The Bond Lawyer®

The Journal of the National Association of Bond Lawyers

National Association *of* Bond Lawyers

Volume 46, Number 2

Spring 2022

Editor-in-Chief
Alexandra M. MacLennan
Squire Patton Boggs (US) LLP Tampa, Florida

Contents

Editor's Notes.....2
Alexandra M. MacLennan
Squire Patton Boggs (US) LLP Tampa, Florida

Federal Securities Law.....6
Paul S. Maco
Bracewell LLP, Washington, D.C.

The Tax Microphone 13
Antonio D. Martini
Hinckley Allen, Boston, Massachusetts

The Bond Lawyer®: The Journal of The National Association of Bond Lawyers is published four times a year, for distribution to members and affiliate members of the Association. Membership information may be obtained by writing to Linda H. Wyman, COO, National Association of Bond Lawyers, 601 Thirteenth Street, NW, Suite 800 South, Washington, DC 20005-3875; calling (202) 503-3300; emailing nabl@nabl.org; or at www.nabl.org.

Editor's Notes

Alexandra M. (Sandy) MacLennan, Squire Patton Boggs (US) LLP, Tampa, Florida

Welcome to the Spring 2022 Edition of *The Bond Lawyer*.

In this Edition

In another episode of the passing of the baton and truly the end of an era, Paul Maco's column in this edition will be his last, ending the longest running column in *The Bond Lawyer's* history. Paul's first column appeared in *The Bond Lawyer*, Volume 22, No. 1, March 1, 2001, and he has been the only securities law commentator *The Bond Lawyer* has ever had. To put this in perspective, when Paul started his column, Hobby Presley was President of NABL, the NABL national offices were still in Chicago and George W. Bush had just been inaugurated as President after what now, in hindsight and comparison, seems like a relatively uncontested election result. That was also before 9/11. In addition to being the first securities law commentator for *The Bond Lawyer*, Paul was also the first director of the SEC's Office of Municipal Securities (the original one created in 1995). I noted in my first column that Paul is among those who encouraged (and maybe in Paul's case, challenged) me in my earlier career. I recall sitting on the Continuing Disclosure panel with Paul at the NABL Workshop in 1995 or 1996 discussing the then new amendments to SEC Rule 15c2-12. There were some engaging exchanges (some might say heated) but the discussion was always thought-provoking and definitely educational. Upon learning of Paul's decision to step away from *The Bond Lawyer*, the immediate past Editor-in-Chief, Rick Weber offered the following statement:

> I first got to know and admire Paul Maco when he chaired NABL's Securities Law and Disclosure Committee, and I was his board liaison, when Rule 15c2-12 was first being considered by the SEC. After Paul joined the SEC staff (again, the first being in the aftermath of the New York City financial crisis of the 1970s) to create the SEC's Office of Municipal Securities, then returned to private practice, he began his invaluable, always insightful quarterly securities law column in *The Bond Lawyer*. After he had contributed columns for many years, I was honored to award the Carlson Prize to Paul in 2009 to recognize his then prodigious cumulative quarterly output. Little did I realize that Paul's contributions would continue for another 13 years and that I would personally benefit from Paul's work during my tenure as editor of <u>The Bond Lawyer</u>. We all owe Paul a debt of gratitude, and I personally say "thanks, bravo, and best wishes."

NABL President Ann Fillingham, told Paul "Thank you again for all you have been doing over the years for NABL. The organization is better for it as a whole, and I know that I personally am much smarter and have a much more nuanced understanding of a number of topics due to your willingness to so generously share your wisdom. I know many other members feel exactly the same."

Paul, you have been so generous with the contributions you have made to NABL, generally, and this publication in particular. On behalf of a grateful Association….. Thank You.

Tony Martini's column in this edition discusses recent IRS private letter rulings, including an excellent reminder of how little things might carry a big bite.

Thoughts on Recent SEC Enforcement Order

The SEC regulates the municipal market through enforcement actions, as well as through direct regulation of broker-dealers (e.g. SEC Rule 15c2-12). So, when the SEC announces an enforcement action, we tend to view the action as part of the SEC's "lesson plan" for the market. We dissect the language of SEC orders and staff reports in an attempt to discover the latest elucidation of the evolving interest and reach of the SEC into municipal market activities and, from a practical standpoint, to further hone our diligence practices or refine our client's disclosure policies and procedures. Sometimes, the orders and reports are clear about the point being made such as the Orange County, California order and staff report discussion of a governing board's responsibility for disclosure documents, the San Diego order and staff report discussion regarding pension liability, or the Harrisburg order and report discussion of public statements and websites, among other things. In the run-up to MCDC, there were SEC actions regarding the failure to disclose past non-compliance with continuing disclosure undertakings. When the MCDC enforcement orders were released, however, the euphemistic "many" were dismayed that the orders provided little to no real explanation why some relatively minor (and some really minor) continuing disclosure transgressions were deemed material by the SEC. The MCDC orders were a bit of a puzzle but, we all moved on and now official statements routinely include disclosure of past compliance issues without regard to materiality.

