NATIONAL ASSOCIATION OF BOND LAWYERS

THE WORKSHOP 2023
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HOT TOPICS IN SECURITIES LAW

Chair:

Daniel Deaton — Nixon Peabody LLP, Los Angeles, California

Panelists:

David Cohen — RBC Capital Markets, New York, New York
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***Panel Description**: This panel will include practitioners and securities regulators discussing the latest federal securities law issues facing the municipal bond market, with a focus on how lawyers may assist their clients in addressing these issues. While the final topics are subject to change based upon current events, expect to hear updates about (i) analysis concerning the application to the municipal securities market of the recent SEC actions, initiatives and developments concerning ESG disclosure, and (iii) recent enforcement actions and pending rule changes impacting securities laws and transactions in the municipal market.*

I. MUNICIPAL SECURITIES LEGAL & REGULATORY LANDSCAPE

A. Securities Act of 1933 – The Securities Act of 1933, as amended (the "Securities Act") is the foundational securities law governing securities offerings, which is generally inapplicable to municipal securities other than the anti-fraud provisions

> Securities Act Section 17(a)(2) – "*It shall be unlawful for **any person** in the offer or sale of any securities … or any security-based swap agreement … by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission 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; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser*."

This statutory provision formed the basis for the settlements with underwriters, municipal issuers and obligated persons in the SEC's Municipalities Continuing Disclosure Cooperation ("MCDC") Initiative.

B. Securities Exchange Act of 1934 – The Securities Exchange Act of 1934, as amended (the "Exchange Act") created the Securities and Exchange Commission (the "Commission" or the "SEC"), and establishes regulatory authority and jurisdiction of the Municipal Securities

Rulemaking Board (the "Board" or the "MSRB") and other self-regulatory organizations and market utilities, requires registration of broker-dealers, municipal securities dealers and municipal advisors with the SEC, establishes certain securities-related reporting and related requirements inapplicable to municipal securities, and includes anti-fraud provisions that are applicable to municipal securities.

(1) Exchange Act Section 10(b) – "*It shall be unlawful for **any person**, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange … [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.*"

This statutory provision provides authority for SEC Rule 10b-5: "*It shall be unlawful for **any person**, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit 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, or (c)[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.*"

(2) Exchange Act Section 15(c)(1)(B) – "*No **broker, dealer, or municipal securities dealer** shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.*"

(3) Exchange Act Section 15(c)(2)(B) – "*No **broker, dealer, or municipal securities dealer** shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.*"

This statutory provision provides authority for SEC Rule 15c2-12, establishing requirements on underwriters with respect to municipal issuers' primary and continuing disclosures, derived from this section and Section 15(c)(2)(D).

(a) Current text of Rule 15c2-12: https://www.ecfr.gov/cgi-bin/text-idx?SID=eb2c65d80de644ceac78502b5fb51b3d&mc=true&node=se17.4.240_115c2_612

(b) SEC Office of Municipal Securities page on Rule 15c2-12 and related disclosure matters: https://www.sec.gov/municipal/municipal-securities-disclosure.html

(4) Exchange Act Section 15B(a)(5) – "*No **municipal advisor** shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in connection with which such municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice.*"

(5) Registration requirements:

(a) Broker-dealers must register with the SEC as broker-dealers under Exchange Act Section 15(a)(1).

(b) Non-broker-dealer banks effecting, inducing or attempting to induce transactions in municipal securities must register with the SEC as municipal securities dealers under Exchange Act Section 15B(a)(1)(A).

(c) Municipal advisors (including broker-dealers or municipal securities dealers already registered as described in (i) and (ii)) must register with the SEC as municipal advisors under Exchange Act Section 15B(a)(1)(B).

This statutory provision provides authority for SEC Rules 15Ba1-1 through 1-8, defining who is a municipal advisor.

(6) Exchange Act Section 15B(c)(1) [first sentence] – "*No **broker, dealer, or municipal securities dealer** shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security, and no broker, dealer, municipal securities dealer, or **municipal advisor** shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in contravention of any rule of the Board.*"

This statutory provision is what requires broker-dealers, municipal securities dealers and municipal advisors to comply with MSRB rules.

(7) Exchange Act Section 15B(c)(1) [second sentence] – "*A **municipal advisor** and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.*"

This statutory provision is what establishes the federal fiduciary duty of municipal advisors to their municipal entity clients.

(8) Rulemaking authorities:

(a) MSRB Rulemaking – Exchange Act Section 15B(c)(2) – "*The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by* ***brokers, dealers, and municipal securities dealers*** *and advice provided to or on behalf of municipal entities or obligated persons by* ***brokers, dealers, municipal securities dealers, and municipal advisors*** *with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by* ***brokers, dealers, municipal securities dealers, and municipal advisors***. *The rules of the Board, as a minimum, shall … [sets out 12 specific areas for rulemaking]*"

(i) MSRB Rules and Interpretations: http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules.aspx

(ii) MSRB's EMMA website: https://emma.msrb.org/

(b) SEC Rulemaking

(i) Exchange Act Section 15B(c)(7) – "*Nothing in this section shall be construed to impair or limit the power of the Commission under this title.*"

(A) *e.g.*, MSRB rulemaking authority does not foreclose SEC from adopting rules under the Exchange Act, such as SEC Rule 15c2-12

(ii) Exchange Act Section 19(c) – "*The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization … as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title….*"

This provision provides the SEC residual rulemaking authority to add to, amend or override MSRB rules on broker-dealers, municipal securities dealers and municipal advisors under Exchange Act Section 15B(c)(2)

(c) "Tower Amendment"

(i) Limitation on SEC and MSRB rulemaking authority – Exchange Act Section 15B(d)(1): "*Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities,*

directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities."

(ii) Further limitation on MSRB rulemaking authority – Exchange Act Section 15B(d)(2): "*The Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise, to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer: Provided, however, that the Board may require municipal securities brokers and municipal securities dealers or municipal advisors to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title.*"

(A) The inapplicability of subsection (2) of the Tower Amendment to the SEC allowed the SEC, but not the MSRB, to adopt the requirements set out in SEC Rule 15c12-12.

(B) The proviso clause in subsection (2) allowed the MSRB's requirements for underwriters to provide official statements, if produced and made available, to the MSRB and to customers.

(9) Examinations for compliance with, and enforcement of, MSRB rules conducted by:

(a) For broker-dealers:

(i) the Financial Industry Regulatory Authority ("FINRA"), with:

(A) examination authority under Exchange Act Section 15B(c)(7)(A)(i)

(B) enforcement authority under Exchange Act Section 15A(b)(7)

(ii) the SEC, with:

(A) examination authority under Exchange Act Section 17(b)(1)

(B) enforcement authority under Exchange Act Section 15(b)(4) and Section 15B(c)(2)-(4)

(b) for non-broker-dealer municipal securities dealers:

(i) the US Treasury Department's Office of the Comptroller of the Currency, the Federal Reserve Board or the Federal Deposit Insurance Corporation, depending on the type of bank (as prescribed in Exchange Act Section 3(a)(34)(A)), with:

(A) examination authority under Exchange Act Section 15B(c)(7)(A)(ii)

(B) enforcement authority under Exchange Act Section 15B(c)(5)

(ii) the SEC, with:

(A) examination authority under Exchange Act Section 17(b)(1)

(B) enforcement authority under Exchange Act Section 15B(c)(2)-(4)

(c) for municipal advisors:

(i) the SEC, with:

(A) examination authority as primary examiner for non-broker-dealer municipal advisors under Exchange Act Section 15B(c)(7)(A)(iii) and for all municipal advisors under Exchange Act Section 17(b)(1)

(B) enforcement authority under Exchange Act Section 15B(c)(2)-(4)

(ii) FINRA, for municipal advisors that are broker-dealers, with:

(A) examination authority derived from the SEC's designation under Exchange Act Section 15B(c)(7)(A)(iii) and Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67468 (November 12, 2013), Section IV ("Municipal Advisor Registration Order")

(B) enforcement authority under Exchange Act Section 15A(b)(7)

C. Trust Indenture Act of 1939 – inapplicable to municipal securities pursuant to Trust Indenture Act Section 304(a)(4)(A)

D. Investment Company Act of 1940

(1) governs mutual funds and other fund-based investment vehicles, even when vehicles invest in municipal securities

(2) fund products issued by municipal entities (*e.g.*, 529 plans, ABLE Act plans and local government investment pools) are exempt pursuant to Investment Company Act Section 2(b)

E. Investment Advisers Act of 1940

(1) regulates provision of investment advice with respect to all types of securities investments

(2) no exemption for municipal securities

II. IMPLEMENTATION OF 2017 "FINANCIAL OBLIGATIONS" EVENT DISCLOSURES IN SEC RULE 15c2-12

A. Overview of implementation of the financial obligations event disclosures

(1) Documenting the new events in new continuing disclosure undertakings – what to say in the undertaking itself

(2) Understanding how issuers and obligated persons identify, track and disclose:

(a) incurrence of a material financial obligation

(i) what is a "financial obligation"?

(ii) when is it "material"?

(iii) when is it "incurred"?

(b) agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation

(i) what are "covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation"?

(ii) which "affect security holders"?

(iii) when is there an "agreement to" covenants *et al.*?

(c) occurrence of a default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation

(i) what is a "default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation"?

(ii) when do they "reflect financial difficulties"?

(iii) are defaults *et al.* reflecting financial difficulties with respect to non-material financial obligations covered?

(d) are standard processes or approaches for issuers and obligated persons emerging so far?

(3) Understanding how underwriters comply with their obligation to:

(a) "reasonably determine" that the issuer or obligated person have made a compliant continuing disclosure undertaking – do underwriters expect more than just an undertaking with the right language?

