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Content

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Editor's Notes

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Welcome to Volume 49 No.1 of *The Bond Lawyer*.

In this Edition

In this edition, Tony Martini provides commentary on the new administration's approach to government efficiency and reviews the recent (but very few) developments in federal tax matters, including the final reissuance regulations. In homage to the Fourth Installment of the Municipal Securities Retrospective in this issue, Drew Kintzinger's securities law column will return in the next issue.

Fourth Installment of Municipal Securities Retrospective

In the fourth installment of our Municipal Securities Retrospective, Paul Maco, Drew Kintzinger, and Rick Weber provide an in-depth discussion of the 1994 SEC interpretive release and the initial amendments to Rule 15c2-12 requiring contractual continuing disclosure for issuers of municipal securities to support secondary market transactions. This installment also includes the evolution of today's Electronic Municipal Market Access System (EMMA), the municipal counterpart to EDGAR. The fascinating background for the ultimate publication of the interpretive release and initial amendments provides valuable context to our practice today. This installment also catalogues and underscores the importance of industry-wide participation in the regulatory process.

Is there an Alternate Reality About the Municipal Market in Academia?

While contemplating topics for this column from time to time, I have run across articles written by academics delving into various topics concerning state and local government finance, including aspects of municipal securities law. Unfortunately,

misstatements and conflated concepts about securities law and municipal disclosure contained in some of these articles overshadow what might have been thoughtful analysis. Here are some (mostly) paraphrased statements I read recently:

- *Municipal issuers have a lot of bonds to trade.* Municipal issuers are not typically involved in trading. The "value" of a municipal issuer does not rise and fall with the price of its municipal bonds the way a public company's value may rise or decline with its stock price. The importance of the secondary trading market to municipal issuers has historically been a rather nebulous topic, particularly for infrequent issuers of long-term fixed rate bonds (or short-term fixed rate tax or revenue anticipation notes, for that matter). That said, liquidity for municipal bonds (or at least the perception of liquidity) is important, even though the municipal market was, for a very long time, viewed as a "buy and hold" market. To support this premise, consider an underwriter's reaction in a bond transaction if transfer restrictions are suggested or imposed through investment letters, "travelling" or otherwise.

- *The Tower Amendment amended Section 10(b) of the Securities Exchange Act of 1934.* The Tower Amendment did not amend Section 10(b), but it did add paragraph (d) to the new Section 15B which restricts what the MSRB and SEC can require of municipal issuers pre- and post-issuance. The 1975 amendments to the federal securities laws were extensive. The Tower Amendment was just one piece of the larger legislation.

- *The Tower Amendment brought municipal disclosure within the purview of SEC enforcement.* Actually, it was always there. Municipal issuers are (and have always been) subject to anti-fraud provisions.

- *The original 1989 version of Rule 15c2-12 set minimum standards for issuer disclosure.* Other than a definition of "final official statement" and items that can be omitted from a "deemed final" official statement, there do not appear to be any minimum "standards" for disclosure in the original version of Rule 15c2-12. There was certainly discussion in the proposing and adopting releases about the importance of the disclosure document being made available to investors and lengthy discussion about the responsibility of an underwriter to review the disclosure and have a reasonable basis for recommending the bond issue to investors, but not much on the actual contents of the disclosure. To try to put

this statement in the most positive light, one could say that by listing items that can be omitted from a "deemed final" preliminary official statement, the SEC did set some sort of standard regarding disclosure.

- *Rule 15c2-12 is not easily enforceable because the MSRB does not have enforcement powers.* The incorrectness of this statement is obvious.

- *The MCDC initiative may have discouraged disclosure.* This statement was attributed to a research paper chock-full of data about, among other things, continuing disclosure filings before and after MCDC. It was difficult to understand the data analysis, but the conclusions drawn included the suggestion that the MCDC initiative was "too lenient" in its penalties for issuers. The MCDC initiative was not about compliance with continuing disclosure *per se*, it was about what an issuer said about its past compliance. I think most bond lawyers would agree that the MCDC initiative most certainly has focused practitioners (and underwriters) on the accuracy of statements about past compliance.

- *Industry practices regarding disclosure are based upon "shared interpretations of Rule 15c2-12."* This might be accurate with respect to continuing disclosure matters but it is not accurate with respect to primary market disclosure. That said, I think it is an accurate statement that disclosure language and concepts do tend to "travel in packs" at times, particularly if a novel issue arises (think the Zika virus, COVID, and for those us in the "elders" category, preparation for the Year 2000). Who among us can say we were never provided "sample" disclosure by underwriters (or counsel) or searched on munios.com for disclosure examples to serve as a starting point for novel disclosure. (I confess!)

The larger and more important question raised by articles written from an academic perspective, in my opinion, is how do we, as a group of lawyers highly skilled in municipal finance law, educate academia about our market. If only we had a way to create a library of scholarly works that accurately reflects the history of municipal securities law (and federal tax law) and current issues in the municipal marketplace..... Oh wait! We do have the means to do exactly that.

New Administration

The phrase "drinking from a fire hose" has crossed my mind a few times since January 20, 2025. There have been so many executive orders and other potential actions

reported that could have far reaching effects on our market, it is impossible to keep up. For those writing risk factor disclosure in current deals, it's difficult to summarize the potential changes in federal funding and the local economy (not to mention federal tax policy) to name just a few. Are the statements "we don't know what's going to happen" or "your guess is as good as mine" appropriate risk disclosure statements? There are lots of rumors flying around about what may or may not be in the budget reconciliation package. Is the sky really falling this time? In 1985, a tax-exempt pooled loan bond was issued that allowed for bond proceeds to be recycled into new loans after the initial loans were paid. Under pre-1986 rules, the private use limit on governmental bonds was 25%. This particular bond issuer recycled bond proceeds to new loans for years, thereby affording new borrowers the benefit of the higher 25% cap on private use. Could something similar work in the face of total loss of tax-exempt financing? David Cholst and Cliff Gerber wrote about blind pools in the last edition of *The Bond Lawyer*[1] and, based upon their description of successful blind pools, there could be a path to create such a pool, assuming enough advance warning on the legislative front to allow sufficient demand diligence, and a host of other assumptions. Just a thought (dream).

Another thought I have had from time to time over the last 40 years is whether and when to revisit the 1988 *South Carolina v. Baker* U.S. Supreme Court decision.[2] The tax restriction at issue in that case was the requirement for registration of tax-exempt bonds (and the resulting prohibition on bearer bonds), a relatively unintrusive restriction when compared to the additional restrictions enacted since then. Would a complete elimination of tax-exemption be viewed the same way by the Supreme Court now?[3]

From the 1988 dissent of Justice O'Connor[4]:

> I do not think the Court's bipartite test adequately accommodates the constitutional concerns raised by the prospect of applying the federal income tax to the interest paid on state and local bonds. This Court has a duty to inquire into the devastating effects that such an innovation would have on state and local governments. Although Congress has taken a

[1] See *The Bond Lawyer*, Volume 48 Number 4.
[2] 485 U.S. 505 (1988)
[3] In an obvious shameless plug for my tax partner, Mike Cullers, see the current installment of The Public Finance Tax Blog, entitled "What are the Odds that FanDuelDraftKingsBet365 Can Save Tax-Exempt Bonds?" Available at https://www.publicfinancetaxblog.com.

[4] 485 U.S. at 531.

> relatively less burdensome step in subjecting only income from bearer bonds to federal taxation, the erosion of state sovereignty is likely to occur a step at a time.
>
> > If there is any danger, it lies in the tyranny of small decisions -in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.
> >
> > *L. Tribe, American Constitutional Law 381 (2d ed.1988*).
>
> Federal taxation of state activities is inherently a threat to state sovereignty. As Chief Justice Marshall observed long ago, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316,17 U. S. 431 (1819). Justice Holmes later qualified this principle, observing that "[t]he power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 277 U. S. 223 (1928) (Holmes, J., joined by Brandeis and Stone, JJ., dissenting). If this Court is the States' sole protector against the threat of crushing taxation, it must take seriously its responsibility to sit in judgment of federal tax initiatives. I do not think that the Court has lived up to its constitutional role in this case. The Court has failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution. I respectfully dissent.

The decision in *South Carolina v Baker* was a plurality opinion. While Justice O'Connor was the lone dissenter, other Justices did not concur in the entire majority opinion. Justice Scalia[5]:

> I do not read *Garcia* as adopting -- in fact I read it as explicitly disclaiming -- the proposition attributed to it in today's opinion, ante at 485 U. S. 512-513, that the "national political process" is the States' only constitutional protection, and that nothing except the demonstration of "some extraordinary defects" in the operation of that process can justify judicial relief. We said in *Garcia*:

[5] Id. at 528.

> "These cases do not require us to identify or define what affirmative limits *the constitutional structure* might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U. S. 559 (1911)."
> 469 U.S. at 469 U. S. 556 (emphasis added). I agree only that that structure does not prohibit what the Federal Government has done here.

Chief Justice Rehnquist[6]:

> This well-supported conclusion that § 310(b)(1) has had a *de minimis* impact on the States should end, rather than begin, the Court's constitutional inquiry. Even the more expansive conception of the Tenth Amendment espoused in *National League of Cities v. Usery*, 426 U. S. 833 (1976), recognized that only congressional action that "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" runs afoul of the authority granted Congress. Id. at 426 U. S. 852. The Special Master determined that no such displacement has occurred through the implementation of the TEFRA requirements; I see no need to go further, as the majority does, to discuss the possibility of defects in the national political process that spawned TEFRA, nor to hypothesize that the Tenth Amendment concerns voiced in *FERC v. Mississippi*, 456 U. S. 742 (1982), may not have survived *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). Those issues, intriguing as they may be, are of no moment in the present case, and are best left unaddressed until clearly presented.

I haven't done the research on the positions of the current Justices of the U.S. Supreme Court on the status of state's rights and sovereignty, but it would seem a total elimination of the exemption of the interest on state and local bonds might present a significant opportunity to (re)test the constitutional waters.
The link to the NABL Advocacy Page is: https://www.nabl.org/advocate/

And now, please enjoy the rest of this edition of *The Bond Lawyer*.

[6] Id. At 529.

Federal Tax Law: The Tax Microphone

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We're just about done with the winter of 2024-2025. We're less than three months into a new administration in Washington DC, still well shy of the end of the first 100 days since Inauguration Day 2025, the period during which an incoming President sets a tone and an agenda for governing, and the period in which the case for a new administration's potential for achieving legislative and policymaking success can be made. The idea of the "first 100 days" apparently derives from a coinage of President Franklin D. Roosevelt, made in a radio address in the summer of 1933, shortly after he first took national office and shortly after the commencement of the first session of the 73rd Congress. Today, in the midst of the latest edition of the first 100 days, what we're seeing is something like the administrative equivalent of "52 pickup," in which many of the familiar norms of regular, reliable governance appear, at least for now, to be in short supply.

In the municipal market, as in most markets, regularity and reliability in the administration of applicable laws and rulemaking are essential ingredients for making good business. So far in 2025, to my knowledge, we haven't seen any drastic shocks or corrections in the municipal markets, and I certainly hope that continues to be the case as we go forward. Direct, imminent threats to the tax-exempt treatment of municipal bonds under Sections 103 and 141 through 150 have not materialized so far (see my last column for additional commentary on that topic), and, as before, I encourage NABL members to find ways to participate in the outstanding educational outreach work that NABL's Governmental Affairs Committee does. Legislative repeal aside though, we cannot ignore current reports about the disruptions that are threatened regarding the administration of federal tax law, and not just from the executive branch of our government.

Let's start with the new administration, though. At the beginning of 2025, the Internal Revenue Service had some 100,000 employees. Some seven to eight thousand recent IRS hires, with fewer employment protections, have already been laid off, and there is credible, widespread reporting indicating that the administration intends to carry out additional IRS workforce reductions that would drive employment levels down at the Service to as few as 50,000 employees. Members of the Republican majorities in both houses of Congress appear to be on board with most of these job cuts and with the idea of drastically cutting the operating budget of the IRS as well. Some, presumably on the party's fringes, seem to think that it's a good idea abolish the IRS, and the federal income tax, altogether. And, not least, in the case of *Loper Bright Enterprises*, decided in June of 2024, the Supreme Court overturned the so-called Chevron doctrine under which the federal courts for decades had employed a deferential standard of review with respect to federal agency interpretations of ambiguous legislative provisions; the implications of Loper for the future of administrative rulemaking are not yet clear, but the decision pretty clearly portends a much more ponderous and slow-moving process for the release of new regulatory guidance, including in the federal tax law field. This starts to look like a trifecta, in terms of branches of government.

