

[A Study In Issuer Abuse - The Wisconsin Public Finance Authority.](#)

One of the best institutions ever created for providing public financing to state and local governments is the municipal bond market. It provides an easy and competitive source of funding for governments, both for their own needs as well as for local projects that create jobs and further investments. Its attraction is that it puts investment decisions affecting local economic well being at the local level, not Washington DC, where such decisions can be best made. Sure there is a lot of inefficiency and abuse, but there are also buyers, the SEC, the IRS and state securities authorities to exercise enough constraints to keep abuses in check.

While one could write a book on abuses of taxpayers caused by the reckless use of municipal debt by local officials, I will focus here on the abuses we run across regularly by private purpose users of the municipal market. The vast majority of defaults are in private purpose municipal bonds. It has been a problem for decades but escaped notice because most such bond issues are small so the losses draw little public notice or comment. In years past we have called out abusive players or practices to alert those in power to correct a problem area. We did this for retirement bond issues and Texas MUDs in the 1980s, staged defaults in the 1990s and then Florida CDDs in the 2000s.

The Wisconsin Public Finance Authority represents a new type of issuer abuse where the consequences are just beginning to appear. The abuse here is that they are authorizing bond issues in which the state of Wisconsin has absolutely no economic interest or need. A superficial look at their authorized issues shows them approving bond issues for 10 different states running in size up to \$800 million for the recent American Dream Mall in East Rutherford New Jersey. The only legitimate purpose we can see in these actions is that they are fee driven, but they raise concerns of baser motives. One can also assume that bond underwriters are drawn to this issuer because the approval process is easier. We leave it to others to investigate since the practice undermines the integrity of the entire market.

Questions arise as to how do these bond issues figure in the Federal quota on the volume of bonds a state can issue as tax exempt. Also, how misleading is this for bond buyers and how do they figure in single state bond funds. As for state oversight of bonds issued for projects in that state, does this not undermine their credibility and authority? I don't have answers but I know the burden of proof is on Wisconsin to justify their infringement on the economic development of another state. For example, Texas and Florida have both tightened up on rules for community development projects caused by massive overbuilding. Do we let those developers now go to Wisconsin if local or state authorities are hesitant? The same questions exists for retirement facilities and charter schools. Let's keep municipal financing at home.

Forbes

by Richard Lehmann

Oct 16, 2020

SEC's Proposed Broker-Dealer Exemption May Apply to "Finders" for Municipal Securities: Mintz Levin

Introduction

Today, the SEC published in the Federal Register^[1] a proposed notice of an exemptive order (the "Proposal") that would, subject to limitations and conditions discussed below, exempt certain individuals seeking to find investors for private companies, unregistered funds and other non-reporting issuers ("Finders") from federal broker-dealer regulation requirements. Among other things the Proposal would allow Finders to earn commissions or other transaction-based compensation. Although not targeted at municipal securities, the proposal would cover otherwise-eligible finders for most municipal securities as municipal securities generally meet the requirement that the issuer is not a public company for purposes of the Securities Exchange Act of 1934 (the "Exchange Act") and that the securities are exempt from the Securities Act of 1933's registration requirements.

The Exchange Act generally requires any individual or entity engaged in the business of effecting securities transactions to register as a broker-dealer (or, if the broker is an individual, to register as a broker-dealer representative). The burdens and uncertainties surrounding the registration requirements have discouraged many potential Finders from helping issuers raise capital. The Proposal would attempt to alleviate this by exempting two classes of Finders - Tier I Finders and Tier II Finders - from registering under the Exchange Act, based on the activities permitted. The SEC indicated the Proposal's relief is "intended to be narrowly-tailored and seeks to address the capital formation needs of certain smaller issuers while preserving appropriate investor protections."

Tier I Finders

To qualify as a Tier I Finder, a Finder's activities would be limited to providing contact information of potential investors:

- without having any contact with the potential investors about the issuer; and
- in connection with only one capital raising transaction by a single issuer within a 12-month period.

Tier II Finders

The Proposal would permit Tier II Finders to engage in the following activities related to "solicitation"^[2]: identifying, screening, and contacting potential investors; distributing issuer offering materials; and arranging or participating in meetings with the issuer and prospective investors. To qualify for the relief, a Tier II Finder would need to provide each potential investor before or early in the solicitation process the following written disclosures:

- the names of and the relationship between the Tier II Finder and the issuer;
- a description of the Tier II Finder's compensation;
- any material conflicts of interest; and
- a statement that the Tier II Finder is acting as the issuer's agent, not associated with a broker-dealer, and "not undertaking a role to act in the investor's best interest."

As a condition on the relief, the Tier II Finder must obtain before each investment a dated written acknowledgment of the investor's receipt of the required disclosures.

Conditions on Both Tiers

The relief for either kind of Finder would apply only if:

- the Finder is a natural person (i.e., not an entity);
- the issuer is not a reporting company under the Exchange Act;
- the transaction is intended to be exempt from registration under the Securities Act of 1933 (“Securities Act”);
- the potential investors are, or the Finder reasonably believes the potential investors are, “accredited investors” under Securities Act Rule 501; and
- the Finder’s services are pursuant to a written agreement describing the Finder’s services and compensation.

Neither Tier I Finders nor Tier II Finders would qualify for the Proposal’s relief if they:

- engage in general solicitation;
- help structure the transaction;
- negotiate offering terms;
- handle customer funds or securities;
- have authority to bind the issuer or any potential investor;
- participate in offering material preparation;
- perform independent transaction analysis;
- engage in due diligence;
- assist or provide financing of any securities purchase;
- advise on valuation or advisability of the potential investment;
- are associated with a broker-dealer; or
- are subject to statutory disqualification under the Exchange Act.

Requests for Comment

The Proposal seeks comments on 45 questions, including whether various aspects of the relief are appropriate for investor protection, whether the relief should be subject to the limitations and conditions summarized above, whether certain existing no-action letters granting and denying broker-dealer registration relief should be codified or withdrawn, whether the SEC should issue guidance on related matters (including applicability of broker-dealer registration to private fund advisers and real estate brokers), and how the Tier II disclosure requirements should relate to proposed amendments to the SEC’s cash solicitation rule.[3] Comments are due November 12, 2020.

Relation to Existing No-Action Relief and Issuer Safe Harbor

The relief in the Proposal is non-exclusive. It would be additive to and combinable with existing kinds of relief from broker-dealer registration under the Exchange Act, including the safe harbor for associated persons associated with an issuer[4] and the no-action letter granting relief to mergers and acquisition brokers.[5]

Relation to State Broker-Dealer Requirements

Nothing in the Proposal affects requirements to register as a broker-dealer or broker-dealer agent under state “blue sky” securities laws.

Observations

Uncertainties about broker registration present legal risks and obstacles for private companies and

funds seeking to engage and incentivize individuals with the requisite industry experience and connections to raise capital. Such uncertainties also may affect capital-raising outreach by or on behalf of smaller issuers or borrowers in the municipal markets. Among other things, not registering when required can: (i) trigger SEC or state enforcement action against a finder for violating registration requirements or against an issuer or investor for aiding and abetting the finder's violations; (ii) give rise to rescission claims by investors solicited by an unregistered finder; and (iii) prevent finders from prevailing on claims to collect fees. The non-exhaustive safe harbor in the Proposal would allow engagements and success fee arrangements not possible today while providing much-needed clarity on which solicitation-related activities require registration and which do not.

The limitations on the narrowly tailored relief in the Proposal will keep it from being useful in many situations that commonly arise. Conditions that would make it challenging for many consulting arrangements to use the relief as proposed include the inability to pay a Finder's entity, structure transactions, help prepare marketing materials, value deals, or perform due diligence. The ban against negotiation could be difficult in practice because soliciting investors often bleeds into discussing terms.

Relief from registering federally with the SEC and FINRA is of limited use if a Finder must still register in one or more states. State adoption of parallel relief under identical conditions would be ideal. In the absence of such parallel state relief, Finders could explore existing finder exemptions under state law, which have their own conditions and restrictions that differ with the Proposal, or other state broker-dealer exemptions and exclusions.

Finally, in the context of municipal issuers, as noted by the SEC in the notice, whether or not a Finder complies with the proposed broker-dealer exemption, he or she may need to consider whether the contemplated activities require registration as a municipal advisor.

Next Steps

Private companies, managers and advisers of private funds, municipal issuers and borrowers and prospective Finders interested in taking advantage of any relief resulting from the Proposal should contact the authors or their Mintz attorney. We stand ready to assess how to pursue the opportunities presented to further clients' business objectives and to help prepare any comment letters that might make the final relief more valuable than the Proposal.

Endnotes

1 [Notice of Proposed Exemptive Order Granting Conditional Exemption From the Broker Registration Requirements of Section 15\(a\) of the Securities Exchange Act of 1934 for Certain Activities of Finders](#), 85 FR 64542 (Oct. 13, 2020).

2 The Proposal defines "solicitation" broadly as "any affirmative effort to induce or attempt to induce a securities transaction."

3 See [Investment Adviser Advertisements; Compensation for Solicitations](#), Release No. IA-5407 (Nov. 4, 2019), 84 FR 67518 (Dec. 20, 2019).

4 See [Exchange Act Rule 3a4-1, 17 C.F.R. § 240.3a4-1](#).

5 See [SEC No-Action Letter re M&A Brokers](#) (Jan. 31, 2014).

By Steve Ganis, Leonard Weiser-Varon

October 13, 2020

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SEC Proposes Exemptive Order for Certain Activities of Finders.

On October 7, the U.S. Securities and Exchange Commission (Commission or SEC) released for notice and comment a proposed exemptive order (Notice)¹ that would grant conditional exemption from the broker-dealer registration requirements of Section 15(a) of the Securities Exchange Act of 1934 (Exchange Act) for certain activities of “finders.” If the Commission issues a final exemption, it would mark the Commission’s broadest statement ever about the ability of persons not registered as broker-dealers to take transaction-based compensation for U.S.-based solicitation of investors on behalf of issuers in connection with capital-raising activities, something that historically has been considered a core activity that requires registration as a broker-dealer under the Exchange Act. In addition to potentially easing capital raising for operating company issuers, private fund advisers seeking investors in their funds may also benefit from the exemption if such advisers do not own, or are otherwise affiliated with, a registered broker-dealer.

Background

Although not officially defined in any statute or rule issued by the Commission, a finder is a person who performs some of the activities in the initial stages of a securities transaction that are normally conducted by brokers. For example, a finder may place potential buyers and sellers of securities in contact with one another and receive a fee for its services. Though Section 3(a)(4) of the Exchange Act defines a “broker” as “any person engaged in the business of effecting transactions in securities for the account of others,”² the SEC has been historically hostile to the notion of allowing finders to conduct a business — for compensation — of making introductions without broker registration under the Exchange Act.

As recognized in the Notice, the existing law and guidance on finders is varied and inconsistent.³ Although the Commission staff has previously recognized a finders’ exception, it has done so in limited circumstances that would not sustain an ongoing business. The Commission itself has not broadly addressed whether and under what circumstances a person may “find” or solicit potential investors on behalf of an issuer without being required to register as a broker, or even whether such activity implicates the Commission’s regulatory regime for brokers.⁴ Instead, market participants have had to look to guidance in SEC enforcement actions and no-action/denial of no-action letters issued by Commission staff. Although some general themes can be distilled from the no-action letters, the relief granted usually depends on the particular set of conditions and policy considerations presented and therefore may not have broader application. In addition, the no-action letters that relate to finders span over decades of market evolution, often rendering the guidance inconsistent. The settled and litigated SEC enforcement actions similarly have presented unusual facts and have had inconsistent results.

Description of the Proposed Exemption⁵

To provide clarity regarding the guidance on finders, the Commission in its Notice proposes to grant a conditional exemption from the broker-dealer registration requirements of Section 15(a) of the Exchange Act to permit natural persons to engage in certain limited capital-raising activities

involving accredited investors. The proposed exemption would create two classes of exempt finders, Tier I Finders and Tier II Finders, that would be subject to conditions tailored to the scope of their respective activities. Tier I and Tier II Finders would both be permitted to accept transaction-based compensation under the terms of the proposed exemption.⁶

Conditions for Both Tier I and Tier II Finders

Finders (collectively Finders) would be subject to certain conditions. The proposed exemption for Tier I and Tier II Finders would be available only where

- the issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act
- the issuer is seeking to conduct the securities offering in reliance on an applicable exemption from registration under the Securities Act of 1933 (Securities Act)
- the Finder does not engage in general solicitation⁷
- the potential investor is an “accredited investor” as defined in Rule 501 of Regulation D or the Finder has a reasonable belief that the potential investor is an “accredited investor”
- the Finder provides services pursuant to a written agreement with the issuer that includes a description of the services provided and associated compensation
- the Finder is not an associated person of a broker-dealer⁸
- the Finder is not subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act, at the time of his or her participation

Tier I and II Finders would have to comply with additional requirements as described below.

Tier I Finders

A Tier I Finder would be limited to providing contact information of potential investors in connection with only a *single* capital-raising transaction by a *single* issuer in a 12-month period.⁹ A Tier I Finder cannot have any contact with a potential investor about the issuer. Neither the Tier I Finder nor the issuer would have any disclosure requirement concerning the Finder’s activities or compensation.

Tier II Finders

A Tier II Finder could directly solicit investors on behalf of multiple issuers within a given 12-month period, but the solicitation-related activities would be limited to (i) identifying, screening, and contacting potential investors; (ii) distributing issuer offering materials to investors; (iii) discussing issuer information included in any offering materials, provided that the Tier II Finder does not provide advice as to the valuation or advisability of the investment; and (iv) arranging or participating in meetings with the issuer and investor. In addition, a Tier II Finder must provide appropriate disclosures of the Tier II Finder’s role and compensation, which must be made prior to or at the time of the solicitation. Further, the Tier II Finder must obtain from the investor, prior to or at the time of any investment in the issuer’s securities, a dated written acknowledgment of receipt of the required disclosures. The Tier II Finder could not be involved in structuring the transaction or negotiating the terms of the offering, handle customer funds or securities, or bind the issuer or investor. The Tier II Finder also could not participate in the preparation of any sales materials; perform any independent analysis of the sale; engage in any “due diligence” activities; assist or provide financing for such purchases; or provide advice as to the valuation or financial advisability of the investment.

The proposed exemption would not affect a Finder’s obligation to continue to comply with all other applicable laws, including the antifraud provisions of the Securities Act and the Exchange Act, such as the obligations under Section 10(b) and Rule 10b-5 under the Exchange Act, and state law. In

addition, the proposed exemption would not affect the rights of the Commission or any other party to enforce compliance with other applicable law or the available remedies for violations of the law.

Further, regardless of whether or not a Finder complies with this exemption, it may need to consider whether it is acting as another regulated person such as an investment adviser or a municipal adviser. An exemption from the obligation to register as a broker-dealer does not insulate a person from the registration requirements of the Advisers Act if such person is acting as an investment adviser.

Some private fund advisers take the position that their internal marketing activities come within the nonexclusive safe harbor exemption in SEC Rule 3a4-1. Although SEC Rule 3a4-1 has a comparable 12-month restriction as proposed for Tier I Finders, the rule does not permit the payment of transaction-based compensation. As such, the proposed exemption may expand the ability to compensate internal fund marketing personnel.

The proposed order addresses only broker-dealer registration under Section 15(a) of the Exchange Act. It does not address separate “broker-dealer” requirements that could arise under applicable states’ so-called “Blue Sky” or securities laws. All states require registration of broker-dealers subject to limited exceptions/exemptions that may not encompass Finders.

Conclusion

Following publication in the Federal Register, there will be a 30-day period for interested persons to comment on the proposal. The Commission provided a chart to further explain the parameters of its proposal, which can be found [here](#).

The prospects for adoption of the proposal are uncertain, and it could be modified in light of comments. The November elections further cloud the prospects of the proposal; both Democratic commissioners voted against issuance of the Notice on investor protection grounds and may eventually oppose adoption of the proposal. That said, the short 30-day comment period may indicate the Commission’s intention to move forward before a new administration takes the helm.

¹The Notice has not yet been published in the Federal Register but is available here: <https://www.sec.gov/rules/exorders/2020/34-90112.pdf>.

² Section 3(a)(4)(A) of the Exchange Act, 15 U.S.C. 78c(a)(4)(A). In accordance with this provision, Section 15(a)(1) of the Exchange Act makes it unlawful for any broker to use the mails or any other means of interstate commerce to “effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security” unless that broker is registered with the Commission. As a result, absent an available exception or exemption, a person engaged in the business of effecting transactions in securities for the account of others is generally a broker required to register under Section 15(a) of the Exchange Act. See Section 15(a) of the Exchange Act, 15 U.S.C. 78o(a).

³ See Notice at 14.

⁴ See Id.

⁵ We note the conditions of this proposed exemptive order for Finders differ from the requirements for solicitors under the Commission’s proposed amendments to Rule 206(4)-3 under the Investment Advisers Act of 1940 (“Advisers Act”). See Investment Adviser Advertisements; Compensation for Solicitations, Release No. IA-5407 (Nov. 4, 2019), 84 FR 67518 (Dec. 20, 2019) (“Cash Solicitation

Rule Proposed Amendments”). These differences reflect the particular facts and circumstances surrounding the proposed permitted activities for Finders and solicitors, and the characteristics of the applicable regulatory regimes, notably that a solicitor would solicit for an investment adviser and would be subject to oversight by such investment adviser, while a Finder would solicit for an issuer and therefore would not be subject to such oversight. See Cash Solicitation Rule Proposed Amendments at 67580.

6 Because the proposed exemption would be limited to natural persons, it is not clear that a natural person could establish an entity to receive its fees.

7 This limit would seem to suggest that a Finder could not participate in a “private” offering conducted under SEC Rule 506(c), which allows the issuer to rely on the private offering exemption in Section 4(a)(2) of the Securities Act even if general solicitation is used.

8 This concept has been construed broadly in a similar context to mean that any person who is employed in a group that owns or controls a registered broker-dealer would, generally, be deemed to be an associated person of the broker-dealer, even if the person does not conduct any activities on behalf of the broker-dealer.

9 This is a comparable requirement to SEC Rule 3a4-1, a nonexclusive safe harbor exemption for certain associated persons of an issuer.

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October 12, 2020

[SEC Issues Proposed Order Exempting “Finders” from Registration Requirements.](#)

On October 7, 2020, the Securities and Exchange Commission announced that it had voted 3-2 in favor of a [Proposed Exemptive Order](#) granting conditional exemption from the broker registration requirements of Section 15 of the Exchange Act. The exemption would allow “finders” to engage in certain limited activities on behalf of issuers without registering as brokers. The Order seeks to provide the clarity that market participants have sought for many years. It also follows requests to address the issue from government and professional bodies including SEC advisory committees, the American Bar Association, and the U.S. Department of the Treasury. The SEC is requesting public comments on the Order.

Background

Small businesses often find it challenging to connect with investors in the exempt market, particularly in regions lacking robust capital-raising networks and when they seek investment below a level that attracts venture capital or registered broker-dealers. “Finders” can help bridge this gap between businesses and investors.

However, there is insufficient clarity on when a company can properly engage a Finder or a platform that is not registered as a broker-dealer. Generally, brokers must register with the SEC and comply with comprehensive regulation because they act as intermediaries between customers and the securities markets. The Exchange Act defines a “broker” as “any person engaged in the business of

effecting transactions in securities for the account of others.” Since the Act does not define what it means to be “engaged in the business” or “effecting transactions,” non broker-dealers are dissuaded from facilitating investment for early stage companies in case they are inadvertently acting as unregistered brokers. At the same time, there may be untapped capital that could help small businesses grow were it not for such regulatory uncertainty.

In the absence of definitional clarity, courts and the SEC currently look to various factors in determining whether a person is a broker. Market participants also look to SEC staff no-action letters for guidance. Unfortunately, none of these sources provide a uniform framework for participants. It is in this context, and in the hope of facilitating capital formation for small and emerging businesses, that the SEC is establishing a limited exemption from the registration requirement.

Proposed Order “Finder” Exemption

The SEC proposes to permit a natural person to engage in certain defined activities on behalf of an issuer without registering as a broker. If a Finder complies with all the ‘general’ and ‘specific’ conditions below, they may assist businesses with capital formation and receive compensation for their services.

General Conditions

The Finder exemption would be available where the following general conditions are met:

- the issuer is not required to file reports under Section 13 or 15(d) of the Exchange Act;
- the issuer is seeking to offer securities under an applicable exemption from registration;
- the Finder does not engage in general solicitation;
- the potential investor is an “accredited investor” under Regulation D or the Finder has a reasonable belief that the potential investor is an “accredited investor”;
- the Finder and issuer have a written agreement that includes a description of the services provided and associated compensation;
- the Finder is not an associated person of a broker-dealer; and
- the Finder is not subject to statutory disqualification, defined in Exchange Act Section 3(a)(39)

The exemption does not permit potential Finders to engage in any of the following:

- structuring the transaction or negotiating the terms of the offering;
- handling customer funds or securities;
- binding the issuer or investor;
- participating in the preparation of any sales materials;
- performing any independent analysis of the sale;
- engaging in any “due diligence” activities;
- assisting or providing financing for purchases; or
- advising on the valuation or financial advisability of the investment.

Conditions Specific to Tier I and Tier II Finders

The Proposed Order establishes two classes of Finders: Tier I and Tier II. In addition to fulfilling the general conditions above, potential Finders must also comply with requirements specific to each Tier.

A “Tier I Finder” is a Finder who *meets the general conditions and only provides contact information of potential investors for only one capital raising transaction by a single issuer within a 12-month*

period. The contact information may include, among other things: name, telephone number, e-mail address, and social media information. The Tier I Finder may not have any contact with the potential investors about the issuer, nor participate in continuous or multiple sales of securities.

A “Tier II Finder” is a Finder who *meets the general conditions and engages in solicitation-related activities for an issuer*. Solicitation is “any affirmative effort to induce or attempt to induce a securities transaction.” Although solicitation is generally prohibited for unregistered persons, the activities below fall under the exemption in the Proposed Order:

1. identifying, screening, and contacting potential investors;
2. distributing offering materials to investors;
3. discussing information included in offering materials, provided that the Finder does not provide advice as to the valuation or advisability of the investment; and
4. arranging or participating in meetings with the issuer and investor.

Prior to or at the time of the solicitation, a Tier II Finder must also disclose to the potential investor:

1. the name of the Tier II Finder;
2. the name of the issuer;
3. the description of the relationship between the Finder and the issuer, including any affiliation;
4. a statement that the Tier II Finder will be compensated for their solicitation activities by the issuer and a description of the terms of such compensation arrangement;
5. any material conflicts of interest resulting from the arrangement between the Finder and issuer; and
6. an affirmative statement that the Finder is acting as the issuer’s agent, is not acting as an associated person of a broker-dealer, and is not undertaking a role to act in the investor’s best interest.

A Tier II Finder may make these disclosures orally if supplemented by written disclosures. Delivery of the disclosures may be evidenced by a dated written acknowledgment, obtained from the investor prior to or at the time of the investment, of receipt of the disclosures. The disclosures and acknowledgment may be in paper or electronic form.

The SEC has prepared a [chart](#) that shows the differences between the two tiers of Finders and registered broker-dealers.

Individuals hoping to act as Finders will need to remember that the exemption applies only to the defined activities and not to any related actions, such as facilitating a registered offering, reselling the securities, or selling to unaccredited investors. Furthermore, the exemption does not affect a Finder’s obligation to comply with all other applicable laws, including state laws and the SEC’s antifraud laws. Naturally, potential Finders will also need to ensure that they fall under the exemption and are not instead required to register with the SEC as a broker. Moreover, individuals falling under the Finder exemption may still be regulated in other ways, for example if they are an investment or municipal advisor.

Michael Best & Friedrich LLP – Betsy T. Voter, Joshua B. Erekson, Michael H. Altman, Kevin C. Timken, Shawn T. Stigler, Melissa M. Turczyn and Iqan E. Fadaei

October 14 2020

[COVID-19 Regulatory Actions and Developments - Municipal Advisor: Katten Muchin](#)

Securities and Exchange Commission (SEC)

Date: April 24, 2020

SEC Announces Cross-Divisional COVID-19 market Monitoring Group

The SEC announced the formation of a senior-level internal cross-divisional COVID-19 Market Monitoring Group to assist the Commission with respect to actions and analysis related to the effects of COVID-19 and to respond to requests for information and assistance from regulators and others.