(b) undertake "due diligence" regarding official statement disclosure of material non-compliance with financial obligation disclosures – what steps do underwriters take, and how do they expect issuers/obligated persons to back up their official statement disclosures

(c) are standard processes or approaches for underwriters emerging so far?

(4) General discussion of the good, the bad and the ugly of financial obligation disclosure so far

B. Elements of the 2017 disclosure obligations – teasing out the open questions

B.1 – What is a financial obligation?

(1) Definition of "financial obligation" in Rule 15c2-12(f)(11):

(a) debt obligation;

(b) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or

(c) guarantee of any financial obligation described in (i) or (ii) above;

but excludes municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule 15c2-12.

(2) Excerpts from the SEC discussion in Exchange Act Release No. 83885 (August 20, 2018), 83 FR 44700 (August 31, 2018) ("15c12-12 Amendment Order"), Section III.A.2:

> (a) general nature of financial obligation:
>
> (i) "*... does not include ordinary financial and operating liabilities incurred in the normal course of an issuer's or obligated person's business, only an issuer's or obligated person's debt, debt-like, and debt-related obligations*"
>
> (ii) "*... is not limiting the term "debt obligation" to debt as it may be defined for state law purposes, but instead is applying it more broadly to circumstances under which an issuer or obligated person has borrowed money*"
>
> (iii) "*... any short-term or long-term debt obligation of an issuer or obligated person under the terms of an indenture, loan agreement, lease, or similar contract [such as a line of credit] is covered by the term 'debt obligation' regardless of the length of the debt obligation's repayment period*"
>
> (b) direct purchases and loans
>
> "*... a direct purchase of municipal securities by an investor and a direct loan by a bank would be debt obligations of an issuer or obligated person*"
>
> (c) leases
>
> (i) "*... generally should be considered to include lease arrangements entered into by issuers and obligated persons that operate as vehicles to borrow money*"
>
> (ii) "*... the types of leases that could be debt obligations include, but are not limited to, lease-revenue transactions and certificates of participation transactions*"
>
> (iii) "*... leases entered into in the ordinary course of an issuer's operations do not represent competing debt and should be excluded from the definition of financial obligation*"
>
> (iv) "*... leases that are typically not vehicles to borrow money that are common among issuers and obligated persons include, but are not limited to: commercial office building leases…, airline and concessionaire leases at airport facilities…, and copy machine leases….*"

(d) derivatives

(i) "*… not limited to derivative instruments incurred by issuers or obligated persons solely to hedge the interest rate of a debt obligation or to hedge the value of a debt obligation to be incurred in the future. Instead, the term covers any type of derivative instrument that could be entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation.*"

(ii) "*… the definition captures any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument to which an issuer or obligated person is a counterparty … provided that such instruments are related to an existing or planned debt obligation. This includes, under certain circumstances, instruments that are related to an existing or planned debt obligation of a third party.*"

(iii) "*To determine whether a derivative instrument that relates to an existing or planned debt obligation of a third party is covered … it would be reasonable to distinguish derivative instruments designed to hedge against the risks of a related debt obligation (i.e., debt-related derivatives) from derivative instruments designed to mitigate investment risk. … the former generally would be covered …, while the latter would not.*"

(iv) "*… a debt obligation is 'planned' at the time the issuer or obligated person incurs the related derivative instrument if, based on the facts and circumstances, a reasonable person would view it likely or probable that the issuer or obligated person will incur the related yet-to-be-incurred debt obligation at a future date. … it would be likely or probable that an issuer or obligated person will incur a future debt obligation if, for example, the relevant derivative instrument would serve no economic purpose without the future debt obligation (regardless of whether the future debt obligation is ultimately incurred).*"

(v) "*Factors relevant to whether an issuer's or obligated person's debt obligation is "planned" might include, but are not be limited to, whether: (1) the documents evidencing the relevant derivative instrument explicitly or implicitly assume a future debt obligation; (2) the legislative body of the issuer or obligated person has taken any preliminary (e.g., preliminary resolution) or final (e.g., authorizing resolution) action to authorize the related future debt obligation; or (3) the issuer or obligated person has hired any professionals (e.g., municipal advisor, bond counsel, rate consultant) to assist or advise the issuer or obligated person on matters related to the future debt obligation.*"

(vi) "*Determinations by issuers and obligated persons of whether a derivative instrument contemplates a future debt obligation should prioritize substance over form. In addition, whether a debt obligation is "planned" is based*

on an objective assessment of the facts and circumstances prevailing at the time of incurrence of the derivative instrument, and is not a bright-line test."

(e) guarantee

(i) "*... the term "guarantee" is intended to capture any guarantee provided by an issuer or obligated person (as a guarantor) for the benefit of itself or a third party, which guarantees payment of a financial obligation.*"

(ii) "*A guarantee provided for the benefit of a third party or a self-liquidity facility or other contingent arrangement would be a guarantee under the amendments.*"

(iii) "*...guarantee may assume different forms including a payment guarantee or other arrangement that could expose the issuer or obligated person to a contingent financial obligation. For example, an issuer that is a county could agree to guarantee the repayment of municipal securities issued by a town located in the county. In this instance, the county could be required to use its own funds to repay the town's municipal securities. Furthermore, an issuer or obligated person may provide a guarantee with respect to its own financial obligation. For example, an issuer or obligated person could, in connection with the issuance of variable rate demand obligations, agree to repurchase, with its own capital, bonds that have been tendered but are unable to be remarketed. In this instance, the issuer or obligated person uses its own funds to purchase the bonds instead of a third party liquidity facility.*"

(iv) "*A guarantee ... could raise two disclosures under the Rule – one for the guarantor and one for the beneficiary of the guarantee. Specifically, if an issuer or obligated person incurs a material guarantee, such guarantee would be subject to disclosure under the Rule, as amended. For an issuer or obligated person that is the beneficiary of a guarantee provided in connection with a debt obligation or a derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation, the Commission believes that, generally, such beneficiary issuer or obligated person should assess whether such guarantee is a material term of the underlying debt obligation or derivative instrument and, if so (and if the underlying debt obligation or derivative instrument is material), disclose the existence of such guarantee under the Rule.*"

(f) excluded municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule 15c2-12

(i) "*... for this exclusion to apply, whether the final official statement is submitted voluntarily or not, the issuer or obligated person must submit the final official statement to the MSRB subject to the requirements of Rule 15c2-12(b). This exclusion from the definition of "financial obligation" covers only "municipal*

securities as to which a final official statement has been provided to the [MSRB] consistent with this rule" and does not extend to instruments or obligations (contingent or otherwise) related to such municipal securities. Under a continuing disclosure agreement, an issuer or obligated person will need to disclose any such derivative instrument or guarantee if it is material and affects security holders for purposes of new paragraph (b)(5)(i)(C)(15) of the Rule and make any related disclosures required under new paragraph (b)(5)(i)(C)(16) of the Rule."

(ii) With regard to bond offerings that qualify for one of the exemptions from Rule 15c2-12, it should be noted that "final official statement" is defined in Rule 15c2-12(f)(3) to mean, in relevant part, "*a document … that sets forth … a description of the undertakings to be provided pursuant to paragraph (b)(5)(i), paragraph (d)(2)(ii), and paragraph (d)(2)(iii) of this section, **if applicable** ….*"

(A) A literal reading of the Rule suggests that a final official statement for an issue to which the continuing disclosure provisions are not applicable (for example, a "limited offering" under Rule 15c2-12(d)(1)(i)), and therefore does not include a description of such an undertaking, would be consistent with section (b) of the Rule, so long as such final official statement has been provided to the MSRB.

(B) The SEC staff position, however, appears to be that such a final official statement must effectively commit the issuer or obligated person to provide continuing disclosures in order to qualify for this exclusion.

If continuing disclosure provisions must apply, which version is sufficient? Must the issuer/obligated person agree to provide:

(1) annual financial information as included in the official statement, audited financial statements, and event notices, as would be required under paragraph (b)(5)(i) of the Rule?

(2) annual financial information as is customarily prepared and made publicly available and event notices, as would be required under paragraph (d)(2)(ii) of the Rule?

(3) solely event notices, as would be required under paragraph (d)(2)(iii) of the Rule?

(iii) With regard to any "*instruments or obligations (contingent or otherwise) related to*" a bond offering (including a related swap or guarantee for a bond offering subject to Rule 15c2-12's continuing disclosure requirements), the 15c2-12 Amendment Order states that the exclusion applies only to the bonds offered and not to these related obligations.

It appears that swaps, guarantees and other financial obligations related to a new issue offering, even if disclosed in the official statement and already likely to trigger a continuing disclosure for that issue if drawn upon or if they fail to perform, are now expected to trigger separate clause 15 and 16 disclosures to the issuer's other outstanding bonds as well.

B.2 – What must be reported?

(1) Incurrence event under Rule 15c2-12(b)(5)(i)(C)(15):

(a) Incurrence event consists of:

(i) "*Incurrence of a financial obligation of the obligated person, if material, ...*" or

(ii) "*... 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*"

(b) Excerpts from the SEC discussion in 15c12-12 Amendment Order, Section III.A.1:

(i) materiality

(A) "*... not every incurrence of a financial obligation or agreement to terms is material. For example, an issuer or obligated person may incur a financial obligation for an amount that, absent material terms that affect security holders, would not raise the concerns the amendments are intended to address. Utilizing a materiality standard permits an issuer or obligated person to assess its disclosure obligation in the context of the specific facts and circumstances.*"

(B) *"... What constitutes materiality can vary by entity based on the size of the overall balance sheet, the size of existing obligations or the size of the overall bond portfolio …, [but] these are not the only factors that are relevant in evaluating the particular facts and circumstances…. For example, it may be appropriate for issuers and obligated persons to consider not only the source of security pledged for repayment of the financial obligation, but also the rights associated with such a pledge (e.g.,*

senior versus subordinate), par amount or notional amount (in the case of a derivative instrument or guarantee of a derivative instrument), covenants, events of default, remedies, or other similar terms that affect security holders to which the issuer or obligated person agreed at the time of incurrence, when determining its materiality."

