

The Bond Lawyer

THE JOURNAL OF THE NATIONAL ASSOCIATION OF BOND LAWYERS // VOLUME 49 NUMBER 3 // 2025

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Editor's Notes¹

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Welcome to Volume 49 No. 3 of *The Bond Lawyer*.

In this Edition

In this edition, Tony Martini provides commentary on recent developments on the public finance tax front, including IRS vacancies, turnovers, and staff reductions, as well as spaceports and other interesting developments.

Drew Kintzinger's securities law column will return in the next issue with a report on the activities of the SEC, including recent enforcement activity.

That's a Wrap! The Final Installment of the Municipal Securities Retrospective

In the fifth and final installment of our Municipal Securities Retrospective, Paul Maco, Drew Kintzinger, and Rick Weber provide an in-depth discussion of and fascinating context for the regulatory developments since the adoption of the 1994 amendments to Rule 15c2-12. The original purpose for the retrospective was to provide historical perspective for bond lawyers who have been practicing in the municipal finance space for less than 15 years (give or take), and for the more seasoned practitioners perhaps a bit of nostalgia and déjà vu moments. The endeavors of Paul, Drew, and Rick in producing this series are greatly appreciated (an understatement). Their work provides not only a well-researched and thorough account of the regulatory evolution in the

¹ Portions of this column (including this footnote) were generated with the assistance of ChatGPT, an AI language model developed by OpenAI (version September 19, 2025). While the author curated and edited the content, the AI contributed some original phrasing and ideas.

municipal space but also thoughtful context that may be lost to newer practitioners and, thus, overlooked. The clarity with which they presented the historical developments made the series especially engaging and informative. Thank you again to Paul, Drew, and Rick for your hard work—it's a meaningful resource for practitioners, scholars, and anyone with an interest in the municipal securities market.

The Gilded Age: Law, Railroads, and (Maybe) the Birth of Municipal Bond Counsel

The world portrayed in HBO's *The Gilded Age*² unfolds during the early 1880s, which was a transformative era marked by dazzling wealth for some, rapid industrial expansion, and social change. New York City, the nation's financial hub, was teemed with newly minted fortunes built on steel, railroads, and real estate speculation. One of the primary characters and storylines in the series is that of George Russell, a railroad tycoon who is rather ruthless in business and, according to some reports, based upon a combination of characters of the time, including Jay Gould. (More on Mr. Gould later.) One of the storylines in Season 3 includes Russell desperately seeking equity funding or financing for his quest of developing a transcontinental railroad. While there was never any indication of local governments investing in Russell's particular (fictional) railroad company, the plot line reminded me of the historical railroad bond defaults of the period.

As municipal bond history buffs will know, during the 1800's some local governments issued bonds to finance railroad construction including by delivering those bonds to railroad companies in exchange for stock in the railroad company. The railroad would then sell the bonds in the secondary market and use the proceeds to fund railroad development. The incentive for the local government was to ensure the railroad came through its jurisdiction. Defaults ensued due to varying circumstances, as did the lawsuits. There is actually a long line of cases on these matters described in a 2020 article in the *American Bankruptcy Law Journal* written by Allison Buccola and Vincent S.J. Buccola.³ These cases, including some non-railroad projects, addressed authorization, validity, and enforceability of the bonds, which some issuers had repudiated. According to the Buccolas' review of some 203 cases between 1859 and 1899, the majority of the cases were decided in favor of the bondholders.⁴

It was in the face of these repudiations and defaults that municipal bond underwriters and investors sought legal confirmation of the validity of the bonds being offered. And

² [https://en.wikipedia.org/wiki/The_Gilded_Age_\(TV_series\)](https://en.wikipedia.org/wiki/The_Gilded_Age_(TV_series)); accessed September 19, 2025.

³ Buccola, Allison and Buccola, Vincent S.J., "The Municipal Bond Cases Revisited". 94 *American Bankruptcy Law Journal* 591 (2020), Available at SSRN: <https://ssrn.com/abstract=3699633>

⁴ Id.

so marked the “birth” of the bond counsel. I can find no readily available documentation for the first “bond opinion” ever written that would accompany a bond offering but we can surmise it would have been sometime in the late 1880’s or early 1890’s, coinciding with the spate of bond defaults. A few of the current bond counsel firms, my own included, tout a long history of providing opinions. Squire lore says our first opinion was rendered in 1900⁵ but internal, albeit informal, history suggests the original partners (Squire and Sanders) were practicing in the municipal finance space since forming the partnership in 1890. Ballard Spahr’s origins date back to 1885, according to its website, but no mention of the earliest bond opinion. The Hawkins, Delafield & Wood firm was formed in 1854 but only claims to have delivered “some of the earliest unqualified approving legal opinions.” One would think if they were the first, it would be noted.

Consider John Dillon. John Forrest Dillon was a judge, author, and lawyer, and perhaps best remembered for his opinion in the 1868 case of *City of Clinton v. Cedar Rapids and the Missouri River Railroad Co.*⁶ and the formulation of what would be known as “Dillon’s Rule.”⁷ Dillon authored several case digests, books, and treatises, including “The Law of Municipal Corporations”⁸ in 1873 and “*The Law of Municipal Bonds*”⁹ in 1876, leading him to be seen as the leading authority on municipal law at the time. According to a biographical sketch included in “*The Biographical Dictionary of Iowa*,”¹⁰ after retiring from the bench in 1879, he taught at Columbia University for three years and, apparently, was moonlighting as an advisor to several corporations connected to his uncle, Sydney Dillon, who was a close ally of Jay Gould. In 1882 he left Columbia University and went into private practice in New York and his practice included serving as general or advisory counsel to several railroad companies and, upon Gould’s passing in 1892, the estate of Jay Gould. According to a 1991 article in *The Bond*

⁵ I say “lore” because I haven’t actually seen a copy of that opinion.

⁶ *City of Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa 455 (1868).

⁷ Dillon’s Rule stands for the proposition that all powers and authority of a municipality are provided by the state. Contrast this to the concept of “home rule” authority of municipalities. See Fillingham, Ann D., Alexandra M. MacLennan, Joseph (Jodie) E. Smith, and Perry Israel. “Municipal Market Evolution Reflecting the Constitutional Underpinnings of the Law of Public Finance.” *The Urban Lawyer* 52, No. 1 (2023). Accessed September 19, 2025. Also reprinted in *The Bond Lawyer*, Volume 47, Number 2.

⁸ Dillon, John F., 1873. *The Law of Municipal Corporations*. The original edition is available as an e-book here: <https://play.google.com/books/reader?id=QeQ9AAAAIAAJ&pg=GBS.PR2&hl=en>

⁹ Dillon, John F., 1876. *The Law of Municipal Bonds*. The original edition is available as an e-book here: <https://play.google.com/store/books/details?id=CA2s4Xdk8sEC&rdid=book-CA2s4Xdk8sEC&rdot=1&pli=1>

¹⁰ <https://uiopress.lib.uiowa.edu/bdi/DetailsPage.aspx?id=95>; accessed September 19, 2025.

Buyer,¹¹ a long, close relationship was formed between Dillon and Gould. Gould was investing in railroad bonds and reportedly looked to Dillon to sign off on the legality of the bonds. The 1991 article includes this description:

Gould himself often had to purchase large blocks of municipal bonds in connection with the innumerable railroad wars he was always waging, and turned to Judge Dillon to be sure the bonds he was buying were legal and validly binding upon the town. Judge Dillon would usually review a transcript of the financing and deliver a favorable opinion if all was in order.

Here is another excerpt from the article:

The Premier Bond Counsel

After Gould's death in 1892, Dillon still had several years of work as the executor of Jay Gould's estate, which was estimated at \$72 million, but he began to spend less time on corporate legal battles and increasing amounts of time developing into the country's premier bond counsel.

Although initially, investors came to his Broadway offices for the opinions, over time the cities and towns who issued bonds began to come to him directly for advice in structuring their financings. Eventually, cities such as Kansas City and Memphis came to him for an approving opinion on their bonds.

As his reputation grew, despite his work for Jay Gould, additional honors presented themselves. In 1891, Judge Dillon became president of the American Bar Association and Storrs Lecturer at the Yale University Law School.

As he expanded the scope of his bond counsel practice, he solidified the position of New York City as the capital of the public finance industry.

The concept of a municipal bond issuer coming to New York lawyers for bond opinions continued, with a few local exceptions up until the mid-1970s, when the dominance of New York bond counsel declined.

Perhaps one of the greatest contributions made by Judge Dillon was his service as a member of the New York City Charter Commission in 1889, which resulted

¹¹ <https://www.bondbuyer.com/news/pioneer-doctor-lawyer-judge-author-and-the-first-bond-counsel-john-f-dillon>; retrieved September 19, 2025

in the merger of all five formerly separate cities into the five Boroughs of Greater New York City. The commission did its work well enough that the structure lasted until changes were enacted in 1990.

So, was John Dillon the first bond counsel? Maybe, maybe not. It's a good story line, though, and factually consistent with stories handed down about the origins of the bond counsel practice. Maybe in Season 4 of *The Gilded Age* we will see George Russell engage a former judge, professor, and municipal bond expert as his advisor on his railroad investments. Stay tuned!

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



Federal Tax Law: The Tax Microphone

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We've made it to the end of another summer in New England, and we're now pivoting to autumn. On the administrative front, there have been precious few bond tax law developments to report, none of them substantive. This is unsurprising to me, given staffing trends at the Internal Revenue Service, which I'll discuss later in this column. Really, the most significant tax law development in our corner of the world—by far—over the last three months is legislative in nature; something, actually, that did not happen. That is, the provisions of the Internal Revenue Code governing the tax exemption of state and local bonds made it through the enactment of H.R. 1 on July 4, 2025, wholly unscathed. In fact, this enactment, Public Law 119-21, added incrementally to the footprint of tax-exempt bonds by adding a new sub-category to the litany of exempt facility bonds in Section 142 of the Code, for spaceports. More on that below, as well.

Taking it from the top, over the course of the summer, we've seen Billy Long come and go as Commissioner of Internal Revenue. As I reported in my last column, Mr. Long was confirmed to the position by the Senate on June 12. He took office on June 17, but it turns out he wouldn't last two months; he was removed from office by the President on August 8. Some run; those 7 or so weeks in office apparently make him the shortest-tenured Commissioner of Internal Revenue since the post was first created by Congress as part of the Revenue Act of 1862 (Ch. 119, 12 Stat. 432). According to reports immediately after his removal, the reasons for his dismissal "were not immediately clear," although it was reported in the press that as Commissioner, he had incorrectly stated that the starting date for the 2026 tax filing season would be in August. Mr. Long himself reported on his social media shortly after his dismissal that he was going to be nominated to serve as ambassador to Iceland. As of the time of

this writing, Mr. Long has not been confirmed by the Senate as ambassador to any country.

In the meantime, the Secretary of Treasury, Scott Bessent, is now serving as the Acting Commissioner of Internal Revenue. So, through the end of September, we've seen seven Commissioners and Acting Commissioners of Internal Revenue in 2025, as follows: (1) Danny Werfel, Commissioner (Biden Administration appointee, serving through January 20); (2) Douglas O'Donnell, Acting Commissioner (January 21 – February 28); (3) Melanie Krause, Acting Commissioner (February 29 – April 16); (4) Gary Shipley, Acting Commissioner (April 16 – April 18 (!)); (5) Michael Faulkender, Acting Commissioner (April 18 – June 16); (6) Billy Long, Commissioner (June 17 – August 8); and (7) Scott Bessent, Acting Commissioner (August 8 – present). My research suggests that prior to 2025, there has only been a single year in which there were as many as four Commissioners of Internal Revenue. That was in 1883. I don't have a crystal ball, but I'd be willing to give good odds that we'll see an eighth Commissioner or Acting Commission before 2025 has fully run its course.

And the upheaval doesn't end with the office of the Commissioner. All of the following senior positions within the IRS have seen vacancies or turnover in 2025: Chief of Staff to the Commissioner; Deputy Commissioner; Chief Counsel; Chief Communication and Liaison; Chief Tax Compliance Officer; Chief Information Officer; Chief Operating Officer; Chief Procurement Officer; IRS Human Capital Officer; Chief Privacy Officer; Chief Financial Officer; Chief of Data and Analytics; Chief of Facility management and Security Services; and Chief Risk Officer. This is not a comprehensive list, but to me it is a most troubling symptom of an agency experiencing profound instability. In particular, it's not lost on me that several of the positions are charged with ensuring the integrity of confidential taxpayer information, which is always a critical IRS mission.

As I've previously reported, staffing reductions throughout the IRS have been unprecedented in 2025. We started the year with around (or just over) 100,000 employees on the Service's payroll. Mid-year reports indicated that about a quarter of that workforce had left, voluntarily or involuntarily; and that 25% staffing reduction includes revenue agents as well as other IRS staff including those in customer service positions. Apparently, the government is reconsidering some of these staff reductions and more recently has been trying to hire or rehire for some of the Service's most mission-critical positions, but these disruptions appear to be hitting home for the bond counsel practice as well. Earlier this year, in the Volume 49 Number 1 issue of *The Bond Lawyer*, I described the abrupt disappearance of an IRS agent handling an audit

of a bond issue to which I was responding. I've now heard that more than a few other bond tax practitioners have had similar experiences. I've also heard about challenges NABL members have experienced getting assistance on IRS customer service lines about filings for Section 6417 subsidies, IRS Form 8038-CP filings and receipt of direct-pay subsidies on build America and other similar tax credit debt instruments, as well as the timely or untimely filing of other forms in the 8038 series.

I also understand the Office of Chief Counsel has experienced notable staffing reductions. Whether or not most or all of these departures have been voluntary (e.g., as a result of accepting early retirement offers), it seems clear this trend signals a troubling brain drain, and, as important, a bleeding out of experience and judgment. This within the office of the IRS that is principally charged with advising the Commissioner on matters relating to the interpretation, administration, and enforcement of federal tax law.

Overall, this turmoil seems to go a long way in accounting for why we're not getting any substantive guidance out of Treasury or the IRS recently. Given the trend lines, I wouldn't expect this to change over the rest of the year, or even into 2026.

Public Law 119-21: Tax-Exempt Facility Bonds for Spaceports

With that, let's turn to spaceports. Section 70309 of Public Law 119-21 (a copy of the full enactment can be found at <https://www.congress.gov/119/plaws/publ21/PLAW-119publ21.pdf>) provides that "spaceports" are treated like "airports" under the exempt facility bond rules of Code Section 142. In particular, the statute grafts the words "and spaceports" after the word "airports" in Code Section 142(a)(1). Section 70309 also adds a new Section 142(p) to the Code, providing definitional details elaborating the meaning of the "spaceports" concept.

We're told that "spaceports" means any facility *at or in close proximity to* a launch or reentry site used for (A) manufacturing, assembling or repairing spacecraft, space cargo, (B) flight control operations, (C) providing launch or reentry services or (D) transferring crew, spaceflight participants or space cargo to or from spacecraft. A "spacecraft" is defined, intuitively, I think, as a launch or reentry vehicle. "Space cargo" is defined to mean satellites, scientific experiments, other property transported into space, and any other payload whether or not such other property returns from space. Other terms in the preceding litany—such as "launch site" and "space flight participant"—are defined by way of a cross-reference to 51 U.S.C. Section 50902 as in

effect on July 4, 2025. Section 70309 also provides, helpfully, that the public use requirement that applies under federal tax law to certain other types of exempt facilities under Code Section 142 is not applicable with respect to spaceports, and the statute also provides an exception from the federal guarantee prohibition of Code Section 149(b).

Finally, as with exempt facility bonds for airports, spaceport facilities financed with exempt facility bonds are required to be governmentally owned (see Code Section 142(b), which cross-references Code Section 142(a)(1), among other subclauses of Section 142(a)). You will recall that Code Section 142(b)(1)(B) offers safe harbor leasing and management contract provisions which permit a private business user to operate the financed facilities if certain conditions are met—including a condition that the term of the arrangement with the private business user does not exceed 80% of reasonably expected economic life of the financed facility. Section 70309(b) of the new enactment follows this general treatment, with a special rule for spaceport ground leases and subleases that explicitly states that spaceport property will not fail to meet the governmental ownership requirement if the general safe harbor rules of Code Section 142(b)(1)(B) are satisfied; for some reason, management contracts for spaceport facilities are not referenced by name in this spaceport-related provision, though they are referenced in the longstanding safe harbor provisions of Code Section 142(b)(1)(B).

The newly-enacted spaceport provisions of the Code Section 142 apply to bonds issued after July 4, 2025.