[Read the SEC Press Release.](#)

Date: March 26, 2020

Temporary Extension for Updating Form MA

The SEC issued a temporary conditional exemptive order allowing municipal advisors affected by COVID-19 an additional 45 days to file annual updates to Form MA that otherwise would have been due between March 27, 2020 and June 30, 2020, subject to certain conditions. The additional time is available only to municipal advisors that are unable to meet the deadline due to COVID-19.

[Read the SEC Order.](#)

Date: March 23, 2020

OCIE Statement on Examinations of SEC Registrants

The SEC's Office of Compliance Inspections and Examinations announced that it has moved to conducting examinations of registrants off-site through correspondence, unless it is absolutely necessary to be on-site.

[Read the SEC Order.](#)

Katten Muchin Rosenman LLP

October 14 2020

[A Guide to the World's New Benchmarks After Libor.](#)

Here's how to make sense of the dizzying array of acronyms that have sprung up in major markets.

For about 50 years, the London interbank offered rate has helped determine the cost of borrowing

around the world, from student loans and mortgages to interest-rate swaps and collateralized loan obligations.

Libor, derived from a daily survey of bankers who estimate how much they would charge each other to borrow, was simple, effective, ubiquitous, and seemingly reliable.

As markets evolved, the trading that helped inform those estimates dried up. In the wake of the 2008 financial crisis, regulators discovered that the banks trusted to set the rates underpinning hundreds of trillions of dollars of financial assets had been manipulating them to their advantage.

[Continue reading.](#)

Bloomberg Rates

By Boris Korby, William Shaw, and Alex Harris

August 11, 2020, 12:00 AM PDT

[Wall Street Eyes Fix for \\$345 Billion Libor Dilemma in Debt Swap.](#)

- **Beleaguered benchmark set to be discontinued by end of 2021**
- **FFCB exchanging bonds that can't switch to new reference rate**

A U.S. government-sponsored agricultural lender is seeking to swap \$1.9 billion of Libor-linked bonds in a deal backers say could serve as a template for future transactions ahead of the discredited reference rate's planned phase-out.

The Federal Farm Credit Banks Funding Corp. is looking to exchange the securities due between 2022 and 2032 that lack language to account for the end of Libor for notes that will shift to the Secured Overnight Financing Rate when the beleaguered benchmark expires at the end of next year. There's at least \$345 billion of dollar-denominated floating-rate notes set to mature after 2021 that don't have the necessary contractual terms to transition from Libor, according to TD Securities (USA), which is managing the deal.

The swap comes as proposed legislation designed to address the issue makes little headway with New York state lawmakers, raising concerns on Wall Street. The deal is being viewed as something of a trial balloon as bankers, investors and regulators work to avert financial chaos when Libor is phased out. Without a solution, countless floating-rate bonds would effectively convert to fixed-rate notes based on Libor's final print, potentially upending the market and leading to a flood of litigation, according to industry watchers.

The swap "could be a very significant moment for the transition," said Andrew Gray, co-chair of the outreach and communications working group for the Alternative Reference Rates Committee, the Federal Reserve-backed group guiding the U.S. Libor shift. It may cause "a domino effect as other bond issuers seek to incorporate ARRC fallback language through similar bond exchanges."

While issuers could theoretically amend outstanding bonds to address the fallback language issue, floating-rate notes typically require consent from each holder to change their benchmark interest rate, making such efforts impractical.

The FFCB exchange offer began Sept. 24 and is set to expire at 5 p.m. New York time on Oct. 22.

Bondholders often choose to participate in debt swaps rather than risk getting stuck with notes with reduced liquidity, which can weigh on their price.

Still, without unanimous participation the swap will only be a partial fix, according to Anne Beaumont, counsel at Friedman Kaplan Seiler & Adelman LLP.

“They’ll still have a complex problem for the bonds that aren’t exchanged,” she said. “It’s not a total solution. You could even say it makes it more complicated as you are likely to have two sets of bonds.”

The FFCB raises funds by selling debt to banks, insurers and state and local municipalities. It then provides loans, leases and other services to rural communities and U.S. agriculture businesses, according to its website.

Bloomberg Markets

By William Shaw

October 13, 2020, 8:34 AM PDT

[IRS Issues Guidance on Transition From LIBOR to IBORs: NABL](#)

On Friday, October 9, 2020, the US Internal Revenue Service (IRS) released Revenue Procedure 2020-44 (the RP) which provides interim guidance to facilitate the transition from the London interbank offered rate (LIBOR) and other interbank offered rates (IBORs) to alternative reference rates through adoption of fallback language recommended by the Alternative Reference Rates Committee (ARRC) and the International Swaps and Derivatives Association (ISDA).

Specifically, the RP addresses whether modifying existing documents to incorporate fallback language published by the ARRC and ISDA results in a reissuance for federal income tax purposes. The RP states that interim guidance was needed as the U.S. Department of the Treasury (Treasury) continues the process of finalizing related Proposed Treasury Regulations promulgated in 2019 (view the NABL comment letter regarding the Proposed Treasury Regulations [here](#)).

The RP is intended to support modifications that follow the ARRC and ISDA fallback language and protocols by providing that such modifications will not cause a reissuance, and applies to bonds, leases, and swaps and certain other contracts referencing an IBOR, as well as to variable rate private student loans that may be based on LIBOR.

The relief under the RP applies only to modifications where a contract is modified to:

- Incorporate an ISDA fallback.
- Incorporate an ARRC fallback.
- Incorporate either of the above, with certain specified deviations, such as deviations to confirm the fallback is enforceable under local law, changes to terms that are not relevant to a particular transaction, adjustments to incorporate ISDA language into a contract that is not otherwise a contract covered by the ISDA protocol, adding or revising technical items necessary to adopt the new language (but the RP relief does not apply to the addition of a term that obligates one party to make a one-time payment (or similar payments) as a substitute for any portion of an ARRC or ISDA fallback).

The RP also provides that such adjustments to a qualified hedge under Treas. Reg. § 1.148-4 will not result in a deemed termination of the qualified hedge.

The RP is effective for modifications to contracts occurring on or after October 9, 2020 and before January 1, 2023. The RP can be relied on for modifications to contracts occurring before October 9, 2020.

View Revenue Procedure 2020-44 [here](#).

SEC Enforcement Approach May Hinge On Election Results.

The next appointed Securities and Exchange Commission is likely to be more polarizing, and the SEC's approach to enforcement will differ depending on who wins the presidential election.

Current SEC Chair Jay Clayton, widely considered a centrist and who is reportedly not interested in continuing in the role, will likely not be reappointed as both President Donald Trump and former Vice President Joe Biden are likely to pick chairs more aligned with their political parties. Importantly, the SEC chair historically does not view municipals as a main priority.

At the end of the day, Clayton was more of a centrist than a lot of other policy people Trump appointed, a securities lawyer said.

"So thematically, I would expect if anything he would have somebody be more right wing," he said. "Basically, although it hasn't really happened in the last 12 years, you might see the SEC chair be a little bit of a more polarized choice, reflecting the increasing polarization of so many of our institutions like the Supreme Court."

If Biden wins in November, there is a good possibility that he will have learned from the mistakes made by the Obama administration when he was vice president. One mistake was appointing too much of a centrist as SEC chair, the securities lawyer said.

Obama appointed Mary Schapiro, an independent, in January 2009, and she was the first woman to serve as the SEC's permanent chair. Under Schapiro, the lawyer said, the SEC failed to aggressively pursue bad actors, including in the municipal space.

The weakest part of Obama's presidency was how he had the ability to make lasting reform, but didn't because most of the people he chose for senior policy positions were anti-regulation and either moderate or right-leaning, the securities lawyer said.

"While you might not need additional regulation, you might need somebody who is leading the financial market who is a little more focused on bringing enforcement actions against the biggest players and the worst behavior," the securities lawyer said.

Mary Jo White, an independent, was nominated by Obama after Schapiro. White had a very strict "broken windows" approach to enforcement. Under her watch the SEC introduced the Municipalities Continuing Disclosure Initiative, which promised underwriters and issuers would receive lenient settlement terms if they self-reported instances over the last five years where issuers falsely stated in offering documents that they were in compliance with their continuing disclosure agreements.

Also under White's leadership, the Enforcement Division brought numerous muni enforcement cases

including against the mayor of Harvey, Illinois.

Depending on Trump's pick, a Republican chair is likely to err on the side of guidance and amending rules before taking enforcement action. Under a Democratic chair, the SEC may be more willing to do rulemaking by enforcement, said Peter Chan, a partner at Baker & McKenzie and former SEC enforcer.

"Saying that they will be more aggressive isn't saying that they will be better or worse," Chan said.

In fiscal year 2019, the SEC brought 516 standalone enforcement actions, up from 490 in FY 2018. In FY 2017, 446 enforcement actions were brought by the SEC and in FY 2016 there were 548 standalone enforcement actions, according to the SEC's 2019 annual report.

Municipal issues will likely be a point of bipartisan consensus, such as timeliness of financial documents and pricing transparency in the secondary market. The SEC has long been focused on the timeliness of issuers' financial reporting.

"The way they attack concerns, there may be some difference in approach, but the issues are shared in a bipartisan way," Chan said.

Beyond the municipal bond market, the SEC will be more focused on differences in corporate disclosure, among other topics. The municipal market isn't really the focus of an SEC chair.

"Because of that, if anything in the midst of severe disagreement on other issues, whether it's a Republican or Democratic-appointed chairman, there will be a lot of institutional desire to address the public finance market where there are much less partisan disputes," Chan said.

Chuck Samuels, counsel to the National Association of Health & Educational Facilities Finance Authorities, emphasized that municipal finance is not a significant sector for the SEC. It would be "pure chance" for the next SEC chair to have any experience in municipal finance, he said.

The Senate also has to affirm the next president's pick. The Senate is currently majority Republican, but that could flip next year. If it does flip, Sens. Elizabeth Warren, D- Mass., or Sherrod Brown, D- Ohio could have an influence on who is next SEC chair.

"There will be a tug of war between the left-wing and the moderates in the Biden administration," Samuels said.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 10/14/20 01:41 PM EDT

[Bond Markets Face Big Challenges.](#)

The Libor transition, credit risk in municipal bonds, best execution and remote access for trading platforms are just some of the pressing challenges facing tomorrow's bond markets, according to fixed income experts.

On Oct. 5, the Securities and Exchange Commission held an open meeting of its Fixed Income Market Structure Advisory Committee (FIMSAC), whose members include investors, bond issuers and dealers, trading venues, academics, data providers and more.

Monday's meeting of the minds provided not just context around recent events, but also a rare sneak peek into what could become the regulatory agency's future priorities for the fixed income markets.

What The Meeting Covered

Monday's sessions ranged far and wide. To start, the committee deliberated how best to define "electronic trading," so as to allow for a regulatory framework that could be consistent and consistently applied.

That was followed up with in-depth conversations about structural strengths and challenges in the corporate and municipal bond markets; then a postmortem on how bond ETFs fared during the market volatility in March and April. (Spoiler alert: Despite a few isolated bumps, mostly they worked as intended.)

However, one of the most interesting bits came in the closing comments, where FIMSAC members shared where they felt the committee's future priorities ought to lie.

Generally, the committee agreed that the fixed income market is structurally sound. But it could use a few key updates and modernizations.

Facing The Libor Transition Head-On

One of those modernizations is already taking place: the global phaseout of Libor in favor of the secured overnight financing rate (SOFR).

Currently, the London interbank offered rate, or Libor, is the world's most widely used benchmark for short-term interest rates, tied to hundreds of trillions of dollars in loans, mortgages, corporate debt, derivatives and other instruments. Libor is calculated by averaging several bank funding rates across five different currencies and seven different borrowing periods, ranging from overnight to one year.

But Libor has some issues. Its calculation methodology is clunky and outdated, and the pool of banks who report their rates has shrunk since the 2008 financial crisis. That's led to greater reliance on subjective estimates and "expert judgment" to calculate moves in the rate. Plus, by the nature of representing banks' average borrowing costs, there is some built-in credit risk to the Libor.

Ushering In SOFR

For those reasons, Libor is being retired in favor of SOFR—at least for dollar-denominated loans and securities. SOFR is a median of overnight cash borrowing rates in the Treasury's repo market.

Yet transitioning from one rate to another isn't as easy as just hitting Ctrl-F on a Word document. An entire indexing and investment infrastructure has been built up around Libor, and thousands of existing financial instruments are foundationally based on the existing reference.

Multiple FIMSAC members pointed to this transition as one of the most pressing concerns of the next year, indicating that there was still a lot of work to be done, both in identifying potential market challenges and addressing any credit-sensitive impacts.

How Best To Protect Best Execution?

Many committee members also expressed concerns about how to improve and ensure best execution across the fragmented fixed income market, where most trades still happen in opaque, over-th-

-counter matchups.

The potential was floated for additional national best bid and offer (NBBO) regulation for corporate bonds. Such regulation would require brokers to source the best prices when trading on behalf of clients—meaning, they must trade at the highest bid and lowest ask.

Current NBBO regulation only applies to stocks, however, and the equity market is much smaller and more transparent than the bond market.

Whereas the equity market comprises roughly 3,500 securities, there are tens of thousands of corporate bond issues alone, with thousands more launching every year. (One FIMSAC member, academic and former SEC Chief Economist Larry Harris, even brought this up as a potential avenue of further inquiry: How can the agency encourage the issuance of fewer bond securities?)

Fleeting Pricing Confidence

Reggie Browne, principal of market-making firm GTS, also championed the idea of NBBO in fixed income when we spoke to him in March: “You don’t have anyone disseminating nationally and instantaneously the best bid/best offer and where the last trade occurred. You have issues around confidence about the ability to transact in corporate bonds.” (Read: “Why Many Bond ETFs Now Trading At Discounts.”)

Relatedly, other committee members raised the question of how best to disseminate pricing data and data about new issuers, including identifiers, maturity date, coupon and so on. This data is critical for any bond trade, yet access to it can vary substantially depending on which platform is used.

“Without this data, [investors are] hampered in their ability to trade these issues on equal footing,” said Lynn Martin, president and COO of ICE Data Services.

A number of committee members suggested improvements to FINRA’s over-the-counter real-time price dissemination service, Trade Reporting and Compliance Engine (TRACE), as well as the possible introduction of a corporate bond pricing reference service that would offer impartial, equal access to trading data for all market participants.

Trouble Brewing In Munis?

Notably, several committee members raised concerns about rising credit risk in the municipal bond market.

With the COVID-19 pandemic depressing economic activity across the nation, state and local governments are seeing reduced tax revenues—the same revenues they use to pay off their debt obligations. Should conditions persist or worsen, Mark Kim, COO of the Municipal Securities Rulemaking Board, wonders if these governments will be able to continue making timely payments.

“Munis have proven themselves resilient in the face of shocks, but markets don’t like surprises,” he noted.

Other commenters questioned whether municipals were being fairly rated, given the difficulty in acquiring timely financials from municipalities. Better disclosure for munis is needed, said former SEC chairman Elisse Walter, adding that “fixing that may do much to fix transparency in the municipals market.”

E-Trading Can Be Made More Efficient

Finally, many FIMSAC members pointed to the opportunity and challenge of the market's increasing reliance on remotely accessed electronic trading ("e-trading").

E-trading of bonds is nothing new. But when the pandemic struck and lockdowns were implemented overnight, nobody really knew how smoothly trading technology would function in a 100% work-from-home setting. (Read: "For ETFs, Trading Floor Closures Mean Little.")

Fortunately, it did work, both for bond traders and for dealers. Still, there's more work to be done in making efficient, secure platforms available across all bond markets—indeed, some illiquid corners of the market still place trades by phone—and to make these platforms accessible to everyone, not just a subset of traders.

"The whole life cycle needs access to this, not just traders, but clients, compliance, risk officers, the variety of participants in the market," said Tradeweb CEO and Co-Founder Lee Olesky.

"We're not out of the pandemic yet," he added. "We still have a ways to go."

etf.com

by Lara Crigger

October 9, 2020

[Muni Bond Market Disclosure: It's About Time - And Time Is Money](#)

The prior article [A Technology Solution For Muni Bond Disclosure](#) discussed how new technologies and data science methods are transforming disclosure in the municipal bond market.

This article, the sixth and final piece of a six-part series on investor disclosure in the municipal bond market, outlines how municipalities and authorities pay the very high real dollar cost of inefficient disclosure. Ironically, it is these very borrowers who use this capital market that are the one's with the power to correct many of the market's disclosure problems.

The Cost of Disclosure

Understandably, municipal bond borrowers want the best, lowest interest rates for their bonds. There is grumbling that, for all this talk of disclosure, they don't see it in the underwriting price of their bonds. But to expect efficient pricing when disclosure is reported months late, lacks consistently applied standards and is not structured data? It's like having frosted windows installed and then being upset the view isn't clear.

[Continue reading.](#)

Forbes

by Barnet Sherman

Oct 6, 2020

MSRB: Primary Market Disclosures Citing COVID-19 Hit a 15-Week High.

[Municipal Securities Market COVID-19-Related Disclosure Summary](#)

Last Updated: Oct 05, 2020 for the Week Ending Oct 04, 2020

MSRB CEO Mark Kim's Remarks at the U.S. Securities and Exchange Commission's Fixed Income Market Structure Advisory Committee (FIMSAC) Meeting.

Meeting Occurred on October 5, 2020.

Good afternoon Chairman Clayton, SEC Commissioners, Commission staff, FIMSAC Chair Heaney and FIMSAC colleagues.

On behalf of the MSRB, I thank you for this opportunity to share the views of the Board on risks in the municipal securities market.

As we have seen from the panel presentations this morning, the pandemic caused a significant dislocation in the municipal securities market.

During this past March and early April, many state and local government issuers did not have access to the primary market and liquidity was scarce due primarily to mutual fund outflows. Secondary market trading in March increased to levels not seen since the financial crisis of 2008-2009.

Fortunately, the dislocation was relatively short-lived, and the muni market showed its resilience in the following months. Liquidity from mutual fund inflows returned to the primary market with issuance volumes and secondary market trading in the months of May and June returning to historical levels.

However, there is one significant risk that the Board would like to take this opportunity to share with the Commission, and that is the risk of credit quality in the municipal securities market.

With the pandemic continuing to dampen economic activity across the country, state and local governments are facing increasing financial pressure with reduced tax revenues.

As you know, these are the very same tax revenues that support the repayment of most municipal bonds.

The Board is monitoring the ongoing impact of the pandemic on state and local governments' revenues and their continued ability to make timely payments of principal and interest on their municipal bond issues.

In our current low interest rate environment, and subsequent spread compression across all rating categories of bonds, it remains challenging for investors to fully evaluate and price credit risk in the municipal securities market. This is especially true for "main street" or retail investors, who remain an important part of the buyer base for municipal securities.

The Board's response to this risk has been to provide the market and investors with greater

transparency. We are leveraging technology to analyze the continuing disclosures and event notices submitted by issuers that disclose material information about the impacts of the pandemic on their operations and finances.

We applaud your efforts, Chairman Clayton, and the efforts of the Office of Municipal Securities, to draw attention to the broader issue of disclosure in the municipal securities market.

And we applaud the efforts of state and local government issuers to address this risk by providing the market with more timely and more complete information about the impacts of this pandemic on their finances and operations.

In conclusion, the municipal securities market has proven itself to be resilient in the face of external shocks. But as we all know, markets don't like surprises. And as this pandemic continues to add complexity and uncertainty to the economic outlook of state and local economies, the risk of an unexpected or sudden deterioration in credit quality in the municipal securities market could undermine investor confidence.

Thank you for the opportunity to share the views of the MSRB with the Commission.

[SEC Committee Tackles Disorderly Electronic Bond Trade Reporting.](#)

New definition could affect shares of electronic bond trading platforms

Liquidity is key in bond markets, but measuring it has grown more complex as trades move onto competing electronic trading venues. A Securities and Exchange Commission committee this week moved to help.

The Fixed Income Market Structure Advisory Committee proposed the SEC adopt new reporting standards aimed at improving transparency and helping traders decide which electronic marketplaces to frequent.

Stakes are high in the proposed regulatory overhaul for publicly listed electronic bond trading platforms such as MarketAxess Holdings Inc., MKTX 0.70% Tradeweb Markets Inc. TW -0.63% and Intercontinental Exchange Inc., ICE -0.05% or ICE. The exact terms of the definition the SEC adopts could raise or lower each venue's reported market share, and the value of their stocks.

"You can't ignore the importance of this to investors in the electronic trading platforms," said Kevin McPartland, head of market structure research at Greenwich Associates.

The committee proposed the SEC adopt a clear definition of electronic trading in corporate and municipal bond markets. A uniform definition would capture a broader range of trades, avoid double-counting them and standardize reporting across different venues, according to a recommendation released at a committee meeting on October 5.

Unlike stocks, which mostly trade on listed exchanges, bonds trade over the counter, and the electronification of the market has been fragmented as financial technology companies have offered traders competing options to find buyers and sellers.

"The recommendation this week is trying to tackle the fact that electronic venues all report their trading volumes and estimates differently, so it's very difficult for any market participant or

regulator to get an accurate picture of what's going on," said Rick McVey, chief executive officer at MarketAxess and a member of the SEC committee.

"Transparency and investor confidence are essential to efficient markets, and considered regulation of fast-growing electronic protocols and platforms makes a lot of sense," Tradeweb CEO Lee Olesky said. A spokesman for ICE declined to comment.

Electronic bond trading has grown since the March market crisis, when investors rushed to raise cash by selling bonds. The increase was sharpest in high-yield bonds, about 22% of which were traded electronically in August compared with 17% in February before the pandemic hit the U.S., according to data from Greenwich.

Still, trading air pockets at the height of the panic exposed liquidity shortfalls in municipal and corporate bond markets. The market freezes renewed concerns about liquidity—a term sometimes used to describe how easily traders can buy and sell at a stable price—but inconsistent reporting of electronic trading has made postmortem analysis more difficult.

"Determining the effect of electronic trading on liquidity conditions and transaction costs over time is difficult," the SEC committee said in its recommendation.

In government bond markets, the yield of the 10-year Treasury rose to 0.784% Wednesday from a close of 0.741% Tuesday, according to data from Tradeweb.

The Wall Street Journal

By Matt Wirz

Updated Oct. 7, 2020 5:24 pm ET

[Libor Law Is Adrift in Albany and Wall Street Is Getting Nervous.](#)

- **End of Libor is trouble for many contracts without backup rate**
- **Proposed legislation to address issue has made little headway**

For the past seven months, an arcane financial-markets proposal has been collecting dust in the statehouse halls of Albany, New York. Between the pandemic and the racial-justice protests, lawmakers have been so preoccupied that no one in either chamber has even initiated the legislative process on it.

But to bankers, investors and regulators, this is no run-of-the-mill document. It's a proposal that's crucial to ensuring that a huge swathe of the global financial system, involving deals worth potentially trillions of dollars, doesn't turn into a chaotic, lawsuit-riddled mess when the London interbank offered rate is officially discontinued at the end of next year.

And while that still leaves 15 months to hammer out a solution, Albany is not expected back in session until January, and anxiety is already mounting among those on Wall Street who had originally expected the proposal to sail through the legislative process in the Spring.

So many contracts will fall into legal limbo without the legislation — which would slide a comparable, new rate into deals that don't have provisions for a backup — that bankers say there's really no way to try to renegotiate all of them, or even a fraction of them, in the run-up to Libor's

expiration. Which leaves them with little recourse for now beyond lobbying state lawmakers.

“We continue to have conversations with key stakeholders and we’re trying to move this forward,” said Tom Wipf, vice chairman of institutional securities at Morgan Stanley and chairman of the Federal Reserve-backed group guiding the U.S. Libor transition. “We’ve put forward something that has broad benefits for a wide range of market participants.”

It is certainly rare for a decision like this — with such massive repercussions for the world of finance — to be made in upstate New York.

It’s a consequence of the outsize role state law plays in governing the roughly \$200 trillion in securities and commercial transactions tied to U.S. dollar Libor. The draft bill would guarantee financial products that lack viable language to deal with the benchmark’s end are shifted to a replacement, known as the Secured Overnight Financing Rate. SOFR currently sits at about 0.1%, slightly below three-month Libor.

Global regulators have remained steadfast that the timetable for doing away with Libor remains on track, despite the coronavirus outbreak causing a number of near-term goals and milestones to be pushed back.

Yet it’s also clear that there’s growing concern over how long the legislative process is taking. The Fed-backed Alternative Reference Rates Committee had originally hoped the “urgently needed” legislation would pass by May.