(C) "*In the materiality inquiry that issuers, obligated persons, and dealers must regularly undertake when preparing disclosure documents in connection with an Offering, they must assess whether a piece of information at the time of issuance is of a character that there is a substantial likelihood that, under all the circumstances, 'the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available.'*"

(D) "*... the determination by an issuer or obligated person of whether to submit an event notice under subparagraph (b)(5)(i)(C)(15) requires the same analysis that is regularly made by such parties when preparing offering documents. Accordingly, under the Rule, as amended, an issuer or obligated person will need to consider whether a financial obligation or the terms of a financial obligation, if they affect security holders, would be important to a reasonable investor when making an investment decision.*"

(E) "*Materiality is determined upon the incurrence of each distinct financial obligation, taking into account all relevant facts and circumstances. For example, if the issuer or obligated person enters into a series of transactions that, though related, are incurred at different points in time for legitimate business purposes – e.g., to satisfy the necessary conditions for the debt to be considered tax-exempt under provisions of the Internal Revenue Code of 1986, as amended ('IRC') – the issuer or obligated person would need to assess the materiality of each transaction at the time it was incurred…. Relevant factors that could indicate that a series of financial obligations incurred close in time are related include the following: (i) share an authorizing document, (ii) have the same purpose, or (iii) have the same source of security.*"

(F) "*When an issuer or obligated person is considering whether a series of related transactions is a single incurrence or has been incurred at different points in time for legitimate business purposes for determining materiality under the amendments, such issuer or obligated person must consider all relevant facts and circumstances. An example of the type of facts and circumstances that could indicate that a series of related transactions were incurred separately for legitimate business purposes would be if the series of financial obligations satisfy the requirements set forth in the U.S. Department of Treasury regulations and guidance*

governing what constitutes a single issue of municipal securities under the IRC.… The Commission cautions issuers and obligated persons against entering into a series of transactions with a purpose of evading potential disclosure obligations established by paragraphs (15) and (16) of the Rule in a manner that is inconsistent with the purposes of the Rule."

(ii) when incurred

"*… a financial obligation generally should be considered to be incurred when it is enforceable against an issuer or obligated person…. For example, if an issuer or obligated person enters into an agreement providing for a material drawdown bond, or such agreement contains material terms that affect security holders, the issuer or obligated person generally should provide notice at the time the terms of the obligation are legally enforceable against the issuer or obligated person, instead of each time a draw is made.… The Commission likewise believes that a financial obligation is incurred with regard to a derivative instrument when the derivative instrument is enforceable against an issuer or obligated person.*"

(iii) agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation

(A) "*…agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation, any of which affect security holders, may result in, among other things, contingent liquidity and credit risks that potentially impact the issuer's or obligated person's liquidity and overall creditworthiness and reduce value for existing security holders.*"

(B) Discussion of the meaning of this clause in the15c12-12 Amendment Order is extremely limited – instead, the clause is discussed in Exchange Act Release No. 80130 (March 1, 2017), 82 FR 13928 (March 15, 2017) ("15c12-12 Amendment Proposal"), Section III.A.1.

(1) "*... a list of events—specifically, covenants, events of default, remedies, priority rights, or other similar terms—which are typically agreed to in connection with the incurrence of a financial obligation and analyzed by market participants. These terms of a financial obligation could result in, among other things, contingent liquidity and credit risks, refinancing risk, and reduced security for existing security holders.*"

(2) "*... there are other material terms similar to covenants, events of default, remedies, and priority rights that an issuer or obligated person may agree to that could, among other things, create liquidity, credit, or refinancing risks that could affect the liquidity and creditworthiness of an issuer or obligated person or the terms of the securities they issue. For example, an investor may make an investment decision without knowing the issuer or obligated person has entered into a financial obligation structured with a balloon payment at maturity creating refinancing risk that could compromise the issuer or obligated person's liquidity and creditworthiness and their ability to repay their outstanding municipal securities*"

(iv) content of notice

(A) "*... a material event notice for the events described in paragraph (b)(5)(i)(C)(15) generally should include a description of the material terms of the financial obligation. Examples of some material terms may be the date of incurrence, principal amount, maturity and amortization, interest rate, if fixed, or method of computation, if variable (and any default rates); other terms may be appropriate as well, depending on the circumstances.*"

(B) "*... depending on the facts and circumstances, it could be consistent with the requirements of the Rule for issuers and obligated persons to either submit a description of the material terms of the financial obligation, or alternatively, or in addition, submit related materials, such as transaction documents, term sheets prepared in connection with the financial obligation, or continuing covenant agreements or financial covenant reports to EMMA. Any such related materials, if submitted as an alternative to a description of the material terms of the financial obligation, should include the material terms of the financial obligation.*"

(C) "*The amendments do not require the provision of confidential information such as contact information, account numbers, or other personally identifiable information to EMMA. Provided the necessary disclosures are made, the formatting of such disclosures tailored to avoid disclosure of such confidential information would be consistent with Rule 15c2-12.*"

(2) Financial difficulty event under Rule 15c2-12(b)(5)(i)(C)(16):

(a) A financial difficulty event consists of the following types of events, "*any of which reflect financial difficulties*":

(i) "*Default*",

(ii) "*event of acceleration*",

(iii) "*termination event*",

(iv) "*modification of terms*", or

(v) "*other similar events under the terms of a financial obligation of the obligated person*".

(b) Excerpts from the SEC discussion in 15c12-12 Amendment Order, Section III.A.3:

(i) reflect financial difficulty/no materiality standard

(A) "*A modification of terms would be reported under a continuing disclosure agreement only if the modification "reflect[s] financial difficulties of the issuer or obligated person." This qualifier is included to help target the disclosure of information relevant to investors in making an assessment of the current financial condition of the issuer or obligated person. Accordingly, because the modification of terms already is subject to a qualifier, the Commission believes there is no need to also include a materiality qualifier.*"

(B) "*... the concept of "reflecting financial difficulties" has been used in paragraphs (b)(5)(i)(C)(3) and (b)(5)(i)(C)(4) since the 1994 amendments to Rule 15c2-12, and, as such, market participants should be familiar with the concept as it relates to the operation of Rule 15c2-12…. For example, … an issuer or obligated person may covenant to provide the counterparty with notice of change in its address and may not promptly comply with the covenant. A failure to comply with such a covenant may not reflect financial difficulties; therefore, absent other circumstances, this event likely does not raise the concerns the amendments are intended to address. On the other hand an issuer or obligated person could agree to replenish a debt service reserve fund if draws have been made on such fund. In this example, if an issuer or obligated person fails to comply with such covenant, then such an event likely should be disclosed to investors and other market participants…. Issuers and obligated persons may consider disclosing the occurrence of events that do not reflect financial*

difficulties as a matter of best practice if they believe investors would find those occurrences important."

(ii) default

"*…there are defaults that may reflect financial difficulties even if they do not qualify as "events of defaults" under transaction documents. This may constitute important information related to an issuer's or obligated person's material financial obligations that could impact an issuer's or obligated person's liquidity, overall creditworthiness, or an existing security holder's rights. Accordingly, the Commission believes the concept of "default" should be retained ….*"

(iii) waiver

"*Additionally, "modification of terms" is broad, and as such, a written or verbal waiver of a deal provision would be a modification of the terms of an agreement because such waivers are a departure from what was agreed to under the terms of the agreement.*"

(iv) other similar events

"*… paragraph (b)(5)(i)(C)(16) covers not only defaults, events of acceleration, termination events, or modifications of terms that reflect financial difficulties of the issuer or obligated person, but also events arising under the terms of a financial obligation that similarly reflect financial difficulties of the issuer or obligated person…. in order to be subject to disclosure under the Rule, the term "other similar events under the terms of a financial obligation of the obligated person reflecting financial difficulties" must necessarily share similar characteristics with one of the preceding listed events (a default, event of acceleration, termination event, or modification of terms).*"

B.3 – When did the 2017 financial obligation events begin to apply for a particular offering?

(1) Amendment to Rule 15c2-12 became operative on February 27, 2019.

(a) Continuing disclosure undertakings for offerings on and after that date that are subject to the continuing disclosure provisions of the Rule must include the two new events:

(i) Does not apply to pre-existing continuing disclosure undertakings, and no obligation for an issuer or obligated person to amend pre-existing continuing disclosure undertakings to incorporate the new

events or to otherwise provide notice of such events with respect to the corresponding prior offering.

While not required to do so, an issuer or obligated person may voluntarily provide event notices for outstanding bonds for which the corresponding continuing disclosure undertaking does not include the two new events

(ii) Thus, issuers and obligated persons may have some outstanding bonds for which the new event notices apply and some outstanding bonds for which the new event notices do not apply, and this status is likely to continue for many years.

(b) So long as an issuer or obligated person does not have a new offering that becomes subject to the two new events, the amendment to Rule 15c2-12 has no impact on such issuer or obligated person.

(2) Incurrence events (clause 15) are required to be provided only for events triggering that clause that occur on or after the effective date of a continuing disclosure undertaking; that is, an issuer or obligated person is not required to "back fill" incurrence event notices under clause 15 for incurrences that occurred prior to the effectiveness of the continuing disclosure undertaking.