Taking a step back from the particulars of the statutory text, I would note that Section 70309 probably isn't going to have a sweeping effect on bond counsel practice. That's probably obvious to most readers. Some large volume tax-exempt spaceport transactions may well get done under this provision (remember that under Section 146(g)(3), no private activity bond volume cap is required for exempt facility bonds issued under Code Section 142(a)(1)), but the geography likely will be limited. As I have recounted above, under the statute, the term "spaceports" means any facility *at or in close proximity to* a launch or reentry site. To the best of my understanding, there are only a few states that will fit the bill, with space launch or reentry sites, the principal ones being Florida, California, Texas, New Mexico and Virginia. My research also suggests that there are licensed space launch sites in Alaska, Alabama, Colorado, and Georgia.

Paragraph (10) of 51 U.S.C. Section 50902, cited above as the source of the definition of the term “launch site” for purposes of the exempt spaceport facility bond rules, references licensure, so it may well be for purposes of Code Sections 142(a)(1) and 142(p) that licensure will be enough even if space launch activities are not regularly carried on at a particular location. However, it seems that spacecraft manufacturing or other space-related economic activity that is truly *remote* from any space launch (or reentry) site may not be eligible for tax-exempt financing under these new statutory provisions. Think, for example, of a commercial satellite construction or assembly facility in Wisconsin or Massachusetts. Those types of facilities appear to be left out of the statutory construct we find in Public Law 119-21.

Time will tell whether this new flavor of tax-exempt bond financing will find traction in the marketplace. Let’s stay tuned.

Public Law 119-21: Other Tax-Exempt Bond “Adjacent” Provisions

The spaceport provisions are the only ones in the new enactment that directly enlarge access to financing in the municipal markets, but there are other provisions on the peripheries that may impact the bond practices of some NABL members. Let’s make short work of a few of them.

First, Section 70422(b) of Public Law 119-21 amends Code Section 42(h)(4) to lower the threshold for qualifying for the 4% low income housing tax credit (LIHTC) to 25% (from 50% prior to the new enactment) as the level at which a housing project’s aggregate basis must be funded with tax-exempt private activity bonds. This lower 25% threshold applies to properties placed in service after 2025, and it mandates that at least 5% of such aggregate basis be financed with private activity bonds issued after 2025. Depending on the plan of finance for any particular project, this change in law will tend to decrease the demand for private activity bond volume cap in connection with multifamily bond transactions, thereby increasing the availability of volume cap for other tax-exempt bond financings that require cap allocations.

Next, Section 70302(b)(5) of the statute amends Code Section 144(a)(4)(C)(iv) by striking the reference previously set forth in the qualified small issue bond provisions to Code Section 174(a) and replacing it with a reference to Code Section 174A(a). This recognizes the full expensing treatment afforded to domestic research and experimental expenditures under other provisions of Public Law 119-21 and should reduce the amounts of expenditures required to be taken into account by

borrowers of qualified small issue bonds under the capital expenditures limitation of Code Section 144(a)(4)(A)(ii).

There are other provisions in the new statute that might affect municipal market participants, but those provisions are even further removed from the mainstream of bond counsel practice. These include the raising of the cap in Code Section 164 for the deduction of state and local taxes (the so-called SALT cap), the treatment of “opportunity zones” under Code Section 1400Z-1, the permanent extension of the new markets tax credit program at an annual \$5 billion level nationwide, and an increase on the excise tax imposed by federal tax law on the endowments of certain higher educational institutions, to an 8% rate.

I would invite readers to seek out other commentaries on Public Law 119-21 to get a more granular view of these statutory developments.

Internal Revenue Manual Changes

Readers may wish to review certain changes to the Internal Revenue Manual that have been made recently. First, a number of changes and updates to the Manual were transmitted on August 26, 2025, with respect to administrative matters for examinations conducted by TE/GE. These provisions are found in Part 4, Chapter 70, Section 11 (commonly cited as IRM 4.70.11), apparently to comply with certain executive orders issued earlier in 2025 and guidance of the federal Office of Professional Management, and for other reasons. About 15 restated subsections of Section 11 were transmitted in August 2025. The IRS webpage at https://www.irs.gov/irm/part4/irm_04-070-011 will afford readers with the relevant details.

Additionally, at some point earlier this year, it appears that Part 4, Chapter 70, Section 17 (IRM 4.70.17) was removed from view on the IRS website. These provisions of the Manual set forth guidance for examiners in TE/GE as to how to process taxpayer claims for arbitrage- and rebate-related overpayments, as well as claims for COVID-19 relief credits. I have found no explanation for the removal of this IRM guidance from the IRS website, and I cannot say when exactly this Section of the IRM was taken down.

IRS Appeals Regulations

Finally, a brief catch-up note on final regulations released by the Department of the Treasury and the IRS on January 15, 2025, in the waning days of the Biden administration. The regulations, released as Treasury Decision 10030 (a full print can be found at <https://www.federalregister.gov/documents/2025/01/15/2025-00426/resolution-of-federal-tax-controversies-by-the-independent-office-of-appeals>; and corrections can be found at <https://www.federalregister.gov/documents/2025/07/18/2025-13561/resolution-of-federal-tax-controversies-by-the-independent-office-of-appeals-correction>), detail when taxpayers can appeal a tax dispute to the IRS Independent Office of Appeals under the Taxpayer First Act of 2019, including with respect to certain tax-exempt bond related matters. Among other things, these final regulations appear to clarify the provisions of Code Section 7803(e)(4), which generally affords access to the Appeals Office, with certain specified exceptions. The regulations also address certain procedural and timing rules that must be satisfied by consideration of a tax dispute by the Appeals Office is available.

I will close here, adding as ever my best wishes and appreciation to the readers of *The Bond Lawyer*.

Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 5)

By Andrew R. Kintzinger¹², Paul S. Maco¹³, and Fredric A. Weber¹⁴

In the first article of this series,¹⁵ 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 of 1934 (the “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.

¹² 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 and Carlson Prize by NABL.

¹³ 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.

¹⁴ 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.

¹⁵ 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,¹⁶ 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,¹⁷ 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 the fourth article of this series,¹⁸ we discussed (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, (b) amendments to Rule 15c2-12 contemporaneously proposed to provide for continuing disclosure by issuers of municipal securities to support secondary market transactions, and (c) the initial establishment of repositories for offering documents and their evolution into today's

¹⁶ See "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 2)," *The Bond Lawyer*, Vol. 48, No. 3.

¹⁷ See "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 3)," *The Bond Lawyer*, Vol. 48, No. 4.

¹⁸ See "Federal Regulation of the Municipal Securities Market: A (Not so) Brief History and Retrospective (Part 4)," *The Bond Lawyer*, Vol. 49, No. 1.

Electronic Municipal Market Access System (EMMA), the municipal counterpart to EDGAR.

In this fifth (and last) article of this series, we discuss:

- a series of events following the 1994 amendments to Rule 15c2-12 that shaped significant statutory changes in financial regulation and subsequent amendments to Rule 15c2-12,
- 2010 amendments to Rule 15c2-12, which expanded required continuing disclosure undertakings by adding reportable events, tightening materiality and timing requirements, and extending its requirements to variable rate demand obligations,
- enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which empowered the MSRB to regulate independent municipal advisors for the protection of issuers as well as investors and imposed a fiduciary duty on municipal advisors to governmental units, among other provisions,
- the SEC's Municipalities Continuing Disclosure Cooperative Initiative (the "MCDC Initiative"), a self-reporting initiative for failures by issuers and underwriters to disclose prior material breaches of continuing disclosure undertakings in subsequent public offerings; and
- 2018 amendments to Rule 15c2-12, which added two more reportable events—the incurrence or amendment of material financial obligations and certain acts indicating financial distress.

An Early Portent of Dark Days to Come

Transition. In the waning months of 1994 as the SEC adopted amendments to Rule 15c2-12 described in the prior installment of this series, several consequential events occurred, resulting in increased use of risky derivatives, structured products, and other new products and, following a sharp change in the direction of Congressional regulation of securities and financial markets, the largest global financial crisis since the Great Depression and withdrawal of the exemption for variable rate demand notes included in Rule 15c2-12 when it was adopted 15 years earlier. Several intervening events also contributed to the crisis and resulting regulation.

On November 8, 1994, two days before the November 10 adoption of amendments to Rule 15c2-12, the mid-term elections changed control of both the U.S. Senate and the U.S. House of Representatives from the Democratic Party to the Republican Party. For the first time since 1952, the Republican Party would have control of both houses of Congress when the 104th Congress convened in January 1995. "The Congressional elections of 1994, established, for the time being, the political ascendancy of antiregulatory reformers ... epitomized by the 'Contract with America,' one fundamental premise of [which] called for limitations on government regulations and laws which Republicans contended hurt economic competitiveness."¹⁹ Congressional pressure for greater regulation of the municipal securities market, previously exerted by the legendary John Dingell, Chairman of the House Energy and Commerce Committee, vanished. An era of regulation with a light touch appeared to have dawned.²⁰

A week after the election, on November 15, 1994, the Federal Reserve Board raised its two benchmark interest rates--the federal funds rate and the discount rate--for the sixth time that year, this time by three-quarters of a percentage point.²¹ For the County of Orange, California, this would be one rate increase too many. On December 6, 1994, it filed for protection under Chapter 9 of the United States Bankruptcy Code.²² At the time, it was the largest municipal bankruptcy in U.S. history. The bankruptcy was the result of the County's critical dependence upon income received from investment of the deposits in the Orange County Investment Pool (OCIP) to close a structural gap in its budget and meet its obligations. That income accounted for 12 percent of the

¹⁹ Anti-Regulation Ascendancy, Congress, the SEC and Financial Regulation, SEC Historical Society, accessed at:

https://www.sechistorical.org/museum/galleries/mec/mec05d_modernization_ascendancy.php#ftn37 citing, John J. Pitney, Alonzo L. Hamby, Mona Charen, et al, June 1, 1995, 100 Days That Shook the World? Hoover Institution, accessed at <https://www.hoover.org/research/100-days-shook-world>

²⁰ Republicans retained a majority in both houses of Congress until 2001, when the Senate was split 50-50, with Vice President Cheney the tie-breaker, until May 24, 2001, when Senator Jim Jeffords, a Republican, became an Independent caucusing with the Democrats.

²¹ James Risen, Fed Hikes Interest Rates; Increase Is Biggest of the Year: Economy: Boost of three-quarters of a point in funds rate and discount rate reaffirms central bank's fight on inflation. Critics see dangers to growth and job creation, Los Angeles Times, Nov. 16, 1994 12 AM PT, at [Fed Hikes Interest Rates; Increase Is Biggest of the Year : Economy: Boost of three-quarters of a point in funds rate and discount rate reaffirms central bank's fight on inflation. Critics see dangers to growth and job creation. - Los Angeles Times](#), accessed July 14, 2025, at 2:50 pm.

²² See, *In re County of Orange, California; Orange County Flood Control District and County of Orange, California Board of Supervisors*, Securities Act Release No. 7260, Exchange Act Release No. 36760, A.P. File No. 3-8937 (January 24, 1996), available at: <https://www.sec.gov/info/municipal/mbonds/issuers.htm#CO11>.

County's general fund revenue in fiscal year 1994 and was budgeted to provide 35 percent of the revenues for fiscal year 1995. It was the general fund's largest source of income. The deposits in the OCIP were invested in complex (and illiquid) structured derivatives, which were then used as collateral for loans to purchase additional complex derivatives, which provided collateral for loans to purchase more derivatives. This strategy had the effect of two dollars borrowed for every dollar on deposit, all to be invested in derivatives whose yields were inversely related to interest rates, leveraging the original investment in the OCIP from \$7.6 billion to \$20.6 billion, increasing (or decreasing) the returns on the original investments threefold. Over the course of 1994, as the Federal Reserve raised interest rates, the value of the OCIP's assets dropped. In November, auditors told county officials the OCIP had lost about \$1.64 billion of the \$7.6 billion of deposits. The loans taken out to leverage the OCIP securities were coming due and the securities collateralizing the loans had been losing value each time interest rates increased. The County did not have the cash to repay the portion of the loans that could not be rolled over without additional collateral, and the County was unsuccessful in selling the complex securities it held into the market. So, the County and the OCIP filed for bankruptcy protection.²³ The bankruptcy of the conservative California county struck a nerve in the incoming Congress.

On January 5, 1995, Deputy Secretary of the Treasury Frank Newman, Federal Reserve Chairman Alan Greenspan, SEC Chair Arthur Levitt, and CFTC Chair Mary Schapiro appeared before the Senate Banking Committee, under its new Chair, Senator Alfonse D'Amato.²⁴ For the incoming 104th Congress, Orange County was not a municipal disclosure issue (the SEC's enforcement investigation was little more than a month underway), but a derivatives issue. Unlike prior Congresses, a call to action did not sound. As the New York Times reported, "Federal regulators and members of the Senate Banking Committee expressed little enthusiasm today for putting broad new

²³ When Government Fails: The Orange County Bankruptcy A Policy Summary, pp. 1-4, The Second Annual California Issues Forum After the Fall: Learning from the Orange County Bankruptcy Sacramento, California March 18, 1998 Public Policy Institute of California, accessed at: https://www.ppic.org/wp-content/uploads/content/pubs/op/OP_398OP.pdf July 14, 2025.

²⁴ The purpose of the hearing was "to examine issues involving municipal, corporate, and individual investors in derivative products and the use of highly leveraged investment strategies." Congressional Record-Senate, p. S516, Jan. 5, 1995, accessed at: [CREC-1995-01-05-pt1-PgS516.pdf](https://www.congress.gov/records/senate/1995/01/05/pt1-pgS516.pdf); "Committee held hearings to examine issues involving municipal, corporate and individual investors in derivative products and the use of highly leveraged investment strategies, receiving testimony from Frank N. Newman, Acting Secretary of the Treasury; Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System; Arthur Levitt, Chairman, Securities and Exchange Commission; and Mary L. Schapiro, Chairman, Commodity Futures Trading Commission." Congressional Record Vol. 141, Issue 2, daily digest. Accessed at: [Congressional Record | Congress.gov | Library of Congress](https://www.congress.gov/records/senate/1995/01/05/pt1-pgS516.pdf).

controls on the derivatives market after the heavy losses in Orange County, Calif. But they said a few narrow regulatory changes might be needed.”²⁵ Derivatives were not, inherently, a problem, they thought. Improper use by the wrong end users seemed to be the consensus. Derivatives would continue to grow in use over the coming years, and more than a decade later would play a role in the global financial crisis to come.²⁶

Several years after the Senate Banking Committee hearings, on November 12, 1999, Congress passed the Gramm-Leach-Bliley Act,²⁷ substantially relaxing federal regulation of financial markets, including repeal of the Glass-Steagall Act.²⁸ The Glass-Steagall Act had been passed as part of the Banking Act of 1933 shortly after President Franklin Roosevelt took office and had prevented commercial banks from investing in risky securities.

At the SEC, after a series of Interpretations of the Rule and No-Action Letters by the SEC staff,²⁹ attention to the municipal market would turn from rulemaking to

²⁵ Keith Bradsher, Regulators See No Need for Tougher Rules on Derivatives, New York Times, January 6, 1995, Section D Page 12, accessed at <https://www.nytimes.com/1995/01/06/business/regulators-see-no-need-for-tougher-rules-on-derivatives.html?searchResultPosition=1> July 14, 2025.

²⁶ “The global financial crisis of 2008 was one of the most important economic events of recent decades, with long-lasting consequences. The causes of the crisis were several but there is little doubt that derivatives were one of the factors.” T.V. Somanathan and V. Anantha Nageswaran, [The Role of Derivatives in the Global Financial Crisis of 2008 \(Chapter 9\) - The Economics of Derivatives, in The Economics of Derivatives, Cambridge University Press, 2015.](#)

²⁷ Pub. L. 106-102, 113 Stat. 1338, Nov. 12, 1999.

²⁸ Pub. L. 73-66, 48 Stat. 162, June 16, 1933. Available at: <https://fraser.stlouisfed.org/title/banking-act-1933-glass-steagall-act-991?page=9> on July 15, 2025.