“Substantial delay or uncertainty may lead to some pricing dislocations” in markets if it persists too deeply into 2021, said Michele Navazio, a partner at law firm Seward & Kissel LLP. “I don’t have to emphasize that increased uncertainty often leads to liquidity problems and volatility.”

The law would impact everything from adjustable-rate mortgages and municipal debt to collateralized loan obligations and complex financial derivatives.

One of the asset classes most affected would be floating-rate bonds, many of which would effectively be convert to fixed-rate notes based on Libor’s final print in the absence of a legislative solution. That’s because they typically require unanimous consent from holders to change their benchmark rate.

For about \$1.8 trillion of Libor-linked securitizations tied to auto loans, credit card receivables and other types of debt, there’s the added risk that the structures and the underlying assets could transition from Libor using distinct methodologies, creating a cash flow mismatch. That could lead to liquidity disruptions and a potential wave of lawsuits.

And it’s not just Wall Street that would be affected. There’s about \$1.2 trillion of adjustable-rate U.S. residential mortgages linked to Libor. Contract language generally gives noteholders discretion to choose a replacement rate. Different lenders could wind up using different benchmarks, leading to unequal outcomes for home owners. The proposed law would encourage all lenders to use the ARRC’s recommended fallback rate by offering protection from litigation.

Sponsor Sought

To pass, the draft legislation first needs either a state senator or assembly member to sponsor it. It could alternatively be included as part of a larger bill package, such as the governor’s budget. Either way, it would ultimately need to clear both chambers and be signed by the governor to become law.

So far, no backers have stepped forward.

“Failure to get legislation passed can create enormous economic and legal uncertainty in the legacy Libor world,” said Priya Misra, head of global rates strategy at TD Securities in New York. “The courts could well be overwhelmed,” said Misra, who is TD’s representative on the ARRC.

Before she gives her support, Democrat Liz Krueger, chair of the New York Senate Finance Committee who represents the Upper East Side of Manhattan, says she wants the bill to ensure that borrowers with exposure to Libor via consumer products will get the lowest interest rate available among potential replacement benchmarks.

“I want to make sure that the less-represented party doesn’t get a fast one pulled off of them,” Krueger said. “I’m not really worried that New York state won’t watch out for its financial interests in these changeovers, but I don’t know whether a million New Yorkers with consumer loans through 300 different banks are really going to be able as a group to watch out for their interests.”

If there was a sign of movement on federal legislation, Krueger said it would make sense to wait and see what was happening at the national level before moving forward with a state bill.

“I’m cautiously saying that I am willing to move this kind of bill in New York state, as long as I make sure I’m dotting all the i’s and crossing the t’s, and that there is a need for it,” Krueger said.

No Favoritism

The legislation’s backers say the delay risks holding up the wider adoption of SOFR as market participants focus on addressing legacy contracts instead of wider transition planning.

“The longer the uncertainty remains, you just have to say that’s obviously a greater risk to the market,” said Thomas Deas, chairman of the National Association of Corporate Treasurers and the group’s ARRC representative.

He says the draft legislation isn’t tilted in favor of lenders. Rather, its recommended fallback language includes a replacement-rate calculation based on SOFR plus a spread adjustment that’s designed to ensure the successor rate is as close as possible to what the parties originally intended.

“We’re not trying to lower the rate so one party gets an advantage, we’re trying to make it value neutral,” Deas said. “With all respect to the Senate Finance Committee, we’re not trying to give a benefit to anybody.”

Legal Concerns

The ARRC has also approached the Office of the New York State Comptroller, the State Division of the Budget, and the Assembly’s Ways and Means Committee seeking backers, yet to little avail thus far.

Jennifer Freeman, communications director for the comptroller, said the body had not had detailed conversations on the legislation. The Division of the Budget is currently focused on addressing the pandemic and its economic fallout, and will tackle the proposed legislation at the appropriate time, spokesman Freeman Klopott said in an email.

Helene Weinstein, chair of the Assembly Committee on Ways and Means, didn’t respond to multiple requests for comment.

Even if the law is eventually passed, there are concerns among lawyers that it won't be able to prevent a rush of lawsuits as Libor's end approaches.

While many legacy contracts are governed by New York law, those that aren't would likely need separate legislation.

And borrowers or lenders affected by the new law could argue that changing contractual terms retroactively is unconstitutional, according to Jonathan Ching, a partner at Linklaters LLP.

"Given the number of affected parties, it would not be surprising to see all sorts of challenges arise if and when a bill is introduced," Ching said. "The big concern at the moment is that if enacted, the legislative solution would just change the nature of the litigation."

Bloomberg Markets

By William Shaw and Keshia Clukey

October 8, 2020, 3:00 AM PDT

[More Unknowns to Come for Issuers, FIMSAC Members Say.](#)

State and local governments will have to deal with many unknowns as 2020 wraps up, and figure out how to disclose pandemic concerns as conditions deteriorate for vulnerable credits, experts said at a Securities and Exchange Commission's Fixed Income Market Structure Advisory Committee meeting Monday.

FIMSAC met Monday to discuss various issues facing issuers.

Former SEC Chair and Commissioner Elisse Walter said FIMSAC needs to keep an eye on market structure to see if any changes need to be made to make the market function better, she told fellow members.

"We need to continue to have an eye on transparency and whether or not there are further routes that should be taken in mind, particularly with respect to pre-trade transparency to help investors in this market," Walter said.

In regards to all types of fixed income, the committee needs to look at regulatory disparities between broker-dealers and alternative trading systems, Walter said. FIMSAC began taken those steps after approving a preliminary recommendation asking for a consistent definition of "electronic trading" and an industry standard for reporting "electronic trading volumes" on Monday.

The committee said there was no consistent standard for publicly reporting trading volumes across the 20 trading platforms currently trading corporate and municipal bonds. Volumes are reported inconsistently and make it harder for analysts to interpret, they said.

Some inconsistencies include reporting venue practices that don't distinguish between trades that are fully electronic versus processed. Fully electronic trades are those in which all material interactions between the parties to the trade occur through the platform. Processed trades are trades where counterparties negotiate price and other terms away from the venue, but then submit the trade to a venue.

“I understand and support the desire for enhanced transparency,” SEC Chair Jay Clayton said in his written remarks. “Generally, markets and market participants benefit from accurate and consistent trading data, to find liquidity and make investment decisions. I appreciate the Committee’s attention to this important matter.”

This recommendation is related to an SEC concept release from last week. The SEC asked for comment on whether the current regulatory structure for alternative trading systems needs to be changed.

Major broker-dealer groups plan to comment on that release.

Meanwhile, Suzanne Shank, chair, chief executive officer and co-founder of Siebert Cisneros Shank & Co. LLC and member of the committee told members said she expects continued volatility as the year rounds out.

“We anticipate volatility to continue and to stall as municipal issuers really grapple with budgetary distress, which will hinge on news around vaccine developments and other stimulus package passages, if there is one with aid to state and local governments,” Shank said. “Of course, if there is any disruption surrounding the election results, we would expect that to contribute to volatility.”

Lawmakers have yet to pass another relief bill, and it is becoming less likely as election season nears. House Democrats approved a \$2.2 trillion HEROES Act late last week without Republican support. It would include \$436 billion in direct state and local aid.

Over the next few months, there will be a wider difference between the “haves and have-nots,” Shank said. Issuers with robust rainy day funds will be better positioned compared to challenged credits that hinge on hospitality, which will continue to struggle, she said.

Issuers are also grappling with how much to disclose because they are dealing with a lot of unknowns, Shank said.

The Municipal Securities Rulemaking Board tracks the number of COVID-19-related disclosures and publishes that data on a weekly basis.

To date, state and local government issuers have filed over 20,000 disclosures with the MSRB that reference the pandemic, said Mark Kim, FIMSAC member and MSRB CEO.

Many stakeholders have wondered in actuality how many issuers have submitted the disclosures.

Based on using the base CUSIP as a proxy, Kim said they found about 12,600 issuers had submitted disclosures that referenced COVID-19 to date. The muni market has over 50,000 municipal issuers total.

“If you take that universe of all the distinct CUSIP-6’s that have traded in 2020, approximately 40% of those CUSIPs have a COVID-19 related disclosure associated with it,” Kim told FIMSAC members.

CUSIP-6 identifies the bond issuer.

The Bond Dealers of America believe reasonable efforts to improve the clarity and transparency of trade reports are welcome, such as the recommendation approved Monday.

The American Securities Association said the recommendation will help more trading venues register and be under the SEC’s supervision.

SEC commissioners also voiced their support to extend FIMSAC's term to March 2021 during the meeting Monday.

By Sarah Wynn

BY SOURCEMEDIA | MUNICIPAL | 10/05/20 03:37 PM EDT

[Taxing Disclosures: Municipal Securities Issuers and COVID-19](#)

As discussed in my earlier blog, "[SEC Focus on Municipal Securities: Disclosure and Enforcement – The Peculiar Structure of the Municipal Securities Disclosure Regime](#)," since 1994 issuers and, in the case of conduit issuers, obligated parties are required to enter into a Continuing Disclosure Agreement ("CDA") at the time of issuing municipal securities. Under a CDA, the issuer (or obligated person, or both) must post a Material Event Filing ("MEF") within ten business days of occurrence, and since 2008, that posting must be made on the Electronic Municipal Market Access ("EMMA"). Failure to comply with these requirements will lead to enforcement much like that which a public company would face under the Securities Exchange Act of 1934, as amended if the public company does not meet its disclosure obligations (such as press releases, filing Current Reports on Form 8-K, etc.) The particular challenge facing municipal securities issuers in the face of the COVID-19 pandemic is how to address in a timely manner and clear away the impacts of COVID-19 on the revenues of municipal securities issuers, as well as on the costs of governmental operations. Fortunately, municipal securities issuers have been given guidance in the form of recommended best practices developed by an industry group, the Disclosure Industry Working Group ("DIWG"), the "[General Continuing Disclosure Considerations for Municipal Securities Issuers](#)" (the "CDC"), which was published in August 2020.

Taxing Disclosures

The DIWG, which includes bond lawyers, issuer officials, municipal securities analysts, and municipal advisors, was founded in July 2019 under the leadership of the Government Finance Officers Association ("GFOA"). Founded in 1906, the GFOA is a trade association with over 20,000 members, who are finance officials in federal, state, provincial, and local governments in the United States and Canada. The DIWG was formed to seek improved and more timely disclosure due to the significant increase in scrutiny by the U.S. Securities and Exchange Commission ("SEC") of the quality and promptness of municipal disclosures. The GFOA had met with SEC Chair Jay Clayton and other commissioners in June 2019, following Chairman Clayton's call for the SEC Office of Municipal Securities to work with the Municipal Securities Rulemaking Board to improve municipal securities disclosure. One can readily conclude that forming the DIWG was and is a defensive move to try to forestall more frequent and aggressive enforcement actions. Nonetheless, the CDC does provide helpful reminders and guidance. This first product of the DIWG, said Emily Brock, Director of the GFOA's federal liaison center, is intended "...to improve disclosure without input from regulators." The DIWG had significant disagreements among its members as to what to put in any group document, but that situation was fundamentally changed by the pandemic. The DIWG has stated that: "We recognize that this is our problem and rather than a regulatory mandate, we thought it would be best ... to work together and show the SEC and other parties... that we can work together and ... {offer} solutions to address ... timely disclosure."

One particular part of the CDC stresses the need for "good investor relations," which involves "... facilitating widespread and contemporaneous access to information" to ALL investors. This section

was of critical importance to the National Federation of Municipal Analysts (“NFMA”) and had to be in the document in order for the NFMA to support its issuance. A good part of the CDC is devoted to the need to recognize diligently the obligations inherent in a CDA, and to administer compliance with professionalism and care. This surely reflects concerns (raised by SEC comments and the formation of the DIWG itself) that too often municipal securities issuers do not devote adequate attention and/or resources to meeting those obligations, and do not adequately administer the disclosure regime applicable to them. For example, the CDC notes that the SEC has NOT relaxed the reporting requirements of issuers under their CDA’s, both as to MEF’s AND as to the annual filing requirement. As to the latter, the CDC emphasizes the need to know the date that the annual filing is due. The CDC also discusses at length the need for municipal securities issuers and obligated persons to consider voluntary disclosures relating to the impact of COVID-19, specifically making clear that revenue or budget projections should be official government estimates, and clearly marked as unaudited financial information. The CDC cites, in this regard, an SEC statement of May 4, 2020, which encourages municipal securities issuers and obligated persons to provide investors with forward-looking information regarding the impact of COVID-19. The SEC statement suggests that the issuer may want to add “...meaningful cautionary language...,” and notes that “good faith forward-looking information will not be second-guessed by the SEC.”

Finally, the CDC reminds municipal securities issuers and obligated persons that NONE of the federal tax requirements related to the tax treatment of municipal securities have been suspended in the face of the pandemic. So issuers remain obligated to make federal arbitrage rebate and yield reduction payments. Issuers are also still subject to the private use regulation and must comply with other obligations related to tax-exempt bond issuances.

Municipal Securities Issuers and COVID-19

The CDC is helpful, BUT only if municipal securities issuers and obligated persons invest adequate time and resources in carrying out the steps it recommends. Neither the quality of municipal disclosure nor the quality of mercy need be strained IF issuers and their officials and advisors act promptly, in good faith, to keep investors informed – even in the face of a pandemic.

by Peter D. Hutcheon

Thursday, October 1, 2020

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[MSRB Municipal Securities Market COVID-19-Related Disclosure Summary.](#)

Last Updated: Oct 05, 2020 for the Week Ending Oct 04, 2020

[Read the MSRB Report.](#)

[A Technology Solution For Muni Bond Disclosure.](#)

This article is the fifth of a six-part series on investor disclosure in the municipal bond market.

The previous article, [Muni Bond Market Disclosure: Thoughts From Standard-Setters And Stakeholders](#), discussed how other stakeholders in the municipal bond market, such as the Governmental Accounting Standards Board and the National Federation of Municipal Analysts, have also contributed to creating a disclosure framework.

This article discusses how, just as the then-new technologies of a decade ago transformed disclosure in the municipal bond market, today's current technologies and data sciences portend further transformations. And, just as before, there are those that embrace them—and those that oppose them. History has shown that one thing is certain: technology keeps moving forward. Like it or not. Those that embrace it tend to succeed. Those that don't, fail.

[Continue reading.](#)

Forbes

by Barnet Sherman

Sep 30, 2020, 11:19am EDT

[Treasury's OIG Updates FAQs for Coronavirus Relief Fund Reporting Requirements.](#)

On September 21, the Department of Treasury's Office of Inspector General (OIG) updated their Coronavirus Relief Fund (CRF) FAQs on reporting requirements.

The document swapped out guidance initially released on August 28, following complaints about the guidance by the OIG conflicting with guidance issued by the Treasury on August 10 regarding reporting payroll expenses for public health and public safety employees determined to have "substantially dedicated" their time in responding to the COVID-19 public health emergency.

The updated FAQs provide more flexibility to CRF prime recipients by implementing "administrative accommodations made in accordance to Treasury's FAQs."

[View Updated Document.](#)

Government Finance Officers of America

[Disclosure Industry Working Group Encourages Timely Covid-19 Disclosures.](#)

The Disclosure Industry Working Group reminds issuers that applicable filing deadlines have not been extended by either the U.S. Securities and Exchange Commission (SEC) or the Internal Revenue Service (IRS), and encourages all issuers to discuss COVID-19 disclosure with their entire financing team, including their bond and/or disclosure counsel. In its publication, [General Continuing Disclosure Considerations for Municipal Securities Issuers](#), which includes those considerations related to COVID-19 financial matters, the working group provides guidance regarding the following topics:

- **Material Event Filings:** A Material Event Filing must be completed within 10 business days of the

occurrence of a Material Event; notwithstanding the pandemic, the SEC has not relaxed these reporting requirements under SEC Rule 15c2-12 of the Securities Exchange Act.

- **Knowing Your Annual Disclosure Filing Dates:** Notwithstanding the pandemic, the SEC has not suspended the annual disclosure filing requirements under SEC Rule 15c2-12 of the Securities Exchange Act.
- **Annual Continuing Disclosure Filings:** If all or a portion of the annual continuing disclosure information is not available by the filing deadline, issuers (and obligated persons) must file a failure-to-file notice. The working group notes that it is important to include the reason(s) as to why any part of the submission is late.
- **Good Investor Relations:** With respect to information given to investors and rating agencies, issuers (and obligated persons) may want to consider disclosing the same information on their websites or via a filing on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access (EMMA) system.
- **Determining Whether and/or When to Make Voluntary Disclosure Filings:** Issuers (and obligated persons) may be facing fiscal challenges due to the COVID-19 pandemic. Issuers (and obligated persons) should discuss the appropriateness, the contents and the context of voluntary disclosure of such fiscal challenges with their bond counsel and/or disclosure counsel.
- **Presenting COVID-19 Voluntary Disclosure Information:** As discussed in the SEC [public statement](#) on May 4, 2020, Chairman Jay Clayton and Rebecca Olsen, Director of the SEC's Office of Municipal Securities, encourage municipal issuers to provide investors with forward-looking information regarding the impact of COVID-19 on their financial and operating conditions.
- **EMMA Filings:** All filings on EMMA should be submitted for all relevant CUSIP numbers, and may be filed under multiple filing categories on the EMMA system.
- **Post-Issuance Compliance for Tax Law Purposes:** The IRS has not suspended the post-issuance responsibilities of issuers of municipal debt.

McCarter & English LLP - Sarah C. Smith

September 17 2020

[BDA Washington Weekly - Muni Provisions Sidelined](#)

For the past few weeks, it appeared that Congress was headed towards a government shutdown, in the middle of a pandemic, less than 6 weeks to a presidential election, with no deal in sight. This week, cooler heads prevailed, and disaster has been averted-for now.

House Leadership, along with Trump Administration officials struck a short term deal mid-week and fast tracked the legislation through the House with a [strong bipartisan vote](#). The bill is expected to [pass the Senate next week](#). **Attached to the package is a years-long extension to the Surface Transportation reauthorization that does not include municipal bond provisions.**

Not to be forgotten is the death of Supreme Court Justice Ruth Bader Ginsburg, which will have direct impact on the Senate schedule, dampening the hopes of additional stimulus and aid to state and local governments. Though House Speaker Pelosi is attempting to revive talks with a narrow compromise bill, a long shot effort to pass legislation prior to the election.

This week, the BDA kicked off its new podcast series titled Bonding Time with an episode focused on muni happenings in Washington, DC. The podcast features Emily Brock of the GFOA Federal Liaison Center and the discussion focuses on issues such as stimulus,

infrastructure and politics.

****The inaugural Bonding Time podcast can be found here****

Legislative Recap:

Congress Avoids Shutdown - Muni Provisions Sidelined

In the midst of a national health and economic crisis, Congress appeared poised to add gasoline to the fire by allowing government funding to lapse. This appears to have been avoided, at least in the near term, but in doing so Congress has dashed any hope that BDA priorities such as the restoration of advance refundings, expansion of PABs, or the raising of the BQ debt limit will happen in 2020.

As part of the negotiations, both House, Senate and administration officials [agreed to extend the Surface Transportation Reauthorization](#) through FY 2021 at current levels. This means that the House legislation that included many municipal market priorities are tabled likely through the remainder of 2020. There is still an outside chance for negotiations for a new stimulus deal, especially post elections in the lame duck session. However, at this time it is hard to see both Chambers and the White House coming together for a deal robust enough to include municipal bond provisions.

While a disappointing outcome, this is not an unexpected maneuver. The BDA continues to advocate for these provisions, along with our partners in the Public Finance Network, and believe that they are well positioned for consideration in 2021 regardless of outcome of the elections.

Dems Press Fed Chair to Expand MLF

In a marathon week of Congressional testimony for the Federal Reserve Chairman Jay Powell, the House Financial Services Committee pressed the Chair to [expand the Municipal Liquidity Facility](#), noting that interest rates are still too high resulting little assistance to state and local governments with only two issuers accessing the program.

The Chair defended the program by stating, *"What that facility has accomplished is it opened up the private market so state and local governments are borrowing in record amounts at record low yields,"* avoiding the calls to lower the pricing of the securities.

This point of view was reiterated last week during a CARES Act oversight hearing in which Senator Pat Toomey (R-PA) called for the ending of the program with his rationale being that if only two issuers have used the program and the market is stabilized, thus it is unneeded.

[The House also passed legislation this week](#) that would require the Federal Reserve and the Treasury Department to expand the number of credit rating firms allowed to participate in Covid-19 financial market support programs.

The bill would intervene in the Fed and Treasury's bond-buying programs by forcing them to accept securities rated by any credit rating agency recognized by the SEC.

Since summer hearings on the issue, [a bipartisan group of House lawmakers has continued to press the Fed and Treasury](#) to expand the list of rating agencies beyond the three dominant ratings firms — Standard & Poor's, Moody's and Fitch. Under the bill, the Treasury and Fed would be able to exclude certain ratings if they're deemed unreliable or inaccurate for a particular asset class.

Fed Recap:

Fed Chair Calls on Congress to Provide Relief

Chairman Powell this week continued to [urge Congress to take further actions to support the stalling U.S. Economy](#). While noting the CARES Act helped to vastly improve the national economic situation, he noted that the path ahead is uncertain as monies allotted in the legislation expires.

Powell has long been in favor of additional aide to state and local governments and further reiterated that position on the Hill this week. The Chairman also continue to praise Fed lending programs such as the Main Street Lending program and the MLF stating they help unlock liquidity and assisted the U.S economy in reversing the March loses.

Bond Dealers of America

September 25, 2020

[Muni Bond Market Disclosure: Thoughts From Standard-Setters And Stakeholders](#)

This article is the fourth of a six-part series on investor disclosure in the municipal bond market.

For decades, the issues surrounding disclosure in this \$3.9 trillion market have vexed municipal bond borrowers and investors alike. Now, with both governments and nonprofits reeling from the adverse financial effects of Covid-19, municipal bond disclosure is back on the front burner. The public health crisis may prove the tipping point needed to finally resolve the market's disclosure issues.

The previous article, [Muni Bond Market: In Dogged Pursuit Of A Disclosure Framework](#), covered the unflagging efforts of the Securities and Exchange Commission (SEC) and the Municipal Securities Regulatory Board (MSRB) to sometimes guide and sometimes impose disclosure rules and standards in that market.

This article discusses how other market stakeholders and standard setters have shaped municipal bond disclosure—and continue to actively work to improve it.

[Continue reading.](#)

Forbes

by Barnet Sherman

Sep 25, 2020

[Regulatory Spillover: Evidence from Classifying Municipal Bonds as High-Quality Liquid Assets](#)

In the aftermath of the 2008-2009 financial crisis, the Basel Committee on Banking Supervision (BCBS) strengthened banks' liquidity regulation by requiring banks to maintain a minimum liquidity coverage ratio (LCR). This ratio is defined as high-quality liquid assets (HQLA) divided by estimated

total net cash outflows during a 30-day stress period. Whether municipal bonds should be classified as HQLA in computing this ratio and the resulting economic consequences are subject to intense debate. Issuers of municipal bonds contend that municipal bonds should be classified as HQLA based upon their safety and liquidity profiles. In contrast, the U.S. banking regulators questioned both the liquidity of these bonds and the claim that municipalities would be affected and excluded municipal bonds from HQLA in the final rule issued in 2014. However, less than a year later, in an abrupt reversal, the Federal Reserve Board (FRB) unilaterally decided to include general obligation municipal bonds in the measurement of HQLA while continuing to exclude revenue municipal bonds. Exploiting this policy reversal, Jacob Ott of the University of Minnesota examines two potential spillover effects of the classification of general obligation municipal bonds as HQLA: (1) if there is a change in the yield spread of general obligation bonds relative to revenue bonds; and (2) if municipalities change their pattern of issuance of general obligation bonds relative to revenue bonds.

Ott finds that changing the measurements used in bank liquidity management can have spillover effects, specifically that classifying a general obligation municipal bond as a high-quality liquid asset in the regulatory accounting for the liquidity coverage ratio has a spillover effect by influencing municipal market pricing and behavior. In addition, the reduction in financing costs of general obligation bonds appears to influence municipalities' issuance decisions. This effect is magnified in the cross section of highly rated municipalities. Finally, Ott finds some indirect evidence for the proposed mechanism: a change in banks' investment behavior.