(3) Notice of financial difficulty (clause 16) must be provided only for events triggering that clause that occur on or after the effective date of a continuing disclosure undertaking.

(a) Thus, an issuer or obligated person is not required to "back fill" financial difficulty event notices under clause 16 for an event reflecting financial difficulty that occurred prior to the effectiveness of the continuing disclosure undertaking.

(b) However, clause 16 requires disclosures relating to any existing financial obligation of an issuer or obligated person, regardless of whether the financial obligation was incurred before or after the effectiveness of the continuing disclosure undertaking; that is, even if an incurrence of a financial obligation did not require disclosure under clause 15, an event reflecting financial difficulty with respect to such financial obligation is still required to be disclosed under clause 16, regardless of whether such non-disclosure under clause 15 was due to the fact that:

(i) the financial obligation was incurred prior to the effectiveness of the continuing disclosure undertaking, or

(ii) the financial obligation was deemed not to be material and therefore its incurrence did not require a disclosure under clause 15.

B.4 – What is the impact of a "materiality" standard applicable to incurrence events under clause 15 but not to financial difficulty events under clause 16?

(1) Even if an incurrence of a financial obligation did not require disclosure under clause 15 because the financial obligation was determined to be not material, a disclosure of the occurrence of an event reflecting financial difficulty with respect to such financial obligation is still required under clause 16.

Thus, the amendment to Rule 15c2-12 effectively requires the issuer or obligated person to be able to monitor all of its financial obligations it has previously incurred and that remain outstanding, or that it incurs in the future, for compliance with clause 15, including financial obligations that are not material for purposes of triggering clause 16.

(2) An adverse event of the type listed in clause 16 that does not reflect financial difficulties is not required to be disclosed, even if the size, nature or impact of such adverse event is material.

For example, a clerical error that results in non-payment on a financial obligation, even if it results in material financial or other consequences, is not required to be disclosed if that error does not reflect financial difficulties – this would appear to be true, even if the adverse event reflects gross negligence or malfeasance of an individual employee, or poor internal procedures or supervision, or other reasons that do not reflect financial difficulty.

In the context of a real-world occurrence of such a scenario, however, depending on the specific facts, it would not be surprising if the regulators were tempted to view these types of causes as arising from a lack of resources to properly carry out or supervise the obligations relating to such financial obligation, which in turn might be characterize by the regulators as potentially reflecting financial difficulty.

B.5 – How are the 2017 event disclosures made on EMMA?

(1) The MSRB provides detailed submission instructions in its EMMA Dataport Manual for Continuing Disclosure Submissions on its website at http://www.msrb.org/msrb1/EMMA/pdfs/EMMACDManual.pdf .

(2) Under Rule 15c2-12, the new event disclosures consist of events that have an impact on outstanding municipal bond offerings that are subject to the Rule; that is, Rule 15c2-12 does not treat the incurrence of such financial obligation as triggering required disclosures for the benefit of the holder(s) of such financial obligation, but instead for the benefit of holders of outstanding bonds subject to the Rule.

(3) Consistent with Rule 15c2-12's treatment of financial obligations, the MSRB provides for the new financial obligation disclosures to be indexed to outstanding bonds

for which the disclosures are provided under the Rule through the CUSIP numbers (with very limited exceptions) of such bonds.

Thus, incurrence event disclosures under clause 15 and financial difficulty disclosures under clause 16 are both indexed to the CUSIP numbers of outstanding bonds, not as standalone disclosures pertaining to the financial obligation itself.

(a) That is, financial obligations are available as a disclosure attached to another debt offering's disclosure page on EMMA, not as its own disclosure page.

(b) As a result, a financial difficulty disclosure under clause 16 is not attached directly to the incurrence disclosure under clause 15 for the corresponding financial obligation, but instead both such notices (along with incurrence and financial difficulty disclosures for other financial obligations) are attached to outstanding bonds subject to Rule 15c2-12.

(4) Searches for the new financial obligation disclosures can be conducted on EMMA through:

(a) the "Search" link at https://emma.msrb.org/MarketActivity/RecentCD; or

(b) for a more precise search function, the "Disclosures" filter (which can be used in combination with the other available filters) at https://emma.msrb.org/Search/Search.aspx

(5) EMMA's new incurrence notice category under clause 15 has effectively replaced its prior voluntary bank loan disclosure category, which is no longer available for new submissions

The MSRB has indicated that issuers and obligated persons that wish to disclose on a voluntary basis the incurrence of a bank loan or other obligation that is not otherwise required to be disclosed by operation of Rule 15c2-12 may be disclosed, as a voluntary disclosure, through this new clause 15 category

B.6 – What do Issuers and Obligated Persons need to do?

(1) Overview – Rule 15c2-12 creates no direct obligations on issuers and obligated persons – instead, the Rule applies to underwriters. How it applies to underwriters has an indirect, but significant, impact on issuers and obligated persons, as outlined below.

(2) Prior to issuing its first issue of municipal securities subject to the new financial obligations disclosure, an issuer or obligated person have no new obligations as a result of the Rule 15c2-12 amendment; however, if they anticipate such an issuance in the future, they should consider familiarizing themselves with the new requirements ahead of such

issuance and take appropriate preparatory steps to facilitate compliance once the new disclosures take effect for them.

(3) For a new issue that is to be underwritten (including in a "private placement") and that is subject to the continuing disclosure provisions of Rule 15c2-12(b)(5) or (d)(2)(ii)(B), the issuer and/or applicable obligated persons will be expected to enter into a continuing disclosure undertaking that includes the two new financial obligation disclosures.

(4) For a new issue that is not subject to the continuing disclosure provisions (for example, a limited offering under Rule 15c2-12(d)(1)(i)), the issuer/obligated person will need to consider whether to:

(a) Voluntarily enter into a continuing disclosure undertaking as if the issue were subject to the Rule requirements and include a description of such undertaking in an official statement that is then submitted to EMMA.

(i) In this case, the issuer/obligated person would treat this issue just like a typical issue subject to the Rule for all purposes of continuing disclosures.

(ii) Note that this notion of voluntarily subjecting an issue to a continuing disclosure undertaking arises from Rule 15c2-12(f)(11)(ii), which provides that "*The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.*" – see the discussion above regarding this exclusion; or

(b) Maintain the status as not being subject to the Rule's continuing disclosure requirements but instead disclose the incurrence of the new issue, if material, in an incurrence event notice under clause 15 and make any necessary financial difficulty event disclosures under clause 16, to the extent that the issuer/obligated person has other offerings that are subject to the two new financial obligation disclosures

(5) The issuer/obligated person should consider what existing financial obligations exist, including, but not limited to, outstanding municipal bond issues exempt from Rule 15c2-12 that are now subject to financial difficulty event disclosures under clause 16 (incurrence notices are not required for incurrences that occurred in the past).

Because financial difficulty event disclosures under clause 16 are not limited to only material financial obligations, but to any financial obligation whatsoever (so long as the event reflects financial difficulties), this consideration of existing financial obligations cannot be limited solely to material financial obligations.

(6) The issuer/obligated person should understand and develop processes for ensuring that it will be able to identify when it is incurring a material financial obligation (for purposes of clause 15) or when a financial difficulty event with respect to any financial obligation has occurred (for purposes of clause 16), what to include in the disclosure submission, how to make sure the submission is made in a timely manner, and how to ensure that the submission is indexed to all outstanding CUSIPs to which the disclosure applies.

While a formal written procedure for complying with continuing disclosure undertakings, including specifically clauses 15 and 16, is not technically required, issuers and obligated persons should expect that underwriters will increasingly expect to review such written procedures and to consider their likely effectiveness as they seek to fulfill their "due diligence" obligations in connection with underwriting new issues.

(7) Official statement disclosures regarding past instances of material non-compliance with Rule 15c2-12 would not cover the new financial obligation event disclosures in clauses 15 and 16 until the issuer's or obligated person's second new issue subject to the amended Rule. The issuer/obligated person must issue a first new issue subject to the requirement to make such financial obligation disclosures, and then must issue a second new issue subject to that requirement for which the issuer/obligated person is required to disclose in the official statement any material non-compliance with the first issue's financial obligation disclosure requirement.

B.7 – What do Underwriters need to do?

(1) Rule 15c2-12(b)(5)(i) obligates the underwriter to reasonably determine that the issuer or obligated person has entered into a continuing disclosure obligation that meets the requirement of the paragraph (b)(5)(i).

(a) At a minimum, underwriters will expect to see that the continuing disclosure undertaking for new issues now include the new financial obligation event disclosures under clauses 15 and 16.

(b) Practices vary among underwriters regarding the level of confidence they expect to develop in the ability of an issuer or obligated person to achieve substantial compliance with the new financial obligation event disclosures.

(i) in many cases, underwriters will expect to conduct heightened diligence to establish its reasonable determination – and perhaps receive written representations to the effect that – the issuer/obligated person has established written procedures to identify and disclose continuing disclosures, including in particular financial obligation event disclosures under clauses 15 and 16, in part due to the heightened difficulties arising

from the nature of such disclosures as compared to the other types of disclosures traditionally required under Rule 15c2-12.

(ii) There is no explicit legal obligation, however, to determine the likelihood of compliance at the time of entering into a continuing disclosure undertaking, other than ensuring that the undertaking includes all of the required elements and is not illusory or entered into without any expectation of performance.

(c) Underwriter "due diligence" with regard to the disclosure of any material non-compliance with past continuing disclosure obligations with respect to second and subsequent issues occurring after the Rule 15c2-12 effective date, when such disclosures could apply with respect to the new financial obligation event notices under clauses 15 and 16, can be expected to be more exacting in many cases.

