issuers and obligated persons could provide information to investors on whether they are planning to seek federal, state and local aid. If they are planning to do so, SEC Chair Clayton and OMS Director Olsen suggest that issuers and obligated persons consider disclosing the nature, amount and other material terms of the aid if it materially affects or reasonably likely will materially affect their operational or financial condition.

4. Reports Prepared for Other Governmental Purposes. Issuers and obligated persons could provide via EMMA any reports prepared for other governmental purposes related to their current financial condition, especially those with respect to the COVID-19 pandemic.

Finally, in the public statement, SEC Chair Clayton and OMS Director Olsen state that issuers and obligated persons are often required to disclose similar information as described above to other parties, such as federal and state governments, and they reiterate that it is important that disclosure of “this type is (1) consistent across all contexts, regardless of the purpose and (2) kept confidential until disclosed, and when disclosed, disclosed broadly.”

SEC Chair Clayton and OMS Director Olsen acknowledge that issuers and obligated persons may not be entering the municipal market or may not be required to make a disclosure filing in the near future. Because this public statement does not create any new or additional obligations for any person, any additional filings or the inclusion of any forward-looking information regarding the impact of the COVID-19 as part of a required filing is voluntary. For more information, please contact any member of the Public Finance Group.

McCarter & English LLP – Sarah C. Smith

May 29 2020

S&P COVID-19 Activity In U.S. Public Finance - Updated as of 5/21/20

Read the Updated Activity.

COVID-19 Crisis Drives Spike in Transaction Costs for Municipal Securities.

Read the MSRB report.

NABL Issue Briefings for Congress.

NABL has released 8 issue briefs to supplement the April 9 letter we sent to Congress and the Treasury asking that they enact certain legislative and regulatory proposals to assist in getting our nation through these uncertain times. The briefings were sent to all offices on Capitol Hill.

We created these briefings, in part, because NABL's Board of Directors did not take its annual trip to Washington, DC this year due to travel restrictions as a result of the COVID-19 pandemic. Had they been able to travel, they would have requested meetings with many offices on Capitol Hill to discuss these and other issues. In lieu of those in-person meetings, we prepared these short informational briefings to cover some of the issues we see affecting the municipal bond market.

The briefings are available on the NABL U Now page, here. They are generally less than 10 minutes and are accompanied by a PowerPoint presentation. They are also free and accessible by anyone who visits our website.

Briefings Topics Include:

- Provide for a New Direct-Pay Taxable Bond
- Restore Advance Refundings
- Stimulate Demand by Financial Institutions
- Facilitate the Recovery of Housing and Continuing Care Facilities
- Facilitate Economic Recovery by Raising Volume Cap
- Facilitate Federal Guarantees
- Facilitate Partnerships with Business for Recovery
- Facilitate Access to Working Capital

Please Share with your Member of Congress: We encourage all NABL members to share these briefings and our April 9 letter with your member of Congress and their staff.

SEC Urges Disclosure of COVID-19 Impact in the Municipal Market: Orrick

On May 4, 2020, Securities and Exchange Commission Chairman Jay Clayton and Director of the Office of Municipal Securities Rebecca Olsen issued a statement encouraging municipal securities issuers and obligors (each referred to herein as "issuer(s)") to provide robust, timely and accurate disclosures, in light of the effects of and uncertainties created by COVID-19. This statement echoes a statement issued on April 8 by the SEC Chairman and the Director of the Division of Corporation Finance regarding disclosures by public companies in light of the COVID-19 pandemic, and encourages a similar approach to the provision of current and, to the extent practicable, forward-looking disclosure as outlined in the corporate issuer disclosure statement.

WHAT DOES THIS MEAN FOR ISSUERS IN THE MUNICIPAL MARKET?

As most issuers in the municipal market only file annual reports and notice of specifically listed events, and COVID-19 on its own is not a listed event under Rule 15c2-12 1, the SEC has urged issuers to make additional, voluntary disclosures concerning both the current and projected impacts of COVID-19. Issuers that plan on being in the market or that are filing annual reports, quarterly reports or event notices (or the next time a required filing is due) should disclose the impact of COVID-19 on their financial and operating condition in offering documents or required filings. All other issuers should consider (i) providing voluntary disclosure on the current and reasonably anticipated future impact of COVID-19 on their financial condition and operating results and (ii) the risks associated with providing such voluntary disclosure. However, issuers should note that there is no requirement to make such a voluntary disclosure. The SEC does not have the power to require issuers to make this voluntary disclosure.

To date, issuers have made several thousand filings on EMMA concerning the effects of COVID-19. The MSRB publishes a list of these filings weekly, so issuers can review other filings and compare what other entities similar to themselves have done.

If an issuer decides to make a voluntary disclosure, the disclosure can either be posted on EMMA or posted on the issuer's website. If the information is posted in both places, the same information should be posted in each place. Any information posted must be consistent with any other information in the public domain, such as reports made to public officials or public bodies.

SUMMARY OF SEC STATEMENT

The municipal disclosure statement requests issuers to provide investors with "as much information about their current financial and operating condition as is reasonably practicable" and encourages issuers to make "voluntary, unaudited and non-routine disclosures regarding current financial status and operating conditions." The statement emphasizes the "need for timely financial information" and notes that due to the unpredictable nature of the health crisis and its impact in today's markets, the practice of providing historical financial information in an annual information filing may not be enough for investors to make assessments of an issuer's current and expected financial condition in order to make an informed investment decision. The statement also encourages issuers to provide forward-looking information on the potential impact of COVID-19 on their financial and operating condition. Regarding timing, the statement encourages issuers to include these disclosures in disclosure for bond offerings or required filings, and also to consider providing voluntary disclosure.

The statement acknowledges that the issue of liability for voluntary or expanded required disclosures is often raised, and lists some factors that weigh in favor of making those disclosures in light of the concern of potential liability:

- The statement notes that accompanying these disclosures with "meaningful cautionary language – including, for example, (1) a description of relevant facts or assumptions affecting the reasonableness of reliance on and the materiality of the information provided, (2) a description of how certain important information may be incomplete or unknown, and (3) the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information—will not only improve the quality of the disclosure but also will reduce legal and other risks."
- Issuers may already be required to disclose similar information to other parties in connection with government programs or in the pursuit of funding and disclosure should be consistent and reach all potential investors when appropriate.
- According to the statement, the Chairman and the Director "would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC."
- The statement notes that "[w]hile the safe harbors for forward looking statements that are available to certain corporate issuers are not available to issuers of municipal securities, we

believe that a municipal issuer’s approach to forward-looking disclosures should be informed by the judicially developed “bespeaks caution” doctrine, which is discussed below.

CONSIDERATIONS WHEN DRAFTING COVID-19 DISCLOSURE

An issuer’s disclosure about the impacts of COVID-19 should not merely recite the history of COVID-19 related actions it has taken. Rather, its disclosure should address the myriad potential effects of COVID-19 on the operations and finances of the issuer as an entity and on the issuer’s securities.

In addition to any historical results that may be required for a particular reporting period, the disclosure should address the current condition of the issuer in light of the COVID-19 pandemic, and issuers should consider whether to include future projections regarding its financial and operating results as the SEC is urging.

Considerations for Disclosure of Current Conditions. Disclosing the current condition of the issuer is based on known and verifiable factual information and is important, especially if its current condition differs from historical results. Issuers should consult with legal counsel but some items to address are:

- How have its operations been affected? Have operations ceased or are they limited?
- How have revenues, expenses and investments been affected?
- Can the issuer make timely debt service payments and does it have enough resources to fund essential operations?
- Have any programs been instituted to reduce expenses and address any unbudgeted costs? (e.g. labor or salary reductions)
- Has the issuer incurred new debt?
- Has the issuer obtained new liquidity facilities or drawn on existing liquidity facilities?
- Has the issuer received any governmental funding or does it plan to seek aid and if so what type and amount and are there any unique terms or conditions?
- Is the issuer a defendant in any litigation related to COVID-19?

Considerations for Disclosure of Projections. In addition to disclosing the past and current state of the issuer, the SEC has encouraged issuers to assess the future impact that COVID-19 will have on their financial and operating condition by using forward-looking statements and projections. Unlike the corporate market, there is no safe harbor for municipal securities for forward-looking statements. Rule 10b-52 liability still applies to any forward-looking statements or projections.

The SEC points out in its municipal disclosure statement that forward-looking statements should be informed by the “bespeaks caution” doctrine which has been created by a series of federal Circuit Court decisions. This doctrine says that a forward-looking statement accompanied by sufficient cautionary language is not actionable because a reasonable investor could not have found the statement materially misleading. However, issuers should be aware of the enforcement and litigation risks associated with such statements, especially in this evolving and uncertain environment. For that reason it is important to internally vet all projections and assumptions with experts, legal counsel and other advisers, as well as include all assumptions and appropriate disclaimers in such disclosure. This will be critical in order to mitigate any litigation or enforcement risk should projections materially differ from actual results.

REMINDER

As with any communication by an issuer to the market, Rule 10b-5 liability applies to any issuer statements regarding the effects of COVID-19, whether it be in an offering document, annual or quarterly filing, event notice, voluntary event notice, public statement (for example statements made in connection with presenting budgets for upcoming fiscal years) or investor website. Issuers should consult with legal counsel and other advisors when making any disclosures or other public statements about the effects of COVID-19 on the issuer and its securities.

It is important to assess whether your disclosure is material and complete. And it is imperative that any forward-looking statements or projections contain the underlying assumptions and necessary disclaimers.

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1 SEC Rule 15c2-12, 17 C.F.R. § 240.15c2-12 (2020).
2 SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2020).

Public Finance Alert | May.13.2020

Hawkins Advisory: SEC Statement on Disclosure by Municipal Issuers regarding the Impact of COVID-19

This Advisory provides a summary and analysis of the SEC's public statement directed to issuers of municipal securities regarding disclosures about the impact of COVID-19 on their financial and operating conditions.

Read the Hawkins Advisory.

MSRB Enhances Usability of Disclosure Summary Report about Impact of COVID-19.

State and Local Disclosures to Its EMMA System Referencing COVID-19 Are Now Sortable

Washington, DC – States, municipalities and other bond issuers continue to ramp up the pace of public disclosures describing the impact of the novel Coronavirus Disease (COVID-19) on their financial condition and operating status. The Municipal Securities Rulemaking Board (MSRB) today enhanced the format of its weekly report aggregating disclosures submitted to its free Electronic Municipal Market Access (EMMA®) system that reference COVID-19.

"At such a challenging time for the market, the MSRB is pleased that so many market participants found our report useful in monitoring, at a glance, the volume of disclosure filings coming into our EMMA system that speak to the effects of COVID-19 on state and local issuers' revenues and ability to continue providing essential public services," said MSRB Chief Operating Officer Mark Kim. "The number of filings captured in our report quickly rose from 630 on April 2 when we first released the report, to more than 4,500 this week. Today's new sortable spreadsheet format will make it much easier for investors, issuers and other market participants to digest this ever-growing volume of information."

The MSRB's weekly disclosure report captures primary market disclosures, as well as all categories of continuing disclosures, including financial disclosures and event notices. The MSRB does not regulate municipal bond issuers or establish requirements for the content or categorization of disclosures submitted to the EMMA system. However, the MSRB strives to provide tools to make this issuer-provided information more user-friendly. The enhanced format of the MSRB's weekly disclosure summary permits users to sort by category, issuer name, state and posted date.

The full text of the disclosures hyperlinked in the MSRB's report are accessible to the public at no cost on the EMMA website. The MSRB has leveraged cloud-computing to search the approximately 65,000 disclosures the EMMA system received from January 1, 2020 to May 10, 2020 to identify those that referenced COVID-19 or related keywords.

"We are encouraged by this sign of the value to the market that we will be able to deliver once we complete our migration to the cloud and modernize our legacy market transparency systems," Kim said. "In the future, we imagine it won't take a team of MSRB data experts to produce this report. The EMMA website would be able to offer this high-powered keyword search functionality directly to the public."

The MSRB recently formed a Market Transparency Advisory Group and selected a group of 13 individuals to represent the diversity of municipal market participants and help identify objectives for the modernization of the MSRB's systems and provide input on potential data and technology tools for the market.

- View the enhanced COVID-19-related disclosure report.
- View the MSRB's dedicated webpage for COVID-19-related information and market analyses.

Date: May 12, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

SIFMA Updates MSRB Rule G-17 Model Disclosure Documents.

New York, N.Y., May 13, 2020 — SIFMA today announced updates to its set of G-17 model disclosure documents and related drafter's guidance to help municipal securities underwriters comply with the newly amended requirements for disclosure to municipal issuers set forth by the revised interpretive guidance to Municipal Securities Rulemaking Board (MSRB) Rule G-17.

The MSRB established a compliance date of March 31, 2021 (extended as a result of the COVID-19 crisis) for its amended and restated guidance regarding the fair dealing obligations underwriters owe to issuers of municipal securities under MSRB Rule G-17, which covers the conduct of both municipal securities and municipal advisory activities.

"SIFMA created our G-17 model documents in 2012 to assist underwriters in their compliance with the Rule, and we offer the updated versions that take into account the changes the MSRB made to the guidance," said Bernard Canepa, Vice President and Assistant General Counsel, SIFMA. "In the spirit of the revised guidance, the updated documents are designed to streamline the disclosures made to issuers to more narrowly focus on the risks and conflicts most relevant to a given transaction. The updated documents also incorporate new requirements of, and clarifications to, the revised guidance. We encourage underwriters to modify these documents as necessary."

The updated documents now include two disclosure letters reflecting the revised fair dealing obligations of underwriters: one for the Sole or Senior Managing Underwriter to make the standard disclosures and disclose their own conflicts, and one for the co-managing underwriter to disclose their own conflicts as well.

SIFMA recommends that underwriters update their internal processes and continue to educate their public finance departments and issuer clients about the coming changes.

SIFMA plans to update its Model Risk Disclosures prior to the March 31, 2021 compliance date for the rule amendments posted currently on the website.

BDA Submits Comments on Draft Amendments to MSRB Rule A-3: Membership on the Board.

Today, following extensive work with BDA membership committees and leadership, the BDA submitted comments in response to the MSRB request for comment on Draft Amendments to Rule A-3.

The comment letter can be viewed here.

The BDA comments, among other points, requests that the MSRB consider:

- A five-year separation requirement for independent directors is too long
- Delay implementation of the changes included in the Notice until fiscal year 2022 and should begin recruiting the 2021 Board as soon as possible.
- Rule A-3 should not specify a minimum number of non-dealer MAs larger than required by statute. If the MSRB does specify two seats for MAs, one of those should be reserved for dealer MAs.
- Specify a minimum number of issuers among independent directors and reserve one seat for a small issuer representative.

Background

The proposed amendments to MSRB Rule A-3 include tightening the independence standard required of public representatives on the Board by requiring a minimum of five years of separation from a regulated entity before an individual would be eligible to serve as a public member.

The proposal also includes reducing the size of the Board to 15 members, with eight members representing the public and seven representing regulated entities. To facilitate the possible transition to the new Board size, the MSRB currently is not seeking applicants for new Board members for Fiscal Year 2021.

The MSRB's proposal addresses many of the issues raised by Senator Kennedy (R-LA) and co-sponsors Senators Warren (D-MA) and Jones (D-AL) in their proposed legislation, S. 1236, the Municipal Securities Rulemaking Board Reform Act of 2019, as well as recommendations identified as a result of the Special Committee's review and assessment of the Board's governance practices. The MSRB is subject to oversight by both Congress and the Securities and Exchange Commission.

Bond Dealers of America

April 29, 2020

NFMA Submits Comment Letter to MSRB on COVID-19 Credit-Related Material Event Notices.

To review the letter, click here.

BDA Hosts Reg BI Conference Call with SEC, FINRA, and MSRB.

Today, the BDA along with Retail Committee leaders hosted a conference call with representatives from the SEC, FINRA, and the MSRB to discuss the implementation of the best interest standard known as Regulation Best Interest (Reg BI), which has a compliance date of June 30th. Following the SEC announcement stating that the Commission will continue to go forward with implementation of the Rule this summer, the BDA collected questions from membership to be answered by the regulators. The call worked through the questions and issues raised by BDA membership.

The discussion included:

- The SEC's expectation regarding rationale or justification for trades and steps firms and advisors need to take to ensure compliance;
- The inherent compliance obligations with the "risk-based" approach when surveilling portfolio construction and the evaluation of specific recommendations;
- How swaps should be treated for the Reg BI reporting process;
- How to disclose conflicts of interest regarding in principal trading and underwriting;
- Requirements of advisors to justify the suitability of each trade as part of the heightened responsibility stemming from the new Rule;
- Suitability requirements included in Reg BI; and
- Which costs and fees to disclose in layered disclosure documents.

Bond Dealers of America

April 29, 2020

MSRB Seeks to Amend Certain Rules to Align With Regulation Best Interest.

Today, the MSRB filed proposed amendments with the SEC to align MSRB rules with the requirements of SEC Regulation Best Interest. The MSRB's proposal is designed to reduce complexity in financial regulation and facilitate compliance with Reg BI. **The proposed effective date is the compliance date for Reg BI, June 30, 2020.**

The filing can be viewed here.

The proposed amendments would update MSRB Rule G-19 on suitability, Rules G-8 and G-9 on books and records, Rule G-20 on gifts and gratuities and Rule G-48 on transactions with sophisticated municipal market professionals (SMMPs).

The MSRB Board of Directors approved the proposed amendments to MSRB rules to be filed with the SEC, where they will be published for public comment and must be approved by the SEC before becoming effective.

The BDA will continue to provide updates and information regarding potential calls to draft a response to the filing.

Bond Dealers of America

May 1, 2020

GASB Postpones Effective Dates of Upcoming Pronouncements.

Norwalk, CT, May 8, 2020 — The Governmental Accounting Standards Board (GASB) today issued Statement No. 95, *Postponement of the Effective Dates of Certain Authoritative Guidance*. The Statement is intended to provide relief to governments and other stakeholders in light of the COVID-19 pandemic.

The guidance postpones by one year the effective dates of certain provisions in the following pronouncements:

- Statement No. 83, *Certain Asset Retirement Obligations*
- Statement No. 84, *Fiduciary Activities*
- Statement No. 88, *Certain Disclosures Related to Debt, including Direct Borrowings and Direct Placements*
- Statement No. 89, *Accounting for Interest Cost Incurred before the End of a Construction Period*
- Statement No. 90, *Majority Equity Interests*
- Statement No. 91, *Conduit Debt Obligations*
- Statement No. 92, *Omnibus 2020*
- Statement No. 93, *Replacement of Interbank Offered Rates*
- Implementation Guide No. 2017-3, *Accounting and Financial Reporting for Postemployment Benefits Other Than Pensions (and Certain Issues Related to OPEB Plan Reporting)*
- Implementation Guide No. 2018-1, *Implementation Guidance Update—2018*
- Implementation Guide No. 2019-1, *Implementation Guidance Update—2019*
- Implementation Guide No. 2019-2, *Fiduciary Activities*

The Statement postpones the effective dates of the following pronouncements by 18 months:

- Statement No. 87, *Leases*
- Implementation Guide No. 2019-3, *Leases*

The provisions of Statement 95 are effective immediately. Statement 95 does not postpone the effective date of Statement No. 94, *Public-Private and Public-Public Partnerships and Availability Payment Arrangements*, because the pandemic was factored into Statement 94’s effective date.

The Board worked on this guidance under an expedited schedule. It would like to thank all stakeholders who responded under difficult circumstances.

The GASB provides other COVID-19-related resources for stakeholders, including an emergency toolbox, on its website at www.gasb.org/COVID19.

SEC: Investors Need Timely Information on Muni Bond Issues.

Disclosure is needed because of the financial and economic impacts of the COVID-19 pandemic.

The Securities and Exchange Commission is advising municipal bond issuers to disclose “as much information about their current financial and operating condition as is reasonably practicable” because of the economic and financial impact of the COVID-19 pandemic.

The SEC is also encouraging issuers to provide investors with information about the potential future impact of the pandemic on their financial and operating conditions, and it’s encouraging financial advisors to discuss the importance of those disclosures with their clients when providing recommendations and investment advice.
“The fluid and unpredictable nature of the public health crisis and its financial and economic impacts on municipal issuers has placed investor need for timely financial information into stark relief,” according to a statement from SEC Chairman Jay Clayton and Rebecca Olsen, the director of the agency’s Office of Municipal Securities.

The statement notes that disclosures from muni bond issuers should reflect:

- Issuers’ assessments of their current operational and financial status, including decreases in revenues and delays in revenue collections
- How responses to the pandemic have impacted their operational and financial conditions, including unbudgeted costs
- How operational and financial conditions may change as their efforts to fight the pandemic evolve

The SEC would also like muni issuers to include in their disclosures their access to cash and reserves and liquidity facilities, including those they have used and may use in the future; the availability of federal, state and local aid they have sought or plan to seek, including the timing of such aid; and any reports issuers have prepared that may be “significant sources of current information.”

Such disclosures would be “voluntary, unaudited and non-routine” and “may be challenging … under the current circumstances,” according to the SEC.

The Economic and Fiscal Challenges of Muni Issuers

The agency’s request comes at a time when many states, counties, cities and towns have been hit with a big drop in revenues while also experiencing an increased demand for spending and services due to the COVID-19 pandemic.

They’re collecting fewer revenues from sales and other taxes while shelling out more funds to pay for unemployment — roughly 30 million people have lost jobs in the past six weeks — and emergency health care, for example.

On top of that, states must balance their budgets annually, forcing many to cut programs at a time when they’re needed most.

The Coronavirus Aid, Relief and Economic Security (CARES) Act provided about $150 billion in direct federal aid to states and cities, but $500 billion more is needed, according to the National Governors Association.

Federal aid has focused on coronavirus-related expenses rather than future revenue replacement, leading states “to balance their fiscal 2021 budgets on the back of local governments by reducing transfers,” according to a report from Moody’s Investors Service.

Congressional Democrats have been pushing for a fourth federal aid package that would include more funds for states and cities, but Republicans, led by Senate Majority Leader Mitch McConnell, R-Ky., and President Donald Trump, have opposed more funds for states and cities. McConnell even suggested that states file for bankruptcy if they can’t balance their budgets, which is not legal.

On Sunday, Trump’s chief economic advisor, Larry Kudlow, said the White House would like to pause before a fourth coronavirus aid program is developed, although he doesn’t rule it out.

On Tuesday, Moody’s downgraded its outlook for local government debt issuers from stable to negative, just three days after it did the same for state issuers — both because of the economic impact of the COVID-19 pandemic on issuers.

Matt Fabian, a partner at Municipal Market Analytics (MMA), welcomed the SEC’s push for more disclosure among muni issuers.

“Investors are rewarding issuers providing transparency, even if the news is bad,” he said. They are “more likely to shy away from or sell exposures about which they can’t get any fresh information.”

In the absence of “actual financial information, investors are forced to rely on the casual statements and social media posts made by government officials, which are subject to the same anti-fraud requirements of any other informational release,” added Fabian. “Governments do themselves a favor by putting real data into investors hands.”

Chris Brigati, head of municipal trading at Advisors Asset Management, said the SEC’s push for more disclosure will be a challenge for many muni issuers to satisfy. “Most issuers are not great at disclosure to begin with and now you’re asking them for something they have not historically done and to do forecasting on top of that. It’s a nice idea but it’s going to be hard to execute.”

But it’s understandable why the SEC would want investors to have the information. Retail investors dominate the muni bond market, owning about 72% of the bonds either directly or indirectly, or approximately $3 trillion of outstanding issues, according to the SEC.

Given that the muni market is complex and diverse — it includes 50,000 issuers and approximately 1 million securities, according to the SEC, and multiple types of bond structures — the SEC says both “issuer-specific and security-specific disclosures are material.”

ThinkAdvisor

By Bernice Napach | May 05, 2020 at 12:45 PM

SEC Leaders Ask Municipal Issuers for Voluntary COVID-19 Disclosure.

On May 4, Securities and Exchange Commission Chairman Jay Clayton and Rebecca Olsen, Director of the SEC’s Office of Municipal Securities, issued a statement entitled “The Importance of Disclosure for our Municipal Markets”1 stating that “in light of the potentially significant effects of COVID-19 on the finances and operations of many municipal issuers” municipal issuers should provide investors “as much information about their current financial and operating condition as is reasonably practicable,” noting “the fluid and unpredictable nature of the public health crisis and its financial and economic impacts on municipal issuers.” The May 4 Statement offers “observations and requests” to help municipal issuers provide such disclosures and intentionally parallels the Corporate Issuer Statement made in April by Chairman Clayton and William Hinman, Director of the Division of Corporation Finance.2 For municipal issuers experienced in making voluntary disclosure, little should be surprising and much reassuring.

The May 4 Statement lists certain disclosures which the authors believe are important to investors and market participants during the ongoing pandemic: (i) information regarding the impact of COVID-19 on operations and financial condition, (ii) sources of liquidity, such as cash on hand and access to various reserves or other funds, (iii) the availability of federal, state and local aid, and (iv) reports prepared for other governmental purposes “that may be significant sources of current information” in primary offering documents such as contractually required disclosure filings or voluntary public statements on EMMA, their investor relations webpage, or other “place or places at which they regularly make information available.”3 Acknowledging the liability risk associated with decisions to voluntarily disclose or expand required disclosure, the authors “believe there are various factors that generally weigh in favor of making [such] disclosures.” Key among them is that the authors “would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.” The Statement does not specifically discuss federal securities law antifraud provisions, which are omnipresent in the context of municipal disclosure, and so is best read together with the Staff Legal Bulletin No. 21 (OMS) of February 7, 2020 reviewing those provisions as applied to municipal issuer public statements.4

The May 4 Statement begins with a description in detail of the size, importance, complexity, and specialized nature of the municipal securities market and states that municipal issuers and investors should recognize the materiality of both issuer-specific and security-specific disclosure. Likewise, financial professionals should discuss the importance of both kinds of disclosure with their customers and also when providing recommendations and investment advice.

The May 4 Statement goes on to recognize that the COVID-19 pandemic requires an increased focus on the finances and operations of municipal issuers, and requests increased voluntary disclosure of such information. “The fluid and unpredictable nature of the public health crisis and its financial and economic impacts on municipal issuers has placed investor need for timely financial information into stark relief” and so “the typical practice of providing historic financial information in the form of an annual information filing or similar disclosure may not enable investors to make informed assessments of the municipal issuer’s current and expected future financial condition.” In other words, an issuer fully satisfying existing disclosure requirements required by law may not be providing investors all they need in today’s circumstances. The solution is voluntary disclosure, but even the authors acknowledge that there are risks accompanying such disclosure because “certain financial disclosure would be based on estimates and assumptions as well as projections regarding future circumstances.”

The authors recognize that consideration of voluntary disclosure or any expansion of required disclosure may include consideration by the issuer (with advice of counsel) of potential antifraud liability. They describe “various factors that generally weigh in favor of making these disclosures” including practices frequently employed by counsel in the preparation of forward-looking or non-routine disclosures:

- Accompanying those disclosures with meaningful cautionary language will not only improve the quality of the disclosure but will also reduce legal and other risks. This would include, for example:

(1) a description of relevant facts or assumptions affecting the reasonableness of reliance on, and the materiality of, the information provided;

(2) a description of how certain important information may be incomplete or unknown; and,

(3) the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information.

- While the safe harbors for forward looking statements that are available to certain corporate issuers are not available to issuers of municipal securities, the authors believe that a municipal issuer's "approach to forward-looking disclosures should be informed by the judicially developed 'bespeaks caution' doctrine."

Issuers, counsel and other municipal market participants are familiar with the use of these techniques in preparing offering documents. The Statement notes that municipal issuers may be required to disclose similar information to other parties in connection with:

- efforts by federal and state governments to assess the financial impact of COVID-19 on states, municipalities and special purpose entities; and,
- the pursuit by municipal issuers of funding or other support from governmental authorities and private parties.

The May 4 Statement notes that it is "extremely important" to ensure that disclosure of this type is "consistent across all contexts, regardless of the purpose," and "kept confidential until disclosed and, when disclosed, disclosed broadly." This admonition may be understood as a reminder of the assertion in the February 7, 2020 Staff Legal Bulletin that such statements made by an issuer in public reports to other government bodies may be covered by the antifraud provisions.5

The authors of the May 4 Statement state that they "would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC." This assertion seems unusual and worth noting. The Statement from the outset cautions that it:

> represents the views of the Chairman and the Director of the Office of Municipal Securities of the U.S. Securities and Exchange Commission … It is not a rule, regulation, or statement of the SEC. The Commission has neither approved nor disapproved its content. This statement does not alter or amend applicable law and has no legal force or effect.

While it may be unusual for SEC representatives to suggest that the SEC will not "second guess" disclosure that later proves to be inaccurate, this statement does not (and could not) change existing law. Aside from statements made in offering documents, municipal issuers would only be subject to antifraud liability for statements in voluntary disclosures and expansion of disclosures required by continuing disclosure agreements if they acted with scienter. Municipal issuers employing the steps identified in the Statement, following effective disclosure policies and procedures and the assistance of experienced disclosure counsel, would be unlikely to intentionally or recklessly misstate their financial or operating conditions, and therefore would be unlikely to act with scienter. Understood in that light, the statement, while rare, may not be surprising.

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1 Available at: https://www.sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04.

Unless otherwise identified, matters in quotations in this update are text from the Statement.

2 Chairman Jay Clayton and William Hinman, the Director, Division of Corporation Finance, The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19 (Apr. 8, 2020), available at: https://www.sec.gov/news/public-statement/statement-clayton-hinman.

3 As provided in the May 4 Statement:

Information Regarding the Impact of COVID-19 on Operations and Financial Condition.
Disclosures should reflect the issuer's assessment of this state of affairs and outlook and, in particular municipal issuers should provide information regarding: (1) their current operational and financial status, including decreases in revenues and delays in collection of revenues; (2) how their COVID-19 response including efforts to protect the health and well-being of residents and employees has impacted their operational and financial condition, including un-budgeted costs; and (3) how their operational and financial condition may change as efforts to fight COVID-19 evolve. In these circumstances, comparisons to historical information may be relatively less significant.

Information Regarding Sources of Liquidity.
A description of cash on hand, access to reserves or other funds (and to what extent such access is limited), access to liquidity facilities and whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments. If not otherwise disclosed, we encourage municipal issuers to disclose the material terms of any liquidity facility the issuer has used or expects it may use.

Information Regarding Availability of Federal, State and Local Aid.
A description of available federal, state or local aid the issuer has sought or is planning to seek and the anticipated timing of such aid. In addition, if the municipal issuer has obtained any such aid, it should disclose the nature, amount, and other material terms of the aid if it materially affects or reasonably likely will materially affect its operational or financial condition.

Reports Prepared for Other Governmental Purposes.
Municipal issuers routinely prepare reports for governance purposes that may be significant sources of current information. As front-line responders, these reports could provide powerful insight into local, regional, and sector-specific strategies to fight and recover from COVID-19. Accordingly, municipal issuers should consider making these reports more readily accessible to investors. [As noted previously in the Statement, "For various legal and other reasons, ensuring that disclosure of this type is (1) consistent across all contexts, regardless of the purpose and (2) kept confidential until disclosed and, when disclosed, disclosed broadly, is extremely important."

4 Application of Antifraud Provisions to Public Statements of Issuers and Obligated Persons of Municipal Securities in the Secondary Market: Staff Legal Bulletin No. 21 (OMS) (Feb. 7, 2020), available at: https://www.sec.gov/municipal/application-antifraud-provisions-staff-legal-bulletin-21.

5 Id.

Friday, May 8, 2020

[SEC Chair and OMS Director Issue Joint Statement Encouraging COVID-19 Disclosure by Municipal Issuers.]

On May 4, 2020, Securities and Exchange Commission (SEC) Chair Jay Clayton and Office of Municipal Securities Director Rebecca Olson issued a joint statement available here strongly encouraging robust and timely disclosure in the municipal market about the effects of the coronavirus disease 2019 (COVID-19) public health crisis. The joint statement follows a similar statement issued in early April for corporate issuers.

The joint statement specifically discusses the importance of municipal issuers providing investors with information regarding the impact of COVID-19 on their financial and operating conditions. This disclosure is encouraged (and likely necessary) in connection with disclosures made in official statements for current debt offerings, and perhaps filings made under continuing disclosure agreements, depending on the circumstances. In addition, the SEC Chairman and OMS Director encourage municipal issuers to make voluntary disclosure filings if they are not currently in the market or otherwise posting required information on EMMA. The joint statement suggests this disclosure would include:

- Information regarding the impact of COVID-19 on operations and financial condition, including (1) the current operational and financial status, including decreases in revenues and delays in collection of revenues; (2) how COVID-19 has impacted operational and financial condition, including increased costs; and (3) how the financial condition may change as the COVID-19 crisis evolves
- Information regarding availability of sources of liquidity, including cash on hand, access to reserves or other funds, liquidity facilities and whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments
- Information regarding availability of federal, state and local aid, including information about aid that has been applied for or received and the expectation of future payments
- Reports prepared for other governmental purposes, including reports that could provide insight into local, regional and sector-specific strategies to fight and recover from COVID-19

The SEC Chairman and OMS Director recognize the challenge in providing specific information about potential effects of COVID-19 due to the evolving nature of the current public health crisis. However, the joint statement sets out a number of factors that they believe should be weighed heavily by municipal issuers in determining whether to provide meaningful disclosure on a voluntary basis.

Perhaps the most important matter discussed in the joint statement is how the SEC Chairman and OMS Director expect “forward-looking statements” in municipal disclosure to be viewed by the SEC. The SEC Chairman and OMS Director stated, “We would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.” This is important because there is no specific “safe-harbor” for “forward-looking statements” for municipal disclosure. Nevertheless, we have generally concluded that protection from liability for “forwardlooking statements” in municipal disclosure would be afforded in the municipal market by analogy and under the judicially acknowledged “bespeaks caution” doctrine, similar to that provided in the corporate market for reporting companies.

The information provided in the joint statement is consistent with and, to a certain extent, a confirmation of what we have said in prior alerts regarding dealing with disclosure issues during the COVID-19 public health crisis and generally. To the extent that you are making public statements about the impact of COVID-19 on your financial position or operations, whether those statements are specifically intended for your bond investors or not, you should follow your existing disclosure procedures to provide for consistent information for all interested stakeholders, including governing body members, citizens, other government agencies, lenders and investors in your publicly offered debt obligations. These statements should include appropriate explanatory information about the basis for the statements and precautionary language regarding the "forward-looking" nature of the information provided and the likelihood of the information changing, as the public health crisis continues to evolve.

There is no doubt these are challenging times. However, it is important to continue to follow your disclosure policies and procedures, even when challenged by a great national public health crisis. The joint statement by the SEC Chairman and OMS Director is a welcome response in the midst of the current pandemic and will help to facilitate the production of meaningful disclosure.

Squire Patton Boggs

May 8 2020

SEC Urges Municipal Issuers to Voluntarily Expand Disclosures: McGuireWoods

For many years, the U.S. Securities and Exchange Commission (SEC) has advocated for increased transparency for municipal securities investors. Given the absence of a statutory scheme for municipal securities reporting, the SEC sought to protect investors through the regulation of broker-dealers, municipal securities dealers and municipal advisors; SEC interpretive guidance and industry guidelines; and enforcement of the antifraud provisions of the federal securities laws. Disclosure practices in municipal securities offerings, too, have largely developed in this way, with the SEC consistently advocating for greater and timelier disclosures of issuer and conduit borrower financial and operating information in the primary offering and continuing disclosure contexts.

The SEC has now reinforced its focus on enhanced municipal market disclosures in light of COVID-19 and the pandemic's potential effects on the financial status of state and local governments and special purpose entities. On May 4, 2020, SEC Chairman Jay Clayton and Office of Municipal Securities Director Rebecca Olsen released a public statement, "The Importance of Disclosure for Our Municipal Markets," requesting municipal issuers to provide robust, accurate and timely disclosures to market participants. In their statement, Chairman Clayton and Director Olsen stressed the importance of high-quality marketplace disclosures and requested "municipal issuers to provide investors with as much information about their current financial and operating condition as reasonably practicable."

They further observed that, in today's markets, the typical practice of providing historic information in the form of an annual filing or similar disclosure may be insufficient for investors to make informed assessments of the municipal issuer's current and expected future financial information. As a result, Chairman Clayton and Director Olsen encouraged municipal issuers voluntarily to provide investors with detailed current and forward-looking information regarding the impact of COVID-19 on their financial and operating conditions. Recognizing legitimate concerns of liability with respect to voluntary disclosure, including the provision of forward-looking financial information not historically provided by issuers, they expected that the SEC would not second-guess good faith attempts to provide appropriately framed current or forward-looking information. We believe this recognition should provide some comfort to issuers particularly as the SEC recently reminded them (and obligated persons) of the application of the anti-fraud provisions to public statements reasonably expected to reach investors and the trading markets. (For details, see a Feb. 7, 2020, OMS Staff Legal Bulletin, "Application of Antifraud Provisions to Public Statements of Issuers and Obligated Persons.")

Other regulators likewise continue to evaluate the impact of COVID-19 on the markets and investors and provide guidance and relief to assist the industry in tackling the many new challenges brought about by the virus. Regulators at the same time have maintained a strong focus on identifying illicit activities that target the financial markets and prey on investor fears. (For details on regulators' previous efforts, see McGuireWoods' updates on April 28, April 21, April 15, April 6, March 26 and March 17.)

In announcing the formation of the North American Securities Administrators Association (NASAA) Enforcement Task Force (discussed below), Christopher W. Gerold, NASAA President and Chief of the New Jersey Bureau of Securities noted that "fraudsters are ramping up as a result of this crisis" and that state regulators will aim to "proactively identify COVID-19-related threats to investors, including but not limited to fraudulent offerings, investment frauds, and unregistered regulated activities, within the jurisdiction of NASAA member states and provinces, and to disrupt, discourage and deter those activities."

These concerns are in line with messages from regulators as early as Feb. 4, 2020, when SEC issued its investor alert regarding COVID-19-related scams. On March 26, 2020, the Financial Industry Regulatory Authority (FINRA) issued a similar alert and, on March 30, 2020, NASAA issued an investor fraud alert. Finally, on May 4, 2020, the Financial Action Task Force — the international money laundering and terrorist financing watchdog — published a report highlighting fraud-related risks companies are facing in light of COVID-19, including the proliferation of investment scams, bank fraud targeting financial and account information, and cybercrime. The report advocated for increasing cooperation with regulators abroad and with the private sector.

U.S. SECURITIES AND EXCHANGE COMMISSION (SEC)

Chairman Jay Clayton and Office of Municipal Securities Director Rebecca Olsen's Statement on the Importance of Disclosure for Municipal Markets

As described above, Chairman Clayton and Director Olsen are encouraging municipal issuers voluntarily to provide investors with as much current issuer- and security-specific information as practicable, as well as forward-looking investor-oriented disclosures discussing the anticipated effects of COVID-19 on their financial and operating conditions. As examples, they suggested the following kinds of disclosures that they believe would be helpful to investors:

- **Information Regarding the Impact of COVID-19 on Operations and Financial Condition.** Disclosures should reflect the issuer's assessment of this state of affairs and outlook, and issuers should provide investors with information such as current operational and financial status including decreases in revenues and delays in collection of revenues; how their COVID-19 response has impacted their operational and financial condition, included unbudgeted costs; and anticipated changes in operational and financial condition as efforts to fight COVID-19 evolve.
- **Information Regarding Sources of Liquidity.** A description of cash on hand, access to reserves or other funds, access to liquidity facilities, and whether current liquidity is expected to be adequate to fund essential services and make time timely debt service payments. If not otherwise disclosed, the issuer should describe the material terms of any liquidity facility the issuer has used or expects it may use.
- **Information Regarding Availability of Federal, State and Local Aid.** A description of

available federal, state or local aid the issuer has sought or is planning to seek and the anticipated timing of such aid. If the issuer has obtained such aid, include information related to the nature, amount and other material terms of the aid if it materially affects or reasonably likely will materially affect its operational or financial condition.
- **Governmental Reports.** Municipal issuers should consider making available to investors reports prepared by municipal issuers for governance purposes that could provide insight into local, regional and sector-specific strategies to fight and recover from COVID-19.Chairman Clayton and Director Olsen stated that they did not expect the SEC to second-guess good faith attempts to provide the foregoing current and forward-looking disclosures. They believed that a municipal issuer's approach to forward-looking statements should be informed by the judicially developed "bespeaks caution" doctrine (generally, that economic projections, estimates of future performance and similar forward-looking statements in a disclosure document are not actionable when meaningful cautionary language elsewhere in the document adequately discloses the risks involved). Accompanying disclosures with meaningful cautionary language would help to reduce potential legal risks. However, they cautioned that it was extremely important to maintain confidentiality of information related to the financial impact of COVID-19 on municipal issuers, including, among other things, the pursuit of funding and support from governmental authorities and private parties, until that information is disclosed, and where it is disclosed, it should be disclosed broadly.