This paper contributes to several veins of literature, but also has important policy implications. The effects this paper discusses are the result of changing municipal bonds to Level 2B assets. Many different entities (e.g., banks, politicians, trade groups, etc.) have requested Level 2A treatment. It may be the case that the results of this paper would be strengthened in magnitude if this change was made. For example, municipalities could potentially be able to borrow at even lower rates under Level 2A treatment. The lack of Level 2A treatment may put U.S. domiciled municipalities at a disadvantage in maintaining and improving infrastructure relative to municipalities in other countries who do treat municipal bonds as Level 2A in their liquidity management regulations. However, it is important to note that this study does not examine if classifying general obligation bonds as high-quality liquid assets is an optimal decision for the purposes of liquidity management.

[Read the full paper here»](#)

The Brookings Institution

by Jacob Ott

September 21, 2020

[SEC Focus on Municipal Securities: Disclosure and Enforcement - The Peculiar Structure of the Municipal Securities Disclosure Regime](#)

When the two key Federal Securities Laws (the Securities Act of 1933 [the "33 Act"] and the Securities Exchange Act of 1934 [the "34 Act"]) were enacted, municipal securities (the bonds, notes, etc., issued by states, counties, municipalities, and municipal authorities) were exempt, both from the registration requirement of the 33 Act and from the oversight under the 34 Act of the professionals who underwrote and dealt in the purchase and sale of these securities. These

exemptions resulted from policy (municipal securities were generally seen as more secure than those issued by corporations and other private sector entities) and political considerations. More individual investors sought to buy municipals by the early 1970s to reduce federal and state tax liabilities, at a time of ever-increasing inflation. This in turn led to an extraordinary proliferation of municipal security products. Then Congress passed the Securities Act Amendments of 1975, creating the Municipal Securities Rule Making Board (“MSRB”) as a self-regulatory body subject to the oversight of the U.S. Securities and Exchange Commission (“SEC”).

The Peculiar Structure of the Municipal Securities Disclosure Regime

In 1978, the MSRB adopted rules governing underwriting practices, urging “market participants” (i.e., broker/dealers, investment advisers, and the like) to comply with disclosure obligations consistent with those that the SEC required in connection with the registration and sale of securities under the 33 Act. It should be noted that, unlike the registration process (where the disclosure obligations fall on the issuer), in the case of municipal securities those obligations fall on market professionals. Disclosures concerning a municipal security (both as to the issuing entity and the terms of the security) are typically found in a Preliminary Official Statement (“POS”), followed at the time of issuance with an Official Statement (“OS”). The POS and OS are usually prepared by the underwriters in conjunction with the issuing entity and are expected to be reviewed by any broker/dealer involved in selling the security and by any investment adviser recommending the security. This somewhat “Rube Goldberg” disclosure structure reflects continuing political decisions to eschew direct federal regulation of municipal security issuers, including disclosure of material developments following issuance.

In 1989, the SEC adopted Rule 15c2-12 under the 34 Act, which requires an underwriter of municipal securities to obtain a written agreement from the issuer requiring the issuer (and any related obligor, as in the case of conduit issuers), to deliver an OS within seven days of issuance. Under the Rule, underwriters are also required to review the POS and the OS for the adequacy and completeness of the disclosures. In 1994 the SEC amended Rule 15c2-12 to also require the underwriter to obtain a written agreement (a Continuing Disclosure Agreement [“CDA”]) from an issuer of a municipal security, under which the issuer (and any related obligor) commits to provide annual updates on the issuer’s financial condition. In addition, both the Rule and the CDA require the issuer to file “timely reporting of material events” affecting the issuer (or any related obligor). Originally both the OS and disclosures under the CDA were filed with designated depositories. In 2002 the MSRB required that these filings be done electronically. In 2008, the MSRB launched the Electronic Municipal Market Access (“EMMA”) website. All OS’s and CDA disclosures are now filed on EMMA. Any market professional dealing in municipal securities is required to review those filings prior to effecting transactions.

Increasing SEC Enforcement Activity

In January 1996, the SEC brought an enforcement action against the principal officials of Orange County, California (ironically including its Treasurer, Robert Citron, whose last name is the French word for “lemon”) for massive misstatements and omissions in disclosure documents covering 11 bond offerings from July 1, 1993, to September 28, 1994, which raised over \$2.1 billion. In addition to material errors about the tax treatment of some of the offerings and continuing failures to disclose the deteriorating financial condition of the county, there was a failure to disclose that the county tried to greatly increase revenues by attempting to hedge payment obligations on the bonds with “earnings” on short-term reverse repurchase agreements. When interest rates went against the county’s “bets,” the County experienced such great financial losses that it was forced to file bankruptcy under Chapter 9 of the Federal Bankruptcy Act. The county filed on December 9, 1994, and made its final payment under the court-approved reorganization plan on July 1, 2017.

In 2010, the SEC brought its first-ever enforcement action against a state - New Jersey. The SEC asserted that the POS's and OS's used for the offer and sale of over \$26 billion of bonds in 79 separate bond offerings from August 2001 through April 2007 contained material misrepresentations and omissions about the underfunding of New Jersey's two largest pension plans (one for teachers, the other for State employees). There had been no payment default on any of the bonds (a situation that continues to date). New Jersey consented to a settlement in which it accepted a cease and desist order; it was not subjected to a civil penalty. Illinois suffered a similar fate in 2013 for failing to adequately disclose pension shortfalls in connection with the sale of over \$2.2 billion in bonds from 2005 to early 2009.

Beginning in 2014, the SEC undertook an initiative to identify material misstatements and omissions in municipal security offering documents from 2011 on. As a result, the SEC found that 71 issuers (and in some cases, related obligated persons) had inadequate POS's and OS's relating to new securities issuances. In some cases, they also found that the issuers had not met their obligations under the CDA's related to those or previously outstanding issuances. All 71 issuers eventually settled with the SEC and accepted cease and desist orders. On September 14, 2016, the City of Miami and its former budget director were found liable for securities fraud in connection with the sale of \$153.5 million of bonds. The offering documents failed to disclose that the value of the city's reserves were materially overstated (by illegally transferring capital funds to the city's General Fund), resulting in significantly higher ratings from bond rating agencies. Both the city and the former budget director were permanently enjoined from engaging in securities fraud. The city settled the case by paying \$1 million; the former budget director, whom the court found did not personally profit from the fraud, was ordered to pay \$15,000.

In April of 2016, the SEC charged the town of Ramapo, New York, along with the town supervisor (who doubled as president of the municipality's Development Corporation ["RLDC"]), an assistant town attorney (who doubled as executive director of the RLDC), two other municipal officials, and the RLDC with securities fraud in connection with 16 bond offerings from 2010 to 2015, which raised over \$300 million. The primary basis of the material misstatements in the offering documents was the failure to disclose the impact of the expenditure of over \$58 million to construct a minor-league baseball park for the town's Ramapo Boulders - presciently-named, as this became the proverbial "millstone" around the necks of the defendants. The United States Attorney brought parallel criminal proceedings against the town supervisor and the assistant town attorney. In October 2018, the town and the RLDC consented in the SEC lawsuit to injunctions; the town supervisor paid a \$327,000 civil penalty; the two other municipal officials paid civil penalties of \$25,00 and \$10,000 respectively; and all four were collaterally barred from serving as officials of a municipal entity. The two other officials were able to apply for release from the bar after a term of years. The assistant town attorney pled guilty in the criminal action, was fined \$10,000, sentenced to 18 months supervised release, and disbarred. The town supervisor was convicted by a jury on 20 counts and sentenced to serve 30 months in prison and pay a fine of \$75,000.

In November 2017, the SEC brought a lawsuit against the Town of Oyster Bay ["TOBAY"] (a part of Nassau County, Long Island, New York, where the author of this blog grew up; TOBAY has a dedicated portion of Jones Beach set aside for TOBAY residents), and the town supervisor for failing to disclose in 26 offerings from August 2010 to December 2015 that the town had guaranteed four private loans totaling over \$20 million to a restaurateur in connection with his operating restaurants and concession stands on town property (theoretically at TOBAY Beach). TOBAY was permanently enjoined. The town supervisor was acquitted in a criminal prosecution for official corruption; the resolution of the SEC's civil lawsuit against him was not reported.

The SEC Provides an "Education" in Disclosure Obligations

In March 2019, the SEC brought a civil lawsuit against the former controller of the College of New Rochelle, a non-profit college located in Westchester County, just north of New York City. The college was under financial duress due to declining enrollment and deteriorating collection of pledged donations. The controller created false financial records and failed to pay payroll taxes so that the college's financial statements for 2015 had overstated net assets by almost \$34 million. He also certified those statements. What he failed to do was file timely disclosures under the CDA relating to an outstanding 1999 bond issue. Due to its self-reporting of the matter and exemplary cooperation, as well as its difficult financial condition, the college was not charged and no penalty was sought. The controller, who was also charged in a parallel criminal action for securities fraud, pled guilty in the criminal case and reached a partial settlement with the SEC that permanently enjoined him from future misconduct, with civil penalties to be determined by the court. Six months later the SEC brought suit in federal court in California against the former chief business officer and the superintendent of schools of a school district in connection with falsified disclosures relating to the 2016 offering of \$100 million of the district's general obligation bonds. The district's independent auditor had repeatedly sought to investigate allegations of fraud and internal control issues. The district refused to pay the fees for that investigation, and instead terminated the auditor. The chief business officer used the prior year's clean audit as part of the 2016 offering documents and provided "deceptive updates" to the attorneys who worked on the disclosures for those 2016 documents. The district and the superintendent agreed to settle with the commission, consenting to the entrance of cease and desist orders. The superintendent, who signed the OS, was also ordered to pay a \$10,000 civil penalty. The case against the former chief business officer seeks injunctive and collateral bars, as well as financial penalties, for his active misconduct.

This year brought an expanded scope of "educational" opportunities in the charter school context. First, in April 2020, the SEC charged the then chief executive officer AND the then director of finance of the Tri-Valley Learning Corporation, which operates two charter schools in Northern California, with misleading investors who purchased \$25.54 million in bonds in a May 2015 offering. The two individuals helped prepare and signed the POS and the OS, which failed to disclose serious cash flow problems, inability to service payments on the bonds, delinquency on payables, non-payment of a term loan over one year overdue, and that the school had fully drawn on its bank line of credit. The same two signed demonstrably false certifications that the POS and OS contained no material misrepresentations or omissions. The individual defendants agreed, in a settlement with the commission, to be permanently enjoined from securities law violations and from participating in future municipal securities offerings, and in addition, to pay a civil penalty of \$20,000 and \$15,000 respectively. Most recently on September 14, 2020, the SEC charged a state-funded nonprofit charter school in Arizona and its former president with misleading investors in a \$7.6 million offering in April 2016. The charter school was experiencing significant operating losses and was "staying afloat" by making repeated unauthorized withdrawals from two reserve accounts to cover "routine" operating expenses, pay other debts, and transfer money to affiliated entities. The offering documents did not disclose this but instead contained profit and expense projections showing profitability in fiscal 2017 and a clear ability to repay the debt. Both the charter school and its former president agreed to settle with the commission, becoming subject to an injunction against future violations of the Federal Securities Laws. In addition, the individual defendant agreed not to be involved in any future issue of a municipal security.

Closing Observations

It seems quite clear that persons acting in the municipal securities markets, including public officials and local educators, are not all well-informed. "Educational" lessons from the SEC can prove costly and destructive of both careers and reputations, let alone possible exposure to criminal prosecution. The design, functioning, and assessments of municipal securities markets are necessarily critical to

achieving both fairness and liquidity when raising private capital for public purposes. It behooves financial professionals and others to learn the disclosure rules, and even more importantly, to strive for clarity, completeness, and compliance.

The National Law Review

by Peter D. Hutcheon

September 22, 2020

Peter D. Hutcheon practices primarily in the areas of business governance, commercial transactions, securities, banking, and finance.

Peter counsels management of public and private companies and banking institutions on governance matters. He also has particular expertise with respect to indemnification and insurance issues affecting directors and officers. Peter has represented parties in major public-private partnership financings. He also represents clients seeking investment capital from private placements, venture capital, and private...

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[SEC Charges Former Jefferies Registered Representative for Improper Retail Orders in Municipal Bond Offerings.](#)

September 22, 2020 - The Securities and Exchange Commission today filed settled charges against Eliseo Sampayo, a former registered representative at Jefferies LLC, for his improper conduct involving the submission of retail orders in new issue municipal bond offerings.

According to the SEC's order, between October 2016 and August 2017, Sampayo, of Larchmont, New York, improperly placed retail orders for new issue municipal bonds on behalf of a registered broker-dealer that was attempting to buy bonds for its inventory. Municipal issuers typically require underwriters to give retail investor orders the highest priority when allocating new issue bonds, particularly retail investors within the municipal issuer's jurisdiction. The order finds that Sampayo improperly submitted the orders as retail customer orders when he knew or should have known that these did not qualify for retail priority. In addition, the order finds that Sampayo submitted inaccurate zip codes with some of these improper retail orders, which created the appearance that the orders were on behalf of an individual residing in the issuer's jurisdiction when, in fact, they were not, and had the effect of giving the orders priority that should have been reserved for retail customers.

On September 3, 2019, the SEC filed settled charges against the trader who submitted these orders to Sampayo, see [Administrative Summary 34-86848](#).

The SEC's order finds that Sampayo willfully violated the disclosure and fair dealing provisions of Rules G-11(k) and G-17 of the Municipal Securities Rulemaking Board, and imposes a 6-month industry suspension and penny stock bar and a \$20,000 civil penalty. Sampayo consented to the

order without admitting or denying the SEC's findings.

The SEC's investigation was conducted by the Division of Enforcement's Public Finance Abuse Unit, including Joseph Chimienti, Laura Cunningham, Warren Greth, and Cori Shepherd, with assistance from Deputy Unit Chief Mark Zehner. The investigation was supervised by Ivonia K. Slade.

File No. 3-20047

[MSRB Summary Report.](#)

Read this week's COVID-19 [summary report](#), aggregating municipal market disclosures that cite the pandemic.

[Muni Bond Market In Dogged Pursuit Of A Framework.](#)

This article is the third of a six-part series on investor disclosure in the municipal bond market.

This piece discusses how both Securities and Exchange Commission (SEC) and the Municipal Securities Rulemaking Board (MSRB) continue to doggedly pursue disclosure improvements in the municipal bond market. Restricted by legislation from accomplishing that by regulating municipal bond borrowers directly, they have wisely applied the substantial powers they have to regulate market participants in order to enforce better disclosure from municipal borrowers. They have also encouraged what should be disclosed and the framework for that disclosure. But is there a constitutional solution that makes all this legal maneuvering moot?

In Dogged Pursuit

Limited by the Securities Act of 1933, Securities Exchange Act of 1934 and its founding legislation, the Securities Exchange Act 15B, the MSRB found its ability to compel municipal bond issuers to disclose hobbled.

But it could sure compel the underwriters and broker dealers selling and trading the bonds of those issuers. Having bulked up in 1994 with the adoption of [further amendments to the Rule](#), the MSRB flexed its regulatory muscle to "deter fraud and manipulation" in the market. Disclosure was a big part of that deterrence strategy; municipal bond underwriters were compelled to get written disclosure agreements, in compliance with MSRB guidelines, from their bond issuer clients. If broker/dealers wanted to engage in the underwriting and secondary market trading of their primary market bond issues, they were required to get a continuing disclosure statement from an issuer.

No disclosure? No underwriting, no trading.

As the municipal bond market grew (in 1994, there were roughly \$1.5 trillion in outstanding bonds compared to nearly \$4 trillion today), the rule continued to be amended and expanded. Additionally, new technology was integrated into the solution. The MSRB created "Electronic Municipal Market Access" (EMMA) as the official source for municipal securities data and disclosure documents with mandatory filing requirements. Currently, there are [16 material event disclosures](#) codified in the rule, requiring an issuer to post if one (or any) occur.

Constitutional Sidebar

Richard Ciccarone, president of Merritt Research Services (an Investortools Company) and a long-time municipal bond market veteran, offers a different perspective on the legal limitations oft cited in regard to disclosure. Ciccarone has not only given this subject considerable thought, but he dedicated a large part of his career to it. Back in 1986—well before the internet, “big data,” the MSRB, and EMMA—he was tapped to build out a municipal research database and software package that ultimately led to the creation of the Merritt System. Today, Merritt Research Services arguably offers subscribers the longest standardized time-series of municipal financial information in the world, with financial information (including annual audits) on over 12,000 municipal bond credit obligors reporting entities.

Ciccarone contends that the Tower Amendment arguments overlook a constitutional issue, specifically the Commerce Clause. Congress has the power to regulate commerce “among the several states.” The sale of a municipal bond—a debt security—across state lines constitutes commerce. Congress (or its agents and assigns—i.e. regulators) can therefore step in to impose rules and regulations on those securities. Issues of sovereignty may apply to any number of things but regulating the disclosure of securities in financial markets is not one of them, in Ciccarone’s view. After all, municipal securities dealers fall under the regulation of the Securities Exchange Act 15B specifically because they engage in “interstate commerce to effect any transaction [including] the purchase or sale of any municipal security.” If the purchase and sale of the goose’s eggs can be regulated, why not the goose?

In any legal matter, there is always going to be counterargument. According to some legal-eagles, the reason the Commerce Clause argument doesn’t apply to municipal bonds is two-fold. They object, in the first place, to the Goose’s Eggs analogy on the grounds that the issuer isn’t engaging in interstate commerce; rather, the underwriter is. The issuer’s bonds might be sold and distributed across state lines by others, but the issuers themselves aren’t doing that. It’s a thread-thin line perhaps, but it is a line nonetheless. They also object to the matter of the matter of the sovereignty issue as set forth under Article 10 of the US Constitution. Issuers of municipal bonds are public entities, municipal securities dealers are private entities. This is a crucial regulatory distinction: the feds can regulate private companies, but they cannot impose regulations, at least in this regard, on states.

If there is a legal conflict between the Constitution’s Commerce Clause, Article 10, and the Securities Acts of 1933 and 1934, it can only be resolved by one body: the Supreme Court. Currently, there are no cases regarding this matter on the Court’s docket.

Encouraging a Disclosure Framework

While the SEC and MSRB might not be able to establish a disclosure framework for the municipal bond market by direct fiat, they actively use their bully pulpit and big stick oversight powers to offer disclosure guidelines to the market and its borrowers. Recently, they took advantage of both.

The SEC and MSRB released a public statement on May 4, 2020, [The Importance of Disclosure for our Municipal Markets](#), in which it offered quite explicit guidance to “encourage” issuers on what and how to disclose. (Note the word “encourage” is applied no less than thirteen times in the SEC’s May 4 statement. Seven of those specifically refer specifically to municipal issuers, the first one in the introductory paragraph.)

This statement is consistent with the long-standing position on disclosure by these regulators. “Investor access to accurate, timely, and comprehensive information about municipal issuers and

their securities has long been a focus of the SEC,” stated Rebecca Olsen, the Director of the Commission’s Office of Municipal Securities. She continued, “[SEC] Chairman Clayton and I thought it was important to highlight this focus in light of the potentially significant effects of COVID-19 on the finances and operations of many municipal issuers.”

Explicit Language

For example, the release explicitly encourages borrowers to provide investors with forward-looking statements during this time, including five very clearly detailed bullet points explaining the why and the how. To those timid souls fretting about potential liability—there are no “safe harbor” rules on the governmental side preventing potential legal action for forward looking statements—the SEC promises that such good-faith, forward-looking disclosure would not be “second guessed”.

The regulators didn’t stop there. The statement goes on to offer four very specific “examples of information” that might be disclosed, such as Federal, State and Local Aid and Sources of Liquidity. It goes even further. For a “helpful guide” to frame municipal disclosure practices and procedures, it points to [Regulation Fair Disclosure](#) (65 FR 51716). Reg FD codifies best practices for corporate issuers. Interpret that as you will, but it sure sounds something like ‘if the corporate market can do it, the municipal bond market can too.’

The statement also points to the many reports for “other governance purposes” municipal issuers routinely prepare and release. This provides critical information not only to internal and external government administrators, but to investors as well.

Important point: Reading through all this, one cannot help but notice that the vast majority of this guidance and encouragement outlined here apply regardless of the state of public health. These are just good disclosure practices, regardless of Covid-19. The SEC and MSRB have set out some very clear “best practices.”

These may not be regulations, but the SEC is speaking loudly and has a big stick to back up its statements. It is entirely possible that what is “encouraged” now could eventually appear as must-haves in disclosure agreements. Borrowers are encouraged to listen.

Read the first two articles of this series:

[Covid-19: The Tipping Point For Municipal Disclosure?](#)

[Municipal Bond Market Disclosure: Through The Legal Looking Glass](#)

Next in the six-part series: The SEC and MSRB aren’t the only one’s setting out disclosure standards in the municipal bond market. Investors, borrowers, bond counsel and broker/dealers all have their very distinct—and sometimes opposing—views.

Forbes

by Barnet Sherman

Sep 21, 2020

[Charter School Defrauds Bond Holders.](#)

Municipal bonds are sold to fund a variety of local projects. One of the sales features is the local interest. Another can be the tax free income. These bonds can thus be a very attractive investment. Critical to the investment is the ability to repay. The necessary information is supposed to be provided to potential investors in the offering documents. If those documents do not have the proper information, as in the Commission's most recent municipal bond case, investors can suffer significant losses. *SEC v. Park View School, Inc.*, Civil Action No. 3:20-cv-08237 (D. Ariz. Filed September 14, 2020).

Park View School, defendant, is an Arizona nonprofit corporation based in Prescott Valley, Arizona. It operates two charter schools that receive funding from the state of Arizona. That funding is paid in monthly installments beginning in July, the start of the fiscal year. The payments are based on reported school enrollment. The schools submit a budget of anticipated expenses to the Arizona State Board for Charter Schools at the beginning of the year. The firm's operations and finances were managed by Debra K. Slagle, also a defendant.

This action is based on two offerings, the first in 2011 and the second in 2016. In 2011 Park View was a conduit borrower for a \$6.625 million by Pima Industrial Development Authority. The bonds were issued subject to an indenture agreement that governed disbursement of the bond proceeds and repayment of the bond investors. The 2011 Indenture provided that the trustee deposit almost \$250,000 of the bond proceeds into an Operating Reserve Fund to protect investors. The bonds were to build the school facilities.

Monthly deposits were required to be made to cover the operating expenses under the terms of the 2011 bond offering to an Operating Reserve Fund. Ms. Slagle, however, made 12 requested over a four-year period, beginning in May 2012, to withdraw funds. While she certified that each request was permissible, that claims were incorrect.

The school was unable to replenish the withdrawals despite efforts by Ms. Slagle to aid the project. By January 2016 Park View was essentially out of cash and owed \$400,000. Ms. Slagle made four requests totaling \$31,900 from the Operating Reserve Fund and a total of \$46,000 from the Repair and Replacement Fund. Each request certified that it was for unbudgeted expenses or repair and replacement costs. In fact, most of the funds were used to cover payroll and to pay other operating expenses.

In 2016 Ms. Slagle decided to seek another bond offering to repay the 2011 bonds and other debt. The Official Statement for the offering was posted on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access system in April 2016.

The statement was based on a feasibility study for the next two years that contained projects showing Park View as profitable. The projections contained material errors, understating, for example, the operating expenses for 2016 by 20%. Key to the projections was an expense reduction program. The statement and projections were created by Ms. Slagle.

The offering materials did not disclose the operating difficulties of Park View. While the projections were based on an expense reduction program, it had not in fact been adopted or implemented. Without that program Park View's on-going financial difficulties would preclude meeting the projections in the offering materials.

No debt reduction was ever adopted. By early the next year Park View defaulted. It was April 2017, one year after the offering. The complaint alleges violations of each subsection of Securities Act

Section 17(a) and Exchange Act Section 10(b). The action is pending.

SEC Actions - T. Gorman

September 15 2020

Roosevelt & Cross Settles Bond-Flipping Case; CEO Resigns.

Roosevelt & Cross agreed to pay about \$1 million as part of a settlement with the Securities and Exchange Commission over charges that the broker-dealer and its chief executive officer improperly allocated municipal bonds meant for retail buyers to professional investors looking to make a quick profit.

The SEC found that Roosevelt & Cross helped so-called “flippers” by circumventing order periods designated for individual investors between March 2014 and May 2017. The flippers would then resell the bonds to other broker-dealers for a profit. Roosevelt & Cross did not deny or admit the SEC’s charges.

Chief Executive Officer Thomas Vigorito resigned on Sept. 11, said Matthew Campolettano, the firm’s chief compliance officer.