In this context, it's not at all surprising to me that the output of new and useful federal tax law guidance pertaining to the tax-exempt bond market appears to have ground to a screeching halt this winter. Perhaps it's just a coincidence, and perhaps we'll soon witness a return to a more representative, historic pace of regulatory output in our field (a pace that I generally haven't viewed as especially impressive). I'm doubtful, but we'll see. I know some will think it wouldn't be a bad thing to see the IRS and all of its employees fading off into a permanent sunset, but I'd say be careful what you wish for, at least when it comes to orderly administration of the tax laws that, as of today, still govern the public finance markets. I'll repeat myself here, because it matters: regularity and reliability in the administration of applicable laws and rulemaking are essential ingredients for making good business in our world.

With that, I can tell you that I have two regulatory developments to report on. Both of them were released prior to the start of the new administration. You can read on to learn more.

Final Reissuance Regulations for Tax-Exempt Bonds

On December 30, 2024, while some of us were settling down for a long winter's nap, Treasury Decision 10020 dropped, setting forth final regulations regarding when

tax-exempt bonds are treated as retired and reissued for federal tax law purposes. The final regulations restate and unify the disparate guidance on this topic that has come down to us over decades in a number of prior administrative releases, including IRS Notice 88-130 and IRS Notice 2008-41 and most recently in proposed regulations under Sections 150 and 1001 of the Internal Revenue Code which were promulgated in December 2018. The final regulations are effective as of the date of their release, December 30, 2024, but issuers and borrowers are permitted under the terms of Treasury Decision 10020 to continue to apply the provisions of Notice 88-130 or Notice 2008-41 to events occurring and actions taken with respect to tax-exempt bonds for a "transition period" until December 30, 2025. Notice 88-130 and Notice 2008-41 will become obsolete as of the latter date, and the final regulations will then remain as the singular rulemaking authority governing questions relating to the retirement and reissuance of tax-exempt bonds.

So what does Treasury Decision 10020 do and say? It adds a new Treasury Regulations Section 1.150-3 prescribing standards regarding the retirement (and reissuance) of tax-exempt state and local bonds, and it revises the cross-reference in Treasury Regulations Section 1.1001-3(a)(2) that directs readers to Section 1.150-3 when the debt instrument modifications they have in mind pertain to tax-exempt instruments. The rubric in the final regulations, which is generally consistent with prior guidance in most respects, starts by telling us that a tax-exempt bond will be treated as retired for federal tax law purposes when (i) the bond is significantly modified under the principles of Regulations Section 1.1001-3, (ii) an issuer or its agent acquires the bond in a manner that causes it to be extinguished or (iii) the bond is otherwise redeemed (as in, actually redeemed; you know it when you see it). The final regulations then offers three exceptions to these general precepts.

The first exception is that in applying Regulations Section 1.1001-3 to a "qualified tender bond," both the existence and the exercise of a "qualified tender right" are disregarded for purposes of determining whether an alteration of the interest rate, or the interest rate mode, for the bonds pursuant to the terms of the bond is a modification (which is how a reissuance analysis begins to be triggered under Regulations Section 1.1001-3). You can find the definitions of "qualified tender bond" and "qualified tender right" in Regulations Sections 1.150-3(e)(2) and 1.150-3(e)(3), respectively. Suffice it to say here that these definitions should look familiar to you, though I call to your attention the fact, as is the case in Notice 2008-41, the definition of "qualified tender bonds" permits them to be structured with final maturities as long as 40 years after issuance and to be remarketed to final maturity with interest rate couponing that generates market premium or discount.

The second exception provides that the acquisition of a qualified tender bond by its issuer, or the issuer's agent, does not cause the bond to be retired or extinguished, as long as the acquisition occurs pursuant to the operation (exercise?) of a qualified tender right and neither the issuer or its agent continues to hold the bond after the close of the 90-day period that begins on the tender date.

The third, and final, exception to the general rubric is that the acquisition of any tax-exempt bond (not just qualified tender bonds) by a third-party guarantor or liquidity facility provider acting on the issuer's behalf does not cause the bond to be retired or extinguished if that acquisition takes place pursuant to the terms of the guarantee or liquidity facility.

Under the foregoing rules, if a bond is treated as retired as a result of a significant modification under the principles of Regulations Section 1.1001-3 (i.e., as a consequence of a significant modification of the bond's terms that gives rise to a deemed exchange of an old bond for a new bond under Code Section 1001), the modified bond is treated as a "new bond" issued at the time of the modification (which is addressed in Regulations Section 1.1001-3(c)(6)). Similarly, if an issuer or its agent subsequently resells a bond that has been acquired in a manner that causes it to be treated as extinguished, the bond is treated as a "new bond" issued on the date of resale. As to the characterization of the resulting "new bond" in either case as refunding bond, the final regulations direct us to the definitional provisions of Treasury Regulations Section 1.150-1(d).

After some 37 years since the advent of Notice 88-130, and the abiding sense in the intervening years that the law in this area was not fully settled, it seems like a relief to have Treasury Decision in hand, even if the outcome today seems a bit anticlimactic. Let's hope the federal courts don't throw out these final regulations as part of a "de novo" post-Roper review of the administration of Code Sections 150 and 1001. Where would we be then?

Private Letter Ruling 202506001

In this private letter ruling, published on February 7, 2025, but issued on November 6, 2024, the IRS concludes that a management agreement relating to a hotel financed with tax-exempt bonds does not cause the hotel to be used for a private business use within the meaning of Section 141 of the Code. The management agreement provides that the hotel manager will be compensated on the basis of a

"base fee" calculated as a percentage of gross hotel receipts, together with an "incentive fee" calculated as a percentage of gross revenues (not receipts, per the PLR, though it is not clear to me what the difference between the hotel's gross receipts and gross revenues would be, if any). The twist, for purposes of PLR 202506001, is that the incentive fee is only activated with respect to fiscal years of the hotel in which the hotel's revenue per available room ("RevPAR") and gross operating profits ("GOP Margins") surpass certain specified benchmarks.

In the ruling, the IRS makes quick work of the base fee component of the manager's compensation, noting that it does not entail any sharing of the net profits derived from hotel operations in contravention of the strictures of Code Section 141(b) or Revenue Procedure 2017-13. The IRS goes on to observe that, like the base fee, the incentive fee that may be paid to the hotel manager from time to time also is calculated based on the hotel's gross revenues, but that it differs from the base fee insofar as it payable only upon the satisfaction of the RevPAR and GOP Margin benchmarks, the latter of which is a "variant" of net profits.

Taking a facts and circumstances approach to this twist, the IRS concludes that the incentive fee does not provide the hotel manager with a share of net profits derived from the operation of the hotel. For one, as the Service points out, the amount of the incentive fee that may be paid from time to time is not structured to rise or fall in proportion to increases or decreases in the profitability of the hotel. For another, as the Service also points out, the incentive fee is even more insulated from net profits because it is only payable if the gross revenues-based RevPAR benchmark is also satisfied in the same fiscal year. The upshot of this structure is that, even in fiscal years during which the hotel is profitable, the incentive fee will not be payable if a specified gross revenue plateau is not reached. These factors appear to have been sufficient to satisfy the IRS that the management contract is not problematic from a private business use perspective.

On a parting note, it appears that PLR 202506001 has a lot in common with PLR 201622003, in terms of underlying facts and legal conclusion. The only notable difference is that the earlier ruling was decided under Revenue Procedure 97-13, the predecessor to the current management contract safe harbor guidance in Revenue Procedure 2017-13. I've generally thought that if a management contract passed muster under the more exacting and formulaic standards of Rev. Proc. 97-13, it probably should pass muster as well under the more qualitative standards of Rev. Proc. 2017-13. So, in sum, it's probably fair to say that PLR 202506001 is not exactly

earth-shattering. But its reasoning is predictable and reliable, which can be a very good thing.

Take care and keep your chins up!

Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 4)

By Andrew R. Kintzinger[7], Paul S. Maco[8], and Fredric A. Weber[9]

In the first article of this series,[10] we described the prosecution of unregistered broker-dealers, known as "Bond Daddies," by the Securities and Exchange Commission (SEC or Commission) for defrauding unsophisticated investors and that these abuses resulted in adoption of 1975 municipal securities reform legislation (1975 Amendments). The 1975 Amendments created the Municipal Securities Rulemaking Board (MSRB or Board) and required registration of municipal securities dealers with the SEC and MSRB and compliance with MSRB rules. The 1975 Amendments also expanded the antifraud statutes aimed at broker-dealers by adding "municipal securities dealers" to those covered, directed the Commission to adopt rules that identify devices or contrivances as manipulative, deceptive, or otherwise fraudulent, and amended the definition of "person" in the Securities Exchange Act by adding "government, or political subdivision, agency, or instrumentality of a government," to remove any doubt that Section 10(b) and Rule 10b-5 applied to state and local governments.

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[7] Andrew R. Kintzinger is counsel to Hunton Andrews Kurth LLP. He served as NABL's President between 1994 and 1995. He is a co-author of *Disclosure Roles of Counsel in State and Local Government Securities Offerings* and many NABL publications and has been awarded the Frederick O. Kiel Distinguished Service Award by NABL.

[8] Paul S. Maco is a retired partner of Bracewell LLP and served as the founding Director of the SEC's Office of Municipal Securities and previously as a member of its Division of Enforcement assigned to reports on transactions in New York City securities in the 1970s. He is co-reporter of *Disclosure Roles of Counsel in State and Local Government Securities Offerings*, 2nd and 3d Editions, and co-editor of the 1st edition. He has been awarded the Frederick O. Kiel Distinguished Service Award and Carlson Prize by NABL.

[9] Fredric A. (Rick) Weber is a retired partner of, and "Of Counsel" to, Norton Rose Fulbright US LLP. He served as NABL's President between 1991 and 1992. He is a co-author of *Disclosure Roles of Counsel in State and Local Government Securities Offerings* and many NABL publications and has been awarded the Bernard P. Friel Medal, Frederick O. Kiel Distinguished Service Award, and Carlson Prize by NABL.

[10] *See* "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 1)," *The Bond Lawyer*, Vol. 48, No. 2.

In the second article of this series,[11] we chronicled a series of events that resulted in the first SEC regulation of municipal securities transactions pursuant to the 1975 Amendments:

- the New York City and Washington Public Power Supply System (WPPSS) securities defaults and resulting SEC investigations and reports, which found disclosure shortfalls in offerings of the defaulted securities and consequent investor harm;

- national economic turmoil evidenced by stagflation, an aggressive Federal Reserve response that increased federal funds rate to a high of 20%, and resulting financial havoc experienced by savers, savings banks, and state and local governments; and

- financial markets innovations developed to adapt to rapidly changing markets as well as tax and SEC mutual fund regulations that increased participation by individual investors in the tax-exempt municipal bond market.

In the third article of this series,[12] we discussed the initial proposal and modified adoption of Rule 15c2-12, which, as initially promulgated, focused on underwriters' responsibilities in municipal transactions and required they obtain, professionally review, and distribute offering documents in primary offerings of municipal securities, unless exempted by the Rule. We also noted the SEC's proposing release invited comment on an MSRB proposal to create a central repository through which broker-dealers and investors could access offering documents.

In this article, we discuss the initial establishment of repositories for offering documents and their evolution into today's Electronic Municipal Market Access System (EMMA), the municipal counterpart to EDGAR. But first, we discuss (a) a 1994 SEC interpretive release designed to remind municipal market participants of their duties under the antifraud provisions of the federal securities laws when participating in primary offerings or activities in or affecting the secondary market and (b) amendments to Rule 15c2-12 contemporaneously proposed to provide for continuing disclosure by issuers of municipal securities to support secondary market transactions.

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[11] *See* "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 2)," *The Bond Lawyer,* Vol. 48, No. 3.

[12] *See* "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 3)," *The Bond Lawyer,* Vol. 48, No. 4.

Background for 1994 Interpretive Release and Rule 15c2-12 Amendments

Unlike the two dramatic New York City and WPPSS municipal market defaults that spawned the 1989 adoption of Rule 15c2-12, the 1994 amendments to the Rule to require continuing disclosure for municipal bonds resulted from front page reporting of scandals in the municipal securities market as well as the desire of broker-dealers to have information needed to comply with MSRB rules. Congress paid attention and in the hearings that followed, brought forward both the work underway by municipal market participants and regulators to improve the market and reports of the regulators highlighting the inadequacies of then current regulation, all the while as both national and trade publications highlighted ongoing federal criminal and civil investigations into municipal market corruption.

