

- Adopted amendments to Rules A-13 and G-32 to increase assessments in order to defray increased expenses associated with the EMMA platform, especially through eliminating fee exemptions for short-term and demand obligations other than commercial paper<sup>1024</sup>

### **Elusive “Spirit” of the Tower Amendment—Legislative Cracks**

Since the enactment of the Tower Amendment in the mid-1970s, the provision has served as fodder for heated debate as to the appropriate authority of the Securities and Exchange Commission and reasons or excuses for regulatory nonaction.<sup>1025</sup> The 2010

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<sup>1024</sup> MSRB Notice 2009-56, Amendments to Rule A-13 on Underwriting Assessments” (Sept. 30, 2009) (“Rule G-32 has also been amended to include a new definition of commercial paper.”) See Ackerman, “MSRB Says Rule Change Could Bring in \$2M” (Bond Buyer Online Oct. 2, 2009).

In addition, the Board “filed a new rule with the [SEC] that would allow [the Board] to collect a flat \$60 ‘development fee’ on examinations taken by municipal securities representatives and principals, as well as muni fund securities ‘limited principals,’ to demonstrate competence in their areas of work.” Ackerman, “MSRB Files Rule to Charge \$60 Development Fee on Exams” (Bond Buyer Online Nov. 6, 2009); MSRB Notice 2009-58, “Proposed Rule A-16 on Examination Fees” (Nov. 5, 2009).

See also MSRB Notice 2009-61, “Reminder of December 1, 2009 Effective Date of Amendments to Rule A-13 on Underwriting Assessments” (Dec. 1, 2009).

The MSRB also announced that it is considering whether to increase fees further. Ackerman, “MSRB Eyes Raising Its Fees—Puts Banking PAC Proposal on Hold” (Bond Buyer Online Feb. 2, 2010) (“including subscriptions for market data its collects”).

<sup>1025</sup> For example, see SEC Commissioner Elisse B. Walter’s remarks entitled “Regulation of the Municipal Securities Market: Investors Are Not Second-Class Citizens” (Oct. 28, 2009), calling for a number of regulatory changes in the municipal securities market, including among them, repeal of the Tower Amendment.

Ackerman, “SEC Looks to Target Tower Amendment—Commission May Propose Repeal” (Bond Buyer Online May 13, 2009); Ackerman, “Reg Reform, SEC Top Agenda—More Power Over Munis Sought” (Bond Buyer Online Dec. 30, 2009).

See also Cohen, “Municipal Market Meltdown? Response to Bookstaber” (Apr. 9, 2010) at [thepublicpurse.com](http://thepublicpurse.com)—

The Tower Amendment should be abolished and municipalities that want to participate in public capital markets and be rated like corporates should be held to the same reporting standard. Period. Would you buy a corporate bond whose disclosure was two years old?

financial reform legislation introduced cracks in the Tower Amendment by means of the new regulation of municipal advisors, as discussed below.

Many market participants see the “spirit” of the Tower Amendment under every bed. If, however, they would turn on the lights and look under the bed, they would see there is no “spirit” there.

Actually, the Tower Amendment has no effective role—none whatsoever—in terms of restricting the SEC’s authority. It prevents the SEC from imposing pre-filing requirements on municipal securities offerings, but the SEC does not wish to become involved in such an arduous task in any event. There is nothing else to the Tower Amendment so far as the SEC’s authority is concerned. Arguments against SEC regulation of municipal securities disclosure are misplaced to the extent the arguments are based upon the Tower Amendment. It is a waste of time and energy to argue about the Tower Amendment. The time and energy would be far better spent in working constructively on market improvements in a rapidly changing World.