In the last couple of years, SEC enforcement actions against municipal issuers and issuer officials have largely been focused on misleading, stale, and/or inaccurate financial information (including projections) included in offering documents or audited financial statements. So, it was with somewhat bated breath that I read the SEC Order regarding the Louisiana town of Sterlington[1], wondering if the SEC might have some useful or enlightening nuggets for municipal bond lawyers. As best I can tell, there was no offering document, the "offerings" were three private placements in 2017 and 2018 and the "investors" were either banks or a state lending authority. The SEC Order refers to misleading statements in "closing documents" and omissions "in documents provided" to investors. The transactions sound more like bank loans than securities except for the use of the moniker "bond" (commonplace in Louisiana) but that is a subject for another day.

According to the SEC Order, the misleading statement made to investors was that the Louisiana State Bond Commission (LSBC) had approved the debt. The LSBC had, in fact, approved the debt but the approval was based upon false projections allegedly put together by an unregistered municipal advisor and the then Sterlington Mayor Vern Breland. Notably, it does not appear the

[1] https://www.sec.gov/litigation/admin/2022/33-11069.pdf

projections were specifically used to market the debt, although there are references in the separate federal complaints against the former mayor[2] and the unregistered municipal advisor[3] that the LSBC application was indeed provided at least to the bank purchasing the 2018 debt. As I was reading the SEC Order for the first time, my mind was racing ahead wondering if the SEC was going to somehow say the act of submitting the false projections to the LSBC was, in and of itself, the securities law violation, which would have been confounding; however, continuing to read, it turned out, the transgression, according to the SEC Order, was that the statement of approval was not tempered with the fact that the LSBC approval was based upon false projections, thereby creating a risk that the bonds may not have been duly approved as required under Louisiana law. While this does appear to be a material risk, there is no indication the LSBC has revoked its approval.

The omission sited in the SEC Order was a failure to disclose the risk that bond proceeds would not be spent as intended in that the town had previously been written up in its 2016 audit for diverting bond proceeds to projects that were not part of the originally authorized projects which could be a violation of state law and, because the projects being financed were revenue-producing projects and diverting proceeds away from the project could affect availability of revenues to pay the bonds.

So, why was the SEC compelled to investigate 3 private placements to presumably qualified institutional buyers? Doing a little research, I found the news reports of the Mayor's resignation in October 2018[4], the continuing fiscal deterioration of the town in late 2018, the court-ordered fiscal administration of the town in August 2019[5], and a rather scathing October 2019 state legislative investigative audit[6] of the town. I also found the news reports of the August 2020 state indictment of the former Sterlington Mayor for malfeasance in office, a felony in Louisiana[7]. The state legislative investigative audit is actually a more comprehensive explanation of the underlying facts (or allegations, depending on your perspective).

According to the findings in the state legislative investigative audit, the investigation was the result of several complaints received alleging the town had used debt proceeds for unauthorized purposes (findings the audit confirmed). As the investigation proceeded, however, the focus of the report ultimately was on the financial projections used in the application to the LSBC for approval of the 3 debt transactions in 2017 and 2018. It would appear this investigative audit could have been the spark that peaked the SEC's interest in this matter, particularly in light of the SEC's tip of the hat to the legislative audit staff's assistance[8] in the news release announcing the SEC's action.

[2] https://www.sec.gov/litigation/complaints/2022/comp-pr2022-97-breland.pdf

[3] https://www.sec.gov/litigation/complaints/2022/comp-pr2022-97-fletcher.pdf

[4] https://www.thenewsstar.com/story/news/local/2018/10/01/vern-breland-resigns-mayor-sterlington/1492932002/; accessed June 8, 2022

[5] https://app.lla.state.la.us/LLAitems.nsf/vwPRsWeb/Judge_Approves_Fiscal_Administrator_for_Town_of_SterlingtonKROY-BF3RFG.html

[6] https://lla.la.gov/PublicReports.nsf/A3D373C0723C50AD862584B200641583/$FILE/Town%20of%20Sterlington.pdf

[7] https://www.knoe.com/2020/08/10/former-sterlington-mayor-indicted-on-charge-of-malfeasance-in-office/