Finally, Chairman Clayton and Director Olsen encouraged financial professionals to discuss the importance of issuer-specific and security-specific disclosures with their investors who buy, sell and hold municipal securities, including in particular when providing recommendations and investment advice to Main Street investors.

Please refer to McGuireWoods' April 17 legal alert regarding the similar statement by Chairman Clayton and the SEC Division of Corporate Finance with respect to corporate issuers.

Updates to SEC Investment Management Staff FAQs

On April 27, 2020, the Staff of the SEC Division of Investment Management updated its COVID-19 Response FAQs. Among other things, the Staff addressed advisers that receive Paycheck Protection Program (PPP) Loans.

- The Staff said advisers should disclose to their clients the nature of assistance they received under the program if the circumstances leading the firm to seek a PPP loan or assistance "constitute material facts relating to your advisory relationship with clients."
- The Staff specifically noted that inability of the adviser to pay its advisory employees' salaries would be a material fact that must be disclosed.
- *Notably, this guidance from the SEC diverges somewhat from the stance FINRA has taken in its FAQs*, where FINRA has advised that, to the extent consistent with the terms of the PPP loan, forgiveness of the loan would be consistent with the loan's original terms, and therefore would not constitute a "compromise with creditors" for purposes of Form U4 disclosure. (See April 15 update.)

FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)

On April 28, 2020, FINRA released Episode 58 of its Unscripted Podcast, "Market Structure & COVID-19: Handling Increased Volatility and Volumes."

- In Episode 58, FINRA Executive Vice President of Market Regulation Tom Gira emphasized that the markets have generally held up very well during this period of extraordinary volatility.

Gira provided a summary of the various market indicators during the COVID-19 pandemic and put them in historical context.
- First, circuit breakers had been utilized only once prior to the COVID-19 pandemic to temporarily halt trading on an exchange. Notably, between March 9 and 18 alone, the circuit breakers were employed four times.
- The CBOE VIX index (commonly known as the fear index) hit a record high of 83 on March 16. Additionally, the Limit Up/Limit Down has been triggered over one hundred times more than usual during the past several weeks, including a peak of 1,475 activated on March 18.
- Finally, short sale circuit breakers are activated on a stock-by-stock basis and when activated, short sales have to be executed in a stabilizing way. In the past, about 250 stocks were subject to the short sale breakers at any given time. But at various points throughout March, about 6,000 stocks were subject to it.
- Despite the extreme numbers for the market volatility moderators, FINRA is, overall, very pleased with how the markets have done and commended market intermediaries for their role in maintaining the markets.
- Given the increase in volume across markets and volatility generally, Gira indicated that FINRA will be actively prioritizing and escalating issues, as it wants to focus on issues that are creating more risk to the market and to investors.

STATE REGULATORS

On April 28, 2020, NASAA announced the formation of the COVID-19 Enforcement Task Force, consisting of state and provincial securities regulators, to identify and stop potential threats to investors stemming from the COVID-19 pandemic. NASAA has identified as many as 200,000 coronavirus-related domains as of April 20, 2020, and the task force will be using online investigative techniques to identify additional websites, as well as social media posts that may be offering or promoting fraudulent offerings, investment frauds and unregistered regulated activities. Individual jurisdictions working as part of the task force will be responsible for taking regulatory action to address identified threats.

by E. Andrew Southerling, Cheryl L. Haas, Emily P. Gordy, Aline McCullough, Nicole S. Giffin, Joy D. Llaguno, Steven W. Peretz, Piper A. Waldron and Patrick A. Wallace

May 7 2020

McGuireWoods LLP

NABL: SEC Issues Public Statement on Disclosure

SEC Issues Public Statement: The Importance of Disclosure for our Municipal Markets

The U.S. Securities and Exchange Commission (SEC) released a public statement from Chairman Jay Clayton and Rebecca Olsen, Director of the Office of Municipal Securities.

This statement is directed to issuers of municipal securities as well as investors and market participants more generally and is intended to parallel the Corporate Issuer Statement issued in light of the effects and uncertainties created by the COVID-19 pandemic.

The statement contains, among other things, the following information:

- The SEC's View that Market Participants Should Recognize the Size, Importance, Complexity and Specialized Nature of the Municipal Securities Market;
- The SEC's Position that the Importance of Robust, Timely and Accurate Municipal Issuer Disclosures Has Become Even Greater as a Result of the Effects of COVID-19;
- The Citation of Important Considerations that Generally Weigh in Favor of Providing Updated Investor-Oriented]
- Disclosures that Discuss the Current and Anticipated Effects of COVID-19; and
- Examples of Information Municipal Issuers Could Provide to Investors.

KBRA Releases Research – Coronavirus (COVID-19): Municipal Issuers' Virus-Related Voluntary Disclosures Trend Up

Kroll Bond Rating Agency (KBRA) releases commentary on municipal issuers and coronavirus (COVID-19) voluntary disclosure through the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA) system.

While the pandemic's impact on municipal finances has been the dominant focus of investors and rating agencies, only 343 unique municipal issuers or conduit borrowers (a tiny fraction of the market) had provided coronavirus-related voluntary disclosures through EMMA as of April 22.

Voluntary disclosure is distinct from the mandatory continuing disclosure requirements pertaining to material events under Securities Exchange Commission (SEC) Rule 15c2-12 and is supplemental to required annual and quarterly continuing disclosure filings. Issuers who decide to disclose pandemic-related information that is not, or is not yet, a material event may do so via the voluntary disclosure option.

Click here to view the report.

Business Wire

April 27, 2020

NFMA Comments to GASB on Postponement of the Effective Dates of Certain Authoritative Guidance.

To view the comment letter submitted to GASB, click here.

NFMA Submits Comment on Draft Amendments to MSRB Rule A-3.

On April 29, 2020, the NFMA submitted a comment letter to the MSRB on Draft Amendments to Rule A-3: Membership on the Board.

To view the comment letter, click here.

SIFMA: MSRB Request for Comment on Potential Changes to Board Governance Rule A-3

SUMMARY

SIFMA sent comments to the Municipal Securities Rulemaking Board's ("MSRB") regarding proposed amendments to MSRB Rule A-3 governing membership on the MSRB's Board.

SIFMA welcomes the MSRB's review of its governance with a view to better protecting investors, issuers, and the public interest. This goal can be achieved by a Board that is truly representative and knowledgeable of the municipal securities market.

Download SIFMA Comment Letter.

COVID-19's Impact on Bond Issuers' Finances and 15c2-12 Continuing Disclosure Obligations.

As state and local governments continue to take actions to protect the safety and well-being of their citizenry in response to the COVID-19 pandemic, it is important for issuers and other obligated persons of tax-exempt financings to understand the impact such actions and the economic slowdown may have on their finances and outstanding debt obligations. Each issuer or obligated person should analyze the current and potential effect on its finances and begin to plan for its response to decreased revenues, at least for the foreseeable future.

For example:

- Delayed property and income tax deadlines and stay-at-home orders may lead to decreased government revenues, creating difficulties for issuers and obligated persons to cover existing debt payments, lease rental payments and operating expenses.
- Issuers and obligated persons may also incur increased operational costs associated with maintaining facilities, employee turnover and adapting to enable employees to work remotely.
- Decreasing revenues and increasing costs may lead to reportable events under Securities and Exchange Commission (SEC) Rule 15c2-12 including unscheduled draws on debt service reserves and credit enhancements or ratings downgrades.
- Operational disruptions may create obstacles for issuers and obligated persons to make timely disclosures of reportable events, and the Municipal Securities Rulemaking Board and SEC have no authority to postpone filing deadlines. Failures to meet mandatory disclosure obligations must be reported on offering statements for five years.
- In addition to mandatory disclosures, voluntary disclosure of nonreportable events may be appropriate for some issuers and obligated persons to maintain transparency with investors.

With uncertainty surrounding historically predictable revenue streams, issuers and obligated persons may need to take out loans or issue short term warrants to meet current payment obligations. Issuers and obligated persons should also keep their continuing disclosure obligations under Rule 15c2-12 and procedures for making event disclosures top of mind. Issuers and obligated persons should maintain consistent communications with their attorneys and other advisers to understand how secondary effects of COVID-19 impact their outstanding issues and operations, and how to stay prepared as the situation continues to evolve.

Frost Brown Todd LLC – Michael A. Brockman, Denise Y. Barkdull, Beau F. Zoeller, Laura H. Theilmann and Scott A. Krapf

April 29 2020

ARRC Proposes New York State Legislation to Facilitate LIBOR-to-SOFR Transition.

The Alternative Reference Rates Committee (the "ARRC") recently proposed statutory language for consideration by the New York State legislature intended to minimize costly and disruptive litigation that could result from the discontinuation of LIBOR at the end of 2021. Because many of the financial products and agreements that reference LIBOR are governed by New York law, the ARRC is encouraging urgent legislative action to provide legal certainty to market participants and mitigate potential risks to the economic stability of the financial markets. The accompanying memo published by the ARRC presents a conceptual description of a legislative solution to address LIBOR cessation in financial contracts and outlines several case studies that detail how the proposed statutory language would interact with certain financial products, including floating rate notes, securitizations, consumer adjustable rate mortgages, derivatives, business loans, procurement agreements, and municipal bonds. The ARRC's publication also includes draft statutory text that the New York State legislature could consider if it decided to adopt the ARRC's proposal.

Overview of Proposed Legislation

1. Prohibit a party to the relevant contract from refusing to perform its obligations under the agreement or declaring a breach of contract as a result of LIBOR cessation or the use of the statutory benchmark replacement;
2. Establish that the statute's recommended benchmark replacement (which includes a spread adjustment) is a commercially reasonable and economically equivalent substitute for LIBOR; and
3. Provide market participants with a safe harbor from litigation when they use the statute's recommended benchmark replacement.

Use of the statute's recommended benchmark replacement, which is the benchmark rate recommended by the Federal Reserve Board, the Federal Reserve Bank of New York, or the ARRC, would be required for contracts that are silent with respect to what occurs when LIBOR ceases or where the existing fallback language resorts to a LIBOR-based rate (e.g., polling banks for LIBOR or the last quoted LIBOR), unless the parties mutually agree to opt out of the proposed legislation's mandatory application. For contracts with fallbacks that provide a party with discretion to select a replacement rate, the proposed statute provides a safe harbor if the party with such discretionary power elects to use the statute's recommended benchmark replacement. The ARRC's proposed statute would not have any impact on contracts that contain fallback provisions to a non-LIBOR replacement rate (such as a Prime-based rate), however.

Conclusion

The ARRC's proposed statute and accompanying memo can be found here. While the proposed statute aims to alleviate the potential burden on New York's judicial resources resulting from LIBOR cessation-related disputes, market participants should not rely on a legislative solution alone. With approximately $200 trillion of financial products worldwide referencing the USD LIBOR benchmark, market participants are strongly encouraged to analyze their portfolios to identify contracts that lack provisions addressing LIBOR cessation or have provisions that could have significant economic impacts that were not previously anticipated, and to immediately begin amending the terms of those contracts where possible.

Paul Hastings LLP

April 27 2020

SEC: When Using the Word 'Advisor' Is a No-No.

As broker-dealers are busy preparing for the SEC's Regulation Best Interest, which kicks in June 30, the agency is reminding them about the correct use of the term "advisor" or "adviser."

So reports ThinkAdvisor, citing an update to frequently asked questions on the SEC's website about the rule, which aims to boost broker-dealers' standard of care.

Here's the skinny: Broker-dealers generally can't use the terms "advisor" or "adviser" in their names or titles if they are not also registered as investment advisors, according to the FAQs. The agency presumes that doing so "is a violation of the requirement to disclose the broker-dealer's capacity" under Reg BI's Disclosure Obligation.

There are exceptions. Broker-dealers "may use these terms when they are acting in a role specifically defined by federal statute that does not entail providing investment advisory services to retail customers, for example, as a municipal advisor, commodity trading advisor, or advisor to a special entity."

In other words, don't use the terms when it comes to providing advice to retail investors.

A couple of other points: Broker-dealers that are affiliated with RIAs are generally prohibited from using the terms. But broker-dealers who are registered as investment advisors with states are considered RIAs and thus are exempt from the prohibition.

Barron's

April 29, 2020 2:34 pm ET

Financial Accounting Foundation Board of Trustees - Notice of Meeting.

Read the Notice of Meeting.

[04/27/20]

MSRB's Weekly COVID-19-Related Disclosure Summary.

The MSRB's weekly COVID-19-Related Disclosure Summary is now available. The report outlines

118 new primary market disclosures and 375 new continuing disclosures related to COVID-19 during the week ending April 12, 2020.

Read here.

GASB Proposes to Postpone Effective Dates of Certain Pronouncements.

Norwalk, CT, April 15, 2020 — The Governmental Accounting Standards Board (GASB) today proposed to postpone the effective dates of provisions in almost all Statements and Implementation Guides due to be implemented by state and local governments for fiscal years 2019 and later.

In light of the COVID-19 pandemic, the Exposure Draft, *Postponement of the Effective Dates of Certain Authoritative Guidance*, is intended to provide relief to governments. The proposal would postpone by one year the effective dates of provisions in the following pronouncements:

Statement No. 83, *Certain Asset Retirement Obligations*
Statement No. 84, *Fiduciary Activities*
Statement No. 87, *Leases*
Statement No. 88, *Certain Disclosures Related to Debt, including Direct Borrowings and Direct Placements*
Statement No. 89, *Accounting for Interest Cost Incurred before the End of a Construction Period*
Statement No. 90, *Majority Equity Interests*
Statement No. 91, *Conduit Debt Obligations*
Statement No. 92, *Omnibus 2020*, paragraphs 6–10 and 12
Statement No. 93, *Replacement of Interbank Offered Rates*, paragraphs 13 and 14
Implementation Guide No. 2017-3, *Accounting and Financial Reporting for Postemployment Benefits Other Than Pensions (and Certain Issues Related to OPEB Plan Reporting)*, Questions 4.85, 4.103, 4.108, 4.109, 4.225, 4.239, 4.244, 4.245, 4.484, 4.491, and 5.1–5.4
Implementation Guide No. 2018-1, *Implementation Guidance Update—2018*
Implementation Guide No. 2019-1, *Implementation Guidance Update—2019*
Implementation Guide No. 2019-2, *Fiduciary Activities*
Implementation Guide No. 2019-3, *Leases*.

The GASB did not propose postponing the other provisions of Statement 93 or Statement No. 94, *Public-Private and Public-Public Partnerships and Availability Payment Arrangements*, because the pandemic was factored into the establishment of the effective dates for those pronouncements.

The GASB is working under an expedited schedule to issue this guidance as quickly as practicable. The Exposure Draft is available on the GASB website, www.gasb.org, with a comment deadline of April 30. The GASB invites stakeholders to review the proposal and provide comments. The Board is scheduled to review stakeholder feedback and consider a final Statement for issuance on May 8.

In response to the COVID-19 pandemic, the GASB provides a number of resources for stakeholders, including an emergency toolbox, on its website at www.gasb.org/COVID19.

BDA Submits Additional Comments to Fed on Municipal Liquidity Facility.

Today, following continued discussions with the Muni Exec Committee, the BDA submitted comments to the Federal Reserve in response to the announcement of the Municipal Liquidity Facility. The BDA comments follow prior communications with the Federal Reserve and Treasury, and focus on support of the new program, while providing additional recommendations for the Fed as they continue to build out key features and terms of the facility.

The letter can be viewed here.

The BDA comments focus on the following aspects of the Feds program:

- Scope of Participation
- Pricing
- Information Disclosure
- Cost of Issuance

The BDA will continue to provide updates as they become available

Bond Dealers of America

April 15, 2020

Implications Of COVID-19 Pandemic For Municipal Bond Transactions.

The COVID-19 pandemic is affecting municipal borrowers, including state and local governmental entities and conduit borrowers, as unexpected expenses grow and expected revenue declines as a result of stay-at-home and other similar mandates. Issuers and conduit borrowers likely will encounter in the coming months a number of legal issues relating to tax-exempt borrowings in light of these changing financial conditions. This Alert will address a few of these legal issues relating to continuing disclosure and tax (particularly cash flow deficits and debt restructuring). For more information about the topics discussed below, please contact any member of the Public Finance Group.

Continuing Disclosure

Pursuant to outstanding continuing disclosure agreements, issuers and obligated persons may be required to file notices related to late annual or quarterly filings and listed event notices related to a change in economic conditions because of the COVID-19 pandemic. Issuers and obligated persons should review their outstanding agreements and disclosure policies and procedures.

Under the U.S. Securities and Exchange Commission (the “SEC”) Rule 15c2-12 of the Securities Exchange Act (the “Rule”), issuers and obligated persons are required to file a notice regarding late annual or quarterly filings prior to the date listed in the applicable continuing disclosure agreement and listed event notices within 10 business days after the occurrence of the event. These notices must be filed on the Municipal Securities Rulemaking Board’s (MSRB) Electronic Municipal Market Access (EMMA) system. Issuers and obligated persons are not excused from making these filings if an office is closed or if employees are working remotely.

1. Required Filings

Some of the listed events that should be reviewed carefully include:

A. Principal and interest payment delinquencies: Did the issuer fail to make its principal or interest payment related to the bonds on time? Did the obligated person (i.e., the conduit borrower) fail to make its payment to the issuer that will be used to pay the principal or interest on the bonds on time?

B. Non-payment related defaults, if material: Did the change in its economic condition cause the issuer or the conduit borrower to fall below a financial covenant?

C. Rating changes: Did the rating on the bonds change – upgraded or downgraded? Did the rating on the credit enhancement (i.e., the rating of the issuer of municipal bond insurance or letter of credit) change? Typically, a change in "outlook" (such as stable, positive, or negative) is not considered a rating change for the purpose of the Rule.

D. Bankruptcy, insolvency, receivership, or similar event of the obligated person: Was a receiver appointed in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal laws?

2. Financial Obligations

Additionally, for bonds issued on or after February 27, 2019, issuers and obligated persons may be required to file notices related to the following two listed events:

A. Incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material.

Did the issuer or the obligated person obtain a loan from a bank, e.g., the U.S. Small Business Administration's Paycheck Protection Program, or obtain a new line of credit?

B. Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

Did the issuer or the obligated person fail to make a timely payment related to a bank loan or lease because of financial difficulties? Did that failure cause an acceleration of the bank loan or lease?

The term "financial obligation" means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). The term "financial obligation" shall not include municipal securities as to which a final official statement has been provided to the MSRB consistent with the Rule.

3. Modifications

Issuers and obligated persons are required to file notices related to modifications to existing agreements related to the two new events related to Financial Obligations listed above and for modifications to rights of the bondholders, if material.

A modification occurs when the modified terms become enforceable against the issuer or the obligated person. A modification may be written or oral. Examples of modifications include a waiver of an interest rate change, changing or waiving a covenant in a bond document, deferring a payment, or entering into a temporary forbearance agreement. These modifications may or may not trigger a reissuance for tax purposes (see discussions in Tax section below).

4. Financial Difficulties

There are several listed events that require the issuer or the obligated person to file a notice if the event is caused by financial difficulties:

A. Unscheduled draws on debt service reserves reflecting financial difficulties: Did the issuer or the obligated person draw on a debt service reserve fund in order to make a payment related to the bonds?

B. Unscheduled draws on credit enhancements reflecting financial difficulties: Did the issuer or the obligated person draw on a letter of credit in order to make a payment related to the bonds?

C. For bonds issued on or after February 27, 2019: Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a Financial Obligation of the obligated person, any of which reflect financial difficulties (see above).

For these listed events, if the issuer or obligated person determines that the event would affect the liquidity or overall credit worthiness of the issuer or the obligated person, then the issuer or obligated person is required to file a notice on EMMA.

5. Voluntary Filings

In addition to the filings that are required under the Rule, issuers and obligated persons may decide to make a voluntary filing on EMMA related to a change in their economic condition, presumably upon the occurrence of an event under its disclosure obligation (without regard to the date of the February 27, 2019 update) or included in a regular filing to describe the impact of COVID-19 on operating and financial data. Prior to making these voluntary filings, the issuer and the obligated person should discuss them with bond counsel or disclosure counsel.

Tax

1. Reissuance as a Result of Restructuring

The effect on the bond market resulting from the liquidity crunch caused by the COVID-19 pandemic is proving to be similar to that resulting from the credit crunch caused by the financial crisis in 2008. In both instances, issuers and borrowers are finding the remarketing of their outstanding tax-exempt bonds to be extremely difficult. As a result, they have begun seeking a range of solutions, from debt payment deferrals, covenant waivers, and other debt modifications to purchases of debt obligations by issuers. Such proposed changes to the debt instruments touch on the various aspects of bond reissuance that are discussed below in more detail.

A. Treasury Regulation §1.1001-3

For all federal income tax purposes, Treas. Reg. §1.1001-3 (the "1001 Regulations") generally provide that a modification of terms of a debt instrument that is significant enough will result in a deemed exchange of an old debt for a new debt, or a "reissuance," which results in gain or loss to the holder of the debt instrument. The 1001 Regulations test reissuance in two parts: (i) modification and (ii) significance of the modification. For modification, the 1001 Regulations set forth rules (and exceptions) as to whether a change of a term in the debt instrument (whether addition or deletion) is a "modification." If the change is a considered a modification, the 1001 Regulations set forth rules (and exceptions) to test whether the modification is significant enough to result in a reissuance. Below are highlights of the modification and significance tests that are relevant to changes to bonds:

(i) Modification

Generally, a modification is any change, including any addition or deletion, in a legal right or obligation of the issuer or holder of a debt. Also, a modification generally occurs at the time the parties agree upon the modification, not when it goes into effect.

An alteration of a legal right or obligation that occurs by operation of the terms of a debt instrument is generally **not** a modification. However, it still is a modification if the alteration (a) is a change in obligor or nature of the debt instrument (from recourse to nonrecourse or from nonrecourse to recourse), (b) converts the instrument into equity, or (c) results from an exercise of an option by either the issuer or the holder. However, an exercise of an option is **not** a modification if (x) the option is unilateral and (y) for an option exercisable by a holder, the exercise of the option does not result in a deferral of or a reduction in any scheduled payment of interest or principal.

Generally, an issuer's failure to perform its obligations under a debt instrument is not a modification. In addition, a holder's temporary forbearance to stay collection or waive acceleration clauses and default rights for up to two years, plus any additional period during which the parties conduct good faith negotiations or a bankruptcy case is pending, is not a modification.

(ii) Significance
Once there is a modification, the 1001 Regulations set forth a combination of five specific tests and a catch-all "economic significance" test to see whether the modification is significant. Below are the highlights of the six significance tests:

(a) Economic significance: A modification is a significant modification only if, based on all facts and circumstances, the legal rights or obligations that are altered and the degree to which they are altered are economically significant. All modifications to the debt instrument (other than modifications subject to the five specific tests) are considered collectively, so a series of such modifications may be significant when considered together although each modification would not be significant if considered alone.

(b) Change in yield: Generally, a modification that results in a change in yield of the modified debt instrument by more than 25 basis points is significant.

(c) Deferral of payments: A delay of payment of the amount due under a debt instrument (including a change in the amount of the payments) that results in a "material deferral" of scheduled payments is significant. The delay or deferral may result from an extension of the final maturity or a deferral of payments due prior to maturity. **However, as a safe harbor, a delay or deferral of scheduled payments for a period equal to the lesser of five years or 50 percent of the original term of the instrument is not a material deferral. Any option to extend the original maturity and deferrals of de minimis payments are ignored.** Keep in mind, though, that a delay or deferral within the safe harbor period may be limited by 120 percent of the weighted average economic life of the financed facilities.

(d) Change in obligor or security: For tax-exempt bond purposes, Notice 2008-41 has effectively streamlined this test such that any change in obligor, security, or credit enhancement is a significant modification if the modification results in a change in the payment expectations.

(e) Changes in the nature of a debt instrument: A change in the debt instrument from debt to equity is a significant modification. A change in the debt instrument from recourse to nonrecourse and vice versa is also a significant modification.

(f) Changes to the accounting or financial covenants: A modification that adds, deletes, or alters customary accounting or financial covenants is not a significant modification.

B. Notice 88-130
While the 1001 Regulations apply for all federal income tax purposes, they do not apply to "qualified tender bonds" for purposes of Sections 103 and 141 through 150. For 20 years, Notice 88-130 governed what constitutes a "qualified tender bond" ("QTB") and whether there is a reissuance with respect to a QTB. Under Notice 88-130, a QTB is any tender bond with a final stated maturity date that is no later than the earlier of (a) the date that is 35 years after the date of issue or (b) the latest date reasonably expected (as of the date of issue) to be required to carry out the governmental purpose of the issue of which the bond is a part. The key aspect of Notice 88-130 was that a qualified tender change (such as a change in the interest rate mode provided for in the bond documents) with respect to the QTB was not treated as a reissuance that would otherwise have been under the 1001 Regulations. However, Notice 88-130 was generally regarded as being inflexible, with its "hair trigger" reissuance analysis for any changes not otherwise provided for in the bond documents, including and in particular changes to the length of the bonds from a long period (more than one year) to a short period (less than one year) and vice versa. The financial crisis in 2008 showed that Notice 88-130 was not helpful to issuers and borrowers who wanted to amend bond documents either to create or to preserve the opportunities to remarket their existing QTBs while not causing a reissuance at the same time.

C. Notice 2008-41
In response to the financial crisis of 2008 and the shortcomings of Notice 88-130, the Internal Revenue Service ("IRS") issued Notice 2008-41, designed to relax the rules with respect to certain changes to qualified tender bonds and to avoid causing a reissuance. However, Notice 2008-41 did not supersede Notice 88-130, as issuers can elect to apply Notice 88-130. As a general matter, under Notice 2008-41, a tax-exempt bond is treated as reissued if (i) the terms of the bond were significantly modified or the bond was disposed of, (ii) the bond is purchased by or on behalf of the governmental issuer, or (iii) the bond is retired or redeemed.

(i) QTB
Under Notice 2008-41, a QTB is a tax-exempt bond that has all of the following features:
(a) for each interest rate mode that is provided for under the terms of the bond considered separately, the interest of the bond is either a fixed interest rate; a variable interest rate that reasonably can be expected to measure contemporaneous variations in the cost of newly borrowed funds, including interest rates determined by reference to eligible interest rate indexes (e.g., the SIFMA index); a tender option-based interest rate; a Dutch auction rate; or an eligible objective rate for a variable-rate instrument (e.g., a qualified inflation rate or a qualified inverse floating rate);

(b) interest on the bond must be unconditionally payable at least annually;

(c) the final maturity date of the bond is not longer than the lesser of (i) 40 years from the issue date of the bond or (ii) the latest date that is reasonably expected as of the issue date of the issue of which the bond is a part to be necessary to carry out the governmental purpose of the issue of which the bond is a part (with 120 percent of the weighted average economic life of the financed facilities being a safe harbor for this purpose); and

(d) the bond is subject to an optional tender right or a mandatory tender requirement which allows or requires a bondholder to tender the bond for purchase in one or more prescribed circumstances under the terms of the bond.

(ii) Qualified Interest Rate Mode Change and Qualified Tender Right
For a QTB that meets all of the features above, any qualified interest rate mode change or exercise

of a qualified tender right is not treated as a modification under the 1001 Regulations and thus will not cause a reissuance of the QTB.

A “qualified interest rate mode change” is a change in the interest rate mode on a bond that is provided for under the bond documents. Furthermore, in order to be a qualified interest rate mode change, the terms of the bond must require that the bond be remarketed at par upon conversion to a new interest rate mode, unless the conversion is to a fixed interest rate mode for the remaining term of the bond to maturity, in which case the bond may be resold at a market premium or a market discount from the stated principal amount of that bond.

A “qualified tender right” is a tender right for the purchase of a bond (regardless of whether the purchase is by or on behalf of a governmental issuer) that is provided for under the bond documents. The tender right must involve either an optional tender right or a mandatory tender requirement which allows or requires the bondholder to tender the bond for purchase on at least one tender date before the final stated maturity date. The tender right must entitle a tendering bondholder to receive a purchase price equal to par (which may include any accrued interest). The terms of the tender right must require the issuer or its remarketing agent to use at least best efforts to remarket a bond upon a purchase pursuant to the tender right.

(iii) Purchase of Bonds by Issuers
A bond purchased by or on behalf of a governmental issuer pursuant to a qualified tender right is treated as **not** retired pursuant to and as a result of the qualified tender right for a 90-day period from the date of such purchase. After the 90-day period, the bond will be treated as retired if the governmental issuer continues to hold its own bond.

(iv) Purchase of Bonds by Conduit Borrowers or Third Parties
A bond purchased by third-party guarantors, third-party liquidity facility providers, and conduit borrowers (other than a conduit borrower that is a governmental issuer) is not treated as purchased by or on behalf of a governmental issuer. Therefore, any such person may hold a bond purchased pursuant to the exercise of a qualified tender right for an unlimited holding period without causing a retirement of such bond. Furthermore, a governmental issuer may purchase and hold its own bond for a period of 89 days while using best efforts under the terms of the bond to remarket the bond and then resell the bond to a third-party guarantor, a third-party liquidity facility provider, or another independent third party before the expiration of the 90-day period to avoid causing a retirement of the bond.

(v) Program Investment
Under Treasury Regulation § 1.148-1(b), for an issuer to avail itself of the benefits of the special arbitrage rule for “program investments” under which the issuer may set a loan yield that is 150 basis points (1.5 percent) in excess of the bond yield, the issuer must restrict a conduit borrower’s purchase of tax-exempt bonds for a governmental program in an amount “related” to the amount of its purpose investment (the loan) financed by the program. The permitted purchase by the conduit borrower of its tax-exempt auction rate bond (without causing a reissuance) that financed its loan to facilitate liquidity under adverse market conditions is treated as not being so related for this purpose. As a result, the issuer’s program investment benefits would not be jeopardized as a result of a purchase of the bonds by the conduit borrower.

(vi) Nonrecourse Debt
Solely for tax-exempt bond purposes, in determining whether a modification of the security or credit enhancement on a tax-exempt bond that is a nonrecourse debt instrument is a significant modification, the modification is treated as significant only if the modification results in a change in payment expectations, which is a significant modification test for recourse debt instruments.

D. Consequences of Reissuance

For tax-exempt bonds, a reissuance is treated as a refunding of the bond prior to being reissued, and the consequences of a refunding include a need for new bond counsel opinion, a filing of the proper variation of the 8038 form, and a final rebate calculation for the prior bond that had been reissued. But perhaps the most important consequence is the change in the law applicable to the reissued bonds at the time of the reissuance. For bonds that were issued under programs that have expired, a reissuance would be fatal in that the reissued bond would lose the benefits of the expired program and, in some cases, even tax-exemption unless the reissuance qualifies for a transitional refunding exception designed to grandfather the expired program.

E. Recent Developments

On December 31, 2018, the IRS released proposed Treasury Regulation §1.150-3 (the "Proposed Regulation") to address the issue of reissuance. The Proposed Regulation generally followed Notice 2008-41 except for two points. The first is that the Proposed Regulation did not include the program investment fix about the related amount in the case of a purchase by the conduit borrower. The second is that the Proposed Regulation did not provide for the permissible remarketing of the qualified tender bond with market premium if the conversion of the bond is to the remaining term of the bond to maturity. Comments from the public finance legal community were submitted to the IRS to reinstate those two points in the final regulations.

On March 25, 2020, the National Association of Bond Lawyers submitted a letter to the United States Department of Treasury and the IRS seeking, among other things, (i) an expanded holding period beginning on March 1, 2020, and ending on the later of (a) December 31, 2021, or (b) 90 days after the date on which no United States jurisdiction remains covered by a state or federal declaration of emergency or disaster related to the COVID-19 pandemic for issuers to purchase their own bonds without causing reissuance; (ii) an extension of the general holding period from 90 to 180 days for issuers that might still need to hold their bonds at the end of the requested expanded holding period; and (iii) a suspension of the "best efforts" requirement discussed in the qualified tender right section above during the requested expanded holding period.

2. Cash Flow Deficit and Extraordinary Working Capital Financings

A loss of expected revenue, such as sales taxes and other taxes or assessments in the case of municipalities and other local governments, or operational revenue in the case of 501(c)(3) conduit borrowers, can result in shortfalls in budgets. Certain financing vehicles provide tools for issuers to address these shortfalls on a tax-exempt basis.

The federal tax law has long permitted these entities to issue tax-exempt tax or revenue anticipation notes, generally on a short-term basis, to finance a cumulative cash flow deficit. The obligations are sized taking into account on a monthly basis the available amounts of revenue, the anticipated expenses, and a permitted working capital reserve that results in a cumulative cash flow deficit. The term is typically limited to 13 months, and certain rebate accounting can be avoided by sizing the obligations to cover a deficit that occurs within six months of the date of issuance of the obligations.

The tax law also permits the financing of certain extraordinary working capital expenditures without regard to a cash flow deficit. These are expenditures for extraordinary, nonrecurring items that are not customarily payable from current revenue, such as casualty losses or extraordinary legal judgments in amounts in excess of reasonable insurance coverage. Prior to 2016, there was no stated term limit for these obligations; the term is now limited to 13 months. These extraordinary expenditures also can be the subject of a reimbursement borrowing, where proceeds of the obligations are used to reimburse the issuer for expenditures made before the date of issuance of the obligations. Generally, the issuer needs to adopt a reimbursement resolution within 60 days of the expenditure being made in order to have a valid reimbursement.

Beginning in 2016, the IRS permitted by regulations the issuance of long-term working capital obligations, including extraordinary working capital borrowings. The 2016 rules require the issuer on the issue date to determine the first fiscal year following the 13-month period after date of issue in which it reasonably expects to have surplus (the "first testing year"), which must be within five years of the date of issuance; determine the amount of surplus at the beginning of each testing year; and redeem bonds and/or purchase eligible tax-exempt bonds up to the amount of the outstanding working capital bonds.

April 14, 2020

McCarter & English, LLP

NABL Sends Suggestions for COVID-19 Relief to Congress & Treasury.

Today NABL sent a letter to Congress and the Treasury as they continue to develop additional legislative and regulatory initiatives to provide economic stimulus and fiscal relief as a result of the economic impact of the COVID-19 pandemic.

This letter follows up on our March 22, 2020 letter in which we identify proposals that will allow state and local governments to access much needed capital now, while also mitigating damages affecting our nation in the longer term.

Today's letter provides a more robust explanation of how certain proposals will assist in getting our nation through these uncertain times.

You can find NABL's letter here.

Please send this letter to your Representative and Senators: As Congress continues to work on the next stimulus package, it is imperative that they hear from you. Please forward this letter on NABL's behalf to demonstrate strength in our advocacy efforts.

If you do not know who your representatives in Congress are, you can find your House representative here and Senator here.

For any questions, please contact Jessica Giroux, Director of Governmental Affairs at jgiroux@nabl.org, (518) 469-1565.

The GASB Continues to Address Practice Issues Arising from COVID-19 Pandeminc.

Norwalk, CT, April 6, 2020 — The Governmental Accounting Standards Board (GASB) continues to share concerns about the stakeholder impact of the coronavirus (COVID-19) pandemic. The GASB is actively addressing and responding to the evolving situation. We are committed to supporting and assisting stakeholders during this uncertain period.

The GASB is working on several fronts to provide relief to governments and other stakeholders and to assist them in identifying accounting and financial reporting guidance that is particularly relevant at this time.

Postponement of Effective Dates

The Board is reviewing a proposed Statement that would postpone the effective dates of provisions in certain pronouncements and will consider releasing it for public comment during the April 14, 2020, teleconference meeting.

The proposal tentatively has identified provisions that became effective or will become effective for reporting periods beginning after June 15, 2018, through Statement No. 92, *Omnibus 2020*, and Implementation Guide No. 2019-3, *Leases*. Most notably, that includes Statement No. 84, *Fiduciary Activities*, and Statement No. 87, *Leases*, as well as their related Implementation Guides. In all, the draft would postpone the effective dates of provisions in eight Statements and five Implementation Guides. The Exposure Draft continues the encouragement of early implementation, which is important to governments that already have implemented some of those provisions or intend to proceed with implementation under the original effective dates.

In its active standards-setting activities, the GASB also has considered or is considering lengthening effective dates. During its March 2020 meeting, the GASB approved Statement No. 94, *Public-Private and Public-Public Partnerships and Availability Payment Arrangements*, which includes an extended effective date of reporting periods beginning after June 15, 2022, one year later than had been originally proposed. The GASB will consider similar changes as it reviews upcoming drafts of final Statements (such as for subscription-based information technology arrangements) and due process documents (most notably, an Exposure Draft from the Financial Reporting Model Reexamination project).

Impact on Other Standards-Setting Activities

The GASB has decided to extend to June 30, 2020, the comment deadline for the Exposure Draft of a Proposed Concepts Statement, *Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*. The GASB also will postpone the public hearing on the document. The hearing has been tentatively rescheduled to July 28, 2020.

The Board also has instituted a hiatus for planned stakeholder research activities, such as interviews and surveys, until at least June 1 (for pre-agenda research) and at least July 1 (for Post-Implementation Review).

“Toolbox” Coming Soon

The GASB soon will be posting a “toolbox” on its website to assist governments and other stakeholders to identify the guidance that they can draw on to address the issues they are facing during this difficult period.

In the meantime, the GASB encourages stakeholders to connect by using its web resources, including the GASB’s technical inquiry service, through which stakeholders can submit questions directly to the GASB staff regarding standards implementation or other issues.

BDA Hosts Call with MSRB on Unique Challenges Posed by COVID-19.

Today, a group of BDA Municipal Bond Division and Legal & Compliance leadership hosted a call with the MSRB to discuss the unique challenges dealers are encountering because of the volatility in the market and the move to work from home for many market participants.

The MSRB shared its focus during these challenges, which primarily focuses on collecting data from the municipal securities market which it makes available to other regulators and the market as a whole.

On the call, dealers shared a variety of concerns, such as:

- The duration of the suspension of the Price Variance Alerts,
- Some current challenges in filing Form G-32; and
- Suggestions concerning additional data that the MSRB could provide

The MSRB is encouraging market participants to share concerns they are experiencing so that the MSRB can consider whether any regulatory response is needed to address those concerns.

Bond Dealers of America

April 7, 2020

Disclosing COVID-19 Risks and Impacts in Connection with Municipal Securities.

Given the far-reaching consequences of the COVID-19 pandemic, including unprecedented financial and operational impacts, volatile municipal market conditions and the potential for a significant economic contraction, many issuers and other obligated persons in the municipal market are faced with the challenge of not only managing their financial health, operations and the safety of their employees, residents, customers, patients, students, clients and other personnel, but also complying with federal antifraud securities laws in both the primary market and secondary market and avoiding potential securities law liability.

Due to the rapidly evolving facts and circumstances relating to COVID-19, obligated persons often struggle to determine what COVID-19 related disclosures—whether in offering documents for primary offerings or in secondary market disclosures—may be appropriate and informative to the market.

Am I required to post notices to EMMA about COVID-19?