The SEC’s order said that Roosevelt & Cross placed such orders for two firms, RMR Asset Management Company and Core Performance Management, LLC -also known as Dockside Asset Management — over 100 times and often during retail order periods.

“In almost all instances where bonds were allocated, Roosevelt’s registered representatives submitted inaccurate zip codes which corresponded to the state of the issuer and did not correspond to where Dockside and RMR were located,” the order said.

The SEC filed enforcement actions against RMR and Core and their associates in 2018.

Campolettano, the compliance officer, said in an emailed statement that the broker-dealer “is among the firms that interacted with flippers and failed to detect the flippers’ fraudulent misrepresentations.”

“These dealing with the flippers involved a very small part of the firm’s total business and took place between three and six years ago,” he said. “Roosevelt & Cross fully cooperated with the SEC in its investigation and took prompt remedial actions.”

The SEC also settled with Vigorito and William W. Welsh, a salesperson. Both representatives consented to cease-and-desist order findings but did not admit or deny the SEC’s allegations. The SEC’s order says that Vigorito had served as the company’s chief executive officer since 2017.

The SEC order against Vigorito said he would also engage in a practice known as “parking,” in which he would arrange for a bond flipper to buy a new issue deal underwritten by Roosevelt with the understanding that the flipper would sell the bonds back to Roosevelt at a higher price.

Roosevelt & Cross is ranked the 28th largest underwriter of long-term municipal-bond debt so far in 2020, according to data compiled by Bloomberg. The firm specializes in smaller bond deals sold by towns and school districts in New York, New Jersey and Connecticut.

Monday's announcement is the latest enforcement action by the SEC involving muni-bond flippers, an enforcement effort that's spanned years. In July, UBS Group AG agreed to pay more than \$10 million to resolve charges that it helped such buyers.

Bloomberg Markets

By Amanda Albright

September 14, 2020, 10:45 AM PDT Updated on September 14, 2020, 12:25 PM PDT

— *With assistance by Danielle Moran*

[GASB Opens Search for Director of Research and Technical Activities.](#)

Norwalk, CT, September 10, 2020 — The Governmental Accounting Standards Board (GASB) today announced that it has [opened a formal search](#) for the next GASB director of research and technical activities.

David R. Bean, the GASB's current director of research and technical activities, plans to retire on March 31, 2021 after more than 30 years with the organization.

The director in this role is the leader of the GASB staff and principal advisor to the GASB chair and Board. This position has a critical leadership function in the overall management of projects on the GASB's technical and research agendas, GASB project-related communications, and interaction and engagement with stakeholders.

Reporting to the GASB chair, the director leads and manages the GASB's 25 staff members on all technical accounting projects and ensures that detailed project plans, priorities, and timetables are consistent with the Board's goals and priorities. In addition, the director represents the GASB as a spokesman on technical issues at a variety of speaking engagements, serves as a primary liaison with key stakeholder groups, and develops the GASB budget.

The ideal candidate should be a demonstrated leader and critical thinker, have a passion for the GASB mission, a dedication to service, and extensive technical knowledge of state and local government accounting and financial reporting. The successful candidate will have a minimum of 15-20 years senior-level experience at a public accounting firm, government, university, or comparable organization.

A [full job description and list of requirements](#) can be found on the Financial Accounting Foundation (FAF) website. Interested candidates must apply by October 30, 2020.

[SEC Charges Charter School Operator With Fraudulent Municipal Bond Offering.](#)

SEC Charges Charter School Operator, Debra Kay Slagle, and its Former President With Fraudulent Municipal Bond Offering

Washington DC (STL.News) The Securities and Exchange Commission today charged Park View

School, Inc., a state-funded, nonprofit charter school operator based in Prescott Valley, Arizona, and its former President, Debra Kay Slagle, with misleading investors in an April 2016 municipal bond offering.

According to the SEC's complaint, Park View and Slagle made false and misleading statements about Park View's financial condition. As alleged, in the years and months leading up to the bond offering, Park View experienced significant operating losses and repeatedly made unauthorized withdrawals from two reserve accounts to cover routine operating expenses, to pay other debts, and to transfer money to affiliated entities. Park View allegedly provided investors an offering document that included misleading statements about profit and expense projections and showed that Park View would be profitable in the upcoming fiscal year and able to repay the bondholders. According to the complaint, investors purchased \$7.6 million in bonds in the April 2016 offering. Although the bonds were nominally offered by the Industrial Development Authority of the County of Pima, Arizona, Park View, as conduit borrower, received the bond proceeds and was responsible for repaying them. Park View allegedly defaulted one year later by reducing the interest payments that it made on the bonds.

"Issuers and conduit borrowers of municipal bonds must provide investors with an accurate picture of their financial condition, and any financial projections they provide to investors must have a reasonable basis," said LeeAnn G. Gaunt, Chief of the Division of Enforcement's Public Finance Abuse Unit. "The SEC will continue to vigorously pursue those who deceive investors, as we allege Slagle and Park View did."

The SEC's complaint, filed in U.S. District Court for the District of Arizona, charges Slagle and Park View with violating antifraud provisions of the federal securities laws. Without admitting or denying the allegations in the complaint, Slagle and Park View agreed to settle with the SEC and to be enjoined from future violations of the charged securities laws. Slagle further agreed to pay a \$30,000 penalty and to be enjoined from participating in future municipal securities offerings. The settlements are subject to court approval.

For further information about the SEC's enforcement actions involving fraud charges in connection with bond issuances by or on behalf of schools and colleges, see SEC v. Batchelor (N.D. Cal. April 27, 2020), SEC v. Rojas (C.D. Cal. September 19, 2019), and SEC v. Borge (S.D.N.Y. March 28, 2019). The SEC has also brought a number of recent enforcement actions against municipal advisors who provide services to school district issuers.

The SEC's investigation was conducted by Steven Varholik and Creighton Papier of the Enforcement Division's Public Finance Abuse Unit and John Yun of the San Francisco Regional Office, with assistance from Deputy Unit Chief Mark Zehner and Erin Smith of the Division of Economic and Risk Analysis. The investigation was supervised by Jason H. Lee.

STL.News

09/14/2020

[SEC Charges Charter School Operator and its Former President With Fraudulent Municipal Bond Offering.](#)

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[NFMA At-Large Board Elections.](#)

Each fall, the National Federation of Municipal Analysts Board accepts applications for three At-Large Board seats. The term for these seats is two years, commencing January 1, 2021. All regular members in good standing are eligible to submit an application. The election will take place in late October. While traditionally, participation on the Board would entail three in-person meetings per year (along with a few virtual meetings), the current pandemic has curtailed in-person meetings until later in 2021.

Questions about serving on the Board may be addressed to Lisa Good at lgood@nfma.org.

To submit an application, [click here](#) or go to the Member Home page (after logging in).

Applications are due by October 1.

MSRB Event-Based Continuing Disclosures.

Event-based continuing disclosures that cite COVID-19 continue their downward trajectory.

[Read this week's disclosure summary report.](#)

SEC Identifies LIBOR Preparedness as an Examination Priority.

On 18 June 2020 the Securities Exchange Commission's (SEC's) Office of Compliance Inspections and Examinations (OCIE) announced the details of an examination initiative specifically focused on London Interbank Offered Rate (LIBOR) preparedness.(1)

The OCIE has previously identified LIBOR preparedness of registrants (eg, SEC-registered investment advisers, broker-dealers, investment companies, municipal advisers, 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. The OCIE will be conducting examinations to facilitate an orderly transition.

Examination process

According to the OCIE's release, examiners will review whether and how a registrant has evaluated the potential impact of the LIBOR transition on the organisation's:

- business activities;
- operations;
- services; and
- 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. The OCIE has also identified the types of information and document that may be sought in these examinations, including:

- information regarding any individuals or groups (eg, 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 (eg, performance-based fees) or performance reporting (eg, 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 organised as a corporation;
 - information regarding any third-party vendors the registrant uses that may be impacted by the LIBOR transition, including the services provided (eg, back office) and how the vendor may be impacted; and
 - 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 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. Further, as a matter of best practice, firms should begin collecting information that would be responsive to the areas identified by the OCIE.

Endnotes

(1) See SEC, "[Examination Initiative: LIBOR Transition Preparedness](#)" (18 June 2020).

(2) See SEC, "[Examination Priorities for Fiscal Year 2020](#)" (7 January 2020).

Shearman & Sterling LLP - Donna M Parisi, Geoffrey B Goldman, Azam H Aziz, Jennifer Oosterbaan

[NABL: Disclosure Industry Working Group Publishes Paper on Timely Disclosures](#)

The Disclosure Industry Working Group has released a paper entitled, General Continuing Disclosure Considerations for Municipal Securities Issuers. The considerations were developed to provide guidance to issuers on timely disclosure. The ongoing COVID-19 pandemic and its impact on all municipal governments and their respective economies highlights a need for accurate, timely, and responsive municipal disclosure.

The paper contains eight considerations including:

- Material Event Filings
- Know Your Annual Disclosure Filing Dates
- Making Annual Continuing Disclosure Filings
- Good Investor Relations
- Determining Whether and/or When to Make Voluntary Disclosure Filings
- Presenting COVID-19 Voluntary Disclosure Information
- EMMA Filings
- Post-Issuance Compliance for Tax Law Purposes

While the considerations contained in the paper are general in nature, different issuers of different credits may need to take into account other specific considerations while addressing disclosure both generally and during the COVID-19 pandemic. Further, while the recommendations are actions that municipal issuers should consider, all issuers are encouraged to discuss COVID-19 disclosure with their entire financing team, including with their bond or disclosure counsel.

The organizations who signed onto the paper include:

- Bond Dealers of America (BDA)
- Government Finance Officers Association (GFOA)
- National Association of Bond Lawyers (NABL)
- National Association of Municipal Advisors (NAMA)
- National Association of State Auditors, Comptrollers and Treasurers (NASACT)
- National Association of State Treasurers (NAST)
- National Association of Health and Educational Facilities Finance Authorities (NAHEFFA)
- National Federation of Municipal Analysts (NFMA)

You can find the paper [here](#).

[MSRB Disclosure Summary Report.](#)

Rating change disclosures citing COVID-19 hit their highest weekly count since early May.

[Read the MSRB's new disclosure summary report.](#)

[MSRB Weekly COVID-19-Related Continuing Disclosures.](#)

Weekly COVID-19-related continuing disclosures hit their second-highest weekly figure, driven in large part by 356 new quarterly and monthly financial information disclosures.

[Read this week's disclosure summary report.](#)

[FAF Reappoints Robert Scott and Alan Skelton to Leadership Roles on the](#)

Governmental Accounting Standards Advisory Council.

Norwalk, CT—August 18, 2020 — The Board of Trustees of the Financial Accounting Foundation (FAF) today announced the reappointment of Robert Scott and Alan Skelton as chair and vice chair, respectively, of the Governmental Accounting Standards Advisory Council (GASAC). The reappointments are for a one-year term beginning on January 1, 2021.

The GASAC is responsible for advising the Governmental Accounting Standards Board (GASB) on technical issues, project priorities, and other matters that affect standard setting for accounting and financial reporting by state and local governments. Members of the GASAC represent a cross-section of the GASB's state and local government stakeholders, including users, preparers, and auditors of financial information. GASAC members are selected for their professional expertise and the depth and breadth of experience they bring to the Council.

The GASB is the independent, private-sector organization that sets accounting standards for state and local governments in the United States. The FAF oversees the activities of the GASB and its sister accounting standard setter, the Financial Accounting Standards Board (FASB).

"We are very pleased that Robert and Alan have agreed to continue their strong leadership of the GASAC for another year," said Kathleen Casey, chair of the FAF Board of Trustees. "They combine strategic insight with on-the-ground perspective about accounting issues facing state and local governments, and they have proven to be capable leaders and advisors to the GASB."

Mr. Scott has been the Director of Finance and Administration for the city of Brookfield, Wisconsin since 1999. Prior to joining the city of Brookfield, he served in similar financial management positions for Milwaukee Area Technical College and the cities of Franklin and Cedarburg, Wisconsin. Before entering the public sector, he was employed as an audit manager with the accounting firm of Deloitte & Touche. He joined the GASAC in 2011 as a representative of the Government Finance Officers Association and has served as chair since 2015.

Mr. Skelton serves as the State Accounting Officer for the state of Georgia and was initially appointed to the position by Governor Nathan Deal in July 2012. He was reappointed by Governor Brian Kemp in January 2019. He provides accounting leadership for the state of Georgia, which includes oversight of statewide financial reporting, issuing accounting policy and interpretation of GAAP standards, and the implementation of business process improvements. Before his current appointment, he was Deputy State Accounting Officer for three years and had more than a decade of experience in public accounting roles.

SIFMA Seeks to Vacate Muni Advisor BD Exemption: Cadwalader

SIFMA [filed suit](#) seeking to vacate a recently adopted SEC temporary exemption for municipal advisors from broker-dealer registration. The exemption (which was previously covered here) permits municipal advisors to make limited solicitations to certain banks and similar entities to invest in "direct placements" of municipal issuers without being subjected to broker-dealer registration.

SIFMA stated that existing market data do not support the purported need for the exemption, which harms investors and other market competitors by "eliminating investor protections and critical reporting requirements." SIFMA President and CEO Kenneth Bentsen Jr. asserted that "through the

[exemption], the SEC allows municipal advisors to engage in broker-dealer activity without the attendant legal and regulatory requirements that apply when a broker-dealer is engaged.”

The SIFMA petition – filed for review in the D.C. Circuit Court of Appeals – has yet to be made public.

Cadwalader Wickersham & Taft LLP – Nihal S. Patel

August 19 2020

[LIBOR Transition: Business Loans SOFR Summer Wrap Up - McGuireWoods](#)

It’s been a busy summer in the land of LIBOR transition preparation. As part of the ARRC’s ongoing efforts to prepare the cash product markets for the transition to SOFR and away from LIBOR as a benchmark interest rate, it posted ten separate releases between Memorial Day and August 7, 2020, in addition to hosting six “SOFR Summer Series” panel discussions on various SOFR topics (which were recorded and can be accessed [here](#)). This blogpost focuses on aspects of the ARRC’s releases relating to business loans.

Read on for more details, but here are a few major takeaways: (1) don’t expect any COVID related delays in the LIBOR sunset schedule – work on implementing hardwired LIBOR fallback language this fall and plan stop using LIBOR by mid-2021; (2) the ARRC now recommends simple SOFR in arrears as the best available fallback rate alternative for most business loans (at least until a term SOFR in advance market develops); and (3) feedback from the business loan market reflects a preference for following ISDA’s lead on LIBOR to SOFR transition issues whenever practicable to facilitate consistency between swaps and business loans (e.g., spread adjustments and certain conventions).

ARRC Best Practices for Completing Transition from LIBOR

On May 27, 2020, the ARRC released its “[Best Practices for Completing Transition From LIBOR](#),” which set the table for its later releases over the summer. The key recommendations for business loans:

- To the extent not already utilized, all new business loans should include ARRC-recommended (or substantially similar) **hardwired** USD LIBOR fallback language (rather than relying on the “amendment approach” which has been more widely accepted to date) as soon as possible, but in no event later than September 30, 2020.
- Third-party technology and operations vendors relevant to business loans (including those with booking, trading, valuation, settlement, and accounting systems used for loans) should complete all necessary enhancements to support SOFR (including but not limited to simple, compounding in arrears, and term SOFR) by September 30, 2020.
- No business loans using USD LIBOR and maturing after 2021 should be originated after June 30, 2021.
- For business loans specifying that one or more parties will select a replacement rate for USD LIBOR at their discretion, the determining parties should disclose to relevant parties the replacement rate and any related spread adjustment methodology that they anticipate selecting to relevant parties at least 6 months prior to the date that a replacement rate would become effective.

The release also set forth recommendations for Floating Rate Notes, Consumer Loans, Securitizations and Derivatives. Click through above and check in with this blog for further detail on the ARRC's best practices recommendations for those products.

SOFR Spread Adjustments Revisited

In a June 30 release, the ARRC elaborated on its prior recommendation for a spread adjustment methodology in cash products, based on market participant feedback from its supplemental consultation on spread adjustment methodology. Recall that the ARRC had initially recommended a spread adjustment methodology based on a historical median over a five-year lookback period calculating the difference between USD LIBOR and SOFR, which matches the methodology recommended by the International Swaps and Derivatives Association (ISDA) for derivatives, with a 1-year transition period to this methodology for consumer products.

<<https://www.liborblog.com/2020/04/arrc-announce-recommendation-of-a-spread-adjustment-methodology-for-cash-products/>>.

After soliciting and receiving additional market feedback on the interaction of this methodology with ISDA's methodology and timing, the ARRC clarified in a [June 30 release](#) that:

- for cash products (other than consumer products), the ARRC would recommend that the value of USD LIBOR spread adjustment match the value of ISDA's spread adjustment spread adjustments (rather than merely using the same adjustment methodology to calculate a different spread adjustment for each potential fallback rate), while reserving on treatment for consumer products; and
- for all cash products, in the event of a pre-cessation trigger, the ARRC's recommended 5-year historical median spread adjustments will be determined at the same time as the ISDA's spread adjustments (which will be at the time of any announcement that LIBOR will or has ceased or will or has become no longer representative).

In short, the ARRC continues to respond to feedback from market participants that cash products should be closely aligned with the swaps and derivatives market in the transition from LIBOR to SOFR.

Updated Hardwired Fallback Language: This Time We Mean It

The ARRC also released updated recommended "Hardwired" fallback language for syndicated loans on June 30. Recall that in April 2019, the ARRC released both "Amendment" fallback language (adopting a streamlined but flexible amendment process to incorporate a to-be-determined substitute benchmark rate for LIBOR) and "Hardwired" fallback language (contemplating Compounded SOFR in Advance as the default substitute benchmark rate) for syndicated loans. The syndicated loan market responded by almost uniform adoption of some version (in some cases modified) of the "Amendment" language, with little uptake of the "Hardwired" approach.

In an effort to help foster adoption of a "Hardwired" approach beginning in Q4 2020 as recommended in its May 2020 "Best Practices" release, the June 30 ARRC release modifies its recommended "Hardwired" amendment language to account for market feedback and easier market adoption. "To the extent market participants continue to enter into LIBOR-based contracts, the ARRC recommends and endorses the fallback language and related guidance herein and believes the cash markets will benefit by adopting a more consistent, transparent and resilient approach to contractual fallback arrangements for new LIBOR products." It is a lengthy release containing both updated form contract language and an explanatory guide. A few highlights:

- *Available Tenors*: Refines the references to and transition between LIBOR tenors (forward looking periods (e.g., 30/60/90 days) of locked rates) and potential SOFR tenors (periods of interest accrual and interest payment periods).
- *Benchmark Replacement Triggers*: Clarifies that the “No Longer Representative” prong of the benchmark replacement trigger will only be triggered when “all Available Tenors” of LIBOR are deemed unrepresentative of market conditions. This will prevent an unintended early benchmark transition trigger if only certain LIBOR tenors become unreliable (e.g., as we approach the formal LIBOR cessation date, longer LIBOR tenors may become unrepresentative while shorter LIBOR tenors remain viable), allowing administrative agents to “turn off” those LIBOR tenors that are deemed no longer representative.
- *Benchmark Replacement Waterfall*: Changes the “waterfall” of benchmark replacement rates (originally drafted as (1) forward looking term SOFR (plus a spread adjustment) (which does not currently exist and may not exist), then (2) compounded SOFR (either in advance or in arrears) (plus a spread adjustment), then (3) as selected by the Administrative Agent and Borrower (plus a spread adjustment)) **by replacing** compounded SOFR in arrears (step 2) with daily simple SOFR. The ARRC rationale for the change: the use of compounded SOFR in advance does not match the needs of business loans to accommodate frequent unscheduled balance changes (e.g., prepayments), and although compounded SOFR in arrears better matches the ISDA calculation convention, daily simple SOFR can be more easily implemented on bank systems now and historically only varies from compounded SOFR in arrears values by a few basis points. The ARRC release contains detailed explanations on when market participants might prefer to use daily compounded SOFR in arrears or compounded SOFR in advance, so it should be reviewed for further detail on the differences in these calculations.
- *Spread Adjustments*: Implements the revised ARRC approach to spread adjustments released on June 30 and summarized above, and defaults to available ISDA spread adjustments if ARRC approved spread adjustments are not available.

The revised language contains other modifications and should be reviewed in detail with the guidance that follows it in the June 30 release.

Down to Details: SOFR “In Arrears” Conventions for Syndicated Business Loans

In the June 30 ARRC release updating the “Hardwired” fallback language, the definition of “Daily Simple SOFR” provides that the administrative agent shall establish conventions for that rate in accordance with ARRC recommended conventions. On July 22, the ARRC released its initial guidance on conventions for “in arrears” structures ([Daily Simple SOFR and Daily Compounded SOFR](#)). To remind, these rate structures allow for interest accruals to be calculated daily, but they are not set in advance and not fixed during each interest period (both of which are true for forward-looking term LIBOR rates). The recommended ARRC conventions for “In Arrears” rate structures described in the July 22 release address both new loans that are originated using SOFR and legacy loans that “fall back” from LIBOR to SOFR upon LIBOR cessation or LIBOR being declared to be unrepresentative. The ARRC emphasized in its release that these convention recommendations are voluntary and may not be applicable to all segments of the business loan markets. Some highlights:

- *Compounding*: The release compares simple interest and compound interest, and describes different calculation approaches for compounding in arrears.
- *Lookback / Lockout / Payment Delay*: The release recommends using the business day “lookback” approach with no observation shift for SOFR loans. A five day “lookback” convention (different days can be selected by market participants) for a June 1 loan with a 30 day interest period, for example, would apply the May 25 SOFR rate to the June 1 balance, and so on throughout the interest period, so that by June 23, the administrative agent will know the daily rates through the

end of the 30 day interest period. This would enable the administrative agent to determine the rate of interest for the interest period before the period ends and the payment is due, so that the administrative agent has time to invoice the borrower and the borrower has time to pay the interest on time. The ARRC rejected an observation shift for compounded SOFR in arrears (which would weight the rate by the daycount weight of the “lookback” day in the compounding formula) for creating unnecessary complexity relative to the benefit gained in reduced hedging basis relative to a standard SOFR OIS contract.

- *Holiday and Weekend Conventions:* For Compound Interest, interest would be compounded on business days, and the preceding business day’s rate would be applied over weekends or holidays, weighted by the number of calendar days until the next business day. For Simple Interest, the preceding business day’s rate would be applied over weekends or holidays, weighted by the number of calendar days until the next business day. For payment dates, the release recommends a convention similar to that applicable to LIBOR today: if a SOFR loan is repaid to a UK lending office on a US Business Day that is not a UK Business Day, it would remain in the swift/clearing account of the UK lending office until the following UK Business Day when the lending office processes the payment. A borrowing notice for a USD borrowing sent to a UK Bank on any day other than a UK Business Day would be processed on the next succeeding UK Business Day.
- *Daycount:* actual / 360 (standard for US money markets).
- *Modified Following Business Day Convention:* payments dates that fall on a non-Business Day would be adjusted to the next succeeding business day, unless that business day falls in the next succeeding calendar month, in which case the interest payment date would be the preceding business day.
- *Rounding: interest-rate calculations rounded (not truncated) to 5 decimal points;* dollar amounts rounded to 2 decimal points (for example in an invoice or ledger reports), but recommends that calculations not be rounded internally.
- *Floors:* interest rate floors would be calculated daily and not at the end of an interest period because loans accrue interest daily and loan funds strike a daily net asset value based on this daily accrued interest.
Distribution of Interest: Daily accrued interest calculated on each lender’s share of principal that day, which is same convention currently used for LIBOR loans.
- *SOFR Index:* The release points out that the ARRC published SOFR Index is less useful for business loans than other cash products, such as floating rate notes, due to (1) use of an observation shift (as noted above, not recommended for business loans), (2) the possibility of frequent intra-period prepayments for business loans and (3) the possibility for interest rate floors in business loans, which are not compatible with the SOFR Index.
- *Compensation for Losses:* The release recognizes that typical “breakage” language found in LIBOR based loan agreements may not be applicable to Daily Simple SOFR or Daily Compounded SOFR, but that market participants may wish to include language that compensates lenders for funding losses due to intra-period prepayments.