[8] https://www.sec.gov/news/press-release/2022-97

The town consented to the SEC Order and agreed to cease and desist from future violations, with no financial penalty being imposed. The unregistered municipal advisor (both the firm and the individual) also consented to judgment and agreed to pay civil penalties to be determined later by the court. The former mayor, on the other hand, is litigating the matter with SEC, as well as facing the state felony charge of malfeasance in office. The Town of Sterlington, meanwhile, appears to be well on the road to fiscal recovery with the court-ordered fiscal administrator offering his final report in 2021.[9]

What are the takeaways from this enforcement action? What chapter is this in the SEC's lesson plan for the municipal market? The obvious lesson is, in the famous words of Sir Walter Scott, oh, what a tangled web we weave, when first we practice to *(allegedly)* deceive.[10] In other words, don't try to manipulate a state bond commission with rosy projections or act as a municipal advisor without proper registration or you will set in motion a domino game that may lead to the SEC.

Additionally, while some may be alarmed over an SEC enforcement action involving what might have been characterized, structured and "papered" as a bank loan despite its moniker, it does not appear this question was raised by any party. There is not enough information in the order to draw any conclusion regarding the loan-vs-security analysis, including whether the bank purchasers are accepting of the treatment of these transactions as "securities."

From a practice standpoint, I think there is at least one takeaway for bond lawyers:

- In transactions utilizing projected financial information, it bears repeating that you should thoughtfully review the underlying assumptions and the base year and note any discrepancies from current year budget or prior audited financial statements.

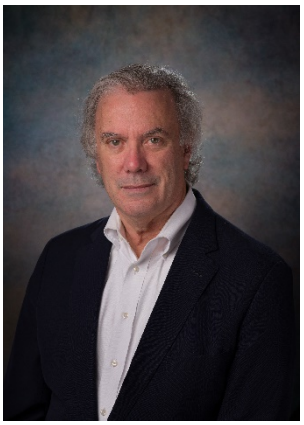
And now for something completely different…

This space would normally include some random snippet of mostly useless information but the events of the last several weeks have cast a shadow over my sense of humor. In addition to the war in Ukraine and the horrific mass shootings in the U.S., I lost a long-time client last month. Benjamin N. Donatelli II, was the long time Secretary of the Higher Educational Facilities Financing Authority in Florida. He was a special, thoughtful man. In his eulogy of his father, Benjamin N. Donatelli III, told of story when he had to fess up to dropping some chewing gum in his dad's beloved Volvo (the chewing gum not being found for several days). When his dad forbade him from chewing gum, he asked his dad "for how long?" to which the response was "until further notice." I wish I had thought of that response with my own kids back in the day. Rest in peace, Ben.

And, with that, please enjoy the rest of the Spring 2022 Edition.

[9] https://www.thenewsstar.com/story/news/2021/05/26/fiscal-administrator-gives-final-report-sterlington-aldermen/5211808001/

[10] *Scott, Walter, 1771-1832. Marmion : a Tale of Flodden Field. London :Printed by J. M'Creery ... for Archibald Constable and Co., Edinburgh, and William Miller ... and John Murray, London, 1810.*



Federal Securities Law:

Paul S. Maco, Bracewell LLP, Washington, D.C.

Enforcement

Within the first two weeks of June 2022, the Securities and Exchange Commission initiated a series of enforcement actions against municipal market participants in three separate matters in three separate jurisdictions, all based on allegations of financial fraud. Each of the three matters involve noteworthy fact patterns. Only one of the three involves an official statement, in this instance prepared by an issuer official and the issuer's municipal advisors. One involves two private placements for a town of 2,600 in which the disclosure documents provided investors were filings made with the state bond commission. The third, against the former chief administrative officer and city secretary of a city of 1,627, is based on an allegedly fraudulent annual financial report filed on EMMA. In this last matter, the issuer was not charged. The SEC's use of federal court in all three matters, as well as the scope of charges and remedies pursued in each reflect the aggressive enforcement tactics and settlement terms promoted by SEC Chair Gensler described initially in the Fall 2021 column and again in the Winter 2021 column regarding the Crosby Independent School District enforcement proceedings.[1]

Sterlington, Louisiana

On June 2, 2022, the SEC announced charges against a Louisiana town and its former Mayor as well as the Town's unregistered municipal advisor and its owner,[2] arising out of two private placements for the town of 2,600. The SEC charged:

- the Town with violations of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;
- the former Mayor with violations of Sections 17(a) (1) and (3) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aiding and abetting the Town's violation of Securities Act Section 17(a) (2);
- the unregistered municipal advisor and its owner with violations of Sections 17(a) (1) and (3) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; violations of Section 15B(c)(1) of the Exchange Act (breach of fiduciary duty), violations of Section 15B(c)(1) of the Exchange Act (Acts in Contravention of Any Rule of the MSRB), and violations of MSRB Rule G-17 (Engaging in a Deceptive, Dishonest, or Unfair Practice);
- the unregistered municipal advisor with violations of Section 15B(a)(1)(B) of the Exchange Act (failure to register with the Commission), and
- the owner of the municipal advisor with aiding and abetting the unregistered municipal advisor's violation of Section 15B(a)(1)(B).