²⁹ In addition to the Interpretive Letters, NABL 1 and NABL 2, mentioned in our last installment, the Staff issued a Letter from Janet W. Russell-Hunter to Hawkins, Delafield & Wood re North Carolina Municipal Power Agency Number 1, dated Oct. 26, 1995; an Exemptive Order regarding Texas Permanent School Fund, granted by letter from Catherine McGuire to the Texas Education Agency, dated Feb. 9, 1996; a Letter from Catherine McGuire to the Subcommittee of Public Securities of the Public Finance Committee of the State and Local Government Law Section of the American Bar Association, dated Mar. 15, 1996, and a Digital Assurance Certification L.L.C. No-Action Letter, dated September 21, 2001, all of which are available as paper copies on request as described at www.investor.gov. (Letters issued before January 1, 2002 are not available on the SEC site. The letters are also available in the Federal Securities Laws of Municipal Bonds Deskbook published by LexisNexis.)

enforcement. Chairman Levitt moved on to another area of his rulemaking agenda, concerns regarding potential conflicts in the accounting profession.³⁰

On August 8, 2001, Harvey L. Pitt succeeded Arthur Levitt as SEC Chairman. Pitt was a former SEC General Counsel and a highly talented and well-regarded securities lawyer. His talents were quickly needed. Within five weeks after the start of his tenure, the 9/11 terrorist attacks occurred. The twin towers of the World Trade Center, in the heart of Wall Street in New York City, were a principal target, and thousands of lives were lost in the attack, of which more than 70% worked in the financial services industry. The SEC New York Regional Office was destroyed, and most of the Wall Street area had no utilities or communication services and was covered in debris. Several billion dollars of physical securities were destroyed. Yet, through close coordination among federal, state, and local governments, the U.S. Securities and Exchange Commission, self-regulatory organizations, and the private securities industry were able to allow the debt markets to re-open on September 13 and the equity and option markets to re-open on September 17.³¹

Before the year would end, on December 2, 2001, Enron Corporation filed for bankruptcy, after news of widespread internal fraud became public in October 2001. At the time, it was the largest bankruptcy reorganization in U.S. history, and it was cited as the biggest audit failure.³² Less than eight months later, on July 21, 2002, WorldCom, Inc. filed for bankruptcy, replacing Enron's bankruptcy as the largest, after internal auditors reported what initially amounted to \$3.8 billion worth of fraudulent entries in WorldCom's books to the company's audit committee and board of directors in June 2002.³³ The "Big Five" accounting firm Arthur Andersen was the audit firm for both

³⁰ See, *Trouble Behind the Numbers*, The Center for Audit Quality Gallery on Corporate Governance, SEC Historical Society, accessed at: https://www.sechistorical.org/museum/galleries/caq/caq05a_trouble_behind_numbers.php on July 21, 2025. Chairman Levitt resigned on February 2, 2001.

³¹ *Markets Close in Wake of Terrorist Attacks*, SEC Historical Society, Timeline 2000, accessed at: <https://www.sechistorical.org/museum/timeline/2000-timeline.php> on July 21, 2025.

³² *Enron Scandal*, Wikipedia, citing Bratton, William W. (May 2002). "Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value". *Tulane Law Review* (1275). New Orleans: *Tulane University Law School*. SSRN 301475.

³³ MCI Inc. Wikipedia, accessed at: https://en.wikipedia.org/wiki/MCI_Inc., citing, Pulliam, Susan; Soloman, Deborah (October 30, 2002), "*How Three Unlikely Sleuths Exposed Fraud at WorldCom: Firm's Own Employees Sniffed Out Cryptic Clues and Followed Hunches*" accessed at: https://www.wsj.com/articles/SB1035929943494003751?gaa_at=eafs&gaa_n=ASWzDAhvVcZiN4P1N3glG8sdEJzavAWUxOwtmW3YNk0oT4VCeAqAyvtaMmmnsVVAQEk%3D&gaa_ts=687e7560&gaa_sig

Enron and WorldCom. The firm surrendered its CPA licenses and its right to practice before the SEC on August 31, 2002.³⁴

Congress responded to the failures of Enron, WorldCom, and their auditor with the Sarbanes-Oxley Act.³⁵ Sarbanes-Oxley did not directly affect municipal securities issuers, but one section, 302, *Corporate responsibility for financial reports*, and the related SEC rule *Certification of Disclosure in Companies' Quarterly and Annual Reports*, adopted shortly thereafter,³⁶ would later be mimicked in SEC enforcement settlements with municipal issuers, which frequently required adoption of disclosure policies and procedures, as initially implemented in the settlement with the City of San Diego.³⁷ Meanwhile, in his speeches, SEC Chairman Christopher Cox called for legislation requiring large, frequent municipal issuers to have “policies and procedures for disclosure that are appropriate for the circumstances.”³⁸ He did the same in a whitepaper sent to Congress.³⁹ The legislation would not come to pass, but other circumstances would provide an opportunity to implement disclosure policies and procedures through enforcement.

As described in our last installment, the SEC used its regulatory authority in 2009 to amend Rule 15c2-12, designating EMMA the sole nationally recognized municipal

[=kArzIGvGjdoLOz7CUOiBsvOvgKWZteGKwPdVSxFPDtvuZQijE1lWUWrcvEJC7bwycl_-7XxaaGwSglqlz60nzQ%3D%3D](#) on July 21, 2025.

³⁴ Andersen Surrenders Licenses To Practice Accounting in U.S., Wall Street Journal, Sept. 2, 2002, accessed at: https://www.wsj.com/articles/SB1030845411754123835?mod=article_inline, July 21, 2025.

³⁵ Pub. L. 107-204, 116 Stat. 745, Sarbanes-Oxley Act, July 30, 2002. See SEC Historical Society, <https://www.sechistorical.org/museum/timeline/2000-timeline.php>.

³⁶ Certification of Disclosure in Companies' Quarterly and Annual Reports, Securities Act Rel. No. 33-8124, Exchange Act Rel. No. 34-46427 (Aug. 29, 2002). Available at: <https://www.sec.gov/rules/final/33-8124.htm>.

³⁷ In the Matter of City of San Diego, Respondent, available at: <https://www.sec.gov/files/litigation/admin/2006/33-8751.pdf>.

³⁸ Chairman Christopher Cox, Integrity in the Municipal Market, (July 18, 2007), available at: <https://www.sec.gov/news/speech/2007/spch071807cc.htm>.

³⁹ See SEC press release 2007-148, July 26, 2007, available at <https://www.sec.gov/news/press/2007/2007-148.htm>, and attached White Paper to Congress, Disclosure and Accounting Practices in the Municipal Securities Market. For a detailed history of the SEC's efforts to have municipal issuers implement disclosure policies and procedures, see Federal Securities Law: What Does the SEC Have in Mind? Putting Disclosure Policies and Procedures in Context, by co-author, Paul S. Maco, in The Bond Lawyer, Vol. 43, No.1, Winter 2019, accessible at: <https://www.nabl.org/wp-content/uploads/2023/01/The-Bond-Lawyer-2019-Winter.pdf>.

information repository (NRMSIR) to create a single central repository for filings made under continuing disclosure agreements (“CDA”s). As described below, it used its regulatory authority again in 2010 to amend Rule 15c2-12 to require a 10-business day event filing deadline in CDAs. As also described below, as EMMA was completing five years of operation, the SEC used its enforcement authority to extend a voluntary initiative for issuers and underwriters to self-report inaccurate statements about their prior compliance with continuing disclosure obligations under the Rule. In exchange for standardized, favorable settlement terms, issuers and underwriters had to adopt disclosure policies and procedures, including training requirements, under the Commission’s MCDC Initiative discussed later in this installment. Before those actions would occur, the subject of structured products and derivatives that attracted attention after the Orange County bankruptcy would return.

The 2010 Amendments to Rule 15c2-12

Darkening Clouds. At the outset of his President’s Column for the March 1, 2008, edition of *The Bond Lawyer*, then NABL President J. Foster Clark gave the following “quick review:”

Actual and feared losses from structured investment products involving subprime mortgage investments (having no connection with the traditional bond market) led to the sudden and unforeseen loss of AAA/Aaa ratings of bond insurers. How and why that happened are subjects for another day. These downgrades, coming at a time of general unease about the nation’s economy, triggered a loss of liquidity that virtually shut down the market for auction rate bonds. Failed auctions have caused interest rates to be reset at “maximum rates” and otherwise credit-worthy issuers have seen their interest rates rise from the neighborhood of 3.5% to as high as 20% without any change in the quality of the underlying credit. And as frequently happens when things start to go wrong in a fragile environment, the cascade effect takes over. The loss of liquidity and investor confidence that began with auction rate securities now seems to have spread to the market for variable rate demand bonds, with reports that billions of dollars of VRDBs are being dumped by money market funds and tender option bond programs. Banks that provided liquidity support for these VRDBs are increasingly being called upon to purchase unremarketed bonds and issuers are forced to pay substantially higher rates for “bank bonds”. And if all of that is not enough, recent revelations of possible criminal charges against 30 employees of financial firms resulting from the government’s 18-month investigation of alleged bid-rigging in the solicitation of

guaranteed investment contracts promise a further taint to an already damaged market. As is true in any time of great volatility, a few shrewd investors will profit while issuers, rating agencies, bond insurers and liquidity banks take it on the chin.⁴⁰

President Clark's column provides a real-time account of the disaster then unfolding, identifying as a source "structured investment products." As Investopedia explains, these "are prepackaged investments that typically combine assets linked to interest rates with one or more derivatives."⁴¹ The same edition of *The Bond Lawyer* also reported SEC Chairman Cox's request to the SEC staff "to present proposed rules to the Commission that begin to address the significant shortcomings that we've identified in the municipal market. The recent financial stress on monoline insurers has heightened the importance of timely and rigorous disclosure that investors can understand. ... Another problem we've seen in the municipal market is the inadequacy of pricing information for floating-rate municipal bonds, such as auction rate securities."⁴²

On Tuesday, March 18, 2008, "pushed to the brink of collapse by the mortgage crisis, Bear Stearns Cos, agreed – after prodding by the federal government – to be sold to J.P. Morgan Chase & Co. for the fire-sale price of \$2 a share in stock, or about \$236 million. Bear Stearns had a stock-market value of about \$3.5 billion as of [the preceding] Friday – and was worth \$20 billion in January 2007."⁴³ That was just the beginning. What followed would become known as "the Great Recession." As the SEC Historical Society Timeline summarized,

Beginning in September, a worldwide financial crisis led the U.S. government to take emergency actions to bail out or nationalize financial institutions exposed to distressed assets. Fannie Mae and Freddie Mac were taken over by the federal government. Lehman Brothers, Inc. filed for Chapter 11 bankruptcy, Merrill Lynch was sold to Bank of America, and Goldman Sachs and Morgan Stanley were transformed into bank holding

⁴⁰ President's Column, *The Bond Lawyer*, Vol. 30, No. 1, March 1, 2008, accessed at: [The-Bond-Lawyer-2008-March.pdf](#), July 21, 2025.

⁴¹ Peter Gratton, An Introduction to Structured Products, Updated May 28, 2025, Investopedia, accessed at: https://www.investopedia.com/articles/optioninvestor/07/structured_products.asp on July 21, 2025.

⁴² Paul S. Maco, Federal Securities Law, *The Bond Lawyer*, n. 29 *supra*, at 15.

⁴³ Robin Sidel, Dennis K. Berman, and Kate Kelly, J.P. Morgan Buys Bear in Fire Sale, As Fed Widens Credit to Avert Crisis, *Wall Street Journal*, March 17, 2008, 11:5p pm ET, accessed at: https://www.wsj.com/articles/SB120569598608739825?mod=Searchresults_pos4&page=1 on July 22, 2025.

companies. Washington Mutual Bank collapsed, the largest bank failure to date in U.S. history. Congress approved the Troubled Assets Relief Program (TARP), a bailout package which would allow the Treasury to buy underperforming mortgage-related securities. However, the U.S. rescue plan failed to slow a global market meltdown. Extreme volatility affected stock markets worldwide, with most suffering record declines. The U.S. unemployment rate rose to over 10% by October 2009, and remained at 9% or higher until the end of 2011. In 2012, government data revealed that the median net worth of American families plunged almost 40% from 2007 to 2010.⁴⁴

As reported in the previous installment of this series, in early December 2008, the SEC approved final amendments to Rule 15c2-12, providing “a single centralized repository, the MSRB, for the electronic collection and availability of information about outstanding municipal securities in the secondary market.”⁴⁵ The MSRB became the sole NRMSIR, and the prior NRMSIRs were decertified. The MSRB had become the destination of annual reports and event notices filed pursuant to the Rule from July 1, 2009, forward. The proposed amendments to Rule 15c2-12 discussed below were released 17 days after the effective date of the December 2008 final amendments.

The Proposing Release. On July 17, 2009, the SEC issued its Proposed Amendment to Municipal Securities Disclosure (the “2009 Proposing Release”),⁴⁶ citing, among other factors, issues in the market for municipal auction rate securities. The 2009 Proposing Release proposed amendments to Rule 15c2-12 that would: (1) increase the categories of events for which notice would be required under CDAs from 11 to 14, add tender offers to the then existing bond calls event category, and expand the scope of tax-related events requiring notice; (2) remove the “materiality” qualification from many of the 11 events; (3) provide a “certain” deadline--10 business days after the event—by which notices must be filed; and (4) remove the exemption from CDA requirements (but not from other requirements of the Rule) for demand securities, i.e., securities sold in denominations of \$100,000 or more and which, at the option of the holder thereof, may

⁴⁴ SEC Historical Society, Timeline, Great Recession, accessed at: <https://www.sechistorical.org/museum/timeline/2000-timeline.php>.

⁴⁵ See Securities Exchange Act Release No. 59062 (December 5, 2008), 73 FR 76104 (December 15, 2008). Available at: <https://www.sec.gov/files/rules/final/2008/34-59062fr.pdf>.

⁴⁶ Securities Exchange Act Release No. 60332 (July 17, 2009), 74 FR 36831 (July 24, 2009). Available at: <https://www.sec.gov/files/rules/proposed/2009/34-60332.pdf>.

be tendered to an issuer of the securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months.⁴⁷

Modification of the Exemption for Demand Securities. The last of the proposed amendments clearly reflected recent market problems, i.e., the inability of investors to obtain information about the credit of underlying obligors after credit enhancers encountered credit issues. However, the proposed amendment posed a structural implementation problem.

As adopted in 1994, under the Exemptions paragraph (d)(1), the entire section (that is Rule 15c2-12) did not apply to securities in authorized denominations of \$100,000 or more described within it, including demand securities described in paragraph (d)(1)(iii).⁴⁸ The proposal deleted that paragraph and added a new paragraph (d)(5) to the Rule,⁴⁹ exempting the same demand securities from the Rule “with the exception of paragraphs (b)(5) and (c) of this section.” (Paragraph (b)(5) required CDA undertakings to provide annual financial information and notices of events; paragraph (c) required broker-dealers to have systems to receive event notices before recommending securities transactions.) Aside from paragraphs (b)(5) and (c),⁵⁰ no other provisions of the Rule would apply.

Under the proposed amendment, a Participating Underwriter of demand securities would need to comply with paragraph (b)(5) by reasonably determining that the issuer or obligated person has entered into a qualifying CDA⁵¹ committing it to submit continuing disclosure documents to the MSRB in accordance with paragraph

⁴⁷ 74 FR 36831, 36835. See also, Maco, Federal Securities Law, *The Bond Lawyer*, Vol. 32, No.3, Fall 2009, pp. 15-18.

⁴⁸ The text of Rule 15c2-12(d)(1)(iii) is: “At the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent.”

⁴⁹ “(5) With the exception of paragraphs (b)(5) and (c) of this section, this section shall not apply to a primary offering of municipal securities in authorized denominations of \$100,000 or more if such securities may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent.” 74 FR 36868.

⁵⁰ All brokers, dealers, and municipal securities dealers would now need to have the procedures in place required under paragraph 15c2-12(c) before recommending the purchase or sale of the demand securities.

⁵¹ A CDA meeting the requirements of paragraph (b)(5) of the Rule.

(b)(5). Paragraph (b)(5)(i)(A) requires that a CDA commit to provide “Annual financial information for each obligated person for whom financial information or operating data is presented *in the final official statement, ...*” For non-demand securities offerings under the Rule, to determine whether a CDA was qualifying under the Rule, a participating underwriter could look to the definitions of “final official statement”⁵² and “annual financial information”⁵³ provided in the Rule. For demand securities offerings, however, the definitions in paragraph (f) are not referenced in paragraph (d)(5). Similarly, paragraph (d)(5) did not include paragraphs (b)(1) through (4), requiring final official statements, so even if the definition of annual financial information (which refers to information included in a final official statement) did apply, the requirement to have a final official statement did not apply, and in the absence of one, the annual financial information to be updated would have been unclear.⁵⁴

At best, without further guidance from the Commission, good faith interpretation of the Rule as amended would appear to require a commitment to update financial or operating data, as defined and described in paragraph (f), included in the offering document, if any, but not to require such inclusion.⁵⁵

Deadline for Submitting Event Notices. At the time of the 2009 Proposing Release, Rule 15c2-12 required CDAs to commit to submit event notices “in a timely manner.”⁵⁶ Based upon press reports of several months delays in filings,⁵⁷ and market emphasis of the importance of timely filing,⁵⁸ the Commission proposed to change the time requirement to “in a timely manner not in excess of ten business days after the occurrence of the event.”⁵⁹ The change would, of course, apply to future, not then existing, CDAs. The Commission acknowledged that “undertakings by issuers and obligated persons that were entered into prior to the effective date of any final

⁵² Rule 15c2-12 (f)(3).