Wrapping up the SOFR Summer with the SOFR Starter Kit

The ARRC wrapped up its busy “SOFR Summer” with the release of its [“SOFR Starter Kit”](#) on August 7. This release links to three factsheets covering (1) the History and Background of USD LIBOR, the ARRC and SOFR, (2) Key Facts about SOFR and (3) SOFR Next Steps. These convenient fact sheets consolidate current best practices and timelines for transitioning from LIBOR to SOFR, and link through to more detailed materials previously published by the ARRC and maintained on its website.

By Donald A. Ensing, Susan Rodriguez, Jennifer J. Kafcas & Barlow T. Mann on August 21, 2020

[ARRC Updates Recommended Best Practices in Anticipation of ISDA's IBOR Fallback Protocol: McGuireWoods](#)

On August 19, 2020, the ARRC updated its recommended Best Practices for the LIBOR transition in anticipation of the imminent publication of ISDA's IBOR Fallback Protocol (the "Protocol") (which we discussed in our earlier blog post, available [here](#)).

These updates follow the July 22, 2020 letter from ISDA (the "Letter") (available [here](#)), in which ISDA confirmed that market participants will be able to sign up to the Protocol "in escrow". This will consist of a two-week pre-publication period in which firms can sign up in order to adhere to the Protocol as promptly as possible. It is expected that this escrow period will begin soon, though no hard date has yet been set.

In light of the Letter, the ARRC's Best Practices have been updated to include a specific recommendation to "[d]ealers and other firms with significant derivatives exposures" to sign up to the Protocol during the escrow period to promote adoption as quickly as possible. The Best Practices have also been updated to recommend that other market participants adhere to the Protocol "within the 3 to 4 month period after it is published and before the amendments to embed the fallbacks in legacy transactions take effect."

As such, it is important that market participants, especially those with significant derivatives exposures, consider adhering to the Protocol "in escrow" in order to navigate the transition of their legacy derivatives as smoothly and efficiently as possible. Please contact any of the authors of this article or your regular McGuireWoods contact if you have questions about, or would like assistance with, the LIBOR transition.

By Jennifer J. Kafcas, Donald A. Ensing, Susan Rodriguez, Lauren J. Blaber & Harry Poland on August 24, 2020

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[MSRB COVID-19 Rating Change Disclosure Report.](#)

COVID-19-related rating change disclosures continue to rise, now at their highest point in almost three months.

[Read the MSRB's new disclosure summary report.](#)

[SIFMA Files Suit Seeking to Vacate SEC's Temporary Conditional Exemption for Municipal Advisors.](#)

Washington, D.C., August 14, 2020 - SIFMA today filed a suit seeking to vacate the Securities and Exchange Commission's Order Granting a Temporary 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 (TCE). The TCE permits registered municipal advisors to

solicit banks, their wholly-owned subsidiaries that are engaged in commercial lending and financing activities, and credit unions in connection with direct placements of securities issued by their municipal issuer clients, without registering as broker-dealers.

The Commission described the TCE as a measure needed to provide relief to small issuers in light of the Covid-19 pandemic. Generally speaking, SIFMA applauds the SEC's and other regulators' ongoing efforts to proactively respond to pandemic-related interference with normal market operations. In this case, however, the purported need for the TCE is not supported by existing market data and creates a host of negative consequences for not only other market competitors but also issuers and investors alike.

"The TCE creates an uneven playing field that exclusively benefits municipal advisors at the expense of more regulated broker-dealers, and ultimately we believe at the expense of issuers and market transparency," said Kenneth E. Bentsen, Jr., president and CEO of SIFMA. "The SEC in effect suspended SEC regulatory requirements for one type of business entity, at the expense of another. Further, we believe the SEC failed to follow the proper procedure by taking such sweeping action absent a formal rulemaking with notice and comment, along with a genuine cost benefit analysis."

The SEC has suggested for some time that it would consider taking this type of action and SIFMA has repeatedly argued that the Commission must go through a formal rulemaking process involving notice and comment and rigorous cost benefit analysis, where SIFMA believes the proposal would fail. Instead, the Commission chose to assert its exemptive powers to cure a perceived emergency in the small-issue municipal market, which is not supported by existing market data. The Commission's claim is not supported by the facts, and even if it were, such circumstances would not justify eliminating substantive issuer and investor protections.

The Commission's action has a detrimental impact on investors and the municipal market by eliminating investor protections and critical reporting requirements. In addition, there is no evidence the TCE creates cost savings for municipal issuers by lowering fees or by creating additional market liquidity. The only parties benefiting from the TCE are municipal advisors who are now incentivized to advise clients to engage in transactions that fit within the parameters of the TCE. As a result, the investor protections and stringent reporting requirements under MSRB rules and Exchange Act Rule 15c2-12 that apply when a broker-dealer is involved do not apply to municipal advisors under the TCE. The resulting lack of transparency could have broad and detrimental effects on issuers, investors and the municipal markets.

The SEC did not adequately justify why it is "consistent with the public interest and protection of investors" for municipal advisors to engage in broker-dealer activity pursuant to the terms of the TCE without the protections afforded to investors when a registered broker-dealer is engaged.

"Through the TCE, the SEC allows municipal advisors to engage in broker-dealer activity without the attendant legal and regulatory requirements that apply when a broker-dealer is engaged. Broker-dealer transaction reporting requirements provide critical market data and transparency to the municipal securities market. These reporting requirements, along with other significant compliance obligations, are completely lacking when a municipal advisor acts pursuant to the TCE. There is also a risk of harm to issuers, as the TCE undermines the duty owed them by advisors, and the SEC has not provided any empirical evidence that issuers would benefit from the TCE as compared to the public market or direct placements solicited by broker-dealers," said Mr. Bentsen.

[GASB Offers Grants for Research on Severe Financial Stress.](#)

[Read the Request for Research.](#)

[08/12/20]

[MSRB to Implement Strengthened Board Governance and Announces FY 2021 Board Leadership.](#)

Washington, DC - The Municipal Securities Rulemaking Board (MSRB) announced today that enhancements to its governance structure would take effect for the fiscal year beginning October 1, 2020. The MSRB initially proposed the strengthened governance standards in a filing to the Securities and Exchange Commission (SEC) in June after a lengthy comment process. The new rules tighten the standards for selecting members and reduce the size of the Board of Directors that oversees the self-regulatory organization (SRO) responsible for safeguarding a fair and efficient municipal securities market. The SEC approved the standards on Wednesday, August 5.

In its [approval order](#), the SEC noted it had carefully considered the proposed rule change, the comment letters received and the [MSRB's letter](#) in response to comments.

Bob Brown, MSRB Board member and Chair of the Board's Governance Review Special Committee said: "The rules approved by the SEC remove even the appearance of a conflict of interest for public members of the MSRB Board. We also begin a two-year process to scale down the size of the Board following its expansion a decade ago."

Amended MSRB Rules A-3 and A-6 tighten the eligibility requirement for public board members by requiring separation from a regulated entity of at least five years. The amended rules also reduce the size of the 21-member Board, initially moving to 17 members in Fiscal Year 2021 before ultimately shrinking to 15 members in FY 2022. The Board had expanded to 21 members in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 as a way to provide additional flexibility in balancing public and regulated membership and to broaden the range of Board-member perspectives during the development of the core municipal advisor regulatory framework.

As part of its transition to a smaller board size, the Board approved extending the terms of two current Board members whose terms were about to expire. Julia Cooper, Director of Finance, City of San Jose, will remain on the MSRB Board as a public member representing issuers. Ed Sisk, current Board Chair and Managing Director, Head of Public Finance at BofA Securities, will remain on the Board as a regulated member. The 17-member transitional Board will therefore include two issuer representatives among its nine public members. Also, as required by statute, the Board will continue to be as closely divided in number as possible between public and regulated representatives.

In addition to extending their terms, the Board re-elected Sisk to serve as Chair and elected Cooper to serve as Vice Chair in FY 2021.

"We are fortunate to have Ed's experienced leadership at the helm of the Board especially at this time of unprecedented strain on market participants stemming from the pandemic and during the integration of a new CEO into the MSRB team," said Brown. "As we demonstrated when we amended our original transition plan, the Board believes this is a critical time to have effective

issuer representation on the Board. With Julia and our FY 2020 Vice Chair Manju Ganeriwala both continuing on the Board in FY 2021, the MSRB will have the benefit of local and state issuer representation next year.”

The Board formed the Governance Review Special Committee in September 2019 to begin a comprehensive review of the MSRB’s governance practices. In January 2020, the Board solicited public comment on a number of proposed changes to MSRB Rules A-3 and A-6. The comment period occurred during the early stages of the pandemic, and in response to requests from stakeholders, the Board extended the original 60-day comment period to 90 days to ensure all interested persons had sufficient time to prepare comments. After reviewing the comments received, the MSRB then filed a revised proposal for SEC approval, where additional comments were received and considered.

[Read the MSRB’s approval notice.](#)

Date: August 6, 2020

Contact: Leah Szarek, Interim Chief External Relations Officer
202-838-1500
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[Financial Accounting Foundation Board of Trustees Notice of Meeting.](#)

[Read the Notice.](#)

[08/03/20]

[FINRA Issues Guidance to Help Firms Prepare for LIBOR Transition: McGuireWoods](#)

On August 5, 2020, FINRA issued a [regulatory notice](#) outlining steps for broker-dealers to prepare for the pending transition away from LIBOR. The notice reminds firms to “evaluate their exposure to LIBOR” and “review their preparedness to manage LIBOR’s phase-out.” While the notice expressly disclaims any agency view of “specific effective practices,” it provides questions for firms to consider and a general description of best practices, which derive from responses to a survey undertaken by FINRA of a cross-section of member firms.

The survey found that, while large broker-dealers, especially those affiliated with large bank holding companies, had implemented extensive programs to prepare for the LIBOR transition, many other FINRA members had implemented only limited efforts. To help these firms prepare, FINRA shared practices relating to the following categories of preparedness:

- **Governance Framework:** Not surprisingly, as with any large-scale change event affecting the industry, FINRA found that many firms have prepared for the transition by implementing governance frameworks to manage the LIBOR phase-out. These firms will assign organizational responsibility for preparing for and managing the transition and developing “comprehensive phase-out plans,” including identifying process changes, setting timelines, and tracking progress.
- **Financial Risk:** FINRA also found that firms are evaluating their financial risk by identifying their

inventory of products and contracts maturing or rolling over after the phase-out to estimate the exposure of the firm and its customers.

- **Operational Risk:** FINRA found that firms are evaluating their operational risk by identifying “business processes, business units, information systems and vendors that would be impacted by the phase-out” and by testing the firm’s market, credit, and liquidity models with appropriate new reference rate(s).
- **Alternative Reference Rates:** FINRA found that firms have “reviewed and identified options” for alternative reference rates to replace LIBOR, including by participating in, or following the work of, industry organizations.
- **Legal Risk:** FINRA found that firms are reviewing their exposure to legal risk by identifying all existing contracts impacted by the phase-out and reviewing or developing fallback language. In some cases, this may include renegotiating contracts to account for the transition and replacement with alternative rates.
- **Staff Training and Customer Education:** Finally, FINRA found that firms have prepared by providing education and guidance to their staff, customers, and counterparties, including by developing “centralized” resources and guidance for staff and by “providing disclosures on firm websites and customer communications” about the phase-out’s impact on the firm’s customers and its products.

We can expect more information from FINRA between now and leading up to the transition deadline. As FINRA stated in its [2020 Risk Monitoring and Examination Priorities Letter](#), in highlighting their continued efforts to “explore new ways to expand our dialogue with firms about risks and trends facing the industry,” it intends to engage with firms outside the examination program in order to understand how firms are preparing for the LIBOR transition. FINRA has used this approach to understand other issues with significant impact on the industry and shared its findings in the form of notices and reports to assist other firms in meeting the challenges. Additionally, the 2020 Letter emphasized FINRA’s intent to assess the transition impact on customers, in addition to assessing risk and exposure to LIBOR-linked products.

FINRA’s notice follows the [June 18, 2020, SEC Risk Alert](#) announcing that its Office of Compliance Inspections & Examinations (“OCIE”) had identified registrant preparedness for the LIBOR transition as an examination priority for fiscal year 2020. OCIE stated that it “intends to engage with registrants through examinations to assess their preparations for the expected discontinuation of LIBOR and the transition to an alternative reference rate.” These examinations will review, among other items, exposure of firms and their investors to LIBOR-linked contracts, “operational readiness” to manage the transition, and firms’ disclosures and representations to investors regarding their “efforts to address LIBOR discontinuation and the adoption of alternative reference rates.”

The SEC also highlighted the LIBOR transition in its [2020 examination priorities alert](#). OCIE noted that the examination staff, along with other SEC Divisions and Offices, would engage with firms to assess the impact the transition would have on risk and compliance challenges. OCIE also highlighted that they would pay particular attention to disclosure issues “regarding [firms’] readiness, particularly in relation to the transition’s effects on investors.” OCIE concluded by encouraging “each registrant to evaluate its organization’s and clients’ exposure to LIBOR, not just in the context of fallback language in contracts, but its use in benchmarks and indices; accounting systems; risk models; and client reporting, among other areas. Insufficient preparation could cause harm to retail investors and significant legal and compliance, economic and operational risks for registrants.”

These communications highlight the extensive attention given by the federal government and financial regulators to ensuring industry’s proactive preparedness for the LIBOR transition and its

consequences. We can expect to see further alerts from both regulators throughout the rest of 2020 and in 2021 as they share what they have learned from their engagement with the industry about what has worked and not worked for firms in preparing for the end of reliance on the LIBOR standard.

By Emily Gordy, Bryan M. Weynand & Edward M. Nogay on August 10, 2020

McGuireWoods LLP

[Brace for More SEC Muni Advisor Antifraud Actions.](#)

SEC hasn't taken enforcement action against a municipal advisor in over a year, but that situation could change very soon.

As we approach the 10-year anniversary of Dodd-Frank's municipal advisor antifraud and registration provisions, which takes place on Oct. 1, several trends are converging that may put municipal advisors in the SEC's crosshairs.

Historically, the SEC's enforcement actions against issuers of municipal bonds often look very similar to the actions brought against issuers of other securities.

So, for example, a few years ago, the New York and New Jersey Port Authority paid \$400,000 to settle SEC claims the Port Authority violated the antifraud provisions of the federal securities laws in connection with a \$2.3 billion bond offering.

The Port Authority admitted failing to disclose to investors known material risks surrounding the potential lack of legal authority to fund the projects described in the bond offering documents. This and dozens of other, similar SEC cases are fairly routine stuff as against securities issuers.

However, in 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act contained a municipal advisor antifraud provision that for the first time specifically applied to the many advisors who assist municipal entities with bond offerings, reinvestment of bond proceeds, and structuring and pricing of related products.

It took the SEC six years after Dodd-Frank became effective before it used its new tool to bring an enforcement action for the first time against a municipal advisor.

'Opening of Floodgates'

The SEC's first case applying the municipal advisor antifraud provision involved a small, California-based advisor to several school districts who allegedly shared confidential information with financial professionals being considered by the school districts for certain advisory contracts. The advisory firm paid a small fine to settle the matter.

But the floodgates opened: since that first 2016 case, the SEC has brought several more enforcement actions against municipal advisors. Until the middle of 2019.

In June of last year, the SEC brought an action against a municipal advisor for breaching its fiduciary duties to its client: a small public library district in Illinois.

According to the SEC, the advisor (among other things) "did not provide the Library District with the

information and advice needed to determine whether the price of the bonds was fair and reasonable . . . and the mispricing of the bonds will cause the Library District to pay more than \$500,000 in additional interest over the life of the bonds.”

The municipal advisor paid a \$50,000 penalty to settle.

But the SEC hasn't brought any enforcement actions against a municipal advisor in over a year. Current volatile market conditions and the unprecedented precarious fiscal posture of many municipalities create a unique set of risks that may cause the SEC to end its drought.

Coronavirus Climate

News reports in the spring painted a dire picture of the impact COVID-19 would have on municipal bond issuers: “Delinquencies in the municipal market — already on the rise as counties and cities get squeezed by the coronavirus crisis — are likely to worsen amid soaring unemployment, rising alarm about stressed municipalities, and Federal conflict about aid,” according to a Barron's report in April.

More recent reports note that the Federal Reserve's \$500 billion Municipal Liquidity Facility — open to states and cities and counties that meet population thresholds — have calmed the municipal bond markets. Ironically, even municipalities that qualify aren't using the federal backstop in large numbers because bond issuance is way up.

“In all, about \$201.5 billion in municipal bonds were issued during the first half of the year, up from \$173.3 billion during the first half of 2019,” according to the Fed.

Against this backdrop, the SEC put out a public statement in May with an explicit (and verbose) headline: “The Effects of COVID-19 Have Raised Uncertainties Regarding Financial Status of State and Local Governments and Special Purpose Entities; Municipal Securities Issuer are Encouraged to Provide Updated Financial and Other Disclosures; Financial Professionals are Encouraged to Discuss These Matters with Main Street Investors.”

The SEC emphasized the types of information that it views as critical to municipal bond investors:

- The impact of COVID-19 on operations and financial condition;
- Sources of liquidity availability of federal, state and local aid; and
- Reports prepared for other governmental purposes.

The municipal bond market is booming; the risks faced by that market are enormous and unprecedented; the SEC is hyper-focused on ensuring that retail muni-investors receive adequate disclosures; and municipalities will rely in no small part on financial advisors to successfully navigate this high wire.

Expect the SEC to spend the next several years forensically pouring over the events of the next several months to find its next case against a municipal advisor.

ThinkAdvisor

By Nicolas Morgan | August 07, 2020 at 09:31 AM

SEC Publishes OCIE Risk Alert on LIBOR Transition Preparedness Examination Initiative: Dechert

The Securities and Exchange Commission’s Office of Compliance Inspections and Examinations issued a National Exam Program Risk Alert on June 18, 2020 (Risk Alert),¹ which introduces an examination initiative on the upcoming discontinuation of, and transition from, LIBOR² to alternative risk-free reference rates (widely referred to as RFRs) (LIBOR Transition). The Risk Alert states that the examination initiative (LIBOR Exams), which has commenced recently, is intended to allow OCIE to assess the preparedness of SEC-registered investment advisers, broker-dealers, investment companies, municipal advisors, transfer agents and clearing agencies (collectively, Registrants) that may be impacted by the LIBOR Transition. The Risk Alert includes a sample list of documents that may be requested in a LIBOR Exam and is intended to assist Registrants with their preparations.

This Dechert OnPoint provides general background regarding LIBOR and the LIBOR Transition, describes key points for Registrants impacted by the LIBOR Transition or who are the recipients of a related examination request, and offers next steps that Registrants can consider in their LIBOR Transition preparations. Dechert has tracked developments related to LIBOR and the LIBOR Transition - for further information, please refer to [Preparing for the Replacement of LIBOR](#).

Background on LIBOR

On any given day, LIBOR is calculated across seven tenors for each of five currencies (USD, GBP, CHF, EUR and JPY). LIBOR is intended to be a measure, for each currency and tenor, of the average rate at which leading internationally active banks are willing to borrow wholesale, unsecured funds in the London interbank market.³ LIBOR and other interbank offered rates (IBORs) are global, long-standing and extensively used benchmarks or reference rates (reference rates) for determining interest rates in contracts related to financial transactions, adjustable-rate financial products and derivatives.⁴

In July 2017, Andrew Bailey, then-Chief Executive of the UK Financial Conduct Authority (FCA), announced that the FCA would no longer persuade or compel LIBOR panel banks to continue to make LIBOR data submissions after 2021.⁵ As a result, it is currently expected that around January 1, 2022, LIBOR will cease publication or will no longer be sufficiently robust or reliable to be representative of its underlying market.⁶ It follows that LIBOR (and most other IBORs) then will cease to be effective reference rates for financial transactions and other contractual arrangements.

Following Mr. Bailey’s 2017 announcement, working groups began to plan in earnest for the eventual unavailability of LIBOR and other IBORs throughout the world. Each of these working groups aimed to identify and recommend alternative RFRs denominated in the relevant local currency. Since reference rates serve a critical commercial function, any alternative to LIBOR will need to be commercially similar in a variety of respects in order to assure consistent adoption by the financial community.⁷ It is expected that the majority of LIBOR (and other IBOR) replacements will be derived from RFRs developed by these working groups.

In the United States, the Federal Reserve Board and the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee (ARRC), a working group of private-sector representatives and financial regulators, to recommend an alternative reference rate to USD LIBOR. The ARRC recommended the Secured Overnight Financing Rate (SOFR)⁸ as its preferred alternative reference rate. Launched in April 2018, SOFR is based on the cost of overnight loans, using repurchase agreements secured by U.S. government securities (which represents a larger section of

transactions than is used to derive the Fed Funds rate). However, at this time, SOFR is not widely used as a reference rate. As LIBOR may become unavailable to be used in contracts in 2022, the timeline for the transition to using SOFR as the reference rate for USD LIBOR will be highly compressed. The ARRC and similar working groups are continuing their work on LIBOR replacement solutions.

Practically, transitioning to a new reference rate is not a flip-of-the-switch event, and the current timeline only emphasizes the need for a transition plan. Given the widespread use of LIBOR as a reference rate in common commercial arrangements, the LIBOR Transition no doubt will have a significant and broad-reaching impact on many Registrants (including their business activities, operations and service provider relationships). Based upon a Registrant's business model, the Registrant will need to implement LIBOR Transition solutions (such as those recommended by the ARRC or other similar working groups) in a manner appropriate to its businesses and operations.

In light of the commercial importance of LIBOR and other IBORs, coverage in the financial press has been widespread, and issues related to LIBOR and its expected discontinuation are high on regulatory agendas worldwide.⁹ Financial services regulators – including the staffs of OCIE and various other SEC divisions and offices – have repeatedly emphasized the importance of Registrants' careful and considered preparation for the LIBOR Transition.¹⁰ In addition, the LIBOR Transition is listed as one of OCIE's 2020 examination priority "risk themes" that would be used to "tailor its risk-based program" this year.¹¹ Consistent with those messages, the Risk Alert further emphasizes the importance of Registrants' preparations, and provides OCIE's views regarding the preparations required for a Registrant to effect an orderly transition away from LIBOR.

Risk Alert

The Risk Alert describes the "scope and content" for a series of risk-based examinations (often referred to as "sweep exams") that will focus on Registrants' preparedness for the LIBOR Transition.¹² The Risk Alert further emphasizes the theme of preparedness and provides some insight into what OCIE staff may view as steps Registrants could take in anticipation of the LIBOR Transition. The Risk Alert states OCIE's view that "[p]reparation for the transition away from LIBOR is essential for minimizing any potential adverse effects associated with LIBOR discontinuation" and that the "risks associated with this discontinuation and transition will be exacerbated if the work necessary to effect an orderly transition to an alternative reference rate is not completed in a timely manner." As such, OCIE staff stresses that the LIBOR Exams are intended to "help promote and facilitate an orderly discontinuation ... and transition."

Examinations

Consistent with the above themes, the Risk Alert states that LIBOR Exams will assess (among other matters) "whether and how the 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). By way of example, the Risk Alert states that OCIE will seek to review the Registrant's preparation, plans and actions related to the LIBOR Transition, which could include an evaluation of:

- *Exposure to LIBOR and mitigation efforts.* OCIE will seek to understand and evaluate, to the extent relevant, the exposure of the Registrant and its investors to contracts that use LIBOR as a reference rate beyond the expected LIBOR Transition date, "including any fallback language incorporated into these contracts";
- *Operational readiness for LIBOR Transition.* OCIE will review and evaluate enhancements or modifications the Registrant has made to its "systems, controls, processes, and risk or valuation

- models” in connection with the LIBOR Transition to a new reference rate;
- *Investor communications relating to the LIBOR Transition.* OCIE will examine the Registrant’s “disclosures, representations, and/or reporting to investors regarding its efforts to address LIBOR discontinuation and the adoption of alternative reference rates”;
 - *Potential conflicts of interest.* OCIE will seek to understand and evaluate the Registrant’s identification and mitigation of “any potential conflicts of interest” related to the LIBOR Transition; and
 - *Efforts to replace LIBOR.* OCIE will examine the Registrant’s actions taken to transition to an “appropriate alternative reference rate.” ***Sample Document Request List***

The Risk Alert states that the sample document request list included in the Risk Alert is intended to “empower compliance professionals” to assess and assist with Registrants’ preparedness for the LIBOR Transition. While this list is a “resource” for Registrants to consult, it is not “all-inclusive” or “specifically indicative of the validation and testing” OCIE could perform. Thus, an actual document request list received by a Registrant is likely to vary based on the facts and circumstances. The Risk Alert also references the OCIE staff’s potential “review [of] certain information onsite.”