Congressional Concern Regarding Regulation of the Municipal Securities Market

On May 24, 1993, Chairman Dingell of the House Energy and Commerce Committee and Chairman Markey of the House Subcommittee on Telecommunications and Finance sent a joint letter (Joint Letter) to three organizations with regulatory responsibility for the municipal securities market – the SEC, the National Association of Securities Dealers, Inc. (NASD), and the MSRB (or Board). The Joint Letter asked the organizations to "take a comprehensive look" at the present scheme of regulation in the market and to provide information on what the organizations have done or plan to do in light of reports of illegal payoffs, influence peddling, conflicts of interest, and questionable sales practices. The Joint Letter also asked for comment on the adequacy of secondary market disclosure and for recommendations on the possible need to revise the structure and expand the authority of the MSRB.[13]

The first paragraph of the Joint Letter[14] explained why: "we are looking into the facts and circumstances surrounding the recent New Jersey Turnpike refunding scandal and the adequacy of the current laws and regulations applicable to the issuance and sale of municipal securities." A top-of-the fold headline of the May 4, 1993, *New York Times* announced: "Broker Suspends 3 Over Bond Deal With New Jersey/Links To Top Florio Aide/ Merrill Lynch Says It Found 'Apparent Irregularities' and Alerted U.S."[15] The

[13] So stated the first paragraph of the MSRB's September 3, 1993, *Report of the Municipal Securities Rulemaking Board on Regulation of the Municipal Securities Market* (MSRB Report) Personal file copy, Paul S. Maco.

[14] Conveniently included as "Attachment A" to the MSRB Report.

[15] https://www.nytimes.com/1993/05/04/nyregion/broker-suspends-3-over-bond-deal-with-new-jersey.html?searchResultPosition=20. As the article related, "Merrill Lynch & Company, the lead

federal investigations that followed expanded beyond New Jersey to other parts of the United States, resulting in federal criminal convictions as well as civil settlements with underwriters and financial advisors relating to undisclosed payments, kickbacks, and other consideration for municipal bond business.[16]

On May 6, 1993, two days after that New York Times headline, the SEC experienced post-election turnover. Chairman Richard C. Breeden bade farewell and Commissioner Mary Shapiro, who became a Commissioner in December 1988, shortly after the 1988 15c2-12 Proposing Release, stepped in as Acting Chair, in time to receive the Joint Letter and field emerging problems in the country's municipal bond markets.[17] Several days earlier, on April 28, 1993, President William J. Clinton announced his intention to nominate Arthur Levitt, Jr., owner of the Capitol Hill newspaper *Roll Call* and former chairman of the American Stock Exchange, as a member of the Commission and designate him Chairman.[18] He was sworn in on July 27, 1993 and would serve as Chairman until February 9, 2001, the longest serving Chairman of the SEC.[19] Trouble in

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underwriter for New Jersey Turnpike Authority bonds, said today that it had suspended three senior executives involved in a $2.9 billion bond transaction that is now the subject of a Federal investigation, ... portrayed itself ... as the party that had alerted Federal authorities to the problem" and "said that it acted after a routine audit in March by the National Association of Securities Dealers" The full text of the article and subsequent reporting on the investigation are available in the New York Times online archive.

[16] *See, e .g,:* United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997); *SEC v. Mark S. Ferber*, Civ. Action No. 96-12653 (EFH) (D. Mass.), Litigation Release No. 15193 (December 19, 1996) (settled final order); *In re Ferber*, Exchange Act Release No. 38102, A.P. File No. 3-9211 (December 31, 1996); *In re Lazard Freres & Co., LLC, and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 36419, A.P. File No. 3-8872 (October 26, 1995); *SEC v. Nicholas A. Rudi, Joseph C. Salema, Public Capital Advisors, Inc., George L. Tuttle Jr. and Alexander S. Williams*, Litigation Release No. 15218 (January 17, 1997) (settled final orders against Rudi and Public Capital Advisors); *SEC v. Nicholas A. Rudi, Joseph C. Salema, Public Capital Advisors, Inc., George L. Tuttle Jr. and Alexander S. Williams*, Civ. Action No. 95 Civ. 182 (S.D.N.Y.), Litigation Release No. 14421 (February 23, 1995) (settled final order against Salema); *In re George L. Tuttle, Jr. and Alexander S. Williams*, Exchange Act Release No. 35605, A.P. File No. 3-8668 (April 14, 1995).

[17] Commissioner Shapiro, the youngest female SEC Commissioner, would leave October 13, 1994, to become Chairwoman of the CFTC and return as Chairman January 27, 2009, as the first woman to be permanent Chair of the SEC.

[18] The American Presidency Project, William J. Clinton, Nomination for Chairman of the Securities and Exchange Commission, available at: https://www.presidency.ucsb.edu/documents/nomination-for-chairman-the-securities-and-exchange-commission

[19] https://www.sec.gov/about/current-sec-commissioners/sec-historical-summary-chairmen-commissioners/arthur-levitt

the municipal market was also on the mind of the Senate that summer, and Levitt faced questions about municipal market conditions in his confirmation hearings. [20]

On September 3, 1993, the MSRB and the SEC sent their responses to the Joint Letter to Chairmen Dingell and Markey. The MSRB's Report of the Municipal Securities Rulemaking Board on Regulation of the Municipal Securities Market[21] (MSRB Report) and the SEC's Staff Report on the Municipal Securities Market (Staff Report)[22] are summarized below. House hearings quickly followed.

Testimony of the Regulators. That fall, the Subcommittee on Telecommunications and Finance of the Committee of Energy and Commerce of the U.S. House of Representatives held two oversight hearings on federal regulation of the municipal securities market, the first with the regulators of the municipal market, the second with municipal market participants. The witness panel for first hearing, on September 9, 1993, was comprised of the Honorable Arthur Levitt, Chairman, Securities and Exchange Commission; Mr. Charles W. Fish, Chairman of the MSRB, accompanied by Mr. Christopher A. Taylor, Executive Director of the MSRB; and Mr. John Pinto, Executive Vice President, NASD.

Chairman Levitt noted at the outset of his testimony "it is indisputable that this vital market has been the subject of intense scrutiny in the past several months, and serious concerns have been raised regarding certain aspects of it . . . we also share the Subcommittee's concern that investor confidence in its integrity may have been impaired as a result of recent serious allegations of abusive practices. . . . In brief, I believe the key to reform of the municipal securities business is more hard information."[23]

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[20] Noting the Commission's inquiry into industry practices in the municipal underwriting area, Senate Banking Chairman Donald W. Riegle, Jr., asked whether the municipal market needed more regulation and whether investors in municipal securities should receive additional disclosure? On July 16, 1993, Levitt responded to the first question that the Division of Enforcement was reviewing political contribution practices and would not draw conclusions "until the ongoing inquiry establishes the nature and extent of these practices," and to the second, after noting the Commission was preparing responses to the Joint Letter, that he "would like the benefit of the Commission's study in reaching a conclusion on this issue." Arthur Levitt, Jr. letter of July 16, 1993, to The Honorable Donald W. Riegle, Jr. Chairman, Committee on Banking, Housing and Urban Affairs, Q.6 and Q. &A. 6.A and 6.B. Available at: https://www.sechistorical.org/collection/papers/1990/1993_0716_LevittConfirmation.pdf.

[21] See note 7 *supra.*

[22] https://www.sec.gov/info/municipal/mr-munimarketreport1993.pdf.

[23] Testimony of Arthur Levitt Jr., Chairman U.S. Securities and Exchange Commission Concerning The State of The Municipal Securities Market Before the Subcommittee on Telecommunications and Finance,

Chairman Levitt then discussed "some of the problems identified in the [*Staff Report*] and what the Commission intends to do to address those problems" and improve access to hard information. Two topics took center stage:

First, Chairman Levitt addressed municipal broker-dealer market practices. He noted a substantial increase in negotiated underwritings and media reports regarding pay-to-play practices, observed that they raise questions about the integrity of the municipal securities market as a whole, and stated the SEC's intention to bring enforcement actions where warranted.[24]

Second, Chairman Levitt advocated increased and more readily available information about issuers and described regulatory initiatives to that end, including:

- Exploring "ways to improve disclosure under its existing interpretive authority by providing guidance to issuers regarding the disclosures required under the antifraud provisions of federal securities laws."[25] This initiative resulted in the 1994 Interpretive Release.

- Consider proposing "rules prohibiting municipal securities broker-dealers from recommending outstanding securities unless the issuer provides ongoing information about the financial condition of the issuer."[26] This initiative resulted in the Rule 15c2-12 continuing disclosure amendments.

The Staff Report. The *Staff Report* described the disclosure shortcomings alluded to in Chairman Levitt's testimony. It also identified two additional problems to be addressed: the lack of transparency of municipal securities quotation and trading information and better audit trails.[27]

Committee of Energy and Commerce, United States House of Representatives, September 9, 1993, at 2-3, available at https://www.sechistorical.org/collection/papers/1990/1993_0909_LevittMunicipal.pdf.

[24] Id., 4.

[25] Id, 6.

[26] Id.

[27] As explained in the *Staff Report*, "audit trails" referred to creation of a cost-effective trade reporting system, through cooperation among the MSRB, NASD, and the banking agencies, that will provide the regulators with an integrated audit trail of municipal securities and result in improved surveillance for all segments of the market. *Staff Report*, at 38.

In six sections, the *Staff Report* provided the information requested by the House Committees in the Joint Letter. In the section captioned "The Municipal Securities Market: Options for Change" it states:

> After reviewing the current regulation of the municipal market, the Staff believes that increased attention, including both Congressional and Commission action, would be beneficial in several areas significant to investors and the operation of the market.[28]

With regard to municipal issuer disclosure, it reports:

> Under the current system, the quality of municipal offering documents depends on the voluntary undertaking of individual issuers to prepare complete documents, and the competence of the advice issuers receive from financial advisors, underwriters, and counsel. As a result, complete and comprehensive disclosure of the financial condition of the issuer and any credit enhancer, the characteristics of the security, and investment risks, is not consistently available.

After discussing then current voluntary initiatives, the *Staff Report* states:

> In the Staff's view, comprehensive improvement of the existing system would require Congressional action. Such action could include direct statutory authority to set mandatory disclosure requirements for municipal issuers and authorize specifically the Commission to require continuing financial disclosure . . . Congress could even rescind the exempt status of municipal bonds under the Securities Act and the Exchange Act, thereby subjecting them to the registration and continuous reporting obligations applicable to corporate and foreign government bond issues.

The *Staff Report* continues:

> At a minimum, the Staff would support legislation requiring registration of all corporate obligations underlying municipal conduit securities.
>
> If Congress chooses not to provide the Commission with full authority to address the adequacy and consistency of disclosure in this market, the Staff believes that the Commission could explore ways to improve initial and secondary market disclosure under its existing authority. Specifically, the Staff will prepare a memorandum and draft release recommending that the Commission use its

[28] *Staff Report*, at 32.

interpretive authority to provide guidance regarding the disclosures required by the antifraud provisions of the federal securities laws. Similarly, the Staff will recommend amending Rule 15c2-12, or adopting similar rules, to prohibit dealers from recommending outstanding municipal securities unless the municipal issuer makes available ongoing information regarding the financial condition of the issuer of the type required in initial offerings.

The *Staff Report* cautions:

> The Staff strongly believes, however, that any Commission action in this area could not fully address the lack of complete disclosure in the municipal securities market. As noted above, comprehensive improvements to the existing system would require legislation.[29]

The MSRB Report. The *MSRB Report* had three parts: a summary of the Board's structure, authority, and rules; a discussion of the Board's long-range regulatory priorities and goals; and the Board's comments on specific issues raised by the Joint Letter.

Part I highlighted MSRB Rule G – 17,[30] explaining:

> the Board has interpreted rule G-17 to mean, among other things, that a dealer must disclose to a customer, at or before the time of sale, all material facts concerning the transaction, including a complete description of the security, and must not omit any material facts which would render other statements misleading.[31]

Part II described the steps taken following the 1989 adoption of Rule 15c2-12 to help insure market access to the official statements required by the Rule, accomplished by (i) the adoption of Rule G-32, requiring underwriters to submit official statements to

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[29] Id. 39-40. In addition to the 143 endnotes elaborating upon statements made in it, the *Staff Report* includes four Appendixes providing greater context to the foundation underlying the *Staff Report*: *The Municipal Securities Market – A Historical Overview*, *Municipal Bond Defaults- An Overview*, *A Comparison of the GFOA Guidelines and Corporate Disclosure Requirements*, and *Municipal Securities Cases*, with brief summaries of 40 Commission actions involving municipal securities under the subject matter headings of *Fraud Violations*, *CTR Violations*, *Insider Trading*, *Financial Disclosure*, *Net Capital and Other Violations*, *Investment Company Violations*, and *Rule 2(e) Proceedings*.