⁵³ Rule 15c2-12 (f)(9). The term annual financial information, as defined in paragraph (f)(9), means “financial information or operating data, provided at least annually, *of the type included in the final official statement* with respect to an obligated person,”

⁵⁴ In addition to paragraphs (b)(1)-(4) and (f), as proposed, paragraphs (a), (d), (e), and (g) were also excluded under new paragraph (d)(5).

⁵⁵ Cf. Rule 10b-5.

⁵⁶ See text of 1994 amendments to the Rule at 59 FR 59590, 59610 (November 17, 1994).

⁵⁷ 74 FR 36837, n. 69.

⁵⁸ 74 FR 36838, n. 70.

⁵⁹ 74 FR 36868.

amendments would be different from those entered into on or after the effective date of any final amendments.”⁶⁰

Materiality Qualifier for Event Notices. At the time of the 2009 Proposing Release, all 11 notice events were qualified by materiality, i.e., notice was not required for immaterial events. The Commission proposed to delete the materiality qualifier from six of the 11 events, stating notice of the events should “always should be available because of their importance to investors and other market participants.” The six events were:

- (1) principal and interest payment delinquencies with respect to the securities being offered;
- (2) unscheduled draws on debt service reserves reflecting financial difficulties;
- (3) unscheduled draws on credit enhancements reflecting financial difficulties;
- (4) substitution of credit or liquidity providers, or their failure to perform;
- (5) defeasances; and
- (6) rating changes.

The Commission observed that removal of the materiality qualifier “should not alter greatly the current practice ... because of the significant nature of these events and their importance to the marketplace.”⁶¹ As proposed, new events 13, the “consummation of a merger,” and 14, “appointment of a successor or additional trustee” were qualified for materiality.⁶²

Notices Regarding Adverse Tax Events. At the time of the 2009 Proposing Release, event (6) read “[a]dverse tax opinions or events affecting the tax-exempt status of the security,” qualified by the phrase “if material,” which then preceded all 11 events. The Commission’s proposal would revise event (6) to read “Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax-exempt status of the securities, or other events affecting the tax-exempt status of the security.”⁶³ As

⁶⁰ 74 FR 36835 at n. 36, 36846, *II F. Effective Date and Transition*.

⁶¹ 74 FR 36839.

⁶² 74 FR 36868.

⁶³ *Id.*

proposed, the then existing materiality modifier would be dropped, replaced with the more specific description of actions the Commission deemed material.

Additional Events. The 2009 Proposing Release also proposed four new events among those of which notice must be agreed to be provided to the MSRB:

1. **Tender Offers.** Existing notice event (8), “Bond calls,” would be amended to add “if material, and tender offers.” “If material” would qualify “bond calls” but not “tender offers.” The Commission explained, “notice of the existence of tender offers for municipal securities would help investors to be better able to protect themselves from misrepresentations and fraud, including deciding whether to tender their holdings to the issuer or its representative, and assist brokers, dealers and municipal securities dealers to carry out their obligations. . . . communication of the existence of a tender offer to municipal securities investors is important to assist each investor to make an informed, timely decision whether or not to tender ... the recent events in the market for ARS could be seen as an example of the need to provide timely notice within ten business days of a tender offer.”
2. **Insolvency Events.** A new notice event would be added as event (12), “Bankruptcy, insolvency, receivership or similar event of the obligated person,” together with a note listing events subsumed by event (12) and that, like the new event, would be part of the regulation §240.15c2-12 Municipal Securities Disclosure.⁶⁴ The Commission explained that, “Although issuers and other obligated persons of municipal securities rarely are involved in bankruptcy, insolvency, receivership or similar events, the Commission notes that the occurrence of such events, even if rare, can significantly impact the value of the municipal securities. Information about these events is important to investors and other market participants [*cit. om.*], and knowledge of the bankruptcy, insolvency, receivership or similar event involving an issuer or other obligated person would

⁶⁴ 74 FR 36868: “(12) Bankruptcy, insolvency, receivership or similar event of the obligated person;

Note to paragraph (b)(5)(i)(C)(12): For the purposes of the event identified in paragraph (b)(5)(i)(C)(12), the event is considered to occur when any of the following occur: the appointment of a receiver, fiscal agent or similar officer for an obligated person in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the obligated person, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan or reorganization, arrangement or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the obligated person.”

allow investors to make informed decisions about whether to buy, sell or hold the municipal security and help prevent fraud [*cit. om.*].”⁶⁵

3. **Merger, Consolidation, Acquisition, and Sale of All or Substantially All Assets.**

A new notice event (13) would be added: “The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.”⁶⁶ The Commission stated that such information is important, as such events “may signal that a significant change in the obligated person’s corporate structure could occur or has occurred” and “investors may want to have information about the identity and financial stability of the obligated person that would be responsible, following such event, for payment of a municipal security. Further, municipal security holders generally may wish to know about the obligated person’s creditworthiness, particularly its ability to support payment of the security following such event”⁶⁷

4. **Change in Trustee.** A new notice event would be added as event (14): “Appointment of a successor or additional trustee or the change of name of a trustee, if material.”⁶⁸ The Commission explained its belief “in the importance of an investor’s ability to learn of a material change in the trustee’s identity, given the significant function and role of the trustee for the holders of the municipal security. ... Although the identity of the trustee may have little or no influence on a decision whether to buy or sell a security under normal circumstances, bondholders would need to know the identity of a trustee to be able to contact the trustee for various reasons, particularly when an issuer or other obligated person may be experiencing financial difficulty.”⁶⁹ As the Commission explained, “it is possible for a name change by a trustee to be so minor that an event notice would not be required. For example, a name change such as ‘ABC National Bank and Trust Company of XYZ,’ to ‘ABC National Bank and Trust Company’ may not

⁶⁵ 74 FR 36844.

⁶⁶ 74 FR 36838.

⁶⁷ 74 FR 36845.

⁶⁸ *Id.*

⁶⁹ 74 FR 36845-46.

be material in the absence of other factors, such as a change of the location at which the trustee can be reached.”⁷⁰

Interpretive Guidance for Underwriters. The 2009 Proposing Release includes a Commission interpretation of the duties of underwriters with respect to CDAs. The Commission noted that “municipal securities industry participants have expressed concern that some municipal issuers and other obligated persons may not consistently submit continuing disclosure documents, particularly event notices and failure to file notices, in accordance with their undertakings in continuing disclosure agreements.”⁷¹ The Commission then reaffirmed its previous interpretations of the obligations of municipal securities underwriters under the antifraud provisions of the federal securities laws, citing prior regulatory releases beginning with the 1988 Proposing Release 20 years earlier, and provided additional guidance regarding CDA compliance.

The Commission noted that, in a 1994 release adopting prior amendments to Rule 15c2-12, it had stated that “it is doubtful that an underwriter could form a reasonable basis for relying on the accuracy or completeness of the issuer’s or obligated person’s ongoing disclosure representations, if such issuer or obligated person has a history of persistent and material breaches or if it has not remedied such past failures by the time the offering commences.”⁷² After noting that the Rule requires underwriters to obtain and review a final official statement and that the Rule’s definition of “final official statement” requires “a description of ... any instances in the previous five years in which each person specified ... failed to comply, in all material respects, with any previous undertakings ...,” the Commission stated:

[i]f the underwriter finds that the issuer or obligated person has on multiple occasions during the previous five years,¹⁴³ failed to provide on a timely basis continuing disclosure documents, including event notices and failure to file notices, as required in continuing disclosure agreements for prior offerings, it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would

⁷⁰ Id., n. 122. In the 2010 Adopting Release, the Commission added: “On the other hand, when a trustee transfers all or part of its trust operations to a different organization, on account of a merger or otherwise, the Commission believes that it is important for a bondholder to be able to determine the identity of the new trustee.” 75 FR 33100, 33122.

⁷¹ Citing comments made eight years earlier by the participants at the 2001 SEC Municipal Market Roundtable—Secondary Market Disclosure for the 21st Century, available at <https://www.sec.gov/info/municipal/roundtables/thirdmuniround.htm>. See 74 FR 36847.

⁷² 74 FR 36847-36848.

provide such information under a continuing disclosure agreement in connection with a subsequent offering. In the Commission's view, it is doubtful that an underwriter could meet the reasonable belief standard without the underwriter affirmatively inquiring as to that filing history.¹⁴⁴ The underwriter's reasonable belief would be based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking. If the underwriter finds that the issuer or obligated person has failed to provide such information, the underwriter should take that failure into account in forming its reasonable belief in the accuracy and completeness of representations made by the issuer or obligated person.⁷³

Note 144 in the text above states: "The Commission notes that, in light of the adoption of the 2008 Amendments and their effective date of July 1, 2009, for disclosures made on or after July 1, 2009, an underwriter could verify that the information has been submitted electronically to the MSRB."

The 2010 Adopting Release. On May 26, 2010, the SEC released its Amendment to Municipal Securities Disclosure⁷⁴ (the "2010 Adopting Release"), approving, "substantially as proposed, with minor modifications, the amendments proposed by the 2009 Proposing Release, after discussing and largely dismissing comments received.⁷⁵ The 2010 Adopting Release also included interpretive guidance that is substantially the same as in the 2009 Proposing Release.⁷⁶

Modification of the Exemption for Demand Securities. The 2010 Adopting Release makes two changes to the proposed imposition of CDA requirements on offerings of demand securities:

First, it reverses the wording of the exemption. The proposed amendment would have stated that the Rule does not apply to demand securities except for the CDA provisions (and duty of brokers to monitor filings).⁷⁷ As adopted, the amendment states

⁷³ 74 FR 36948.

⁷⁴ Amendment to Municipal Securities Disclosure, 17 CFR Parts 240 and 241, Release No. 34-62184A (May 26, 2010), 75 FR 33100 (June 10, 2010). Available at: <https://www.sec.gov/files/rules/final/2010/34-62184a.pdf>.

⁷⁵ 75 FR 33100.

⁷⁶ 75 FR 33101.

⁷⁷ Respectively, paragraphs (b)(5) and (c) of the Rule.

that it does apply to demand securities with the exception of paragraphs (b)(1) through (b)(4). The drafting change clarified that paragraph (f), Definitions, did apply to CDAs now required for demand securities, resolving some uncertainties raised by the 2009 Proposing Release discussed above, but did not address the use of the final official statement as the baseline for annual financial information to be provided when the requirements of a final official statement did not apply to demand securities.⁷⁸

Second, although the amendment generally applies to any primary offering of demand securities (including a remarketing that is a primary offering) occurring on or after December 1, 2010 (the compliance date of the amendments),⁷⁹ the 2010 Adopting Release added a “limited grandfather provision” for remarketing of currently outstanding demand securities. “Specifically, the continuing disclosure provisions will not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the compliance date of the amendments and that continuously have remained outstanding [*cit.om.*] in the form of demand securities.”⁸⁰ The Commission added this grandfather provision because of possible confusion as to whether a routine remarketing of outstanding demand securities would require compliance with the CDA provisions.⁸¹

Deadline for Submitting Event Notices. Eighteen of the twenty-five commenters provided views on this proposal. The majority opposed the proposal, with some opposing any outside time frame, among them NABL and the Government Finance Officers Association (GFOA), while others objected to the proposed ten day time period,

⁷⁸ In note 57 in the 2010 Adopting Release, the Commission said it was slightly modifying the text of paragraph (d)(2)(B)(5) of the Rule from the version in the Proposing Release to clarify that demand securities remain exempt from paragraphs (b)(1)–(4) of the Rule, consistent with the Commission’s description and discussion of the amendment in the Proposing Release. 75 FR 33104.

⁷⁹ *Id.*

⁸⁰ *Id.* As amended, paragraph (d)(2)(B)(5) of the Rule, after applying the CDA provisions to demand securities, added a proviso: “paragraphs (b)(5) and (c) shall not apply to such securities outstanding as of November 30, 2010 for so long as they continuously remain in authorized denominations of \$100,000 or more and may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent.”

⁸¹ In note 41 of the 2010 Adopting Release, the Commission noted: “Making a determination concerning whether a particular remarketing of demand securities is a primary offering by the issuer of the securities requires an evaluation of relevant provisions of the governing documents, the relationship of the issuer to the other parties involved in the remarketing transaction, and other facts and circumstances pertaining to such remarketing, particularly with respect to the extent of issuer involvement.” 75 FR 33103.

particularly in the context of certain events and the use of “occurrence” rather than “discovery”.⁸² The Commission, nonetheless, adopted the amendment as proposed, explaining that “the ten business day time frame provides a reasonable amount of time for issuers to comply with their undertakings, while also allowing event notices to be made available to investors, underwriters, and other market participants in a timely manner.”⁸³ The Commission also adopted a substantially similar revision to the limited undertaking in paragraph (d)(2)(ii)(B) of the Rule.⁸⁴

Materiality Determinations Regarding Event Notices. The Commission adopted the proposal to remove the materiality qualification from the six events identified in the 2009 Proposing Release: (1) Principal and interest payment delinquencies with respect to the securities being offered; (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; (9) defeasances; and (11) rating changes.⁸⁵ It explained “each of these events by its nature is of such importance to investors that it should always be disclosed. In particular, these events are likely to have a significant impact on the value of the underlying securities. Moreover, the Commission believes that notice of these events should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.”⁸⁶ A materiality qualifier was retained for the other notice events: (2) non-payment related defaults; (7) modifications to rights of security holders; (8) bond calls; and (10) the release, substitution, or sale of property securing repayment of the securities.⁸⁷

Notices Regarding Adverse Tax Events. The Commission adopted, with minor modification, the proposed amendment to specify material adverse tax events in event (6) of the Rule.’ The only modification was to replace the phrase “tax exempt

⁸² 75 FR 33109, nn. 125, 126, and 127.

⁸³ 75 FR 33111.

⁸⁴ 75 FR 33109.

⁸⁵ The Commission discussed several comments regarding the rating change event, including deleting the event completely, limiting reporting to actual knowledge of the issuer, and excluding changes resulting from rating changes for bond insurers and credit enhancers (about which issuers are generally not notified), but nevertheless adopted the deletion of the materiality condition as proposed for this event.

⁸⁶ 75 FR 33112.

⁸⁷ 75 FR 33115. For clarity, prior to the 2010 amendments, the phrase “if material” preceded the list of eleven events. Its removal from that position necessitated its addition in the phrasing of the events that would continue to be subject to a materiality determination.

status” with “tax status” to “focus the disclosure on information relevant to investors, whether the municipal security is taxable or tax-exempt.”⁸⁸

Addition of Events. The Commission adopted, as proposed, amendments adding four new events to paragraph (b)(5)(i)(C) of the Rule regarding tender offers, insolvency events, corporate consolidations and changes in trustees. The Commission stated its belief that the amendments are justified by the transparency benefits that will result to investors, broker dealers, analysts, and others.⁸⁹

⁸⁸ In pages 33115 to 33118, the Commission provides a detailed explanation of the phrasing of the amendment, noting, among other matters, that all tax audits are not equal, that it “continues to believe that ‘an event affecting the tax-exempt status of the security’ can include an audit (and thus an audit should be the subject of an event notice when it is material), it agrees with the comment that not all audits indicate a risk to the security’s tax status. ... Thus, a determination by the issuer or obligated person in possession of the facts concerning the audit of a particular bond issue regarding whether a particular audit is material (and, thus, is an “other material event affecting the tax status of the security”) is appropriate. In contrast, proposed and final determinations of taxability and Notices of Proposed Issue, which are determinations by the IRS that the IRS believes that a security is or may be taxable and has begun a formal administrative process in that regard, suggests that there could be a significant risk to the tax status of that security.[*cit.om.*] Accordingly, the Commission believes that proposed and final determinations of taxability and Notices of Proposed Issue are of such importance to investors that they always should be disclosed pursuant to a continuing disclosure agreement.” 75 FR 33116. “[T]he Commission believes that disclosure in all instances of proposed and final determinations of taxability, Notices of Proposed Issue, and other material events affecting the tax status of a security, such as material audits, would help apprise investors of important information with respect to these securities.” 75 FR 33117. The Commission explains that it is adopting, for purposes of the event, the phrase “tax status,” rather than “tax-exempt status,” of the security to clarify the applicability of the event to bonds authorized by the American Recovery and Reinvestment Act of 2009, which authorized the issuance of Build America Bonds and other taxable municipal bonds with associated tax credits or direct federal payments to the issuer (collectively, “ARRA Bonds”). As explained in n. 251, the American Recovery and Reinvestment Act of 2009 (the “ARRA”) introduced three new categories of tax advantaged *taxable* bonds—Build America Bonds (I.R.C. § 54AA), Qualified School Construction Bonds (I.R.C. § 54F), and Recovery Zone Economic Development Bonds (I.R.C. §§ 1400U–2). In addition, the ARRA expanded the authority to issue *taxable* New Clean Renewable Energy Bonds (I.R.C. § 54C), Qualified Energy Conservation Bonds (I.R.C. § 54D) and Qualified Zone Academy Bonds (I.R.C. § 54E). This followed the introduction of taxable Qualified Forestry Conservation Bonds (I.R.C. § 54B) in the Heartland, Habitat, Harvest, and Horticulture Act of 2008. Taxpayers who hold such bonds on a “credit allowance date” generally are allowed a specified credit against their federal income tax liability (with the notable exceptions being Build America Bonds for which the issuer has elected to receive payments from the U.S. Treasury under I.R.C. § 54AA(g)(1), referred to as “Direct-Pay BABs,” and Recovery Zone Economic Development Bonds). In addition, the tax credits may be “stripped” from the underlying taxable bonds (see I.R.C. §§ 54A(i), 54AA(f)(2)), either by the issuer or by a holder in the secondary market, and sold to different investors pursuant to Treasury Department regulations to be issued. 75 FR 33117.