The types of documents set forth in the document request list can be broadly categorized as pertaining to:

- *Organizational structure and management.* This consists of information identifying aspects of a Registrant that might be impacted by the LIBOR Transition, as well as the personnel responsible for assessing, overseeing and managing LIBOR Transition efforts, including any third parties, and documentary evidence of the same (e.g., meeting minutes).
- *Assessment and management of LIBOR exposure.* This is documentation identifying: (i) potentially affected contracts or obligations of the Registrant or its investors, performance composites or advertisements, LIBOR-based models (e.g., risk, valuation), and investors (e.g., fee structures, performance reporting); (ii) the related underlying documents; and (iii) information regarding dependence on third-party service providers and the potential impact on their services. This also includes strategic plans or timelines for remediation, and any risk matrices “that reference” the LIBOR Transition.
- *Disclosures to stakeholders.* This includes information provided to governing bodies and filed with the SEC.13
- *Guidance provided by the Registrant to its employees or supervised persons regarding recommendations or advice to investors, issuers or clients.* This includes: recommendations to investors regarding “LIBOR-linked instruments or contracts that extend past the current expected discontinuation date, reviews of portfolios containing such instruments, or the underwriting of new instruments referencing LIBOR”; advice to issuers as to “new LIBOR-linked instruments”; and advice to clients regarding outstanding contracts or obligations that replace LIBOR with an appropriate reference rate.
- *Modifications to operations or compliance programs made or anticipated.* This includes planned or implemented changes to various systems (e.g., “accounting, investor reporting, risk, valuation or trading”) and “compliance procedures, controls, or surveillance systems.” ***Resources to Aid Registrants with the LIBOR Transition***

The Risk Alert encourages continued engagement by: suggesting that Registrants’ personnel keep up-to-date on developments related to the LIBOR Transition via the AARC website; and inviting “the public to share information about the potential impact” of the LIBOR Transition via LIBOR@sec.gov.

Implications for U.S. and Non-U.S. Registrants

While the Risk Alert is the statement of one office of one regulator regarding how to prepare for the

LIBOR Transition, its message should resonate across all market participants and jurisdictions. The message is consistent with statements from other regulators internationally: the issue of LIBOR Transition is not going away, and it is now time for Registrants and other market participants to focus on preparations for the LIBOR Transition. The Risk Alert is a signal that Registrants and other market participants are expected to be preparing for the transition from LIBOR and other IBORs. As indicated by the document request list, Registrants can begin by evaluating the potential impact of the LIBOR Transition on their businesses and operations, with a view toward implementing solutions that are appropriate in light of their exposure to LIBOR or other IBORs.

Regardless of a Registrant's state of preparation, the Risk Alert can prove valuable in helping Registrants better understand OCIE's view as to the type of preparations that could best effectuate an orderly transition. Registrants at the beginning stages of preparedness can use the Risk Alert to assess the scale and scope of the Registrant's current exposure to LIBOR, as well as a road map for managing an orderly LIBOR Transition. Registrants that are further down the road might view the Risk Alert as a checklist to assess their own progress. The Risk Alert (in particular, the sample document request list) also could be instructive to Registrants and other market participants in determining key documents that might be useful in identifying and managing any emerging risks across their businesses, and engaging and sharing information with various stakeholders about those risks and the Registrant's efforts to manage and/or mitigate them.

Dechert LLP - Philip T. Hinkle, Michael L. Sherman, Jonathan D. Gaynor, Ashley N. Rodriguez and Karen Stretch

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Dechert's Financial Services and Finance and Real Estate practice groups have significant experience and are available to assist firms on a collaborative basis to address concerns related to the LIBOR Transition, including guiding a Registrant through any SEC examinations.

Footnotes

1) [Examination Initiative: LIBOR Transition Preparedness, National Exam Program Risk Alert](#), U.S. SEC Office of Compliance Inspections and Examinations (June 18, 2020). The Risk Alert indicates that it "has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person."

2) LIBOR also is referred to as ICE LIBOR and formerly as the London Interbank Offered Rate.

3) The methodologies used to determine LIBOR for a particular currency and tenor are based on submissions made by panel banks to the LIBOR benchmark administrator, ICE Benchmark Administration Limited (IBA), each London business day. The methodologies and panel banks per currency and tenor used are listed on [IBA's webpage](#). As a UK-based benchmark administrator, IBA is regulated by the UK's Financial Conduct Authority.

4) [Libor: Entering the Endgame](#), Andrew Bailey, Governor of the Bank of England (July, 13, 2020) (including an indication that LIBOR rates directly impact the cash flows and values of an estimated \$400 trillion of financial products globally).

5) [The Future of LIBOR](#), Andrew Bailey, then-Chief Executive of the FCA (July, 27 2017).

6) Panel banks have agreed to continue submitting the relevant data through 2021. However, absent an active market for unsecured term lending to banks, the FCA has determined not to compel banks to provide this information after 2021. The limitations of LIBOR as a reference rate have been widely

reported, and the July 2020 speech by Andrew Bailey (footnote 4 supra) includes a discussion of this topic.

More generally, and historically, regulatory investigations in Europe and the United States following the 2007-2008 financial crisis revealed that for some years, both preceding and during the financial crisis, the volume of transactions in the interbank markets of the relevant currencies had decreased significantly. It was determined that the panel banks that contribute to the production of LIBOR were relying on their expert judgment, rather than observable market rates, for some of their submissions, and in many cases were manipulating their submissions to the benchmark administrator and, thus, manipulating LIBOR for certain tenors and currencies.

7) RFRs generally measure market rates for secured overnight borrowing. RFRs do not purport to capture the sort of counterparty credit risk or term component that may be represented in unsecured term borrowing rates, like LIBOR or other IBORs; thus, a spread adjustment would be needed for an RFR to serve as a commercially practical replacement reference rate for LIBOR or other IBORs.

8) [SOFR](#) and the [SOFR Averages](#) are published by the Federal Reserve Bank of New York.

9) For example, regulatory investigations in Europe and the United States following the 2007-2008 global financial crisis revealed that for some years, both preceding and during the financial crisis, the volume of transactions in the interbank markets of the relevant currencies had decreased significantly. It was determined that the panel banks that contribute to the production of LIBOR were relying on their expert judgment, rather than observable market rates, for some of their submissions, and in some cases were seen as manipulating their submissions to the benchmark administrator (and, thus, manipulating LIBOR for certain tenors and currencies).

10) For example, see SEC Public Statement, [Staff Statement on LIBOR Transition](#) (July 12, 2019); for further information, please refer to Dechert OnPoint, [SEC Staff Issues Statement on LIBOR Transition; Practical Considerations for Investment Companies, Investment Advisers and Other Financial Institutions in Proactively Addressing LIBOR Cessation and Transition](#).

11) [2020 Examination Priorities](#), U.S. Office of Compliance Inspections and Examinations (Jan. 7, 2020) (“The risk-based approach, both in selecting registrants as examination candidates and in scoping risk areas to examine, provides OCIE with greater flexibility to cover emerging and exigent risks to investors and the marketplace as they arise. For example, as our registrants and other market participants transition away from LIBOR as a widely used reference rate in a number of financial instruments to an alternative reference rate, OCIE will be reviewing firms’ preparations and disclosures regarding their readiness, particularly in relation to the transition’s effects on investors. Some registrants have already begun this effort and OCIE encourages each registrant to evaluate its organization’s and clients’ exposure to LIBOR, not just in the context of fallback language in contracts, but its use in benchmarks and indices; accounting systems; risk models; and client reporting, among other areas. Insufficient preparation could cause harm to retail investors and significant legal and compliance, economic and operational risks for registrants”). For further information, please refer to Dechert OnPoint, [OCIE Releases 2020 Examination Priorities](#).

12) Typically, the federal securities laws subject Registrants (and those required to be registered) to examination by the SEC. The SEC views examinations as a front-line means to protect investors and ensure compliance with the federal securities laws. Sweep examinations are focused on identified risks, and these examinations tend not to be as broad as routine examinations of Registrants.

13) The sample document request list indicates that the relevant period for filings with the SEC is from January 2019 to present.

LIBOR Summer Update: Regulatory Scrutiny Heats Up on Transition Preparedness - Sherman & Sterling

With fewer than 18 months until the expected cessation of the London Interbank Offered Rate (LIBOR), regulators have developed a keen interest on how financial institutions are preparing to transition from what has been called the “world’s most important number.” In recent weeks, a number of U.S. and global regulators have issued statements on the need for financial institutions to make actionable progress. On July 13, 2020, John C. Williams, President of the Federal Reserve Bank of New York, said “the importance of transitioning from LIBOR is so great that despite the effects of the COVID-19 pandemic, the overall timeline remains the same.”[1] Notably, the transition was the focus of his first speech since the advent of the pandemic on a topic other than economic and monetary policy. Emphasizing the need for the market to “work together to ensure we are all ready for January 1, 2022,” Mr. Williams stressed that “[i]t doesn’t matter whether you’re a large global bank or a local company with a handful of employees, you need to be prepared to manage your institution’s transition away from LIBOR.”

In this memorandum, we summarize some of the more recent statements by regulatory authorities on the LIBOR transition.

Global Regulatory Bodies Urge Action

The LIBOR transition has been called an “essential task” by the Financial Stability Board (FSB), and one that is directly related to global financial stability.[2] With the transition having been identified as a G20 priority, the FSB has joined the Basel Committee on Banking Supervision in issuing a report that identifies several remaining supervisory and other challenges to the transition, based on surveys taken by the FSB, the Basel Committee and the International Association of Insurance Supervisors.[3]

Among other findings, the report noted:

- Authorities are expecting financial institutions to make “significant progress” in 2020.
- From a microprudential perspective, the key concerns related to the LIBOR transition are in terms of operational risks; legal risks; prudential risks; conduct, litigation and reputational risks; hedging risks; and accounting risks.
- From a system-wide perspective, the uncertainty about the future of LIBOR as we get closer to the end of 2021 could increase macroprudential risks from heightened volatility or disorderly markets, as users are unable, unaware or unwilling to move to the new benchmarks.
- Challenges relating to contract amendments and the lack of term rates for risk-free rates (RFRs) are widely cited as the main obstacles to a successful transition for financial institutions.
- Lack of liquidity in new RFR products and the uncertainty of when sufficient liquidity will be achieved make it difficult to motivate market participants to shift to RFRs.
- For derivative contracts, financial institutions are awaiting the finalization of the ISDA fallback language and largely plan to adopt the ISDA protocol for the alternative reference rates. For cash products, authorities in many jurisdictions have raised concerns about the complexity of incorporating robust/standardized fallbacks into legacy contracts that do not have them, and the required operational readiness to facilitate their use.
- Authorities are concerned about the differing supervisory expectations for transition across jurisdictions, especially on legal and conduct risks. The varying transition timelines for different products is complicating the monitoring. There is a lack of clarity regarding the readiness of external systems used by financial institutions and others. Supervisors also have limited insight

into, and communication with, the non-regulated clients of regulated financial institutions.

- Authorities have identified number of available tools of increasing supervisory intensity to speed up transition in case the increased monitoring and scrutiny do not prove sufficient. In the first stage these would include meetings with banks' senior management, board of directors and the issuance of non-binding best practices. More intensive measures may include on-site inspections and requests to improve operational capabilities (e.g., risk-mitigation plans, requirements to increase resources aimed at supporting transition). In exceptional circumstances, some jurisdictions pointed to the use of capital charges and restrictions on specific product offerings, and finally administrative sanctions or other legal actions.

US Banking and Consumer Regulators Ramping Up LIBOR Transition Focus

On July 1, 2020, the Federal Financial Institutions Examination Council (FFIEC) issued a statement highlighting the financial, legal, operational and consumer protection risks that financial institutions will need to address as they prepare to transition away from LIBOR.[4] The discontinuation of LIBOR will affect nearly every financial institution, though larger institutions and those engaged materially in capital markets activities will face a more substantial impact.

The FFIEC's statement does not constitute new guidance, nor it is a regulation, but it suggests an increasing emphasis within the bank examiner community that the LIBOR transition needs to be properly planned for and prioritized.

According to the FFIEC's statement, institutions should first identify risks in their own on- and off-balance sheet assets and contracts that reference LIBOR, including derivatives, commercial and retail loans, investment securities and securitizations. Potential risks include:

- operational difficulty quantifying the exposure;
- financial, valuation and model risk related to reference rate transition;
- inadequate risk-management processes and controls to support the transition;
- consumer protection-related risks;
- limited ability of third-party service providers to support operation changes; and
- potential litigation and reputational risk arising from reference rate transition.

Following an identification of key risks and dependencies, institutions should quantify their LIBOR exposure. Generally, exposure is measured as the size of any activity and the number of counterparties or consumers with financial contracts that reference LIBOR across all products. This quantification should also include an assessment of the viability of existing contract fallback language. For contracts with inadequate fallback language, institutions need to develop a remediation strategy. To limit additional exposure, institutions should also discontinue the origination or purchase of LIBOR-indexed instruments.[5] For derivatives exposures, the FFIEC recommends that financial institutions and their clients eventually adhere to the International Swaps and Derivatives Association's protocol upon its release.

In planning for the transition, institutions should consider the various legal, operational and other risks associated with various consumer financial products that reference LIBOR. Any replacement rate not already included in fallback language may impact consumers, increase reputation risk and result in legal exposure to institutions and the financial industry. Transition plans should, among other things, identify affected consumer loan contracts, highlight necessary risk mitigation efforts and address development of clear and timely consumer disclosures regarding changes in terms.

Relationships with third-party service providers is another key aspect of sound transition planning. When addressing third-party service providers that use LIBOR to provide valuation/pricing,

modeling, accounting or other services, institutions should evaluate the preparedness and transition planning of those providers and consider whether they will be able to accommodate an alternative reference rate.

Significantly, the FFIEC has indicated that “the supervisory focus on evaluating institutions’ preparedness for LIBOR’s discontinuation will increase during 2020 and 2021, particularly for institutions with significant LIBOR exposure or less-developed transition processes.” Looking ahead, supervisory staff will ask institutions about their exposures to LIBOR-indexed instruments and details on their specific plans to transition away from LIBOR during regularly scheduled examinations and monitoring activities. In particular, the FFIEC identified the following areas as points for discussion with supervisory staff:

- identification and quantification of LIBOR exposure across product categories and lines of business;
- risk assessment of LIBOR exposures, which may include scenario testing, legal review and other analysis;
 - transition plans with milestones and key completion dates addressing areas such as:
 - strategies to inventory, analyze and assess risk posed by existing contracts;
 - strategies to identify replacement rates, modify spreads and revise existing contracts, as necessary;
 - strategies to address third-party risk management;
 - potential impact to the institution’s customers;
 - communication plans for engaging with customers and other stakeholders; and
 - plans to identify, monitor and resolve system and other operational constraints;
- management’s assessment of revisions that may be necessary to update the institution’s policies, processes and internal control systems;
- responsibility for LIBOR transition oversight (to a committee, team or officer); and
- progress reporting to a supervised institution’s board of directors and senior management on the LIBOR transition plan.

While there is a recognition that the supervisory focus itself will depend on the size and complexity of each institution’s LIBOR exposures, examiners expect “[a]ll institutions” to have transition plans and risk management processes in place.

SEC Eyes LIBOR Preparedness of Registrants

On June 18, 2020, the Securities Exchange Commission’s (SEC) Office of Compliance Inspections and Examinations announced the details of an examination initiative specifically focused on the LIBOR preparedness of firms on the “buyside” of LIBOR-based products: SEC-registered investment advisers, broker-dealers, investment companies, municipal advisors, transfer agents and clearing agencies.[6] The announcement was accompanied by a sample document request that included items ranging from the assessments and plans undertaken to date, the identity of third parties that have been engaged to assist with the transition and materials referencing the LIBOR transition that have been provided to a registrant’s board of directors. We have summarized the SEC’s release in our [memorandum](#) of July 20, 2020.

Next Steps

Financial institutions of all kinds need to take recent statements by regulators seriously. Indeed, many financial institutions have already designed transition-related infrastructure and formulated plans. But having plans is not the same as actually executing them. There needs to be a full understanding of how to properly mitigate the various legal and other risks that arise from such

tasks as executing contract amendments, communicating with customers and counterparties and responding to inquiries from regulators.

Footnotes

[1] John C. Williams, President and Chief Executive Officer, Federal Reserve Bank of New York, "[537 Days: Time Is Still Ticking](#)" (July 13, 2020).

[2] FSB, "[FSB Statement on the Impact of COVID-19 on Global Benchmark Reform](#)" (July 1, 2020).

[3] FSB and the Basel Committee on Banking Supervision, "[Supervisory Issues Associated with Benchmark Transition: Report to the G20](#)" (July 9, 2020).

[4] FFIEC, "[Joint Statement on Managing the LIBOR Transition](#)" (July 1, 2020). The FFIEC is composed of the principals of the following: the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the State Liaison Committee and the Consumer Financial Protection Bureau. Various agencies with representatives on the FFIEC have made separate statements indicating that the LIBOR transition is a key supervisory priority for 2020 and 2021.

[5] The U.S. Alternative Reference Rates Committee (ARRC) has recently issued a set of "recommended best practices," which contained specific timelines for a variety of products. According to the ARRC, USD LIBOR should not be used in new transactions, with timing varying on the particular product: for floating rate notes, by December 31, 2020; for business loans, by June 30, 2021; for mortgages, by September 30, 2021; for securitizations other than CLOs, by June 30, 2021, and for CLOs by September 31, 2021; and for derivatives, by June 30, 2021. See "[ARRC Recommended Best Practices for Completing the Transition from LIBOR](#)" (May 27, 2020).

[6] SEC, "[Examination Initiative: LIBOR Transition Preparedness](#)" (June 18, 2020).

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July 23 2020

[MSRB Board Prioritizes Investing in Technology and Reducing Compliance Burdens.](#)

Washington, DC - The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) convened virtually on July 29-30, 2020 for its final quarterly meeting of Fiscal Year 2020. The Board adopted an operating budget of \$41.5 million for FY 2021 and approved designating \$10 million of reserves for a multi-year strategic investment to modernize its market transparency systems to leverage the power of the cloud.

"We are poised to seize the potential of cloud-based technologies to begin delivering new market transparency tools and functionality to the market," said Ron Dieckman, Chair of the Board's Technology Committee. "We are tremendously excited to continue working with our [Market Transparency Advisory Group](#) to test out several promising prototypes in our new EMMA Labs platform."

The MSRB is developing EMMA Labs as an innovation hub where market stakeholders can collaborate on active prototypes and share feedback on preliminary concepts that could eventually make their way to the Electronic Municipal Market Access (EMMA®) website.

The MSRB will publish its budget detailing its operating expenses and technology investment when the fiscal year begins October 1, 2020. The Board also will announce the results of its elections for FY 2021 chair and vice chair in the coming weeks.

The MSRB could begin the fiscal year with a smaller Board under a proposal before the Securities and Exchange Commission (SEC) for approval. The [MSRB's governance proposal](#) also enhances the independence standard for public members of the Board and establishes a six-year lifetime service limit.

At its meeting the Board also discussed several major initiatives aimed at reducing compliance costs and burdens for regulated entities. Finally, the Board discussed its search for a new Chief Executive Officer and senior staff promotions.

Reducing Compliance Burdens

As part of its [retrospective rule review](#), the Board discussed supervision requirements for dealers under MSRB [Rule G-27](#) and approved a staff-led effort to conduct a comprehensive review of the historical body of interpretive guidance in the MSRB Rule Book. The review of guidance aims to identify opportunities to clarify, amend or delete guidance to help ensure it continues to achieve the intended purposes and takes into account the current state of the municipal securities market. The Board noted that input from stakeholders would be essential throughout this multi-year project.

"In our 45 years as the market's regulator, we have produced a vast library of interpretive guidance," said Gail Marshall, the MSRB's Chief Compliance Officer. "We believe this initiative will be an impactful way to support compliance and reduce unnecessary costs and burdens for regulated entities while balancing our regulatory obligation to protect investors and issuers."

The Board continued its discussion of the practice of pennyng in the municipal securities auction process and directed staff to remain coordinated with the Financial Industry Regulatory Authority (FINRA).

The Board also discussed its efforts to advance regulated entities' understanding of MSRB rules through MuniEdPro®, a free online learning service featuring courses on core MSRB regulatory obligations and their application in practical scenarios.

Corporate Leadership

The MSRB announced today that it is promoting Jacob Lesser to Deputy General Counsel to lead the team responsible for governance and corporate legal matters. Lesser joined the MSRB as an associate general counsel and has played a critical role in the development of the Board's proposed enhancements to its governance rules. The MSRB also named Gail Marshall Interim Chief Regulatory Officer and Chief Compliance Officer, a role in which she will continue to lead the MSRB's market regulation activities, including rulemaking, enforcement coordination and professional qualifications. The MSRB is naming Leah Szarek Interim Chief External Relations Officer in recognition of her leadership of the MSRB's corporate communications and stakeholder engagement initiatives, as well as new responsibility for government relations.

"The Board is consistently impressed with the dedication and commitment of the staff, particularly as our market continues to feel the effects of the pandemic," said Board Vice Chair Manju Ganeriwala. "We are tremendously grateful for these individuals and the entire senior leadership team, whose experience and thoughtfulness help to advance our important mission."

The Board's CEO Search Special Committee is continuing its work to identify a new CEO. MSRB

Chief Financial Officer Nanette Lawson has led the organization as interim CEO since October 1, 2019. [Hear Lawson and other MSRB leaders speak about the MSRB's strategic initiatives and proactive response to the pandemic in a recent MSRB Podcast.](#)

Bill Fitzgerald, Chair of the Board's CEO Search Special Committee, said, "Few decisions are more important for a Board than selecting the executive to lead and inspire the organization into the future. The pandemic has certainly changed the way our Board is going about its search process, but we remain optimistic that we will identify our candidate in the near future."

Date: July 31, 2020

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[The SEC and DOJ Sign Historic Memorandum of Understanding to Enhance Competition in Securities Markets: BakerHostetler](#)

On June 22, 2020, the Securities and Exchange Commission ("SEC") and Antitrust Division of the Department of Justice ("DOJ") Antitrust Division announced that they have signed an interagency Memorandum of Understanding ("MOU") to "foster competition and communication between the agencies" in an effort to enhance competition in the securities industry.[1] This is the first MOU between the DOJ's Antitrust Division and the SEC.

While the two enforcement agencies have worked together in the past, Assistant Attorney General Makan Delrahim stated that the MOU "institutionalizes a strong working relationship between" the agencies, which he expects will result in "robust, comprehensive analyses" regarding competition and securities law concerns.[2] According to Delrahim, this in turn could result in "healthier markets yielding enhanced consumer benefits." [3] SEC Chairman Jay Clayton also noted the MOU's goal of "greater collaboration and cooperation" between the agencies and the desire to ensure efficiency and competitiveness in U.S. markets.[4]

Competition in the Securities Markets

The presence of competition in the securities markets benefits customers on many levels, including competition on price, quality, service, and innovation.[5] Delrahim noted that firms that fear losing their market position are more likely to engage in these activities, thereby benefitting customers.[6] For example, firms may invest more in research and development to introduce new products or services to meet customer needs, seek out ways to streamline production processes, enhance the quality of their offerings, and pursue ways to make their products and services desirable.[7]

The SEC has consequently listened to concerns from market participants on where competition may be absent or diminished and has engaged in reviews of these concerns and the underlying industries to determine whether competition is lacking. This has led to various rule-making actions by the SEC, including the Market Data Proposal,[8] which is designed to update the national market system ("NMS") for the "collection, consolidation, and dissemination of information with respect to quotations for and transactions in [NMS] stocks." [9] The proposal also seeks to introduce competitive forces NMS for the first time. According to the SEC, the introduction of competition could allow all market participants — including investors — to access and benefit from the expanded content of NMS market data.[10] The Antitrust Division lauded the Market Data Proposal in its

public comments, noting that it seeks to lower barriers to market entry, which improves quality of and access to inputs, such as information — a classic way to enhance competition.[11] This is a signal that the SEC is seeking to revisit and revise older regulations in an effort to enhance competition in the U.S. markets.