[30] As then stated: "In the conduct of its municipal securities business, each broker, dealer and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice." *MSRB Report* at 14.

[31] Id.

the Board; and (ii) the creation of a central, comprehensive repository of official statements, to facilitate dissemination [32] (See Central Repository" below.)

Part III addressed political contributions and influence peddling, continuing disclosure, and the structure and authority of the Board. The *MSRB Report* emphasized the need for improved continuing disclosure. Referencing its discussion in Part I of MSRB Rules G-17, G-19,[33] and G- 30,[34] the *MSRB Report* states:

> Continuing disclosure information plays a critical role in helping dealers to meet their investor protection responsibilities. For example, a dealer effecting a customer transaction must ensure that the customer is informed of all material facts about the transaction and must also ensure that the transaction is priced fairly. In addition, when recommending a security to a customer, the dealer must have sufficient knowledge of the current credit quality of the security to determine whether the transaction is suitable for their customer. If issuers do not publicly disclose major financial and other material developments affecting their securities after issuance, the dealers who buy and sell the securities in the secondary market can not be sure that they are meeting these basic investor protection responsibilities.[35]

Supporting this concern, the *MSRB Report* quoted a letter from the Chairman of the Municipal Securities Division of Public Securities Association (a predecessor to SIFMA):

> Given the regulatory scheme ... dealers should have access to material changes in an issuer's condition in order for customers to be fully protected. ... At this time, however, a sanctioned mechanism for the dissemination of information does not exist, which is why we believe that secondary market disclosure is the most important issue confronting dealers and customers alike.[36]

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[32] Id., 32.

[33] Suitability of Recommendations and Transactions. The cited MSRB Rule, available at, https://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-19, has been amended several times since September 3, 1993, the date of the *MSRB Report*.

[34] Prices and Commissions. The cited MSRB Rule, available at: https://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-30, has been amended several times since September 3, 1993, the date of the *MSRB Report*.

[35] *MSRB Report*, 66-67.

[36] Id., 67-68 quoting Letter from Gerald P. McBride, Chairman, PSA Municipal Securities Division, dated January 8, 1993.

Testimony of the Market Participants. On October 7, Congressman Markey's Subcommittee[37] held a second oversight hearing, this time with a panel of representatives of municipal market participants.[38] In his opening statement, Chairman Markey noted that in the prior hearing with the regulators:

> We were told that the municipal market was fundamentally strong, and sound. At the same time, the Subcommittee also heard testimony suggesting that storm clouds were gathering on the horizon which, if not corrected, could cast a dark shadow over the integrity and efficiency of this important market. . . . The purpose of today's hearing is to hear how representatives of key participants in the municipal market respond to the various options for reform. As I indicated at our last hearing, there is a very strong probability that the Subcommittee will be legislating in this area. We therefore are seeking – through the oversight process – to determine in which areas regulatory reforms would be sufficient, and in which areas carefully targeted and properly focused remedial legislation will be necessary.[39]

The general theme of testimony favored encouraging voluntary information. Testimony by the Government Finance Officers Association (GFOA) asserted "There is 'no disarray' in the market. In fact that there have been marked improvements in disclosure over the last several years. . . . GFOA believes that any improvements in disclosure practices can and should be accomplished on a cooperative basis and we remain committed to continuing to cooperate with all public and private entities toward that end. At the same time, our primary concern remains the need for strong suitability rules that are effectively enforced."[40] PSA was more pessimistic and testified that "secondary market information

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[37] Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, U.S. House of Representatives.

[38] The six witnesses were: Ms. Katherine R. Bateman, Assistant Vice-President,, John Nuveen & Co., Inc. and Chairperson, National Federation of Municipal Finance Analysts; Mr. Harvey C. Eckert, Deputy Secretary for Comptroller Operations, Office of the Budget, Commonwealth of Pennsylvania, and Chairman Blue Ribbon Committee on Secondary Market Disclosure, National Association of State Auditors, Comptrollers, and Treasurers; Mr. Jeffrey S. Green, General Counsel, Port Authority of New York and New Jersey, testifying on behalf of the Government Finance Officers Association; Mr. Andrew R. Kintzinger, a co-author of this article, then Partner, Briggs & Morgan and President-Elect, National Association of Bond Lawyers; Mr. C. Richard Lehmann, President, Bond Investors Association; and Mr. Gerald P. McBride, Executive Vice President, Prudential Securities, Inc.. and Chairman, Municipal Securities Division, Public Securities Association.

[39] Opening Statement of Chairman Edward J. Markey Oversight Hearing On The Municipal Securities Market, October 7, 1993. Personal file copy, Paul S. Maco.

[40] Statement of Jeffrey S. Green. Personal file copy, Paul S. Maco.

is difficult to come by even for professional municipal credit analysts, to say nothing of retail investors."[41]

Market Participants and SEC Outreach

While Congressional hearings were underway, the SEC Staff was, according to MSRB Executive Director Christopher Taylor, "beginning the process of developing a list of items for disclosure."[42] By mid-October, Congress had signaled an intention to pursue legislation. The *Staff Report* had requested it in three different areas.[43]

In the fall of 1993 Chairman Levitt invited market participants to recommend a "market sponsored solution to the disclosure issues in the municipal market." They did. On December 20, 1993, the so-called "Gang of 12" (municipal market groups and associations) submitted to the Commission a Joint Statement on Improvements in Municipal Securities Market Disclosure (Joint Statement).[44] As the Interpretive Release would later describe,

> The Joint Statement sets forth 'a framework for improving the availability of information in the marketplace' that calls for both continued market initiatives to improve issuer disclosure and 'support from the SEC and the Municipal Securities Rulemaking Board (MSRB).' Among other things, its participants recommend the adoption of a rule or interpretive guidance restricting underwriting of municipal issues unless continuing information covenants are provided by the issuer.[45]

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[41] Statement of Gerald McBride, Chairman, Municipal Securities Division, Public Securities Association, Before the House Committee on Energy and Commerce, Telecommunications and Finance Subcommittee, October 7, 1993, quoted in the Interpretive Release, 59 F.R. 12750.

[42] Vicky Stamas, SEC Developing New Standard For Disclosure, Regulator Says. *The Bond Buyer*, Sept. 23, 1993.

[43] *See supra,* nn. 22 and 23 and intervening text.

[44] Interpretive Release, 59 F.R. 12750. The Joint Statement was submitted by the American Bankers Association's Corporate Trust Committee, American Public Power Association, Association of Local Housing Finance Agencies, Council of Infrastructure Financing Authorities, Government Finance Officers Association, our own National Association of Bond Lawyers, National Association of Counties, National Association of State Auditors, Comptrollers and Treasurers, National Association of State Treasurers, National Council of State Housing Agencies, National Federation of Municipal Analysts, and Public Securities Association.

[45] Id., n. 27, citing the Joint Statement at 1.

The *Joint Statement* would serve as a template for ensuing Commission regulatory actions.[46]

The March 1994 Interpretive Release and Proposing Release

The March 9, 1994, Commission Meeting

In an open meeting on March 9, 1994, the Commission considered and then approved for comment two proposed rulemakings, Municipal Securities Disclosure (the "1994 Proposing Release")[47] and a Riskless Principal Disclosure Proposal,[48] together with the Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others (the "Interpretive Release").[49] The Interpretive Release and the 1994 Proposing Release are described below, as is the 1994 Adopting Release, approved on November 10, 1994.[50] At that meeting, the Commission agreed to defer consideration of the Riskless Principal Disclosure Proposal.[51] The issue was never formally revisited.

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[46] At the beginning of the March 9, 1994, Commission open meeting, Chairman Levitt stated: "That is why I am so pleased that in December, in response to our call for a market-sponsored disclosure solution, a group of 12 organizations, representing municipal securities issuers and underwriters, bond lawyers and analysts, presented the SEC with a Joint Statement that calls for voluntary and regulatory action to improve disclosure in the secondary market for municipal securities. The Joint Statement serves as a template for many of the recommendations we are considering today. We will continue to work closely with the market to develop effective and practical mechanisms to improve disclosure." Opening Statement for Chairman Levitt, March 9, 1994, available at: https://www.sechistorical.org/collection/papers/1990/1994_0309_LevittMarketT.pdf

[47] Release No. 34-33742, Municipal Securities Disclosure, 59 F.R. 12759 (March 17, 1974).

[48] Release No. 34-33743, Confirmation of Transactions, 59 F.R. 12767 (March 17, 1974).

[49] Release No. 33-7049, 34-33741, Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, 59 F.R.12748 (March 17, 1974).

[50] Release No. 34-34961, 59 FR 59590 (November 17, 1994) ("1994 Adopting Release")

[51] See, Leslie Wayne, *S.E.C. Issues Municipal Bond Rules*, New York Times, Nov. 11, 1994, available at: https://www.nytimes.com/1994/11/11/business/sec-issues-municipal-bond-rules.html. As the article explained: The S.E.C. said it would defer to the Municipal Securities Rulemaking Board to develop a better system to disseminate bond prices. The board and the industry trade association are working on a four-part project to make prices more available. The first phase would provide more price information for municipal bonds sold among dealers; eventually bond prices would be listed in newspapers. The S.E.C. said it would review this effort in six months. Following an industry outcry, the S.E.C. also backed away from a proposal to require disclosure of profits on certain bond trades among dealers. As part of the

The proposed amendments to Rule 15c2-12, like the original Rule, were concerned with the supply and dissemination of information and not determinative of fraud. Unlike the amendments, the Interpretive Release was simply that, an "interpretation" of antifraud law.[52] The Commission did not invite public comment on its interpretation of the law or its application to municipal securities.[53]

The Interpretive Release

The heart of the Interpretive Release appears under two headings--"Primary Offering Disclosure"[54] and "Disclosure in the Secondary Market for Municipal Securities."[55] A third heading, "Interpretive Guidance With Respect to Obligations of Municipal Securities Dealers," fills a gap in the prior guidance for dealers--market participants the SEC regulates directly. In the 1994 Proposing and Adopting Releases for Rule 15c2-12, the Commission addressed the obligations of underwriters under the antifraud provisions as interpreted by the Commission. In the Interpretation, it affirms that interpretation and then proceeds "to emphasize the responsibilities of brokers and dealers in trading municipal securities in the secondary market":

> The Commission historically has taken the position that a broker-dealer recommending securities to investors implies by its recommendation that it has an adequate basis for the recommendation.[cit.om.] A dealer, unlike an underwriter, ordinarily is not obligated to contact the issuer to verify information. A dealer must, however, have a reasonable basis for its recommendation. [56]

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actions yesterday, the Public Securities Association said it would join with the rule-making board in a pilot project to provide a generic municipal bond yield curve for investors and a "900"-number telephone line on bond prices, and that it would lobby newspapers to carry more municipal bond prices.

[52] *See* The Bond Lawyer, Vol. 48, No.4, at 40, citing Fippinger and Pittman, *Disclosure Obligations of Underwriters of Municipal Securities*, 127, 130, n.18 and 156, 41 Bus. Lawyer, No. 1 (Nov. 1991).

[53] At the end of the Interpretation, under heading VI. Request for Comments, the Interpretation adds: "The Commission intends to continue to monitor developments in municipal securities disclosure practices. Comment is requested regarding the disclosure items discussed in this release, and in particular, items warranting event disclosure. Comment also is requested regarding additional action that should be taken with respect to disclosure in the municipal securities market by the Commission, the MSRB, or Congress."

[54] 59 F.R. 12750.

[55] Id., 12755.

[56] Id., 12757-12758.

This concern would be addressed in the "Companion Release" through amendments of Rule 15c2-12.

Primary Offering Disclosure. At the outset its discussion of primary offering disclosure, the Commission reminds readers that disclosure documents used by municipal issuers are subject to the antifraud provisions, citing *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976). Voluntary disclosure guidelines prepared by GFOA and the National Federation of Municipal Advisors (NFMA) are noted as providing "a generally comprehensive roadmap for disclosure in offering statements for municipal securities offerings."[57]

Areas Where Improvement is Needed. There are areas that need further improvement, the Commission said, and "small issuers and conduit issuers, particularly in the health care, housing and industrial development areas, do not always provide the same quality of disclosure."[58] The Commission noted six areas, described below, in which it believed improvements were needed to comply with the antifraud provisions.