The SEC’s primary difficulty with respect to regulating municipal securities issuers is not the Tower Amendment, but rather the Commission’s limited affirmative authority.<sup>1026</sup>

The Tower Amendment restricts both the SEC and the MSRB, although in very different ways, with far greater restrictions placed appropriately upon the Board as a

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<sup>1026</sup> See Ackerman, “Haines: SEC Can’t Set Up Corporate-Style Disclosure Regime for Munis” (Bond Buyer Online Oct. 9, 2009) (“The Securities and Exchange Commission cannot set up a corporate-style disclosure regime for the municipal market under its rules because it does not have the statutory authority to do so, the SEC’s muni chief told financial advisers ... .”)

dealer-dominated (or after recent legislation, dealer- and advisor-influenced) entity. That is, the Tower Amendment restricts the MSRB's (but to underscore the point, *not* the SEC's) ability to *require* issuers directly or indirectly to furnish documents and information to the Board or purchasers of municipal securities. With the commencement of operation of the Board's EMMA disclosure platform, however, the MSRB now has identified and, with the Commission's approval, adopted mechanisms through which the Board is able to *encourage voluntary* enhanced issuer disclosures.

The Tower Amendment's restrictions on the MSRB's ability to *require* issuers, directly or indirectly, to furnish documents or information make sense because it would not be appropriate for dealers—the issuers' adversaries at the negotiating table—to be regulating issuers with whom the dealers are supposed to be dealing at arms' length as principals.<sup>1027</sup>

In contrast, in reality, insofar as the SEC is concerned, the Tower Amendment accomplishes virtually nothing. That's right, despite all the "*sturm und drang*," *virtually nothing*. The Commission's ability to regulate municipal securities does not depend on whether the Tower Amendment is or is not in effect. Its continued effectiveness or its

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<sup>1027</sup> The author was a consultant to GFOA in the mid-1970s when the Tower Amendment was adopted, and shortly thereafter served as GFOA's General Counsel. The author recalls considerable issuer concern regarding potential dealer regulation of issuers.

Another important concern was that regulation of dealers would somehow impact issuers. Yet, Congress contemporaneously gave the Commission explicit authority to regulate against fraud in municipal securities transactions and amended the definition of "person" in the 1934 Act to include governments (thereby, among other things, bringing issuers under the antifraud prohibitions of SEC Rule 10b-5, which applies to any 'persons.')

Those amendments indicated a congressional desire that the Commission exercise jurisdiction in the municipal securities market.

See n. 710 regarding dealer arguments that, as underwriters, they are principals dealing with issuers at arms, length.

repeal are essentially irrelevant—unless the Commission were to wish to require pre-offering filings.

Let's begin at the beginning. The Tower Amendment,<sup>1028</sup> contained in the Securities Exchange Act of 1934, provides, as follows with respect to the Commission, as well as the Board—

(d)(1) Neither the Commission nor the Board is authorized under this chapter, by rule or regulation, to require any *issuer of municipal securities*, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, *to file with the Commission or the Board prior to the sale of such securities* by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities. [Emphasis added.]

That restriction applies *solely* to the pre-offering period. It *only* prohibits document filing requirements.<sup>1029</sup> It *does not* prohibit requirements regarding disclosure content.

In contrast, with respect to the MSRB *alone*, the Amendment goes much farther in terms of restrictions applicable at any time—

(2) The Board is not authorized under this chapter to require any *issuer of municipal securities*, directly or indirectly through a municipal securities

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<sup>1028</sup> Securities Exchange Act of 1934 §15B(d)(1)-(2), 15 U.S.C. §78o-4(d)(1)-(2).

<sup>1029</sup> Municipal securities already were exempt from the filing requirements of the Securities Act of 1933 pursuant to Section 3(a)(2) thereof, so the Tower Amendment can be viewed as largely redundant in that sense.

broker or municipal securities dealer or otherwise, *to furnish to the Board or to a purchaser or prospective purchaser of such securities any application, report, document, or information with respect to such issuer*: Provided, however, That the Board may require municipal securities brokers and municipal securities dealers to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this chapter. [Emphasis added.]

Notice again the last sentence of the quoted provision, which states, “Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this chapter.”