Obligated persons must comply with their undertakings as written, including the timely filing of annual disclosures of operating and financial data and financial statements, as well as any interim disclosures covered thereby. While the material event categories enumerated under SEC Rule 15c2-12 do not include pandemics, the impact COVID-19 may have on an obligated person's financial health or operations may eventually give rise to a material event required to be disclosed. Recently, when asked about how the COVID-19 pandemic would impact obligated persons' undertakings to provide secondary market disclosures under continuing disclosure agreements, staff from the Office of Municipal Securities (OMS) of the Securities and Exchange Commission (SEC) demurred, noting that the SEC lacks the regulatory authority to provide relief with respect to continuing disclosure undertakings, as these agreements are private contracts and the SEC has no authority over obligated persons in connection with contractual undertakings.

COVID-19 impacts may result in delays in an obligated person's ability to timely file annual reports or financial statements. Any delay in filing annual disclosures or audited financial statements due to COVID-19 should be treated in the same way as any other delay—if there is a failure to file annual disclosure by the required date, an obligated person must file a "failure to file" notice, and may include an explanation of the relevant facts and circumstances causing the delay. When an obligated person eventually files its annual financial and operating data, that filing may also include a similar explanation. Upon determining that a late filing is material, the obligated person should also include disclosure of the late filing in its offering documents for the next five years as required by Rule 15c2-12.

What should I say in my Offering Documents about COVID-19?

Obligated persons entering the primary market, as well as those who remain committed to providing the secondary market with current information on a voluntary basis, can apply a consistent analysis to their disclosure decisions concerning COVID-19. As the market can fairly be presumed to be aware of COVID-19 generally, general information about the pandemic and risks applicable to any obligated person, regardless of its particular facts and circumstances, are not necessary, nor particularly probative. Risk factors should be as specific to the obligated person as possible; and general risk factors should be discouraged. An obligated person who simply parrots general risk factors used by others in its industry, without evaluating its own unique situation and market and risk profile, is not providing the market with material information. Rather, obligated persons should disclose (i) how COVID-19 is directly and indirectly impacting their current business and operations, (ii) how they currently assess the near-term and long-term impacts on their financial condition, results of operation, and business prospects as a result of COVID-19, and (iii) how they are managing or mitigating the impacts from COVID-19 on their business and operations.

On March 25, 2020, the SEC's Division of Corporate Finance provided disclosure guidance to corporate registrants concerning the COVID-19 disclosures. While not directly applicable to municipal securities obligated persons, this guidance provides valuable insight into the level of diligence the SEC believes an obligated person should undertake with respect to COVID-19. All obligated persons in the municipal market should consider the following inquiries carefully in preparing their own primary and secondary market disclosures.

How has COVID-19 impacted ***your financial condition and results of operations?***

In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?

- Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted ***your capital and financial resources,*** including your overall liquidity position and outlook?
- Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change?
- Have your sources or uses of cash otherwise been materially impacted?
- Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
  If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?
- Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between

borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk.
- Do you expect to disclose or incur any material COVID-19-related contingencies?

How do you expect COVID-19 to affect assets on ***your balance sheet*** and your ability to timely account for those assets?

- For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?

Do you anticipate ***any material impairments*** (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

Have COVID-19-related circumstances such as ***remote work arrangements*** adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?

- If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?

Have you experienced challenges in implementing your ***business continuity plans*** or do you foresee requiring material expenditures to do so?

- Do you face any material resource constraints in implementing these plans?

Do you expect COVID-19 to materially affect the ***demand for your products or services?***

Do you anticipate a material adverse impact of COVID-19 on ***your supply chain*** or the methods used to distribute your products or services?

Do you expect the anticipated impact of COVID-19 to materially change the ***relationship between costs and revenues?***

Will your operations be materially impacted by any constraints or other impacts on ***your human capital resources and productivity?***

Are ***travel restrictions and border closures*** expected to have a material impact on your ability to operate and achieve your business goals?

In preparing its disclosure, an obligated person should consider not just its particular facts and circumstances, but also assess the potential magnitude and likelihood of future COVID-19 impacts. The level of disclosure should be directly proportional to magnitude and probability of such impacts. Information concerning the efforts an obligated persons is undertaking to manage—and mitigate—the magnitude and probability of COVID-19 impacts is particularly well suited for inclusion under a “Management Discussion and Analysis” section in the offering document.

What about COVID 19 information in other forms of communications?

Obligated persons must also consider that antifraud liability may attach not only to their public statements, whether specifically incorporated into offering documents, posted on EMMA or an obligated person's website, but may also arise in connection with any communication of information. Compliance with effective (and updated) policies and procedures regarding municipal securities disclosures should be the starting point, as noted in this recent White Paper analyzing a recent staff legal bulletin from OMS regarding the application of antifraud rules to all communications by obligated persons that may reasonably be expected to reach the market, even if not intended for that purpose.

While the impacts from COVID-19 remain uncertain, is it better to remain silent?

Obligated persons must also recognize that liability under the federal securities law can attach for the omission of material information. An omitted fact is considered material if there is a substantial likelihood that the missing information would have been viewed by a reasonable investor as having significantly altered the total mix of information available. In the case of municipal issuers, the "total mix" analysis, which is a facts and circumstances test, can differ greatly among the enormous number—and variety—of issuers in the municipal market. Following the guidance set forth above, however, should assist obligated persons in developing effective disclosures of all material information, including risks and impacts of COVID-19.

www.ballardspahr.com

by Teri M. Guarnaccia, William C. Rhodes, and Kimberly D. Magrini

April 8, 2020

MSRB Provides Temporary Regulatory Relief to Market Participants Affected by COVID-19.

Washington DC — In light of the disruptions to normal business operations as a result of the coronavirus disease (COVID-19) pandemic, today the Municipal Securities Rulemaking Board (MSRB) sought immediate authorization from the Securities and Exchange Commission (SEC) to provide temporary regulatory relief to market participants by extending certain MSRB compliance and testing deadlines.

The actions announced today provide for an extension of time to implement certain amended rules and interpretive guidance, and additional time to complete certain professional qualification and supervisory requirements. MSRB-regulated firms will now have additional time to:

- Prepare to operationalize the submission of additional data related to primary offerings of municipal securities under amendments to MSRB Rule G-32;
- Prepare to operationalize compliance with amended and restated guidance regarding the fair dealing obligations underwriters owe to issuers of municipal securities under MSRB Rule G-17;
- Take and pass certain qualification exams and continuing education modules required by MSRB Rule G-3;
- Conduct the annual needs analysis and the delivery of continuing education content pursuant to MSRB Rule G-3;
- Conduct the annual compliance meeting and branch inspections pursuant to MSRB Rule G-27;
- Provide the annual report related to the dealer's review of the firm's supervisory controls under MSRB Rule G-27; and
- Provide the annual certification related to the municipal advisor firm's compliance policies and procedures under MSRB Rule G-44.

"The MSRB appreciates the unusual circumstances that municipal market professionals find themselves in today," said Chief Compliance Officer Gail Marshall. "Targeted regulatory relief allows dealers and municipal advisors to more effectively allocate resources to meeting the needs of their employees and clients while continuing to focus on investor protection and market transparency goals."

Additionally, the MSRB sought SEC approval to temporarily waive late fees for any registration, annual and market activity-based fees billed for the period of March 1, 2020 to July 31, 2020 under MSRB Rules A-11, A-12 and A-13.

Previous regulatory action taken by the MSRB in response to the COVID-19 outbreak include suspending price variance alerts for dealers, extending the comment deadline on request for comment on proposed governance enhancements and reminding regulated entities of application of supervisory requirements in light of coronavirus.

The MSRB has created a dedicated COVID-19 information page and has begun publishing a daily Municipal Securities Market Trading Summary and weekly Municipal Securities Market COVID-1--Related Disclosure Summary based on filings made to the MSRB's Electronic Municipal Market Access (EMMA®) website.

Read the notice.

Date: April 9, 2020

Contact: Leah Szarek, Director of Communications
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The MSRB protects investors, state and local governments and other municipal entities, and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating the municipal securities firms, banks and municipal advisors that engage in municipal securities and advisory activities. To further protect market participants, the MSRB provides market transparency through its Electronic Municipal Market Access (EMMA®) website, the official repository for information on all municipal bonds. The MSRB also serves as an objective resource on the municipal market, conducts extensive education and outreach to market stakeholders, and provides market leadership on key issues. The 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. The MSRB is overseen by the Securities and Exchange Commission and Congress.*

MSRB Publishes Summary of State and Local Disclosures to Its EMMA System about Impact of COVID-19.

Washington, DC – Disclosures submitted to the Municipal Securities Rulemaking Board's (MSRB) free Electronic Municipal Market Access (EMMA®) system provide a window into how states and municipalities are grappling with the impact of the novel Coronavirus Disease (COVID-19) on their revenues and ability to finance essential public services. The MSRB today began publishing a weekly summary to assist market participants, policymakers and the general public with identifying disclosures submitted to the EMMA system by issuers of municipal securities that reference COVID-19.

The disclosures in the MSRB's summary are accessible to the public at no cost on the EMMA website. The MSRB searched the approximately 40,000 disclosures the EMMA system received from January 2020 to March 2020 to identify those that referenced COVID-19 or related keywords.

"This disclosure summary is a great example of the kind of enhanced search capabilities and data analysis the MSRB hopes to offer EMMA users as a self-service tool in the future once we complete our enterprise-wide migration to the cloud," said MSRB Board member Meredith Hathorn. "We see tremendous potential for the EMMA website to continue to evolve and deliver market insights that are never more valuable than at times of market disruption like we are experiencing now."

MSRB data show that over the three-month period from January 1, 2020 through March 30, 2020, the EMMA system received 506 COVID-19-related continuing disclosures out of a total of 43,667 continuing disclosures, and 125 COVID-19-related primary market disclosures out of 2,548 total primary market disclosures. Issuers in the state of California submitted the highest number of disclosures across all states with a total of 97 COVID-19-related primary market and continuing disclosures. View the MSRB's disclosure analysis here.

The MSRB also recently began publishing daily analysis of municipal market trade activity to assist market participants, policymakers and the general public with understanding the impact of the COVID-19 on the liquidity of the market following days of unprecedented volatility.

View the first COVID-19-related disclosure summary (January 2020 – March 2020).
View the MSRB's dedicated webpage for COVID-19-related information and market analyses.

Date: April 2, 2020

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GFOA Debt Committee Releases Urgent Member Guidance for COVID-19 Debt

Service and Disclosures.

GOVERNMENT FINANCE OFFICERS ASSOCIATION

URGENT MEMBER GUIDANCE

IMPORTANT CONSIDERATIONS to Maintain Your Entity's Debt Management Program and Disclosure Responsibilities During the COVID-19 Crisis

1. Confirm Debt Service Payments Are Made. Governments should confirm that debt service payments are made on time. Considering many state and local finance offices are operating in unconventional ways (due to work in place/work from home orders), GFOA encourages governments to pay particular attention to payment processes and staff to fulfill this obligation. In addition, one reaction to the current COVID-19 crisis is to adopt laws and ordinances that delay deadlines and delays payments. Governments should be aware that debt service payments cannot be subject to such laws and ordinances. Questions on relief from debt service payments should be discussed with your bond team.

- https://www.gfoa.org/debt-management-policy

2. Disclosures Related to COVID-19 Crisis Should Be Factual. Governments may be facing various fiscal challenges due to the crisis. Further, some public sectors may be affected more immediately than others. While urgency is important, governments should take special care to put into context what these challenges are when choosing to disclose the various problems caused by COVID-19. In addition, disclosure should be factual and governments should be hesitant to disclosure any estimates or projections of revenues and budgets just for the sake of providing such estimates or projections.

3. Communicating with Outside Professionals. Governments should keep in contact with their bond counsel and other outside professionals. As governments address various disclosure matters, and managing their debt portfolio, they should initiate and maintain communications with their bond team.

- https://www.gfoa.org/selecting-bond-counsel
- https://www.gfoa.org/selecting-and-managing-municipal-advisors

4. Interim/Voluntary Disclosures. Voluntary and interim disclosures are a helpful way to keep investors apprised of the government's fiscal conditions. Be sure to make filings and/or place information on your entity's investor relations web page and consider making the filings available in the EMMA system, based on facts and information that are already developed by your entity. It may also be useful to discuss these disclosures with bond counsel and/or other bond team professionals. Issuers should be mindful when they provide specific information as of certain date, which may change soon thereafter, there should be a note in the voluntary filing that they are not obligated to prepare and file updates in relation to that filing.

- https://www.gfoa.org/understanding-your-continuing-disclosure-responsibilities-0
- https://www.gfoa.org/maintaining-investor-relations-program

5. Selective Disclosure. When discussing impacts on the government of COVID-19 with investors, governments should be careful about making "selective disclosures". Material information should be available to everyone on an equal basis. Governments should be careful about providing information that has not yet been disclosed on their website for investors or filed on EMMA. Similar care should be taken with Rating Agencies – governments should let them know when giving them non-public information.

6. Disclosures Needed for Primary Offerings. In primary offering documents, Governments may need to provide COVID-19 related disclosures for debt being issued. Governments may be requested to provide supplemental disclosures to address any material changes between the date of the disclosure document and the closing date.

- https://www.gfoa.org/primary-market-disclosure

7. Know Your Annual Disclosure Filing Dates. Governments should always be aware of the dates in their continuing disclosure agreements (CDA) when annual disclosures are due to EMMA, and make those filings accordingly. If a government is unable to make a filing, due to current circumstances (e.g., financial statements and/or audits not available), follow the requirements contained in your CDA, which may require a filing with EMMA with explanation as to why the submission is late. If annual disclosure submissions did not occur as noted in your CDA, that information will need to disclosed in future issuance documents. Again, it is important to note the reasons why the submission(s) was late – due to the inability to complete financials and/or audits or other reasons related the COVID-19 crisis – underwriters of future issuances will need to understand these reasons.

- https://www.gfoa.org/primary-market-disclosure
- https://www.gfoa.org/understanding-your-continuing-disclosure-responsibilities-0

8. Material Event Filings. Governments are reminded that when a credit is downgraded by a credit rating agency that a material event filing must be made within 10 days in the EMMA system. Other events resulting from the COVID-19 crisis may also require a material event filing. Governments are encouraged to speak with their bond counsel prior to making material event filings about the need to make and information to provide in the filing. Importantly, the SEC Rule 15c2-12 10-day reporting requirement for listed material events is NOT relaxed during this time. Please be mindful of material events and track the time that has lapsed to ensure timely reporting within the 10-day reporting requirement. Governments should be aware of all material events identified in their CDA and SEC Rule 15c2-12, as noted here:

- https://www.gfoa.org/sites/default/files/GFR0849.pdf
- https://www.sec.gov/rules/final/2018/34-83885.pdf

9. EMMA Filings. Governments should make sure that when making annual, continuing, or voluntary disclosure filings within the EMMA system that they are filed correctly. The MSRB makes the following resources available to assist issuers with submitting disclosures to the EMMA system:

- Continuing Disclosure Submission Manual
- Continuing Disclosure Submission Video Tutorials
- Selecting Financial/Operating Disclosure Categories on EMMA Dataport
- Selecting Event Disclosure Categories on EMMA Dataport

10. Know Your State Laws, Local Ordinances and Policies and Procedures Related to Debt Products in Current Market Conditions. As the financial markets are very fluid, it is important for governments, especially those who have planned issuances in 2020, to monitor the debt market, and speak with their municipal advisor or other professionals about the market's impact on your entity. Financial institutions have many options to assist governments with both short and long term borrowing needs. Additionally, new financial products may be considered and implemented by the federal government to help state and local governments through the crisis with conditions such as access to loans for operating and other purposes related to an entity's needs to provide for their citizens during the COVID-19 crisis. Knowing what types of financings are legal and allowable for your entity, along with risks related to these types of financings, is important when considering to use these financing vehicles.

- https://www.gfoa.org/issuing-taxable-debt
- https://www.gfoa.org/using-variable-rate-debt-instruments
- https://www.gfoa.org/bank-loans-and-direct-placement

11. Post Issuance Compliance for Federal Tax Purposes/Arbitrage. The IRS has NOT suspended the responsibilities that entities have to calculate federal arbitrage, yield restrictions, and adhere to private use regulations related to tax-exempt bond issuances.

- https://www.gfoa.org/post-issuance-policies-and-procedures
- https://www.gfoa.org/debt-101-volume-2-responsibilities-after-bond-issuance

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COVID-19 and Secondary Market Disclosure: Butler Snow

Our thoughts are with you, your loved ones and organizations as we all navigate this public health crisis together. We are providing this alert to our public finance clients and other professionals regarding COVID-19 and its potential impact on secondary market disclosure.

A Continuing Disclosure Review.

Before discussing some of the secondary market disclosure issues, a brief review is in order. The Securities and Exchange Commission (the "SEC") has promulgated Rule 15c2-12 (the "Rule") that prohibits underwriters from purchasing or selling most municipal securities unless an issuer or conduit borrowers (collectively, an "Obligated Person") has agreed in writing to provide specific information to the market on an ongoing basis, i.e. continuing disclosure. The written agreement can be a certificate or an agreement and is often referred to as an "Undertaking." Pursuant to the Rule, the continuing disclosure to be provided to the market consists of: (i) annual financial information and operating data as specified in each Undertaking, (ii) annual audited financial statements; and (iii) timely notice of the occurrence of certain events specified in each Undertaking (known as Event Notices). These filings must be made on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access system ("EMMA"). The EMMA website is: www.emma.msrb.org.

Listed Events.

Event Notices must be filed in a timely manner not in excess of ten business days after the occurrence of any of the events listed in an Undertaking for a specific series of bonds. A list of all events currently required follows; however, this list has expanded over time and your Undertakings may not include all of them.

1. Principal and interest payment delinquencies;
2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final

determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;

7. Modifications to rights of security holders, if material;
8. Bond calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the securities, if material;
11. Rating changes;
12. Bankruptcy, insolvency, receivership or similar event of the obligated person;
13. The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material;
14. Appointment of a successor or additional trustee or the change of name of a trustee, if material;
15. Incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and
16. Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

Some Issues to Consider.

The following are some of the issues that our public finance clients are now confronting or asking about.

Is it necessary to file any disclosure about the impacts COVID-19 is having on an Obligated Person? An Obligated Person is only required to file notices of events specified in an Undertaking. No filing is required unless one of those events has occurred (see above for the current list of events; but be aware that some Undertakings have fewer events and some may contain additional events requiring disclosure). It is important for Obligated Persons to consult each Undertaking to determine whether there is some required disclosure. Some of the 16 events may occur as a result of this crisis and Obligated Persons need to be prepared to file an Event Notice. For example, rating changes must be disclosed and Obligated Persons are responsible for filing an Event Notice if a rating change occurs.

What should Obligated Persons consider in making a voluntary filing on EMMA or on its website? Some Obligated Persons may want to make a voluntary filing on EMMA or its website regarding the impacts of COVID-19 on their operations and finances. If such a filing is made, it is subject to the antifraud provisions of the federal securities laws; the information that is provided must not be materially inaccurate or misleading in the context in which it is provided.

What considerations apply if the staff of the Obligated Person prepares revised financial projections for the governing body or if the chief elected official of an Obligated Person makes a speech about the impacts of COVID-19 on the Obligated Person? In a 1994 interpretive release, the SEC advised as follows: “A municipal issuer . . . when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions. The fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate antifraud proscriptions.”

Information on an Obligated Person’s website, press releases regarding the financial health of the Obligated Person, certain public statements by its officials, and responses by its officials to inquiries from the public, all may be considered to be reasonably expected to reach the investing public. The information that is provided must not be materially inaccurate or misleading in the context in which it is provided.

May the staff of an Obligated Person respond to requests from credit analysts for information about the impacts of COVID-19 on the Obligated Person? The staff may respond to such requests, but again the information provided must not be materially inaccurate or misleading in the context in which it is provided. Ideally, the staff should provide only publicly available information to requestors. No provisions of the federal securities laws apply to municipal issuers providing information to investors requesting it. However, the Municipal Securities Rulemaking Board (the "MSRB") and other market participants have expressed concern about Obligated Persons providing new, nonpublic information to select investors or analysts. In a market advisory, the MSRB said:

> The MSRB encourages issuers and their financial professionals to implement practices to ensure that all investors and stakeholders have equal access to the same information in a timely manner. For example, an issuer may choose to voluntarily disclose the information to the broader marketplace by a method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public. Although issuers could choose to utilize other means, such a dissemination could be accomplished by posting the relevant information on EMMA. Based on the type of information, there are multiple options for how an issuer may choose to make such a voluntary disclosure.

What should be done if the audit of the Obligated Person will not be completed in time to meet the filing deadline set forth in the Undertaking? Pursuant to the Rule, the Obligated Person should file a notice on EMMA that the audited financials are not yet ready and that they will be filed late. Check the individual Undertakings to determine whether unaudited financials are required to be filed if the audit isn't complete; should you determine that unaudited financials will not be available either, indicate that in the notice.

If the Obligated Person is late in making filings required by an Undertaking, how will that impact the Obligated Person when it next wants to sell bonds? An underwriter must have a reasonable basis to conclude that an Obligated Person will comply with future Undertakings. Filing a notice as described above satisfies the Undertaking, so an underwriter should be able to review the circumstances and reach the conclusion that the Obligated Person will be able to comply with its future Undertaking.

March 30, 2020

Butler Snow LLP

[MSRB Publishes Summary of State and Local Disclosures to Its EMMA System about Impact of COVID-19.]

Washington, DC – Disclosures submitted to the Municipal Securities Rulemaking Board's (MSRB) free Electronic Municipal Market Access (EMMA®) system provide a window into how states and municipalities are grappling with the impact of the novel Coronavirus Disease (COVID-19) on their revenues and ability to finance essential public services. The MSRB today began publishing a weekly summary to assist market participants, policymakers and the general public with identifying disclosures submitted to the EMMA system by issuers of municipal securities that reference COVID-19.

The disclosures in the MSRB's summary are accessible to the public at no cost on the EMMA website. The MSRB searched the approximately 40,000 disclosures the EMMA system received from January 2020 to March 2020 to identify those that referenced COVID-19 or related keywords.

"This disclosure summary is a great example of the kind of enhanced search capabilities and data analysis the MSRB hopes to offer EMMA users as a self-service tool in the future once we complete our enterprise-wide migration to the cloud," said MSRB Board member Meredith Hathorn. "We see tremendous potential for the EMMA website to continue to evolve and deliver market insights that are never more valuable than at times of market disruption like we are experiencing now."

MSRB data show that over the three-month period from January 1, 2020 through March 30, 2020, the EMMA system received 506 COVID-19-related continuing disclosures out of a total of 43,667 continuing disclosures, and 125 COVID-19-related primary market disclosures out of 2,548 total primary market disclosures. Issuers in the state of California submitted the highest number of disclosures across all states with a total of 97 COVID-19-related primary market and continuing disclosures. View the MSRB's disclosure analysis here.

The MSRB also recently began publishing daily analysis of municipal market trade activity to assist market participants, policymakers and the general public with understanding the impact of the COVID-19 on the liquidity of the market following days of unprecedented volatility.

Date: April 2, 2020

Contact: Leah Szarek, Director of Communications
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GASB Issues Guidance for Transition from Interbank Offered Rates.

Norwalk, CT, April 2, 2020—The Governmental Accounting Standards Board (GASB) today issued new accounting and financial reporting guidance in Statement No. 93, *Replacement of Interbank Offered Rates*, to assist state and local governments in the transition away from existing interbank offered rates (IBORs) to other reference rates.

Some governments have entered into agreements in which variable payments made or received from either derivative counterparties or parties associated with lease agreements depend on an IBOR, most notably the London Interbank Offered Rate (LIBOR). As a result of global reference rate reform, LIBOR is expected to cease to exist in its current form at the end of 2021, prompting governments to amend or replace financial instruments tied to LIBOR.

Statement No. 53, *Accounting and Financial Reporting for Derivative Instruments*, previously required a government to terminate hedge accounting when it changes the reference rate of a hedging derivative instrument's variable payment. In addition, Statement No. 87, *Leases*, previously required a government that replaced the rate on which variable payments depend in a lease contract to apply the provisions for lease modifications, including remeasurement of the lease liability or lease receivable.

The objective of Statement 93 is to address those and other accounting and financial reporting implications of the replacement of an IBOR by:

- Providing exceptions for certain hedging derivative instruments to the hedge accounting termination provisions when an IBOR is replaced as the reference rate of the hedging derivative instrument's variable payment
- Clarifying the hedge accounting termination provisions when a hedged item is amended to replace the reference rate
- Clarifying that the uncertainty related to the continued availability of IBORs does not, by itself, affect the assessment of whether the occurrence of a hedged expected transaction is probable
- Removing LIBOR as an appropriate benchmark interest rate for the qualitative evaluation of the effectiveness of an interest rate swap
- Identifying the Secured Overnight Financing Rate and the Effective Federal Funds Rate as appropriate benchmark interest rates for the qualitative evaluation of the effectiveness of an interest rate swap
- Providing an exception to the lease modifications guidance in Statement 87 for certain lease contracts that are amended solely to replace an IBOR as the rate upon which variable payments depend.

The removal of LIBOR as an appropriate benchmark interest rate is effective for reporting periods ending after December 31, 2021. All other requirements of Statement 93 are effective for reporting periods beginning after June 15, 2020. Earlier application is encouraged.

Orrick: Waivers, Deferrals and Changes to Tax-Exempt Bonds During COVID-19

Given the economic impact of COVID-19 and the ongoing uncertainty of how long it will last, borrowers of tax-exempt bond proceeds may find themselves in the position of requesting their lenders to temporarily waive certain financial covenants contained in tax-exempt financing documents or to defer debt service payments on the related tax-exempt bonds.

Tax-exempt borrowers and banks need to be aware that the deferral or other modifications of debt service payments on tax-exempt bonds could have an adverse impact on the tax-exempt status of such bonds. Certain waivers, deferrals and changes to bonds or bond documents need to be reviewed by bond counsel to determine whether such actions will result in a "tax reissuance" of the related bonds. A tax reissuance is treated as a new debt issuance for tax purposes and a refinancing of the original bond issue. In the event a tax reissuance occurs, the tax exemption on the bonds will be lost absent appropriate legal steps. In addition, the waiver of financial covenants by a lender may not adversely affect the tax-exempt status of the related bonds, however, certain obligations may be triggered, such as notice or other provisions under the bond documents. Certain waivers, deferrals and changes to bonds or bond documents (including continuing disclosure agreements) need to be reviewed by bond counsel to determine whether such actions will result in a "tax reissuance" of the related bonds.

Please note, this does not mean that such waivers, deferrals and/or changes cannot be undertaken. However, such waivers, deferrals and changes should be reviewed by bond counsel prior to taking such actions.

Public Finance Alert | April.02.2020

Orrick Herrington & Sutcliffe LLP

[COVID-19 and Municipal Securities Disclosure.]

COVID-19 is creating more questions than answers in every sector of American life recent days, and the municipal bond market is no exception. Issuers and obligated persons for municipal bonds (collectively, "Obligated Parties") have asked about their disclosure obligations pursuant to Rule 15c2-12 (the "Rule") relating to both their outstanding bonds and bonds for which they are in the process of conducting a primary offering. Obligated Parties should consider the following questions as they navigate challenges presented by COVID-19 as they relate to municipal securities disclosure, and consult with legal counsel to assess any needed action.

What should I do if I cannot meet my deadline for filing my annual financial information required by the Rule due to delays or closures relating to COVID-19? If I am able to make my filing deadline, should I say anything about COVID-19?

The Rule requires Obligated Parties to file certain annual financial information and to provide, in a timely manner, a notice of failure of such Obligated Party to file such annual financial information. The deadline for filing annual financial information is governed specifically by the continuing disclosure agreement (the "CDA") relating to such bonds which are typically six (6) months from the end of the fiscal year. During these hectic times, these deadlines may not be top of mind, but Obligated Parties should take care to provide a notice to the market pursuant to the Rule if they are unable to file. Further, the SEC has publicly stated that because CDAs are private contracts, it has no authority to provide relief from these deadlines.

If an Obligated Party is able to file annual financial information or interim financial information, it may be advisable to include cautionary language in the filing that is similar to that included in primary offering documents to the effect that:

- the filing is being made to comply with the Obligated Party's commitment under its CDA, not to provide all information material to an investment in the applicable securities, and does not purport to provide all such information;
- the dates as of and periods for which information is provided in the filing occurred before the onset of COVID-19 and it is possible that effects related to COVID-19 may adversely affect the Obligated Party's future financial performance to an extent that could be material; and
- consequently, the information set forth in the filing should not be relied upon as indicative of future financial performance of the Obligated Party.

Should I file a material event notice relating to COVID-19 for my outstanding bonds?

COVID-19 itself is not a material event provided for under the Rule. However, if the effects of COVID-19 are such that they trigger a material event such as a payment delinquency, an unscheduled draw on reserve funds, or a ratings change, an Obligated Party should file a notice of such material event. Similarly, if an Obligated Party has entered into a CDA after February 28, 2019 and the Obligated Party enters into a material "financial obligation" or experiences COVID-19 related effects that cause financial difficulties or trigger events of default, events of acceleration, termination events, modification of terms, or other similar events under the terms of a "financial obligation" of the Obligated Party, a material event notice should be filed.

Should I file voluntary disclosure relating to COVID-19 for my outstanding bonds?

An Obligated Party need not file voluntary disclosure. If an Obligated Party chooses to provide voluntary disclosure, the Obligated Party should take care to determine whether the information provided is truly “material” to the market. Materiality, in this context means *“if there is a substantial likelihood that a reasonable investor would determine that the disclosed information significantly altered the “total mix” of information already available in the marketplace.”* Put another way, is the information the Obligated Party is disclosing likely to be so critical that it would influence an investor’s decision to invest in the Obligated Person’s bonds, given other currently publicly available information? If so, the Obligated Party might consider posting a voluntary disclosure. The Obligated Party must balance this with an additional calculus of whether the voluntary disclosure would need ongoing updates.

What should I disclose regarding COVID-19 if I am in a primary offering?

Obligated Parties should consider what impacts COVID-19 is having on the Obligated Party in the short-term, as well as any potential long-term impacts on the Obligated Party and the revenue source supporting the bonds. Given the high level of uncertainty regarding these matters, many Obligated Parties have opted for generalized disclosure. Nevertheless, it will be important for Obligated Parties to work with Bond Counsel, Financial Advisors, the Underwriter and its counsel, and staff of the Obligated Party to determine the content of any risk or other financial disclosure in the offering document.

What about public statements by officials of an Obligated Party regarding COVID-19?

Obligated Parties should bear in mind that the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder apply to all statements providing information that is reasonably expected to reach investors and the trading markets. The Secondary Market Staff of the SEC Office of Municipal Securities previously issued a bulletin alerting issuers that these antifraud provisions apply to public statements and continuing disclosures under CDA. Obligated Parties should take care with any statements that are made with an eye towards, or can be reasonably expected to reach, the investing public.

Winstead PC

April 3, 2020

SEC’s Office of Municipal Securities Offers Guidance Regarding COVID-19’s Impact on Rule 15c2-12 Continuing Disclosure Undertaking Requirements: Miller Canfield

Every continuing disclosure undertaking entered into under Section (b)(5)(i) of Rule 15c2-12 (the “Rule”) of the Securities and Exchange Commission (“SEC”) requires the issuer or obligated person (as defined in the Rule) under such undertaking to report notice of certain events electronically to the Municipal Securities Rulemaking Board (“MSRB”) no later than 10 business days of their occurrence. The COVID-19 pandemic and the resulting array of federal, state and local measures designed to contain its spread are not among such events.

Nevertheless, the pandemic and resulting government actions have raised a number of questions regarding compliance with ongoing disclosure requirements under the Rule. On a March 19, 2020, MSRB webinar, Ahmed Abonamah, deputy director of the SEC’s Office of Municipal Securities, and

David Hodapp, assistant general counsel of the MSRB, gave some insight as to some of the scenarios issuers and obligated persons may come across.

During the course of the webinar, Abonamah and Hodapp were asked to respond to the following specific questions:

- Could the SEC provide regulatory relief for issuers filing their annual financial and operating information late because personnel are required to work from home and cannot access the relevant information?
- Does an issuer have to provide an event notice that its offices are closed to the public because personnel are working from home?
- Should an issuer file a general event notice about COVID-19 on the MSRB's Electronic Municipal Market Access web site ("EMMA")?

From the reported discussion of these questions on the webinar, we can glean the following principles.

The SEC Cannot Absolve Issuers for Late Filings

- The requirements of the Rule come from the SEC's authority to impose pre-sale requirements on broker-dealers (i.e. underwriters).
- The SEC and the MSRB lack similar authority with respect to issuers (due to the Tower Amendment to the Securities Exchange Act of 1934).
- Accordingly, the SEC lacks the authority to provide relief to issuers due to any violation of their continuing disclosure undertaking (e.g. filing their annual financial information late due to COVID-19 related difficulties).
- If an issuer is unable to timely file its annual financial and operating information, it should file a notice of failure to file, along with any other information required to be provided in its undertakings, on EMMA prior to the required filing date.

The Terms of the Undertaking Control

- The continuing disclosure undertaking is a binding agreement between the issuer of (or the obligated person for) the bonds and the bondholders.
- Consequently, issuers and obligated persons should look to the terms of their undertakings as to what financial and operating information to report and when to report it.
- Unless the implications of the COVID-19 pandemic give rise to one of the reportable events under the Rule, an issuer or obligated person is not required to report them. Hence, there is no need for a general event notice regarding COVID-19, or a notice that an issuer's offices are closed due to personnel working from home to curb the spread of COVID-19.
- However, an issuer or obligated person can voluntarily report such circumstances. A guide to reporting required events under the Rule and the categories of voluntary disclosure on the EMMA can be found here.

"Ratings Changes" and "Negative Watch"

Another scenario (not discussed on the webinar) that may arise is actions by rating agencies putting many categories of bonds on "negative watch" for a potential downgrade as a result of the pandemic. The SEC has previously indicated in adopting statements for amendments to the Rule that this does not constitute a "ratings change" for purposes of the Rule, and does not require filing a notice with the MSRB.

April 2, 2020

Miller Canfield

MSRB Suspends Price Variance Alerts for Dealers.

Board Also Extends Comment Date for Proposed Governance Enhancements

Today (March 23, 2020) in response to the significant impact that the spread of the Coronavirus Disease (COVID-19) is having on regulated entities, the MSRB is temporarily suspending the transmission of the price variance alerts for trades reported to MSRB's Real-Time Transaction Reporting System (RTRS) effective immediately.

As background, as of March 2019, the MSRB sends a price variance alert via email to a dealer when a transaction reported to RTRS by the dealer is at a price that is notably different (i.e., notably lower or higher) than the price reported to RTRS by other dealers in the same security within a specified time period. The price variance alert was designed as a tool to assist dealers in identifying transactions that may warrant review to ensure the information reported to RTRS reflects the trade price as intended. While dealers remain obligated under MSRB Rule G-14 to ensure that the information being disseminated by RTRS is accurate, the price variance alert tool does not, in these current market conditions, serve its intended purpose of assisting firms in their efforts to comply with Rule G-14. Accordingly, the MSRB is temporarily suspending reporting on price variance alerts.

A-3 Deadline Extended

The MSRB has extended the comment deadline on amendments to MSRB Rule A-3 for an additional 30 days to April 29, 2020. MSRB Notice 2020-02 requests comment on draft amendments to MSRB Rule A-3, on membership on the Board, designed to improve Board governance.

The BDA continues to draft comments and will provide to membership for review in the coming weeks.

The notice can be viewed here.

Bond Dealers of America

March 24, 2020

MSRB Publishes Daily Data Showing Municipal Market Impact of Coronavirus.

Washington, DC – Historic volatility is straining the predominantly retail investor market that enables state and local governments to finance essential public services, newly published data show. The Municipal Securities Rulemaking Board (MSRB) today began publishing daily analysis of trade activity to assist market participants, policymakers and the general public with understanding the impact of the Coronavirus Disease (COVID-19) on the liquidity of the $4 trillion municipal securities market.

MSRB data show trading in the secondary market for municipal securities is at all-time highs, as institutional investors sell off large positions. Meanwhile, in the fixed-rate market, customer buying in smaller pieces of $100,000 or less, indicative of retail investors, jumped to a daily average of approximately 11,700 trades in March 2020, compared to about 8,500 trades per day in January and February. View the MSRB's analysis, which will be updated daily, here. The MSRB also plans to analyze and publish additional variable rate data.

"The municipal market touches the lives of every single American because it finances over two-thirds of the state and local infrastructure that is bearing the brunt of the Coronavirus crisis," said MSRB Board Chair Ed Sisk. "Dislocation in this critical capital market damages investor confidence and has an outsize effect on the financial health of communities around the country."

As the primary regulator for the municipal securities market, the MSRB's mission is to protect municipal securities investors and issuers. The MSRB is governed by a Board of Directors representing investors, issuers, dealers, municipal advisors and others with first-hand understanding of the municipal securities market. The MSRB's market transparency systems collect municipal market trade data and disclosure documents and make them available to the public for free on the Electronic Municipal Market Access (EMMA®) website.

"The MSRB actively monitors trade data and will continue to release the results of our analysis to help market participants and policymakers make informed decisions in the best interests of the country," Sisk said. "We stand ready to provide our data and expertise to help advance effective policy solutions that will provide emergency relief to the municipal securities market."

View the MSRB's dedicated webpage for COVID-19-related information and market analyses.

Date: March 25, 2020

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MSRB Suspends Price Variance Alerts for Dealers.

Municipal Securities Rulemaking Board sent this bulletin at 03/23/2020 05:13 PM EDT

The Municipal Securities Rulemaking Board (MSRB) recognizes the significant impact that the spread of the Coronavirus Disease (COVID-19) is having on regulated entities. The MSRB is committed to providing updates and other information as we address questions raised by market participants during this pandemic.

Given the current market volatility, the MSRB is temporarily suspending the transmission of the price variance alerts for trades reported to MSRB's Real-Time Transaction Reporting System (RTRS) effective immediately.

As background, as of March 2019, the MSRB sends a price variance alert via email to a dealer when a transaction reported to RTRS by the dealer is at a price that is notably different (i.e., notably lower or higher) than the price reported to RTRS by other dealers in the same security within a specified time period. The price variance alert was designed as a tool to assist dealers in identifying transactions that may warrant review to ensure the information reported to RTRS reflects the trade price as intended. While dealers remain obligated under MSRB Rule G-14 to ensure that the information being disseminated by RTRS is accurate, the price variance alert tool does not, in these current market conditions, serve its intended purpose of assisting firms in their efforts to comply with Rule G-14. Accordingly, the MSRB is temporarily suspending reporting on price variance alerts.

GASB to Consider Postponing Effective Dates of Certain Statements and Implementation Guides.

Norwalk, CT, March 26, 2020—The Governmental Accounting Standards Board (GASB) today announced that it has added a project to its current technical agenda to consider postponing all Statement and Implementation Guide provisions with an effective date that begins on or after reporting periods beginning after June 15, 2018.

As a result of the closure of many state and local government offices due to the Covid-19 pandemic, many government officials do not have access to the information necessary for implementing new GASB pronouncements. The GASB has received numerous requests from state and local government officials and public accounting firms regarding postponing the upcoming effective dates of pronouncements. Most notably, those pronouncements include Statement No. 84, *Fiduciary Activities*, and Statement No. 87, *Leases*, as well as their related Implementation Guides.

The Board plans to consider an Exposure Draft for issuance in April and finalize the guidance in May 2020.

MSRB Responds to COVID-19 Rocking the Market.

The Municipal Securities Rulemaking Board will be publishing daily data summaries, pushing back comment deadlines and suspending a price alert in response to market volatility and COVID-19 concerns.

The MSRB published its first data summary Wednesday morning and plans to publish them every morning. Since the spread of the virus, the municipal market has tumbled through high "unprecedented" trade volume and large outflows.