(i) Because of the heightened difficulties arising from the nature of such disclosures, as described above, underwriters will seek varying levels of confidence that the issuer/obligated person has been able to identify all relevant financial obligations, disclose all material incurrences in a timely manner, and disclose all adverse events reflecting financial difficulty (regardless of materiality) in a timely manner, to the point that the underwriter has an adequate basis to reasonably determine that the disclosure in the official statement is not materially misleading.

(ii) There is a more substantial legal basis for concern regarding the issuer/obligated person's ability to perform, or to identify instances of non-performance, under a continuing disclosure undertaking in the context of the necessary due diligence in connection with the official statement disclosure, as compared to the potential legal exposure in connection with determining whether the issuer/obligated person has entered into a continuing disclosure undertaking, so long as the terms of the undertaking match the Rule requirements.

B.8 – How Can Investors and the Public View Financial Obligation Event Information?

(1) Investors and members of the public can search for the new financial obligation disclosures on EMMA through:

(a) use of the "Search" link at https://emma.msrb.org/MarketActivity/RecentCD; or

(b) for a more precise search function, use the "Disclosures" filter (which can be used in combination with the other available filters) at https://emma.msrb.org/Search/Search.aspx

(2) New financial obligation disclosures are viewable on EMMA as continuing disclosure, based on the indexing information provided to EMMA at the time of submission of such disclosure, as investors and members of the public view information about:

(a) a specific issuer under the "Event-Based Disclosures" tab, which accumulates all event disclosures for all outstanding issues of such issuer

(b) a specific bond issue under the "Continuing Disclosure" tab, which accumulates all financial and event notices, by specific disclosure category, for all maturities of such issue

(c) a specific maturity of an issue under the "Disclosure Documents" tab, which accumulates all primary market and continuing disclosure documents, by specific disclosure category, for such maturity

(3) Since the financial disclosure event notice requirement was designed to provide additional relevant information not previously available on EMMA, investors and members of the public seeking a more complete understanding of this type of information about all existing obligations that may have an impact on a particular bond issue should use the available search and navigation tools on EMMA to find and review disclosures for other bond issues of the issuer available on EMMA under the traditional primary market and continuing disclosure obligations under Rule 15c2-12.

(a) Investors and members of the public should understand that disclosures submitted as financial obligation event notices under clauses 15 and 16 will usually represent only a portion of all potentially relevant outstanding obligations that may have an impact on a particular issue of municipal securities.

(b) More generally, investors and members of the public seeking to obtain the most comprehensive view of an issuer's or obligated person's outstanding material obligations should also be reviewing any financial statements or other financial information for such issuer or obligated person posted on EMMA.

In particular, for obligated persons that may borrow through multiple municipal issuers and for which no assured manner of searching for related municipal bond issues has yet been developed, the financial statements likely will continue to be the primary source for understanding their full range of outstanding obligations, supplemented by the new financial obligation event notices.

C. The Rest of Rule 15c2-12 – what are the key sticking points of the "legacy" provisions of the Rule that challenge issuers, obligated persons, underwriters and investors?

(1) Timeliness of disclosures and availability of interim information

(a) Benefits and risks of voluntary disclosures

(b) Understanding practical considerations in producing disclosures and in confidently assessing quality and timeliness of disclosures

(2) Ability to manage the continuing disclosure obligation over the course of a multi-decade commitment

(a) Are undertakings too brittle, or are there ways to amend or otherwise conform disclosures made under different circumstances than existed at the time of the undertaking many years earlier?

(b) Is it clear what post-issuance actions (remarketings, tender offers, restructurings, modifications of terms, etc.) may trigger a new continuing disclosure obligation under the Rule?

(3) How do new concepts of disclosable information fit into the Rule 15c2-12 construct?

(a) COVID-19 risks, impacts and mitigation efforts

(b) Exposure to risk of LIBOR demise

(c) climate change/resiliency, other ESG

(d) cybersecurity policies and procedures/incident disclosures

(e) other issues

(4) Are issuers with multiple outstanding issues incurred under different versions of Rule 15c2-12 facing increasing complexity in their overall management of their disclosure obligations?

III MUNICIPAL ADVISORY VS. UNDERWRITING (VS. INVESTMENT ADVISORY VS. SWAP ADVISORY VS. ENGINEERING VS. ACCOUNTING VS. BOND LAWYER) ACTIVITIES … NOT TO MENTION IRMAs

A. Are the lines between being a municipal advisor and being someone else involved in a bond transaction becoming any clearer?

B. Some key points of ambiguity between municipal advisors and:

(1) Underwriters [underwriter exclusion under Exchange Act Rule 15Ba1-1(d)(2)(i)]

(a) when does the underwriting relationship begin and end?

(b) is the breadth of activities within the underwriting exclusion just right, too broad, or to narrow?

(c) if an underwriter qualifies for the underwriter exclusion (or otherwise qualifies for an exclusion or exemption from being treated as a municipal advisor under Rule 15Ba1-1(d), such as by application of the IRMA exception), is that underwriter automatically also not a "financial advisor" under MSRB Rule G-23 for the duration of such exclusion or exemption?

(i) or are there situations where a broker-dealer can be treated as a financial advisor under MSRB Rule G-23 but not as a municipal advisor under SEC Rule 15Ba1-1?

(ii) is the MSRB considering merging Rule G-23 with Rule G-42, or are there reasons for keeping the two rules separate?

(d) Given that a municipal advisory regulatory regime exists today that did not exist when the SEC issued the Dominion Resources no-action letter, relating to certain placement activities of financial advisors, and then revoked it (Dominion Resources, Inc., SEC No-Action Letter (July 23, 1985), withdrawn March 7, 2000), is it time to revisit whether to revoke the revocation of the Dominion Resources no-action letter?[1]

(2) Investment advisers [investment adviser exclusion under Exchange Act Rule 15Ba1-1(d)(2)(ii)]

Given that a municipal advisory regulatory regime exists today that did not exist when the SEC's Division of Investment Management published its Staff Bulletin No. 11 (Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers (September 19, 2000)), under which most instances in which financial advisors advised their issuer clients were viewed as being subject to investment advisory regulation, is it time to revisit Staff Bulletin No. 11?

[1] There continues to be ongoing concern and confusion surrounding when a municipal advisor can be involved in a direct placement of securities with investors and avoid the broker-dealer registration requirements. This led to a temporary exemptive order by the SEC in 2020 that provided an exemption from broker-dealer registration for covered activities, which has now expired. (https://www.sec.gov/files/rules/exorders/2020/34-89074.pdf).

(3) Swap advisors [commodity trading advisor exclusion under Exchange Act Rule 15Ba1-1(d)(2)(iii)]

(a) When is a swap advisor acting as a municipal advisor subject to the MSRB municipal advisor rules vs. acting as a commodity trading advisor (CTA) subject to the rules of the Commodity Futures Trading Commission (CFTC)? Is the status as municipal advisor vs. CTA something that the swap advisor can elect, or is it determined by law/regulation without the opportunity to make an election?

(b) If a swap advisor is acting as a CTA under CFTC rules, can that swap advisor effectively serve as an "independent registered municipal advisor" (IRMA) for purposes of the IRMA exception? Or must a CTA serving as swap advisor also be registered as a municipal advisor in order for the IRMA exception to be available?

(4) Engineer [engineer exclusion under Exchange Act Rule 15Ba1-1(d)(2)(v)]

(a) Are there recognized categories of engineers, or a minimum requirement for licensing or other customary qualification for engaging in engineering services, needed in order for this exclusion to apply?

(b) Or, does this exclusion apply more generally to any person undertaking the types of analytic activities described in the SEC discussion in Section 3.A.1.c.vii of the Municipal Advisor Registration Order and in Section 12 of Registration of Municipal Advisors Frequently Asked Questions (updated September 20, 2017) ("MA FAQs")?

(c) Are there some types of analytic activities that are excluded from being treated as municipal advisory activities only if such activities are undertaken by an "engineer"?

(5) Accountants [accountant exemption under Exchange Act Rule 15Ba1-1(d)(3)(i)]

(a) Are there any ambiguities around what is covered and what is excluded?

(6) Bond lawyers [attorney exclusion under Exchange Act Rule 15Ba1-1(d)(2)(iv)]

(a) is it clear what services "*of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction*" are included as permitted non-municipal advisory activities of an attorney?

(i) the Municipal Advisor Registration Order provides several examples of activities that constitute an attorney representing itself "*as a*

financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products", including where "*the attorney provides advice that is primarily financial in nature, such as: (1) the financial feasibility of a project or financing; (2) advice estimating or comparing the relative cost to maturity of an issuance of municipal securities depending on various interest rate assumptions; (3) advice recommending a particular structure as being financially advantageous under prevailing market conditions; (4) advice regarding the financial aspects of pursuing a competitive sale versus a negotiated sale; and (5) other types of financial advice that are not related to the attorney's provision of legal advice and services of a traditional legal nature*"

(ii) Would any of these types of activities be viewed as traditional business counselling outside of the context of the municipal securities market? If so, does this create ambiguities or dislocations where the client is an obligated person to which differing ranges of advice may be available from their attorneys depending on such client's status?

(b) What lessons are there to be learned from the Barcelona Strategies, LLC settlement order (https://www.sec.gov/litigation/admin/2018/34-83191.pdf)?

(c) When does it make sense for a law firm to register as, or to form an affiliate as, a municipal advisor?

(7) Other municipal advisors [IRMA exemption under Exchange Act Rule 15Ba1-1(d)(3)(vi)]

(a) May a municipal advisor rely on the IRMA exemption? For example:

(i) In a complex new issue, can an issuer's municipal advisor engaged to advise on traditional bond issuance matters rely on the IRMA exemption in connection with swap advice where the issuer has engaged another municipal advisor with expertise in derivatives matters?