[1] *See*, The Bond Lawyer, Federal Securities Law, *Enforcement* Vol. 45, No. 4, Fall 2021.
[2] SEC Charges Louisiana Town and Former Mayor with Fraud in Two Municipal Bond Deals, Press Release 2022-97, available at https://www.sec.gov/news/press-release/2022-97.

As described in the SEC announcement,

> On April 27, 2017, Sterlington sold $4 million of water and sewer utility revenue bonds ("2017 Bonds"), and on September 28, 2018, it sold a $1.8 million refunding bond ("2018 Bonds") (collectively, the "Bonds"). The Bonds, which were sold in private placements to investors, were intended to finance development of a water system for the Town and improvements to its existing sewer system. As required by Louisiana law, the Town applied to the Louisiana State Bond Commission ("Bond Commission") for approval of these bond offerings. The Town submitted applications for the 2017 Bonds and 2018 Bonds to the Bond Commission on January 18, 2017 and July 18, 2018, respectively. In support of each application, the Town included false financial projections about the anticipated revenue of the Town's sewer system. The false projections were created by the Town's municipal advisor with the participation and approval of the Town's then-Mayor. The false projections misled the Bond Commission as to the Town's ability to cover its debt service for the proposed Bonds. Bond investors were not informed that the Town had obtained Bond Commission approval of the Bonds based on false projections, and were not informed of the associated risk that the Bonds may not have been duly authorized. In addition, the Town did not disclose to investors in the 2017 Bonds and 2018 Bonds that it had misused over $3 million from earlier bond offerings.

Sterlington settled the charges against it with the SEC by consenting, without admitting or denying the findings (except as to jurisdiction and subject matter), to entry of an Order, including a Cease-and-Desist Order.[3]

The SEC filed a complaint in federal district court against Twin Spires Financial LLC, the unregistered municipal advisor and its owner, Aaron B. Fletcher reflecting the charges described above.[4] According to the SEC announcement, Twin Spires and its owner Fletcher have consented to the entry of judgments enjoining them from future violations and agreed to pay disgorgement, prejudgment interest, and civil penalties in amounts to be determined at a later date by the Court.[5]

The SEC also filed a complaint in federal district court against the former Town Mayor Vern A. Breland.[6] According to the SEC announcement, Breland is litigating the SEC's allegations against him.[7] In addition to the charges described above, the SEC complaint states:

> On August 7, 2020, a Louisiana grand jury charged Breland for "malfeasance in office (a felony) between the dates of January 1st, 2017 and including September 30, 2018, willfully and unlawfully perform, refuse or fail to perform his duty as a public officer, contrary to

[3] In the Matter of Town of Sterlington, Louisiana, Order Instituting Cease And-Desist Proceedings Pursuant To Section 8A of the Securities Act Of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, And Imposing A Cease-And-Desist Order; Securities Act Rel. No. 11069; Exchange Act Rel. No. 95034 (June 2, 2022 (Order).
[4] *SEC v. Fletcher*, Civil Action No. 3:22-cv-01467 (D.La. Filed June 2, 2022).
[5] N. 1, *supra*.
[6] *SEC v. Breland*, Civil Action No. 3:22-cv-01470 (D.La. Filed June 2, 2022).
[7] N. 1, *supra*.

> the provisions of R.S. 14:134." The charge is based on the Town's misuse of bond proceeds directed by Breland and the case is still pending.[8]

The 2017 Bonds were sold in a private placement to two banks and a state lending authority in a total issuance of $4 million.[9] The 2018 Bonds were privately placed with a single bank investor.[10] Neither the Order nor either complaint refer to any official statement or other offering document prepared for the bond sales. Rather the facts alleged in the complaint(s) state that potential investors were provided with the allegedly fraudulent documents prepared and filed with the State Bond Commission. While unusual, the staff of the SEC's Office of Municipal Securities had indicated such a possible action two years ago.