Once again, despite repeated overgeneralizations to the contrary by some market participants, and sometimes by implication the Commission itself or at least by certain Commissioners or staff, a reading of the Tower Amendment demonstrates that the only restriction placed by the Tower Amendment upon SEC authority is with respect to requiring pre-offering *filings*, namely, “*requir[ing] any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities.*” [Emphasis added.]

That's it. No documentary pre-filing requirements. End of story. End of restriction.

Due to the Commission's larger regulatory problem in the municipal securities market—weak explicit affirmative regulatory authority with respect to issuers and obligors—the Commission regulates dealers under its explicit authority to do so, reaching issuers and obligors indirectly by prescribing ways in which dealers must interact with the issuers and obligors.<sup>1030</sup> The Commission, of course, continues to possess broad authority with respect to issuers and obligors under Section 10(b) of the Securities Exchange Act of 1934 to adopt rules to prevent fraud, and also has strong antifraud and anti-negligence enforcement authority.

The Dodd-Frank Wall Street Reform and Consumer Protection Act appears to have introduced important cracks in the Tower Amendment. This occurred by the grant to the SEC and MSRB of substantial authority over “municipal advisors.” To summarize the discussion elsewhere in this book,<sup>1031</sup> the following are certain preliminary observations regarding the SEC's and MSRB's new authority—

- The Commission and the Board could, if they choose, utilize their varying authority (the Board through the adoption of rules with the Commission's approval and the Commission through its enforcement authority) to implement the municipal advisors' fiduciary duty in a highly flexible manner to require municipal advisors to provide sound

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<sup>1030</sup> For example, under SEC Rule 15c2-12, a dealer participating in a municipal securities offering subject to the Rule must receive from the issuer and review a near-final official statement.

<sup>1031</sup> See n. 657 and accompanying text regarding the new regulatory scheme applicable to municipal advisors.

- disclosure advice to issuers and obligated persons when municipal advisors participate in the preparation of offering documentation
- The prohibition against fraud, deception and manipulation by municipal advisors will be another powerful tool for the Commission and Board to use to encourage the advisors to advise issuers and obligated persons to make appropriate disclosure in order to avoid enforcement action against the advisors<sup>1032</sup>
  - The Commission appears to have the ability to take enforcement actions regarding the quality of expert work products (rate studies, feasibility studies, market studies, appraisals, projections and the like) and, through enforcement of the municipal advisors' fiduciary duty, disclosure regarding those work products and disclosure practices of the municipal advisor experts preparing them, thereby impacting investigatory procedures and disclosures practices particularly in the riskiest municipal securities issues
  - The Commission and the Board also could utilize their authority to require that municipal advisors provide competent advice to issuers and obligated persons against proceeding with unwise transactions or

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<sup>1032</sup> In Herr and Warren, "Lawyer Liability: Why The SEC Should Clarify Its Recent *Ira Weiss* Decision" *Secs. Reg. & Law* vol. 38, no. 21 at 893 (May 22, 2006), the argument is made that the SEC deliberately avoids action against attorneys for so as not to place a "chill" upon their advice. See n. 416.

The municipal advisors' fiduciary duty and explicit antifraud prohibitions create an entirely different regulatory environment, and even if the Commission does hold back in terms of actions against lawyers, it may be reasonably anticipated that the Commission will not be so reticent with respect to the advisors.

provide competent advice as to how the transactions might be improved, and indeed, that would seem to be one of the more obvious purposes of the fiduciary duty in the legislation

- The Commission and the Board further could utilize their authority to require that municipal advisors decline to assist issuers or obligated persons in completing egregious transactions without providing appropriate advice to the issuers or obligated persons and without appropriate disclosure to investors

Interestingly there may be another crack in the Tower Amendment that has been present all along. The Tower Amendment's prohibitions upon the SEC and MSRB relate to "issuer[s] of municipal securities," but neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 contains a specific a definition of the term "issuer of municipal securities." Literally, the term could be read to refer to the *governmental* issuers of municipal securities, that is state and local governmental entities. With few exceptions, private obligors do not "issue" municipal securities; they enter commonly instead into underlying leases, installment sale agreements or loan agreements. It is unclear whether the term "issuer of municipal securities" extends to those private obligors providing substantive credits for certain—usually the riskiest—municipal securities.<sup>1033</sup> The exemption for "municipal securities" in Section 3(a)(2) of the 1933 Act includes tax-exempt industrial development bonds, but the term "issuer of municipal securities" remains undefined in those statutes.