The Antitrust Division also commented on the procompetitive effects of the SEC's Proxy Rules Proposal,[12] which, according to the SEC, is designed to "help ensure that proxy voting advice used by investors and others who vote on investors' behalf is accurate, transparent, and materially complete." [13] Delrahim noted that the proposed rule is also designed to update regulations to better fit the current landscape and lead to healthier competition.[14] In other words, while certain of the details of the markets have changed, competition remains wholly relevant.[15]

Increased Coordination Could Lead to Increased Investigations

Adopting the approach of continuously reviewing rules and regulations for their applicability and relevance in today's markets, the SEC and the Antitrust Division entered into the MOU — the first of its kind — to establish regular communication between the agencies to allow for information sharing. Specifically, the MOU is targeted at facilitating communication and cooperation between the agencies, by establishing a framework for the SEC and the Antitrust Division to continue discussions and review regulatory matters that affect competition in the securities industry.[16] This includes provisions to establish periodic meetings among the agencies' officials.[17] Additionally, the MOU provides for the exchange of information and expertise the agencies may believe relevant to their oversight and enforcement responsibilities, as consistent with legal and confidentiality restrictions.

Delrahim noted that the Division has taken on several complex criminal investigations in the financial services industry, including recent investigations into foreign currency exchange, interest rate benchmarks, and municipal bonds. For example, the agencies worked closely on an investigation of anticompetitive activity in the municipal bond investments market, which resulted in the conviction of one financial services firm and 17 individuals, and in restitution, penalties, and disgorgement related to four other financial institutions under non-prosecution agreements.[18] With help from the SEC, among others, the financial services firm agreed to pay restitution to victims of the anticompetitive conduct and to cooperate with the Antitrust Division regarding ongoing investigations into anticompetitive conduct in the municipal bonds industry. This could mean that the MOU serves as further justification for referrals between agencies that may result in criminal prosecution.

Is noteworthy that shortly after Delrahim's remarks, The Wall Street Journal suggested that the MOU may lead to antitrust scrutiny of fees charged by exchanges for information, including market data.[19] Chairman Clayton has previously noted that the SEC has an obligation under the Securities Exchange Act of 1934 "to suspend exchanges' fee filings unless it is established that the fee is reasonable on another basis, such as a reasonable cost basis,"[20] although, Section 11A of the 34 Act never uses the term "cost basis." Rather the law states that market data must be disseminated by securities information processors and securities exchanges on "fair and reasonable terms" and make that data available on terms that are not "unreasonably discriminatory." The government takes the position that the burden is on the exchange to demonstrate competitive forces or an alternative basis for finding the fee reasonable, while exchanges may well disagree. Exchanges argue that markets functioned well through the highest periods of volatility during the pandemic crisis and continue to do so. Further, they argue that significant changes to well-functioning market infrastructure, particularly during a pandemic, could introduce untold operational and technical risks, confusion and the likelihood for an unfriendly investor experience. Market structure reform raises highly complex, competitive and regulatory issues. This MOU could potentially result in

litigation by and against the SEC or enforcement actions. In recent testimony before the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, SEC Chairman Clayton noted that the signing of the MOU with the Justice Department does not “imply that we are investigating anybody together.”[21] When asked about potential anticompetitive behavior that may have been contemplated, Chairman Clayton informed the Subcommittee that they do not comment on investigations but rather the MOU “formalizes that powerful relationship that we have across our respective agencies.”[22]

Conclusion

Although specific detail has not yet been provided on how the MOU will be put into effect, a number of circumstances now seem more likely:

- **Rule Changes:** The Antitrust Division and the SEC will likely continue to evaluate rules and regulations they deem outdated due to technological advances in the marketplace. There are, however, challenges in achieving this goal. Specifically, markets and data move quickly, which means that the agencies will need to move quickly to monitor industry developments and their effects, particularly in an effort to understand when intervention is appropriate and required.[23]
- **Parallel Investigations:** The agencies will share information on a more frequent basis, which may in turn lead to a greater number of investigations that could very well be done in parallel by both agencies. However, given confidentiality considerations as laid out in the MOU, it will be interesting to see how, if at all, the cooperation contemplated in the MOU will successfully interact with the Antitrust Division’s Leniency Program and/or the SEC’s whistleblower and cooperation program.

[1] U.S. Sec. & Exch. Comm’n., Press Release, Rel. No. 2020-140, “Securities and Exchange Commission and Justice Department’s Antitrust Division Sign Historic Memorandum of Understanding” (June 22, 2020), available at <https://www.sec.gov/news/press-release/2020-140>; U.S. Dep’t. of Justice, Justice News, “Justice Department’s Antitrust Division And The Securities And Exchange Commission Sign Historic Memorandum of Understanding” (June 22, 2020), available at <https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-securities-and-exchange-commission-sign-historic>. The MOU is available at <https://www.sec.gov/files/ATR-SEC%20MOU-06-22-2020.pdf>.

[2] Id.

[3] Id.

[4] Id.

[5] U.S. Dep’t. of Justice, Justice News, “Changes in Latitudes, Changes in Attitudes: Enforcement Cooperation in Financial Markets (June 22, 2020), available at <https://www.justice.gov/opa/speech/changes-latitudes-chang-s-attitudes-enforcement-cooperation-financial-markets> (“Delrahim Speech”).

[6] Id.

[7] Id.

[8] 17 CFR Parts 240, 242, and 249; Rel. No. 34-88216.

[9] Id. at p. 1.

[10] U.S. Sec. & Exch. Comm’n., Press Release, Rel. No. 2020-34, “SEC Proposes to Modernize Key Market Infrastructure Responsible for Collecting, Consolidating, and Disseminating Securities Market Data” (Feb. 14, 2020), available at <https://www.sec.gov/news/press-release/2020-34>.

[11] Supra note 5.

[12] 17 CFR Part 240, Rel. No. 34-87457.

[13] U.S. Sec. & Exch. Comm’n., Press Release, Rel. No. 2019-231, “SEC Proposes Rule Amendments to Improve Accuracy and Transparency of Proxy Voting Advice” (Nov. 5, 2019), available at <https://www.sec.gov/news/press-release/2019-231>.

[14] Delrahim Speech.

[15] Id.

[16] Id.

[17] Id.

[18] Delrahim Speech; see also U.S. Dep't. of Justice, Justice News, "GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay \$70 Million to Federal and State Agencies" (Dec. 23, 2011), available at <https://www.justice.gov/opa/pr/ge-funding-capital-market-services-inc--dmits-anticompetitive-conduct-former-traders>.

[19] Dave Michaels and Alexander Osipovich, The Wall Street Journal, "SEC, Justice Department to Scrutinize Exchanges' Market-Data Business" (June 22, 2020), available at <https://www.wsj.com/articles/sec-justice-department-to-scrutinize-exchanges-market-data-business-11592864481>.

[20] U.S. Sec. & Exch. Comm'n., Speech, "Modernizing U.S. Equity Market Structure" (June 22, 2020), available at <https://www.sec.gov/news/speech/clayton-redfearn-modernizing-us-equity-market-structure-2020-06-22>.

[21] See "Hybrid Hearing - Capital Markets and Emergency Lending in the COVID-19 Era," June 25, 2020, before the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, Committee on Financial Services, U.S. House of Representatives, available at: <http://archives-financialservices.house.gov/media/pdf/072601rb.pdf>.

[22] Id.

[23] Delrahim Speech.

BakerHostetler

July 15, 2020

[NABL Submits Letter to IRS and Treasury.](#)

On July 22, 2020, NABL submitted a letter to the Treasury and IRS to inform the development of their 2020-2021 Priority Guidance Plan.

Topics include: recommendations to provide cash flow relief to issuers and borrowers from economic difficulties caused by COVID-19, recommendations to provide better access to capital markets for issuers and borrowers to deal with the economic difficulties caused by COVID-19, and additional requests for further guidance.

Find the full letter [here](#).

[MSRB Compliance Corner Newsletter.](#)

Read about the MSRB's resources on 529 plans, recent enforcement actions and more in the latest [Compliance Corner newsletter](#).

[NFMA Cybersecurity White Paper.](#)

The National Federation of Municipal Analysts released a draft White Paper on Best Practices in Cybersecurity Risk Disclosure for State & Local Governments in Municipal Offerings. The paper is in the comment period until September 20, 2020.

To read the paper, [click here](#).

[GASB Adds Resources to Emergency Toolbox Addressing Issues Arising from COVID-19 Pandemic.](#)

Norwalk, CT, July 20, 2020 — During the development of the recently issued [Technical Bulletin 2020-1, Accounting and Financial Reporting Issues Related to the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\) and Coronavirus Diseases](#), several issues were raised that were not specifically addressed in the Technical Bulletin, but for which current authoritative standards provide guidance.

To assist stakeholders with those issues, the GASB has updated its Emergency Toolbox, which addresses accounting and financial reporting issues that may arise during the ongoing COVID-19 pandemic.

The following issues have been added:

- Disclosures related to outflows of resources incurred in response to COVID-19
- Donated inventory
- Nonexchange financial guarantee disclosures
- Subsequent contravention of eligibility requirements
- Classification of transactions not specifically addressed in Category A or Category B authoritative literature as either operating or nonoperating revenues and expenses
- Extension of property tax due dates
- Subsequent events disclosures for legislation enacted after the end of the reporting period.

The GASB provides a number of additional stakeholder resources that may be useful during this period on its website at www.gasb.org/COVID19.

[GASB Requests Input on Proposals to Improve Key Components of Government Financial Reports.](#)

Norwalk, CT, July 24, 2020 — The Governmental Accounting Standards Board (GASB) today issued for public feedback a proposed Statement that is designed to improve to key components of the blueprint for state and local government annual financial reports.

- The [Exposure Draft, Financial Reporting Model Improvements](#), proposes improvements that are designed to: Enhance the effectiveness of financial reports in providing information essential for making decisions and assessing a government's accountability, and
- Address certain application issues.

The Exposure Draft includes proposals that would establish or modify existing accounting and financial reporting requirements related to:

- Application of the short-term financial resources measurement focus and accrual basis of accounting in governmental funds (replacing the existing current financial resources measurement focus and modified accrual basis of accounting)
- Management's discussion and analysis
- Presentation of governmental fund financial statements
- Presentation of the proprietary fund statement of revenues, expenses, and changes in fund net position
- Unusual or infrequent items
- Budgetary comparison information.

The changes in the proposed Statement would improve financial reporting in a variety of ways. For example, the proposed short-term financial resources measurement focus and accrual basis of accounting would improve the consistency of the information in governmental fund financial statements. The proposed changes to the presentation of governmental fund financial statements would (1) make the short-term nature of their information more evident and understandable and (2) more clearly differentiate them from the long-term perspective of the government-wide financial statements.

Stakeholders are asked to review the proposals and provide input on the document by February 26, 2021. A series of public hearings and user forums on the Exposure Draft tentatively have been scheduled for March and April 2021 to further enable stakeholders to share their views with the Board. More information about commenting on the Exposure Draft and participating in the public hearings and users forums can be found in the document.

[BDA Sends Comments to SEC on Proposed Changes to MSRB Rules A-3 and A-6 on Board Composition and Governance.](#)

BDA this morning filed a comment letter with the SEC on proposed changes to MSRB Rules A-3 and A-6 on board composition and governance. The proposal before the SEC is available [here](#).

BDA's comment letter is available [here](#).

Senator Kennedy's MSRB reform bill is available [here](#).

The proposed changes will, when approved by the SEC, impose these changes:

- Reduce the size of the MSRB board from 21 to 15, with a transitional 17-member board in 2021, with the new board being comprised of eight independent members and seven industry representatives
- Specify that at least two of the seven industry representatives must be from non-dealer Municipal Advisor firms; and
- Specify that independent board members, if they previously worked for regulated companies, must be away from the industry for five years to qualify for a board position as opposed to the current two, among other changes.

In our letter to the SEC, we state that BDA opposes "the MSRB's Proposal and we urge the Commission to reject the initiative." On the issue of independent directors, we state that "five years

away from the industry and the market is too long for a Board member to be effective.” On the issue of a minimum of two directors being MAs, we state “we call on the MSRB to set the ratio of board seats between dealers and MAs based on each constituency’s relative financial contribution to the organization, subject to statutory requirements.”

It is likely that the SEC will approve the MSRB’s proposal without amendment. It is also likely that the MSRB’s motivation for this change is to forestall action by Senator John Kennedy (R-LA) on his broader MSRB reform legislation.

Please call or write if you have any questions.

Bond Dealers of America

July 15, 2020

Libor Showed its Weakness in Coronavirus Market Crisis.

The deadline for the phaseout of Libor at the end of 2021 will not be delayed and despite the effects of the COVID-19 pandemic, progress is being made on the switch to alternative reference rates.

That was the message of New York Federal Reserve officials in two webcast presentations Monday and Wednesday.

New York Federal Reserve President John Williams said Monday in a joint presentation with Bank of England Governor Andrew Bailey that the transition away from Libor “continues to be of paramount importance.”

“The clock is still ticking,” Williams said. “It’s critical that regulators and institutions continue to work together to ensure they’re all ready for January 1, 2022.”

The No. 1 priority, according to Williams, “is to stop writing Libor contracts.”

The London Interbank Offered Rate is a widely used benchmark for short-term interest rates based on data contributed by participating banks. It was tarnished by rate-rigging scandals.

Market participants who continue to use Libor are driven by nostalgia because it’s not a robust reference rate, Williams said.

Bailey highlighted that weakness by discussing the recent market crisis that occurred as worldwide awareness grew of the impact of the pandemic.

The week of March 16 when central bank rates were at historically low levels, “over half of the 35 published Libor rates across all currencies contain no transaction-based submissions at all,” said Bailey. Simultaneously, Bailey said, “Libor rates, and therefore costs with borrowers, spiked upwards.”

In contrast, the Secured Overnight Financing Rate (SOFR), which is being promoted as an alternative to Libor in the United States, held its volumes and weathered the crisis.

David Bowman, senior associate director of the Federal Reserve, said during Wednesday’s presentations that the SOFR market now accounts for over \$1 trillion of transactions daily.

“It is produced in a transparent and direct manner,” said Bowman. “It is based on observable transactions, not dependent on estimates like Libor or derived from some model.”

CORONAVIRUS IMPACT: ADDITIONAL COVERAGE Economic indicators Beige Book: Outlook ‘highly uncertain’ with no timeline or gauge of effects By Aaron Weitzman 14m ago Fintech Banks and fintechs need each other more than ever By Paul Schaus 16m ago Primary bond market Powering ahead at Academy By Chip Barnett 30m ago

The SOFR, which the Federal Reserve Bank of New York publishes on its website each weekday, represents the rate in the repo market the previous day. It is published in the morning and finalized at 2:30 p.m. Eastern time.

The New York Fed also publishes 30-day, 90-day and 100-day compound averages of SOFR.

The SOFR index, also published by the New York Fed, can be used to calculate a customized compound average over any period the user chooses.

“People forget that the reason that we have to go through this transition is because of the way the financial system structured itself,” said Bowman. “It put far too much weight on a rate that was far too weak. And now we’re dealing with the consequences.”

John Gerli, chief capital markets officer of the Federal Home Loan Bank’s Office of Finance, said his experience with SOFR so far has provided him encouragement that the investor base may be broader than it was with Libor.

“Some of them have said that it’s a good substitute for repo, and it’s a cash and highly liquid marketplace,” Gerli said. “So I think from our perspective, at least in two years out [from the phaseout] the investor base here, may be broader.”

By Brian Tumulty

BY SOURCEMEDIA | ECONOMIC | 07/15/20 03:35 PM EDT

[**LIBOR Summer Update: Regulatory Scrutiny Heats Up on Transition Preparedness - Sherman & Sterling**](#)

With fewer than 18 months until the expected cessation of the London Interbank Offered Rate (LIBOR), regulators have developed a keen interest on how financial institutions are preparing to transition from what has been called the “world’s most important number.” In recent weeks, a number of U.S. and global regulators have issued statements on the need for financial institutions to make actionable progress. On July 13, 2020, John C. Williams, President of the Federal Reserve Bank of New York, said “the importance of transitioning from LIBOR is so great that despite the effects of the COVID-19 pandemic, the overall timeline remains the same.”^[1] Notably, the transition was the focus of his first speech since the advent of the pandemic on a topic other than economic and monetary policy. Emphasizing the need for the market to “work together to ensure we are all ready for January 1, 2022,” Mr. Williams stressed that “[i]t doesn’t matter whether you’re a large global bank or a local company with a handful of employees, you need to be prepared to manage your institution’s transition away from LIBOR.”

In this memorandum, we summarize some of the more recent statements by regulatory authorities on the LIBOR transition.

Global Regulatory Bodies Urge Action

The LIBOR transition has been called an “essential task” by the Financial Stability Board (FSB), and one that is directly related to global financial stability.[2] With the transition having been identified as a G20 priority, the FSB has joined the Basel Committee on Banking Supervision in issuing a report that identifies several remaining supervisory and other challenges to the transition, based on surveys taken by the FSB, the Basel Committee and the International Association of Insurance Supervisors.[3]

Among other findings, the report noted:

- Authorities are expecting financial institutions to make “significant progress” in 2020.
- From a microprudential perspective, the key concerns related to the LIBOR transition are in terms of operational risks; legal risks; prudential risks; conduct, litigation and reputational risks; hedging risks; and accounting risks.
- From a system-wide perspective, the uncertainty about the future of LIBOR as we get closer to the end of 2021 could increase macroprudential risks from heightened volatility or disorderly markets, as users are unable, unaware or unwilling to move to the new benchmarks.
- Challenges relating to contract amendments and the lack of term rates for risk-free rates (RFRs) are widely cited as the main obstacles to a successful transition for financial institutions.
- Lack of liquidity in new RFR products and the uncertainty of when sufficient liquidity will be achieved make it difficult to motivate market participants to shift to RFRs.
- For derivative contracts, financial institutions are awaiting the finalization of the ISDA fallback language and largely plan to adopt the ISDA protocol for the alternative reference rates. For cash products, authorities in many jurisdictions have raised concerns about the complexity of incorporating robust/standardized fallbacks into legacy contracts that do not have them, and the required operational readiness to facilitate their use.
- Authorities are concerned about the differing supervisory expectations for transition across jurisdictions, especially on legal and conduct risks. The varying transition timelines for different products is complicating the monitoring. There is a lack of clarity regarding the readiness of external systems used by financial institutions and others. Supervisors also have limited insight into, and communication with, the non-regulated clients of regulated financial institutions.
- Authorities have identified number of available tools of increasing supervisory intensity to speed up transition in case the increased monitoring and scrutiny do not prove sufficient. In the first stage these would include meetings with banks’ senior management, board of directors and the issuance of non-binding best practices. More intensive measures may include on-site inspections and requests to improve operational capabilities (e.g., risk-mitigation plans, requirements to increase resources aimed at supporting transition). In exceptional circumstances, some jurisdictions pointed to the use of capital charges and restrictions on specific product offerings, and finally administrative sanctions or other legal actions.

US Banking and Consumer Regulators Ramping Up LIBOR Transition Focus

On July 1, 2020, the Federal Financial Institutions Examination Council (FFIEC) issued a statement highlighting the financial, legal, operational and consumer protection risks that financial institutions will need to address as they prepare to transition away from LIBOR.[4] The discontinuation of LIBOR will affect nearly every financial institution, though larger institutions and those engaged materially in capital markets activities will face a more substantial impact.

The FFIEC’s statement does not constitute new guidance, nor it is a regulation, but it suggests an increasing emphasis within the bank examiner community that the LIBOR transition needs to be properly planned for and prioritized.

According to the FFIEC's statement, institutions should first identify risks in their own on- and off-balance sheet assets and contracts that reference LIBOR, including derivatives, commercial and retail loans, investment securities and securitizations. Potential risks include:

- operational difficulty quantifying the exposure;
- financial, valuation and model risk related to reference rate transition;
- inadequate risk-management processes and controls to support the transition;
- consumer protection-related risks;
- limited ability of third-party service providers to support operation changes; and
- potential litigation and reputational risk arising from reference rate transition.

Following an identification of key risks and dependencies, institutions should quantify their LIBOR exposure. Generally, exposure is measured as the size of any activity and the number of counterparties or consumers with financial contracts that reference LIBOR across all products. This quantification should also include an assessment of the viability of existing contract fallback language. For contracts with inadequate fallback language, institutions need to develop a remediation strategy. To limit additional exposure, institutions should also discontinue the origination or purchase of LIBOR-indexed instruments.[5] For derivatives exposures, the FFIEC recommends that financial institutions and their clients eventually adhere to the International Swaps and Derivatives Association's protocol upon its release.

In planning for the transition, institutions should consider the various legal, operational and other risks associated with various consumer financial products that reference LIBOR. Any replacement rate not already included in fallback language may impact consumers, increase reputation risk and result in legal exposure to institutions and the financial industry. Transition plans should, among other things, identify affected consumer loan contracts, highlight necessary risk mitigation efforts and address development of clear and timely consumer disclosures regarding changes in terms.

Relationships with third-party service providers is another key aspect of sound transition planning. When addressing third-party service providers that use LIBOR to provide valuation/pricing, modeling, accounting or other services, institutions should evaluate the preparedness and transition planning of those providers and consider whether they will be able to accommodate an alternative reference rate.

Significantly, the FFIEC has indicated that "the supervisory focus on evaluating institutions' preparedness for LIBOR's discontinuation will increase during 2020 and 2021, particularly for institutions with significant LIBOR exposure or less-developed transition processes." Looking ahead, supervisory staff will ask institutions about their exposures to LIBOR-indexed instruments and details on their specific plans to transition away from LIBOR during regularly scheduled examinations and monitoring activities. In particular, the FFIEC identified the following areas as points for discussion with supervisory staff:

- identification and quantification of LIBOR exposure across product categories and lines of business;
- risk assessment of LIBOR exposures, which may include scenario testing, legal review and other analysis;
- transition plans with milestones and key completion dates addressing areas such as:- strategies to inventory, analyze and assess risk posed by existing contracts;
 - strategies to identify replacement rates, modify spreads and revise existing contracts, as necessary;
 - strategies to address third-party risk management;
 - potential impact to the institution's customers;

- communication plans for engaging with customers and other stakeholders; and
- plans to identify, monitor and resolve system and other operational constraints;
- management’s assessment of revisions that may be necessary to update the institution’s policies, processes and internal control systems;
- responsibility for LIBOR transition oversight (to a committee, team or officer); and
- progress reporting to a supervised institution’s board of directors and senior management on the LIBOR transition plan.

While there is a recognition that the supervisory focus itself will depend on the size and complexity of each institution’s LIBOR exposures, examiners expect “[a]ll institutions” to have transition plans and risk management processes in place.

SEC Eyes LIBOR Preparedness of Registrants

On June 18, 2020, the Securities Exchange Commission’s (SEC) Office of Compliance Inspections and Examinations announced the details of an examination initiative specifically focused on the LIBOR preparedness of firms on the “buy-side” of LIBOR-based products: SEC-registered investment advisers, broker-dealers, investment companies, municipal advisors, transfer agents and clearing agencies.[6] The announcement was accompanied by a sample document request that included items ranging from the assessments and plans undertaken to date, the identity of third parties that have been engaged to assist with the transition and materials referencing the LIBOR transition that have been provided to a registrant’s board of directors. We have summarized the SEC’s release in our [memorandum](#) of July 20, 2020.

Next Steps

Financial institutions of all kinds need to take recent statements by regulators seriously. Indeed, many financial institutions have already designed transition-related infrastructure and formulated plans. But having plans is not the same as actually executing them. There needs to be a full understanding of how to properly mitigate the various legal and other risks that arise from such tasks as executing contract amendments, communicating with customers and counterparties and responding to inquiries from regulators.

Shearman & Sterling LLP - Mark Chorazak, Patrick Clancy , Reena Agrawal Sahni, Lona Nallengara, Donna Parisi and Geoffrey B. Goldman

July 23 2020

[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 to providing 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](#).

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

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[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](#)

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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

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[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 placed 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 COVID-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 than 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

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facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.

[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 a Congressional 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 President's 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 Facilities

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

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[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

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[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

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[**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 program.

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; and How 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-5 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.

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).

[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.

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

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[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 Fed's 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

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 jjgiroux@nabl.org, (518) 469-1565.

[The GASB Continues to Address Practice Issues Arising from COVID-19 Pandemic.](#)

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

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

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This alert is a periodic publication of Ballard Spahr LLP and is intended to notify recipients of new developments in the law. It should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.

[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 disclose 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 be 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 to 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>

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

Contact: Leah Szarek, Director of Communications
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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 has 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 address 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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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 Spahr](#)

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.

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.

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.

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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

[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.

[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,

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

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

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