In February 2020, the Office of Municipal Securities issued Staff Legal Bulletin No. 21.[11] Part IV of the Bulletin, provides examples of statements covered by the antifraud provisions, including paragraph C, Public Reports Delivered to other Governmental or Institutional Bodies, which states:

> Though the Commission has not specifically identified other types of reports which, once public, would be subject to the antifraud provisions, the staff believes that additional types of reports could be covered by the antifraud provisions depending on the facts and circumstances. [cit.om.] In the staff's view, additional types of reports that could, depending on the facts and circumstances, be included in this category may include (but may not be limited to) reports submitted by a municipality to a state agency, reports made by a state or local official to a legislative body (such as a state legislature or city council), and other reports made part of a public record and available to the public.

This appears to be the first application of the concept articulated in Paragraph C of the Bulletin in an SEC enforcement action.

City of Rochester

On June 14, 2022, the SEC announced charges against the City of Rochester, New York, its former finance director Rosiland Brooks-Harris, and former Rochester City School District CFO Everton Sewell alleging the defendants mislead investors in a $119 million bond offering. The SEC also charged Rochester's municipal advisor Capital Markets Advisors, LLC (CMA) and its principal Richard Ganci with misleading investors and breaching their fiduciary duty to Rochester. CMA, Ganci and CMA co-principal Richard Tortora were also charged with failing to disclose conflicts to municipal clients.[12]

[8] Breland Complaint, *supra*, paragraph 7.
[9] Breland complaint paragraph 27, n. 5, *supra*.
[10] Id, paragraph 31.
[11] 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), available at: https://www.sec.gov/municipal/application-antifraud-provisions-staff-legal-bulletin-21.
[12] SEC Charges Rochester, NY, and City's Former Executives and Municipal Advisor with Misleading Investors, Press Release No. 2022-108, (June available at: https://www.sec.gov/news/press-release/2022-108

The charges were made in two complaints filed in the U.S. District Court for the Western District of New York: *SEC v. Everton Sewell*[13] and *SEC v, City of Rochester, New York, Rosiland Brooks-Harris, Capital Markets Advisors LLC, Richard Ganci, and Richard Tortora*.[14]

As described in the SEC announcement,

> The SEC alleges that in 2019 the defendants misled investors with bond offering documents that included outdated financial statements for the Rochester City School District and did not indicate that the district was experiencing financial distress due to overspending on teacher salaries. Sewell was allegedly aware that the district was facing at least a $25 million budget shortfall, but he misled a credit rating agency regarding the magnitude of the expected shortfall. The SEC alleges that Brooks-Harris and Ganci were also aware of the Rochester City School District's increased financial distress, including overspending on teacher salaries, yet they made no effort to inquire further about the District's financial condition prior to the bond offering, nor did they inform investors of the risks that the overspending posed to the district's finances. In September 2019, 42 days after the offering, the district's auditors revealed that the district had overspent its budget by nearly $30 million, resulting in a downgrade of the city's debt rating and requiring the intervention of the state of New York.[15]

According to the SEC announcement, Sewell agreed to settle the SEC's charges by consenting, without admitting or denying any findings, to a court order prohibiting him from future violations of the antifraud provisions and from participating in future municipal securities offerings, and to pay a $25,000 penalty. The settlement is subject to court approval.[16] The remaining Defendants have not settled and presumably will litigate.

In addition to reflecting the allegations against him described above, the Complaint against Sewell requests the Court to:

> Issue a judgment permanently restraining and enjoining Defendant from directly, or indirectly, (i) participating in any issuance, purchase, offer, or sale of municipal securities, as defined in Section 3(a)(29) of the Exchange Act [15 U.S.C. § 78c(a)(29), including but not limited to engaging or communicating with a broker, dealer, municipal securities dealer, municipal advisor, bond insurer, nationally recognized statistical rating organization, investor, issuer or obligated person for purposes of issuing, purchasing, offering, or selling any municipal security; and (ii) participating in the preparation of any materials or information, which Defendant should reasonably expect to be submitted to the Municipal Securities Rulemaking Board's Electronic Municipal Market Access system in connection with an offering or a continuing disclosure obligation, or which Defendant should reasonably expect to be provided to investors in connection with any offering

[13] Case No. 22-cv-6274, (June 14, 2022), available at: https://www.sec.gov/litigation/complaints/2022/comp-pr2022-108-sewell.pdf
[14] Case No. 22-cv-6273, (June 14, 2022), available at: https://www.sec.gov/litigation/complaints/2022/comp-pr2022-108-city-of-rochester.pdf
[15] N. 12, *supra*.
[16] Id.