"The municipal market touches the lives of every single American because it finances over two-thirds of the state and local infrastructure that is bearing the brunt of the coronavirus crisis," said MSRB Board Chair Ed Sisk. "Dislocation in this critical capital market damages investor confidence and has an outsize effect on the financial health of communities around the country."

At the beginning of March, the MSRB began seeing a significant change in volatility, said John Bagley, MSRB chief market structure officer.

"We saw significantly different trading patterns and we were closely watching this data and it was really helpful for us to see what was happening," Bagley said.

In the MSRB's first report showing data from March 24, trades topped 87,215, which is likely a record, said Marcelo Vieira, MSRB director of research.

"It's pretty much unprecedented volume for any time period that we've looked at," Vieira said.

The MSRB is also continuing to see retail buying and more institutional selling, which as been a pattern over the last month as mutual funds look for liquidity amidst an increase in redemptions.

Earlier this week the MSRB also decided to temporarily suspend price variance alerts for dealers because of the current market volatility.

The MSRB sends the alert via email to a dealer when a transaction is reported to its Real-Time Transaction Reporting System by the dealer and is at a price that is notably different than the price reported by other dealers for the same security within a specified time period.

It's a welcome change given the volatility dealers are facing right now, said Michael Decker, Bond Dealer of America's senior vice president of policy and research.

"In a market where trade volume has risen significantly and there's a lot more price volatility, it's my understanding that dealers are getting these price variance alerts more frequently even in cases where all the reports are correct," Decker said.

Dealers still have to abide by MSRB Rule G-14, on reports of sales or purchases, to ensure that information being disseminated by RTRS is accurate. The MSRB said the price variance tool does not, under current market conditions, serve its intended purpose.

Earlier this week, the MSRB also extended the request for comment deadline for muni market participants to respond to changes to its Rule A-3 on membership of the board. Among those proposed changes was reducing the size of its 21-member board, how it selects those board members and imposing limits on how many years a board member may serve.

Comments were originally due on March 30 and have been extended to April 29.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 03/25/20 02:18 PM EDT

SEC Provides Additional Temporary Regulatory Relief and Assistance to Market Participants Affected by Covid-19.

On March 26, the SEC issued a press release announcing an order and a temporary final rule providing temporary relief and assistance to market participants affected by Covid-19. The statement notes that the SEC is providing (i) temporary relief from notarization requirements from March 26 through July 1 to filers in the EDGAR system, subject to certain conditions; (ii) for Regulation A and Regulation Crowdfunding issuers, a temporary extension of 45 additional days to file certain disclosure reports that would otherwise have been due between March 26 and May 31, subject to certain conditions; and (iii) a temporary conditional exemptive order that provides affected municipal advisors with an additional 45 days to file annual updates to Form MA that would have otherwise been due between March 26 and June 30, subject to certain conditions.

Buckley LLP

March 27 2020

NABL Sends Letter to Treasury on COVID-19 Issues.

In response to the COVID-19 pandemic, NABL sent a letter to the U.S. Treasury asking it to addresses certain tax issues that may affect the functioning of the tax-exempt bond markets during the current outbreak of the novel coronavirus disease.

In the letter, NABL asks Treasury to (1) clarify that, at least for a temporary period, TEFRA hearings are not required to be held in person and (2) to provide relief as it relates to refunding and remarketing issues.

You can find the full letter here.

Lumesis Makes Available a Free Service for COVID-19 Related Filings.

Lumesis, home of the DIVER platform, is launching a free service making available a consolidated list of all continuing disclosure filings made to the MSRB that relate to the COVID-19 pandemic, along with a link to each filing. The free service is available on the Lumesis website and will be updated three times daily during each business day (9am, 2pm and 7pm EST).

We are offering this service to assist all market participants to efficiently identify and access COVID-19 related filings made to EMMA. We know that identifying these important filings can be time-consuming. By leveraging our obligor-based database, technological know-how and outstanding team, we are able to provide the market a service that efficiently aggregates and presents important information shared by issuers for use in client communication, research or other needs.
To access the service, simply visit www.lumesis.com and click on the link below the heading "COVID-19 Disclosure Filings."

If you have any questions, support@lumesis.com

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CEO
Lumesis, Inc.
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Mar 25, 2020

The SEC's Fixed Income Market Structure Advisory Committee Approves Two New Recommendations.

The Securities and Exchange Commission's (SEC) Fixed Income Market Structure Advisory Committee (FIMSAC) held its latest meeting on February 10, 2020.1 The SEC formed FIMSAC to provide advice to the SEC on the efficiency and resiliency of the fixed income markets and identify opportunities for regulatory improvement. During the February meeting, FIMSAC considered and voted to approve:

- a recommendation from the Technology and Electronic Trading Subcommittee regarding reporting additional indicators for corporate bond trades to the Financial Industry Regulatory Authority's (FINRA) Trade Reporting and Compliance Engine (TRACE); and
- a recommendation from the Municipal Securities Transparency Subcommittee involving the timeliness of financial disclosures in the municipal securities markets.

FIMSAC also convened a panel to consider internal fund crosses.2

On November 13, 2019, the SEC renewed the charter for FIMSAC for another year.3 With its newly renewed charter, FIMSAC will continue discussions regarding potential enhancements to the fixed income markets during the coming year. FIMSAC's next meetings for this year are currently scheduled for April 27, 2020 and August 3, 2020 (although the dates are subject to change). In addition to considering issues discussed in the February meeting, FIMSAC is considering a request from SEC Chairman Jay Clayton to analyze and comment on various structural and macroeconomic factors in the fixed income markets, including, without limitation:

- developments in monetary policy and corresponding financial conditions as they relate to the fixed income markets;
- the transition away from LIBOR;
- developments in the sub-investment grade and leveraged finance markets, including covenant packages; and
- developments in the municipal finance markets, including issuer disclosure.

Introductory Remarks

In his introductory remarks for the February meeting, FIMSAC Chairman Michael Heaney summarized the work performed by FIMSAC over the past two years, including having provided the SEC with 10 recommendations on nine topics.4 Chairman Heaney also described the progress to date in implementing two of the recommendations. On April 9, 2018, FIMSAC introduced a recommendation for a pilot program to study the market implications of changing the reporting regime for block-size trades in corporate bonds.5 To implement this recommendation, FINRA requested comment on a proposed pilot program to study the recommended changes to corporate bond block trade dissemination.6 FINRA received over 30 comment letters, which expressed divided views on the proposal. FINRA continues to evaluate next steps for such a pilot program.

In addition, on October 29, 2018, FIMSAC recommended that the SEC, in conjunction with FINRA, establish a reference data service for corporate bonds which would contain specified data elements on TRACE-eligible corporate bond new issues.7 On December 4, 2019, the SEC, pursuant to delegated authority, approved FINRA's proposal to establish a central depository for public dissemination of new-issue corporate bond reference data that was in line with FIMSAC's recommendation.8 On December 12, 2019, however, the SEC stayed approval of the service in response to a petition to review the delegated approval, until it orders otherwise.9

Recommendation to Enhance Data Reported to TRACE for Corporate Bond Trades

One panel of the FIMSAC meeting discussed the Technology and Electronic Trading Subcommittee's preliminary recommendation to improve price transparency for certain types of fixed income transactions reported to TRACE. The recommendation addressed two particular types of trades for which the TRACE reported price may not be reflective of the current market price, namely completed spread trades awaiting a Treasury spot and portfolio trades. After discussing issues raised by the proposal, FIMSAC voted to approve the subcommittee's recommendation, with 17 votes in favor and no votes in opposition or abstentions.10

Completed spread trades awaiting a Treasury spot11 are reported to TRACE following the completion of the spotting process, even if the parties agreed to the spread much earlier in the day. As corporate bond spreads and Treasury prices can move throughout a day, the delayed spot process allows for a potential mismatch between the assumed value of the trade when the spread is agreed on and the price reported to TRACE following the Treasury spot later in the day. To address this issue, FIMSAC recommends that the SEC, in conjunction with FINRA, require that reporting parties include a flag or modifier for delayed spot trades that will alert market participants that the spread-based economics of the trade had been agreed on earlier in the day, and that the reporting party on a delayed spot trade be required to report the time at which the spread was agreed on.

In addition, with respect to portfolio trades, FIMSAC recommends that the SEC, in conjunction with FINRA, require that reporting firms use a TRACE modifier to identify whether a particular trade was executed as part of a portfolio trade. For purposes of this recommendation, a "portfolio trade" is defined to mean a trade that is executed between only two parties involving a basket of securities of at least 30 unique issuers for a single agreed price for the entire basket and that was executed on an all-or-none or most-or-none basis. FIMSAC believes that requiring a modifier for the TRACE report of a bond that is part of a portfolio trade would allow market participants to know with certainty that the price was agreed on as part of a portfolio and therefore may not reflect the independent market price for the particular bond.

FIMSAC also believes that market participants would benefit from a complete and accurate picture of the number and volume of fixed income trades that are executed electronically in order to track e-trading trends and to better inform transaction cost analysis. FIMSAC, however, did not provide a recommendation that FINRA and the Municipal Securities Rulemaking Board (MSRB) incorporate an "electronic trade" modifier for the fixed income markets due to the issues raised by the varying regulatory treatment afforded electronic trading platforms (i.e., regulated as broker-dealers, alternative trading systems or not at all). Once there is a unifying regulatory framework for all fixed income electronic trading platforms, FIMSAC believes that FINRA and MSRB should establish an appropriate definition of an "electronic trade" that could form the basis for a comprehensive electronic trading flag.

Recommendation Regarding Timeliness of Municipal Issuer Disclosure

Another panel discussed the Municipal Securities Transparency Subcommittee's preliminary recommendation regarding timeliness of municipal issuer disclosure. After discussion of the proposal, FIMSAC voted in favor of the recommendation, with 14 votes in favor, two votes in opposition and no abstentions.12

FIMSAC recommends that the SEC be given additional statutory authority to (1) provide a mechanism for the SEC to enforce compliance with continuing disclosure agreements and other obligations of municipal issuers to protect municipal securities bondholders, and (2) provide a safe harbor from private liability for forward-looking statements for municipal issuers that satisfy certain conditions, including, but not limited to, appropriate risk disclosure relating to such forward-looking statements, and if projections are provided, disclosure of significant assumptions underlying such projections and that the financials are provided in good faith.

FIMSAC also recommends that the SEC explore ways in which it could make disclosure deadlines for annual financial information and audited financial statements more certain and predictable. This recommendation is intended to give investors more certainty regarding when a municipal issuer has agreed to provide annual financials. FIMSAC further recommends that the SEC seek wide-ranging public comment about the concerns raised by market participants about disclosures in the municipal markets and the potential need for the SEC to establish a disclosure framework, including time frame obligations for municipal issuers. After reviewing comments, the SEC can determine whether it would be appropriate for the SEC to seek legislation to give the SEC additional (but still limited) authority over municipal disclosures. Finally, FIMSAC recommends that the SEC explore ways in which it can raise municipal issuers' awareness of the potential consequences of providing less timely and less robust disclosure information, such as the potential for the market to demand higher yields from such municipal issuers.

Internal Fund Crosses Panel

The final panel of the FIMSAC meeting discussed the risks and benefits of internal fund crosses, and the potential advantages and disadvantages of providing relief from certain regulatory requirements related to such crosses. Certain panelists noted that such crosses can be beneficial to both the buyer and seller, and may assist funds with liquidity risk management. Certain panelists also noted the practical difficulty of obtaining and using bids and quotes for purposes of complying with Rule 17a-7 under the Investment Company Act of 1940, and the improved coverage and quality of pricing services that are now available. The discussion also recognized the need to prevent inappropriate self-dealing in cross trades.

To view all formatting for this article (eg, tables, footnotes), please access the original here.

Wilmer Cutler Pickering Hale and Dorr LLP – Andre E. Owens, Cherie Weldon and Mahlet Ayalew

March 17 2020

NFMA Volunteers Needed – GASB Exposure Draft on Notes to Financial Statements

GASB recently released an *Exposure Draft on Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*.

The NFMA would like to form a working group of members to: 1) review the document; 2) propose comments to the GASB from the NFMA to the Board of Governors; and 3) draft the comment letter based on feedback received from the Board.

The proposal describes who the intended users of note disclosures are (more sophisticated users), and what constitutes essential information (used for decision-making and assessing accountability. Since note disclosures are of high importance to analysts, I think it is important that we provide the NFMA's feedback.

Comments are due by April 17, 2020. Ideally, there will be a volunteer for the project leader role who will coordinate the efforts of the group, as well others who volunteer to serve as working group members. Please contact Lisa Good at lgood@nfma.org and Lisa Washburn at lwashburn@mma-research.com if you are interested.

Lisa Washburn
NFMA Industry & Media Liaison

COVID-19 Outbreak Creates Disclosure and Due Diligence Challenges: Ballard Sphar

Disclosure to municipal bond investors of material risks stemming from the coronavirus outbreak presents a serious concern in the municipal securities industry. This is particularly true in certain sectors, including bonds for:

- senior living: independent, assisted, continuing care, and skilled nursing facilities;
- hospitals and health systems;
- education facilities: student housing, academic buildings, and others;
- other “campus-style” facilities, including multifamily and military housing;
- airports and related facilities, including concessions and parking;
- intercity rail and public transit facilities;
- tourism-dependent facilities: convention centers, resorts, theme parks, cruise terminals, and museums;
- tax-backed government bonds for states and municipalities that rely on tourism and conventions: Hawaii, Las Vegas, Orlando, etc.; and
- manufacturing facilities dependent on international supply chains.

Ballard Spahr LLP

March 12, 2020

GASB Issues Proposal Addressing Certain Component Unit Criteria and Section 457 Deferred Compensation Plans.

Norwalk, CT, March 9, 2020 — The Governmental Accounting Standards Board (GASB) today issued a proposed Statement that would increase consistency and comparability related to the reporting of fiduciary component units in circumstances in which the organization does not have a governing board and the primary government performs the duties that a governing board typically performs.

The Exposure Draft, *Certain Component Unit Criteria, and Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans*, is designed to mitigate financial reporting costs associated with certain defined contribution pension plans, defined contribution other postemployment benefit (OPEB) plans, and other employee benefit plans.

The proposed Statement also would enhance the relevance, consistency, and comparability of accounting and financial reporting for Section 457 deferred compensation plans that meet the definition of a pension plan and for benefits provided through those plans. In addition, it would supersede the remaining provisions of Statement No. 32, *Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans,* as amended, for all Section 457 plans.

The Exposure Draft is available on the GASB website, www.gasb.org. The GASB invites stakeholders to review the proposal and provide comments by April 10, 2020.

MSRB Reminds Regulated Entities of Application of Supervisory Requirements in Light of Coronavirus.

Read the MSRB Regulatory Notice.

MSRB Addresses Supervisory Requirements in Light of Coronavirus: Cadwalader

The MSRB addressed the application of supervisory requirements in light of operational challenges and business disruptions posed by the coronavirus outbreak.

In a new Notice, MSRB reminded municipal market participants that MSRB Rule G-27 ("Supervision") and Rule G-44 ("Supervisory and Compliance Obligations of Municipal Advisors") require broker-dealers and municipal advisors to implement a system to supervise municipal advisory activities. The MSRB stated that neither rule mandates that supervision be conducted in person. Instead, the respective systems may incorporate remote supervision using technological resources.

Cadwalader Wickersham & Taft LLP

March 10 2020

The Bond Lawyer - Winter 2020

The Winter 2020 issue of *The Bond Lawyer®* is now available. Download the document here.

The Bond Lawyer®: The Journal of the National Association of Bond Lawyers is published quarterly, for distribution to members and associate members of the Association. Article submissions and comments should be submitted to Linda Wyman, (202) 503-3300.

MSRB Publishes Annual Fact Book of Municipal Securities Data.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today published its annual Fact Book that highlights 2019 municipal market trends and statistics on trading and disclosures. Among the findings is a marked decline in the total number of municipal securities trades in 2019, which dropped 14% to 8.75 million, the lowest level since 2006. The par amount of municipal securities traded in 2019 decreased 2.5% from the prior year.

"The main driver of the decrease in municipal securities trading activity in 2019 was a decline in small trades consistent with a reduction of retail trading activity," said MSRB Director of Research Marcelo Vieira. "Considering that institutional trading actually increased, we will continue to look into municipal investor behavior to see if we uncover any meaningful trends."

Retail trades—typically defined as trades of $100,000 or less—were down 16.5% in 2019, while institutional trades—trades of $1 million or more—increased 3.9%. Customer trades decreased 14.5% and interdealer trades were down 13.2%.

The MSRB also found an increase in transactions and par amount traded of taxable municipal securities. Trades of taxable securities were up 4.8% in 2019 to 615,982 trades and accounted for 7% of all municipal securities trades, the highest since 2012. “What is particularly notable, though not surprising due to the recent supply of taxable securities, is the increase in the par amount of taxable securities traded,” Vieira said. The par amount of taxable securities traded increased nearly 45 percent to $289 billion in 2019, the highest since 2011.

Continuing disclosures submitted to the MSRB increased to 150,585 in 2019, up 2.2% from the 147,280 submissions in 2018. Bond calls, audited financial statements and annual financial information accounted for about two-thirds of all continuing disclosures. The new event disclosures mandated by the Securities and Exchange Commission Rule 15c2-12 as of February 2019 also contributed to the increase in continuing disclosures.

The 2019 Fact Book includes monthly, quarterly and yearly aggregate market information from 2015 to 2019, and covers different types of municipal issues, trades and interest rate resets. The Fact Book provides municipal market participants, policymakers, regulators, academics and others with historical statistics that can be further analyzed to identify market trends and activity.

The MSRB supports market transparency and access to real-time data and disclosures through its free Electronic Municipal Market Access (EMMA®) website. Explore EMMA’s Market Statistics section for daily and historical trading, issuance and continuing disclosure data.

Download the 2019 Fact Book.

Date: March 3, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

GASB Requests Proposals for Crain Research Grants.

Read the Request for Proposals.

SEC Issues Staff Legal Bulletin On Applying Antifraud Liabilities to Public Statements of Municipal Issuers in the Secondary Market: Hunton Andrews Kurth

Introduction

On February 7, 2020, the staff of the SEC’s Office of Municipal Securities (“OMS”) issued a Staff

Legal Bulletin ("Bulletin" or "Staff Guidance") regarding the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder to statements by municipal issuers and obligated persons (each, a "municipal issuer") in the secondary market. Here is a link to the Bulletin. The Bulletin summarizes and confirms prior SEC guidance that the antifraud provisions apply to any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets. The Staff Guidance provides new insights into the views of SEC Staff regarding continuing disclosure practices in municipal securities issues. The Staff Guidance is summarized below.

Background

The Staff Guidance emphasizes that, though much improved since the creation and implementation of the Electronic Municipal Market Access ("EMMA") system, investor and market access to current and reliable information about municipal issuers remains uneven and inefficient. The Staff Guidance notes the variety of ways that municipal issuers disclose information about themselves, including EMMA disclosures, public announcements, press releases, media interviews and discussions with various interest groups. In addition, information about municipal issuers is collected and disseminated publicly by state and local governments. In the Staff's view, these diverse types of statements provide significant, current information about a municipal issuer and can reasonably be expected to reach investors and trading markets, even if they are not published or conducted for purposes of informing the securities markets. Noting questions raised by market participants about the application of the antifraud provisions to issuer statements, including annual and continuing disclosures, the Staff Guidance outlines previous Commission statements regarding the scope and application of the antifraud provisions to municipal issuer statements, primarily the 1994 Interpretive Release1 and the City of Harrisburg, PA enforcement action (and accompanying report) discussed below. The Staff Guidance provides a broad and current formulation of how the antifraud provisions apply to municipal issuer statements.

The Current Staff Guidance Formulation and the Importance of a Staff Legal Bulletin

The Staff Guidance emphasizes that the antifraud provisions apply to all municipal issuer statements that provide information that is reasonably expected to reach investors and the trading markets, whoever the intended primary audience and whatever the medium of delivery. "Statement" or "Statements" is broadly defined to include any publicly available written or oral communication of a municipal issuer, regardless of the intended audience or medium of delivery. The Staff Guidance refers to this as a "standard" and stresses that the antifraud provisions apply to all statements by a municipal issuer whether on EMMA or elsewhere, whether written or oral, regardless of the extent to which the municipal issuer has fulfilled its continuing disclosure undertakings and notwithstanding changes of municipal issuer disclosure practices technology, investor expectations, and regulatory framework. In outlining previous Commission statements, the Staff Guidance offers a broad, current formulation of how the antifraud provisions apply to municipal issuers.

A Staff legal bulletin is not an SEC rule, regulation or Commission statement. However, while a Staff legal bulletin has no legal force or effect, and may not be formally recognized in administrative or court proceedings, a bulletin does represent the current views of the SEC Staff presumably the staff of the Office of Municipal Securities and the staff of the Public Finance Abuse Unit of the SEC's Enforcement Division that is regularly applying SEC rules, regulations and laws to municipal issuers and municipal securities continuing disclosure. For example, Staff Legal Bulletins are regarded as important, practical guidance for SEC-reporting companies when complying with SEC rules and regulations, from disclosing shareholder proposals to corporate disclosures in registered offerings and ongoing reporting. In short, an issuer and its counsel are well advised to be familiar with applicable SEC legal bulletins when engaged in primary offerings and ongoing disclosures.

It is worth noting that the framework or approach of OMS Staff in the Staff Guidance is grounded in corporate disclosure concepts. Much like the corporate framework used to introduce the financial obligation reporting amendments to Rule 15c2-12 in 2019, the Staff states it views regarding disclosure obligations of municipal issuers in the context of "entities whose securities are publicly traded" and suggests that municipal issuers disclose current information in a variety of ways "like public companies". As discussed below, the Staff Guidance takes into account many of the unique aspects of the municipal market, but the guidance is not unlike Staff legal bulletins that are issued and followed in the reporting company context.

SEC-OMS Views on Antifraud Provisions

The Staff Guidance presents OMS's views on (a) certain elements of Section 10(b) and Rule 10b-5, including intent, scienter and materiality, (b) the scope of coverage of the antifraud provisions with respect to statements made by municipal issuers in the secondary market that are reasonably expected to reach investors and the trading markets, including examples of various, current modes of municipal issuer statements and (c) the importance of disclosure policies and procedures in complying with antifraud provisions.

Elements of Antifraud Provisions Relevant to Municipal Issuer Statements to Secondary Market

Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 are referred to as the "antifraud provisions" and generally prohibit misstatements or omissions of material facts in connection with the purchase and sale of municipal securities. The antifraud provisions apply to municipal issuer continuing disclosures and to municipal issuer statements to the secondary market.

Scienter Standard. The Staff Guidance reminds issuers that "scienter" a mental state of intent is required to find a violation of the antifraud provisions. Specifically, scienter is demonstrated by finding "recklessness", an extreme departure from the standard of ordinary care. However, it is important to remember, as is referenced in a footnote in the Staff Guidance, that the SEC does and can proceed against municipal issuers for disclosure violations under Section 17(a) of the Securities Act of 1933. Different than requiring intent like Rule 10b-5, Section 17(a) only requires a finding of negligence or gross negligence to determine that an antifraud violation has occurred. While Section 10(b) and Rule 10b-5 would be the typical standard applied to secondary market disclosures, recent, other enforcement actions regarding disclosure violations by municipal issuers have been based on Section 17(a) negligence, a lesser standard than Section 10(b) scienter. Nonetheless, the Staff Guidance is helpful in reminding municipal issuers that recklessness and extreme departure from ordinary care is the standard typically applied in evaluating municipal issuer liability for secondary market statements to investors and the trading markets.

Materiality and "Total Mix" of Information. In helpful analysis for municipal issuers, the Staff Guidance reminds issuers that a fact or factual statement is material if there is a substantial likelihood that the information would have been viewed by a reasonable investor as significantly altering the "total mix" of information available. The Staff Guidance emphasizes that "total mix" analysis is a fact and circumstance assessment for an issuer and could differ among municipal issuers. Importantly, "total mix" of information assessment may differ depending on whether issuer information is "uneven or inefficient" in the secondary market or is regularly available through EMMA or other investor relations website. To illustrate this "total mix" analysis for municipal issuers, the Staff Guidance relies on the SEC's 2013 Harrisburg Report that accompanied the SEC's Enforcement action against the City of Harrisburg, Pennsylvania.2 In that case, the city administration recurrently released information that omitted or misstated material information about the City's financial condition, while during the same time period failing to submit annual financial information, audited financial statements, notices of failure to provide annual financial information and material event notices.

Information Reasonably Expected to Reach Investors. The Staff Guidance emphasizes that a municipal issuer's failure to fulfill its continuing disclosure undertakings, as was the case with Harrisburg, is not necessary for a municipal issuer to be subject to antifraud liability. Rather, according to Staff, "all statements of a municipal issuer that are reasonably expected to reach investors and the trading markets are subject to the antifraud provisions, regardless of the municipal issuer's compliance with its continuing disclosure obligations". While this guidance is consistent with a compilation of past statements from the SEC on antifraud liability for municipal issuer statements, this new formulation offers a broad, expansive view of the applicability of antifraud provisions to municipal issuers. According to Staff, whether an issuer's statements to the market have been uneven or consistent may increase or decrease the risk that the statements significantly alter the total mix of information and create antifraud liability.

In addition, SEC Staff takes a broad view of information reasonably expected to reach investors: in addition to EMMA disclosures, public announcements, press releases, interviews with media representatives, discussions with interest groups and municipal issuer information disseminated by other state and local governmental bodies are sources of information that reasonably can be expected to reach investors and the trading markets. These statements are part of the "total mix" and can lead to exposure to antifraud liability, depending on the level of issuer information otherwise available in the market. Even if not published for purposes of informing the securities markets, such oral or written statements may not violate the antifraud provisions

Examples of Statements (Other than EMMA Disclosures) Covered by Antifraud Provisions

To emphasize that the antifraud provisions apply to all issuer statements reasonably expected to reach investors and trading markets, regardless of the intended primary audience or medium of delivery, the Staff Guidance provides examples of issuer statements other than EMMA disclosures that could be subject to antifraud liability:

Information on Municipal Issuer Websites. To avoid misleading investors, information previously posted on an issuer's website should be separately identified as historical and located in a separate section of the website. The Staff Guidance encourages municipal issuers to follow public reporting company guidance regarding hyperlinked information, including disclosing the reason for the hyperlink, using disclaimers and use of exit screens or intermediate screens to minimize antifraud liability. Summary information posted on issuer websites should be displayed in a manner designed to avoid confusing or misleading investors. On each of the foregoing areas of website disclosure concerns, the Staff Guidance directs municipal issuers to follow Commission guidance regarding how antifraud provisions apply to public reporting companies.

Municipal Issuer Reports Delivered to Other Governmental Bodies. The Staff Guidance states that CAFRs, budgets and mid-year financial reports are information reasonably expected to reach investors and trading market even if not posted on EMMA, and are subject to the antifraud provisions. The Staff Guidance states that additional types of reports may be covered by the antifraud provisions, depending on facts and circumstances, including reports submitted by a municipality to a state agency, reports by a state or local official to a city council or state legislature and other publicly available reports. Again, while this Staff Guidance is consistent with past SEC principle-based guidance, it is expansive in its present detail of what sources may be viewed as significant, current information reasonably expected to reach investors and markets.

Statements Made By Municipal Issuer Officials. The Staff Guidance re-emphasizes past SEC guidance that statements by municipal issuer officials reasonably expected to reach investors or securities markets are subject to the antifraud provisions. The current Staff Guidance broadly defines the term “municipal issuer official” to include elected officials, appointed officials and employees or their functional equivalents. In addition, the current Staff Guidance broadly describes the types of statements, depending on facts and circumstances, that may be actionable under the antifraud provisions: verbal statements, speeches, public announcements, interviews with media as well as other avenues such as social media. The Staff Guidance, in bringing past guidance current, is expansive in its views of municipal issuer statements subject to antifraud provisions.

Key Importance of Disclosure Policies and Procedures

The Staff Guidance emphasizes that “reasonably designed” and “consistently implemented” disclosure policies and procedures will help a municipal issuer comply with the antifraud provisions. Given the current, broad views of Staff on what constitutes actionable statements and what public information is reasonably expected to reach investors and trading markets, the Staff’s renewed emphasis on adopting and implementing disclosure policies and procedures is of key importance for municipal issuers. The Staff Guidance recommends that municipal issuers “follow and further develop initiatives to enhance disclosure policies and procedures for both primary offering and ongoing disclosures”, including adoption of disclosure committees and training programs. Specifically, the Staff Guidance recommends that disclosure policies and procedures:

- Designate a responsible individual;
- Conduct periodic training for staff and officials;
- Identify the documents and reports that customarily contain current financial and operational information and establish a process for disseminating the documents and reports to investors; and
- Identify the places, such as EMMA or an investor-relations website, where such documents and reports are regularly available to the public.

Conclusions and Recommendations

The new Staff Guidance provides views consistent with past SEC guidance on municipal issuer secondary market disclosure and states that it does not create new or additional obligations for municipal issuers. At the same time, in offering its current views on how the antifraud provisions apply to secondary market disclosures, the Staff Guidance offers broad, even expansive, views of current municipal issuer obligations: the antifraud provisions apply to all statements, broadly defined from EMMA disclosures to social media, that are reasonably expected to reach investors and the trading markets, whoever the intended primary audience, whatever the medium of delivery and regardless of the extent to which an issuer has fulfilled its continuing disclosure undertakings. The scope of application of the antifraud provisions is broad, notwithstanding changes or improvements in municipal issuer disclosure practices, changes in technology, investor expectations and changes in regulatory framework. While the Staff Legal Bulletin addresses municipal issuers who have outstanding issues in the public market subject to the continuing disclosure rules, the Staff views on application of the antifraud provisions to issuer statements are also relevant to primary offerings and issuer statements made in an offering process before an issue is closed.

According to the Staff Guidance, the broad potential for antifraud liability of municipal issuers and their officials for secondary market disclosures and public statements underscores the need for adopting, and regularly carrying out, thorough disclosure policies and procedures. Municipal issuers can expect to see continued focus by their counsel on adequacy and regular implementation of disclosure policies and procedures. Specifically, municipal issuers will want to ensure that their disclosure policies and procedures appropriately identify the financial and operating information that will regularly be made available to investors and the trading markets by EMMA filings or through other means such as an issuer website, and consider separating and/or disclaiming information not intended for investors or the market. Issuers may look to disclosure counsel increasingly to advise not just on primary disclosure in connection with initial bond issuances, but on ongoing EMMA disclosures and other publicly available issuer statements. The Staff Guidance makes clear that OMS and SEC Staff, including Enforcement, view the application of the antifraud provisions broadly with respect to municipal issuer statements. Disclosure policies and procedures are a critical line of defense against fraud claims and Enforcement review.

Hunton Andrews Kurth LLP

by Douglass P. Selby, Yeshake 'Isaac' Yilma, Benjamin Vernon, Caryl Greenberg Smith, Darren C. McHugh, William H. McBride, Thomas A. Sage , Mark B. Arnold, Clayton T. Holland, Ryan M. Bates, Audra L. Herrera, Samantha Gilley Rachlin, Christopher G. Kulp, Brendan M. Staley, Martha A. Warthen, Andrew R. Kintzinger and Scott H. Kimpel

February 24 2020

[SEC to Municipal Issuers and Obligated Persons: What You Say Can and Will Be Held Against You: Squire Patton Boggs]()

SEC Staff Releases Staff Legal Bulletin No. 21 on Application of Antifraud Provisions to Public Statements in Secondary Municipal Market and Misses Opportunity to Develop a Real-World Approach

In response to a July 2019 direction from Securities and Exchange Commission (SEC) Chairman Jay Clayton, the SEC Office of Municipal Securities (OMS) staff issued a Staff Legal Bulletin No. 21 (OMS) that discusses the application of antifraud provisions to public statements of municipal issuers and obligated persons in the municipal secondary market.1 The purpose of the OMS bulletin, according to the OMS staff, is to "outline previous Commission statements relevant to understanding the application of the antifraud provisions to any statement of a municipal issuer that is reasonably expected to reach investors and the trading markets, and, thereby, promote more informed disclosure practices by municipal issuers in the secondary market; facilitate investor access to accurate, timely and comprehensive information; and improve investor protection."2 Relying heavily on the 1994 Interpretive Release3 and the City of Harrisburg Section 21(a) Report4, the OMS staff puts forth the proposition that virtually every statement made by a municipal issuer, including staff and elected officials, in any medium (e.g., websites, social media, speeches, governmental meetings and reports to other governmental agencies), for any purpose, is reasonably expected to reach investors and the trading market, and is, therefore, subject to the federal securities antifraud provisions.

In order to appreciate the gravity of that proposition, a review of the elements of the antifraud provisions might be informative.

As referred to in the bulletin, SEC Rule 10b-5 essentially prohibits making an untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading, all in connection with the purchase or sale of any security. The bulletin describes how the federal courts and the SEC interpret the phrase "material fact"5. However, the bulletin omits any discussion about when statements will be viewed as being made "in connection with" a purchase or sale of a security or how the phrase "in light of the circumstances under which they were made" might aid the legal analysis.

The discussion of what constitutes a "material fact" revolves around the concept that a fact is material, and its omission from a statement is material, if the inclusion or exclusion, as the case may be, of that fact would alter the total mix of information available. Usually, this analysis of materiality involves a disclosure document (e.g., an official statement). In the case of secondary market disclosure, however, it is not clear from the bulletin what the "total mix of information" would include. The OMS staff suggests that the relative importance of any particular fact (and its materiality) might be affected by whether investors otherwise have regular access to accurate, timely and comprehensive information as opposed to "uneven and inefficient" access to information about the issuer. The staff specifically identifies the MSRB's EMMA system "or some other investor relations-focused medium (e.g., investor website)" as potential means to provide regular access to information, but does not delve into what should be considered "regular" or "comprehensive."

While the bulletin did not discuss the phrase "in connection with the purchase or sale of a security" in the context of the antifraud rules, this concept bears touching on, particularly with respect to municipal issuers. There does not appear to be one uniform interpretation of the meaning of this phrase, although several judicial interpretations have been made with respect to the corporate market. One interpretation is that all publicly disseminated statements are deemed to be made in connection with a securities transaction if they are "reasonably calculated to influence the investing public."6 Case law also refers to a "transactional nexus" requirement, meaning there must be a connection between the alleged fraud and the purchase or sale of securities.7 Courts have found sufficient "connection" in SEC filings, press releases, public statements, letters published in the financial press, news articles, investment research reports and product advertisements.8 Whether this same standard should be applied with respect to municipal issuers is a question that should be given serious consideration in light of the differences in the flow of information in the public and private sectors. Private entities (e.g., corporations, partnerships, etc.), to a large extent, are able to control the release and dissemination of their information and, thus, may keep private all information other than what they choose to divulge or what applicable law requires. State and local government entities, on the other hand, generally are subject to public records laws and are prohibited from keeping any information private unless a law specifically provides an exclusion. Additionally, many jurisdictions have transparency laws that make it compulsory for state and local governments to post specific documents on their websites (or otherwise provide for public access) for the benefit of the entities' constituents. These public records and transparency laws were not developed for the benefit of potential debt investors and so the question is whether complying with these laws should automatically result in federal antifraud scrutiny. When a city clerk posts on the city's website the agenda materials for the next city commission public meeting, should the assumption be that the posting was made to influence the investing public? Is it reasonable to assume an investor might rely on the meeting agenda materials in making an investment decision and, thus, those materials should be "vetted" for antifraud liability? What if the agenda package includes the audited financial statements for acceptance by the city commission? Contrast that to the city finance director posting the final accepted audited financial statements on a webpage designated as the city's "investor relations page." There is an obvious distinction to be made.

The most unfortunate and confusing part of the bulletin, however, is the OMS staff's discussion of policies and procedures. Quoting the Harrisburg report, the staff cited the SEC's recommendation that municipal issuers, among other things, evaluate public statements "prior to public dissemination" for accuracy and completeness.9 The staff suggests that the development and consistent application of policies and procedures such as described in the Harrisburg Report "can help a municipal issuer regularly provide more accurate, timely, and comprehensive information to investors, better manage communications with their investors; and comply with the antifraud provisions."10 After five pages of analysis and the expansive conclusion that all public statements are subject to antifraud provisions, the staff encourages municipal issuers to "identify the place" where the issuer will make pertinent financial information regularly available, "which may include a central repository, such as the EMMA system, or an investor-relations website."11 Yet the bulletin does not otherwise distinguish liability by whether information is posted to a central or investor-focused location. The only sense to be made of this statement in the context of the rest of the bulletin is that the staff is suggesting municipal issuers need to bulk up the information intentionally made available to investors and the trading market so that the public dissemination of other information is less likely to alter the total mix of information available. But, if all public statements (which, from a public records perspective, essentially include all public information) are subject to the antifraud rules regardless of the purpose of the disclosure, why would it matter whether information is posted on EMMA or on a non-investor-focused website? Can we conclude by this recommendation that OMS staff believes that information disseminated to a designated investor location (e.g., EMMA or an investor relations page) would result in a greater weight being given to such information?

The OMS staff could have discussed, but did not, whether the phrases "in connection with" or "under the circumstances under which the statement is made" could be applied to distinguish information routinely posted on an issuer's website for the information and convenience of its citizenry or statements made in a political setting from statements made during an annual investor call, posted to EMMA or to an "investor relations page." OMS staff could have stated, but did not, that municipal issuers and obligated persons would benefit from the use of reasonable precautionary language that could, if properly used, successfully communicate to the reader of the public statements the nature and purpose of the statements, thereby promoting investor understanding and providing a small level of comfort to the municipal issuer or obligated person regarding potential securities liability for intentionally (but understandably so) incomplete information (e.g., unaudited financial statements with no financial notes) or un-vetted information dissemination (e.g., public records responses).

By omitting any discussion of these important elements of the legal analysis, the OMS staff has missed the opportunity to provide meaningful guidance to the municipal market that would have been far more likely to facilitate investors' regular access to accurate, timely and comprehensive information than what is contained in the bulletin. In fact, the bulletin's proposition that all public statements are subject to antifraud rules could lead municipal issuers to provide less information by means of informal media (such as a website). A similar result occurred in response to the MSRB's market analysis that insider trading liability could result from one-on-one investor communications.12

Perhaps the best guidance to be gained from the staff bulletin might be derived from the omitted analysis. We have long provided clients with advice regarding the dissemination of information to the secondary market and specifically about the use of websites to communicate with bondholders. The National Association of Bond Lawyers (NABL) has also provided a very useful publication for its members setting out considerations in the drafting of disclosure policies and procedures similar to what is encouraged in the staff bulletin.13 The staff bulletin can be construed to support the approach set out by NABL, which is to establish (and follow) written procedures for a formal process of vetting information before it is posted to EMMA or to an investors relations webpage and to clearly delineate which information is (and is not) intended for investor consumption. Regardless of the legal arguments that can be made to limit the reach of federal antifraud provisions to public information of governmental entities clearly not intended for investors or the trading market, it behooves governmental entities and other obligated persons to review the type of information available on its websites and in other media, review (and strengthen, if necessary) the current procedures for posting new information and otherwise releasing public statements, and consider voluntary postings to EMMA (or an investor relations page) of relevant vetted financial information (with appropriate precautionary language) that is otherwise routinely prepared and reviewed internally.

Squire Patton Boggs

February 28 2020

SEC Probes Owner of Chicago Apartments After Bond Default.

- **Probe of $170 million of bond deals disclosed in bankruptcy**
- **Better Housing Foundation issued bonds through Illinois agency**

The U.S. Securities and Exchange Commission is investigating a non-profit that defaulted on $170 million of municipal bonds issued to finance the acquisition of about 1,800 low-income apartments in Chicago and its suburbs.

The disclosure of the investigation came in a court filing earlier this month by attorneys for the Better Housing Foundation. Lindran Properties LLC, a subsidiary of the foundation, filed for Chapter 11 protection from creditors on Jan. 31.