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<sup>1033</sup> See the discussion beginning at n. 479 and accompanying text regarding risky municipal securities offerings.

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress treated separately the phrase “issuer of municipal securities” and the term “obligated person.”<sup>1034</sup>

Municipal securities supported by the credits and performance of private parties have been viewed as incorporating more than one security. Some 40 years ago, SEC Rules 131 and 3b-5<sup>1035</sup> set forth the “separate securities” concept, which applies in offerings of municipal securities. Rule 3b-5, adopted by the Commission under the 1934 Act, views a “security” issued by a private party in a conduit securities offering as “separate” from the “security” issued by the governmental issuer.<sup>1036</sup> Rule 131 contains substantially the same language in the context of the 1933 Act. The “separate securities”

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<sup>1034</sup> See n. 668 and accompanying text regarding the treatment of these terms in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

<sup>1035</sup> SEC Rules 131, 17 C.F.R. §230.131, and 3b-5, 17 C.F. R. §240.3b-5.

<sup>1036</sup> SEC Rule 3b-5 provides, as follows—

§240.3b-5 Non-exempt securities issued under governmental obligations.

- (a) *Any part of an obligation* evidenced by any bond, note, debenture, or other evidence of indebtedness issued by any governmental unit specified in section 3(a)(12) of the [Securities Exchange Act of 1934] which is *payable from payments to be made in respect of property or money which is or will be used, under a lease, sale, or loan arrangement, by or for industrial or commercial enterprise, shall be deemed to be a separate “security”* within the meaning of section 3(a)(10) of the Act, *issued by the lessee or obligor under the lease, sale or loan arrangement.*
- (b) An obligation shall not be deemed a separate “security” as defined in paragraph (a) of this section if, (1) the obligation is payable from the general revenues of a governmental unit, specified in section 3(a)(12) of the Act, having other resources which may be used for the payment of the obligation, or (2) the obligation relates to a public project or facility owned and operated by or on behalf of and under the control of a governmental unit specified in such section, or (3) the obligation relates to a facility which is leased to and under the control of an industrial or commercial enterprise but is a part of a public project which, as a whole, is owned by and under the general control of a governmental unit specified in such section, or an instrumentality thereof. [Emphasis added.]

issued by private obligors may be viewed as falling outside the Tower Amendment's limitations.<sup>1037</sup>

Rules 131 and 3b-5 already were in effect at the time of the creation of the MSRB and the enactment of the Tower Amendment in the mid-1970s. Only a few years earlier,

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<sup>1037</sup> Section 3(a)(8) of the 1934 Act defines the term "issuer" to mean (with certain exceptions not relevant for this discussion) as "any person who issues or proposes to issue any security." See also Section 2(a)(4) of the 1933 Act.

In the case of a separate security, it is difficult to view the governmental issuer as the issuer of "a lease, sale, or loan arrangement, by or for industrial or commercial enterprise." By itself, that may not be sufficient to determine that such "separate" obligations lie outside the Tower Amendment, but it also would be difficult to view the private enterprise as the issuer of the securities issued in those transactions at the governmental level. The private enterprises generally authorize, execute and deliver the "lease, sale, or loan arrangement," not the governmental security in which the governmental issuer pledges to pay debt service from payments it receives from the private enterprise pursuant to the lease, sale or loan arrangement.