Conflicts of Interest. The Commission noted:

> Beyond existing specific disclosure requirements and guidelines, the range of financial and business relationships, arrangements and practices that need to be disclosed depends on the particular facts and circumstances of each case. If, for example, the issuer (or any person acting on its behalf) selects an underwriter, syndicate or selling group member, expert, counsel or other party who has a direct or indirect (for example, through a consultant) financial or business relationship or arrangement with persons connected with the offering process, that relationship or arrangement may be material. [cit.om.] Areas of particular concern are undisclosed payments to obtain underwriting assignments and undisclosed agreements or arrangements, including fee splitting, between financial advisers and underwriters. [cit. om.] If the adviser is hired to assist the issuer, such relationships, financial or otherwise, may divide loyalties. Similarly, affiliations between sellers of property to be used in a financed project and conduit borrowers raise questions regarding, among other things, the determination of fair market value of the property and self-dealing.[59]

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[57] Id. 12750.

[58] Id. 12751, citing the NASACT Blue Ribbon Committee Report, the Staff Report, and the October 7, 1993, House Subcommittee testimony.

[59] Id.

In support, the Interpretive Release cites testimony at and reports of the fall 1993 Congressional hearings as well as ongoing press reports of investigations into municipal market practices.[60]

Terms and Risks of Securities. The Commission observes:

> Evolution in the financial markets has led to increasingly complex and sophisticated derivative and other municipal products. While these new products offer investors a wide range of investment alternatives, in choosing among the alternatives, investors need a clear understanding of the terms and the particular risks arising from the nature of the products.[61]

Financial Information. The Interpretive Release identifies four aspects of issuer financial statements as needing improvement.

Under "*Financial Accounting,*" the Interpretive Release states "The key to the reliability and relevancy of the information contained in the financial statements of a municipal issuer is the use of a comprehensive body of accounting principles consistently applied by the issuer." It then notes that "practice in the municipal market is evolving rapidly to reliance on generally accepted accounting principles ("GAAP") as determined by the Government Accounting Standards Board ("GASB")," and cautions: "to avoid misunderstanding, investors need to be informed of the basis for financial statement presentation. Accordingly, when a municipal issuer neither uses GAAP nor provides a quantified explanation of material deviations from GAAP, investors need a full explanation of the accounting principles followed."[62]

Under "*Audits*," it observes "Investors in the public securities markets have a reasonable expectation that annual financial statements contained in offering

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[60] Id. See, e.g., notes 39 and 40, citing Bond Buyer articles, Gasparino, "The Trouble with Consultants'', The Bond Buyer (Nov. 16,1993) and Gasparino, "Several Issuers Start to Scrutinize Ties Between Advisers, Bankers," The Bond Buyer (Dec. 27,1993), as well as testimony before the Subcommittee on Telecommunications and Finance of Andrew Kintzinger, a co-author of this article, on behalf of the National Association of Bond Lawyers, who stated: "(M)embers of the municipal finance bar should work with issuers to develop procurement procedures for state and local governments to ensure that all material financial arrangements between underwriters within the syndicate and between underwriters and financial advisors and possible conflicts of interest between issuers and members of the underwriting syndicate or other participants be accurately documented and disclosed or, if appropriate, prohibited." NABL Testimony at 28. See Joint Statement at 2.

[61] Again in n. 41., citing NABL Testimony at 22.

[62] 59 F.R. 12752.

documents or periodic reports are subject to audit,"[63] and states "A prudent investor needs to be able to evaluate the extent to which he or she can rely on the second look an auditor provides. Accordingly, the offering statement should state whether the financial statements it contains were audited in accordance with generally accepted auditing standards ("GAAS"), as established by the American Institute of Certified Public Accountants."

Under "*Other Financial and Operating Information*," the Interpretive Release identifies "a number of areas in which greater care needs to be taken to provide investors with adequate information" such as: providing information on participating obligors in pooled financing structures, in addition to financial information about the issuing authority or the program in aggregate, depending upon diversification and risk concentration factors; operational information relating to the private enterprise providing the cash flow to service the debt in a conduit bond issue; and disclosure issues arising from activities of the municipal issuer as end users of derivatives.[64] In addition to operating data, a narrative may be necessary to understand the information provided in a numerical presentation. The future impact of currently known facts may also mandate disclosure, such as "in a hospital financing, a steadily declining population in the surrounding community that, in the future, would not support the size of facility to be built would be important to investors."[65]

Regarding "*Timeliness of Financial Statements*," the Interpretive Release observes that "the timeliness of financial information is a major factor in its usefulness. To avoid providing investors with a stale, and therefore potentially misleading, picture of financial condition and results of operations, issuers and obligors need to release their annual financial statements as soon as practical."[66]

Availability of Continuing Information. The Interpretation states that official statements should state clearly whether ongoing disclosure concerning the issuer or obligor will be provided, including the type, timing, and method of providing such information.[67]

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[63] Citing the GFOA publication by Stephen J. Gauthier, *An Elected Official's Guide to Auditing* (1992).

[64] 59 F.R. 12753.

[65] Id.

[66] Id.

[67] Id.

Clarity and Conciseness. Citing both GFOA Congressional testimony and institutional investors, the Interpretive Release states: "Like other disclosure documents, official statements need to be clear and concise to avoid misleading investors through confusion and obfuscation. The expanded level of disclosure in official statements and increased sophistication of municipal securities instruments have, in many cases, resulted in longer and more complex disclosure documents, with the corresponding danger of overly detailed, legalistic, and possibly obtuse disclosure." As the Second Circuit observed, appropriate disclosure "is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead" investors.[68]

Delivery of Official Statements. The Interpretive Release points out that "[S]ince the adoption of Rule 15c2-12, however, there have been continued problems with the timeliness of receipt by underwriters of the "near final" official statement required by the Rule." The answer to this dilemma is the issuer has an obligation "to prepare the official statement at an earlier stage . . . because it is the issuer's obligation to ensure that there is timely dissemination of disclosure documents in connection with the offer and sale of the issuer's securities."[69]

Conduit Financings. The Interpretive Release notes that the Commission has consistently supported legislative proposals to repeal the registration exemptions of conduit borrowers in non-governmental industrial development (private activity) financings and states, "the Commission today renews that legislative recommendation."[70]

Disclosure in the Secondary Market For Municipal Securities. As it did for primary offering disclosure, the Interpretation applies the antifraud provisions to secondary market disclosure practices.

Application of the Antifraud Provisions. According to the Interpretation, municipal market participants "do not dispute the need for ongoing disclosure following an offering of securities," but issuers "reportedly resist developing a routine of ongoing disclosure . . . because of concerns about the costs of generating and disseminating that information and about potential liability" and "are at times advised by their professional advisors that there is no duty under the federal securities laws to make disclosure following the completion of the distribution" and "some municipal issuers thus appear

[68] Id. 12754, n. 66, citing *McMahan & Company, et. al. v. Wherehouse Entertainment, Inc.*, 900 F.2d 576, 579 (2d Cir.1990).

[69] Id., n. 76, See 1994 Adopting Release, 54 FR at 28811 n. 84 (official statement is issuer's document).

[70] Id. 12755.

to believe that silence shields them from liability for what may later be found to be false or misleading information."[71] To this view, the Commission responded: "As a practical matter, however, municipal issuers do not have the option of remaining silent." Municipal issuers routinely release a wide range of information to the public formally and informally in their day-to-day operations on which the market relies. It does not stop at the closing. A variety of information about issuers of municipal securities is collected by state and local governmental bodies and routinely made publicly available. "Municipal officials also make frequent public statements and issue press releases concerning the entity's fiscal affairs." After this litany of publicly available information, the Commission states:[72]

> A municipal issuer may not be subject to the mandated continuous reporting requirements of the Exchange Act, but when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions.[87] The fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate antifraud proscriptions.[88] Those statements are a principal source of significant, current information about the issuer of the security, and thus reasonably can be expected to reach investors and the trading market. As the U.S. Court of Appeals for the Second Circuit has said: "The securities markets are highly sensitive to press releases and to information contained in all sorts of publicly released . . . documents, and the investor is foolish who would ignore such releases."[89] . . .
>
> The current process by which municipal issuers and their officials release information to market participants does not address the risk of misleading investors, because there is no mechanism for disseminating information about the municipal issuer to the market as a whole. To the contrary, in the municipal market, information released publicly frequently is disseminated only to a narrow segment of the marketplace. . . .
>
> Since access by market participants to current and reliable information is uneven and inefficient, municipal issuers presently face a risk of misleading investors through public statements that may not be intended to be the basis of investment decisions, but nevertheless may reasonably be expected to reach the securities markets. As market participants have urged, in order to minimize the risk of misleading investors, municipal issuers should establish practices and procedures

[71] Id., *cit. om.*

[72] Id. 12756.

to identify and timely disclose, in a manner designed to inform the trading market, material information reflecting on the creditworthiness of the issuer and obligor and the terms of the security.[93]

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[87] See Public Statements by Corporate Representatives, Securities Act Release No. 6504 (Jan. 20,1984) 49 FR 2468, 2469; In re Ames Dept. Stores Inc. Stock Litigation, 991 F.2d 953, 965-67 (2d Cir. 1993) (with respect to corporate information).

[88] See Fippinger, THE SECURITIES LAW OF PUBLIC FINANCE (2d ed. 1993) at 291 ("(P)ress releases, conversations with analysts, information meetings, official comments on budget negotiations, and even angry reactions by public officials to rating agency downgrades" are subject to antifraud provisions).

[89] Ames, 991 F.2d at 963 (corporate information).

[92] See GFOA Guidelines at 91-97; Joint Statement.

[93] National Association of Bond Lawyers and Section of Urban, State and Local Government Law, American Bar Association, DISCLOSURE ROLES OF COUNSEL IN STATE AND LOCAL GOVERNMENT SECURITIES OFFERINGS at 135 (forthcoming 1994) (Pre publication Draft) ("ABA Disclosure Roles") (noting that many municipal issuers have concluded that post-issuance disclosure in accordance with GFOA guidelines can be more efficient and expose them to less potential liability than ad hoc disclosures).

Secondary Market Disclosure. The Interpretation next addressed the type of information that the Commission implies should be disseminated by issuers to prevent other publicly available information from misleading investors. As the Interpretation states "There is general recognition of the need for disseminating comprehensive information on an annual basis and, on a more timely basis, information about material events that reflect on the credit quality of the security."[73]

Annual Information. The Interpretive Release states "Investors need updated comprehensive information sufficient to enable them to evaluate the financial condition,

[73] 59 F.R. 12755., n. 94. Citing GFOA Testimony; Mires, "An Investor's Framework for Examining Disclosure Issues and Possible Solutions," *The Bond Buyer* (Feb. 7,1994) at 24; NASACT Blue Ribbon Committee Report at 7. See also PSA Testimony at 6, supporting annual financial statement filing requirements and submission of information regarding any material fact for issuers who borrow $1 million or more annually.

results of operations and cash flows of the issuer or underlying borrower."[74] It then draws heavily upon the GFOA Guidelines to describe what this may look like.[75]

> Regardless of the form of document relied upon to provide the marketplace with information concerning the financial condition of the issuer or obligor, to minimize risk of misleading investors, issuers or obligors should provide, as discussed above with respect to primary offerings:
>
> - Financial statements that are audited in accordance with GAAS for disclosure of the absence of such an audit) and that are either prepared in accordance with GAAP, or accompanied by a quantified explanation of material deviations from GAAP or a full explanation of the accounting principles used;
>
> - Other pertinent financial and operating information (depending on the type of issuer and security sold), as well as the sources for repayment—of course, a variety of information may be appropriate for an issuer with a range of outstanding securities with differing characteristics, from general obligation to revenue and conduit bonds; and
>
> - A narrative discussion that analyzes the issuer's or obligor's financial condition, and results of operations, as well as facts likely to have a material impact on the issuer or obligor.
>
> Clarity and conciseness are equally relevant concerns with respect to ongoing disclosures, as with official statements.

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[74] 59 F.R. 12753.

[75] The GFOA Guidelines for Continuing Disclosure call for, either in an official statement or comprehensive annual report, a description of:

- The issuer and its structure, management, assets and operations;
- The issuer's debt structure (including changes in indebtedness);
- The issuer's finances (including financial condition and results of operations and financial practices of the issuer or the enterprise);
- Legal matters affecting the issuer; including litigation and legislation;
- Ratings; and
- Interests of certain persons.

The GFOA Guidelines also specify additional information to be provided by conduit borrowers. The eligibility criteria for a Certificate of Achievement from GFOA include audited financial statements prepared in accordance with GAAP, reported upon by an independent public auditor. The guidelines for CAFRs include both a financial section and a statistical section, citing, in n. 96, the GFOA Certificate of Achievement for Excellence in Financial Reporting Program. GFOA Guidelines at 64.