(including a private placement) of municipal securities, provided however, that such injunction shall not prevent Defendant from purchasing or selling municipal securities for his own personal account, and

Order Defendant to provide a copy of the judgment by email or mail within 10 days of the entry of the judgment to any issuer of municipal securities or obligated person with which Defendant is employed as of the date of the entry of the judgment.[17]

In addition to reflecting the allegations made respectively against them described above, the Complaint against the City of Rochester, New York, Rosiland Brooks-Harris, Capital Markets Advisors LLC, Richard Ganci, and Richard Tortora, alleges that:

- the related offering documents were prepared by Brooks-Harris and the City's long-time municipal advisor, Capital Markets Advisors, LLC and Richard Ganci;

- in a July 2019 call with a credit rating agency, the District's then-CFO stated that the District's spending was within the budget for fiscal year 2019 that had just ended on June 30, 2019. With respect to the District's finances, the Defendants' message to the rating agency and to investors was "there's nothing to see here;"

- CMA and Ganci knew the District was spending more than it brought in each year and Ganci had specifically identified the risk that the District's overspending could get worse. Further, the City, Brooks-Harris, CMA and Ganci all knew that the District had an enormous and unusual cash decline of $63 million as of the end of fiscal year 2019 that was due, in part, to increased spending on salaries;

- CMA, Ganci, and CMA's other principal Richard Tortora ("Tortora") also failed to disclose to nearly 200 CMA clients (including the City) that CMA had material conflicts of interest arising from its compensation arrangements; and

- in many cases, CMA, Ganci and Tortora falsely stated that CMA had no undisclosed material conflicts of interest.[18]

The Complaint makes a total of twelve separate claims for relief against differing combinations of the defendants for violations of the antifraud provisions of the federal securities laws or aiding and abetting violations against the antifraud provisions, violations of MSRB Rules, and breach of fiduciary duty. The twelfth claim for relief asserts claims for alternative liability against Brooks-Harris, CMA and Ganci, and Ganci and Tortora for aiding and abetting, or knowingly and recklessly providing substantial assistance, to direct violations by others, in the case of Brooks-Harris, aiding and abetting violations by the City, in the case of CMA and Ganci, aiding and abetting violations by the City and/or Brooks-Harris, and in the case of Ganci and Tortora, violations by CMA, should the respective individuals not be found liable for the direct violations charged.[19]

[17] N. 13, *supra*, Prayer For Relief, Parts III and IV
[18] N. 14, *supra*.
[19] Id.

In addition to requesting the Court to permanently restraining and enjoining each Defendant from directly or indirectly violating the federal securities laws and regulations alleged against them, the SEC asks the Court for a judgment restraining and enjoining Brooks-Harris from future activity under the same terms requested in the Sewall Complaint.[20]

Anthony Michael Holland

On June 16, 2022, the SEC announced securities fraud charges against Anthony Michael Holland, the former Chief Administrative Officer and City Secretary for the City of Johnson City, Texas for creating and causing to be distributed falsified financial statements and a falsified audit report for the city's 2016 fiscal year.[21] The charges were made in a complaint filed in the U. S. District Court for the Western District of Texas, Austin Division.[22] The Compliant notes the City's population was 1,627 in 2020.[23]

As described in the announcement,

> According to the SEC's complaint, Holland created the falsified documents to prevent discovery on his ongoing embezzlement of city funds. The complaint alleges that, between 2015 and 2020, Holland stole approximately $1 million from the city, including $107,137 during the 2016 fiscal year. The complaint further alleges that, to hide his theft, Holland initially delayed the annual independent audit of the City's 2016 financial statements, and then, in approximately August 2018, falsified the 2016 documents by changing dates on the city's 2015 financial statements and audit report. According to the complaint, Holland then provided the falsified documents to the city's mayor and municipal advisor, knowing that the material would be posted to the city's public website and the Municipal Securities Rulemaking Board's Electronic Municipal Market Access (EMMA) system and made available to investors. During the time the falsified documents were available to investors on EMMA, investors engaged in secondary trading in the city's outstanding municipal bonds.
>
> The SEC's complaint charges Holland with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Without admitting or denying the SEC allegations, Holland has consented to the entry of a judgment enjoining him from future violations and from, among other things, participating in the preparation of certain material relating to municipal bond offerings. He agreed to pay disgorgement, prejudgment interest, and civil penalties in amounts to be determined at a later date by the Court.[24]

[20] Id., Prayer For Relief, Parts III and IV.
[21] SEC Charges Former Texas City Official for Falsifying City's Financial Documents, Litigation Release No. 25426, available at: https://www.sec.gov/litigation/litreleases/2022/lr25426.htm?utm_medium=email&utm_source=govdelivery
[22] Case No. 1:22-cv-00590 (June 16, 2022), available at: https://www.sec.gov/litigation/complaints/2022/comp25426.pdf
[23] Id., paragraph 6.
[24] N. 20, *supra*.