⁸⁹ 75 FR 33118-22.

Interpretive Guidance for Underwriters. In the 2010 Adopting Release, the Commission repeated the guidance for underwriters that it provided in the 2009 Proposing Release, then discussed comments received about the guidance. In particular, commenters (NABL, the Securities Industry and Financial Markets Association (SIFMA), and the Regional Bond Dealers Association) had “pointed to the difficulties underwriters face in examining event disclosures for sufficiency. The commentors also noted that because underwriters are expected to examine disclosures over a five-year period preceding new offerings, even though EMMA is up and running, underwriters need to continue to depend on the Nationally Recognized Municipal Securities Information Repository (“NRMSIR”) network for such information, which entails searching for various filings in each of the NRMSIRs. [cit.om.] Consequently, the commenters suggested that underwriters be permitted to rely on representations by issuers or obligated persons that they are in compliance with previous disclosure commitments as a basis for forming a reasonable determination that such persons would comply going forward.”⁹⁰

The Commission responded that it “believes that the interpretation included in the Proposing Release is warranted, and it reiterates that interpretation in this Adopting Release.” But in response to comments, the Commission made the following addition to its guidance:

The Commission acknowledges that it may not be possible in some cases for an underwriter independently to determine whether some events, for which an event notice is necessary, have occurred.⁹¹ In order to obtain this information, an underwriter may take steps, such as asking questions of an issuer and, where appropriate, obtaining certifications from an issuer, obligated person or other appropriate party about facts, such as the occurrence of specific events listed in paragraph (b)(5)(i)(C) of the Rule (without regard to materiality), that the underwriter may need to know in order to form a reasonable belief in the accuracy and completeness of an issuer’s or obligated person’s ongoing disclosure representations. However, as discussed above, the underwriter may not rely solely upon the representations of an issuer or obligated person concerning the materiality of such events or that it has, in fact, provided annual filings or event notices to the parties identified in its continuing disclosure

⁹⁰ 75 FR 33124-25.

⁹¹ In n. 359, inserted at this point in the text, the Commission observed “Some of such information, such as the receipt of proposed or final determinations of taxability, may be known solely to the issuer or obligated person.”

agreements (i.e., NRMSIRs, MSRB, and State Information Depositories).⁹² Instead, an underwriter should obtain evidence reasonably sufficient to determine whether and when such annual filings and event notices were, in fact, provided.⁹³ The underwriter therefore must rely upon its own judgment, not solely on the representation of the issuer or obligated person, as to the materiality of any failure by the issuer or obligated person to comply with a prior undertaking.⁹⁴

The Commission's addition was not the relief hoped for. Rather, the SEC made clear to underwriters that they could not simply take an issuer or obligated person's word (except possibly as to whether an event had occurred without qualification for materiality) or even certifications for compliance. They needed evidence beyond written statements.

In the 2006 Congressional elections, after 12 years in the minority in one or more houses of Congress, the Democrats regained control of both the House and Senate. In the 2008 elections, along with electing a Democratic President, Barack Obama, the Democrats increased their majorities in the House and the Senate as the financial crisis approached its darkest hour.

Dodd-Frank Wall Street Reform and Consumer Protection Act

Background. In the first decade of the current century, many consumers bought homes, goods, and services on credit, enabled by a period of low interest rates. Many

⁹² In n. 360, inserted at this point in the text, the Commission added "Therefore, the underwriter may not likewise rely solely on a written certification from an issuer or obligated person that it has provided all filings or notices."

⁹³ In n. 361, inserted at this point in the text, the Commission added: "For example, for annual filings and event notices due prior to July 1, 2009, an underwriter could reasonably rely upon information obtained from NRMSIRs and SIDs. In addition, an underwriter could rely upon other evidence that such information was provided, such as a certified copy of the annual filing or an event notice from a responsible issuer official, representative of an obligated person, or a designated agent and a receipt from a delivery service or other evidence that the information had, in fact, been sent. For filings made on or after July 1, 2009, however, an underwriter should examine the filings available on the MSRB's EMMA system. If the underwriter finds that some annual filings or event notices appear to be missing, it may request the issuer official or representative of an obligated person to provide a written certification and evidence showing whether and when such information was provided to the MSRB."

⁹⁴ N. 362, inserted at this point in the text, states: "The Commission notes that the definition of "final official statement" in the Rule provides for the inclusion of any instances in the previous five years in which each person specified pursuant to Rule 15c2-12(b)(5)(ii) failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in Rule 15c2-12(b)(5)(i)."

banks made high risk “subprime” mortgage loans with adjustable rates, enabled by securitizations that transferred the risk of repayment to investors searching for higher rates of return, who in turn mitigated risks through newly developed credit default swaps. Credit rating agencies assigned ratings to the securitizations that were, in retrospect, undeserved. Buoyed by easy access to credit, buyers bid up the price of real estate, creating a bubble. The bubble burst in 2007. As a result, securities firms Bear Stearns & Co. and Lehman Brothers, Inc. became insolvent, the former experiencing a forced sale (with assistance from the Federal Reserve Bank) to J.P. Morgan, as described above, and the latter being forced to liquidate, and Merrill Lynch & Co. experienced an arranged sale to Bank of America. To prevent another Great Depression, Congress passed the Emergency Economic Stabilization Act, creating the Troubled Asset Relief Program (TARP) to save financial institutions and restore credit and appropriated \$700 billion for that purpose. A depression was avoided, at great expense to the U.S. Treasury, but the Great Recession of 2008 ensued, resulting in broad support for remedial legislation to prevent its causes from reoccurring.⁹⁵

Overview. The Dodd-Frank Wall Street Reform and Consumer Protection Act⁹⁶ was enacted in July 2010. It overhauled federal regulation of the financial services industry in the aftermath of the Great Recession. While the Dodd-Frank Act was not focused on the municipal securities market, it did include one provision aimed at it and other provisions affecting it. The Dodd-Frank Act provided for the regulation of swaps, the funding and study of the Government Accounting Standards Board (GASB), the regulation of rating agencies, and a study of the municipal securities market by the Government Accountability Office (GAO). Importantly, it (a) provided for registration and regulation of municipal securities advisors, (b) expanded MSRB authority, added protection of issuers to the MSRB’s mandate, and modified MSRB governance, (c) firmly established the SEC’s Office of Municipal Securities (OMS), (d) provided for enhanced regulation of rating agencies, and (e) imposed new requirements on securitizations, including in some cases those conducted by or on behalf of municipal issuers.

Regulation of Municipal Advisors. The Dodd-Frank Act requires municipal advisors to register with the SEC and MSRB, to comply with MSRB rules, and to observe a fiduciary duty to municipal entities. Prior to adoption of the Dodd-Frank Act, only

⁹⁵ P. Scott Corbett, Volker Janssen, John M. Lund, Todd Pfannestiel, Sylvie Waskiewicz, Paul Vickery, OpenStax *U.S. History*, 32.2 (2014), accessible for free at <https://openstax.org/books/us-history/pages/32-2-the-domestic-mission>.

⁹⁶ Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 12 U.S.C. § 5301, §§ 5481-5603, and in laws amended (Title X); and 12 U.S.C. § 5481 note, 15 U.S.C. § 1601 note, § 1602, and § 1631 et seq. (Title XIV).

financial advisors that were also registered broker-dealers or municipal securities dealers were subject to MSRB rules, putting them at a competitive disadvantage to independent advisors, who were not subject to, among MSRB rules, restrictions on political contributions.

The Dodd-Frank Act defined “municipal advisors”⁹⁷ to include any person (other than an issuer or its employees) that advises (a) either a municipal entity (i.e., a state, political subdivision of a state, or municipal corporate instrumentality of a state or of a political subdivision of a state)⁹⁸ or a person committed by contract or other arrangement to support the payment of all or part of an issue of municipal securities (obligated person)⁹⁹ (b) with respect to the issuance of municipal securities or municipal financial products (i.e., municipal derivatives, guaranteed investment contracts, and investment strategies).¹⁰⁰ The term also includes any person who solicits a municipal entity for business on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser in connection with municipal financial products or the issuance of municipal securities, but it specifically excludes underwriters, registered investment advisers, registered commodity trading advisors, attorneys providing advice of a traditional legal nature, and engineers providing engineering advice. The Dodd-Frank Act also authorizes the SEC to exempt any class of municipal advisors from its provisions, if the SEC finds the exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B.¹⁰¹

The SEC subsequently interpreted these provisions and exercised its exemptive authority through rulemaking. After adopting temporary rules for the registration of municipal advisors,¹⁰² the SEC proposed final rules for comment.¹⁰³ After reviewing comments, the SEC adopted final rules, generally effective in January 2014.¹⁰⁴ In addition to clarifying the statutory definition of municipal advisor and exemptions for underwriters, registered investment and commodity swap advisors, attorneys, and

⁹⁷ Securities Exchange Act § 15B(e)(4), 15 U.S.C. § 78o-4(e)(4).

⁹⁸ See SEC Rule 15Ba1-1(g), 17 CFR § 240.15Ba1-1(g).

⁹⁹ Securities Exchange Act § 15B(e)(10), 15 U.S.C. § 78o-4(e)(10).

¹⁰⁰ Securities Exchange Act § 15B(e)(5), 15 U.S.C. § 78o-4(e)(5).

¹⁰¹ Securities Exchange Act § 15B(a)(4), 15 U.S.C. § 78o-4(a)(4).

¹⁰² Exchange Act Release No. 34-62824 (September 1, 2010).

¹⁰³ Exchange Act Release No. 34-63576 (December 20, 2010).

¹⁰⁴ Exchange Act Release No. 34-70462 (September 20, 2013), adopting Rules 15Ba1-1 through 15Ba1-8 and 15Bc4-1, 17 CFR §§ 240.15Ba1-1 through 240.15Ba1-8, 240.15Bc4-1.

engineers, the final rules exempted advice given in response to RFPs and RFQs, advice to a municipal entity or obligated person represented by an independent registered municipal advisor (IRMA), advice from swap dealers, accountants, and other professionals, and advice from banks concerning accounts, credit extensions, or sweep account investments or acting as trustees, all under specified conditions. In addition, the SEC staff posted (and subsequently updated) frequently asked questions (FAQs) with its responses to provide further guidance.¹⁰⁵

The Dodd-Frank Act subjects municipal advisors to antifraud provisions applicable to municipal securities dealers¹⁰⁶ and also authorizes the MSRB to regulate municipal advisors and directly imposes a federal fiduciary duty on municipal advisors when they advise municipal entities:

A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.¹⁰⁷

The Dodd-Frank Act requires the MSRB to adopt rules governing advice by municipal advisors with respect to municipal financial products and the issuance of municipal securities. The rules must be designed to protect investors, municipal entities, and obligated persons, must provide for continuing education and periodic examination of municipal advisors, and must prescribe professional standards and means reasonably designed to prevent acts, practices, and courses of business inconsistent with a municipal advisor's fiduciary duty to municipal entities.¹⁰⁸ The MSRB subsequently adopted business conduct and other rules applicable to municipal advisors.¹⁰⁹

¹⁰⁵ SEC Office of Municipal Securities, Registration of Municipal Advisors (last reviewed or updated January 17, 2025), available at <https://www.sec.gov/about/divisions-offices/office-municipal-securities/registration-municipal-advisors>.

¹⁰⁶ Securities Exchange Act § 15B(a), (c), 15 U.S.C. § 78o-4(a), (c).

¹⁰⁷ Securities Exchange Act § 15B(c)(1), 15 U.S.C. § 78o-4(c)(1).

¹⁰⁸ Securities Exchange Act § 15B(b)(2), 15 U.S.C. § 78o-4(b)(2).

¹⁰⁹ See MSRB Rules G-8 (books and records), G-10 (client education and protection), G-17 (fair dealing), G-37 (political contributions), G-40 (advertising), G-42 (duties), G-44 (supervision and compliance), and G-46 (solicitor advisors).

MSRB Governance and Authority. The Dodd-Frank Act modified governance of the MSRB. As originally established, the MSRB was a "self-regulatory" authority, in that a majority of the board was required to be brokers, dealers, or municipal securities dealers. As modified by the Dodd-Frank Act, eight (a majority) of the 15-member board are required to be unaffiliated with any dealer or municipal advisor (i.e., any regulated entity), including at least one representative of each of issuers, investors, and the general public, and the balance must include at least one representative of each of non-bank dealers, bank dealers, and municipal advisors.¹¹⁰ In addition, although enforcement of MSRB rules remained with FINRA and the SEC, the Dodd-Frank Act authorizes the MSRB to assist them in examinations and enforcement actions¹¹¹ and requires that they meet at least twice a year to share compliance observations and their interpretation of MSRB rules.¹¹²

Office of Municipal Securities. While the SEC's initial Office of Municipal Securities (OMS), led by Paul Maco, an author of this series, reported directly to SEC Chairman Levitt, it had subsequently become part of the Division of Trading and Regulation, and effectively demoted. The Dodd-Frank Act re-established by legislation an Office of Municipal Securities within the Commission (to be "staffed sufficiently" and led by a director who reports directly to the chairman of the SEC) to administer rules related to municipal securities and coordinate rulemaking and enforcement actions with the MSRB.¹¹³

Rating Agencies. The Dodd-Frank Act substantially increased federal regulation of securities credit rating agencies, after a Congressional finding that the inaccuracy of their ratings on structured financial products "contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy in the United States and around the world."¹¹⁴ In addition to creating an Office of Credit Ratings within the SEC with examination and enforcement authority,¹¹⁵ it requires rating agencies to adopt and publish ratings and rating methodologies in accordance with rules promulgated by the SEC.¹¹⁶ (Published

¹¹⁰ Securities Exchange Act § 15B(b)(1), 15 U.S.C. § 78o-4(b)(1).

¹¹¹ Securities Exchange Act § 15B(b)(4), 15 U.S.C. § 78o-4(b)(4).

¹¹² Securities Exchange Act § 15B(b)(5), 15 U.S.C. § 78o-4(b)(5).

¹¹³ Pub. L. No. 111-203, 124 Stat. 1376, sec. 979, 15 U.S.C. § 78o-4a.

¹¹⁴ Pub. L. No. 111-203, 124 Stat. 1376, sec. 931(5).

¹¹⁵ Securities Exchange Act § 15E(p), 15 U.S.C. § 78o-7(p).

¹¹⁶ Securities Exchange Act § 15E(q and r), 15 U.S.C. § 78o-7(q) and (r).

rating reports and methodologies provide a source of guidance about facts that may be material to an investment in municipal securities.) In addition, the Dodd-Frank Act authorized SEC enforcement procedures and penalties against rating agencies on the same grounds as for public accounting firms.¹¹⁷

Securitizations. Since securitizations, including particularly the divorce of credit risk and lending decisions that they enabled, were a principal cause of the Great Recession, the Dodd-Frank Act understandably imposed new restrictions on securitizations, which it referred to as “asset-backed securities.” It defined “asset-backed security” broadly as “a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset.”¹¹⁸ The Dodd-Frank Act mandates SEC rules to require issuers of (or persons who provide the assets for) asset-backed securities to retain at least a specified amount (generally not less than 5%) of the credit risk they present, unless the underlying financial assets are qualified residential mortgages or meet specified credit standards.¹¹⁹ Municipal securities (e.g., conduit obligations and mortgage revenue bonds) were not specifically excluded from the risk retention requirement, but the SEC was authorized by rule to exempt in whole or part any security issued or guaranteed by a state or any of its political subdivisions or public instrumentalities that is exempt from registration under Section 3(a)(2) of the Securities Act of 1933, if consistent with the public interest and the protection of investors.¹²⁰ The Dodd-Frank Act required the SEC to adopt rules to require issuers of registered asset-backed securities to disclose information about the underlying financial assets.¹²¹

¹¹⁷ Securities Exchange Act § 15E(m), 15 U.S.C. § 78o-7(m).