(ii) Where there are co-financial advisors on a new issue, could the "lead" financial advisor serve as an IRMA so that the other financial advisor does not formally serve as a municipal advisor?

(iii) Can an issuer that has engaged a municipal advisor use the IRMA exception to seek a second opinion from another municipal advisor firm without subjecting the second firm to formal municipal advisor liability?

C. What are the impacts – positive, negative or ambiguous – of the municipal advisory regulatory regime as it has taken shape since 2010?

(1) for issuers

(2) for obligated persons

(3) for the regulated entities

(4) for investors

D. What areas touching on municipal advisory activities still need to be dealt with, either for the first time or to better focus matters previously addressed?

IV. DUTIES AND ROLES IN THE NEW ISSUE PROCESS, THROUGH THE PRISM OF MSRB RULE G-17 AND RETAIL INVESTOR PROTECTION RULES

A. Underwriter role disclosures under MSRB Rule G-17 as a roadmap for new issue obligations of the various new issue transaction participants – underwriters, municipal advisors, issuers, obligated persons and others

(1) General fair practice principle – "*Rule G-17 requires an underwriter to deal fairly at all times with both municipal (b) For a more detailed discussion of post-issuance compliance procedures, see Session #22 – Post Issuance Compliance issuers and investors*"

(a) Fair dealing obligation is above and beyond the notion of the federal anti-fraud provisions and specific rule-based obligations

(b) Goes to core of the "intermediation" role of an underwriter between the issuer and the investor

(c) While the duty is only mentioned in the context of the issuer and investors, it applies to all parties, including obligated persons, municipal advisors, etc.

(d) What was the unfairness in:

(i) *In the Matter of Edward D. Jones & Co., L.P.* and related matters [misrepresentation regarding bona fide offering; honoring priority of orders] – https://www.sec.gov/news/pressrelease/2015-166.html

(ii) the line of "flipping" and retail order period abuse cases, described at https://www.sec.gov/news/press-release/2021-179, with links to cases from August 2018 through September 2021*Securities and Exchange Commission vs. Core Performance Management, LLC et al.* and

related matters [flipping; kickbacks] – https://www.sec.gov/news/press-release/2018-153

(iii) *In the Matter of First Midstate Inc. and Paul D. Brown* [misrepresentation to issuers of underwriter's distribution capability where underwriter sold bonds primarily to broker dealers] – https://www.sec.gov/litigation/admin/2020/34-90783.pdf

(iv) *In the Matter of Crews & Associates, Inc.* and related matters [broker-dealer recommended tender offer to issuer while having undisclosed interest in tendered bonds] – https://www.sec.gov/news/press-release/2021-166

(v) *In the Matter of IFS Securities* [new issue pricing not fair and reasonable to the issuer] – https://www.sec.gov/litigation/admin/2019/34-86210.pdf

(vi) *Securities and Exchange Commission v. Rhode Island Commerce Corporation (f/k/a Rhode Island Economic Development Corporation* [lack of disclosure regarding adequacy to complete project; inadequate disclosure of fees] – https://www.sec.gov/litigation/litreleases/2019/lr24428.htm

(vii) *In the Matter of City Securities Corporation and Randy G. Ruhl* [undisclosed donations, entertainment expenses as cost of issuance] – https://www.sec.gov/news/press-release/2013-136

(viii) *Securities and Exchange Commission vs. City of Victorville et al.* [misleading valuation and debt service ratio; undisclosed fees] – https://www.sec.gov/news/press-release/2013-2013-75htm

(ix) *In the Matter of Goldman, Sachs & Co.* & *In the Matter of Neil M.M. Morrison* [undisclosed political contributions and conflicts of interest] – https://www.sec.gov/news/press-release/2012-2012-199htm

(e) Do any other parties to a new issue have parallel "fairness" duties to each other or to investors? – Issuer? Obligated person? Municipal advisor? Counsel? Other parties?

(2) Conflicting interests in a commercial transaction – "*the underwriter's primary role is to purchase securities with a view to distribution in an arm's-length commercial transaction with the issuer and it has financial and other interests that differ from those of the issuer*"

(a) Does this generalized disclosure of the conflicting interests of the underwriter and the issuer (that is, the underwriter has its own interests that differ from the issuer's) affect the level of particularity of conflicts disclosures required to the issuer?

(b) This disclosure is only to the issuer – does not reach the question of conflicting interests with other parties

(c) Municipal advisors have own conflicts disclosure obligations under MSRB Rule G-42

(d) Do any other parties to a new issue have parallel "conflicting interest" disclosure obligations to the issuer? – Obligated person? Counsel? Other parties?

(3) Fair dealing vs. best interest – "*unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the issuer without regard to its own financial or other interests*"

So what is the difference between "fair dealing" (Rule G-17) and "best interest" (fiduciary duty)? Is this a distinction that will survive broader regulatory evolution?

What is the impact of Regulation Best Interest ("Reg BI") on underwriter activity and enforcement actions? Imposing a fiduciary duty on underwriters as it relates to retail investors?

(4) Pricing a new issue – "*the underwriter has a duty to purchase securities from the issuer at a fair and reasonable price, but must balance that duty with its duty to sell municipal securities to investors at prices that are fair and reasonable*"

(a) Pricing duty to issuer under Rule G-17:

(i) "*... implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced*"

(ii) "*... a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid (as defined in MSRB Rule G-13) that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid*"

(iii) "*In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer*"

(b) Pricing duty to investors under MSRB Rule G-30:

(i) "*No broker, dealer or municipal securities dealer shall purchase municipal securities for its own account from a customer, or sell municipal securities for its own account to a customer, except at an aggregate price (including any mark-up or mark-down) that is fair and reasonable*"

(ii) "*A 'fair and reasonable' price bears a reasonable relationship to the prevailing market price of the security*"

(iii) "*Reasonable compensation differs from fair pricing. A dealer could restrict its profit on a transaction to a reasonable level and still violate this rule if the dealer fails to consider market value.*"

"*For example, a dealer may fail to assess the market value of a security when acquiring it from another dealer or customer and as a result may pay a price well above market value. It would be a violation of fair-pricing responsibilities for the dealer to pass on this misjudgement to another customer, as either principal or agent, even if the dealer makes little or no profit on the trade.*"

(iv) "*The most important factor in determining whether the aggregate price to the customer is fair and reasonable is that the yield should be comparable to the yield on other securities of comparable quality, maturity, coupon rate, and block size then available in the market.*"

(c) How does the fair pricing obligation to the issuer constrain the pricing offered to investors?

(d) How does the fair pricing obligation to investors constrain the pricing of the offering to the issuer?

(e) How much difference is there between the fair price to the issuer and the fair price to the investor?

(f) How does all of this interact with Reg BI?

(5) Issuer disclosure and underwriter due diligence – "*the underwriter will review the official statement for the issuer's securities in accordance with, and as part of, its responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of the transaction*"

(a) Do issuers understand that, when it comes to disclosures in the official statement, the federal securities laws expect the underwriter to stand on the side of the investors as opposed to the issuer?

(b) The MCDC settlements with underwriters, together with certain pre- and post-MCDC individualized enforcement actions, represent the most prominent recent set of examples of this obligation.

(i) The SEC alleged that municipal securities dealer firms sold municipal bonds with offering documents that contained "materially false statements or omissions about the bond issuers' compliance with the continuing disclosure obligations." Additionally, the SEC charged that the firms had neglected to conduct sufficient due diligence and therefore failed to identify the omissions or misstatements before offering and selling the bonds.

(ii) The settlements with underwriters under the MCDC represented 96% of the municipal market's underwriting community; as an offshoot of these settlements, this 96% of the municipal market's underwriting community is now legally committed to having in place policies and procedures that have been vetted by the SEC with regard to their due diligence obligation.

(c) Beyond the question of whether the underwriters have engaged in adequate due diligence to develop a reasonable basis for believing the truthfulness of material statements in the official statements is the question of the obligation of the "speaker" itself to speak truthfully in the official statement, as outlined below.

(6) Of retail investors and new Regulation Best Interest – Regulators have been focused in recent years on potential abuses related to retail investors in the new issue process, as seen in the flipping/retail order period cases. The SEC has adopted its new Regulation Best Interest, which supplants the MSRB's suitability under Rule G-19 with respect to retail investors. Enforcement actions under Regulation Best Interest as just begun – will this have an impact on municipal new issue retail sales? – see *SEC v. Western Int'l. Sec. et al* [alleging violation of Regulation Best Interest by offering certain unrated bonds to retail investors] – https://www.sec.gov/litigation/complaints/2022/comp-pr2022-110.pdf

B. Issuer/obligated personal liability with regard to disclosure

(1) The MCDC-era settlements with issuers and obligated persons addressed their direct obligations under the federal anti-fraud provisions with regard to materially false statements or omissions about their compliance with continuing disclosure obligations.