The Complaint, in addition to permanently enjoining Holland from future violations of the federal securities laws, asks the Court for a judgment restraining and enjoining him from future activity under the same terms requested in the Sewall Complaint.[25]

Change

This is my 69th Federal Securities Law column for The Bond Lawyer and my last. The first was published in the March 1, 2001 edition of The Bond Lawyer.[26] In late 2000, shortly after I left the SEC to join Vinson & Elkins (and rejoin NABL) the legendary Fred O. Kiel extended the offer and privilege of authoring this column. I gladly accepted. After 21 years, it is certainly time for a fresh new voice.

NABL has identified and approved Andrew "Drew" Kintzinger as my successor. I had the pleasure of serving together with Drew on the NABL Board in the early 1990s. I was fortunate to have the opportunity, together with Amy Dunbar, to accompany Drew when he testified on behalf of NABL as President-Elect before then Congressman Ed Markey's House Subcommittee on Telecommunications and Finance October 1993 hearing on the adequacy of federal securities regulation of the municipal bond market. Drew is steeped in the development of federal regulation of the municipal market. I look forward to the benefit of his perspective.

Thank you, and fare thee well.

Paul

[25] Complaint, Prayer for Relief paragraphs V. and VI.
[26] The Bond Lawyer, Vol. 22, No. 1 (March 1, 2001), available at: https://www.nabl.org/Newsroom/e-Publications/The-Bond-Lawyer-Members-Only/the-bond-lawyer-march-1981

Federal Tax Law: The Tax Microphone

Antonio D. Martini, Hinckley Allen, Boston, Massachusetts

Seems to me things have been fairly quiet over the past three months at the 103 Corral. Apart from a couple of private letter rulings under Code Section 141 and 146 from earlier this year and the customary solicitation by the Internal Revenue Service for input on its annual priority guidance plan, there has been little of note on the guidance front in our corner of the federal tax laws. Let's take a look at what there is to see.

Private Letter Rulings 202205016 and 202205017 (February 4, 2022)

These paired rulings, which appear to vary only in terms of the security for bonds proposed to be issued (special taxes in the case of the bonds described in PLR 202205016, tax increment in the case of the bonds described in PLR 202205017), apply a private business use analysis under Code Section 141 to certain publicly-owned improvements in connection with the reclamation of land for the development of governmental service buildings and public infrastructure. According to the rulings, these public improvements, which include the construction of earthworks and revetments for soil stabilization and erosion control, governmental structures and facilities including public safety buildings and clean water/wastewater facilities, and public roadways and park space, will be adjacent or proximate to other land and improvements owned and used or to be owned and used by private persons in their trades or businesses.

The proponent of the ruling requests appears to have submitted them because some of the soil stabilization and erosion control measures to be implemented would either benefit the land parcels of adjacent or proximate private property owners and users or, in some cases, would actually be performed on such properties. The rulings state that these measures would be carried out on privately-owned or -used property only to the extent necessary to facilitate the construction of public improvements and that the scope of design of the related ground improvements, such as revetments, did not take into account the needs or requirements of any building, structure or facility to be owned or used by a private person.

The IRS concludes in both rulings that the public improvements to be financed with the bonds will not give rise to special legal entitlements or to special economic benefits that would result in any private business use of the proceeds of the bonds. Any benefits accruing to private business users in the area would either be the same that would be enjoyed by other members of the public or would be, at most, coincidental.

Private Letter Ruling 202206018 (February 18, 2022)

This ruling is another in a long line of requests under § 301.9100-1 of the Procedure and Administration Regulations for an extension of time to file IRS Form 8328 to carry forward unused private activity volume cap from a prior year. There is nothing especially remarkable

about the extension request, which the IRS granted, except perhaps that the facts state that the reason for the failure to timely file the Form 8328 was the responsibility of the bond counsel firm working with the issuer to file the form. It appears that the 8328 was prepared and executed by the issuer and then transmitted to bond counsel, all on a timely basis, and that, due to a "miscommunication" between two offices within bond counsel's firm, the form was not filed before the applicable deadline (*i.e.*, generally by February 15 of the calendar year following that in which the carried-forward volume cap arose, plus six months under the automatic extension provided in Revenue Procedure 2005-30). According to the recital of facts in the ruling, the failure to file the 8328 was only discovered in the lead-up to the issuance of bonds for which the issuer had earmarked the volume cap carryforward. The request for an extension was filed promptly after the discovery.

