

## **Dispatches from Phoenix: Highlights of the 2018 NABL Tax and Securities Law Institute**

On February 22-23, 2018, Pacifica public finance attorneys attended the National Association of Bond Lawyers (“NABL”) Tax and Securities Law Institute (“TSLI”) in Phoenix, Arizona. Deanna Gregory chaired the Securities and Exchange Commission (“SEC”) Enforcement panel, and Stacey Lewis was a panelist for the Securities Hot Topics session. The following highlights the topics discussed, from a tax law and securities law perspective.

### **TSLI Tax Notes:**

#### IRS Audits: Focus on Forms

As we have reported in previous alerts, the IRS has recently adopted a more streamlined and data driven approach to tax-exempt bond audits. At the Tax Enforcement panels at TSLI, panelists discussed how information culled from various IRS forms is being used to initiate audits. This focus on forms dovetails with the IRS published work plan for 2018. The work plan lists five current focus areas for audits: arbitrage of tax-advantaged bonds with guaranteed investment contracts and/or qualified hedges as well as bonds with investments beyond a temporary period; acquisition financing involving private activity bonds to determine whether the rehabilitation requirement was satisfied; non-qualified use in the disposition of financed facilities and/or excessive private business use; bonds issued with a deep discount; and private activity bonds with excessive weighted average maturities. Whether or not one of these focus areas are relevant to an issue of bonds is easily determined by reviewing certain forms filed with the IRS: Forms 8038 or 8038G filed at initial issuance; notice of defeasance relating to disposition of bond-financed facilities; or Schedule K to Form 990 for 501(c)(3) bonds. Participants also noted that audits may be triggered by failure to file required forms (for example, Form 8703 demonstrating annual compliance for multifamily housing) or forms being filled out incorrectly. Issuers and conduit borrowers are encouraged to take extra time when preparing forms for the IRS and to consider engaging bond counsel to review relevant forms before they are filed.

### **TSLI Securities Law Notes:**

#### SEC Hot Topics

The Securities Hot Topics panel included a discussion of the SEC’s examination process for municipal advisors. Nadine Evans, Senior Special Counsel and Senior Specialized Examiner, SEC Office of Compliance Inspections and Examinations, provided an overview of examination priorities (available

[here](#)), including compliance with registration, recordkeeping, and supervision requirements. Municipal advisors that are not dual registered as broker-dealers are a current priority for compliance exams. No update on timing or next steps for the SEC's proposed Rule 15c2-12 amendments was available. The SEC received a significant number of comments to the proposed amendments, including comments submitted by NABL, available [here](#).

#### Enforcement: Still a Priority for the SEC

Enforcement continues to be a priority of the SEC. Since the SEC released its *Report on the Municipal Securities Market* in 2012, the SEC has pursued a number of "first-of-their-kind" enforcement actions and initiatives, aimed at changing the way municipal market participants draft and diligence disclosure. Panel members discussed SEC enforcement actions and remedies available to and used by the SEC, including imposing financial penalties (against issuers, underwriting firms, municipal advisory firms and individuals); finding individuals liable under a "control person" liability theory; banning issuers, underwriters, municipal advisors and individuals from participating in the municipal market (either temporarily or permanently); obtaining emergency injunctions to halt bond offerings; referring matters to the Department of Justice to seek criminal fraud charges; and seeking relief in federal district court. Enforcement proceedings continue to involve a post-issuance review of disclosure. Many enforcement actions focus on *omitted* (as opposed to misstated) information that the SEC found would have been material for a reasonable investor to have known at the time of making an investment decision.

SEC enforcement priorities for 2018 include a continued focus on protecting retail investors (specifically senior investors), pricing abuses and disclosing conflicts of interest, including conflicts of interest involving municipal advisors. Recent enforcement actions involving municipal advisors, and in particular the failure of certain municipal advisors to uphold their fiduciary duty and duty of fair dealing owed to municipal clients under the Dodd-Frank Act, demonstrate the SEC's increased attention in this area.

Given this backdrop, the panel turned to practical take-aways on how to manage securities legal risk. The top of the list for municipal issuers includes adopting and following written disclosure policies and procedures that prompt a careful review of disclosure documents, conducting periodic training regarding the issuer's responsibilities under the federal securities laws, documenting legal and other analysis, resolving questions of authority before issuing debt, identifying and disclosing any potential conflicts of interest, and retaining independent outside counsel to assist with the bond issuance process.

#### **TSLI Joint Panel Notes:**

##### Life After LIBOR

On July 27, 2017, the Financial Conduct Authority ("FCA") announced that it will no longer require the quotation of London Inter-Bank Overnight Rate ("LIBOR") rates after 2021. One TSLI panel of industry participants discussed the coming industry shift away from the LIBOR Index and how it might affect the municipal bond and derivatives markets.

Panelists hoped an alternative rate index will be available by the middle of this year, and that the necessary infrastructure will subsequently develop to provide a true comparison to LIBOR Index rates. The panelists agreed the replacement index will likely be based on secured interbank loans, which may result in lower rates than the LIBOR Index. The markets may develop a mechanism for maintaining returns when adjusting from a new index to LIBOR or adjustments may need to be made by banks and borrowers on a case by case basis. Though many details regarding the transition are still unclear (including whether regulatory agencies and banks may agree to continue publishing a LIBOR Index rate after the stated 2021 termination), panelists suggested the shift could have both tax and securities implications for borrowers and issuers, and that it would probably be “imprudent” to plan to rely on LIBOR after 2021.

Although the panelists speculated the IRS will provide guidance on the impact of a switch to a new rate index, borrowers and issuers may also need to analyze what the costs and risks of a reissuance would be for their variable or adjustable rate, LIBOR-based bond issues. Issuers who are heavily invested in LIBOR-based assets may also need to consider whether and how to describe potential impacts from the LIBOR transition in future offering documents. This is a topic to monitor into 2019 and beyond.

If you have any questions on these tax and securities law topics of interest to state and municipal bond issuers, please contact any of our public finance attorneys.

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