> As discussed above with respect to offering statements, as a general matter, the annual financial information may reasonably be expected to be made available within six months of the issuer's fiscal year end.[76]

The Interpretive Release points out that "for some conduit entities, annual information may not be sufficient and investors may need more frequent periodic financial information," and notes that credit- appropriate periodic continuing disclosure guidelines have been developed by specific issuer type groups, such as the State Housing Guidelines by the National Council of State Housing Agencies.[77]

Event Disclosure. The Interpretation states "There is a general consensus among participants in the municipal securities market that investors need information about the following events, among others, where material:

a. Principal and interest payment delinquencies

b. Nonpayment-related defaults

c. Unscheduled draws on reserves

d. Unscheduled draws on credit enhancements

e. Substitution of credit or liquidity providers, or their failure to perform

f. Adverse tax opinions or events affecting the tax-exempt status of the security

g. Modifications to rights of security holders

h. Bond calls

i. Defeasances

j. Matters affecting collateral

k. Rating changes"[78]

Dissemination. The Interpretive Release noted "To be effective in minimizing the issuer's risk under the antifraud provisions, the annual financial information and event disclosure should be disseminated in a manner reasonably designed to inform the holders of the issuer's securities and the market for those securities."[79] The Interpretive Release also observed that municipal market then lacked an effective mechanism for

[76] 59 F.R. 12757.

[77] Id.

[78] Id.

[79] Id.

disseminating material information to investors and the marketplace. That would soon be fixed by the continuing disclosure amendments and development of a central post office, as described below.

Interpretive Guidance With Respect to Obligations of Municipal Securities Dealers. In the 1994 Proposing and Adopting Releases for Rule 15c2-12 as initially adopted, the Commission had set forth its interpretation of the obligation of municipal underwriters under the antifraud provisions of the federal securities laws, but did not address the obligations of dealers when not acting as underwriters. The Commission did so by proposing amendments to Rule 15c2-12 as described below.

The 1994 Proposing Release

The "Gang of 12's" *Joint Statement* called for, among other things, "adoption of a rule or interpretive guidance restricting underwriting of municipal issues unless continuing information covenants are provided by the issuer."[80] At the end of its discussion of secondary market disclosure, the Interpretive Release states:

> In the Companion Release, the Commission is proposing an amendment to Rule 15c2-12 to prohibit, as suggested by the Joint Statement, underwriting of a municipal securities issue unless the issuer of the municipal security has covenanted to provide annual and ongoing disclosure to a repository.[81]

The referenced "Companion Release" is *Municipal Securities Disclosure,*[82] the 1994 Proposing Release for amendments to Rule 15c2-12. The amendments, as summarized by the Commission, "would make it unlawful for a broker, dealer, or municipal securities dealer to act as an underwriter of an issue of municipal securities unless the broker, dealer, or municipal securities dealer has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of the holders of such municipal securities to provide certain information to a nationally recognized municipal securities information repository; or to recommend the purchase or sale of a municipal security, without having reviewed the information the issuer of the municipal security has undertaken to provide[83].

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[80] 59 F.R. .12750.

[81] 59 F.R. 12757.

[82] 59 F.R. 12759; see n. 17 *supra*.

[83] Id.

As the 1994 Proposing Release explained, "The purpose of the proposed amendments is to further deter fraud and manipulation in the municipal securities market by prohibiting the underwriting and subsequent recommendation of securities for which adequate information is not available."[84]

As in the initial adoption of Rule 15c2-12 in 1989, the legal authority cited for the proposed amendments is Section 15(c)(2) of the Securities Exchange Act of 1934 (Exchange Act).

Proposed Amendments to Rule 15c2-12. The 1994 Proposing Release proposed amendments to prohibit underwriting municipal securities offerings without a continuing disclosure undertaking as well as recommending a municipal security transaction without having reviewed the continuing disclosure provided pursuant to the undertaking. It also added definitions related to the amendments and provided exemptions from the new underwriting requirement.

Underwriting Requirement. The engine used for requiring continuing disclosure in the municipal market was the same as for requiring official statements – using the SEC's authority over brokers, dealers, and municipal securities dealers, which it proposed to employ by adding paragraph (b)(5) to Rule 15c2-12. Unlike the initial Rule's requirement for participating underwriters to *contract* with an issuer of municipal securities under paragraph (b)(3), the language in proposed paragraph (b)(5) would require an underwriter, before purchasing or selling municipal securities in a non-exempt primary offering, to reasonably determine "that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of holders of such municipal securities to provide certain information" to a nationally recognized municipal securities information repository (NRMSIR). "In using the terms 'purchase' or 'sale,' the proposed amendment contemplates that, at such time as the issuer of municipal securities delivers the securities to the Participating Underwriters, the issuer will have undertaken, in a written contract or agreement for the benefit of holders of the municipal securities, to provide information to a NRMSIR."[85] As the Commission explained, to

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[84] Id.

[85] 59 F.R. 12760. Proposed paragraph (b)(5) provided:

(5)(i) A Participating Underwriter shall not purchase or sell municipal securities in connection with an Offering unless the Participating Underwriter has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of holders of such securities, to provide to a nationally recognized municipal securities information repository:

"reasonably determine," the "Participating Underwriter would need to receive assurances from the issuer that such undertakings would be made before agreeing to act as an underwriter.[86] Rather than requiring a direct contract with an issuer, the "reasonably determine" language would allow the issuer's continuing disclosure undertaking to be in an indenture, resolution, or other agreement that is for the benefit of the holders of the bonds to be offered.

Under the proposed amendment, the written contract would require provision to a NRMSIR of both annual information and event disclosure.

Annual Information. The information proposed to be provided to NRMSIRs annually was "current financial information concerning the issuer of the municipal security and any significant obligors, including annual audited financial statements and pertinent operating information".[87] It could be provided "through any disclosure document, whatever its form or principal purpose, that includes annual audited financial

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(A) At least annually, current financial information concerning the issuer of the municipal securities and any significant obligors, including annual audited financial statements and pertinent operating information; and

(B) In a timely manner, notice of any of the following events, if material:

(1) Principal and interest payment delinquencies;
(2) Non-payment related defaults;
(3) Unscheduled draws on debt service reserves reflecting financial difficulties;
(4) Unscheduled draws on credit enhancements reflecting financial difficulties;
(5) Substitution of credit or liquidity providers, or their failure to perform;
(6) Adverse tax opinions or events affecting the tax-exempt status of the security;
(7) Modifications to rights of security holders;
(8) Bond calls;
(9) Defeasances;
(10) Matters affecting collateral; and
(11) Rating changes.

(ii) Such written agreement or contract for the benefit of holders of such securities shall also specify:

(A) The accounting principles pursuant to which the audited financial statements will be prepared;
(B) The financial and pertinent operating information to be provided on an annual basis, in addition to audited
financial statements; and
(C) The time within which the annual information for the preceding year will be provided to the repository.

Text of Proposed Amendments to Rule 15c2-12, 59 F.R. 12766 (March 17, 1994).

[86] 59 F.R. 12760, n. 16.

[87] 59. F.R. 12761.

statements and pertinent operating information."[88] So, for example, "sequential final official statements prepared by frequent issuers of municipal securities may meet the standards of the rule."[89] "Similarly, the audited financial statements should fairly present the current financial condition, the results of operations, and cash flows of the municipal issuer and any significant obligor."[90] Other than audited financial statements, "the proposed amendment does not specify the content, rather that is left to the offering participants to negotiate."[91]

Material Events. As for event disclosures, proposed paragraph (b)(5)(i)(B) would require an undertaking to provide, in a timely manner, notice of any of the 11 events described in Section IV of the Interpretive Release, where material.[92]

Recommendations Without Specified Information. A second proposed amendment would apply to secondary market transactions in municipal securities issued on or after the effective date of the proposed continuing disclosure amendment described in the preceding paragraph. New paragraph (c), as proposed, would prohibit any broker, dealer, or municipal securities dealer from recommending the purchase or sale of a municipal security unless it has reviewed the information provided pursuant to the issuer's continuing disclosure undertaking [93] Whether such information would be obtained from a NRMSIR or other source was left to the market.[94]

Definitions. To implement the new continuing disclosure requirement under the proposed rule, the Commission proposed to revise the then existing definition of "final official statement" and to add a definition of "significant obligor."

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[88] Id.

[89] Id.

[90] Id.

[91] Id.

[92] 59 F.R. 12756-12757, under B. *Secondary Market Disclosure*, 2, Event Disclosure. In the Interpretive Release, the Commission stated that there was a general consensus among market participants that investors should be informed of the listed event, if material, citing publications of the Corporate Trust Committee of the American Bankers Association and an addendum to the Joint Statement. Id.

[93] (c) *Recommendations without specified information*. As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for any broker, dealer, or municipal securities dealer to recommend the purchase or sale of a municipal security unless such broker, dealer, or municipal securities dealer has reviewed the information the issuer of the municipal security has undertaken to provide pursuant to paragraph (b)(5) of this section. 59 F.R. 12766.

[94] See text under the heading "*B. Recommendations Without Specified Information*" at 59 F.R. 12762.

Final Official Statement. The then-existing definition of "final official statement" did not prescribe information required to be included in the document or documents constituting the "final official statement." So, the Commission proposed to amend the definition to include "an information requirement" which "also governs the items of information to be included in the near final official statement, subject to availability considerations."[95]

Revised as proposed, the term "final official statement" would mean "a document or set of documents prepared by the issuer of municipal securities or its representatives setting forth, among other matters, information concerning the terms of the proposed issue of securities, and financial and operating information adequate to provide a fair presentation of the issuer's and any significant obligor's current financial condition and results of operations, and cash flows, including audited financial statements, that is complete as of the date delivered to the Participating Underwriter."[96]

Significant Obligors. As proposed, the amended Rule would define "significant obligor" as "any person who, directly or indirectly, is the source of 20 percent or more of the cash flow servicing the obligations on the municipal securities."[97] The 1994 Proposing Release implied that, to be a "source" of cash flow, a person must be an "obligor," which the Commission described as "any person who, directly or indirectly, under a lease, loan, sale, or other agreement or arrangement, is obligated to make payments to the issuer, which cash payments are the source of the cash flow servicing the obligations on municipal securities. The term 'obligor' is not limited to issuers of separate securities under Rule 3b-5 under the Exchange Act and Rule 131 under the Securities Act." In a footnote, the 1994 Proposing Release adds: "An obligor is not only an industrial or commercial enterprise, but may include governmental and nonprofit entities as well. See the definition of issuer in Rule 15c2-12(e)(4), 17 CFR240.15c2-12(e)(4); Rule 3 b - 5 .17 CFR 240.3b-5, and Rule 131,17 CFR 230.131. under the Securities Act."[98]

Exemptions. An exemption was proposed to exclude small, infrequent issuers from the proposed new continuing disclosure obligations of proposed paragraph (b)(5) in addition to the Rule's then existing inapplicability to offerings of less than $1,000,000.

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[95] 59 F.R. 12762, n.21, referencing the August 24, 1992, interpretation *Public Securities Association*, regarding the information to be contained in near final official statements obtained and reviewed by underwriters pursuant to Rule 15c2-12.

[96] Text of Proposed Amendments to Rule 15c2-12, 12766.

[97] Id.

[98] 59 F.R. 12763, n.23.

As proposed, offerings would be exempt from the operation of paragraph (b)(5) if, at such time as the issuer of municipal securities delivers the securities to the underwriter, the issuer (a) would have less than $10,000,000 in aggregate amount of municipal securities outstanding, including the offered securities, and (b) the issuer would have issued less than $3,000,000 in aggregate amount of municipal securities in the most recent 48 months preceding the offering.[99]

An additional exemption was proposed to exempt from the proposed new restriction on recommending municipal securities transactions municipal securities not offered in an offering to which the proposed new continuing disclosure requirement applied. This would exempt transactions in bonds issued before enactment of (b)(5), sold in an offering less than $1,000,000, or sold in an offering under then existing exemptions from the Rule for limited placements, short-term securities, and securities with demand features as well as securities of small, infrequent issuers proposed to be exempt. [100]

Nationally Recognized Municipal Securities Information Repositories. The 1994 Proposing Release noted that, while the term "nationally recognized municipal securities information repository" was used both in the then existing Rule and the proposed amendments, it was not defined, nor was it proposed to be defined by the 1994 Proposing Release. The Commission requested comment on whether the term should be defined to establish standards for NRMSIRs. For the strange and relatively short life of NRMSIRs, see "Central Repository" below.