This ruling can and should serve as a helpful reminder for bond practitioners; although some of the tasks we do for our issuer and borrower clients seem to be hum-drum and entirely ministerial, and thus can be easy to overlook, a lot can ride on the outcomes. A late Form 8328 means no volume cap carryforward is available. A late- or never-filed IRS Form 8038 or 8038-G may put the tax-exempt status of bonds in jeopardy, at least technically. An overlooked IRS Form 8038-T filing, when there is a positive rebate liability due, may mean additional liability for late payment interest and penalties. This list goes on from here.

In this ruling, even, where all's well that ends well, someone would have had to foot the bill for the time and expense associated with preparing the ruling request, and it's a safe bet that the discovery of the failure to file caused some disruption in the closing schedule for the affected bond transaction, and perhaps some embarrassment as well. It's probably fair to say that these are hassles that might have been avoided easily enough. Enough said.

IRS Notice 2022-21—Request for Input on Priority Guidance Plan; NABL Response

On April 26, 2022, the IRS released Notice 2022-21 to solicit public input on recommended items for inclusion in its "Priority Guidance Plan" for FY 2022-2023. On June 2, in response to the solicitation, NABL's President, Anne Fillingham, submitted the following four suggestions for inclusion in the IRS plan, in order of priority:

1. **Guidance on "Qualified Broadband Projects" and "Qualified Carbon Capture Facilities".** A request for interpretative guidance with respect to the new categories of exempt facility bonds—for "qualified broadband projects" and "qualified carbon capture facilities"—provided in the Infrastructure Investment and Jobs Act (Public Law 117-58) that was enacted in November 2021. In her submission, President Fillingham noted that NABL will be providing specific comments to the IRS regarding these new exempt facility categories; as of the date of this writing, that commentary is still pending.

2. **Modification and Finalization of Proposed Reissuance Regulations.** A request that the IRS modify and finalize its 2018 proposed regulations addressing the circumstances in which tax-exempt (and other tax-advantaged) bonds will be treated as reissued for federal tax law purposes. President Fillingham reminded the IRS that, in NABL's view, the 2018 proposed regulations omitted several helpful or useful principles found in the existing law of reissuance for

tax-exempt (and other tax-advantaged) bonds, such as those in existing law that permit premium pricing, alterations of security and other "corrective" changes in connection with certain remarketings of outstanding bonds, and that NABL submitted a fulsome set of comments on the 2018 proposed regulations to the IRS on March 1, 2019.

3. **Simplification and Expansion of Remedial Action Rules.**

A reminder that on February 1, 2019, in response to the release of Revenue Procedure 2018-26, which extended the availability of remedial action by means of alternative use of disposition proceeds to certain long-term, pay-as-you-go leases and for qualified tax credit bonds (including direct pay bonds), NABL offered the IRS commentary to further clarify, simplify and expand the application of the remedial action rules. President Fillingham's letter reiterates NABL's willingness to discuss its remedial action recommendations with the regulators.

4. **Clarification of the Final Allocation and Accounting Regulations.**

A reiteration of NABL's request for additional clarification regarding the allocation and accounting principles of Treasury Regulations Section 1.141-6, which were promulgated in final form in October 2015. Here as well, the request is accompanied by an invitation (really, a re-invitation) for the IRS to sit down with NABL representatives to discuss specific comments on the 1.141-6 regulations that we offered by our membership in September 2018.

NABL Tax Law Committee Highlights

In closing, I want to highlight a NABL Tax Law Committee project of note, which recently resulted in the submission of a request to the IRS for clarifying guidance. The submission was transmitted to the IRS on June 24, 2022 to call for clarifications and additional interpretive guidance concerning "qualified carbon capture facilities". As regular readers of this column will know, this is a new category of assets for which exempt facility bonds can be issued on a tax-exempt basis under Sections 142(a)(17) and 142(o) of the Code, which were enacted late in 2021 as part of the Infrastructure Investment and Jobs Act (Pub. L. 117-58).

Among other matters, the Tax Law Committee has asked the Service with some urgency to clarify that the "capture and storage percentage" requirement of Section 142(o)(3) applies only to projects at industrial carbon dioxide facilities that are designed to, and capable of, capturing and geologically storing carbon dioxide. The Committee's submission explains that, without this clarification, significant portions of the new exempt facilities enactment could be rendered moot, and otherwise-eligible facilities that are not designed to provide for geologic sequestration of captured carbon dioxide might not be .

You can find a copy of the complete submission here. Kudos to Charlie Henck and Brian Teaff, who lead this project on behalf of NABL's membership. Let's hope their work elicits some helpful guidance from the IRS to make this new exempt facility category a serviceable financing tool; we'll be following the progress of this project, and the IRS's response, in this space.