Clark Hill Plc, a law firm representing BHF in the bankruptcy, said the non-profit received a subpoena from the SEC "seeking records related to the events that preceded current ownership's involvement in BHF and its affiliates."

BHF was incorporated in 2015 by Meredith Rosenbeck, an attorney in a Columbus, Ohio, suburb, just one-year before it started borrowing through the Illinois Finance Authority to acquire the apartments in Chicago. The non-profit paid Chicago-based real estate investor L. Mark DeAngelis more than $4 million to acquire and manage three of the five portfolios of apartments, known as Shoreline, Icarus and Ernst, according to a lawsuit filed by BHF in October 2018.

The apartments managed by DeAngelis suffered from scores of building code violations and overdue property taxes, according to bond filings by BHF. The foundation accused DeAngelis of providing deeply flawed reports on the properties, which needed extensive repairs, and alleged DeAngelis grossly mismanaged the apartments and failed to collect rent.

As a result, the Chicago Housing Authority terminated tenants' housing vouchers and BHF defaulted on the debt. The non-profit later defaulted on the two remaining bond issues and some of the securities traded this month for 2 cents on the dollar.

Andrew Belew, a Palm Beach, Florida-based real-estate investor who took over Better Housing Foundation in late 2018, said he's cooperating with the SEC investigation. Rosenbeck couldn't immediately be reached to comment, nor could DeAngelis.

On one $52 million bond sale in 2017 to acquire the 500-unit Icarus portfolio, a consultant hired by BHF estimated the apartments, some built in the 1890s, needed less than $500,000 in repairs, according to the bond offering document.

A report commissioned by Belew in 2019 after the bonds defaulted found the properties needed more than $7 million in critical repairs and almost $8 million to fix code violations. Making recommended repairs and curing potential code violations would cost another $34 million

Stifel Financial Corp. managed the Better Housing Foundation's bonds sales. Neil Shapiro, a Stifel spokesperson, didn't immediately return a call seeking comment.

Bloomberg Markets

By Martin Z Braun

February 24, 2020, 12:47 PM PST Updated on February 24, 2020, 1:45 PM PST

John W. Auchincloss Named Executive Director, Financial Accounting Foundation.

Norwalk, CT—February 27, 2020 — The Board of Trustees of the Financial Accounting Foundation (FAF) today announced that it has appointed John W. Auchincloss as the executive director of the Foundation. The FAF is the organization that oversees the Financial Accounting Standards Board (FASB) and the Governmental Accounting Standards Board (GASB).

Mr. Auchincloss joined the FAF as vice president and general counsel in May 2016. In 2019, following the departure of then-president Terri Polley, he was appointed acting president while a national search was conducted for an executive director of the Foundation. His appointment as executive director is effective immediately.

"John has long impressed the FAF trustees with his intelligence, thoughtful strategic counsel, and commitment to the FASB and the GASB and their important mission," said FAF Chair Kathleen L. Casey. "I am very pleased that we will continue to benefit from his strong leadership."

"I am grateful to the FAF trustees and the entire organization for this opportunity to serve," said Mr. Auchincloss. "The standard-setting boards have a unique role serving investors and other stakeholders across our capital markets. The entire FAF organization is committed to supporting the integrity of the independent standard-setting process and ensuring the boards have what they need to succeed."

Before joining the FAF, Mr. Auchincloss developed deep professional experience with nonprofit governance, tax, and regulatory issues. His last position before coming to the FAF was general counsel and secretary for Commonfund, a private, nonprofit asset management firm.

Previously, Mr. Auchincloss served as an assistant U.S. attorney in the Southern District of New York. He began his career at Davis Polk & Wardwell in Washington, D.C. and New York City. Mr. Auchincloss received a bachelor's degree in history from Yale University, a J.D. degree from the University of Virginia School of Law, and an LL.M. degree from Cambridge University.

MSRB Seeks Volunteers for New Market Transparency Advisory Group.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today announced that it is establishing a new Market Transparency Advisory Group (MTAG) to advise its Board of Directors on strategic initiatives to modernize and enhance the free Electronic Municipal Market Access (EMMA®) website and related systems in support of market transparency. The MSRB is now seeking volunteers for the FY 2020 MTAG, which will convene in April 2020 and continue through September 2020.

"As we migrate our market transparency systems to the cloud, the MSRB sees tremendous potential for the EMMA website to deliver even greater value to our market stakeholders by enabling dynamic comparison, regulatory compliance and big data analytics," said Ron Dieckman, Chair of the Board's Technology Committee.

Jerry Ford, Chair of the Board's Stakeholder Engagement Committee, said, "This new advisory group will provide a forum for stakeholders to partner with the MSRB in identifying and prioritizing data and technology initiatives that advance transparency in our market, ultimately contributing to a fairer and more efficient market for all participants."

The MSRB seeks volunteers representing regulated entities, issuers, investors, and other market participants with knowledge of the EMMA website and the MSRB's market data to serve on the MTAG. The MSRB will accept applications through March 13, 2020, and review and assess candidates based on their individual knowledge and experience as well as other factors such as diversity in geographic location and size and type of firm. The selection process and announcement of MTAG members is expected to occur in March.

Read more information on volunteering for MTAG.

Date: February 25, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

SEC Probes Owner of Chicago Apartments After Bond Default.

The agency is investigating a nonprofit that defaulted on $170 million of municipal bonds issued to finance the acquisition of about 1,800 low-income apartments in Chicago and its suburbs.

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Crain's Chicago Business

February 24, 2020 04:09 PM

MSRB to Enhance Transparency of Timing of Issuer's Annual Disclosures on the EMMA Website.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) received approval from the U.S. Securities and Exchange Commission (SEC) of a proposal to more prominently display existing information on the timing of issuers' annual and audited financial disclosures on the MSRB's free Electronic Municipal Market Access (EMMA®) website. The EMMA "Submission Calculator," proposed in November 2019, would become visible on the EMMA website by July 2020 to allow time for stakeholders to preview the new display and provide feedback on educational tools.

"Improving the timeliness of financial disclosures in the municipal securities market has been an ongoing concern of the MSRB, the SEC, investors and other market participants," said MSRB Chief Compliance Officer Gail Marshall. "The EMMA Submission Calculator supports greater transparency around the timing of issuers' annual financial disclosures, and the MSRB looks forward to continued dialogue with market participants as they develop consensus solutions that would complement the increased transparency."

The MSRB's EMMA website serves as the official source for municipal securities data and disclosure documents, providing free public access to information that enables investors to make informed decisions.

In approving the MSRB's proposal, the SEC noted its belief that the Submission Calculator "would enable investors and others to more readily locate and access the financial information available on the EMMA Portal and provide investors and others with additional tools to evaluate an issuer's disclosure practices." Read the SEC's approval order.

The MSRB will host a free educational webinar on March 19, 2020 from 3 p.m. to 4 p.m. Eastern Time to discuss the Submission Calculator and demonstrate other upcoming EMMA enhancements that will provide a "modification history" to clearly indicate how a continuing disclosure filing has been amended over time. Register for the webinar.

GASB Issues Proposal to Enhance Concepts for Notes to Financial Statements.

Norwalk, CT, February 21, 2020 — The Governmental Accounting Standards Board (GASB) has issued a proposed Concepts Statement that would provide enhanced guidance to the Board when it establishes note disclosure requirements for state and local governments.

When finalized, these concepts may be used by preparers and auditors when applying the generally accepted accounting principles hierarchy in assessing specific information items in certain circumstances for which the GASB does not provide authoritative guidance. These concepts also may help stakeholders to better understand the fundamental concepts underlying future GASB standards.

The Exposure Draft, *Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*, describes the purpose of notes to financial statements and the intended users of notes. The proposals set forth in the Exposure Draft would replace the existing criteria for disclosing information in notes to financial statements.

The proposals elaborate on the types of information that should be disclosed in notes and the types of information that are not appropriate for note disclosures. Of particular importance, the Board is proposing the characteristics that distinguish information that is essential to users in making economic, social, or political decisions or assessing accountability. Those proposed characteristics are that (1) the information is currently being utilized in users' analyses for making decisions or assessing accountability or (2) would be utilized if it became available.

The Exposure Draft is available for download at no charge on the GASB website, www.gasb.org. Stakeholders are encouraged to review and provide comments by April 17, 2020.

The Board has scheduled a public hearing on May 17, 2020 in New Orleans, in conjunction with the annual conference of the Government Finance Officers Association. Additional information is available in the Exposure Draft. The deadline for providing written notice of intent to participate is April 17, 2020.

A Bid to Shame Muni-Disclosure Derelicts Draws Industry's Fire.

- **MSRB proposes showing how long the wait is for annual reports**
- **Industry, government groups say it could be buggy, misleading**

What seems like a tiny tally is causing a big controversy in the world of municipal finance.

State and local government officials are pushing back against a proposal from the Municipal Securities Rulemaking Board that would reveal to their bondholders a potentially embarrassing fact: how long it takes them to post their audited financial statements.

That count of the days between the end of the fiscal year and the appearance of annual reports, to be disclosed on the MSRB website where securities filings are posted, is an effort to give the $3.8 trillion municipal-bond market some of the transparency that's long been demanded from publicly traded corporations, whose annual reports have to be filed with the Securities and Exchange Commission as soon as two months after their years end.

Continue reading.

Bloomberg Markets

By Mallika Mitra

February 18, 2020, 6:02 AM PST

MSRB Compliance Corner.

Read about the LIBOR transition, recent enforcement actions and more in the latest MSRB Compliance Corner newsletter.

Hawkins Advisory: SEC Staff Bulletin

This Advisory provides a summary and analysis of the recent Staff Legal Bulletin from the SEC's Office of Municipal Securities.

Read the Advisory.

SIFMA Follow Up Letter to SEC in Response to Proposed Exemptive Order.

SUMMARY

SIFMA submitted comments to the SEC on December 9, 2019 in response to the Proposed Exemptive Order. Subsequent to such submission, on December 12, 2019, representatives of SIFMA and its member firms met with staff from the Division of Trading and Markets and the Office of Municipal Securities, and met separately with Commissioner Lee and Commissioner Roisman and members of their respective staffs to discuss SIFMA's comments and concerns about the Proposed Exemptive Order.

SIFMA and member firm representatives also met separately with Commissioner Jackson and Commissioner Peirce and their respective staffs on December 17, 2019, and with Chairman Clayton and his staff on January 9, 2020, to further discuss those concerns.

Read the SIFMA Comment Letter.

Virtually All Issuer Statements and Information Subject to SEC Rule 10b-5 (Anti-Fraud) Liability.

The Securities and Exchange Commission (SEC) announced in September 2019 that it would release a staff bulletin to provide more certainty on the SEC's position regarding the application of certain antifraud laws to municipal issuers, particularly Rule 10b-5 of the Securities Exchange Act of 1934 (the Act). The concern was raised as issuers and other obligated persons have been called upon to provide more material event disclosures, interim financials, and other disclosures pursuant to continuing disclosure obligations under Rule 15c2-12 of the Act. The SEC fulfilled the promise by releasing on Feb. 7, 2020, its "Application of Antifraud Provisions to Public Statements of Issuers and Obligated Persons of Municipal Securities in the Secondary Market: Staff Legal Bulletin No. 21 (OMS)" (the SEC Bulletin), which can be found here:

Rule 10b-5 prohibits, in connection with the purchase or sale of any security (including publicly offered bonds), the making of any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. See 17 C.F.R. Section 240.10b-5(b) (2019).

There are several questions to consider, as provided in the SEC Bulletin, when determining whether someone has violated Rule 10b-5:

- Scienter Standard – Was there a mental state embracing intent to deceive, manipulate, or defraud (includes recklessness)?
- Materiality and Total Mix of Information – Is there a substantial likelihood that the information would have been viewed by a reasonable investor as having significantly altered the total mix of information?
- Information Reasonably Expected to Reach Investors – Did the statements made by the issuer provide information that is reasonably expected to reach investors?

The SEC staff provided that Rule 10b-5 applies to all issuer statements that are reasonably expected to reach investors, regardless of who the intended audience is and the method of delivery. Even though a statement was not made for the purpose of informing an investor it does not prevent liability or the application of Rule 10b-5. Such statements could include information on the issuer's website, information in public reports to other governmental entities, and information made in speeches, interviews or press releases. This is a very broad list and could include any statements made or information provided by an issuer, including board members, staff and elected officials, that is then promulgated on the internet or social media. For that reason, the SEC staff encourages issuers to adopt policies and procedures, which establish information dissemination principles, designate a compliance individual, and establish training requirements for staff among other things.

It is important for issuers to speak with an attorney about adopting such policies and procedures, providing appropriate disclaimer language in provided information, and ensuring compliance with Rule 10b-5.

Frost Brown Todd LLC – Beau F. Zoeller, Denise Y. Barkdull, David A. Rogers and Laura H. Theilmann

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SEC Legal Bulletin: Antifraud Provisions Apply to Public Statements by Public Officials - Day Pitney Alert

On February 7, the Securities and Exchange Commission (SEC) provided a legal bulletin setting forth the views of the Office of Municipal Securities (the Office) regarding the application of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (collectively, the antifraud provisions) with respect to public statements made by issuers of municipal securities.[1] The Office indicated it issued the bulletin in response to questions raised about the application of antifraud provisions to statements of municipal securities issuers.

Antifraud Provisions

The antifraud provisions apply to the purchase and sale of municipal securities in the primary and secondary markets. They prohibit an issuer from making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. The primary elements in determining whether there has been a violation of these provisions are scienter and materiality.

Scienter

Scienter involves the intent to deceive, manipulate or defraud. However, the courts and the SEC have stated that scienter may be satisfied by a showing of recklessness. Recklessness is an extreme departure from the standards of ordinary care and involves the danger of misleading market participants known to the person making the statement, or so obvious that the official must have been aware of the possibility of misleading the market participants

Materiality

Under the antifraud provisions, a fact is material if there is a substantial likelihood that the information would have been viewed by the reasonable investor as having significantly altered the total mix of information available to an investor. Determining whether a statement is material is based on an analysis of facts and circumstances (a total mix analysis). The Office noted that it believes all statements of a municipal securities issuer that are reasonably expected to reach investors and trading markets are subject to the antifraud provisions even if the issuer is in compliance with its continuing disclosure undertakings. However, the total mix analysis may affect the materiality of a public statement made by an issuer and may depend on whether access to accurate, timely and comprehensive information about an issuer is “uneven and inefficient” rather than regularly available to investors through the MSRB’s EMMA system or another investor-based communication vehicle such as an investor website.

Information Reasonably Expected to Reach Investors

The Office further noted that "information reasonably expected to reach investors" may be in the form of public announcements, press releases, interviews with media representatives and discussions with groups. The fact that the information is not published for purposes of informing the securities markets does not alter the mandate that it not violate the antifraud provisions. Information reasonably expected to reach investors includes the following:

Information on Websites

- Information needs to be accurate and not misleading.
- Historical information should be accurately reflected as such.
- Summaries should be accurately reflected as such, with layered links to more detailed information.
- Hyperlinks should be included with care as the information may be attributed to the issuer.
  – If an issuer was involved in the preparation of the hyperlinked information, the information may be attributed to the issuer.
  – If an issuer endorses or approves the hyperlinked information, it may be attributed to the issuer.
  – Issuers should add exit notices or intermediate screens before visitors enter the hyperlinked site, to minimize risk of attribution.
  – Issuers should add disclaimers to minimize the risk of attribution.

Public Reports Delivered to Other Governmental Bodies

- Comprehensive Annual Financial Reports (CAFRs)
- Budgets
- Mid-year financial reports
- Reports submitted by a municipality to a state agency
- Reports made by a state or local official to a legislative body (state legislature, city council, etc.)
- Reports made part of a public record and available to the public

Statements Made by Issuer Officials

"Officials" include those who may be viewed as having knowledge regarding the financial condition and operation of the issuer, and statements may include:

- Speeches
- Public announcements
- Interviews with media
- Statements disseminated through other avenues, including social media
- Disclosure Policy and Procedures

Finally, the Office noted that proper disclosure policies and procedures, when consistently implemented, can benefit an issuer in its compliance with the antifraud provisions, and it encouraged issuers to adopt appropriate policies.

The attorneys in Day Pitney's Municipal Finance group routinely counsel clients on addressing compliance with the antifraud provisions and drafting disclosure policies and procedures. Please feel free to contact any of the attorneys listed to the right of this alert if you would like to discuss this alert, compliance with the antifraud provisions or drafting a disclosure policy.

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[1] The Bulletin can be found here. Note that the statements in the bulletin represent the views of the Office and the bulletin is not a rule, regulation or statement of the SEC and has no legal force or effect.

Publisher: Day Pitney Alert

Day Pitney Author(s) Namita Tripathi Shah

February 11, 2020

Financial Accounting Foundation Board of Trustees Notice of Meeting.

Notice of Meeting.

[02/10/20]

BDA Responds with Narrowly Tailored Parameters to Any Potential Exemptive Relief for Municipal Advisors.

After multiple meetings at the SEC including with the Chair, all Commissioners, and staff leadership at the Office of Municipal Securities and Trading and Markets, **today (1/28/20) the BDA submitted comments to the SEC that would narrowly tailor the proposed exemptive order**. Following extensive work with the BDA working group and outside counsel Davis Polk and Nixon Peabody, comments were developed that create distinct parameters, limiting instances where non-dealer MA's can place securities.

The comments can be viewed here.

While the BDA remains in opposition to the SEC issuing any form of the requested relief, the BDA is taking proactive steps in response to requests in order to ensure municipal market structure is not altered by the misguided proposed action.

The BDA is currently assessing next steps and continuing to monitor actions taken at the SEC. The BDA will provide updates when they become available.

Bond Dealers of America

February 4, 2020

SEC Signals Heightened Scrutiny of Cybersecurity Practices.

On January 7, 2020, the U.S. Securities and Exchange Commission's (SEC) Office of Compliance Inspections and Examinations (OCIE) announced its 2020 Examination Priorities that included cybersecurity practices. Soon after the publication of the OCIE Examination Priorities, on January 27, 2020, OCIE followed-up with a report entitled Cybersecurity and Resiliency Observations. These two OCIE releases, along with prior SEC alerts and actions, provide strong indications that the SEC, in 2020, will be ramping up its focus on cybersecurity practices in the financial services industry. We expect increased examination and enforcement activities concerning cybersecurity practices, including vendor management and controls.

2020 Examination Priorities: Information Security

OCIE's 2020 Examination Priorities include information security practices for investment advisers, broker dealers, municipal advisers, and other registered entities that fall within the scope of OCIE's programs. As in previous years, OCIE is prioritizing information security practices in the industry to bolster investor and financial market confidence given the potential risk if massive data breaches were to occur. Information security examinations for 2020 will, therefore, include the following:

- Proper configuration of network storage devices
- Information security governance
- Retail trading information security
- Protection of registered investment advisers (including robo-advisers) clients' personal financial information, including: governance and risk management, access controls, data loss prevention, vendor management, training and incident response and resiliency
- Oversight practices of certain service providers and network solution, including firms leveraging cloud-based storage
- Compliance with Regulations S-P and S-ID
- Controls surrounding online access and mobile application to customer brokerage account information
- Safeguards regarding proper disposal of retired hardware possibly containing client or network information

OCIE also encourages market participants to engage with regulators and law enforcement to identify and address security risks like cyber-related attacks.

OCIE Cybersecurity and Resiliency Observations

This OCIE report, issued within the same month as the OCIE Priorities, discussed industry practices to manage and combat cybersecurity risk and to maintain operational resiliency that OCIE has observed through "thousands of examinations of broker-dealers, investment advisers, clearing agencies, national securities exchanges and other SEC registrants…" Here's our take:

- The observed industry practices covered areas of governance and risk management, access rights and controls, data loss prevention, mobile security, incident response and resiliency, vendor management, and training and awareness.
- By putting all financial industry participants on notice regarding the availability of such practices, we believe the SEC is setting the stage to bring enforcement actions against financial industry participants that fail to adopt practices that are the equivalent to or reasonably meet the goals of the currently observed industry practices.
- Further, the report is yet another step toward creating a basis for future SEC enforcement cases related to deficient practices and controls of third party vendors that have access to client and customer data. The OCIE report devotes a separate section to vendor management, including cyber and privacy related due diligence, as well as robust contract language providing clear rights of the registrant to address a cyber incident arising out of a vendor relationship, monitoring and training. The SEC has historically not been shy about holding companies responsible for violations facilitated (or caused) by their third parties, and this would seem to be a logical extension of that approach.
- In 2015, the SEC brought its first ever enforcement action against an investment adviser in connection with a cyber breach. The action involved a breach of a third party-hosted web server that held personally identifiable information (PII) of the investment adviser's clients. The SEC faulted the investment adviser for failing to have any written policies to safeguard client PII. At the time, the SEC did not set forth any requirements to assess outside vendor's ability to safeguard

client data.

- In May 23, 2019, OCIE issued a Risk Alert regarding the need to safeguard customers and information in network storage including the use of third party security features and cloud-based storage. Among other things, OCIE expressed concerns with inadequate oversight of vendor-provided network storage solutions.
- In the recent Report, OCIE specifically identified industry practices on vendor management that includes vendor monitoring and testing.

Recommended action

Given the prominence of information security in OCIE's 2020 Examination Priorities, registered firms should ensure that their policies and procedures appropriately account for risks to customer records and to IT systems in accordance with Regulation S-P Rule 30. With regard to broker-dealers specifically, FINRA will play an important part in this trend toward greater regulatory oversight. Indeed, FINRA expects all firms to implement policies and procedures related to cybersecurity, but expects that firms will approach these challenges in accordance with their scale and model.

Finally, in light of OCIE's report on industry practices, registered firms also should review their current procedures and processes to determine whether they are equivalent to or reasonably meet the goals of the practices described in the Report, and whether further enhancements are appropriate or necessary.

Baker McKenzie – Bernard (Brian) L. Hengesbaugh, Harry Valetk, Amy J. Greer, Jennifer L. Klass, A. Valerie Mirko, Peter K.M. Chan and Jerome Tomas

February 4 2020

GASB Issues Omnibus Statement Addressing Wide Range of Practice Issues.

Norwalk, CT, February 5, 2020 — The Governmental Accounting Standards Board (GASB) today issued guidance addressing various accounting and financial reporting issues identified during the implementation and application of certain GASB pronouncements.

The issues covered by GASB Statement No. 92, *Omnibus 2020*, include:

- Modifying the effective date of Statement No. 87, *Leases*, as well as associated implementation guidance, to *fiscal years* beginning after December 15, 2019, to address concerns regarding interim financial reports
- Reporting of intra-entity transfers of assets between a primary government employer and a component unit defined benefit pension plan or defined benefit other postemployment benefit (OPEB) plan
- The applicability of Statement No. 73, *Accounting and Financial Reporting for Pensions and Related Assets That Are Not within the Scope of GASB Statement 68, and Amendments to Certain Provisions of GASB Statements 67 and 68*, as amended, and Statement No. 74, *Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans*, as amended, to reporting assets accumulated for pensions and OPEB
- The applicability of certain requirements of Statement No. 84, Fiduciary Activities, to pension and OPEB arrangements
  Measurement of liabilities and assets, if any, related to asset retirement obligations in a government acquisition.

The requirements of Statement 92 that relate to the effective date of Statement 87 and its associated implementation guidance are effective upon issuance. Provisions related to the application of Statement 84 are effective for periods beginning after June 15, 2020. Provisions related to intra-entity transfers of assets and applicability of Statements 73 and 74 are effective for *fiscal years* beginning after June 15, 2020. The remaining requirements related to asset retirement obligations are effective for government acquisitions occurring in reporting periods beginning after June 15, 2020. Earlier application is encouraged and is permitted by topic.

GASB Outlook E-Newsletter Winter 2020.

Read the Newsletter.

02/04/20

MSRB Sets Date for Compliance with Interpretive Guidance on Underwriting Activities.

The MSRB set November 30, 2020 as the date for compliance with revised interpretive guidance concerning the conduct of municipal securities underwriting activities.

As previously covered, the MSRB updated the interpretive notice on MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") to codify underwriters' disclosures and focus on the risks and conflicts associated with their transactions. The MSRB stated that the interpretive notice is intended to reduce disclosure burdens on underwriters, as well as the burden on issuers to acknowledge and review disclosures of risks that are (i) unlikely to materialize, (ii) not unique to a particular transaction or underwriter where a syndicate is formed, or (iii) otherwise duplicative.

Cadwalader Wickersham & Taft LLP

February 3 2020

Issuers Oppose Broad Interim Disclosure.

Issuers are pushing back against analysts and regulators seeking more frequent financial disclosures and say they want to know what specifically investors and analysts are looking for in their finances.

At a Government Finance Officers Association debt committee meeting Monday, issuers aired concerns about being asked to provide financial documents on a more frequent basis. Some said groups like the National Federation of Municipal Analysts are asking for too much. The NFMA wants interim financials from municipalities in order to get a good idea of their fiscal direction.

"NFMA has asked for the moon with quarterly filings," said Richard Li, a public debt specialist for the city of Milwaukee. "That's a nonstarter for the industry as a whole."

Securities and Exchange Commission Chair Jay Clayton has said he is focused on both more timely annual financial reporting and interim unaudited financial information to improve municipal disclosure. Some analysts also say issuers take too long to get out their audited financial information and want information on a more frequent basis.

Li believes the municipal market needs to start interim disclosure with “low hanging fruit” such as certain parts of an issuer’s budget that have volatile revenues such as sales tax and toll revenues.

“We need to have that discussion on how can we report it in a way that’s meaningful, which is why I’m thinking if you just isolate the volatile revenues or volatile expenditures, maybe that gives analysts most of what they need to know,” Li said.

If NFMA can agree that volatile revenue is something to report on a regular basis, then that would be helpful, Li said.

“Then I think we’re getting to the place where they’re getting useful information that the issuer should be tracking, but then you’re not requiring all issuers to be tracking those numbers for the sake of producing numbers,” Li said.

For some issuers that don’t enter into the market often, they wonder if they will have to construct their interim financials, meaning more staff to help them do that.

“If you are an infrequent issuer, you’re likely to have a smaller staff,” said LaShea Lofton, finance director for Dayton, Ohio. “So you’re trying to figure out, how do you balance the provision of additional information in existing staff capacities as well?”

The city posts on its website its budgeted to actual statements for its general fund on a monthly basis. Lofton stressed even with that disclosure that investors would need to look at overall trends to get the bigger picture of the city’s financials.

Finding a solution to interim disclosures cannot be one size fits all, issuers said at the GFOA meeting.

Some issuers believe that quarterly financial statements are not going to address what analysts or investors are looking for.

“Quarterly financial statements are thrown out there generically,” said Dave Erdman, capital finance director for the state of Wisconsin. “What’s needed is everyone stepping back and identifying what is needed.”

Quarterly financial statements take “significant time” for issuers to prepare, Erdman added and disclosure should be narrowed to specific information. Erdman is also concerned that audited financial statements will now take longer to produce if issuers also have to do interim financials.

“As it’s often said, governments hire police officers and firefighters,” Erdman said. “Governments don’t employ an army of accountants.”

GFOA formed a disclosure working group last year to explore solutions around the subject of timely disclosure. The group has a variety of muni market participants including NFMA, municipal advisors and bond lawyers among others.

Erdman hopes that in discussions stemming from the disclosure working group market participants can come to a solution without regulatory interaction. That could be through best practices and guidance from the working group and the SEC.

“I don’t think we have a broken problem here,” Erdman said. “It’s just a matter of polishing what we do have.”

The Bond Buyer

By Sarah Wynn

January 28 2020, 1:27pm EST

SEC Proposes Amendments to the Advertising and Solicitation Rules: Dechert

View pdf.

Dechert LLP – Mark D. Perlow, Russel G. Perkins, Michael L. Sherman, David A. Vaughan, Christine Ayako Schleppegrell, Aaron D. Withrow, Ashley N. Rodriguez and Teresa Jung

January 31 2020

SIFMA Makes Late Push to Limit SEC's Muni Advisor Order.

The Securities Industry and Financial Markets Association is making its own last push to limit or kill a Securities and Exchange Commission order that would grant non-dealer municipal advisors more latitude to facilitate private placements for their issuer clients.

SIFMA made its case in a letter to the commission dated Jan. 31 and provided to The Bond Buyer on Monday. It follows close behind a similar Bond Dealers of America letter, as dealers seek to restrict or potentially even completely kill the SEC’s proposal to allow non-dealer MAs to facilitate at least some private placements of municipal bonds. Dealers view such activity as properly performed by a registered broker-dealer acting as a placement agent, while MAs view it as consistent with their fiduciary duty under federal law.

“We believe the law is pretty clear on this issue,” Leslie Norwood, SIFMA’s head of municipals, said in an interview.

To qualify for an exemption from dealer registration under the SEC proposal, the MA would have to make written disclosures to an investor saying that it represents the interests of the issuer, not the investor. In return, the MA would have to get written acknowledgment of that disclosure from the investor.

The SEC opened a comment period on the proposal in October 2019. To qualify for an exemption from dealer registration under that proposal, the MA would also need to get written representation from the investor that they are capable of independently evaluating the investment risks of the transaction. Also the entire issuance would have to be placed with a single investor and the MA would have to continue to comply with regulations governing municipal advisors.

SIFMA’s nine-page letter is consistent with SIFMA’s previous comments, arguing that allowing muni advisors with a fiduciary duty to issuers but no duty to investors to sell securities on behalf of their clients would negatively impact market transparency and put investors at risk.

"If approved in its current form, the proposed exemptive order would allow municipal advisors to place municipal securities with a broad audience of purchasers, including state-registered investment advisers," SIFMA told the SEC. "As discussed above, these placements could be made without the municipal advisors making even minimal disclosures or engaging in basic due diligence regarding the municipal securities being sold. A municipal advisor's fiduciary duty to its issuer client would not undo or somehow cure these lapses in municipal securities market transparency and information disclosure."

Norwood said she believes the SEC is looking for ways to narrow the proposal, and while SIFMA believes the order is not appropriate it provided several suggestions along those lines in an effort to be productive in its discussions with the commission.

The suggestions, made in an appendix, include among other things a requirement that the bonds be investment-grade or are on parity with outstanding bonds of the issuer that are investment grade. They would need to be subject to continuing disclosure requirements and be sold in one tranche to one investor.

SIFMA also wants the offerings to be capped at $1 million, made only to certain "qualified providers" such as a bank, and for the municipal advisor to have to receive a statement from the buyer that the investor intends to hold the bonds until maturity or redemption.

SIFMA further believes that all applicable Municipal Securities Rulemaking Board rules be appropriately amended prior to the effective date of any exemptive order. Such an undertaking would almost certainly take years.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 02/03/20 01:14 PM EST

Dealer Groups Want the SEC to Approve FIMSAC Recommendation.

Both major securities dealer groups have asked the Securities and Exchange Commission to approve a recommendation to allow investment advisers affiliated with broker-dealers to offer and sell negotiated new issue muni bonds during the order period that the dealer also participates in as a syndicate manager or syndicate member.

The Fixed Income Market Structure Advisory Committee's Municipal Securities Transparency Subcommittee recommended last year to change its rule under section 206(3) of the Investment Advisers Act of 1940, amid what broker-dealers say is a sustained trend toward an increase in advisory accounts.

"The effect of these changed circumstances will be an increased demand for relief from Section 206(3)'s disclosure and consent requirements, particularly during times of market stress," said the Securities Industry and Financial Markets Association in its letter released on Thursday.

FIMSAC is recommending the SEC consider a rule that permits a broker-dealer that negotiates and underwrites a new-issue muni bond or is a co-manager or member of a syndicate to meet the requirements under section 206(3) of the Advisers Act when acting in a principal capacity to sell new-issue muni bonds during the negotiated order period.

Under current rules, a broker-dealer that negotiates and underwrites a new issue muni bond or is a co-manager or member of a selling group can't sell bonds in the offering to its advisory clients without meeting the disclosure and consent requirements of the Advisers Act.

Dealer groups say advisers have to make certain written disclosures and obtain consent from a client each time the adviser and client want to engage in a principal transaction.

"The process of making disclosures and obtaining consent for each covered principal transaction is cumbersome and impractical," Mike Nicholas, Bond Dealers of America CEO, said in his June 2019 letter. "Consequently, many RIAs (registered investment advisers) simply refrain from engaging in covered principal transactions with advisory clients."

Current rules are causing clients to lack access to the bonds that meet their investment criteria or only have access to the bonds in the secondary market at potentially higher prices, FIMSAC said.

According to FIMSAC, this has resulted in few or none of the underwriting dealer's advisory clients buying bonds in initial offerings.

"Advisory clients that wish to buy these bonds will buy them after the deal is closed and the bonds are free to trade — typically at a price higher than the original offer price," FIMSAC wrote.

"The goal here is to provide retail investors with access to as broad a swath of the municipal new issue market as possible," said Michael Decker, consultant to BDA.

Decker said there has been a shortage of bonds available to retail, without much tax-exempt inventory and a portion of the market moving to private placements.

The SEC did have a temporary rule in 2007, Rule 206(3)-3T, that permitted advisers who were also registered as broker-dealers and who offered non-discretionary advisory accounts to engage in certain principal transactions with their advisory customers without requiring transaction-b--transaction, written disclosure and consent.

Clients make trading decisions in a non-discretionary account, while discretionary accounts give dealers freedom to make decisions for their clients.

Rule 206(3)-3T was extended several times before it sunsetted in December 2016.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 01/10/20 11:28 AM EST

MSRB Seeks Comment on Potential Changes to Board Governance Rule.

Washington, DC – Following a comprehensive review by its Governance Review Special Committee, the Municipal Securities Rulemaking Board (MSRB) today published a request for comment on potential amendments to its rule establishing the parameters for composition and selection of its Board of Directors.

The proposed amendments to [MSRB Rule A-3] include tightening the independence standard required of public representatives on the Board by requiring a minimum of five years of separation from a regulated entity before an individual would be eligible to serve as a public member.

The proposal also includes reducing the size of the Board to 15 members, with eight members representing the public and seven representing regulated entities. To facilitate the possible transition to the new Board size, the MSRB currently is not seeking applicants for new Board members for Fiscal Year 2021.

"The MSRB is uniquely positioned as a self-regulatory organization to bring together expertise from across the market to effectively and efficiently safeguard the integrity of the $4 trillion municipal securities market, which is responsible for the bulk of our nation's infrastructure," said MSRB Board Chair Ed Sisk.

MSRB Governance Review Special Committee Chair Bob Brown said, "As an independent, majority-public Board, we must continue to hold ourselves to the highest standards of integrity to maintain the confidence of municipal securities investors and issuers."

The MSRB's proposal addresses many of the issues raised by Senator Kennedy (R-LA) and co-sponsors Senators Warren (D-MA) and Jones (D-AL) in their proposed legislation, S. 1236, the Municipal Securities Rulemaking Board Reform Act of 2019, as well as recommendations identified as a result of the Special Committee's review and assessment of the Board's governance practices. The MSRB is subject to oversight by both Congress and the Securities and Exchange Commission.

The MSRB established a 60-day comment period for the proposal, with comments due by March 30, 2020. After considering comments on the proposal, the MSRB would file any proposed changes to its rules with the SEC for approval.

Date: January 28, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

Municipal Securities Regulation Enforcement: Year in Review 2019 and Look Ahead 2020

Read the report.

Ballard Spahr LLP | Jan. 22

MSRB Advances Governance Proposal at Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met on January 22-23, 2020 for its quarterly in-person meeting, where it voted to seek public comment on recommendations from its Governance Review Special Committee.

The Board established a special committee at the start of Fiscal Year 2020 to conduct a comprehensive review of the MSRB's governance practices, including potential improvements to the Board's structure and composition.

"The structure of the MSRB's Board of Directors leverages the expertise of diverse municipal market participants to effectively and efficiently protect investors and issuers," said MSRB Board Chair Ed Sisk. "We know there is room for continuous improvement, and we set out this fiscal year to carefully scrutinize our governance practices and consider input from policymakers and other stakeholders."

The potential amendments to MSRB Rule A-3, which will be released for a 60-day comment period, include tightening the independence standard required of public representatives on the Board and reducing the size of the Board.

Market Regulation

The Board also plans to seek public comment on a retrospective rule review of MSRB Rule G-27, on supervision, to align the rule with the Financial Industry Regulatory Authority's (FINRA) supervision rules. Rule G-27 was one of the rules prioritized for review by the Board at its meeting in July 2019.

In another action to promote regulatory consistency, the Board voted to file proposed amendments to its rules concerning suitability, gifts and gratuities, and books and records to facilitate implementation of the Securities and Exchange Commission's (SEC) Regulation Best Interest ("Reg BI"). The MSRB has coordinated closely with the SEC and FINRA to mitigate any potential confusion over which standards will apply with respect to recommendations to retail customers.

The Board discussed public comments submitted to the SEC on a proposed order to grant conditional exemptive relief, which would, if granted by the SEC, permit municipal advisors to engage in certain limited activities in connection with the direct placement of municipal securities without registering as a broker. The Board submitted a comment letter on the proposal.

Market Transparency

The Board continued its review of comments received on its proposal, filed with the SEC in November 2019, to enhance the Electronic Municipal Market Access (EMMA®) website with a "submission calculator" to more prominently display existing information on the timing of issuers' annual and audited financial disclosures. The MSRB will continue to review input from commenters and will publish a letter responding to comments in advance of SEC action on the proposal.

The Board received an update on the enterprise-scale migration of MSRB market transparency systems and data to the cloud, which aims to position the MSRB to evolve its EMMA system to facilitate the use of municipal market data for dynamic comparison, regulatory compliance and deeper market analysis.

"Our long-term strategic goal is to optimize the utility of market data for our stakeholders and enhance our own capabilities to effectively oversee the market," Sisk said. "The Board's investment in cloud technology and system modernization brings us much closer to that goal."

Other Business

During its meeting, the Board met with SEC Chairman Jay Clayton and FINRA CEO Robert Cook to discuss regulatory coordination and oversight of the municipal securities market.

As part of its stewardship of financial resources, the Board reviewed its reserves in accordance with the organization's funding policy.

Date: January 24, 2020

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

Nacha Takes Position of "No Enforcement" With Respect to Government Entities on "Supplementing Data Security Requirements"

NASACT, in conjunction with the Government Finance Officers Association and the National Association of State Treasurers, recently responded to Nacha's upcoming rule, *Supplementing Data Security Requirements*.

Although NASACT, NAST and GFOA are supportive of the enhanced security provisions outlined in the rule, state and local governments expressed concerns about the implementation deadline of June 30, 2020, for account information used in states' Origination of ACH entries to be rendered unreadable when it is stored electronically. The government groups requested a one-year extension to the implementation date. Read the full letter.

On January 21, Nacha responded and will be taking a position of "no enforcement" of the new data security rule through June 30, 2021, with respect to government entities that are working in good faith toward implementation and compliance, but that require additional time. With this position of no enforcement, Nacha thinks that government entities can continue to work towards compliance without interruption to their existing ACH payment processes.

Financial Accounting Foundation Announces Search for New Member of Governmental Accounting Standards Board.

Press Release.

[01/23/20]

MSRB Outlines 2019 Regulatory and Strategic Initiatives.

The MSRB outlined significant regulatory and strategic initiatives undertaken in 2019.

In its 2019 Annual Report, the MSRB, among other things:

- formalized its retrospective rule review process;
- implemented a pilot examination for municipal advisor principals;
- provided compliance assistance materials on MSRB Rule G-40 ("Advertising by Municipal Advisors");

- enhanced EMMA's search functionality and user experience for issuers;
- expanded access to municipal market yield curves and indices from third-party providers on the EMMA website;
- considered migrating MSRB market transparency systems to the cloud;
- developed over 20 interactive courses on how to "apply MSRB rules to real-world municipal market scenarios";
- launched a podcast discussing municipal securities regulation, market data and emerging market topics; and
- helped market participants understand and prepare for new disclosure requirements under SEC Rule 15c2-12 ("Municipal securities disclosure") through webinars, educational resources and other publications.