¹¹⁸ Securities Exchange Act § 3(a)(7), 15 U.S.C. § 78c(a)(77).

¹¹⁹ Securities Exchange Act § 15G, 15 U.S.C. § 78o-11.

¹²⁰ Securities Exchange Act § 15G(c)(1)(G)(iii), 15 U.S.C. § 78o-11(c)(1)(G)(iii). Municipal securities were not excluded despite the request of a group of organizations (including NABL) that they be excluded. See Letter, Council of Infrastructure Financing Authorities, et al. to Chairman Dodd and Chairman Frank (June 21, 2010). In December 2024, the SEC published its final rule on credit risk retention and provided the exemption for securities exempt from registration under Section 3(a)(2) of the Securities Act of 1933. See <https://www.federalregister.gov/documents/2014/12/24/2014-29256/credit-risk-retention>.

¹²¹ Securities Act of 1933 § 7(c), 15 U.S.C. § 77g(c).

The Municipalities Continuing Disclosure Cooperation Initiative

The MCDC Initiative was a self-reporting enforcement initiative launched by the SEC in 2014 to improve compliance with CDAs.

Background. In March 2014, EMMA was approaching its fifth anniversary. The “time-limited” need for underwriters to rely on NRMSIRs for disclosure made prior to the creation of EMMA was about to end. On July 1, 2014, an underwriter for an offering by an issuer would be able to look at EMMA alone to check what annual financial information and event filings the issuer had filed within the last five years in accordance with its existing continuing disclosure agreements, as part of its due diligence in forming “a reasonable belief in the accuracy and completeness of an issuer’s or obligated person’s ongoing disclosure representations”¹²² concerning CDA compliance. CDAs entered into on or after December 1, 2010, would include the “timely manner not in excess of ten business days after the occurrence” filing timeframe for event notices under the Rule.

These changes laid the groundwork for a widespread enforcement initiative that would address longstanding market complaints about non-compliance with continuing disclosure agreements¹²³ and enable the imposition of undertakings by issuers and obligated persons to establish disclosure policies and procedures similar to those required of corporate issuers under the Sarbanes Oxley Act, and imposed in issuer-related disclosure settlements with the SEC since the 2006 settlement with the City of San Diego.¹²⁴ Two settled enforcement proceedings in July, 2013, *In the Matter of West Clark Community Schools*,¹²⁵ and *In the Matter of City Securities Corporation and Randy*

¹²² 75 FR 33125. The expanded interpretive guidance intended to assist municipal securities brokers, dealers, and municipal securities dealers in meeting their obligations under the antifraud provisions of the federal securities laws became effective June 10, 2010, as stated in the 2010 Adopting Release.

¹²³ See, e.g., 2001 SEC Municipal Market Roundtable, *supra* n. 60; 74 FR 36832, 36837 at n. 69. The Commission had previously observed: “Market participants have indicated that many issuers comply with their written obligations under their continuing disclosure agreements for a period of time, but that over time, as a result of staffing changes or otherwise, compliance with these contractual obligations weakens. After the passage of time, compliance may be limited solely to annual audited financial statements, and the other ongoing financial information or operating data may not be provided ... One market participant stated that it is well known that many issuers simply do not comply with continuing disclosure agreements.” U.S. Securities and Exchange Commission, Report on the Municipal Securities Market (July 31, 2012), p.67, available at <https://www.sec.gov/files/munireport073112.pdf>.

¹²⁴ See, n. 26 *supra*.

¹²⁵ [Securities Act Release No. 9435](#), Securities Exchange Act Release No. 70057, A.P. File No. 3-15391 (July 29, 2013), accessed at: <https://www.sec.gov/files/litigation/admin/2013/33-9435.pdf>.

G. Ruhl,¹²⁶ based on misrepresentations in a disclosure document about prior CDA compliance, provided a template.

The MCDC Offer. On March 10, 2014, the SEC announced the MCDC Initiative, “a new cooperation initiative out of its Enforcement Division to encourage issuers and underwriters of municipal securities to self-report certain violations of the federal securities laws rather than wait for their violations to be detected.”¹²⁷ The SEC press release announcing the MCDC Initiative was accompanied by two additional documents: the SEC Enforcement Division announcement (the “Enforcement Announcement”) ¹²⁸ and an MCDC Initiative Questionnaire for Self-Reporting (the “Questionnaire”).¹²⁹ As the Enforcement Announcement explained, the MCDC Initiative was “intended to address potentially widespread violations of the federal securities laws by municipal issuers and underwriters of municipal securities in connection with certain representations about continuing disclosures in bond offering documents.”¹³⁰

Under the offer, as described in the Enforcement Announcement, the Division of Enforcement “will recommend standardized, favorable settlement terms” to issuers, obligated persons, and underwriters if they self-report to the Division “possible violations involving materially inaccurate statements relating to prior compliance” with CDAs, adding in a footnote: “Recommendations by the Division to the Commission are subject to approval by the Commission.”¹³¹

Scope. The offer extended only to potential violations of the antifraud provisions made in an Official Statement regarding the issuer’s past compliance with

¹²⁶ [Securities Act Release No. 9434](https://www.sec.gov/files/litigation/admin/2013/33-9434.pdf), Securities Exchange Act Release No. 70056, Investment Company Act Release No. 30632, A.P. File No. 3-15390 (July 29, 2013), accessed at: <https://www.sec.gov/files/litigation/admin/2013/33-9434.pdf>.

¹²⁷ SEC Press Release 2014-46, *SEC Launches Enforcement Cooperation Initiative for Municipal Issuers and Underwriters*, March 10, 2014, accessed at: <https://www.sec.gov/newsroom/press-releases/2014-46>.

¹²⁸ Municipalities Continuing Disclosure Cooperation Initiative, Division of Enforcement, modified November 13, 2014. Accessed at: <https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml>, July 26, 2025.

¹²⁹ MUNICIPALITIES CONTINUING DISCLOSURE COOPERATION INITIATIVE QUESTIONNAIRE FOR SELF-REPORTING ENTITIES, Municipalities Continuing Disclosure Cooperation Initiative Questionnaire accessed at: <https://www.sec.gov/divisions/enforce/mcdc-initiative-questionnaire.pdf>, July 27, 2025.

¹³⁰ Enforcement Announcement, first sentence.

¹³¹ Enforcement Announcement, n. 1.

continuing disclosure agreements and not to other violations of the antifraud provisions.¹³²

Offered Settlements. The settlement terms offered to be recommended by the Enforcement Division differed for issuers and underwriters.

For *issuers*, the Division would recommend a settlement in which the issuer (a) consents to the institution of a cease and desist proceeding under Section 8A of the Securities Act for violation(s) of Section 17(a)(2) of the Securities Act (which requires a finding of negligent conduct), (b) makes the undertakings regarding future compliance described below, (c) neither admits nor denies the findings of the Commission, and (d) pays no civil penalty.¹³³

For *underwriters*, the Division would recommend a settlement in which the underwriter (a) consents to the institution of a cease and desist proceeding under Section 8A of the Securities Act and administrative proceedings under Section 15(b) of the Exchange Act for violation(s) of Section 17(a)(2) of the Securities Act, (b) makes the undertakings regarding future compliance described below, (c) neither admits nor denies the findings of the Commission, and (d) pays a civil penalty: \$20,000 per offering for violating offerings of \$30 million or less and \$60,000 per violating offering of more than \$30 million, but subject to a per underwriter cap of \$100,000, \$250,000, or \$500,000, depending on its most recently reported total revenue.¹³⁴

Individuals associated with issuers or underwriters were not included in the offer. The Enforcement Announcement warned, “the Division may recommend enforcement action against such individuals and may seek remedies beyond those available through the MCDC Initiative. Assessing whether to recommend enforcement action against an individual for violations of the federal securities laws necessarily involves a case-by-case assessment of specific facts and circumstances, including evidence regarding the level of intent and other factors such as cooperation by the individual.”¹³⁵

Undertakings. To qualify for the offer, issuers and underwriters were required to make specified undertakings in favor of the SEC. If the Commission approved an offered settlement, it would institute a cease and desist proceeding and simultaneously issue a

¹³² Enforcement Announcement, n. 5.

¹³³ Enforcement Announcement, III.C.

¹³⁴ *Id.*

¹³⁵ Enforcement Announcement, III.D.

Cease-and-Desist Order (“Order”) reflecting the settlement, as described above. Undertakings were to be completed within certain time frames from the Order or on a date certain, with one exception applicable to both issuers and underwriters – cooperation with any subsequent investigation by the SEC regarding the false statement(s) described in the Order had no time limit (aside from the applicable statute of limitations).

Issuers were to, within 180 days of the Order, establish appropriate policies and procedures and training for continuing disclosure, and comply with existing disclosure undertakings, including updating past delinquent filings; provide a compliance certification regarding its undertakings to the Commission staff on the first anniversary of the Order; and disclose the settlement terms in any final official statement for an offering of the issuer within five years of the Order.

Underwriters were to retain an independent consultant, not unacceptable to the Commission staff,¹³⁶ to conduct a compliance review and, within 180 days of the Order, provide recommendations regarding the underwriter’s municipal underwriting due diligence processes and procedures; within 90 days enact the recommendations (demonstrably unreasonable recommendations could be waived by the Commission); and on the first anniversary of the Order, provide a compliance certification regarding the undertakings to the Commission staff.

Enforcement Actions Outside of the MCDC Initiative. The Enforcement Announcement cautioned that issuers and underwriters eligible for the MCDC Initiative who did not self-report may not receive the same terms and could face remedies beyond those offered in the MCDC Initiative. “For issuers, the Division will likely recommend and seek financial sanctions. For underwriters, the Division will likely recommend and seek financial sanctions in amounts greater than those available pursuant to the MCDC Initiative.”¹³⁷

Timing. To participate in the MCDC Initiative, an issuer or underwriter had to “accurately” complete the Questionnaire and submit it by a specified deadline.¹³⁸ *For*

¹³⁶ This proved more difficult than many submitting underwriters expected, as consultants formerly employed by underwriters and other financial services firms previously sanctioned by the Commission were often rejected, and remaining consultants competent to provide the required services were quickly booked.

¹³⁷ Enforcement Announcement, III.E.

¹³⁸ Enforcement Announcement, III.B. The use of the modifier “accurately” is significant. Aside from the folly of making an inaccurate statement while reporting inaccurate statements to the SEC, providing misleading statements to the SEC in an investigation may worsen the reporter’s status with the SEC, at the extreme converting a civil matter to a criminal matter. See the discussion of SEC Form 1662 below.

issuers, the deadline was initially September 10, 2014, but was subsequently extended to 5:00 p.m. EST on December 1, 2014. For underwriters, the deadline was (and remained) 12:00 a.m. EST on September 10, 2014.¹³⁹

The Offer did not identify a time period for offerings covered by the MCDC Initiative. However, a five-year statute of limitations applies to SEC enforcement actions seeking financial penalties, running from the time the alleged violation occurs.¹⁴⁰ As noted above, Official Statements must disclose CDA non-compliance by the issuer or obligor within the past five years. As a result, depending upon the circumstances, a review of CDA compliance by an issuer or obligor would need to extend as far back as 10 years from the date of self-reporting.¹⁴¹

The Questionnaire. MCDC was an enforcement initiative, and the gathering and marshalling of evidence to support findings of the violations of Section 17(a)(2) of the Securities Act in a uniform manner resulting in a cease and desist order by the Commission was central to that initiative. To be eligible for the MCDC Initiative, issuers and underwriters had to submit an executed Questionnaire. The Questionnaire had five questions, including identification of the offerings in which a materially inaccurate CDA compliance statement may have been made and the names of other entities and individuals who participated in the offerings.

The Questionnaire was required to be signed by a duly authorized signer on behalf of the self-reporting entity and to certify that the self-reporting entity intended to consent to the applicable settlement terms under the MCDC Initiative.

At the top of the Questionnaire, a note stated “The information being requested in this Questionnaire is subject to the Commission’s routine uses. A list of those uses is contained in SEC Form 1662, which also contains other important information.” “Routine uses” sounds benign. It is not. SEC Form 1662 begins with “False Statements and Documents,” describing Section 1001 of Title 18 of the US Code, known as the “lying to the government” statute, describing the circumstances under which fines and terms of imprisonment may be imposed.¹⁴² A civil proceeding may, in the worst circumstances,

¹³⁹ The deadline was 12:00a.m. EST on September 10, 2014, so the last effective filing date was September 9, 2014.

¹⁴⁰ *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442 (2013).

¹⁴¹ Maco, Federal Securities Law, *The Bond Lawyer*, Vol. 37, No. 1, p. 4.

¹⁴² Available at: <https://www.sec.gov/files/sec1662.pdf>.

generate a criminal proceeding against the self-reporter, under several of the statutes described in Form 1662.

The gathering information through the submissions set the stage for follow-up SEC enforcement investigations, since the submissions included statements certified by the submitting officials and identified participants in the transactions within the various issuers and firms, thus facilitating construction of a data base of lead underwriters, municipal advisors, bond counsel, underwriter's counsel and disclosure counsel through which those most frequently associated with reported non-compliant disclosure could be identified.

For bond counsel and counsel to the participating issuers and underwriters, the MCDC process provided a sharp focus on the attorney-client privilege and the duties owed by counsel to issuers and underwriters, and the protocols of waiver as well as the risks of inadvertent waiver.

The “Prisoners’ Dilemma.”¹⁴³ By extending the offer to both issuers and underwriters and requiring self-reporting issuers and underwriters to identify all participants to a transaction, as required by the Questionnaire, the SEC created a tension between issuers and underwriters. For example, after the expiration date, the SEC could examine the submissions made by underwriters (who are routinely examined by the SEC and FINRA) to check whether the issuers of the bond offerings reported under question 2 had self-reported as well. If one or more issuers had not self-reported, the SEC could open an enforcement investigation of the issuer and pursue financial penalties, as cautioned in the Enforcement Announcement.¹⁴⁴

Tension also may have been created among frequent members of the “working groups” for bond offerings, since a self-reporting issuer or underwriter, in self-reporting, had to identify the name of the firm and primary individual contact for each of the participating senior underwriter, financial advisor, bond counsel, underwriter's counsel and disclosure counsel and, should the Division of Enforcement recommend enforcement action and a settlement, among other conditions, agree to undertake to “cooperate with any subsequent investigation by the Division regarding the false statement(s), including the roles of individuals and/or other parties involved.” Perhaps the tension was highest among employees of issuers, obligated persons, and

¹⁴³ Charlotte W. Rhodes, *Living in a Material World: Defining “Materiality” in the Municipal Bond Market and Rule 15c2-12*, 72 WASH. & LEE L. REV. 1989, 2006 (2015), accessed at: <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4481&context=wlulr>.

¹⁴⁴ Enforcement Announcement, III. E.

underwriters, as the offer did not extend to them, as the Enforcement Announcement clearly stated.

Materiality. When completing the Questionnaire, self-reporters had to identify the offering(s) that “may” contain a “materially” inaccurate statement regarding prior CDA compliance. Rule 15c2-12 requires underwriters to obtain, review, and distribute an official statement that describes instances in which the issuer “failed to comply, in all material respects,” with previous CDAs, so most official statements contained a statement that the issuer had not failed to comply in any material respect or were silent on the subject. But “material” for state contract law or federal securities law purposes? For state contract law purposes, a breach is generally described as material if the other party to a contract is relieved of further performance until the breach is cured. For purposes of “materiality” under federal securities law, the standard is “Northway materiality,” a fact for which, if omitted, there is a substantial likelihood that, under all the circumstances, “the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available.”¹⁴⁵ Would a breach of a continuing disclosure agreement, if, under state contract law, it was not “material”, nevertheless be material under *Northway*, and therefore, if not disclosed, create a “materially inaccurate certification” under *Northway* materiality? Or would an affirmative statement of compliance in all material respects be true, if prior breaches were not material for state law purposes, so that no misstatement of fact would have occurred? Potential self-reporters and their lawyers wrestled with such questions in deciding whether and what to report. The SEC would answer this “materiality” question, but not until late summer 2018 in Amendments to Municipal Securities Disclosure.¹⁴⁶

Outcome. By its conclusion, the SEC had settled 144 enforcement actions against 145 respondents under the MCDC Initiative.

Issuers. On August 24, 2016, the SEC announced settled enforcement actions against 71 municipal issuers and other obligated persons¹⁴⁷ for violations in

¹⁴⁵ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 440 (1976).