(2) Other relevant cases:

(a) *Securities and Exchange Commission vs. City of Rochester, New York, Rosiland Brook-Harris, Capital Markets Advisors, LLC, Richard Ganci, and Richard Tortora* [misleading investors and breaching fiduciary duty by including outdated financial statements and not disclosing imminent financial distress related to overspending on teacher salaries] – https://www.sec.gov/news/press-release/2022-108

(b) *Securities and Exchange Commission v. Anthony Michael Holland* [false financial statements and audit report posted to EMMA] – https://www.sec.gov/litigation/litreleases/2022/lr25426.htm

(c) *In the Matter of Town of Sterlington, Louisiana* and related matters [false financial projects used to obtain state approval for bond offering] – https://www.sec.gov/news/press-release/2022-97

(d) *In the Matter of Crosby Independent School District* and related matters [false and misleading financial statements in the offering documents] – https://www.sec.gov/news/press-release/2022-43

(e) *In the Matter of Sweetwater Union High School District* and related matters [misleading budget projections in offering document] – https://www.sec.gov/news/press-release/2021-178

(f) *Securities and Exchange Commission vs. Keith Borge* [false statements in financial information distributed by obligated person as continuing disclosure] – https://www.sec.gov/news/press-release/2019-46

(g) *Securities and Exchange Commission vs. David Webb, Jr.* [failure to disclose to investors pay-to-play scheme involving bond proceeds] – https://www.sec.gov/litigation/complaints/2017/comp23998.pdf

(h) *Securities and Exchange Commission vs. Dwayne Edwards et al.* [failure to disclose to investors commingling and misuse of funds intended to secure bondholders] – https://www.sec.gov/news/pressrelease/2017-28.html

(i) *In the Matter of the Port Authority of New York and New Jersey* [failure to disclose risks regarding authority to fund financed project] – https://www.sec.gov/news/pressrelease/2017-4.html

(j) *Securities and Exchange Commission vs. Town of Ramapo, et al.* [fraudulent financial information in official statement] – https://www.sec.gov/news/pressrelease/2016-68.html

(k) *In the Matter of Westlands Water District* [use of undisclosed extraordinary accounting principles to meet debt service coverage ratio] – https://www.sec.gov/news/pressrelease/2016-43.html

(l) *Securities and Exchange Commission v. Rhode Island Commerce Corporation (f/k/a Rhode Island Economic Development Corporation* [lack of disclosure regarding adequacy to complete project] – https://www.sec.gov/litigation/litreleases/2019/lr24428.htm

(m) *In the Matter of City of Allen Park, Michigan* [failure to disclose deteriorating conditions affecting viability of project and ability to service debt] – https://www.sec.gov/news/press-release/2014-249

(n) *Securities and Exchange Commission vs. City of Harvey, Illinois et al.* [misstatements and omissions regarding misuse of bond proceeds] – https://www.sec.gov/news/press-release/2014-122

(o) *Securities and Exchange Commission vs. United Neighborhood Organization of Chicago et al.* [failure to disclose breach of agreement potentially affecting ability to repay bonds] – https://www.sec.gov/litigation/complaints/2014/comp-pr2014-110.pdf

(p) *In the Matter of the Greater Wenatchee Regional Events Center Public Facilities District et al.* [failure to disclose consultant reports calling into question viability of project and ability to service debt] – https://www.sec.gov/news/press-release/2013-235

(q) *In the Matter of Public Health Trust of Miami-Dade County, Florida* [misstatement of revenues and misrepresentation that financial statements prepared according to generally accepted accounting principles] – https://www.sec.gov/news/press-release/2013-181

(r) *Securities and Exchange Commission vs. City of Miami, Florida and Michael Boudreaux* [false and misleading disclosures regarding interfund transfers to mask deteriorating financial condition] – https://www.sec.gov/news/press-release/2013-130

(s) *In the Matter of South Miami, Florida* [failure to disclose use of proceeds of tax-exempt bond issue in a manner that jeopardized tax-exempt status] – https://www.sec.gov/news/press-release/2013-2013-91htm

(t) *In the Matter of the City of Harrisburg, Pennsylvania* [misleading statements regarding financial condition made to the public in light of failure to

make required continuing disclosures] – https://www.sec.gov/news/press-release/2013-2013-82htm

(u) *Securities and Exchange Commission vs. City of Victorville et al.* [misleading valuation and debt service ratio] – https://www.sec.gov/news/press-release/2013-2013-75htm

C. Municipal advisor's role in the new issue process

(1) Where are the municipal advisor's duties in connection with specific new issues defined?

(a) Solely in the contract with the issuer/obligated person client under MSRB Rule G-42(c)?

(b) Or are there "inherent" duties that the municipal advisor is deemed to have if it is engaged to work in some capacity on a new issue?

That is, although (in the case of a municipal entity client), a municipal advisor has a fiduciary duty, to what activities does that duty run?

(2) What is the relationship between a municipal advisor's fiduciary duty to its municipal entity client and its Rule G-17 fair dealing duty to all other persons?

(a) Fair dealing with direct transaction participants with which the municipal advisor interacts

(b) Is there a fair dealing duty to investors, even where the municipal advisor does not interact directly with the investor?

(i) Potential duty through the underwriter, as "representative" of investors?

(ii) Potential duty to investor as a key participant of the overall financing transaction (a "duty to the transaction")?

(c) Does the fiduciary duty outweigh the fair practice duty?

(d) Do the disclosures that municipal advisors are required to make to their clients relevant to other parties? Is there a duty to provide a subset of such disclosures to others, including to investors in the official statement? If so, where does that legal duty arise?

See *Securities and Exchange Commission vs. City of Rochester, New York, Rosiland Brook-Harris, Capital Markets Advisors, LLC, Richard Ganci, and Richard Tortora* [alleging principals of municipal advisor were aware of financial

distress but did not inquire further about school district's financial condition or inform investors of risk] – https://www.sec.gov/litigation/complaints/2022/comp-pr2022-108-city-of-rochester.pdf

See also *Securities and Exchange Commission vs. Aaron B. Fletcher and Twin Spires Financial LLC* [alleging preparation of false financial statements in connection with bond offering approval and acting as unregistered municipal advisor] – https://www.sec.gov/litigation/complaints/2022/comp-pr2022-97-fletcher.pdf

See also *Securities and Exchange Commission vs. Choice Advisors, LLC and Matthias O'Meara* and related matters [alleging violation of municipal advisor duties and engaging in unregistered municipal advisory activities] – https://www.sec.gov/news/press-release/2021-188

See also *Securities and Exchange Commission v. Comer Capital Group, LLC and Brandon L. Comer* [alleged violation of municipal advisor's fiduciary duty in connection with engagement of underwriter and pricing of new issue] – https://www.sec.gov/litigation/litreleases/2019/lr24520.htm

See also *In the Matter of Central States Capital Markets, LLC et al.* [persons acting in dual role of underwriter and financial advisor failed to make disclosures of roles, including in the official statement] – https://www.sec.gov/news/pressrelease/2016-54.html – with regard to official statement disclosure, was liability incurred as underwriter or as municipal advisor?

V. WHAT IS MATERIAL?

A. Preview: the standard characterization of materiality in the context of disclosure looks to "*facts which a prudent investor should know in order to evaluate the offering before reaching an investment decision*" [Municipal Securities Disclosure, Securities Exchange Act Release No. 26100 (September 22, 1988) at note 76], with the US Supreme Court stating that a fact is material if there is "*a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor]. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available*" [TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)]

B. Query: what does materiality mean as investment decisions are increasingly made using big data/machine learning/algorithmic means that rely less and less on standard qualitative and quantitative data traditionally included in securities offering documents?

(1) What is a "prudent investor" where the investor's prudence is a technological solution?

(2) Is the concept of materiality due for a retrospective review?

VI. SEC, CLIMATE/ESG AND CYBERSECURITY DISCLOSURE

A. SEC Initiatives – corporate focus, but analogous to municipal securities

i. February 24, 2021 – Statement on the Review of Climate-Related Disclosure (https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure)

1. Acting Chair Allison Herren Lee directs the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings.

2. The Commission in 2010 provided guidance to public companies regarding existing disclosure requirements as they apply to climate change matters. As part of its enhanced focus in this area, the staff will review the extent to which public companies address the topics identified in the 2010 guidance, assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and absorb critical lessons on how the market is currently managing climate-related risks.

ii. March 3, 2021 – SEC Division of Examinations Announces 2021 Examination Priorities with Enhanced Focus on Climate-Related Risks (https://www.sec.gov/news/press-release/2021-39)

1. SEC announced greater focus on climate-related risks by examining proxy voting policies and practices to ensure voting aligns with investors' best interest and expectations as well as business continuity plans in light of intensifying climate change risks.

iii. March 4, 2021 – SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (https://www.sec.gov/news/press-release/2021-42)

1. Creates Climate and ESG Task Force in the Division of Enforcement led by Kelly Gibson, Acting Deputy Director of Enforcement.

2. Consistent with increasing investor focus and reliance on climate and ESG-related disclosure and investment, the Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct.

3. The initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules. The task force will also analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.

iv. March 15, 2021 – Request for Comment on Climate Disclosure (Acting Chair Allison Herren Lee) (https://www.sec.gov/news/public-statement/lee-climate-change-disclosures)

1. Public input requested from investors, registrants and other market participants on climate change disclosure.

2. Acting Chair Allison Herren Lee has asked the staff to evaluate SEC disclosure rules with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change.

3. SIFMA response – https://www.sifma.org/wp-content/uploads/2021/06/SIFMA-Climate-Disclosure-SEC-RFI-June-10-2021.pdf

    a. SIFMA recommends a high level response urging the SEC to take action on climate disclosure through formal rulemaking, thus allowing for appropriate public notice and comment periods to opine on the proposals.

    b. Recommends nature and placement of climate-related disclosure be determined by materiality, which varies by industry and among companies within industries. SIFMA recommends the SEC adopt a smart mix of climate disclosure requirements, consisting of (A) a principles-based requirement to disclose material climate-related information and (B) a limited set of core metrics that are generally applicable across industries, with safe harbor protections for any forward-looking climate-related information, whether qualitative or quantitative.

    c. Approach to climate disclosures should be coordinated (globally and nationally) and consistent, and any rulemaking should keep compliance burdens in mind and minimize them to the greatest extent possible and be phased in over time.

    d. Data and methodologies must improve and the SEC should be mindful that some disclosures may be dependent on data or information from other companies.