Application of The Tower Amendment. At the end of the 1994 Proposing Release, the Commission addressed whether its proposals ran afoul of the Tower Amendment:[101]

> While narrowly tailoring the authority of the MSRB to require that disclosure documents be provided to investors, Congress was careful to preserve the authority of the Commission under Section 15(c)(2) of the Exchange Act. ... Moreover, Section 15B(d)(2) expressly indicates that "(n]othing in this paragraph

[99] Id.

[100] 59 F.R. 12764.

[101] 54 F.R. 12765, n. 36, states: The so-called "Tower Amendment," adding section 15B(dX2), 15 U.S.C. 78o-4(d)(2) to the Exchange Act, prohibits the MSRB from requiring municipal issuers, directly or indirectly, through municipal securities broker-dealers or otherwise, to furnish the MSRB or prospective investors with any documents, including official statements. The MSRB specifically is permitted, however, to require that official statements or other documents that are available from sources other than the issuer, such as the underwriter, be provided to investors.

> shall be construed to impair or limit the power of the Commission under any provision of this title." Thus, while prohibiting the Commission from requiring municipal issuers to file reports or documents prior to issuing securities in Section 15B(d)(l), Congress expanded the Commission's authority to adopt rules reasonably designed to prevent fraud. The Commission believes that the proposed amendments to Rule 15c2-12 are consistent with its Congressional mandate to adopt rules reasonably designed to prevent fraud in the municipal securities market.[102]

The 1994 Adopting Release

When the 1994 Proposing Release was published in the Federal Register on March 17, 1994, it announced a July 15, 1994, deadline for comments to the proposed amendments. The 120-day comment period led to an industry-wide effort to evaluate the proposed continuing disclosure provisions. Indeed, when the 1994 Adopting Release was posted on November 10, 1994, Commission Staff noted the Commission had received over 390 comment letters representing over 475 groups and individuals. More specifically, Commission Staff noted the Commission received 232 letters representing the views of 242 issuers and issuer associations; 52 letters representing the views of 57 brokers, dealers, and municipal securities dealers; and 8 letters representing the views of 8 investors and investor associations.[103]A general theme of the comments was to support continuing disclosure requirements but to urge flexibility, "given the diversity that exists in the municipal securities market."[104]

In the 1994 Adopting Release, the Commission made certain modifications to the proposed amendments to address concerns expressed in comments. As noted above, the proposed amendments followed consensus recommendations of a "Gang of 12" industry organizations. After publication of the 1994 Proposing Release, members of the group met with SEC Staff (including Caite McGuire, Elisse Walter, subsequently a chair of the Commission, and Paul Maco, one of the authors of this article) and 10 members of the "gang" (excluding NABL this time) submitted a joint written response to the amendments, urging, among other modifications, that required continuing

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[102] 54 F.R. 12765, *cit. om.*

[103] Release No. 34-34961, 59 FR 59590, 59591 (November 17, 1994). Commission Staff particularly noted that it considered comment letters from the ABA Business Law Section, Hawkins Delafield & Wood, and NABL "who questioned the Commission's authority to adopt the amendments to Rule 15c2-12." Its brief response was "The Commission believes it has ample authority to adopt the amendments.")

[104] Id. 59591 at n. 18, citing, among others, NABL's comment letter.

disclosure not exceed the "footprint" of the offering document and that required event disclosures be limited to those with respect to the securities being offered. The Commission acknowledged that their comments were "valuable" to it in considering the proposed amendments and followed their recommendations, as summarized in the first sentence in the 1994 Adopting Release describing the scope of required undertakings:

> Under the amendments as adopted, the financial information and operational data to be provided on an annual basis pursuant to the undertaking will mirror the financial information and operating data contained in the final official statement with respect to both the issuers and obligated persons that will be the subject of the ongoing disclosure, and the type of information provided[105]

As noted above, the proposed amendments would have prohibited a broker-dealer from recommending a purchase or sale of a municipal security unless it had reviewed annual and event information that the issuer had agreed to provide pursuant to its continuing disclosure undertaking. The broker dealer community had pressed that such an approach would adversely affect secondary market liquidity and would be problematic from a compliance perspective.[106] In the 1994 Adopting Release, the SEC took a more flexible approach, requiring that broker-dealers merely institute procedures to reasonably assure that they will receive prompt notice of event disclosures and failures to provide annual financial information in accordance with an undertaking.[107] The Commission reasoned the additional information made available by issuers would be taken into account regarding that security, under the combination of the MSRB's fair dealing and suitability rules, and the antifraud rules.[108]

Also as noted above, the proposed amendments would have required an undertaking to provide "current financial information concerning the issuer . . . and any significant obligors, including audited financial statements and pertinent operating information;" it would have permitted issuers to specify the financial and operating information to be provided; and it would have defined "significant obligor" as any direct or indirect source of 20% or more of the cashflow servicing the securities. As a result of comments, the SEC made several changes to the proposed requirement.

First, the amendments as adopted defined the financial and operating information that must be updated annually as "annual financial information" and described it as the

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[105] Id.

[106] Id. 59602.

[107] Rule 15c2-12(c), 59 FR 59610.

[108] 59 F.R. 59602.

same type of financial information or operating data that the offering participants decide to include in the final official statement, whether in text or by cross reference.[109] The 1994 Adopting Release clarified that only quantitative data was required and that data of the same "general" type would suffice.[110]

Second, the proposal to mandate audited financial statements on an annual basis was not adopted in the final provisions. Rather, a continuing disclosure undertaking must commit to provide audited financial statements only if and when available.[111]

Third, the 1994 Adopting Release substituted "obligated persons" for "significant obligors" and defined them as follows:

> (10) The term "obligated person" means any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities . . .(other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).[112]

The 1994 Adopting Release provided examples of what did and did not constitute an arrangement within the meaning of the amendments.[113] In addition, the obligated persons for whom annual financial information must be committed was limited to those "for whom financial information or operating data is presented in the final official statement."[114] These changes limited the undertaking to persons associated with the financing and considered material to the offering by the issuer or underwriter.

Fourth, the amendments as adopted permit the undertaking to be made by an obligated person rather than the issuer,[115] in response to comments that issuers should

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[109] Rule 15c2-12(f)(9), 59 FR 59610.

[110] 59 FR 59559.

[111] Rule 15c2-12(b)(5)(i)(B), 59 FR 59609.

[112] Rule 15c2-12(f)(10), 59 FR 59610.

[113] 59 FR 59596.

[114] Rule 15c2-12(b)(5)(i)(A), 59 FR 59609.

[115] Rule 15c2-12(b)(5)(i), 59 FR 59609.

not be made responsible for continuing disclosure about persons not within their knowledge or control.[116]

As adopted, the amendments also were less prescriptive of the information that must be included in official statements. As noted above, the definition of "final official statement" in the proposed amendments required financial and operating information, including audited financial information, regarding "the" issuer and any "significant obligor," again defined as any person who was the source of 20% or more of the cash flow servicing the securities. Comments raised objections to the proposal because issuer financial and operating data is sometimes not material to an offering (e.g., in the case of bond banks and conduit financings) and municipal securities are often payable only from specific funds of the issuer (e.g., in the case of revenue bonds).[117] Under the definition of "final official statement" as adopted, financial information or operating data must be included only for issuers and "those other entities, enterprises, funds, accounts, and other persons material to" the offering.[118] Rather than tying information requirements to "the" issuer or "significant obligor," the definition leaves it to the parties, including the issuer, obligated persons, and underwriters, to determine whose information is material to the offering and, consequently, included in the official statement upon which the continuing disclosure undertaking is built.

The proposed definition of "final official statement" stated that it may consist of a single document or set of documents. The amendments as adopted added that financial information and operating data may be included by cross reference to certain other publicly available information.[119] In the amendments as adopted, submissions under a continuing disclosure undertaking could likewise reference, rather than provide, certain publicly available information.[120]

The definition of "final official statement" was changed from the proposed amendments to include a requirement that it describe the continuing disclosure undertaking and all instances in the previous five years in which any person providing an undertaking in connection with the offering failed to comply in all material respects

[116] 59 FR 59597.

[117] 59 FR 59593.

[118] Rule 15c2-12(f)(3), 59 FR 59610.

[119] Id.

[120] Rule 15c2-12(f)(9), 59 FR 59610.

with any previous undertaking.[121] While it was clear that whether a continuing disclosure undertaking was breached is a matter of state contract law, neither the amendments as adopted nor the 1994 Adopting Release clarified whether the materiality of a breach was to be judged by contract law (i.e., a breach that would excuse performance by the non-breaching party) or federal securities law (i.e., whether an investor would attach significance to the breach in making an investment decision), an ambiguity that was resolved in favor of the latter construction in subsequent SEC enforcement proceedings (under the MCDC initiative) and an SEC release accompanying subsequent amendments to Rule 15c2-12 (to be discussed in the final article in this series).

With respect to notices of material events, the 1994 Adopting Release retained the list of 11 events contained in the 1994 Proposing Release.[122] Commission Staff noted that the 11 events had been proposed based on issuer and market participant input.[123] Likewise, the proposal that material event notices be provided in a "timely" manner was retained from the proposed amendments.[124] The 1994 Adopting Release did narrow one event, though, substituting "Release, substitution, or sale of property securing repayment of the securities" for "Matters affecting collateral,"[125] which comments deemed too broad.[126]

The 1994 Adopting Release noted the expanded role of NRMSIRs in the collection and dissemination of secondary market information as a result of the amendments.[127] The Commission set forth six criteria for evaluating whether an entity qualified as a NRMSIR.[128] The Commission also encouraged the development of state information depositories ("SIDs").[129] The Commission's stated policy goal was to

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[121] Id. The Commission explained that the required disclosure is important to enable investors to judge likely compliance with the undertaking and to incentivize issuers to comply with it. 59 FR 59595.

[122] Rule 15c2-12(b)(5)(i)(C), 59 FR 59609.

[123] See note 86 supra.

[124] Rule 15c2-12(b)(5)(i)(C), 59 FR 59609. Although the Commission declined to specify what is "timely," despite requests that it do so, it did observe: "In general, this determination must take into consideration the time needed to discover the occurrence of the event, assess its materiality, and prepare and disseminate the notice." 59 FR 601.

[125] Rule 15c2-12(b)(5)(i)(C)(10), 59 FR 59609.

[126] 59 FR 59600.

[127] 59 FR 59603.

[128] Id. 59603-59604.

[129] Id. 59604.

facilitate prompt and wide disclosure of information to the secondary market. Consequently, the 1994 Adopting Release implemented a "patchwork" set of information delivery requirements. Annual financial information and audited financial statements, if available, would be delivered to all NRMSIRs and the appropriate SID. Event notices would be filed with each NRMSIR or with the MSRB (as well as the appropriate SID).[130] This information delivery system was, of course, subsequently supplanted as described under "Central Repository" below.

Many comments were submitted to the Commission regarding the proposed small issuer exception to the continuing disclosure requirements.[131] The 1994 Proposing Release proposed an exemption for issuers that had less than $10,000,000 of municipal securities outstanding and had issued less than $3,000,000 in the most recent 48 months preceding an offering. Numerous commenters offered views on levels of dollar thresholds and the complexity of measuring such a two-fold test. The 1994 Adopting Release kept the $10,000,000 threshold, dropped the $3,000,000 test, and conditioned the exemption on an issuer or obligated person providing a limited disclosure undertaking to provide annual information and operating data of the type presented in the final official statement to any person upon request or to the appropriate SID.[132] (A modified small issuer exemption from continuing disclosure was retained in subsequent amendments to and remains in Rule 15c2-12, although it is seldom used in the current electronic disclosure era.)

The 1994 Adopting Release provided a six-month delay in the effectiveness of the continuing disclosure amendments. In addition, issuers did not need to undertake to provide annual financial information for fiscal years ending prior to January 1, 1996.[133] Both municipal securities underwriters and issuers faced numerous transition, interpretive, and timing questions with the new continuing disclosure requirements.

To assist its members and their clients in understanding and applying the amended Rule, NABL's Securities Law and Disclosure Committee, led by John Overdorff, entered into a dialogue with Commission Staff that led to the publication of Staff

[130] Rule 15c2-12(b)(5)(i), 59 FR 59609.

[131] See FR 59606-59607 nn. 179-201.

[132] Rule 15c2-12(d)(2), 59 FR 59610.

[133] Rule 15c2-12(g), 59 FR 59609.

responses to 35 NABL questions in letters colloquially referred to as "NABL I," issued June 23, 1995, and "NABL II," issued September 19, 1995.[134]

Central Repository

The MSRB's EMMA platform resulted from a long and winding multi-step development process.