January 10 2020

Cadwalader Wickersham & Taft LLP

SEC Announces 2020 Exam Priorities of the Office of Compliance Inspections and Examinations.

On January 7, the SEC's Office of Compliance Inspections and Examinations (OCIE) announced the release of its *2020 Examination Priorities*. The annual release of exam priorities provides transparency into the risk-based examination process and lists areas that pose current and potential risks to investors. OCIE's 2020 examination priorities include:

- **Retail investors, including seniors and those saving for retirement.** OCIE places particular emphasis on disclosures and recommendations provided to investors.
- **Information security.** In addition to cybersecurity, top areas of focus include: risk management, vendor management, online and mobile account access controls, data loss prevention, appropriate training, and incident response.
- **Fintech and innovation, digital assets and electronic investment advice.** OCIE notes that the rapid pace of technology development, as well as new uses of alternative data, presents new risks and will focus attention on the effectiveness of compliance programs.
- **Investment advisers, investment companies, broker-dealers, and municipal advisers.** Risk-based exams will continue for each of these types of entities, with an emphasis on new registered investment advisers (RIA) and RIAs that have not been examined. Other themes in exams of these entities include board oversight, trading practices, advice to investors, RIA activities, disclosures of conflicts of interest, and fiduciary obligations.
- **Anti-money laundering.** Importance will be placed on beneficial ownership, customer identification and due diligence, and policies and procedures to identify suspicious activity.
- Market infrastructure. Particular attention will be directed to clearing agencies, national securities exchanges and alternative trading systems, and transfer agents.
- **FINRA and MSRB.** OCIE exams will emphasize regulatory programs, exams of broker-dealers and municipal advisers, as well as policies, procedures and controls.

January 15 2020

Buckley LLP

OCIE Announces Examination Priorities for 2020, Emphasizing Emerging Trends, Technologies, and Compliance with New Regulation Best Interest.

On Monday, January 7, 2020, the Office of Compliance Inspections and Examinations (OCIE), the audit and examination arm of the U.S. Securities and Exchange Commission (SEC), announced its examination priorities for 2020, which include an emphasis on evolving financial technologies and innovative investment instruments. OCIE will also work with registrants to help them comply with new Regulation Best Interest (Reg BI), click here to read more. The announced priorities are summarized below.

Protection of Retail Investors

OCIE's number one priority, as it has been in past years, is to protect retail investors. Broker-dealers trading in microcap securities (companies with a market capitalization less than $250 million) in particular will continue to face intense scrutiny of their compliance and supervision practices, including compliance with Section 5, Reg SHO "locate" requirement, and Rule 15c-211; registered representative hiring practices; and implementation of proper procedures and follow-through for required SAR filings. In 2020, OCIE has indicated interest in a few new areas:

- Reg BI, which becomes effective June 30, 2020, requires all registrants to act in the best interests of their clients when recommending an investment. OCIE has established an Inter-Division Standards of Conduct Implementation Committee to assist registrants in understanding and complying with this new standard. Registrants can send questions to IABDQuestions@sec.gov.
- Broker-dealers trading in municipal securities and corporate bonds will face particular scrutiny for compliance with best execution and fairness of pricing requirements in addition to a thorough review of their trading and risk management practices, including trading in "odd lots" (orders under 100 shares) and use of internal procedures, practices, and controls to manage both human error and risks associated with computer code and trading algorithms.
- OCIE plans to closely examine certain RIA relationships with mutual funds and exchange-traded funds (ETFs) (including RIAs that use third-party administrators to sponsor mutual funds that they advise or are affiliated with and mutual funds or ETFs that have not previously been examined) and private funds that provide management to separate accounts along with other private funds.

Information Security

For 2020, OCIE will specifically inspect network storage devices, third-party vendors, and cloud-based storage and review the firm's internal policies and governance practices respecting information and data security.

Financial Technology

The OCIE acknowledges the rapid innovation in financial technology in 2020 and its intention to stay apprised of new developments and their impact on investors. OCIE continues to be concerned with digital assets like Bitcoin and other digital- or blockchain-based assets. OCIE will observe RIA policies and practices surrounding "robo-advisers," or automated tools used to recommend investments to clients. OCIE will examine the configuration of, and internal procedures and practices related to, algorithmic trading by broker-dealers.

Anti-Money Laundering

While AML compliance has always been a significant component of OCIE examinations, examiners will place particular importance on a firm's compliance with the AML programming requirements of the Bank Secrecy Act, specifically including how it identifies customers, monitors for suspicious activity, performs due diligence, and conducts independent tests of its own AML programs. In addition, OCIE will continue to examine whether broker-dealers and other registrants are filing suspicious activity reports (SARs) when required.

Market Infrastructure, FINRA, and MSRB

As in past years, OCIE will conduct examinations of registrants that are critical to market infrastructure, including SEC SIFMU clearing agencies, FINRA, and MSRB, and will review their respective policies, procedures, and controls.

Contact the experts on Michael Best's Securities and Capital Markets team for more information about broker-dealer and registered investment adviser compliance with securities laws, preparation for OCIE examinations, and understanding and compliance with new Reg BI.

by Betsy T. Voter, Kevin C. Timken, James R. Kruse and Sam C. Johnston

January 14 2020

Michael Best & Friedrich LLP

Dealer Groups Want the SEC to Approve FIMSAC Recommendation.

Both major securities dealer groups have asked the Securities and Exchange Commission to approve a recommendation to allow investment advisers affiliated with broker-dealers to offer and sell negotiated new issue muni bonds during the order period that the dealer also participates in as a syndicate manager or syndicate member.

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"The effect of these changed circumstances will be an increased demand for relief from Section 206(3)'s disclosure and consent requirements, particularly during times of market stress," said the Securities Industry and Financial Markets Association in its letter released on Thursday.

FIMSAC is recommending the SEC consider a rule that permits a broker-dealer that negotiates and underwrites a new-issue muni bond or is a co-manager or member of a syndicate to meet the requirements under section 206(3) of the Advisers Act when acting in a principal capacity to sell new-issue muni bonds during the negotiated order period.

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According to FIMSAC, this has resulted in few or none of the underwriting dealer’s advisory clients buying bonds in initial offerings.

“Advisory clients that wish to buy these bonds will buy them after the deal is closed and the bonds are free to trade — typically at a price higher than the original offer price,” FIMSAC wrote.

“The goal here is to provide retail investors with access to as broad a swath of the municipal new issue market as possible,” said Michael Decker, consultant to BDA.

Decker said there has been a shortage of bonds available to retail, without much tax-exempt inventory and a portion of the market moving to private placements.

The SEC did have a temporary rule in 2007, Rule 206(3)-3T, that permitted advisers who were also registered as broker-dealers and who offered non-discretionary advisory accounts to engage in certain principal transactions with their advisory customers without requiring transaction-b--transaction, written disclosure and consent.

Clients make trading decisions in a non-discretionary account, while discretionary accounts give dealers freedom to make decisions for their clients.

Rule 206(3)-3T was extended several times before it sunsetted in December 2016.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 01/10/20 11:28 AM EST

Where SEC Examinations Will Focus in 2020.

The Securities and Exchange Commission’s Office of Compliance Inspections and Examinations plans to home in on municipal advisor requirements and broker-dealers’ obligations while keeping an eye on self-regulatory organizations in 2020.

OCIE laid out its 2020 examination priorities on Tuesday with an on-trend emphasis of protecting retail investors. The report touched on a few muni market issues of focus for the new year amid a larger focus on other fixed-income markets.

SEC Chair Jay Clayton’s focus has been on retail investor protection and he has taken considerable interest in municipal securities.

“OCIE’s 2020 examination priorities identify key areas of risk, both existing and emerging, that we expect self-regulatory organizations (SROs), clearing firms, investment advisers and other market participants to identify and mitigate,” Clayton said.

OCIE's examinations will focus on the conduct of MAs when faced with conflicts of interest and also compliance with Municipal Securities Rulemaking Board Rule G-40 on advertisements, which went into effect in August 2019. Rule G-40 is a milestone because it formally regulates MA advertising for the first time.

Examinations will also focus on whether MAs have registered, as required by law.

The National Association of Municipal Advisors has requested that OCIE to focus on non-registered MAs previously.

"In the past, we have also asked OCIE to focus on non-registered MAs, as we believe this is still a problem in the marketplace," said Susan Gaffney, NAMA executive director. "We hope that OCIE will continue to address this important issue as part of their work plan."

As for broker-dealers, OCIE plans to examine issues relating to the preparation and implementation of recent rulemaking, such as Regulation Best Interest and other rules. RegBI will strengthen the broker-dealer standard of conduct beyond existing suitability obligations and make it clear that a broker-dealer may not put its financial interests ahead of the interests of a retail investor. The rule becomes effective in June 2020.

"OCIE recognizes that these new rules will require various market participants to make changes to their operations, including to required disclosures, marketing materials and compliance programs," OCIE wrote in its report.

OCIE will also examine broker-dealer activity in municipal and corporate bonds for compliance with best execution obligations, including fair pricing, markups and markdowns and commissions. Examiners will look at retail disclosures relating to markups and markdowns as well.

MSRB rules require dealers to disclose their markups and markdowns on certain transactions in the confirmations they send to retail customers.

Some muni market groups hope OCIE will aim for fairness in examinations between broker-dealers and MAs.

The Securities Industry and Financial Markets Association asked OCIE to examine both groups equally.

"We have been actively engaged in many of the areas OCIE highlights as priorities, and we continue to advocate for a level playing field for municipal securities broker-dealers and the non-dealer municipal advisor community," said Leslie Norwood, managing director, associate general counsel and head of municipals at SIFMA. "We would encourage OCIE to examine both groups equally."

OCIE also said it will focus on high-risk products such as private placements, an area of controversy between dealers and non-dealer muni advisors. The SEC proposed an MA exemptive order in late 2019, which would allow for MAs to be involved in some private placement activities without registering as a broker-dealer, a move strongly opposed by dealer firms.

The Bond Dealers of America's highest priority at the SEC is the MA exemptive order.

"The proposal is misguided and goes against decades of established regulatory treatment of private placements," said Mike Nicholas, BDA CEO. "Soliciting investors is a broker-dealer activity, clearly and specifically."

OCIE will continue to examine self-regulatory organizations like the MSRB and evaluate the effectiveness of its operations and internal policies, procedures and controls.

The MSRB declined to comment.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 01/08/20 01:11 PM EST

Joel M. Black Appointed Chair of the Governmental Accounting Standards Board.

Read the Press Release.

Business Wire | January 7, 2020

States Respond to GASB Chair Appointment: NASACT

The National Association of State Auditors, Comptrollers and Treasurers (NASACT), the National Association of State Treasurers (NAST), and the Government Finance Officers Association (GFOA) understand that on Friday, December 27, the Financial Accounting Foundation (FAF) appointed an individual from the private sector to serve as the next chair of the Governmental Accounting Standards Board (GASB). We wish to congratulate Mr. Joel Black and recognize that he is highly qualified to serve as a representative of the public accounting profession (CPA firms).

Nonetheless, we are duly concerned by this historic and unprecedented decision by FAF. For the first time in GASB's 35-year history, the chair of the GASB will not be a representative from state or local government. All previous GASB chairs have been state auditors. Importantly, state auditors will now be left without any representation on the GASB. This fundamentally compromises the diversity of the GASB. GASB sets generally accepted accounting principles (GAAP) for state and local governments. However, states themselves – often state auditors – have the sole responsibility to determine accounting and financial reporting standards for their state and local jurisdictions. Thus, state support of GAAP is essential for its continued and increased widespread use.

NASACT, together with its affiliate the National State Auditors Association (NSAA), NAST, and GFOA will consult with other government organizations to develop a response to the FAF on its unilateral change to the long-standing composition of the GASB and determine an appropriate path forward.

MSRB Publishes 2019 Annual Report and Audited Financial Statements.

Washington, DC – As the self-regulatory organization (SRO) responsible for safeguarding the integrity of the approximately $4 trillion municipal securities market, the Municipal Securities Rulemaking Board (MSRB) each year publishes an annual report highlighting the previous fiscal year's initiatives in support of a fair and efficient market.

The MSRB's 2019 annual report details the organization's commitment to engaging with stakeholders to advance regulatory and strategic initiatives last year. Highlights included reviewing prior rules to ensure their continued effectiveness, making meaningful enhancements to the usability of its free Electronic Municipal Market Access (EMMA®) website, and broadening access to educational resources for all municipal market participants.

"We have long recognized that engaging with stakeholders outside the boardroom can inform our priorities and shed light on the impact of MSRB's rules, resources and activities on market participants," said Ed Sisk, Chair of the MSRB Board of Directors. "Stakeholder feedback made each of the MSRB's 2019 initiatives more effective, efficient and impactful."

Among its 2019 regulatory activities, the MSRB formalized its approach for reviewing and seeking comment on potential updates to its existing rules. The MSRB also completed the pilot period for a new professional qualification examination for municipal advisor principals and published 10 new compliance resources for municipal advisors and municipal securities dealers.

The MSRB last year made notable enhancements to its EMMA website, including an improved keyword search function and streamlined continuing disclosure submission process, which were informed by user feedback and focus groups.

In addition, the MSRB increased availability of market education by making available free of charge all courses on MuniEdPro® and launching MSRB Podcast.

The annual report includes audited annual financial statements for the fiscal year that ended September 30, 2019, which help ensure transparency around how the organization manages its resources and financial reserves.

"The Board in 2019 conducted an extensive review of the level of financial reserves needed by the MSRB to operate under all market conditions," Sisk said. "The review resulted in a new construct for establishing reserve levels and several other steps that brought us closer to our goal of a more equitable and responsible allocation of fees among regulated entities."

Member Alert: GFOA Priorities See Action on Capitol Hill

In the final days of the first session of the 116th Congress, two GFOA legislative priorities saw action as party leaders attempted to navigate a narrow timeframe in which they could advance bills before adjourning for the holidays. The first priority, full repeal of the 40 percent excise tax on employer-sponsored health care (also known as the Cadillac Tax) managed to find itself on one of the last legislative vehicles moving in 2019. The second, repealing the cap on the deduction for state and local taxes (SALT), will potentially see a floor vote in the House before the end of the week.

Cadillac Tax
On the first priority, GFOA supports full repeal of the Cadillac Tax and has called on Congress to take action since it hinders one of the primary tools to attract and retain public employees – health benefits. Congress has delayed implementation of the tax twice before. But GFOA and other stakeholders have pushed for full repeal of the tax because it is flawed in design and does not actually address rising health care costs. Instead, it penalizes the very initiatives implemented by employers to ensure adequate health care benefits to employees while also attempting to mitigate health care costs. GFOA recently joined a nationwide letter signed by more than 1,000 stakeholders calling on Congress to act.

Momentum to repeal the Cadillac Tax received a major boost in July when the House of Representatives passed a stand-alone bill by a strong bipartisan vote of 419-6. As the final legislative days of 2019 wound down, repeal champions on both sides of the aisle made the case for its inclusion among the select policy riders to the final spending deal that set federal funding levels for the remainder of FY 2020. Language to repeal the Cadillac Tax was ultimately added in the proposed spending package (see page 1481) released on December 16. **Both chambers will be voting on the omnibus bill in the coming days, therefore GFOA members are encouraged to reach out to their delegation members and express support for repealing the tax.**

SALT Deduction

Regarding the second priority, a bill addressing limits on the amount of state and local taxes an individual can deduct from their federal income taxes could be ready for a floor vote this week. As of 2018, the Tax Cut and Jobs Act of 2017 (TCJA) placed a $10,000 cap on the SALT deduction for taxes paid by individuals who itemize their taxes. This provision of the TCJA was opposed by representatives of state and local government, and a conversation over raising or eliminating the cap started shortly after the new law was enacted.

For well over a century, there was no limit to the amounts available for the SALT deduction under the federal tax code. The deduction is a key component of our system of federalism and preserves the ability of state and local governments to raise revenues and to invest in services for their communities. By capping the SALT deduction, some state and local governments have been compelled to reduce services or rely more heavily on other tax revenue sources.

The Restoring Tax Fairness for States and Localities Act (H.R. 5377) doubles the SALT deduction to $20,000 for 2019 and removes the cap for 2020 and 2021 while bringing back the top 39.6% income tax bracket.

GFOA has long opposed the elimination, in whole or in part, of the deductibility provision of the federal income tax code. **GFOA members are encouraged to reach out to their delegation members and express support to suspend the cap on the SALT deduction**. For the GFOA SALT Resource Center, click here.

SEC to Focus on Issuer Disclosure, Municipal Advisors in 2020.

Enforcers will have a strong focus on municipal advisor rules and timely issuer financial disclosure in 2020.

Securities lawyers and muni market participants told The Bond Buyer where the Securities and Exchange Commission could be headed in the next year. One thing is for sure, sources agreed — the SEC will continue being active in the municipal advisor space.

“Speaking generally about enforcement, I think you will continue to see us being very active in the MA space,” LeeAnn Gaunt, chief of the SEC’s Public Finance Abuse Unit, said in an email. “We’re primarily focused on situations involving breach of fiduciary duty, but we are also prepared to enforce the MA registration and professional qualification requirements because they are so important to the overall MA regulatory regime.”

The past year saw a few cases involving MAs, including one involving troubled Harvey, Illinois. The SEC alleged that Mississippi-based municipal advisor Comer Capital Group LLC and its managing partner, Brandon L. Comer, 37, failed to protect its client in a January 2015, $6 million bond offering for the Harvey Public Library District. Comer has denied wrongdoing.

The SEC also plans to focus on issuer disclosure — a topic SEC Chair Jay Clayton has spoken publicly about several times.

“From an enforcement perspective, issuers who violate the anti-fraud provisions in connection with their disclosures are a very serious concern and we’ll continue to focus on those kinds of violations,” Gaunt said.

The SEC plans to also continue its focus on broker-dealer abuses, including abuses of the retail order period in new offerings, Gaunt said. The SEC considers abusive practices in the retail order period to be serious because of the direct effect on retail investors, whom the SEC prioritizes protecting.

Most of the SEC’s muni securities cases involve conduct that poses a risk of harm to Main Street investors, such as issuer disclosure and broker-dealer cases as well as misconduct by MAs, Gaunt said.

Conflicts of interest will continue to be a focus for the SEC, said Peter Chan, a partner at Baker McKenzie and former SEC enforcement lawyer.

“I think a unifying theme is that any time the staff sees an underlying narrative — conflicts of interest where appropriate benefits or interest affecting people’s decisions — that will continue to drive the staff to focus more on those areas,” Chan said.

Chan referenced the SEC vs Comer Capital and Brandon Comer case. The situation arose from market contamination caused by a cash-strapped Chicago suburb, Harvey, that defaulted on millions of dollars of bonds and was the subject of a 2014 SEC enforcement action.

The SEC alleged that Comer Capital and Comer’s actions led to the district receiving a price for its bonds that was not fair and reasonable, causing the borrowing costs to be substantially higher than they should have been.

In the SEC’s complaint against Comer, the staff spent a good amount of time discussing the conflict of interest between the municipal advisor and the underwriter, Chan said.

Comer and Comer Capital allegedly did not give advice on selecting an experienced underwriter and did not find appropriate pricing for the bonds. IFS Securities, the underwriter, allegedly did not act with reasonable care and sold the bonds to another broker-dealer at a price that was not fair and reasonable, the SEC said. IFS recommended Comer as an MA and the district hired them without conducting other MA interviews.

The SEC staff could have just focused on Comer’s alleged failure to do its job, Chan said, but they spent quite a bit of time explaining the narrative as to how Comer got selected.

“As the staff described it, because the municipal advisor had allegedly asked the underwriter to intervene and get them higher fees, that created a conflict of interest to the point where the MA owed the underwriter,” Chan said. “I think that’s a big part of the staff’s ongoing focus.”

Chan also predicts an uptick in municipal advisor cases in 2020 due to the continuance of MA examinations. Those examinations can lead to referrals for enforcement, Chan said.

“Now that there has been a passage of time for the examiners to have examined a number of municipal advisors, my suspicion is that that will also naturally lead to more data that results in referrals of enforcement," Chan said.

The SEC has also shown concern about transparency in the pricing of bonds, which Chan said will continue into 2020.

Some MA firms have not been examined at all yet, said Michael Decker, consultant to Bond Dealers of America.

"We've got this robust regulatory scheme in place for municipal advisors, so let's make sure that the MA community is in compliance," Decker said.

MAs now have an increased awareness in the formality of working in a regulatory and regulated environment and what that means for them, said Leo Karwejna, managing director and chief compliance officer at PFM.

The market is now seeing more well-developed enforcement actions, so it's not cases like an MA forgot to register, but is now focused on fiduciary duties, Karwejna said.

In the time since the MA regulatory groundwork in 2014, the SEC and the Financial Industry Regulatory Authority have become more conversant when examining MAs.

"This isn't just about having them color in between the lines, it's more focused on now, did you use the right punctuation and pronunciation," Karwejna said.

An upcoming election could change the SEC's dynamic on enforcement cases. The SEC has been criticized in the past for bringing many cases against small issuers and there was a political concern that a new MA regime would cause the SEC to beat up on "small enough to jail parties because so many MAs are so small," said Dave Sanchez, senior counsel at Norton Rose Fulbright US LLP.

Next year could bring political pressure to end this practice.

"Depending on what happens in the next election, you may see political pressure on the SEC to stop bringing these kinds of enforcement cases that make up the majority of their playbook that are just against small issuers and small entities," Sanchez said.

If there is a Democratic president or a Democratic Congress, more pressure could be applied.

"(Democrats) want to see the SEC use their resources in a way that is more meaningful to the market versus again, beating up on small players," Sanchez said.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 01/02/20 09:31 AM EST

FINRA Hits Merrill Over Muni Sales.

The firm made 105 customer transactions in a municipal security at amount lower than the minimum denomination, FINRA says.

The Financial Industry Regulatory Authority fined and censured Merrill Lynch over alleged violations of two Municipal Securities Rulemaking Board Rules concerning municipal security minimum denominations, according to FINRA.

FINRA claimed Merrill violated MSRBG-15(f), which prohibits a broker, dealer or municipal securities dealer from effecting a customer transaction in municipal securities in an amount lower than the issue's minimum denomination, and MSRB Rule G-47, which requires customers to be informed when that happens.

Without admitting or denying the findings, Merrill Lynch signed a FINRA letter of acceptance, waiver and consent Dec. 17 in which the firm agreed to the censure and a $150,000 fine that included $130,000 for violating Rule G-15(f) and $20,000 for violating Rule G-47. FINRA accepted the letter Friday.

From July 1, 2015 through June 30, 2018, Merrill "executed 105 customer transactions in a municipal security in an amount lower than the issue's minimum denomination in violation of" Rule G-15(f), according to the FINRA AWC letter.

In 20 of those instances, Merrill "failed to inform its customer at the time of trade that the municipal securities transaction was in an amount below the issue's minimum denomination," violating Rule G-47, according to the letter.

Merrill declined to comment Monday. However, according the letter, the firm "provided evidence that it offered to rescind the transactions to all the firm's customers that continued to hold the position."

Municipal securities issuers establish minimum denominations for bonds at issuance to "help target the sale to an appropriate category of investors or reduce administrative costs, among other reasons," MSRB points out at its website.

"In some cases, the use of minimum denominations is set by state or local law," it notes, adding it "has no rulemaking authority over issuers, including with respect to the use of minimum denominations."

However, "to help to ensure that municipal securities dealers observe minimum denominations in the official statement of a bond issue, the MSRB in 2002 established a rule that generally prohibits dealers from effecting a municipal securities transaction with a customer in an amount below the minimum denomination of the issue," it says.

ThinkAdvisor

By Jeff Berman | January 06, 2020 at 03:03 PM

Muni Industry Awaits Final Reg on Libor Transition in 2020.

Municipal bond market leaders say their top wish for tax regulation in 2020 is for Treasury and the Internal Revenue Service to finalize their proposed transition rules for replacing Libor.

"Our organization has been in general support of the regulations," said Emily Brock, director of the federal liaison center for the Government Finance Officers Association, noting her group's comment letter to Treasury emphasized that issuers should be allowed to choose their new benchmark and make a safe transition.

In GFOA's official comment letter, the group is seeking an additional safe harbor to the substantial equivalence test.

"That's generally our top regulatory issue," Brock said.

It's also the top regulatory issue for the National Association of Bond Lawyers, according to NABL President Richard Moore, a tax partner at Orrick Herrington & Sutcliffe in San Francisco.

NABL submitted a 22-page comment letter to Treasury to ensure that the tax-exempt bond market receives consideration.

Libor, an acronym for the London Inter Bank Offered Rate, is being phased out at the recommendation of the Alternative Reference Rates Committee created by the U.S. Federal Reserve Board and the Federal Reserve Bank of New York.

The new alternative reference rates cited by Treasury and the IRS include the Secured Overnight Financing Rate (SOFR) published by the Federal Reserve Bank of New York and the Federal Funds Rate.

Treasury is including all other interbank offered rates, or IBORs in other countries, including Switzerland, Japan and the European Union.

All other tax-related regulatory initiatives are expected to remain on hold until a successor is hired to replace John Cross as the Treasury Department official involved in tax exempt bonds. His former position as associate tax legislative counsel at the Office of Tax Policy is not a political appointment, but there's no public word yet on when it will be filled.

Once a successor to Cross is appointed, NABL is hoping Treasury and the IRS can finalize a reissuance regulation.

NABL also has submitted comments on Revenue Procedure 2018-26 to clarify and simplify the remedial action rules.

Another item on NABL's wishlist is tweaks to Treasury Regulation 1.141-6 on allocation in accounting which was adopted in 2015. NABL submitted a comment letter to make it easier for issuers to navigate that framework.

And NABL is hoping the IRS responds to its letter seeking a reduction in the fees charged for private letter rulings. The number of PLRs has dropped as the fees have climbed. There were only four of the rulings in 2018 when the fee rose to $28,300 from 16 in 2008 when it was only $11,500.

"We haven't gotten any feedback on that yet," said Moore. "We would be supportive of anything that would lessen the cost of giving state and local issuers to the private letter ruling process."

On the enforcement front, the Internal Revenue Service has announced its 2020 fiscal year compliance strategy will focus on three areas.

One will be jail bonds in respect to whether federal government use of locally built facilities or management contracts with localities cause excessive private business use.

The second is whether sinking fund over-funding causes the tax credit bonds to be arbitrage bonds.

And last area is whether variable rate bonds comply with the rebate and yield restriction rules under Internal Revenue Code Section 148.

NABL's president said, "We appreciate the targeted nature of their audit initiatives and hope that when they audit bonds, they keep the audits focused on those points as possible in order to minimize the issuer's burden and expense."

The Oct. 16 IRS announcement of its audit priorities marked the second consecutive year it has published its compliance strategy online early in the fiscal year.

This has allowed bond attorneys to advise their clients whether a new audit notice is part of a wider initiative.

The IRS planned to close 500 audits in its Tax Exempt Bonds office 2019 fiscal year that ended Sept. 30 and is expected to conduct roughly that number in the current fiscal year.

In November, longtime IRS employee Allyson Belsome began serving as senior manager overseeing the Office of Tax Exempt Bonds after it was separated from the Office of Indian Tribal Government. The two offices had been combined in 2017.

Belsome, who is based in the suburbs of Chicago, most recently served as senior manager of ITG/TEB Technical which generates computer-driven guidance for selecting priorities for field audits.

Belsome already oversaw the Voluntary Closing Agreement Program, compliance reviews, technical assistance to agents, direct pay bonds and an internal computer system known as K-Net.

The VCAP program could be the subject of an overhaul in the coming year. The IRS priority guidance for 2019-2020 includes making improvements in the self-correction program for tax advantaged bonds and the IRS Advisory Council released a report in November suggesting an expansion of VCAP to provide two simpler options.

The VCAP program has seen a dramatic drop in filings over the last several years falling to 27 cases in fiscal 2018 from 44 in 2017, 67 in 2016 and 122 in 2015.

"The written VCAP program can necessitate an issuer spending between $20,000 and $60,000 or more on attorney's fees," the IRS Advisory Council said in its report. "Over 49% of VCAP cases over the last five years took longer than 180 days to resolve and over 75% of cases took 90 days or more for resolution."

The new level 1 self-correction suggested in the report wouldn't require IRS approval for certain insubstantial and unintentional violations provided a written notice is provided.

"The notice should be simple, briefly identifying the applicable bond issue, the error type, the remediation taken, and the existence of issuer corrective actions to monitor and prevent reoccurrence of the error," the report said. "We strongly suggest that the IRS provide the form to be filed for the notice."

A level 1 response would be made by the IRS within two weeks.

The council gave as an example of a level 1 filing the failure by an issuer to invest in zero interest State and Local Government Securities known as SLGS to reduce the yield on an escrow investment. The council said the remediation "might be the appropriate yield reduction payment."

A level 2 self-correction also would involve a streamlined process with a "normally automatic IRS confirmation letter, without necessarily an IRS review, that the violation is considered corrected if the issuer has satisfied specified criteria," the report said.

"We recommend that the submission for level 2 be simple, utilizing a form that is, although streamlined, more lengthy than the level 1 postcard-type notice suggested," said the report.

If there is a level 2 review, the council recommends it be conducted by a Tax Exempt Bonds specialist without other layers of review under normal circumstances.

Confirmation letters should ordinarily be received within two weeks, but it should not be considered a voluntary closing agreement.

"We recommend that level 3 self-correction be through the negotiated VCAP to address less common fact patterns or more egregious situations," the report said. "Because an issuer might want or require a binding closing agreement, we suggest that issuers have the option to utilize level 3 despite potential applicability of levels 1 or 2."

The council recommended that all three levels should encourage issuers to identify and correct violations early.

Moore, the NABL president, thinks the IRS will give an overhaul of the VCAP program serious consideration "largely because it's a sound idea on the policy side and I think the IRS is motivated to consider ideas that will free up resources."

By Brian Tumulty

BY SOURCEMEDIA | ECONOMIC | 12/27/19 08:35 AM EST

Compliance Date Set for More Data From Underwriters.

The Municipal Securities Rulemaking Board set a compliance date of Nov. 30, 2020, for an amendment requiring additional data from underwriters in the primary market.

Starting then, underwriters will be required to provide more information about new offerings of bonds. The change is in association with Rule G-32 on disclosures in connection with primary offerings, which was amended to require additional data about new issue bonds to be included on Form G-32.

The new amendment will ultimately increase transparency and equal access to information, the MSRB has said.

The Securities and Exchange Commission approved the amendments to Rule G-32 along with changes to Rule G-11 on primary offering practices in June.

Form G-32 is submitted to the MSRB by underwriters and provides information about a new issuance, such as the underwriting spread, maturity date, initial offering price, minimum denomination and more.

Most of the data would be auto-populated from the New Issuer Information Dissemination Service (NIIDS) onto Form G-32.

The NIIDS system, developed by the Depository Trust Company at the Securities Industry and Financial Markets Association's request, collects information about a new muni issue from underwriters or their representatives in an electronic format and then makes that data immediately available to vendors that provide such information to market participants.

Nine data fields would be manually completed by underwriters such as identifying syndicate managers, identifying municipal advisors and more.

The MSRB also asked dealers to provide the minimum denomination of a new issue and to indicate yes or no on whether a minimum denomination is subject to change, which Bond Dealers of America supported.

However, BDA has opposed identifying the MA, and said the information was obtainable from the final official statement.

The MSRB plans to make the amended Form G-32 available by early summer.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 12/20/19 01:04 PM EST

SEC Proposes Conditional Exemption for Certain Activities of Registered Municipal Advisors.

Section 15 (a)(1) of the Securities Exchange Act of 1934 (Exchange Act) generally prohibits a broker or dealer from effecting "any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless such broker or dealer is registered with the Securities and Exchange Commission (SEC).

However, as is often the case in U.S. securities laws, the requirements of Section 15(a)(1) are subject to exceptions. On Oct. 2, 2019, the SEC proposed an exemptive order under Section 15(a)(2) of the Exchange Act (Release No. 34-87204) that would permit a registered municipal advisor who is not also a registered broker-dealer to solicit a single Qualified Provider (as defined below) in connection with the direct placement of an entire issuance of municipal securities without registering as a broker-dealer.

The SEC proposes to define Qualified Provider as any of:

i. a bank, savings and loan association, insurance company, or registered investment company;

ii. an investment adviser registered with the Commission or with a state; or

iii. another institution with total assets of at least $50 million.

Thus, the proposed exemption would not be available in transactions involving retail investors, including public offerings of municipal securities.

Furthermore, as noted in the release, a registered municipal advisor wishing to rely on the proposed exemption would be subject to two conditions:

Condition 1: Make written disclosures to the Qualified Provider stating that the registered municipal advisor represents solely the interests of the municipal issuer and not the Qualified Provider, and obtain from the Qualified Provider written acknowledgment of receipt of those disclosures.

Condition 2: Obtain a written representation from the Qualified Provider that the Qualified Provider is capable of independently evaluating the investment risks of the transaction.

Overall, the proposed exemption summarized above would ease the burden for municipal advisors in that they would not have to separately register with the SEC as broker-dealers. In contrast, however, broker-dealers generally object to the proposed exemption. They contend that the relief is unfair because the broker-dealers would still have regulatory burdens that result from their compliance with registration requirements, while the municipal advisors relying on the exemption will not be subject to those same burdens. The Securities Industry and Financial Markets Association (SIFMA) and Bond Dealers of America have also commented that the proposed exemption would be harmful to the municipal market and investors. For example, Leslie Norwood, a managing director of SIFMA, claimed that the proposed exemption would release municipal advisors from "due diligence obligations" that a registered broker-dealer is required to abide by. It remains to be seen whether the SEC will pull back or modify the proposal in any way at the end of the comment period, which closed on Dec. 9, 2019.

Greenberg Traurig LLP – Elaine C. Greenberg, Vincent Lewis and William B. Mack

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Bar Assoc Lawyers Say Laywers Can Hide Knowledge of Serious Crime.

According to the Massachusetts Bar Association Lawyers Have Special Rights to Hide Knowledge of Serious Crimes

I recently filed a complaint with the Massachusetts Bar Association against Sue Curtin, a trial attorney for the Securities and Exchange Commission. I claimed that Sue Curtin engaged in unethical and illegal behavior by withholding knowledge of serious crimes from the Department of Justice.

During the investigation of a whistleblower complaint, Sue Curtin found out that the three credit rating agencies, Moodys, Fitch and S&P issued fraudulent credit ratings on seventy billion dollars in municipal bonds. This resulted in the theft of almost fifty billion dollars from tens of millions of Americans. The SEC has no power to prosecute crimes, it only regulates the financial industry.

According to the President of the Massachusetts Bar Association, Mr. Luke, it may be illegal for U.S. citizens to do this but it is okay for lawyers. It is not unethical; it is within Sue Curtin's discretion. Let's play this out. Another lawyer for the FDIC finds out during a bank audit that the President of the bank stole twenty million dollars from the bank. The FDIC lawyer fails to report the crime. According to Mr. Luke, that is not unethical because lawyers have special rights?

Does this feel right to anyone? Or, is it just one unethical group of attorneys covering for another unethical group of attorneys?

patch.com

By Richard Lawless

Dec 23, 2019 3:19 pm PT | Updated Dec 24, 2019 9:12 am PT

Richard Lawless is an investigative journalist that covers financial crimes and government corruption

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NFMA Responds to SR-MSRB-2019-13.

On Friday, December 13, the NFMA issued its response to the SEC Notice of Filing of a Proposed Rule Change to Amend the Information Facility of the MSRB's Electronic Municipal Market Access (EMMA®) System. Comments are due by December 18.

To read the NFMA's letter, click here.

BDA Delivers Strong Message to SEC: Reject the Exemptive Order Outright.

Both the BDA and C-Suite Leaders Submit Comments with the SEC

Today, following extensive work with the BDA working group, BDA policy committees, and outside counsel Nixon Peabody and Davis Polk, the **BDA submitted two letters in opposition to the SEC request for comment**.

The BDA comments, which can be viewed here, argue that the Commission should dismiss this request in full, and not grant any form of relief as requested by PFM and NAMA.

In addition to the formal comments, the BDA also submitted a C-Suite Letter with the SEC, signed by leadership of 19 BDA full member firms. The letter strongly reiterates the BDA position of collective opposition to the request and the need to swiftly dismiss the exemptive order.

It has been clear from the beginning that the SEC intends to move forward with some form of exemptive relief. While we outright oppose this request it is very important the BDA is "at the table" to ensure any potential relief is a narrow as possible.

Next Steps

The BDA continues to meet with leaders on Capitol Hill to educate on the issue, and is working to get House and Senate legislators involved in pushing back against the SEC request both on and off the record. These meetings are on-going, and the BDA will provide updates going forward.

The BDA is also planning meeting with Commissioners in the coming weeks. While details are still coming together, these meetings will include BDA members and will help further the organizations arguments against SEC action on the exemptive order.

Prior BDA Actions

The BDA has continued to lead the industry response to the PFM and NAMA requests. Following mid-September meetings with leadership at the SEC Office of Trading and Markets, including chief counsel, and the Office of Municipal Securities and Commissioner Robert Jackson, the BDA was tasked with finding a narrow framework for exemptive relief.

While BDA remains opposed to the SEC issuing any form of the requested relief, we believe that, if relief were to be granted, it should be in the form of a **narrowly tailored exemptive order** that makes clear that engaging in the activity constitutes acting as a broker-dealer but, under the limited circumstances, the SEC would exempt municipal advisors from broker-dealer registration requirements.

Following prior fall meetings with SEC staff, the BDA has sent two prior letters in response to the **PFM** and **NAMA** requests for guidance regarding private placement activity by non-dealer municipal advisors.

The September 9th letter, which can be viewed here, focuses on historical precedent, competitive disadvantages and the erosion of investor protections provided by the broker-dealer regulatory regime.

While the **first letter** submitted by the BDA on June 28th addressed directly the problems that would arise from the request for interpretative guidance if granted, including rolling back decades of settled law on what constitutes broker-dealer activity.

Shortly after learning about the letter, BDA staff met with the SEC and the conversation with SEC staff focused on concerns we have with the request, including that it would negate the substantial regulatory protections under BD regulations in place to protect investors.

Bond Dealers of America

December 10, 2019

Broker-Dealers Participating in Primary Offerings of Municipal Securities: Prepare for Implementation of New Rules - Jones Day

The Situation: The Municipal Securities Rulemaking Board ("MSRB") amended its rules regarding primary offering practices and disclosures in connection with primary offerings to enhance regulatory transparency, ensure equal dissemination of information in primary offerings, and include selling group members in certain obligations in a primary offering of municipal securities.

The Result: The rule amendments become effective January 13, 2020, and broker-dealers engaged in underwritings of municipal securities, including those participating as selling group members, will be expected to understand and be in compliance with the changes by that date.

Looking Ahead: Underwriters and firms that participate in primary offerings of municipal securities should be familiar with the impending changes. Firms should review and, as necessary, revise their policies and procedures to ensure compliance with the new requirements.

Overview

On January 13, 2020, amendments to MSRB Rule G-11, on primary offering practices, and Rule G-32, on disclosures in connection with primary offerings, will become effective. In June 2019, the U.S. Securities and Exchange Commission ("SEC") approved the amendments, which are meant to enhance transparency, equalize information dissemination to market participants, and ensure selling group members comply with issuer conditions, priority provisions, and order period requirements that apply to syndicate members.