¹⁴⁶ 83 FR 44700 (Aug. 31, 2018), see Guidance, 83 FR 44706, n. 74. (“The inquiry undertaken in connection with the MCDC Initiative required an assessment of whether the issuer or obligated person materially fulfilled its contractual obligations under its continuing disclosure agreement, which required a consideration of applicable state law and basic principles of contract law.”)

¹⁴⁷ One order included two related obligated persons as respondents.

municipal bond offerings under the MCDC Initiative.¹⁴⁸ The settlement orders provide insight into the type and extent of CDA breaches that the Commission considers material.¹⁴⁹

Violations identified in the Orders include findings that:

The issuer's official statements stated that it "has not failed to comply in any material respect with any of its previous continuing disclosure certificates ... was false and/or misleading because although Respondent filed selected portions of the required fiscal year 2009 and 2010 annual financial information for these years, neither audited nor unaudited financial statements were included in these filings;"¹⁵⁰

"Respondent made a materially misleading statement and a material omission about its prior compliance with its earlier continuing disclosure agreement" in stating it "had filed some annual reports late, but failed to disclose that it had not filed the annual financial statements that it had agreed to provide" for prior years and "misrepresented that these financial statements were contained in official statements that had been disseminated earlier;" and in a 2012 "final official statement [which] made no statement about compliance with Respondent's prior continuing disclosure agreement and thereby failed to disclose that Respondent had not filed the annual financial statement that it had agreed to provide for fiscal year 2010 by the time of the offering, though due before."¹⁵¹

"Respondent made materially false and misleading statements about its prior compliance with its earlier continuing disclosure agreements," in two competitive offerings in 2013 in which the final official statements each read, in relevant part: '[t]he [Respondent] has complied in all material respects with its previous [undertakings] under [Rule 15c2-12]' when "Respondent filed its audited financial statements for fiscal years 2007 and 2008 late by approximately four months and five months, respectively" and "failed to provide within EMMA cross-references to its previously filed audited financial statements for fiscal years 2009

¹⁴⁸ SEC Press Release 2016-166, SEC Charges 71 Municipal Issuers in Muni Bond Disclosure Initiative, Aug. 24, 2016, accessed at: <https://www.sec.gov/newsroom/press-releases/2016-166>. The press release identifies each issuer or obligated person and provides a link to the settled order.

¹⁴⁹ For an analysis of the Orders, see Maco, Federal Securities Law, *The Bond Lawyer*, Vol. 40, No.3, Summer 2016.

¹⁵⁰ State of Hawaii, <https://www.sec.gov/litigation/admin/2016/33-10181.pdf>.

¹⁵¹ Idaho Housing and Finance Association, <https://www.sec.gov/litigation/admin/2016/33-10166.pdf>.

and 2011 and its annual financial information and operating data for fiscal years 2008 through 2011;”¹⁵² and “Respondent made a materially false statement about its prior compliance” in stating it “has never failed to comply in all material respects with any previous undertakings with the provision of reports or notices or events” when it “failed to file certain notices of defeasances prior to the offering, though due before, resulting in bonds ...trading with significantly different credit structures for up to two years.”¹⁵³

One issuer, in addition to prior undisclosed late filings, was cited for failing to disclose the late filing, by 245 days, of its 2010 audited financial reports, “although [they had been] timely filed in the wrong location.”¹⁵⁴

Notably, although Rule 15c2-12 does not require continuing disclosure undertakings to provide for quarterly financial reporting, one obligated person was cited for its silence on disclosure compliance and the resulting failure “to disclose that Respondent failed to file interim financial information for the second quarter of fiscal 2011, and operating data for fiscal 2010 and the second quarter of fiscal 2011” as well as “failure to file the required late notices for these events.”¹⁵⁵

All violations among the 71 Orders relating to filing required annual financial information were accompanied by violations for failure to file the related failure to file notices or, in several instances, the late filing of such notices, once again emphasizing the importance of disclosing a failure to timely file such a notice in addition to the late filing of annual financial information itself.

At least two Orders found violations in private offerings (presumably exempt from Rule 15c2-12), where the issuer entered into a continuing disclosure agreement to market the securities, but failed to disclose that it had materially breached a similar agreement in the last 5 years.¹⁵⁶

Several of the Orders were based on undisclosed failures to link a timely filed Official Statement or annual financial information to the CUSIP for each outstanding

¹⁵² City of Cedar Rapids, Iowa, <https://www.sec.gov/files/litigation/admin/2016/33-10141.pdf>.

¹⁵³ Ascension Health Alliance, <https://www.sec.gov/litigation/admin/2016/33-10129.pdf>.

¹⁵⁴ City of Memphis, Tennessee, <https://www.sec.gov/litigation/admin/2016/33-10147.pdf>.

¹⁵⁵ Carilion Clinic, <https://www.sec.gov/litigation/admin/2016/33-10136.pdf>.

¹⁵⁶ Sanitary District of the City of Gary, Indiana, <https://www.sec.gov/litigation/admin/2016/33-10179.pdf>; County of Berrien, Michigan, <https://www.sec.gov/litigation/admin/2016/33-10157.pdf>.

security that benefited from an existing CDA,¹⁵⁷ and others were based on failure to include some required content in the annual financial information,¹⁵⁸ each of which may inform the diligence procedures that should be applied by underwriters, although the Orders are not addressed to them.

At least one Order found a violation for failing to disclose a late filing five years before the offering, even though late filings in the subsequent three years were disclosed, suggesting that a breach is “material” if it would have significance to an investor in the outstanding securities benefiting from the breached CDA, not (or not only) the investors to whom the new securities are offered.¹⁵⁹

Many of the issuer Orders listed violations in competitively bid offerings. Among the underwriter settlements, with respect to competitive offerings, in all orders save one,¹⁶⁰ failures to disclose occurred in instances where the underwriter participated in a prior negotiated offering or in multiple competitive offerings of the same issuer, a rough dichotomy consistent with the Commission’s prior interpretations of municipal underwriter responsibilities. The guidance therein, relating to an underwriter’s formation of a reasonable basis for belief, does not carry over to issuers’ responsibilities for their offering documents, since as the entity charged with making filings with EMMA and the NRMSIRs, the issuers would have known whether they had complied with their filing obligations.

The 71 Orders use different phrasing compared to the findings from the first issuer order under the MCDC Initiative, *Kings Canyon*.¹⁶¹ In *Kings Canyon*, the Order finds: “The statement regarding compliance with prior continuing disclosure obligations contained in the “Continuing Disclosure” section of the Official Statement for the 2010 Offering was an untrue statement of a material fact. The Issuer should have known that this statement was untrue.” In the 71 subsequent Orders, the finding is modified to “knew or should have known,” in various formulations.¹⁶² Not too much should be made

¹⁵⁷ State of Minnesota, <https://www.sec.gov/litigation/admin/2016/33-10182.pdf>.

¹⁵⁸ Lawrence & Memorial Hospital, Inc. and Lawrence & Memorial Corp., <https://www.sec.gov/litigation/admin/2016/33-10169.pdf>.

¹⁵⁹ City of Andover, Kansas, <https://www.sec.gov/litigation/admin/2016/33-10139.pdf>.

¹⁶⁰ In the Matter of Ross, Sinclair & Associates, L.L.C. <http://www.sec.gov/litigation/admin/2015/33-9936.pdf>.

¹⁶¹ In the Matter of In the Matter of Kings Canyon Joint Unified School District. <https://www.sec.gov/files/litigation/admin/2014/33-9610.pdf>.

¹⁶² Idaho Housing and Finance Association, *supra* n. 138.

of this variation, however, as the “knew or should have known” formulation is embedded in §8A of the Securities Act,¹⁶³ pursuant to which the Orders are issued and amounts to a negligence standard.¹⁶⁴

Underwriters. The SEC announced settled enforcement actions against 72 municipal underwriting firms, in three separate groups, on June 18, 2015,¹⁶⁵ September 30, 2015,¹⁶⁶ and February 2, 2016.¹⁶⁷ Each of the Orders alleged a willful violation of Exchange Act provisions. As previously reported in *The Bond Lawyer* after the final round of underwriter settlements¹⁶⁸, the following may be gleaned:

(i) Failure to file a failure to file notice, mentioned in almost every bullet point of every Order, is clearly a problem (but, at least in the settlements reach to date, only when the failure to file a periodic report was also undisclosed);

(ii) A failure to file an event notice has not yet been cited, except when accompanied by an undisclosed material failure to timely file a periodic report;

(iii) A failure to file a material event notice regarding an advance refunding and an associated redemption in two offerings was cited in one instance;

¹⁶³ SEC. 8A. (a) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. [Emphasis added.]

¹⁶⁴ Statutory language “knew or should have known” sets a negligence standard. *KPMG, LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002).

¹⁶⁵ SEC Press Release 2015-125, SEC Charges 36 Firms for Fraudulent Municipal Bond Offerings, June 18, 2015, accessed at: <https://www.sec.gov/newsroom/press-releases/2015-125> The press release identifies each underwriter and respective penalty amount, and provides a link to the settled order.

¹⁶⁶ SEC Press Release 2015-220, SEC Sanctions 22 Underwriting Firms for Fraudulent Municipal Bond Offerings, Sept. 30, 2015, accessed at: <https://www.sec.gov/newsroom/press-releases/2015-220>. The press release identifies each underwriter and respective penalty amount, and provides a link to the settled order.

¹⁶⁷ SEC Press Release, 2016-18, SEC Completes Muni-Underwriter Enforcement Sweep, accessed at: <https://www.sec.gov/newsroom/press-releases/2016-18>. The press release identifies each underwriter and respective penalty amount, and provides a link to the settled order.

¹⁶⁸ *Supra* n. 137.

(iv) 33 days is the shortest period for a single undisclosed late filing of an annual report;

(v) A silent official statement when annual filings were two and three months late and no failure to file notice was filed is a material omission;

(vi) A sticker 4 months after an official statement is delivered does not cure a misstatement about compliance;

(vii) Filing late filings just before an offering does not avoid the need to disclose prior material noncompliance;

(viii) Filing an audit without required material operating data is a failure to comply that must be disclosed;

(ix) Filing an official statement with required data in lieu of a continuing disclosure filing is not material compliance, if a cross-referencing filing is not made in the continuing disclosure section EMMA for outstanding securities by the filing deadline; and

(x) Filed timely failure to file notice does not obviate the need to disclose noncompliance in an official statement, when the required periodic disclosure filing was four months late.

With respect to competitive offerings, in all Orders but one,¹⁶⁹ failures to disclose occurred in instances where the underwriter participated in a prior negotiated offering or in multiple competitive offerings of the same issuer. Other than the one outlier, the Orders would appear consistent with the Commission's prior interpretations of municipal underwriter responsibilities¹⁷⁰ and, in particular, Commission guidance in the 2008 Proposing Release.¹⁷¹

Issuer Settlements Contrast with Underwriter Settlements. Consistent with the MCDC Initiative, the terms of settlement were less onerous on issuers than on

¹⁶⁹ In the Matter of Ross, Sinclair & Associates, L.L.C., *supra* n. 147.

¹⁷⁰ The Commission initially interpreted the responsibilities of municipal underwriters in the 1988 Proposing Release for Rule 15c2-12 Securities Exchange Act Release No. 26100 (Sept. 22, 1988), 53 FR 37778 and affirmed its interpretation in the 1989 Adopting Release, 26985 (June 28, 1989), 54 FR 28799.

¹⁷¹ Release No. 26100, at 37790, addressing a municipal underwriter's obligation in competitive bid offerings.

underwriters. Each of the issuers consented to the entry of its respective Order, which reflected the terms described in the offer.

For the issuers, the Orders were issued pursuant to Section 8A of the Securities Act only, unlike in the underwriter settlements, the orders for which were also issued pursuant to Section 15(b) of the Exchange Act. With respect to the issuers, proceeding under Section 8A alone made sense, since unlike the underwriters, they are not registered under the Exchange Act. For underwriters, however, it is a reminder that the Commission could have achieved the same result without use of the “willful” violation finding included in each of the 72 underwriter orders under the MCDL Initiative that, in turn, made each firm subject to “statutory disqualification.”¹⁷² The Commission did not choose this narrower path, although it has taken it before in settlements with securities firms, imposing cease and desist orders and sanctions solely under Section 8A of the Securities Act for violations of Securities Act sections 17(a)(2) and (3).¹⁷³ What followed for underwriters is worth understanding.

Because the Commission chose to include “willful” violations in their orders, underwriters had to file a Membership Continuance Application (Form MC-400A) with FINRA within 10 business days after receipt of a SD Notification Letter from FINRA’s Registration & Disclosure Department (which was issued after FINRA received the underwriter’s Order from the SEC) to initiate an eligibility proceeding if it wished to continue in FINRA membership or, more bluntly, stay in business.¹⁷⁴

It is worth pausing for a moment to look back and reflect upon the fact that, while extremely unlikely, this process did present the remote possibility that with a sufficient number of missteps along the way, firms constituting up to “96% of the municipal market share for municipal underwritings”¹⁷⁵ might have become unable to continue membership in FINRA, that is, carry on their business. FINRA and its staff went to great effort in outreach, industry conference calls, and helpful instructive steps, to assure this

¹⁷² See Section 15(b)(4)(D) of the Exchange Act, incorporated by reference in 3(a)(39)(F) of the Exchange Act. Article III, Section 3(a) of FINRA’s By-Laws states that no firm can continue in membership with FINRA if it is subject to a statutory disqualification.

¹⁷³ Morgan Stanley and Co. LLC; Morgan Stanley ABS Capital I Inc.; and Morgan Stanley Mortgage Capital Holdings LLC., <https://www.sec.gov/files/litigation/admin/2014/33-9617.pdf>.

¹⁷⁴ See the description of FINRA’s process at: <http://www.finra.org/industry/faq-eligibility-mcdc>.

¹⁷⁵ Press Release 2016-18, SEC Completes Muni-Underwriter Enforcement Sweep (Feb. 2, 2016), available at <https://www.sec.gov/newsroom/press-releases/2016-18>.

did not happen. SEC staff in the Division of Corporation Finance did the same with respect to the waivers that accompanied the underwriter orders.

Under the terms of the MCDC Initiative, responding issuers are required establish appropriate written policies, procedures, and training regarding continuing disclosure obligations within 180 days, but unlike underwriters, did not need to hire independent consultants deemed “not unacceptable” to the SEC staff to conduct a review of their policies and procedures and adopt, with limited exceptions, the recommendations within 90 days. Nor did the issuers pay any penalty, unlike underwriters, who paid civil penalties up to \$500,000.

Summary. Under the MCDC Initiative, the Commission issued 72 orders with respect to issuers and obligated persons (including Kings Canyon) and 72 orders with respect to underwriters. In the case of underwriters, the Commission stated the underwriters covered “comprise 96 percent of the market share for municipal underwritings.”¹⁷⁶ In the case of issuers and obligated persons, the SEC avoided measuring success by comparing the 72 municipal issuers and obligated persons choosing to participate in MCDC to the estimated number of 50,000 municipal issuers and instead measured by geographic diversity. Commission’s orders cover at least one issuer or obligated person in each of 45 states and include in the mix: states, state authorities, most forms of local government entities in the US, and a sampling of obligated persons.¹⁷⁷

A recent academic study, *Carrot or Stick? The Impact of Regulatory Leniency on Municipal Disclosure Compliance*,¹⁷⁸ offers a harsh judgment of MCDC:

Although there was widespread participation among underwriters, the vast majority of municipal issuers did not participate in the MCDC initiative, despite having publicly observable disclosure violations. Consistent with an improvement in underwriter over-sight of the initial bond offering following the MCDC, we find that official statements were less likely to include false claims regarding past disclosure compliance, particularly for

¹⁷⁶ Id.

¹⁷⁷ Press Release 2016-166, SEC Charges 71 Municipal Issuers in Muni Bond Disclosure Initiative (Aug. 24, 2016), accessed at: <https://www.sec.gov/newsroom/press-releases/2016-166>.