As noted in the last article in this series, Rule 15c2-12, as initially adopted, required underwriters to provide official statements to potential customers on request through 90 days after the end of the underwriting period, but shortened the obligation to 25 days if the official statement was then available from a NRMSIR, giving underwriters an incentive to provide official statements to NRMSIRs where they could be accessed by participants in the secondary market. NRMSIRs were required to make available to subscribers, for a fee, official statements filed with them. In January 1990, the SEC issued letters recognizing three NRMSIRs, the first of nine. Underwriters were free to choose the NRMSIR, if any, to which they submitted official statements, however, so a broker-dealer or investor might need to subscribe to all NRMSIRs to secure access to official statements more than 25 days after the end of the underwriting period.

Also noted in the last article in this series, the SEC's Rule 15c2-12 proposing release invited comment on an MSRB proposal to create a *central* repository of official statements and certain refunding documents for use in the secondary market. The SEC requested comment on whether a repository should be established and, if so, whether it should be provided by the MSRB or the private sector and whether submissions should be mandated or voluntary.

The issuer community was leery of a governmentally established disclosure library, fearing it would morph into information filing requirements similar to those imposed on reporting companies. As noted by Ernesto Lanza, currently Chief Regulatory and Policy Officer at the MSRB, in a 2014 interview:

> When we set up [MSIL], we actually had to be very explicit that we weren't going to do certain things. We were simply a utility, we weren't going to put obligations on issuers, and we weren't going to make them available to the public for free.

[134] Available from the SEC at: https://www.sec.gov/info/municipal/nabl-1-interpretive-letter-1995-06-23.pdf (NABL I) and https://www.sec.gov/info/municipal/nabl-2-interpretive-letter-1995-09-19.pdf (NABL II).

> We were just going to be a behind-the-scenes utility, just to keep people comforted that we weren't going to be an indirect regulator of issuers.[135]

In 1990, the SEC approved two MSRB proposals to enhance secondary access to primary offering documents. It approved MSRB Rule G-36, which required underwriters to submit official statements and, under a subsequent amendment, advance refunding documents to the MSRB. It also authorized the MSRB to establish a public access facility for copying submitted documents.[136] Since submitted documents were in physical form, access to them was cumbersome. The MSRB therefore proposed, and in 1991 the SEC approved, establishment by the MSRB of a Municipal Securities Information Library, or MSIL (pronounced "missile"), where official statements and advanced refunding documents filed with the MSRB were made available to subscribers electronically for a fee.[137]

At about the same time, the MSRB addressed uneven market access to post-issuance disclosure, especially defeasance and refunding notices.[138] In 1989, it wrote to the American Bankers Association (ABA) to complain that trustee notices sent to bondholders only, and not to the market generally, enabled bondholders to trade securities to the disadvantage of uninformed buyers. In response, the ABA released "Proposed Disclosure Guidelines for Corporate Trustees" and recommended the establishment of a central repository to receive notices and other continuing disclosure information (CDI). The MSRB then proposed to the SEC that voluntarily submitted CDI be included in and accessible through the MSIL system. The MSRB explained the utility of expanding MSIL in its submission to the SEC:

> In the course of its rulemaking activities, the Board has observed a critical need for improved access to information about municipal securities bought and sold in the secondary market. In particular, the Board has observed that market

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[135] Quoted in Securities and Exchange Commission Historical Society, The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation, Building a New Machine, Catalyst for Transparency (the "Historical Society Report"), available at https://www.sechistorical.org/museum/galleries/mun/mun05b_catalyst_trans.php#ftn27

[136] Securities Exchange Act Release No. 28081 (June 1, 1990), 55 FR 23333.

[137] Securities Exchange Act Release Nos. 29298 (June 13, 1991), 56 FR 28194.

[138] Of particular concern were transactions that established escrows to defease securities to maturity or a call date, or to call securities previously defeased to maturity, any of which could have a significant impact on the value of the securities and were sometimes difficult to ascertain. One market observer referred to escrow-to-maturity transactions as "the catalyst that helped produce the modern, more transparent municipal market." J. Mysack, *Encyclopedia of Municipal Bonds,* p. 56.

participants often do not have access to official disclosure documents that have been prepared by issuers and trustees during the life of the an [*sic*] issue ("Continuing Disclosure Information" or "CDI").

Examples of CDI include periodic financial reports prepared by issuers, reflecting the credit quality of the issuer's outstanding securities. Other types of CDI may be provided by the trustee for an issue. The security for many outstanding issues is structured around revenue from specific sources or specific assets (e.g., a hospital, a retirement center, a housing project). Trustees for these "structured" issues sometimes generate CDI in the form of notices or reports which relate to the financial status of these issues and the likelihood of the issue defaulting or being redeemed early.

Board rules require dealers to explain to a potential customer all material facts about a proposed transaction, to recommend the transaction to the customer only if it is suitable for the customer, and to price the transaction correctly. These requirements are for the protection of customers and are similar or identical to the requirements placed on dealers in other securities markets. It has become apparent to the Board that, in today's market, access to CDI is necessary for dealers to determine the material facts about a transaction, to determine if a transaction is suitable for a specific customer, and to price the transaction correctly. The Board believes that, in many cases, lack of ready access to CDI is preventing dealers from fully satisfying their investor protection obligations under Board rules.

As an example of a typical problem, trustees currently produce notices, sometimes called "pre-default" notices, which are designed to inform bondholders of certain facts that are within the direct knowledge of the trustee, e.g., that a reserve fund has been invaded by the trustee. The events described in these notices, once known by the market, may significantly affect the price of the issue. However, the notices often are made available exclusively to bondholders, providing an opportunity for bondholders to sell the securities before the information reaches the market. The market may not become aware of the existence of the notices until weeks or even months after the trustee has provided the Information to bondholders. Dealers who are buying and selling the securities during this time may not be providing their customers with the full disclosures

required by Board rules. Similar situations may occur when an issuer makes known its intent to pre-refund one of its outstanding issues.[139]

The SEC approved the MSRB proposal and in early 1993 the MSRB began operating a Continuing Disclosure Information Net (CDINet) system (as part of MSIL) for voluntary submissions of CDI. Following adoption of the continuing disclosure amendments to Rule 15c2-12, the MSRB modified the CDINet System to accept material event notices submitted under continuing disclosure undertakings.

Except for official statements and advance refunding documents submitted by underwriters in compliance with MSRB Rule G-36, submissions to MSIL remained voluntary, and continuing disclosure undertakings entered into to comply with the Rule 15c2-12 amendments could be satisfied by submission to a single NRMSIR or SID rather than to all NRMSIRs. Each NRMSIR posted and linked submissions differently. "Primary documents were often not linked to continuing disclosure and some materials were misfiled."[140] This regime "proved to be an unreliable means of collecting and disseminating primary and continuing disclosure,"[141] which the MSRB pointed out in its *Discussion Paper on Disclosure in the Municipal Securities Market* published in December 2000. Its view was echoed by participants in the SEC's 2001 Municipal Market Roundtable. The MSRB offered to establish an electronic continuing disclosure access system, but issuers pushed back, remaining leery of a governmental platform. (In 2002, the MSRB did launch an online system for the submission of official statements by underwriters, setting the stage for the ultimate development of EMMA.)

To develop a consensus for improving access to CDI, in 2001 the MSRB assembled representatives from 18 municipal securities industry groups, including NABL, for a two-day discussion of possible improvements to the disclosure regime. The group was dubbed the "Muni Council," and it thereafter continued to meet without the MSRB, believing that "there might be more open, more free conversation without a

[139] MSRB Reports, vol. 10, no. 3, pp.3-4 (July 1990), available at https://www.sechistorical.org/collection/papers/1990/1990_0701_MSRBContinuing.pdf.

[140] Historical Society Report at n. 28.

[141] SIFMA, Rule 15c2-12 Whitepaper (April 2016), p. 2, available at https://www.sifma.org/wp-content/uploads/2017/07/Rule-15c2-12_Whitepaper.pdf.

regulator in the room."[142] One of the recommendations of the group was to establish a "Central Post Office" through which all submissions to NRMSIRs would be made.[143]

In response to the Muni Council recommendation, on September 7, 2004, the Municipal Advisory Council of Texas (MAC)[144] established *DisclosureUSA*, a website hosted by it to serve as the Central Post Office for secondary market disclosure. MAC undertook to transmit each electronic submission of CDI received by it to each NRMSIR simultaneously and very shortly after it was received. Accordingly, Martha Haines, then Chief of the SEC's Office of Municipal Securities, issued a press release and an interpretative letter recognizing that submissions to *DisclosureUSA* by issuers and others who make disclosure filings pursuant to SEC Rule 15c2-12 would satisfy their contractual obligations to submit the documents to any of the then three remaining NRMSIRs.[145]

In 2006, the SEC issued an "Access Equals Delivery" concept release, responding to industry demand and leading to the acceptance of electronic filings in lieu of paper copies to satisfy SEC filing requirements. In the same year, the MSRB published a concept release setting forth its vision for a centralized electronic disclosure system for the municipal securities market. The Muni Council recognized the utility of such a system but couldn't find a private host.

Consequently, the MSRB proposed, and the SEC approved,[146] the establishment of EMMA. As most should be aware, EMMA is an online system that provides public

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[142] April 4, 2014, interview with Lynette Kelly, former MSRB Executive Director, as reported in the Historical Society Report at n. 29.

[143] Prior to the Central Post Office and EMMA, issuers had to make inquiry with the SEC before each filing to determine which companies were then recognized by it as a NRMSIR. They did so by calling the SEC's FAX On Demand Service from a telecopier machine and requesting "document number 0206," a cumbersome undertaking.

[144] The Municipal Advisory Council of Texas (MAC) is a non-profit membership corporation organized "to promote effective and efficient investment banking, underwriting, trading and sales of municipal debt by collecting, maintaining and distributing information relating to issuing entities."

[145] MAC's establishment of the Central Post Office resulted in a patent infringement suit brought by Digital Assurance Certification (DAC), which was then providing dissemination agent services to issuers and obligors as well as notifications to broker-dealers. The suit was settled when MAC agreed to make certain changes to operation of *DisclosureUSA,* described in a letter from Martha Haines, which confirmed that submissions to *DisclosureUSA* would continue to satisfy requirements to file with NRMSIRs. Letter from M. Haines to L. Slaughter, Executive Director of MAC (October 3, 2007), available at https://www.sec.gov/info/municipal/texasmac100307.pdf.

[146] See Securities Exchange Act Release No. 57577 (March 28, 2008), 73 FR 18022.

access to disclosure documents, real-time trade price data and educational resources for the municipal securities market. EMMA began operation on March 31, 2008, as a pilot facility as part of the MSRB's existing Official Statement and Advance Refunding Document system in MSIL. Later that year, the SEC approved its expansion to include CDI submissions, including annual reports and event notices, required by Rule 15c2-12 continuing disclosure undertakings,[147] effective July 1, 2009. At the same time, *DisclosureUSA* stopped accepting Central Post Office filings, since they were no longer needed. The launch of the EMMA website made historical data and statistics on the municipal securities market available from a single source, free of charge, for the first time.

Under amendments to SEC Rule 15c2-12, adopted by the SEC in 2008, qualified continuing disclosure undertakings required issuers to provide electronic copies of continuing disclosure documents to the MSRB through EMMA, where they are immediately available to the public.

In addition to developing systems for the dissemination of primary offering and continuing disclosure documents through EMMA, the MSRB also developed and continuously improved systems for price reporting. In 1995, it developed a daily summary report of bonds traded between dealers, a first step in providing price transparency in the municipal securities market. In 1998, it expanded its daily reports to include transactions with customers. In 2009, it launched a program to collect price information about auction rate and variable rate demand obligations from broker-dealers and disseminate it to the public through EMMA.

Conclusion

By (a) effectively mandating periodic disclosure and event notices by municipal securities issuers through amendments to Rule 15c2-12, (b) warning issuers in the Interpretive Release that all disclosure that reaches investors (including outside a primary offering) must comply with the antifraud provisions of federal securities laws, and (c) approving MSRB initiatives to make primary and continuing disclosure readily available to investors and broker-dealers, the SEC substantially increased the amount and reliability of information available to municipal securities investors and narrowed the information gap between the corporate and municipal securities marketplaces.

In the next and final installment of this series, we will recount enactment of the Dodd Frank Investor Protection and Wall Street Reform Act, the resulting regulation of

[147] See Securities Exchange Act Release No. 59061 (December 5, 2008), 73 FR 75778.

municipal advisors, further amendments to Rule 15c2-12, and the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative. Stay tuned.