4. NABL Response – https://www.sec.gov/comments/climate-disclosure/cll12-9218139-250189.pdf

    a. Any disclosure guidance from the SEC should be grounded in materiality.

    b. Issuers should be able to decide whether to label or market their bonds to environmentally or socially-driven investors,

but should not be required to otherwise meet climate change labelling requirements, barring materiality concerns.

v. March 21, 2022 – SEC proposed amendments to the Securities Act that would require corporate issuers to provide certain climate-related information in their registration statements and annual reports - https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

vi. May 25, 2022 – SEC issued two rule proposals in connection with investment advisors and investment companies relating in whole or in part to environmental, social and governance matters:

1. Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies – https://www.sec.gov/rules/proposed/2022/33-11068.pdf

2. Investment Company Names – https://www.sec.gov/rules/proposed/2022/33-11067.pdf

Together, these proposals would, among other things, require funds and their advisers to disclose additional information regarding their ESG investment practices, as well as to adhere to additional practices and standards with respect to their invested assets designed to ensure consistency with fund names and terminology indicative of the fund's focus or strategy, including in connection with ESG strategies.

While not directly applicable to municipal issuers, the proposed rule amendments, if adopted, could have potentially significant impacts on municipal issuers whose bonds are held by mutual funds and other investors engaging in ESG strategies, which may need to modify their standards and practices when investing in municipal securities to conform to their new ESG-related obligations.

B. MSRB Request for Information on ESG Practices – December 8, 2021 (https://www.msrb.org/-/media/Files/Regulatory-Notices/RFCs/2021-17.ashx)

i. The MSRB issued a request for information on ESG market practices in the municipal securities market as part of its broader engagement on ESG trends and to enhance issuer and investor protections related to these matters.

ii. Among other topics, the MSRB is specifically seeking to compile comments on: (i) the disclosure of information regarding ESG-related risk factors and ESG-related practices and (ii) the labeling and marketing of municipal securities with ESG designations. Presently, there are no uniform standards for ESG-related disclosures or ESG-labeled bonds.

The MSRB hopes to gather information from municipal issuers, investors in municipal securities, broker-dealers, municipal advisors, and other participants to

gather a record of stakeholder perspectives and inform the Board on market trends.

iii. The MSRB received 52 submissions from issuers, individuals and industry groups and announced that its next steps with respect to ESG practices in the municipal securities market would be to prepare and publish a summary of the comments and to host a series of virtual town halls to explore themes raised by commenters.

C. GFOA Best Practices

i. ESG Best Practice – "E" Environmental (https://www.gfoa.org/materials/esg-disclosure)

1. Without clear ESG information—either through a rating agency report or disclosures—potential buyers of municipal bonds are likely to conduct their own ESG analysis, which may not include all relevant information or context that a government can provide especially regarding steps taken to mitigate these risks.

2. The GFOA best practices paper notes that the first step for issuers in developing environmental disclosure information is to consider the environmental risks applicable to the issuer and its bonds. To identify these risks, the paper suggests that issuers start by identifying internal resources, such as an emergency planner or sustainability officer, and relevant reports or studies. An issuer also can consult external resources, such as bond offering documents of other relevant jurisdictions, particularly because environmental and climate risks often affect other jurisdictions in the region.

3. After identifying environmental risks, issuers should consider the potential operational and financial impacts of these risks (were they to materialize), evaluate whether the risks can be quantified, and consider whether the risks represent material risks that should be disclosed in bond offering documents, together with appropriate cautionary language and the steps the issuer is taking (if any) to address the risk.

4. The GFOA best practices paper includes a checklist of considerations in preparing environmental disclosure.

ii. ESG Best Practice – "S" Social (https://www.gfoa.org/materials/esg-best-practice-s-social)

1. One important distinction between "E" risks and "S" factors is the lack of consensus within the municipal finance space about what factors would fall under the "S" umbrella that may constitute important information related to credit analysis, which could leave

the issuer in the position of having to decide what social factors, if any, may have a meaningful and relevant connection to its credit quality or the willingness or ability to repay its bonds.

2. Issuers can start by considering the "S" factors that challenge their own community, evaluating whether these factors could have operational and financial impacts, and considering the potential materiality of these factors.

3. The paper suggests that issuers start by reviewing what is already included on these topics in their bond offering documents, and consider whether to provide additional context for how these "S" factors are affecting the jurisdiction and how the factors are being addressed. Because there is less consensus on the "S" factors to consider, "S" disclosure may be most informative when it includes an explanation of the significance of the factor and a discussion of its potential impacts on the jurisdiction.

iii. ESG Best Practice – "G" Governance (https://www.gfoa.org/materials/esg-best-practice-g-governance)

1. Governance factors have always been a part of government management, operations, and finances and information on organizational structure, management, decision-making, policies, and budget and financial management and reporting is already available from issuers and communicated in some way. However, the focus on ESG provides an opportunity for issuers to think about "G" factors in light of ESG and verify that important information of this nature is available and clearly communicated.

2. The GFOA paper notes that "G" (and other disclosure) should be reviewed from time to time to take into account new developments.

E. SEC Cybersecurity Releases – two releases in February and March 2022 address cybersecurity risk management for investment advisers, registered investment companies and business development companies.

i. Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies proposed rules would require advisers and funds to adopt and implement written policies and procedures that are reasonably designed to address cybersecurity risks; require advisers to report significant cybersecurity incidents to the Commission on proposed Form ADV-C; enhance adviser and fund disclosures related to cybersecurity risks and incidents; and require advisers and funds to maintain, make, and retain certain cybersecurity-related books and records. https://www.sec.gov/rules/proposed/2022/33-11028.pdf (February 9, 2022)

ii. Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure proposed rules would require current reporting about material cybersecurity incidents on Form 8-K; require periodic disclosure regarding among other things, registrant's policies and procedures to identify and manage cybersecurity risks; management's role in implementing cybersecurity policies and procedures; board of directors' cybersecurity expertise, if any, and its oversight of cybersecurity risk; and updates about previously reported material cybersecurity incidents; and require the cybersecurity disclosures to be presented in Inline eXtensible Business Reporting Language (Inline XBRL). https://www.sec.gov/rules/proposed/2022/33-11038.pdf (March 9, 2022)

F. How will rule changes in the corporate world create a materiality standard for municipal securities? How well will the concept of 'materiality' be used to elicit information in the context of ESG disclosures in municipal securities offerings and secondary market disclosures? How will proposed SEC corporate amendments on ESG disclosure affect municipal disclosure?

G. How do practitioners glean what is material to investors respecting ESG disclosures?

VII. DISCLOSURE OF RISK FACTORS

A. Use of forward looking statements as a safe harbor from anti-fraud liability.

(1) Based on corporate securities doctrine under the Private Securities Litigation Reform Act.

(2) Creates safe harbor from antifraud provisions for forward looking statements that are reasonably based, honestly believed, and accompanied by meaningful cautionary language like risk factors.

B. Should include well-developed assumptions and cautionary statements that disclose material facts that indicate risk.

(1) Tailored to issuer or borrower's particular circumstances

(2) Cautionary statements do not protect against omission of material facts

VIII. RECENT REGULATORY PROPOSALS

A. In FINRA Regulatory Notice 21-11, FINRA proposes to require dealers to post margin for contracts to sell securities on a "when-issued" basis in a primary distribution in connection with a bona fide offering by the issuer to the general public for cash if they settle after the 42nd calendar day after the trade date.

(1) Potential Impact if Rule Adopted

(a) Additional costs to underwriters for forward settled underwritings

(b) Cost to issuers?

B. In MSRB Notice 2021-07, the MSRB proposes to codify interpretive guidance previously issued in 2017 under MSRB Rule G-17 that relates to the obligations of "solicitor municipal advisors" and add additional requirements that would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor advisors.

(1) "Solicitor municipal advisors" are persons who solicit municipal entities or obligated persons. A solicitation is "a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor or investment advisor that does not control the person undertaking the solicitation, for the purpose of obtaining or retaining and engagement by a municipal entity or obligated person of a broker, dealer municipal securities dealer or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment advisor to provide investment advisory services to or on behalf of a municipal entity."

C. MSRB proposes extending Regulation Best Interest (Reg BI) Obligations to Bank Dealers.

In 2019, the SEC adopted Reg BI, which set a new standard of conduct for broker-dealers when making a recommendation to retail customers of securities transaction or investments involving securities. Retail customers are those that use recommendations primarily for personal, family or household purposes. Reg BI provided that broker-dealers are obligated to act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker dealer ahead of the interest of the retail customer.

As drafted, Reg BI did not apply to municipal recommendations to retail customers made by bank dealers, which led to a potential for disparate treatment of retail customers by bank dealers compared to broker-dealer recommendations.

On April 29, 2022, the MSRB filed a proposed rule change with the SEC to amend MSRB Rule G-19 on suitability of recommendations in order to require bank dealers to comply with Regulation Best Interest to the same extent as broker-dealers when making municipal securities recommendations to retail customers. If approved by the SEC, the proposed rule change would impose the Disclosure Obligation, Care Obligation, Conflict-of-Interest Obligation and Compliance Obligation under Regulation Best Interest on bank dealers. The SEC published a notice to solicit comments on the Reg BI on May 4, 2022 approved the rule changes on June 23, 2022. The approval order can be found here – https://www.sec.gov/rules/sro/msrb/2022/34-95145.pdf.

IX. LATE BREAKING ENFORCEMENT ACTIONS AND OTHER DEVELOPMENTS

A. The panel will discuss additional issues, regulatory developments and enforcement actions arising since the completion of this outline.