¹⁷⁸ Professor Mark Maffett, University of Miami Herbert School of Business, Associate Professor Delphine Samuels, University of Chicago Booth School of Business, and Assistant Professor Frank Zhou, The Wharton School, University of Pennsylvania, *Carrot or Stick? The Impact of Regulatory Leniency on Municipal Disclosure Compliance*, accessed at: <https://som.yale.edu/sites/default/files/2023-06/MSZ-CarrotorStick%2CTheImpactofRegulatoryLeniencyonMunicipalDisclosureCompliance.pdf>.

issuers with participating underwriters. However, contrary to the initiative's primary objective, we find that issuers' compliance with continuing disclosure requirements decreased by 9% after the MCDC initiative. Overall, our findings suggest that absent a credible ex-post enforcement threat, regulatory leniency programs are unlikely to be successful and could instead exacerbate noncompliance by revealing the weaknesses of the existing regulatory regime.¹⁷⁹

2018 Rule 15c2-12 Amendments

Sandwiched between the 2010 Amendments to Rule 15c2-12 and the 2014 MCDC Initiative, in 2012, the Commission issued its comprehensive Report on the Municipal Securities Market (the "2012 Report").¹⁸⁰ The 2012 Report set forth Commission concerns, among others, that since 2009, issuers and obligated persons were increasingly using direct purchases of municipal securities and direct loans as alternatives to publicly offered municipal securities. Specifically, the SEC expressed concern that issuers and obligated persons may not be properly disclosing the existence of the terms of bank loans, particularly when the terms of bank loans may affect the payment priority from revenues in a way that adversely affects bondholders. In the 2012 Report, the SEC indicated that it could amend Rule 15c2-12 to mandate continuing disclosures of new indebtedness not otherwise reported under Rule 15c2-12.

Investors had encouraged issuers to file voluntary notices of loan incurrence with the MSRB, and in 2016, the MSRB modified EMMA to enable such filings to be labeled as "Bank Loan/Alternative Financing Filings." However, a year later, the MSRB estimated that only a small fraction of outstanding loan documents had been posted to EMMA, according to an October 2017 letter it sent to the SEC Investor Advocate.¹⁸¹

2017 Proposed Amendments. On March 1, 2017, in Release No. 34-80130 (the "2017 Proposing Release"),¹⁸² the SEC proposed adding two new event notices to Rule 15c2-12. Continuing its theme from the 2012 Report, the SEC reiterated that, since 2009, issuers and obligated persons were increasingly using direct purchases of municipal securities and direct loans as alternatives to publicly offered municipal securities. The SEC expressed concern that existing bondholders and potential investors

¹⁷⁹ Id.

¹⁸⁰ SEC, Report on the Municipal Securities Market (July 31, 2012), available at <https://www.sec.gov/news/studies/2012/munireport073112.pdf>.

¹⁸¹ Release No. 34-83885 (August 20, 2018) at n. 34.

¹⁸² Release No. 34-80130 (March 1, 2017), 82 FR 13928 (March 15, 2017).

and other market participants (analysts, rating agencies) may not have any access or timely access to disclosure about direct placements or other financial obligations. In the 2017 Proposing Release, the Commission observed that the terms of financial obligations (e.g., liens, covenants, events of default, and remedies) could adversely affect an issuer's liquidity and overall creditworthiness or the rights of existing bondholders.¹⁸³

While previewed in the 2012 Report, the new event notices were proposed by the slimmed of Commission governance, a unanimous 2-0 vote by Acting Chairman Michael S. Piwowar and Commissioner Kara M. Stein. In the meeting, Acting Chair Piwowar said the proposed changes were aimed to reduce the "information asymmetry among market participants and to increase transparency to the municipal securities market by improving investor and market participant access to timely information relating to a municipal issuer's financial obligations." Commissioner Stein said the proposal represented a step toward increased transparency and would create efficiency for issuers and investors alike.

The proposed new event notices were as follows, qualified by the introductory phrase "with respect to the securities offered in the Offering":

- (15) Incurrence of a **financial obligation** of the obligated person, **if material**, or agreement to covenants, events of default, remedies, priority rights or other similar terms of a financial obligation of the obligated person, any of which affect security holders, **if material** [bold emphasis added]; and
- (16) Default, event of acceleration, termination event, modification of terms or other similar events under the terms of a **financial obligation** of the obligated person, any of which **reflect financial difficulties** [bold emphasis added].

In the 2017 Proposing Release, the SEC offered a broad definition of "financial obligation": the term encompassed not just debt obligations such as bank loans and direct placements, but lease arrangements (presumably both financing and operating leases), guarantees, swap transactions and monetary obligations resulting from judicial, administrative or arbitration proceedings.

The 2017 Proposing Release stated that a materiality determination would apply in deciding whether incurrence of a financial obligation or agreed upon terms such as covenants requires an event notice. The 2017 Proposing Release articulated the "preliminary belief" of the Commission "that including a materiality determination would

¹⁸³ Id. at pp 13929-30.

strike the appropriate balance”. The SEC offered some limited examples of what occurrences might be “material”, but as discussed further below, remained reticent in the 2017 Proposing Release (and in the 2018 Adopting Release, discussed below) on defining materiality. Similarly, on the second, proposed event notice, the 2017 Proposing Release offered no specific definition of what may constitute an incident that “reflect[s] financial difficulties”. The Commission provided the market with a timeline for implementation of the two new event notices and the definition of “financial obligation”: following a public comment period of 60 days, upon final adoption, the new event notice requirements would take effect in 90 days.

As forecasted by Author Maco at the time of the 2017 Proposing Release, “[h]ow well [the materiality] balance might work in practice may depend upon how the Commission’s often granular application of ‘materiality’ in the 144 MCDC Settlements [discussed above] will affect the behavior of issuers, obligated persons and underwriters when they decide whether to give notice of an event under the proposed amendments or to require disclosure of a failure to do so under Rule 15c2-12”. Indeed, during the comment period, several market participants questioned whether materiality was the appropriate measure for the event of occurrence of other financial obligations. Equally problematic for the market was the scope and breadth of the five categories included in the definition of covered “financial obligation.”

2018 Final Amendments. On August 20, 2018, the Commission approved amendments to Rule 15c2-12 (the “2018 Amendments”) through its Release, Amendments to Municipal Securities Disclosure (the “2018 Adopting Release”).¹⁸⁴ The 2018 Amendments added two new event notices, as proposed, to the existing 14 events for which municipal securities issuers or obligated persons must commit to provide notice to EMMA as well as a modified definition of “financial obligation.” The amendments were effective for CDAs entered into on or after February 27, 2019 (the “Compliance Date”).

The 2018 Amendments define “financial obligation” as follows, dropping, at least ostensibly, “leases” and the “monetary obligations resulting from judicial, administrative or arbitration proceedings” from the proposed definition:

- (i) The term financial obligation means a:
 - (A) Debt obligation;

¹⁸⁴ Release No. 34-83885, Amendments to Municipal Securities Disclosure (August 20, 2018), 83 FR 44700 (August 31, 2018).

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

(C) Guarantee of paragraph (f)(11)(i)(A) or (B).

(ii) The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.

The Commission stated that “[t]he narrowed definition of financial obligation . . . only covers those obligations that are debt, debt-like, or debt-related”¹⁸⁵

In addition to amending the Rule, the 2018 Adopting Release amplified requirements of the new Rule provisions in a manner that cannot be known simply by reading the Rule itself, posing both a conundrum and challenges for issuers, obligated persons, and underwriters alike.

Form of Undertaking. Early on, the SEC made clear that “undertakings [CDAs] with respect to material events should list all events in the same language as is contained in the rule, *without any qualifying words or phrases, except as the staff has indicated otherwise with respect to mandatory redemption of bonds*”(emphasis added).¹⁸⁶ If an underwriter were to accept a CDA that did not follow this instruction, it might risk sanction for violating the Rule. On the other hand, if parroted rule language did not evidence an agreement to comply with the notice requirements of the Rule as *interpreted by the SEC*, could an underwriter “reasonably determine” that a qualifying undertaking had been made “without qualifying words or phrases”? Some resolved this conundrum by adding an acknowledgment by the issuer or obligated person that it intended the terms in the new paragraphs to have the meanings ascribed to them by the Adopting release.

Financial Obligations. Although “debt obligation” is not defined by the Rule and “leases” were dropped from the proposed definition, the 2018 Adopting Release states that “debt obligation” does include leases operating as vehicles to borrow money. It also clarifies that the term could include short-term as well as long-term obligations.¹⁸⁷ Although the reference to derivative instruments was narrowed from the proposed definition to include only those “connected” to a debt obligation, the

¹⁸⁵ 83 FR 44704.

¹⁸⁶ Letter from Catherine McGuire to National Association of Bond Lawyers, Response to Question 2 (Sept. 19, 1995) (NABL II).

¹⁸⁷ 83 FR 44711-12.

2018 Adopting Release explained that the term is not limited to transactions that hedge the rate on or value of debt obligations, but also includes “any type of derivative instrument that could be entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation,”¹⁸⁸ which might therefore include a hedge of revenue from which debt obligations are to be paid. In the 2018 Adopting Release, the Commission also explained that a future debt obligation should be considered “planned” “if, based on the facts and circumstances, a reasonable person would view it likely or probable that the issuer or obligated person will incur the related yet-to-be-incurred debt obligation at a future date,”¹⁸⁹ apparently even if the issuer itself does not intend to incur the debt obligation. Finally, the 2018 Adopting Release confusingly states that “the term ‘financial obligation’ does not include ordinary financial and operating liabilities incurred in the normal course of an issuer’s or obligated person’s business, only an issuer’s or obligated person’s debt, debt-like, and debt related obligations,”¹⁹⁰ muddying the treatment of ordinary course debt-like obligations.

Incurrence. The 2018 Adopting Release stated that “a financial obligation generally should be considered to be incurred when it is enforceable against an issuer or obligated person.”¹⁹¹ Nevertheless, many issuers give notice of commercial paper programs when they are established and draw down bonds when they are issued, rather than flooding EMMA with a notice each time additional debt is incurred.

Materiality. Despite requests to quantify the size of financial obligations that must be reported, the Commission retained the proposed determinant of “material.” The 2018 Adopting Release explained that “materiality determinations should be based on whether the information would be important to the total mix of information made available to the reasonable investor.”¹⁹² Consequently, to determine whether a financial obligation or amendment is material, parties “must assess whether a piece of information at the time of issuance is of a character that there is a substantial likelihood that, under all the circumstances, ‘the omitted fact would have been viewed by the

¹⁸⁸ Id. at 44713.

¹⁸⁹ Id.

¹⁹⁰ Id. at 44709.

¹⁹¹ Id. at 44708.

¹⁹² Id. at 44705-06, citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 440 (1976).

reasonable investor as having significantly altered the ‘total mix’ of information available.”¹⁹³

Content of Notices. While the Rule requires notice of the incurrence of or agreement to terms of a financial obligation, if material, the 2018 Adopting Release states that notices must include all material terms and gave as examples “the date of incurrence, principal amount, maturity and amortization, interest rate, if fixed, or method of computation, if variable (and any default rates).” It also suggested that a third-party guaranty of an issuer financial obligation could be one of its terms that must be included in the notice, if material.¹⁹⁴ Consequently, even though the two new events are qualified by the introductory phrase “with respect to the securities being offered in the Offering,” and the terms of a financial obligation in new paragraph (15) are limited to those “which affect security holders,” these provisions of the Rule appear to have been read out by the Commission in the 2018 Adopting Release. If the terms of a new or amended financial obligation could affect the value of securities sold in the offering for which a CDA is entered into, they trigger a notice obligation, even if the terms of those securities are unaffected. The 2018 Adopting Release explained that material terms could be provided by either including a summary of the terms or filing documents, which could be redacted for immaterial terms and “confidential information such as contact information, account numbers, or other personally identifiable information.”¹⁹⁵

Existing Financial Obligations. The 2018 Adopting Release clarifies that, if a CDA with the new events is entered into on or after the Compliance Date, it must undertake to provide notice of an amendment to a financial obligation made thereafter, if material, even if the financial obligation was incurred before the CDA was entered into or before the Compliance Date.¹⁹⁶

¹⁹³ Id. at 44706. In footnote 75, the Commission stated “This inquiry is distinct from the inquiry issuers, obligated persons, and underwriters conducted as part of the MCDC Initiative, which required an assessment of the issuer’s or obligated person’s performance of its contractual continuing disclosure obligations.” This statement surprised many, since the Commission could not have entered Orders against issuers unless their statements regarding past CDA compliance were material within the meaning of the antifraud provisions, and none of the Orders issued in the MCDC Initiative stated that undisclosed breaches were material for state law purposes.

¹⁹⁴ Id. at 44714.

¹⁹⁵ Id. at 44708.

¹⁹⁶ Id. at 44717: “an event under the terms of a financial obligation pursuant to paragraph (b)(5)(i)(C)(16) that occurs on or after the compliance date must be disclosed regardless of whether such obligation was incurred before or after the compliance date.”

Events under Financial Obligations Reflecting Financial Difficulties. In response to comments, the 2018 Adopting Release observes that, whatever “reflecting financial difficulties” means, it is no different than when used to qualify two of the pre-existing 14 events: unscheduled draws on debt service reserves and credit enhancement.

Observations. While some circumstances requiring filing of an event notice may be obvious, many will require the considered judgment of issuer officials who are familiar with both the details of the issuer’s financial obligations and federal securities law materiality standards, and they must be able to identify the event, evaluate the need to file, and prepare a proper notice within 10 business days. Use of outside advisors or counsel may be required, particularly by those issuers with minimal staff or familiarity with what is important to investors. This task is complicated by the overly simplified event descriptions in the CDAs that comply with prior SEC staff advice.

For many additional reasons, complying with new event (15) has proved challenging for many issuers and obligated persons. First, it is not possible to discern the clear intended meaning of CDAs that repeat Rule 15c2-12 language, since reference to the Adopting Release is necessary to understand terms. Second, the materiality qualifier is not easily applied by issuers or obligated persons, since it requires a knowledge of both what investors deem important and what the SEC believes they deem important, and (unlike primary offering disclosure) event filings are made without the advice of underwriters and their counsel. Third, since underwriters are subject to MCDC cease and desist orders, they are reluctant not to require disclosure of any failure to file notice of an obligation that might be considered a material financial obligation, effectively forcing issuers to file notice of obligations they do not believe are required. Fourth, issuers with diffuse financial authority find it difficult to be quickly apprised of the incurrence or amendment of financial obligations, particularly with respect to capital leases. Fifth, while the filing deadline makes it more practical to file, rather than summarize, financial obligation documents, issuers often must navigate lender resistance and confidentiality clauses to do so.

Especially after the 2018 Amendments, it is difficult for most issuers or obligated persons to comply with CDAs without adopting disclosure policies and procedures and conducting periodic training to guide responsible officials, especially after turnover. While the Commission likely can’t directly require that they do so, the 2018 Amendments effectively leave them with little choice.

The initial regulatory architecture of Rule 15c2-12 was designed 36 years ago. The additional architecture for continuing disclosure was added 31 years ago. At that

time disclosure was paper-based and disseminated primarily by overnight courier. In April 2016, SIFMA submitted a Rule 15c2-12 whitepaper to SEC Chair Mary Jo White.¹⁹⁷ The whitepaper made the following observation about the Rule 15c2-12 framework: "Today disclosure dissemination occurs within fractions of a second and is available to anyone with access to the web, along with rating agency reports, market information, and news relating to the issuer, its locality, and events affecting all of the foregoing. Markets and market practice have evolved at a similar breakneck pace. The framework reflects a time long past, not the market of today." The whitepaper made recommendations for revisions to the Rule as well as revised guidance on compliance with the Rule. The SEC has yet to address the concerns raised by SIFMA.

Conclusion

The U.S. municipal securities market has grown extensively over the last 50 years, including in the types of products available, the types of issuer credits that support them, and the range of investors who purchase them (directly or indirectly). So has federal regulation of the market.

An efficient municipal securities market is critical to our collective ability to add and replace needed public infrastructure. For a variety of reasons, it is unlikely that the municipal securities market will ever be as efficient as the market for U.S. corporate debt securities.¹⁹⁸ It has undoubtedly become more efficient over the past 50 years, however, in part due to improvements in disclosure practices encouraged by federal regulation.

It is difficult to predict how federal regulation of municipal securities will change in the future. Several recommendations made in SEC reports on the municipal securities market remain to be implemented. At the same time, in recent years legal challenges to federal regulatory authority have increased and met with some success at the U.S. Supreme Court.

Whatever course future regulation of the municipal securities market may take, it will no doubt benefit from informed contributions by NABL and its members. As Winston Churchill once told the British House of Commons, "Those that fail to learn from history are doomed to repeat it." Hopefully our (not so) brief history and

¹⁹⁷ Rule 15c2-12 Whitepaper, SIFMA, April 2016. Available at: https://www.sifma.org/wp-content/uploads/2017/07/Rule-15c2-12_Whitepaper.pdf.

¹⁹⁸ Compared to the U.S. corporate debt market, the U.S. municipal securities market is characterized by many more issuers, many more distinct securities per dollar raised, many variations on the legal authority and responsibilities of issuers, and the consequent need to invest much more time per dollar invested to make an informed investment decision and dealer, over-the-counter nature of the market.

retrospective on federal regulation of the municipal securities market will help all to learn from history.