In short, MSRB Rule G-11 will now:

- ***Require the senior syndicate manager in an underwriting of municipal securities to disseminate the "free-to-trade" information to all syndicate and selling group members at the same time.*** Previously, the syndicate manager had no obligation to provide this information to market participants in a standardized form. As a result, some syndicate members would learn before others that restrictions on an issue had been lifted and the issue was free to trade at prices other than the initial offering price. This created an uneven playing field for syndicate and selling group participants, which the amendment is meant to address.
- ***Require the senior syndicate manager to provide the issuer with the same information the syndicate manager currently provides to syndicate members regarding designations and allocations of municipal securities in the primary offering.*** Currently, the senior syndicate manager is required, within two business days following the date of sale, to disclose to the syndicate, in writing, a summary by priority category of all allocations of securities accorded priority over member orders. In addition, the senior syndicate manager must disclose in writing to each member of the syndicate information on the designations paid to syndicate and nonsyndicate members. The amendment now requires this same information be provided to the issuer regarding their offering.
- ***Codify that selling group members are required to comply with the written communications they receive from the senior syndicate manager relating to, among other things, issuer requirements, priority provisions, and order period requirements.*** The amendment is meant to clarify any confusion that may have existed among selling group members as to their obligations to comply with such communications.
- ***Align the timeframes for the payment of group net sales credits with the existing timeframe for payments of net designation sales credits so all sales credits are received within 10 calendar days following the date the issuer delivers securities to the syndicate.*** Currently, group net sale credits are paid out within 30 calendar days following delivery of the securities by the issuer to the syndicate. The amendment requires this payment to instead be made within 10 calendar days for consistency with the timeframe for payments of net designated sales credits.

Amendments to Rule G-32 will:

- ***Require the underwriter in an advance refunding, where advance refunding documents are prepared, to provide access to the documents on the MSRB's Electronic Municipal Market Access system so market participants receive the information at the same time.*** Currently, some market participants may learn of advance refunding details before the information is more broadly disseminated, giving them an advantage in the market.
- ***Eliminate the current requirement that a dealer acting as a financial advisor and preparing the official statement in a primary offering must make it available to the underwriter after the issuer approves it for distribution.*** This obligation no longer will be required.

Syndicate and selling group members should be aware of their obligations pursuant to the amended rules and update compliance policies and procedures accordingly.

Three Key Takeaways

- Firms participating in the primary offering of municipal securities should be familiar with how the amendments will affect them and be prepared to meet their obligations thereunder.
- At a minimum, policies and procedures should be reviewed and revised to address the changes well before the January 13, 2020, effective date.

- The SEC also approved changes to Form G-32 for the collection of data elements in connection with primary offerings. The MSRB will issue one or more notices in the near future setting forth compliance date(s) for the changes to Form G-32.

Jones Day – Laura S. Pruitt and Margaret R. Blake (Peggy)

December 12, 2019

SEC Issues FY2019 Enforcement Report – Highlights and Key Takeaways

The Division of Enforcement (Division) of the Securities and Exchange Commission (SEC or Commission) published its fiscal year 2019 (FY2019) enforcement report (the Report) on November 6, 2019. As in previous years, the Report addresses the matters that touch on the Division's five core guiding principles: (1) focusing on retail investors; (2) focusing on individual accountability; (3) keeping up with technological change; (4) imposing remedies that best further enforcement goals; and (5) constantly assessing resource allocation. The Division also continued to focus resources on two key priority areas in FY2019: (1) retail investor protection and (2) combating cyberthreats. Report highlights and our key takeaways follow.

The numbers − briefly

In FY2019, the SEC brought 862 enforcement actions, the highest level since 2016. Through these actions, the SEC obtained judgments and orders totaling more than $1.1 billion in penalties and $3.2 billion in disgorgement, with $1.2 billion returned to harmed investors. While the amount of penalties was among the lowest in the last five years, disgorgement and money returned to investors was the highest level for the same period. The increase is due largely to settlement of Ponzi allegations filed against a Florida-based investment company.

As in FY2018, the majority of the SEC's 526 standalone cases in FY2019 concerned investment advisory and investment company issues (36 percent of cases, up from 22 percent last year), followed by securities offerings (21 percent, down slightly from 25 percent last year), and issuer reporting/accounting and auditing (17 percent, compared to 16 percent last year). Actions against broker-dealers accounted for just 7 percent compared to 13 percent last year; SEC broker-dealer actions have declined as the Commission continues its focus on investment advisers in light of FINRA's mandate to enforce the securities laws and its rules regarding broker-dealers. Other areas included insider trading (6 percent compared to 10 percent last year), market manipulation (6 percent), Foreign Corrupt Practices Act (3 percent), and public finance (3 percent).

The Division's FY2019 initiatives and areas of focus

Retail – or Main Street – investors

The Division continued to view protection of retail investors, who are often particularly vulnerable to the conduct of bad actors, as a top priority in FY2019. One particular area of focus was misconduct that occurred in the interactions between investment professionals and retail investors.

The Report highlighted the successes of the Division's Share Class Selection Disclosure Initiative, which it launched in February 2018. Under the Initiative, 95 investment advisory firms self-reported failures to disclose conflicts associated with the selection of fee-paying mutual fund share classes when a lower- or no-cost share class of the same mutual fund was available. The Division agreed to recommend standardized settlement terms, and the majority of the actions were brought in March or September 2019. Over $135 million was returned to affected mutual fund investors, the vast majority of whom were retail investors.

The Division also noted that its Retail Strategy Task Force has undertaken a number of lead-generating initiatives – often using data analytics – and stated that these initiatives have led to swift enforcement actions. The Task Force's work with the Teachers' Initiative and the Military Service Members' Initiative − which focus enforcement and investor education resources on investment fraud issues impacting teachers, veterans, and active duty military personnel −was also highlighted.

Individual accountability

Holding individuals accountable is a "central pillar" in the Division's program because it allows the Commission to achieve multiple goals: specific and general deterrence, and, where injunctive and other non-monetary remedies are imposed, protection of markets and investors from future misconduct by those same bad actors. The Report highlights four cases in which directors and officers were charged with securities law violations. In each of those cases, the company was also charged.

Cyber-related misconduct

In FY2019, members of the Cyber Unit and other Division staff investigated and recommended to the Commission numerous cases involving initial coin offerings (ICOs) and digital assets, and cybersecurity threats to public companies and regulated entities.

According to the Report, the Division's digital asset activities have "matured and expanded." The Commission filed its first charges for unlawful promotion of ICOs in FY2019 and settled an action against a digital asset trading platform for operating as an unregistered national securities exchange. The Report also noted that the SEC reached settlements with three issuers of digital assets; the settlements included tailored undertakings providing a path to compliance with registration requirements and rescission for investors. The Commission's first litigated action against a digital asset issuer solely for violating registration provisions is pending. These actions are intended to reiterate a clear message that, regardless of labeling, if a product is a security, then issuers, promoters, and transaction platforms must comply with the federal securities laws.

The Commission also brought actions against regulated entities for violations of Regulation Systems Compliance and Integrity. Regulation SCI is designed to monitor the security and capabilities of the technological infrastructure of the US securities markets.

While the Commission did not bring any enforcement actions against issuers or other market participants related to "business email compromises" in FY2019, the Commission issued a Report of Investigation regarding the risks associated with cyber-related threats of spoofed or manipulated electronic communications and mandated that such risks should be considered when devising and maintaining a system of internal accounting controls. See DLA Piper's prior alert on the report. In issuing the report, the Commission seemingly put issuers and other market participants on notice that it may pursue actions in the future against those who fail to appropriately consider the risk of cyber intrusions in designing their controls.

Detecting, remedying, and punishing misconduct by issuers and financial institutions

The Report highlighted a number of cases against issuers to demonstrate the focus of Division and the Commission on financial statement integrity, the accuracy of issuer disclosures, and the willingness to punish significant corporate wrongdoing. The cases noted had penalties ranging from $16 million to $100 million, although, in one case, no monetary penalty was imposed due to the issuer's extensive cooperation, including self-reporting and remediation.

With respect to financial institutions and intermediaries, the Division cited its charges against certain large financial institutions for conduct that undermined market integrity in connection with the pre-release of American Depository Receipts (ADRs). The Commission alleged that the ADRs were improperly provided to brokers in thousands of pre-release transactions when neither the broker nor its customers had possession of the foreign shares needed to support the newly issued ADRs, thereby artificially inflating the total number of a foreign issuer's tradeable securities. Over the last two fiscal years, the Commission has brought actions against 13 firms and 4 individuals concerning these practices.

Finally, the critical role of gatekeepers continues to be a focus. The Division noted two significant cases against auditors and audit firms as well as an investigation that led to settled actions against both the issuer and the senior auditors on the engagement.

In addition, the Division touted its growing "complex analytic tools and capabilities," including proprietary technology that allows staff to analyze large quantities of trading and communications data and identify suspicious activity. For example, in one highlighted case involving an alleged hack into the SEC's EDGAR system to obtain non-public data, the Division notes that it brought charges based on a statistical analysis as to the odds of making certain trades, which was then combined with an analysis of IP addresses involved in various communications.

Continuing areas of focus

The Division continues to coordinate with law enforcement where civil sanctions may be inadequate to deter certain types of violations, particularly those cases involving recidivists, microcap fraudsters, insider traders, Ponzi schemers, and others who act with a high degree of scienter. The Report notes that in more than 400 SEC investigations, law enforcement offices and other regulators requested and obtained access to materials in SEC investigative files.

The Division also has focused on accelerating the pace of investigations because it views cases as having the greatest impact when they are filed close in time to the conduct. In FY2019, it took about 24 months on average after a case was opened for an enforcement action to be filed, a slight improvement over prior years. Financial fraud and issuer disclosure cases took longer (37 months), and the Division is taking steps (not specified) to improve that metric. A respondent's extensive cooperation of course improves the speed. The Report notes that the Division recognizes the value in providing greater transparency into how the Commission considers and weighs cooperation credit and to that end has included such information in public orders. The Division anticipates that the Commission will continue to do so going forward, indicating a willingness to reward cooperation where appropriate.

The Report also notes the great success of the whistleblower program; since its 2011 inception, the Commission has ordered more than $2 billion in financial remedies as a result of whistleblower cases and awarded those whistleblowers about $387 million. In FY2019, the SEC received thousands of whistleblower tips and a record number of whistleblower claims. The Report notes that the Division is working to streamline and substantially accelerate the evaluation of claims for whistleblower awards and expects that these improvements will lead to an even greater number of whistleblower claims in the coming year.

Continuing impact of the *Kokesh* decision

In *Kokesh v. Securities and Exchange Commission*, the Supreme Court concluded that the longstanding disgorgement remedy of the SEC was a penalty subject to the five-year statute of limitations under 28 U.S.C. §2462, as covered in a previous DLA Piper client alert. The Division estimated that the *Kokesh* ruling has prohibited the Commission from seeking approximately $1.1 billion in disgorgement, although the Report does not state whether that applies to just FY2019 or the sum total of disgorgement the Commission has forgone since *Kokesh* was decided in June 2017.

The Division also notes that *Kokesh* has forced it to allocate its resources to cases which hold the most promise for returning funds to investors. In light of this, it seems likely that the Division will continue to push those under investigation to come to resolution quickly in order to obtain the maximum disgorgement allowable under *Kokesh*.

Looking forward to FY2020

In addition to the Division's usual investigations related to insider trading, regulated entity and associated person misconduct, FCPA violations, and financial statement issues, we expect that FY2020 will include the following developments:

***Kokesh*, or more broadly disgorgement, will continue to impact the Division:** With the Supreme Court's grant of certiorari in *Liu v. SEC* (see DLA Piper's client alert on the topic here), the Division faces continued uncertainty regarding whether disgorgement is a viable remedy in District Court actions. Even in administrative actions where disgorgement is expressly permitted by statute, we anticipate that those subject to disgorgement claims will continue to push for limits on disgorgement based on more precise measures of the actual amount of ill-gotten gains as opposed to broad brush estimates that have often been the norm.

Protection of retail investors will remain a prime Division objective: We anticipate that the Division will continue to devote significant resources to protecting retail investors. The Division will continue to focus on undisclosed conflicts of interest, inadequately disclosed or improperly charged fees, protection of the personal information of investors, and Ponzi schemes among the many areas where retail investors are at risk.

Broker-dealers, investment advisers and public companies will face increased Division scrutiny of their compliance with laws and regulations designed to protect against cyber-threats: In addition to the Division's Report of Investigation on cyber-related frauds against public companies, FY2019 saw two alerts from the Office of Compliance, Inspections and Examinations related to potential cyber-threats and related regulatory requirements for broker-dealers and investment advisers. We anticipate that the Division will pursue enforcement actions against entities who have not paid attention to these messages.

The Division will continue to expand its use of technological tools to respond rapidly to potential securities law violations: FY2019 saw the Division's use of technological tools to respond rapidly to potential insider trading leading to the initiation of enforcement actions in a matter of months rather than a matter of years. We anticipate that the Division's use of these tools will continue to expand in FY2020 in cases involving potential insider trading and market manipulation.

The Division will bring more cases: With the agency's hiring freeze lifted (see p. 22 of the Report), the Division has been able to hire more staff. With more staff, we expect more cases.

To find out more regarding the Division's likely priorities in FY2020 or the matters highlighted within the report, contact any of the authors.

DLA Piper

By: Mary M. Dunbar Deborah R. Meshulam George G. Demos John M. Hillebrecht Jeffrey D. Rotenberg Katrina A. Hausfeld Michael Boardman

19 November 2019

GASB Proposes New Implementation Guidance to Assist Stakeholders with Application of its Pronouncements.

Norwalk, CT, December 4, 2019 — The Governmental Accounting Standards Board (GASB) today proposed implementation guidance containing questions and answers intended to clarify, explain, or elaborate on certain GASB pronouncements.

The Exposure Draft, *Implementation Guidance Update—2020*, contains proposed new questions and answers that address application of the Board's standards on the financial reporting entity, fiduciary activities, leases, external investment pools, asset retirement obligations, and conduit debt obligations. The Exposure Draft also includes proposed amendments to previously issued implementation guidance.

The GASB annually 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 (1) application issues that are raised during due process on GASB Statements, (2) questions it receives throughout the year primarily from governments and auditors, and (3) concerns identified by members of the Governmental Accounting Standards Advisory Council and other stakeholders. The guidance in Implementation Guides is authoritative and constitutes Category B GAAP.

The Exposure Draft is available on the GASB website, www.gasb.org. The GASB encourages stakeholders to review the proposal and provide comments by January 31, 2020. Information about how to comment can be found at the front of the Exposure Draft.

SIFMA Says SEC Is On 'Wrong Path' With Advisor Exemptive Order.

The Securities and Exchange Commission is making a mistake by considering an exemption from broker-dealer registration for municipal advisors working on private placement deals, a top muni lobbyist said Thursday.

Securities Industry and Financial Markets Association President and CEO Kenneth E. Bentsen Jr. raised that warning among other topics of importance to the muni market during SIFMA's State of the Industry briefing at the group's New York office.

"We have strong concerns," Bentsen said. "We think that the SEC is going down the wrong path with that."

The proposed exemptive order, on which the SEC opened a comment period in early October, would allow registered municipal advisors to perform some roles in the private placement of bonds that dealer firms view as properly their role.

SIFMA has previously sent letters to the commission warning against the concept, and Bentsen said it is among SIFMA's regulatory priorities. Under the proposal, MAs could play a role facilitating private placements without being a registered dealer so long as it complies with certain conditions.

To qualify for an exemption, the MA would have to make written disclosures to an investor saying that it represents the interests of the issuer, not the investor. In return, the MA would have to get written acknowledgment of that disclosure from the investor.

The MA would also need to get written representation from the investor that it is capable of independently evaluating the investment risks of the transaction. The entire issuance would have to be placed with a single investor, and the MA would have to continue to comply with regulations governing municipal advisors.

Dealers have pointed out that muni advisors owe a fiduciary duty to their municipal entity clients, but do not have the regulatory duties to protect investors that dealers have. Dealers have raised concerns that privately placed bonds could make their way into the secondary market without ever having been subject to the due diligence that broker-dealers are required to perform.

The proposed exemption has received a generally favorable reception outside the broker-dealer community, and comment is due to the SEC Dec. 9.

Bentsen also discussed the search for the Municipal Securities Rulemaking Board's next president and CEO. The role has been filled on an interim basis by its CFO Nanette Lawson since longtime leader Lynnette Kelly stepped down at the start of October. The board announced last month that it had hired executive search firm Spencer Stuart to aid the search.

"I think it's very important," Bentsen said, declining to comment on the MSRB's process. "But it's an important job," he added, noting that the post entails a range of responsibilities and the ability to interact with market participants. "You need to engage with the community that you regulate," Bentsen said.

"They're going to have their work cut out to fill that," he said.

Bentsen touched on the need to reinstate tax-exempt advance refundings, and said he was encouraged by the work done by House muni finance caucus co-chairs Steve Stivers, R-Ohio, and Dutch Ruppersberger, D-Md., to introduce a bill that would do so.

"We're eager to see the Senate take this up," Bentsen said.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 12/05/19 12:06 PM EST

SIFMA: Proposed Exemptive Order Related to Muni Advisors

SUMMARY

SIFMA submitted comments in response to the U.S. Securities and Exchange Commission's Proposed Exemptive Order. The Proposed Exemptive Order would allow a registered municipal advisor, acting on behalf of a municipal issuer client, to solicit and engage in the direct placement of municipal securities with certain institutional investors, and receive transaction-based compensation for such activities, without registering as a broker-dealer under Section 15 of the Securities Exchange Act of 1934.

SIFMA strongly opposes the Proposed Exemptive Order and, for the reasons articulated below, believes that if a municipal advisor acts as a placement agent (i.e., underwriter) with respect to direct placements of municipal securities, it should be subject to all of the requirements that would apply to a broker-dealer when acting in that same capacity.

Read the SIFMA Comment Letter.

December 9, 2019

MSRB RFC: Proposed Enhancement to the EMMA Website to More Prominently Display the Timing of Annual Financial Disclosures.

The comment period is now open on the MSRB's proposed enhancement to the EMMA website to more prominently display the timing of annual financial disclosures. Comments are due by December 18, 2019.

Read the Notice.

Submit Comments on SR-MSRB-2019-13.

Federal Register: MSRB Proposes Enhancements to EMMA Website

The MSRB proposal to more prominently display certain financial disclosures and related information on the organization's Electronic Municipal Market Access ("EMMA") system was published in the Federal Register. Comments on the proposal must be submitted by December 18, 2019.

As previously covered, the Security Details pages of EMMA would – under the proposal – provide:

- a link to annual financial information disclosures and/or the most recent fiscal period's audited financial statement;
- a calculation of the number of days between when the first disclosure was posted for the fiscal period and the financial period's end date for the same disclosure.

In an FAQ, the MSRB also provided information on how the information as to the timing of disclosure will be presented.

November 27 2019

Cadwalader Wickersham & Taft LLP

NFMA Newsletter.

The NFMA publishes newsletters for its membership. Officers of NFMA and constituent societies report on activities, and committee chairs report on the status of their initiatives.

To view the current newsletter, click here.

Ex-Morgan Stanley Rep Suspended Over Unsuitable Muni Bond Sales.

The broker incurred unnecessary fees by buying the funds in brokerage accounts and transferring them, FINRA said.

The Financial Industry Regulatory Authority suspended a former Morgan Stanley broker for three months over a series of unsuitable investment transactions, including 28 municipal bonds, that were made by him in eight of his customers' accounts in violation of FINRA rules, according to the regulator.

John A. Borsellino signed a letter of acceptance, waiver and consent on Oct. 25 in which, without admitting or denying FINRA's findings, he agreed to the suspension, to pay a $5,000 fine and to disgorge commissions he made from the 43 unsuitable purchases in the amount of $23,931, plus interest. FINRA accepted the letter Wednesday.

Morgan Stanley declined to comment Thursday. Borsellino's attorney, Marc Dobin of Dobin Law Group in Jupiter, Florida, didn't immediately respond to a request for comment.

The broker recommended that the eight clients buy 28 muni bonds and 15 non-municipal securities in their brokerage accounts, which "caused the customers to incur upfront sales charges," according to the FINRA letter. In each instance, Borsellino transferred the security to the customer's existing fee-based account shortly after buying it despite the fact that, in each case, he could have bought the security in the fee-based account without any upfront sales charges, the letter said.

The upfront sales charges associated with the 43 unsuitable purchases made in the customers' brokerage accounts totaled about $58,000, all of which Morgan Stanley went on to reimburse to Borsellino's clients, FINRA said.

The transactions were made by Borsellino despite the fact that he "lacked a reasonable basis to believe that the recommended securities purchases made in the customers' brokerage accounts were suitable because he failed to exercise reasonable diligence and failed to consider the costs associated with the transactions," according to FINRA.

Borsellino first registered with a FINRA member firm in 1990, when he became associated with Merrill Lynch, according to FINRA's BrokerCheck website. He registered as a general securities representative through Morgan Stanley Dean Witter in 2006, Morgan Stanley & Co. in 2007 and Morgan Stanley in 2009.

The broker remained with Morgan Stanley until Dec. 19, 2017, when he was discharged from the company due to "concerns about asset movements between, and the timing of trades in, accounts for the same clients with different fee characteristics and whether the representative spoke with the clients before taking these actions," according to a disclosure on his BrokerCheck profile.

Between January 2014 and December 2016, Borsellino "recommended and then made unsuitable securities transactions in eight customers' accounts," violating FINRA Rules 2111 and 2010 and Municipal Securities Rulemaking Board Rules G-19 and G-17, according to the FINRA letter.

The incidents didn't represent the first investments he made on behalf of his clients that were later alleged to be unsuitable. There are eight disclosures on Borsellino's BrokerCheck profile, including the 2017 employment separation agreement with Morgan Stanley.

In 2001, a client claimed he made an unauthorized purchase and sued him for $14,550. He denied the claim and there was no settlement, according to BrokerCheck. Then a client claimed he didn't provide any notice of a deferred sales charge on Class B mutual fund shares. That client requested $5,000 in damages, but the settlement in 2002 wound up being for an even larger amount: $11,000. That same year, there was a $20,109 settlement in a case where a client claimed a mutual fund was bought without authorization.

Then came three customer disputes settled between 2003 and 2006 in which there were claims of unsuitable investments being made by Borsellino. The first was closed with no action. However, he settled for $85,000 and $135,000 in the next two disputes, both in 2006.

The first disclosure on his profile actually involved an incident long before his securities career started. He was arrested and charged with shoplifting about $20 worth of merchandise in Poughkeepsie, New York, but the charge was dismissed, according to BrokerCheck.

Think Advisor

By Jeff Berman | December 06, 2019 at 09:50 AM

Municipal Securities Dealer Settles FINRA Charges for Providing Inaccurate Information in Issue Price Certificates.

A municipal securities dealer settled FINRA charges for providing inaccurate information in the issue price certificates of 22 municipal offerings.

According to FINRA, the issue price certificates incorrectly stated the percentage of each offering sold to public investors (as opposed to other broker-dealers). FINRA claimed that the municipal securities dealer failed to implement appropriate supervisory procedures to ensure that information in the issue price certificates was accurate.

To settle the charges, the municipal securities dealer agreed to (i) a censure, (ii) a $85,000 fine, and (iii) undertake remedial measures to identify and notify issuers of inaccuracies in issue price certificates.

December 3 2019

Cadwalader Wickersham & Taft LLP

Regulatory Comments Stress Safe Harbors in Libor Transition.

The establishment of safe harbors is one of the key issues raised by public finance industry groups in their comments to the U.S. Treasury, Internal Revenue Service and the Governmental Accounting Standards Board on their proposed guidance for making the transition away from Libor.

In formal comments filed with the federal government and separately to GASB ahead of filing deadlines this week, municipal finance groups have given the regulators generally high marks while noting the transition to other reference rates is not of their own choosing.

Libor is being phased out at the recommendation of the Alternative Reference Rates Committee created by the U.S. Federal Reserve Board and the Federal Reserve Bank of New York.

National Association of Bond Lawyers President Rich Moore characterized his organization's 22-page submission to Treasury and the IRS as an effort to ensure that the tax-exempt bond market receives consideration.

"This transition from Libor is big in the general tax market," Moore said. "All sorts of folks are going to be commenting on this proposed regulation and NABL wanted to focus on the areas that are unique to tax-exempt bonds because if we don't comment on those, who will?"

NABL, for instance, suggested tweaks to the arm's-length safe harbor to ensure it works for the issuer and more clarity that any one-time payment that goes to or from the issuer not be treated as proceeds of the bonds.

NABL also wants clarity that if the new index uses a multiplier that would otherwise cause that bond to be a contingent debt instrument, that it not be treated as a contingent payment debt instrument.

"We have some background in the appendixes on all these things as to why we care," said Moore, noting that the committee of NABL lawyers who composed the document was chaired by Matthias Edrich.

NABL's comments are longer and more detailed than they might have been because of the recent departure from Treasury of John Cross, the department's most experienced public finance tax expert.

The Government Finance Officers Association, which also filed comments with Treasury and the IRS, requested "an additional safe harbor to the substantial equivalence test."

"This safe harbor may further assist the GASB in their proposed exposure draft addressing replacement rates on current effective hedges," said GFOA.

The new alternative reference rates cited by Treasury and the IRS include the Secured Overnight Financing Rate (SOFR) published by the Federal Reserve Bank of New York and the Federal Funds Rate.

Both the Treasury and GASB proposals include all other IBORs offered in other countries, including Switzerland, Japan and the European Union.

"We are pleased to see the IRS and Treasury's preemptive approach in the proposed regulations, especially as they address issuer's legacy contracts," GFOA said in its comments. "We are especially pleased to assist in the efforts of the industry, official sector and regulatory agencies moving forward to build a framework that allows for a comprehensive approach for issuers and their counterparties in the context of a cessation of Libor."

The GASB proposal, Replacement of Interbank Offered Rates, offers new accounting and financial reporting guidance to assist state and local governments that use GAAP accounting in the transition away from Libor for reporting periods beginning after Dec. 15, 2020.

GASB received more than a dozen comments from groups such as the National Federation of Municipal Analysts and the National Association of State Auditors, Comptrollers and Treasurers.

NFMA's letter noted, "a few of the organization's members questioned whether the GASB should consider allowing other rates/indices as appropriate benchmark rates and broadening the exception to account for the potential discontinuation of other rates or indices."

GASB's proposal clarifies the hedge accounting termination provisions when an IBOR is replaced as the reference rate of a hedged item and that the uncertainty associated with reference rate reform does not, by itself, affect the probability that an expected transaction will occur.

GASB would allow an amendment to replace the reference rate that would not constitute a termination within certain guardrails that prevent changing the terms of the swap. It also clarifies the definition of reference rate, and provides an exception to the lease modifications guidance in Statement 87 for certain IBOR-related lease contract amendments.

By Brian Tumulty

BY SOURCEMEDIA | ECONOMIC | 11/27/19 12:08 PM EST

Lessons from FINRA's 2019 Report on Examination Findings and Observations.

The Financial Industry Regulatory Authority published its 2019 Report on Examination Findings and Observations (2019 Report) on October 16, 2019. This marks the third annual report of FINRA findings, but in a departure from the prior reports, the 2019 Report distinguishes "findings" (determinations that a firm or registered person has violated SEC, FINRA or other relevant rules) from "observations" (suggestions as to how a firm might improve its control environment, communicated separately from a formal examination report).

The 2019 Report focuses on a number of findings and observations, involving: sales practice and supervision; firm operations; market integrity; and financial management. In addition, the 2019 Report provides examples of effective practices, which can help firms improve their supervision, compliance and risk management programs. This OnPoint discusses key findings from the 2019 Report, as well as FINRA's observations regarding how firms might have avoided related weaknesses and risks.1

Sales Practice and Supervision

The 2019 Report focuses on a variety of supervision issues, as well as: suitability; digital communication; anti-money laundering (AML); and Uniform Transfers to Minors Act (UTMA) and

Uniform Grants to Minors Act (UGMA) accounts. Noteworthy examination findings and observations include:

Continue reading.

Dechert LLP

by K. Susan Grafton, Elliott R. Curzon and Jennifer O'Brien

November 18, 2019

SEC Enforcement Annual Report: Retail Focus Raises Regulatory Risk for Investment Advisers

The US Securities and Exchange Commission (SEC) Division of Enforcement recently issued its 2019 Annual Report (ENF Annual Report), which you can read in full here. Of course, the headline is always how many cases did the Enforcement Staff bring and how much money did they collect and distribute and, for fiscal year 2019,1 the Staff was likely relieved to announce that on each score they had, well, scored.

The Baker McKenzie Financial Regulation and Enforcement team will provide a deeper dive in the Enforcement Division's fiscal year 2019, the cases of note and a look ahead to 2020, but we wanted to offer some initial takes on our review of ENF Annual Report.

Fiscal year 2019 represented the best year that the Enforcement Division has had since 2016, as the chart below demonstrates.

Continue reading.

Baker McKenzie

by Jennifer L. Klass, Amy J. Greer, Peter K.M. Chan, Jerome Tomas and Kristal Petrovich

November 20 2019

Electronic Disclosure, RIN 1210-AB90: SIFMA Comment Letter

SUMMARY

SIFMA provides comments to the Department of Labor in response to their proposal for a new, additional safe harbor for the use of electronic media by employee benefit plans. SIFMA strongly supports the Department moving forward with finalizing this proposal.

Read the Comment Letter.

SEC Approves Changes to MSRB Guidance on Underwriters' Disclosure Obligations.

The SEC approved changes to an MSRB interpretive notice concerning the conduct of municipal securities underwriting activities. The MSRB indicated that the changes are to codify underwriters' disclosures and focus on the risks and conflicts associated with their transactions.

As previously covered, the amendments to the interpretive notice concerning MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") are intended by MSRB to reduce disclosure burdens on underwriters, as well as the burden on issuers to acknowledge and review disclosures of risks that are (i) unlikely to materialize, (ii) not unique to a particular transaction or underwriter where a syndicate is formed, or (iii) otherwise duplicative.

The MSRB will provide a compliance date within 90 days of publishing the revised guidance in the Federal Register.

November 12 2019

Cadwalader Wickersham & Taft LLP

Why Is It So Hard to Access Performance and Financial Data in Munis?

Issuers look to the municipal bond market to refresh our nation's infrastructure, but who will update the municipal bond market's obsolete data infrastructure? Almost 20 years into the new century, the functional systems for identifying issuers and their performance are still being served up with 20th century technologies. To move the market forward, we believe that market participants, including regulators, adopt the best of breed technologies from other markets. The first step forward is to build a consortium of private, nonprofit, and academic interests who have been promoting alternative systems for identifying, indexing and analyzing capital market data.

The "who's who" is important

Associating securities with standard issuer identifiers makes it easier for investors to track exactly who owes what. In the municipal market, we often rely on the first six positions of the CUSIP number to identify issuers — but this 1960s-vintage technology is no longer fit for purpose.

CUSIPs have a total of nine positions, but the last position is a so-called check digit used to verify that there are eight characters do not contain a typo. So, for any given issuer, only the seventh and eighth positions can be used to uniquely identify a given bond. Since those positions can be filled with either letters or numbers, there is a theoretical maximum of 36*36=1296 CUSIPs per issuer . Since municipal bond issues often contain a dozen or more serial bonds and since CUSIPs are not reused after maturity, bigger issuers can easily exceed this limit.

Continue reading.

By Mark Campbell

BY SOURCEMEDIA | MUNICIPAL | 11/13/19 12:25 PM EST

MSRB Proposes Enhancements to EMMA Website.

The MSRB proposed amending the organization's Electronic Municipal Market Access ("EMMA") system to more prominently display certain financial disclosures and related information.

Under the proposal, the Security Details pages of EMMA would provide, among other things:

- a link to annual financial information disclosures and/or the most recent fiscal period's audited financial statement;
- a calculation of the number of days between when the first disclosure was posted for the fiscal period and the financial period's end date for the same disclosure.

In an FAQ, the MSRB also provided information on how the information as to the timing of disclosure will be presented.

Cadwalader Wickersham & Taft LLP

WEBINAR – Are State and Local Governments Prepared for the Next Recession?

Wednesday, Jan 29, 2020 . | 2:00 PM – 3:30 PM EST

Online only

Click here to learn more and to register.

The Brookings Institution

FINRA Files for 4210 Effective Date Extension to March 2021.

FINRA has filed with the SEC a proposed rule change to extend (to March 25, 2021) the implementation date of the amendments to FINRA Rule 4210 (margin requirements).

This delay, as well as certain changes to the amendments, are in line with BDA's advocacy efforts and we appreciate all BDA members who helped drive those efforts.

The full notice and text are available here.

Bond Dealers of America

November 6, 2019

Federal Register: MSRB Proposes Changes to Content Outline for Muni

Principal Exam

An MSRB proposal to amend the content outline for the Series 54 examination and selection specification was published in the Federal Register. Comments must be submitted by November 26, 2019.

The MSRB stated that it intends to make the Series 54 examination permanent beginning on November 12, 2019. The proposed amendments were filed with the SEC and are now effective.

As previously covered, municipal advisor principals must pass the Series 54 examination in order to qualify for engagement in the management, direction or supervision of municipal advisory activities. The changes will, among other things:

- incorporate MSRB Rule G-40;
- clarify that 70 percent and above is a passing score for the examination;
- update the sample questions; and
- make technical changes to better explain the topic descriptions.

Cadwalader Wickersham & Taft LLP

November 5 2019

BDA Continues to Lead Industry Pushback on the PFM and NAMA Requests to Avoid Broker-Dealer Regulation.

Since learning of the October 2018 request from advisory firm PFM in late spring, the BDA has lead industry efforts to push back against the initial request and subsequent efforts from NAMA. Below, is a recap of all BDA advocacy activity, including meeting recaps and an overview of the 3 letters submitted to the SEC.

SEC Request
Currently, the BDA is in the process of drafting an outline response with Committee Leadership to the SEC request for comment on a proposed exemptive order that would grant, in limited circumstances, a conditional exemption from the broker registration requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors.

The proposal, which is broad in scope, would permit non-dealer MAs to solicit financial institutions, Registered Investment Advisors and institutional SMMPs in private placement transactions where the entire issue is placed with one account.

After the outline is finalized, the BDA will host a conference call with full Committees to further draft a response.

BDA Advocacy
Following mid-September meetings with leadership at the SEC Office of Trading and Markets, including chief counsel, and the Office of Municipal Securities and Commissioner Robert Jackson, the BDA was tasked with finding a narrow framework for exemptive relief.

While BDA remains opposed to the SEC issuing any form of the requested relief, we believe that, if relief were to be granted, it should be in the form of a narrowly tailored exemptive order that makes clear that engaging in the activity constitutes acting as a broker-dealer but, under the limited circumstances, the SEC would exempt municipal advisors from broker-dealer registration requirements.

Following prior fall meetings with SEC staff, the BDA has sent two prior letters in response to the PFM and NAMA requests for guidance regarding private placement activity by non-dealer municipal advisors.

The September 9th letter, which can be viewed here, focuses on historical precedent, competitive disadvantages and the erosion of investor protections provided by the broker-dealer regulatory regime.

While the first letter submitted by the BDA on June 28th addressed directly the problems that would arise from the request for interpretative guidance if granted, including rolling back decades of settled law on what constitutes broker-dealer activity.

Background
PFM, the municipal advisory firm, sent a letter to the SEC last fall asking that the firm "not be required to register as a broker dealer" when conducting certain placement agent activity. They requested guidance exempting them from BD registration, which they argued "is essential for PFM and other MAs to fulfill their statutory mandate to protect [municipal entity] issuers, and to provide clarity and transparency regarding the role of the MA in municipal financing transactions."

Shortly after learning about the letter, BDA staff met with the SEC and the conversation with SEC staff focused on concerns we have with the request, including that it would negate the substantial regulatory protections under BD regulations in place to protect investors. The BDA also argued that the guidance PFM is asking for would create an unbalanced competitive environment between dealer and non-dealer MAs, and we emphasized that the act of finding investors, even for a direct placement, is inherently BD activity.

Bond Dealers of America

November 5, 2019

Dealers Ask SEC Not to Approve Fair Dealing Guidance Changes.

Broker-dealers don't want the Securities and Exchange Commission to approve changes to fair-dealing guidance, saying that a proposed amendment adds complexity and uncertainty to the rule.

Bond Dealers of America made that case to the SEC in a letter dated Oct. 29, asking them not to approve the Municipal Securities Rulemaking Board's amendment to Rule G-17's interpretive guidance.

"Rather than simplify and streamline Rule G-17 compliance, the lengthy amendment would add significant complexity and uncertainty to the G-17 regime," wrote Michael Nicholas, BDA CEO.

BDA is continually opposed to the MSRB's use of a "reasonably foreseeable" standard, saying it would result in inconsistent compliance standards. The standard would provide that an underwriter's potential material conflicts of interest must be disclosed to an issuer only if that potential conflict is reasonably likely to mature into an actual material conflict of interest during the course of that specific transaction.

BDA said that standard is vague and would provide little useful information for issuers as well as inconsistent compliance.

The Securities Industry and Financial Markets Association reiterated that it wants the MSRB to require only disclosures of actual conflicts of interest.

"The MSRB has chosen a standard of 'reasonably forseeable' conflicts, which we feel is not addressing the industry's concerns about a clear standard," said Leslie Norwood, a managing director, associate general counsel and head of municipals at SIFMA. "This is an undefined standard at this point."

BDA also argued that new language in the proposed amended guidance would introduce new disclosures around complex municipal securities financial structures, creating a "compliance gray area."

"The amendment would create a vague and imprecise standard for determining what is a CMSF and what kinds of information related to the transaction would need to be disclosed and under what conditions," Nicholas wrote.

SIFMA wants clarification from the MSRB regarding complex municipal securities disclosures, and confirmation that standardized underwriters' disclosures will still comply with the rule.

In the MSRB's proposed amended interpretive guidance, they ask that transaction-specific disclosures address complex features or products rather than being general in nature.

Underwriters have to adopt policies and procedures that can be implemented in a consistent manner to satisfy regulatory requirements and examiners, Norwood wrote.

"There have been some small changes in the interpretive guidance that led us to have some concerns regarding the tailoring of complex securities disclosures," Norwood said. "Specifically, SIFMA wants to ensure that the MSRB, FINRA examiners and underwriters implementing this amended guidance all have the same understanding."

SIFMA wants to confirm that the way the industry has been complying with the rule through standardized disclosures where appropriate is still a valid way to comply with the rule, given the proposed changes.

SIFMA believes it is reasonable to give any issuer that has been recommended a common complex structure a standard written disclosure that describes the nature and risks, with the understanding that the disclosures would be more tailored if the transaction deviated from the standard, Norwood wrote.

SIFMA also wants to clarify wording in the guidance such as "individualized," to mean that standard disclosures are designed to be clear, concise and tailored to a specific type of financing such as variable rate demand obligations, not a book of all types of product disclosures.

"Confirmation from the MSRB that this interpretation is reasonable would clear up this confusion from the proposed revised interpretive guidance," Norwood wrote.

If the SEC approves the MSRB's proposed changes, SIFMA will review and update its G-17 model documents, Norwood said.

The MSRB's proposed guidance said that a sole underwriter or lead manager would need to "disclose" to an issuer client that the "issuer may choose to engage the services of an MA with a fiduciary obligation to represent the issuer's interests in the transaction."

BDA is opposed to the provision, saying there are no statutory or regulatory requirements that issuers hire an MA and that underwriters should not be required to promote the services of other market participants.

The National Association of Municipal Advisors supports the changes to the interpretive guidance, restating their support on adding underwriter disclosures that issuers may engage the services of MAs who have a fiduciary duty to the issuer, unlike the underwriter.

"Further, we support expanding the language of the interpretative guidance to disallow underwriters from deterring the use of municipal advisors by issuers," wrote Susan Gaffney, NAMA executive director.

BDA also believes the MSRB missed out on an opportunity to provide compliance on combining and integrating underwriter disclosures required under Rule G-17 and Rule G-23 on activities of financial advisors.

The MSRB is currently reviewing Rule G-23. Some issuers have been concerned that an underwriter firm serving as an issuer's MA could get insight and leverage a deal, only to then resign as advisor and underwrite a transaction or at least submit a bid on a competitive deal.

However, some municipal market participants say not by allowing that broker-dealer firm to switch roles and underwrite the bonds takes one more firm out of the equation that can actually submit a bid.

