

Dispatches from Florida: Selected Highlights of the 2019 NABL Institute

On March 7-8, 2019, Pacifica public finance attorneys attended the National Association of Bond Lawyers (“NABL”) Institute (“Institute”) in Bonita Springs, Florida. Deanna Gregory chaired the Ethical Considerations in Public Finance panel, which included a discussion of ethical issues relating to client confidentiality and client communications, with an emphasis on the use of social media, blogs and technology. The following highlights some of the topics discussed at The Institute, from a tax law and securities law perspective.

Securities Law Notes:

Living with the 15c2-12 Amendments

Not surprisingly, the main hot topic for discussion at The Institute was the new amendments to Rule 15c2-12. The amendments add two new notice events to the continuing disclosure rule that applies to underwriters and results in issuers undertaking contractually to post periodic information and notices to EMMA. Our prior summaries of the new amendments are available [here \(second alert\)](#) and [here \(first alert\)](#). Basically, the new notice events require issuers to include in undertakings entered into on or after the effective date of the amendments (February 27, 2019) a commitment to post notices to EMMA, within 10 business days, after entering into a material new “financial obligation” and after certain amendments, defaults and other events in connection with existing financial obligations.

The panel explored ambiguities in the amendatory language and discussed practical take-aways. Issuers are encouraged to adopt or amend written disclosure policies or procedures to incorporate the amended rule, review existing financial obligations and associated events of default or other events that could trigger the notice requirement, assign responsibility for identifying material financial obligations, and include the new policies or procedures as part of regular, periodic trainings.

Turning its focus to the buy side perspective, the panel also discussed what underwriters can do to feel comfortable that an issuer will comply with the new amendments going forward, and as a result, what can an issuer expect to be asked as part of the underwriter’s due diligence process prior to the bond sale. Given that most (if not all) issuers will not have a track record of providing information required by the new amendments to investors, it was suggested that underwriters may rely more heavily on issuer policies and procedures that are reasonably designed to comply with the new requirements.

Underwriters may inquire as to whether the issuer and responsible persons are aware of the new amendments, whether policies and procedures have been adopted, whether they incorporate the amendments, and what steps the issuer has taken to prepare for ongoing compliance. We expect that market participants will keep a close eye on how issuers and underwriters implement and adapt to the new requirements, and for this discussion to continue.

Roles of Disclosure Counsel and Underwriter's Counsel

Panels at The Institute explored the responsibilities of disclosure counsel to the issuer and the responsibilities of underwriter's counsel. The disclosure counsel panel reflected on the evolution of the role, as state and municipal bond issuers increasingly hire disclosure counsel to support the issuer in meeting its obligations under the federal securities laws.

Both panels discussed the negative assurance letter provided to their respective clients, focusing on the NABL Model Letter of Underwriter's Counsel Second Edition and NABL's Model Letter of Disclosure Counsel (2018 Edition). The model letters share a common core: a statement of negative assurance confirming to the client (and potentially other addressees) that no facts have come to the attention of the attorneys rendering legal services in connection with the bond matter that cause them to believe that the disclosure document contained or contains any untrue statement of a material fact or omitted or omits to state any material fact necessary to make the statements made therein, in the light of the circumstances under which they were made, not misleading.

The model letters diverge in other respects, reflecting the differing roles of underwriter's counsel and disclosure counsel. Underwriter's counsel serves a traditional role, including assisting the underwriter in establishing a due diligence defense under the federal securities laws. Disclosure counsel serves a newer role, assisting the issuer in demonstrating reasonable care in preparing and approving disclosure documents, including through disclosure policies and procedures.

Tax Notes:

Reissuance Regulations

As noted in our 2018 Year in Review, the IRS released proposed reissuance regulations (the "Proposed Reissuance Regulations") for tax exempt bonds on December 31. The Reissuance Regulations focus on standards for reissuance of tax-exempt tender option bonds. On March 1, 2019, NABL provided comments on the Proposed Reissuance Regulations to the IRS. In the comments, NABL made several requests for clarifying changes and a few substantive suggestions.

In its most sweeping suggestion, NABL recommended that issuers be allowed to elect a reissuance when modifications are made to a tax-exempt bond. As the NABL comments note, the existing reissuance regulations are complex, and it is often difficult to know if a modified bond has been reissued or not. This can be a source of uncertainty and confusion for issuers. In many cases, it would be helpful to issuers to simply elect to treat the bond as reissued and then take the appropriate steps (including filing a new IRS Form 8038-G or 8038) to ensure compliance with the tax requirements for the reissued bond. At The Institute, a Treasury official agreed that additional certainty regarding reissuance could be helpful to issuers and said that Treasury would consider the proposal.

NABL also requested guidance on the effect of the phase-out of LIBOR on variable rate bonds. Treasury indicated that the LIBOR phase-out has broad implications beyond the tax-exempt market and guidance on LIBOR will likely be provided with respect to taxable and tax-exempt obligations, outside the scope of the Proposed Reissuance Regulations.

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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