The SEC has the final say. They could choose to require changes suggested in comments or by its own staff. The SEC could also choose to approve the proposal as is.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 10/30/19 02:24 PM EDT

Proposed Rule Change to Amend & Restate MSRB Rule G-17: SIFMA Comment Letter.

SUMMARY

SIFMA provided input to the Securities and Exchange Commission on Amendment No. 1 to Proposed Rule Change to Amend and Restate the Municipal Securities Rulemaking Board's August 2, 2012 Interpretive Notice Concerning the Application of Rule G-17 to Underwriters of Municipal Securities.

SIFMA thanks the MSRB for: (1) adopting our proposal that the underwriter recommending the complex municipal securities transaction should be the one to make the requisite disclosure; (2) clarifying that placement agents may disclaim a fiduciary duty to the issuer if that is consistent with the nature of their arrangement; (3) clarifying the application of scope of the interpretation related to municipal fund securities; and (4) adopting changes regarding acknowledgement of receipt.

Read the Comment Letter.

Tax Relief for Replacing LIBOR in Tax-Exempt Debt and Swaps: Orrick

Many tax-exempt bonds and related hedges, such as interest rate swaps ("Exempt Instruments"), use a LIBOR-based interest rate. LIBOR is going away, and existing Exempt Instruments are going to have to be modified to replace the LIBOR index as a result. These changes can result in potentially serious tax consequences relating to a reissuance of the bonds or a deemed termination of the hedge, in addition to the business issues and document requirements that will arise.

On October 8, 2019, the IRS issued proposed regulations (the "Proposed Regulations") that propose broad relief from these tax consequences. The discussion below focuses on Exempt Instruments, but the Proposed Regulations address replacing any interbank offering rates (IBORs) in any debt instrument or non-debt contract. With some minor limitations, the Proposed Regulations can be applied to IBOR replacements before the final regulations are published.

Potential Tax Consequences of Replacing LIBOR

Prior to the publication of the Proposed Regulations, parties were hesitant to amend existing Exempt Instruments to replace LIBOR-based interest rates, because it was possible that the amendment might trigger a reissuance of tax-exempt bonds or a deemed termination of a related hedge, such as a swap.

If tax-exempt bonds are reissued, the tax treatment is as if the bonds are refunded by new bonds on the date of the reissuance. The new bonds must meet all the requirements for tax-exemption on the reissuance date or the new bonds are not tax-exempt. So long as the law has not changed and certain requirements are satisfied, a reissuance does not usually cause a loss of tax exemption, but that is not the case for other tax-advantaged bonds. For example, the authorization to issue build America bonds (BABs) has expired, and a reissuance of BABs would result in a loss of the subsidy payments to the issuer.

Likewise, if a swap is modified to replace LIBOR with a new index, the swap could cease to meet the requirements for a qualified hedge or could result in a deemed termination of the swap.

The Proposed Regulations provide safe harbors that allow parties to avoid these tax consequences.

In General

The Proposed Regulations provide that amending the terms of an Exempt Instrument to replace LIBOR with a "qualified rate" will not result in a reissuance of the debt instrument or a deemed termination of the hedging contract if the fair market value of the altered Exempt Instrument is substantially equal to the fair market value of the Exempt Instrument prior to being altered. Likewise, any alteration made in association with the replacement (an "associated alteration") will not trigger a reissuance or deemed termination if a fair market value test is satisfied.

In other words, the actual interest rate (and therefore the arbitrage yield) may change due to the substitution of the new index, but the bonds are still the same tax-exempt issue and the swap or cap is still a qualified hedge. This will be true regardless of whether the amendments are made through an amendment of the original instrument or by an exchange of a new instrument for the original instrument.

Qualified Rates

The following rates are considered "qualified rates"[1] under the general rule:

(i) The Secured Overnight Financing Rate published by the Federal Reserve Bank of New York (SOFR);

(ii) Any qualified floating rate, as defined in §1.1275-5(b) (but without regard to the limitations on multiples), and

(iii) Any rate that is determined by reference to one of the rates listed above, including a rate determined by adding or subtracting a specified number of basis points to or from the rate or by multiplying the rate by a specified number.

This is a very broad definition of a qualified rate and, subject to the fair market value test, should accommodate almost all desired substitute rate.

Fair Market Value Test

In addition to using a qualified rate, the fair market value of the amended Exempt Instrument must be substantially equivalent to the fair market value before such amendment. The Proposed Regulations provide that the fair market value of an Exempt Instrument may be determined by any reasonable valuation method, as long as that reasonable valuation method is applied consistently and takes into account any one-time payment made in lieu of an adjustment to the index, such as adding basis points. Recognizing that fair market values tests often are difficult to implement, the IRS provided two safe harbors for determining the fair market value.

First Fair Market Value Safe Harbor

Under the first safe harbor, the fair market value test is met if at the time of the alteration the historic average of the LIBOR rate on the Exempt Instrument is within 25 basis points of the historic average of the rate that replaces it. The parties may use any reasonable method to compute a historic average if

- the lookback period from which the historic data are drawn begins no earlier than 10 years before the alteration and ends no earlier than three months before the alteration,
- once a lookback period is established, the historic average must take into account every instance of the relevant rate published during that period, and
- the parties must use the same methodology and lookback period to compute the historic average for each of the rates to be compared.

Although this lookback test is relatively straight-forward, it too may be difficult to implement at times. For example, the Proposed Regulations are silent regarding the minimum length of the lookback period and the minimum number of data points that is acceptable, which raises the question if a lookback period designed to provide one data point would be sufficient. In addition, the Federal Reserve only began publishing SOFR in April 2018, and SOFR is calculated using data from overnight Treasury repo activity, whereas Exempt Instruments often use 30-day LIBOR.

On the other hand, the Proposed Regulations also provide that, for this purpose, an historic average may be determined by using an industry-wide standard, such as a method of determining an historic average recommended by the International Swaps and Derivatives Association (ISDA) for the purpose of computing the spread adjustment on a rate included as a fallback to an IBOR-referencing rate on a derivative or a method of determining an historic average recommended by the Alternative

Reference Rates Committee (ARRC) for the purpose of computing the spread adjustment for a rate that replaces an IBOR-referencing rate on a debt instrument. We understand that ISDA and ARRC are working on guidance to assist in determining these historic averages for SOFR.

Second Fair Market Value Safe Harbor

Under the second safe harbor, the fair market value test is met if the parties to the Exempt Instrument are not related, and the parties determine that the fair market value of the amended Exempt Instrument is substantially equivalent to the fair market value of the Exempt Instrument before the amendment. In determining the fair market value of an amended Exempt Instrument, the parties must take into account the value of any one-time payment made in lieu of a spread adjustment (described below). This safe harbor should be satisfied in almost any arms-length rate substitution, but counsel will require certifications to support any opinion. This safe harbor may be the only one that applies if there is a substantial one-time payment.

Associated Alterations

"Associated alterations" are alterations that are both associated with the replacement of the LIBOR-based rate and are reasonably necessary to adopt or implement that replacement. This is also a broad concept. One example of an associated alteration is the requirement for one party to make a one-time payment to the other in connection with the replacement of the LIBOR-based rate to offset the change in value that occurs as a result of the replacement.

Importantly, the Proposed Regulations provide that any such payments have the tax character of the associated instrument. For example such a payment by an issuer to a holder of a tax-exempt bond should be tax-exempt interest. Likewise, a payment from a bondholder to an issuer should be considered additional bond proceeds. It is unlikely that any payments made as a result of associated alterations would be able to be financed on a tax-exempt basis.

Multiple Alterations or Modifications

The Proposed Regulations provide that when alterations or modifications go beyond replacing an IBOR rate and making qualified associated alterations, the excessive portion of the alteration is tested under the normal reissuance rules. The portion of the alteration that is a qualified associated alteration is treated as part of the existing terms of the instrument when the reissuance test is applied. As a result, the qualified associated alteration becomes part of the baseline against which the excess portion of the alteration or modification is tested.

The Proposed Regulations do not address the simultaneous alteration of multiple instruments between the same parties. In such situations, parties may be inclined to maximize a payment made with respect to an Exempt Instrument and to minimize a payment made with respect to other instruments. These circumstances will require careful consideration to make sure that the simultaneous alterations do not result in problems that undermine the tax relief provided by the Proposed Regulations.

Proposed Effective Dates

The IRS has proposed that generally the final regulations ultimately adopted would apply to an alteration of the terms of an Exempt Instrument that occurs on or after the date of publication of the final regulations in the Federal Register. However, a taxpayer may choose to apply certain portions of the Proposed Regulations to alterations that occur before that date, provided that the taxpayer and its related parties consistently apply the Proposed Regulations.

[1] Note that a rate is not a qualified rate if it is in a different currency than the rate being replaced or if the rate is not reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds in the same currency. This should not matter much for Exempt Instruments, because all such instruments should be US dollar-based. Accordingly, this alert does not discuss qualified rates in other currencies.

Orrick Public Finance Alert | October.28.2019

NASACT: Treasury/IRS Seek Comment on Potential Tax Consequences of LIBOR Transition

In the summer of 2017, the United Kingdom Financial Conduct Authority announced that all currency and term variants of the London Interbank Offered Rate (LIBOR), including U.S.-dollar LIBOR (USD LIBOR), may be phased out after the end of 2021. LIBOR is used globally as a "benchmark" or "reference rate" for various commercial and financial contracts, including floating rate mortgages, corporate and municipal bonds, asset-backed securities, consumer loans, swaps and other derivatives.

As a result of this announcement, several work groups were formed to recommend an alternative rate to LIBOR. In the U.S., the Alternative Reference Rates Committee (ARRC) was formed and identified the Secured Overnight Financing Rate (SOFR) as the alternative rate for USD LIBOR. SOFR is a broad measure of the cost of borrowing cash overnight and collateralized by Treasury securities.

Earlier this year, the ARRC submitted to the Treasury Department and the Internal Revenue Service documents identifying various potential tax issues associated with the elimination of Interbank Offered Rates (IBOR). ARRC further requested that tax guidance be issued to address potential tax consequences so that an orderly transition may occur. The ARRC stated that existing debt instruments and derivatives providing for IBOR-based payments must be amended to address the transition.

The Treasury Department and the IRS have issued guidance to minimize potential market disruption and to facilitate an orderly transition. Specifically, the guidance would address concerns about whether the replacement rate in a debt instrument or non-debt contract would result in a taxable exchange of the debt instrument or contract.

Generally, the proposed regulations provide that alteration of the terms of existing financial instruments that switch from LIBOR to another alternative rate will not be treated as a modification resulting in the realization of income, deduction, gain, or loss for purposes of section 1001 of the Tax Code. However, the proposed regulations provide more fully the circumstances in which the modification could result in a taxable exchange.

The Treasury and IRS are specifically seeking comment on any complications under any section of the Code or existing regulations that may arise from the replacement of an IBOR with a qualified rate and that are not resolved in the proposed regulations.

NASACT members are urged to provide comments, which may be sent to Cornelia Chebinou no later than COB on Friday, November 15. Should enough comments be received, NASACT will prepare an association response. You may also comment directly to Treasury and IRS no later than November 25, 2019.

Hawkins Advisory: Guidance from Treasury Regarding USD LIBOR Phase-Out

The attached *Hawkins Advisory* discusses recently published Proposed Treasury Regulations that provide guidance as to the ability of parties to variable rate debt and other contracts that currently rely on LIBOR as an interest rate benchmark to alter the documents for these transactions for the purpose of incorporating interest rates reflective of other reference rates. The Advisory also reviews the status of other regulatory efforts to prepare the capital markets to transition from broad reliance upon LIBOR.

The Proposed Treasury Regulations generally provide that such changes will not be treated as "substantial" modifications of existing transactions that might otherwise result in a variety of federal tax consequences, including termination, if the new reference rate is a "qualified rate" and certain other requirements are met. This would create an exception from the current rules governing alterations.

- Qualified rates generally may include a reference rate selected, endorsed or recommended for this purpose by a governmental capital markets regulator (such as the Federal Reserve Bank of New York's Secured Overnight Financing Rate), a rate that is calculated on the basis of such a rate or a "qualified floating rate", defined, with certain variations, as in the existing variable rate debt instrument rules).
- To qualify for the proposed exception, the change to a qualified rate must result in an instrument that continues to have substantially the same fair market value as it did prior to the change. Safe harbor rules are provided for valuations that are based upon historic averages of the relevant reference rates and for new reference rates resulting from arm's length negotiations.

This proposed exception may extend to changes to "fallback rates" and to "associated alterations" that are reasonably necessary to implement the underlying reference rate changes.

The Proposed Regulation comment period expires on Saturday November 23, 2019. Taxpayers may rely upon the Proposed Regulations for permitted changes that occur prior to the Final Regulation publication date, provided that the taxpayer and its related parties consistently apply the proposed regulations prior to such date.

Read the Advisory.

Moving on from LIBOR: Squire Patton Boggs

The IRS has issued proposed regulations that allow issuers to replace LIBOR rates associated with their bonds and swaps without triggering a reissuance of the bonds or a deemed termination of the swaps. The replacement rate must be a "qualified rate," which includes the Secured Overnight Financing Rate ("SOFR"). A rate isn't a "qualified rate" unless the fair market value of the bond or swap is the same before and after the replacement, taking into account any one-time payment made in connection with the switch. Although they're only proposed regulations, issuers can apply them immediately.

Background – Once again, let us dazzle you with the most boring part of a very interesting topic.

Countless municipal bonds and countless derivatives[1] that relate to those bonds depend on the continued existence of one or more of the London Interbank Offered Rates, which are referred to generically as "LIBOR."[2] In particular, many variable rate bond documents contain rates that are based on LIBOR, and many derivatives contain a variable stream of payments or receipts that is based on LIBOR. For municipal bonds that bear interest at a rate that is based on LIBOR, if LIBOR can't be determined, then in most cases the bond documents will move the interest rate on the bonds into a "fallback" rate that could be very financially unattractive for the issuer. The same could be true for an interest rate swap with a stream of payments or receipts that is based on LIBOR.

[Continue reading.](#)

The Public Finance Tax Blog

By Johnny Hutchinson on October 22, 2019

Squire Patton Boggs

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10/24/19

[GASB Outlook E-Newsletter Fall 2019.](#)

[Read the Newsletter.](#)

10/24/19

[MSRB Holds First Quarterly Board Meeting of FY 2020.](#)

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) met on October 23-24, 2019 for its first in-person meeting of Fiscal Year 2020. The Board's standing committees and special committees met to set their priorities for the year and begin work, and the full Board discussed regulatory coordination and the organization's cloud migration, among other topics.

"Much of the Board's important oversight work and strategic thinking happens at the committee level," said Board Chair Ed Sisk. "With two special committees leading the MSRB's governance review and CEO search, and the creation of our new standing committee on stakeholder engagement, I look forward to an especially productive year."

Read more about the MSRB's FY 2020 priorities.

The Board's CEO Search Special Committee interviewed executive search firms to facilitate the broad-based nationwide search for a new president and CEO. The Governance Review Special Committee discussed priority areas for its wide-ranging review of MSRB governance practices, including the size of the Board and selection of public and regulated members, which are established under MSRB Rule A-3.

Regulatory Coordination

The Board approved acting on the recommendation of the U.S. Securities and Exchange Commission (SEC)'s Fixed Income Market Structure Advisory Committee that the MSRB coordinate with the Financial Industry Regulatory Authority (FINRA) on further analysis of a practice in the corporate and municipal bond auction process referred to as "pennying."

"The MSRB seeks to coordinate with FINRA on any matters that cut across the corporate and municipal bond markets to ensure our regulatory approaches are harmonized to the extent possible," Sisk said.

The Board also directed staff to analyze the potential regulatory and market impacts of the SEC's proposed order to grant conditional exemptive relief, which would, if granted by the SEC, permit municipal advisors to engage in certain limited activities in connection with the direct placement of municipal securities without registering as a broker.

As previously announced, the MSRB plans to coordinate closely with the SEC and FINRA to consider the impact of SEC Regulation Best Interest on MSRB rules.

Market Transparency

The Board received an update on the enterprise-scale migration of MSRB market transparency systems and data to the cloud.

"The Technology Committee and the full Board will closely monitor the MSRB's journey to the cloud," Sisk said. "We are committing the largest investment of resources since the launch of our Electronic Municipal Market Access (EMMA®) website to enhance the long-term reliability, data quality and security of our market transparency systems."

Date: October 25, 2019

Contact: Leah Szarek, Director of Communications
202-838-1500
lszarek@msrb.org

SEC Proposes Exemption From Broker Registration for Certain Municipal Advisors.

The U.S. Securities and Exchange Commission seeks comment on proposed exemption from broker registration for certain activities by municipal advisors.

The U.S. Securities and Exchange Commission ("SEC") is seeking comments on a proposed exemptive order granting a conditional exemption from broker registration requirements for certain activities of municipal advisors.

The SEC adopted municipal advisor registration rules in 2013 as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created “municipal advisors” as a new class of regulated persons. The SEC defined “municipal advisor” and “municipal advisory activities” in the Exchange Act rules, and the Municipal Securities Rulemaking Board developed a regulatory framework applicable to municipal advisors engaged in such activity.

Despite the parameters and framework provided, the industry has continued to express confusion about the limits of municipal advisor activity. In particular, questions continue to focus on whether certain activity could cause a municipal advisor to be acting as a broker and thus be subject to registration as such.

On October 2, 2019, the SEC published a request for comment on a proposed exemptive order. It would allow registered municipal advisors acting on behalf of a municipal entity or obligated person client (collectively, a “Municipal Issuer”) to solicit certain institutional investors (“Qualified Providers”) in connection with the direct placement of an entire issuance of municipal securities with a single Qualified Provider without being required to register as a broker. A registered municipal advisor relying on the proposed exemption would be required to:

- make written disclosures to the Qualified Provider stating that the municipal advisor represents only the interests of the Municipal Issuer and not the Qualified Provider and obtain written acknowledgment of receipt of the disclosures from the Qualified Provider; and
- obtain a written representation from the Qualified Provider indicating it is capable of independently evaluating the investment risks of the transaction.

The proposed exemption would apply solely with respect to the limited activities and the requirements noted above. According to the SEC, a municipal advisor complying with the conditions of the exemption could solicit Qualified Providers on behalf of Municipal Issuer clients and receive transaction-based compensation related to the direct placement of the municipal securities without being required to register as a broker.

The proposal contains a number of pointed questions and asks commenters to explain their reasoning for each comment provided. Comments are due 60 days following the SEC’s publication of the proposed exemption in the federal register.

by Laura S. Pruitt, Michael R. Butowsky, Sergio Alvarez-Mena and Margaret R. Blake (Peggy)

USA October 9 2019

Jones Day

Proposed Rules Addressing LIBOR Phase-out Help Ease Reissuance Concerns.

Since the 2017 announcement that the London interbank offered rate (“LIBOR”) may be phased out after the end of 2021, the municipal finance industry has been concerned that changes to debt obligations and related financial products necessary to address the phase out could cause an unexpected “reissuance” of the debt for federal tax purposes, which could result in negative consequences for issuers and debtholders. In response to these concerns, on October 9, 2019, the

Department of the Treasury released Proposed Regulations addressing, among other things, whether changes arising out of the end of LIBOR will result in a reissuance for federal tax purposes (the "Proposed Regulations").

In general, the Proposed Regulations provide favorable guidance that should help avoid a reissuance in most instances. In particular, the Proposed Regulations provide that, if the terms of a debt instrument or non-debt contract (e.g., a swap) are changed to reference a "qualified rate" in lieu of (or as a fallback to) LIBOR and the change does not change the fair market value of the debt instrument or non-debt contract or the currency of the reference rate, then such change will not result in a reissuance for federal tax purposes. For example, if the terms of a variable rate bond that has an interest rate based on USD-LIBOR are changed to provide an interest rate based on the Secured Overnight Financing Rate published by the Federal Reserve Bank of New York (commonly referred to as "SOFR"), such change typically will not trigger a reissuance of the bond, so long as the fair market value of the bond remains the same.

The Proposed Regulations name certain existing rates that are "qualified rates," but also provide for flexibility to accommodate other rates. Further, to assist in addressing the fair market value requirement, the Proposed Regulations provide two safe harbors – one based on historic average of rates and the other on arm's length negotiations – that, if met, will result in the requirements to be deemed satisfied.

It is expected that, in some instances, changes to address the LIBOR phase out will include "associated alterations" that are reasonably necessary to implement the change. For example, a party may be required to make a one-time payment to offset the change in value of the debt-instrument that results from the replacement of LIBOR with a qualified rate. The Proposed Regulations provide that changes that fall within the definition of "associated alterations" will not result in a reissuance. However, other contemporaneous changes (e.g., an increase in the rate to address deterioration of an issuer's credit) must be analyzed separately and may trigger a reissuance.

The final version of Regulation will likely see changes as Treasury responds to comments on the Proposed Regulations, but the Proposed Regulations evidence a willingness to provide guidance setting a path forward that does not involve widespread reissuances and should help ease some of the concerns caused by the phase out of LIBOR. A taxpayer may choose to apply the Proposed Regulations to changes occurring on or after October 9, 2019, as long as the taxpayer and its related parties do so consistently.

Friday, October 18, 2019

Background on LIBOR and SOFR.

LIBOR is a global benchmark interest rate calculated daily. With $200 trillion in U.S. dollar exposures linked to it, LIBOR is the most widely used benchmark and has been called "the world's most important number." Financial products based on LIBOR include loans, corporate bonds, interest rate swaps, mortgages, student loans, and deposits. They also include municipal bonds and loans.

While ubiquitous, LIBOR became less suitable as a benchmark because it is meant to represent the cost of short-term unsecured borrowing by banks, and banks have substantially reduced their use of this type of borrowing. The LIBOR panel banks typically must submit rates based on their judgment rather than actual transactions, and many are understandably reluctant to continue doing so. Regulators and market participants are concerned that this “most important number” is no longer robust. The transition away from LIBOR became urgent in July 2017 when Andrew Bailey, head of the United Kingdom Financial Conduct Authority (FCA) and regulator of LIBOR, announced they would not require panel banks to submit quotes underlying LIBOR after 2021.1 In light of these statements, the future existence of LIBOR is uncertain.

In 2014, the Federal Reserve formed the Alternative Reference Rates Committee (the “ARRC”), a group including private-sector market participants, to select a rate to replace USD LIBOR and guide the transition. After much analysis of many potential alternatives, the ARRC announced in June 2017 that it had selected a new rate, the Secured Overnight Financing Rate (“SOFR”), as the recommended replacement for USD LIBOR. The Federal Reserve began publishing SOFR in April 2018. The ARRC selected SOFR for the following reasons:

- SOFR is fully based on actual transactions and does not rely on judgment.
- SOFR references multiple segments of the US Treasury repurchase agreement market, the largest rates market in the world.
- SOFR’s underlying market is resilient and robust.
- SOFR is a true “risk-free” rate suitable as a reflection of interest rates overall.
- SOFR is produced by the public sector using a transparent methodology.
- SOFR correlates well with other overnight money market rates and with the cost of borrowing for non-financial corporations.

To guide the transition, the ARRC was reconstituted in April 2018 with broad representation from official government entities, banks, asset managers, insurers, consumer groups, and industry trade associations. It is now tasked with (i) developing options for implementing SOFR across loans, bonds, and securities referencing U.S. dollar LIBOR (“cash products”) (ii) transitioning derivatives transactions to SOFR;
(iii) minimizing potential disruptions associated with either voluntary transition to SOFR or to an end of LIBOR; and (iv) communicating the rationale behind the change to SOFR and the status of implementation.

Transition to SOFR for Municipal Issuers

Taking inventories of existing products and processes that use LIBOR should be a first step for any municipal issuer. Some common uses of LIBOR among state and local government generally include:

- Issuance of floating rate notes and loans where the interest rate is reset periodically based on LIBOR such as private placements and bank loans.
- Use of derivatives linked to LIBOR
- Use of synthetic fixed-rate structures to gain exposure to a fixed rate when issuing variable rate bonds. Examples are interest rate swaps where an issuer agrees to receive a LIBOR- based floating interest rate in exchange for paying a fixed interest rate. To the extent that the two floating rates offset each other, the issuer’s net interest rate exposure is limited to the fixed swap rate
- Similarly, use of synthetic variable rate structures to gain exposure to a variable rate when issuing fixed rate municipal bonds. Examples are interest rate swaps where the payments are reversed compared to the example above. To the extent that the fixed rates offset each other, the issuer’s net interest rate exposure is limited to the floating swap rate.
- Use of interest rate swaps, in an effort to assume exposure to changes in tax rates, where the issuer pays the counterparty a floating rate based on the Securities Industry and Financial Markets

Association (SIFMA) index, which tracks tax-exempt seven-day interest rates, and receives a percentage of LIBOR for a set period of time. These transactions provide opportunity for positive carry given differences between tax-exempt and taxable rates.
- Holding of LIBOR-based floating rate notes issued by corporations or sovereigns in the state and local government's asset portfolios.

Because many of these contracts referencing LIBOR do not (adequately) plan for the risk that LIBOR will be discontinued, such an event could have serious consequences for a wide range of market participants and investors. Strategies on how to handle LIBOR cessation in legacy contracts have not yet been worked out and municipal issuers together with their counsel and advisors should work with ARRC to seek ways to address these issues.

Developing mechanisms through which market participants can transition remaining legacy LIBOR-based products to SOFR, and launching new contracts referencing SOFR or other rates should be two core programs for municipal issuers in the coming years. In addition, addressing potential problems, like tax and accounting issues, as well as continuing education about the available resources and the transition timeline will facilitate the transition.

Legacy Contracts

The long duration of existing municipal bonds and loans implies that a considerable part of the outstanding stock will not have matured or rolled over by any likely end date for LIBOR. Securities and products with long duration need to be managed through "fallback" provisions set forth in contracts describing what happens if LIBOR is no longer produced.Open questions include who can legally change contract language to include fallback provisions (i.e. unanimous consent vs calculation agent), what the exact triggers to move to an alternative rate would be, and whether a spread should be included (or adjusted).

New Contracts

Issuers should also start thinking about and planning for new language and terms that would reference SOFR or other rates rather than LIBOR. As soon as they are comfortable with the new language they should start using it in new contracts.

Tax and Accounting Issues

There are a number of potential tax and accounting issues that will need to be addressed, including whether a move from LIBOR would cause a bond to lose its tax-exempt status. The ARRC is working on these questions.

Education and Resources

All market participants should prepare themselves for a world with SOFR, and potentially one without LIBOR. The ARRC maintains a website accessible to all where it will be releasing guidance and steps on transitioning as well as updates on market progress in this transition.

1 Recently, Andrew Bailey has also noted that the FCA could find that LIBOR was not representative, which would preclude supervised entities within the EU from trading new LIBOR contracts and would likely diminish LIBOR's liquidity and usefulness to many participants.

Government Finance Officers of America

Thursday, October 17, 2019

[Local Governments Lobby for Stable NAV Bill; BlackRock $500B in Cash]

As we mentioned in our October 3 Link of the Day, "[Stable NAV Bill Filed in House Again]," efforts are again underway to roll back the last round of money market fund reforms and to return the $1.00 NAV for all money funds. Bills have again been filed in the House and Senate, and the lobbying has begun. A new letter from the Government Finance Officers Association, National Association of Counties, U.S. Conference of Mayors, National League of Cities, International City/County Management Association, National Association of Health and Educational Facilities Finance Authorities, National Council of State Housing Agencies, American Public Power Association and Large Public Power Council, tells us, "The organizations listed above, representing state and local governments, authorities, and other public entities, wish to express their support for S. 733 and H.R. 4492, the bipartisan Consumer Financial Choice and Capital Markets Protection Act, which was recently introduced in the House by Representatives Gwen Moore Moore (D-WI) and Steve Stivers (R-OH), and in the Senate by Senators Pat Toomey (R-PA), Bob Menendez (D-NJ) and Gary Peters (D-MI)."

It states, "Our organizations have long opposed the Securities and Exchange Commission (SEC) modifications to SEC Rule 2a-7 of the Investment Company Act of 1940, which have created an unnecessary disruption to the public funding markets by changing the net-asset-value (NAV) accounting methodology for institutional prime and municipal money market mutual funds (MMMF) from stable to floating. Our members rely on the hallmark stable NAV feature in a variety of ways. First, many governments have specific state or local statutes and policies that require them to invest in financial products with a stable NAV. This is done to ensure that public funds are appropriately safeguarded to best serve the entity."

The letter continues, "Second, MMMFs with a stable NAV are the most commonly used investment by state and local governments. Forcing governments to find alternative investments to prime and municipal MMMFs creates additional risk for public funds by driving them to lower yielding government funds or potentially less suitable products. Such options may not meet liquidity standards required by their governments to meet cash management policies and statutes. H.R. 4492 and S. 733 would restore the ability of state and local governments to use prime and municipal stable NAV funds for their essential and critical investment needs."

It also says, "In addition to the appropriate and historical use of MMMFs as state and local government investments, it is important to note that MMMFs are the largest purchasers of short-term municipal securities. Due to the SEC's floating NAV rule, municipal money market funds have significantly curbed their appetite for these securities, thus decreasing demand and increasing costs to state and local governments that issue this type to fund state and local government operations and finance transportation projects, utilities, affordable housing, public schools and hospitals, and pollution mitigation, among other purposes."

The GFOA, et. al. comment, "In fact, as a result of implementation of the floating NAV rule in October 2016, municipal MMMFs assets fell by nearly 50 percent, thereby shrinking the funding pool available to municipal borrowers. Municipalities fortunate enough to continue selling their debt to tax-exempt funds saw their borrowing costs increase by nearly double the Federal Reserve's rate increases since implementation of the rule. Those short-term costs have increased even more for state and local governments that can no longer sell their debt to MMMFs and must borrow from other investors or replace the debt with bank loans."

Finally, they adds, "State and local governments and other public entities have utilized prime and municipal MMMFs safely and effectively for more than 40 years to both manage liquidity and provide a reliable source of working capital to fund public services and finance continued infrastructure investment and economic development throughout all economic conditions. We ask that you support S. 733 and H.R. 4492 so that state and local governments can continue to have unrestricted access to these safe and highly liquid capital markets tools."

We obtained the letter from the GFOA, and learned about it from the Bond Buyer, who published the piece, "Finance officers renew push for stable net asset value." They wrote, "Finance officers say a change in net asset value requirements put in place by the Securities and Exchange Commission years ago has 'significantly' curbed money market mutual funds' appetite for short-term municipal securities, negatively impacting issuers. In a letter sent to the House Financial Services Committee and the Senate Banking Committee this week, the Government Finance Officers Association renewed its call for money market funds to go back to a fixed net asset value after the SEC flipped the switch to floating NAVs in institutional MMMFs."

In other news, a number of financial firms are releasing their latest Q3 earnings and hosting conference calls. On one of the few to discuss "cash", BlackRock CFO Gary Shedlin says, "In the recent market environment, clients' preference has favored lower risk assets and approximately 85% of our organic growth over the last year has been in fixed income and cash, which have relatively lower fees compared to other asset classes.... BlackRock's cash management platform saw $32 billion of net inflows, a post-financial crisis record and crossed the $500 billion AUM threshold as we continue to leverage scale for clients and deliver innovative digital distribution and risk management solutions through Cachematrix and Aladdin. Cash is a strategic asset class and BlackRock's diverse cash management offering, including prime, ESG, government and munis, position us well to serve our clients' cash needs and continue to grow our market share."

CEO Larry Fink comments, "For the first time since the financial market, the Fed announced that they would add liquidity into the system after a brief spike in short-term repo rates signaled liquidity constraints, or maybe supply issues.... I've spoken in the past about using technology to drive more of BlackRock's revenues. Technology is a priority and a strategic differentiator for BlackRock. In addition to generating direct technology revenues, we're increasingly using technology to enhance our results in our asset management business. For example, we're transforming our cash management business by integrating technology into our business model. We are delivering Cachematrix technology to help clients streamline their operations and quickly and efficiently make more informed decisions."

He continues, "Five years ago, cash management was a $281 billion business. Through technology, organic growth and acquisition, we crossed $500 billion in AUM in July. This represents over a 200 basis point global market share increase from five years ago and is an important milestone as scale is a key value proposition for clients in the asset class. Increasingly, more and more BlackRock holistic client relations are starting through a cash management assignment."

Finally, Fink adds, "We are also seeing clients increasingly adapting shorter duration fixed-income ETFs as a substitute for cash in their portfolios.... Having commission-free for low duration makes ETFs a great alternative to bank deposits, a really good solution [in place of] money market funds. And so, a commission free in the fixed-income realm, cash and fixed-income, is a real opener for so many more participants."

cranedata.com

Oct 2019

MSRB Seeks Input and Volunteers for Advisory Groups.

Read the MSRB Notice.

FINRA Fines UBS Financial Services Inc. $2 Million for Continued Failures Relating to Short Positions in Municipal Securities.

Firm Inaccurately Represented the Tax Status of Thousands of Interest Payments to Customers; Restitution Ordered

WASHINGTON—FINRA today announced it has censured and fined UBS Financial Services Inc. (UBS) $2 million for the firm's repeated failures in timely addressing municipal short positions and in inaccurately representing the tax status of thousands of interest payments to customers. FINRA also required UBS to pay restitution to customers who may have incurred any increased state tax liabilities, to pay the IRS to relieve customers of any additional federal income tax owed, and to certify within 90 days that the firm has taken appropriate corrective measures. FINRA previously sanctioned UBS for its failures in this area in 2015 (AWC No. 2014041645601, August 12, 2015).

Investors often purchase municipal securities because of the tax-exempt interest earned on those investments. However, when a FINRA member firm is short municipal securities purchased by customers, the firm – not the issuing municipality – is the source of the interest payments. That interest, commonly known as "substitute interest," is subject to applicable taxes.

FINRA found that from August 2015, when FINRA previously sanctioned UBS for similar violations, through the end of 2017, UBS continued to fail to timely identify and properly address certain short positions in municipal securities. As a result, UBS inaccurately represented on customer account statements and Forms 1099 that interest payments for 2,853 positions in municipal securities were tax-exempt when, in fact, they were taxable, and inaccurately represented on approximately 950 additional customer account statements and Forms 1099 that interest payments were taxable, when they were tax-exempt. FINRA found that these failures were the result of the firm's continued failure to establish reasonably designed supervisory systems and written supervisory procedures to timely identify short positions in municipal securities and its failure to provide reasonable guidance to its registered representatives instructing them how to address the short positions.

Jessica Hopper, Senior Vice President and Acting Head of FINRA's Department of Enforcement, said, "FINRA member firms must be attentive to municipal short positions that impact customer accounts, and it is critical that member firms convey accurate information to customers regarding their account holdings. In addition, member firms are expected to take prompt corrective action after being sanctioned and avoid repeat violations."

In settling this matter, UBS neither admitted nor denied the charges, but consented to the entry of FINRA's findings. FINRA allocated $1.75 million of the $2 million fine to the MSRB violations.

News Release | October 02, 2019

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UBS Fined for Repeated Client-Reporting Inaccuracies on Munis.

The Financial Industry Regulatory Authority on Wednesday fined UBS Financial Services $2 million for inaccurately representing to customers the tax status of municipal bond interest payments, and ordered it to pay any additional taxes they may owe because of the errors.

Regulators four years ago censured and fined UBS $750,000 for similar supervisory violations.

In an acceptance, waiver and consent letter the broker-dealer signed, Finra said it considered UBS's "recidivism" in determining the fine.

The issue centered on "substitute interest" that UBS paid muni bond investors when it was short the actual muni bonds it sold. Such interest is taxable, unlike interest paid directly by muni issuers, but UBS on account statements and 1099 forms represented it as tax-exempt, the consent letter said.

It attributed the problem to UBS's repeated failures to have supervisory systems and written procedures to identify and manage reporting of the short positions, and to reasonably guide brokers in addressing them.

"[I]t is critical that member firms convey accurate information to customers regarding their account holdings," Jessica Hopper, Finra's acting head of enforcement said in a prepared statement. "In addition, member firms are expected to take prompt corrective action after being sanctioned and avoid repeat violations."

UBS agreed to the sanctions without admitting or denying Finra's findings.

"We are pleased to have resolved the matter," a UBS spokesman said.

The firm mischaracterized as non-taxable about $567,812 of interest on 4,689 muni positions in at least 3,800 customer accounts from January 2014 through the end of 2017, according to the consent letter. (The errors occurred, in part, because UBS recharacterized the short substitute interest in corrective statements as taxable only if a position were still open on the record date for the semi-annual bond coupon payment.)

In addition to the $2 million fine, UBS agreed to directly pay the IRS any additional tax customers may owe for tax years 2014-2017, relieving the customers of "the burden of filing amended federal tax returns and paying additional federal income tax," the consent letter said.

UBS also agreed to compensate customers for any increased state tax liabilities incurred because of characterizing actual tax-exempt interest in some customer statements as substitute interest, the consent letter said.

Finra said that it is allocating $1.75 million of the $2.0 million fine to the Municipal Securities Rulemaking Board.

AdvisorHub

by AdvisorHub Staff

October 2, 2019

Muni Market Divides Over Disclosure.

Nearly a year after Securities and Exchange Commission Chairman Jay Clayton raised concerns about muni investors relying on stale disclosure, a fundamental disagreement has emerged about whether issuers are doing enough to provide fresh information.

While investor analysts seek more frequent continuing disclosure, underwriters and issuers maintain that the data they provide in accordance with the agreements they enter into when they sell their bonds is adequate. That impasse has been a subject of increased contention in recent months, and reared its head again Tuesday during a panel discussion at The Bond Buyer's California Public Finance Conference.

"When they are in compliance, it's still not enough," said William Oliver, a panelist who is industry and media liaison for the National Federation of Municipal Analysts.

The panel's discussion on the subject of regulation focused on the question of disclosure of interim financial information, something that has been a hot topic especially since Clayton's initial December, 2018, pronouncement that he is concerned that investors in the muni market are relying on information that is many months old.

Clayton has returned to the topic in other public statements, and NFMA earlier this year acted on his interest to ask for the SEC to provide guidance about the types of information it would consider valuable to improving disclosure. Issuers have said that producing audited financials necessarily takes time, and have raised concerns that they might expose themselves to liability if they were to post interim unaudited financial information that turned out to be inaccurate.

"Maybe we should focus in on compliance with the continuing disclosure requirements as written," said Leslie Norwood, a managing director and head of munis at the Securities Industry and Financial Markets Association. Norwood said she wanted to make sure to draw a distinction between issuers who are not living up to their continuing disclosure agreements and those who are in compliance.

She noted that in sectors where the market has demanded interim data, such as healthcare, it has become the standard practice for issuers to release that information much more regularly. But most investors are able to sell their bonds without doing so, she said, adding that it may be unwarranted to impose additional responsibilities on issuers. She wondered whether this is what investors really want.

"It is what investors want," Oliver said. "It's what they've wanted for the last 25 years."

Heidi Schrader, the debt and treasury manager for the City of Riverside, California, pushed back on the ideas that issuers could reasonably provide this information and that investors are demanding it.

"We don't operate on a profit like a corporation, and we have limited resources," she said. "We're not having any problems selling to the market because they do think we have sufficient disclosure."

Daniel Kurz, a vice president at Morgan Stanley (MS), said he doesn't think issuers are being penalized in the primary market due to any perception of sluggish disclosure.

"In today's market, we're not seeing a pricing penalty," he said.

"I do think it can impact the secondary market," he added, explaining that some investors might choose to hold off on a purchase until fresh financial information comes out. But in the primary market, with such strong demand and moderate supply, issuers aren't suffering due to their disclosure agreements.

Kurz said underwriters can be hesitant to ask issuers to agree to more regular disclosure in a continuing disclosure agreement because issuers often say they can't provide accurate information more quickly.

"We'd rather have the information be late than inaccurate," Kurz said.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 09/25/19 01:03 PM EDT

BDA 3Q Update – Advocacy & Representation of Member Firms

Read the Update.

Bond Dealers of America

September 26, 2019