In Rule 15c2-12(f)(4), the Commission defined the term "issuer of municipal securities, as follows—

The term *issuer of municipal securities* means the governmental issuer specified in section 3(a)(29) of the Act and the issuer of any separate security, including a separate security as defined in rule 3b-5(a) under the Act.

That definition, however, is intended to maximize the reach of the Rule, not to opine on the meaning of the term for purposes of the Tower Amendment.

Loss, Seligman and Paredes, **SECURITIES REGULATION** at vol. III, p. 54 (4<sup>th</sup> Ed. Aspen Publishers) describes the Tower Amendment as "prohibiting 1933 Act type disclosure documents from being filed before a municipal issuance."

Fippinger, **THE SECURITIES LAW OF PUBLIC FINANCE**, §.4.1 at vol. 1, p. 6-35-40 (Practising Law Institute, New York 2<sup>nd</sup> ed. rev. 2009) quotes from legislative history, including the Senate Report and floor statements made by two key Senators—Harrison Williams and John Tower—at the time the 1975 legislation was under consideration.

The Senate Report (S. Rep. 94-75, at 44-45 (1975) as so quoted, recognized that "the fear has been expressed that requirements could be imposed which would have the effect of subjecting the information disclosed by issuers in connection with an offering to prior review or approval, thus resulting in a *de facto* registration requirement for municipal bonds." Of course, nothing the Commission has done to date would approach such a pre-offering "prior review or approval" process.

The floor statements of Senators Williams and Tower, as quoted, are perhaps more telling for purposes of the author's point in this discourse that the Tower Amendment was not intended to protect private obligors, but rather that the focus was upon governmental issuers and their operations. As quoted, Senator Tower stated that the portion of what is now the Tower Amendment directed to the MSRB's authority would deny the Board "authority to require State and local government units to provide information about their operations." The quotation from Senator Williams is virtually the same that the MSRB "would not have authority to require State and local governments to make disclosure about their operations."

when it had wanted to do so, Congress had prevented the Commission from requiring, in certain circumstances involving tax-exempt industrial development bonds, that offerings involving certain tax-exempt (but not taxable) separate securities be registered under the 1933 Act. Even at that time, which predated the MSRB's creation and the Tower Amendment's enactment, Congress did not override the SEC's rules entirely.

Thus in 1975, while prohibiting the SEC and MSRB from taking certain actions regarding "issuers of municipal securities," Congress did not explicitly or literally extend the Tower Amendment's prohibitions to actions taken with respect to the private "issuers" of separate securities or with respect to offerings of separate securities.<sup>1038</sup>

Turning now to the content of disclosure, under its Rule 15c2-12, using the "back door" of focusing direct disclosure requirements on dealers and, effectively, indirect requirements on issuers,<sup>1039</sup> the SEC has prescribed substantive disclosure requirements both for municipal securities offerings and for continuing disclosure after the offerings.

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<sup>1038</sup> At the time, the "obligated person" concept had not yet been defined, but it may offer further food for thought.

The Commission added the term "obligated person" to Rule 15c2-12(f)(10) in 1994. The term is defined, as follows—

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

<sup>1039</sup> Rule 15c2-12 does not require that issuers make disclosure. Rather, it applies to dealers serving as underwriters. Issuers are free to sell their securities without compliance with the Rule. The problem is that issuers cannot do so easily without underwriters, and underwriters must comply with the Rule.

In offerings, the SEC already has imposed specific disclosure requirements through the definition of the term “final official statement,” which *requires* that final official statements subject to the Rule contain the following disclosure information<sup>1040</sup>—

- Information concerning the terms of the proposed issue of securities
- Information, including financial information or operating data, concerning issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the offering
- A description of the continuing disclosure undertakings to be provided by issuers or obligors pursuant to Rule 15c2-12
- A description of any instances in the previous five years in which persons specified in Rule 15c2-12 failed to comply, in all material respects, with any previous undertakings

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<sup>1040</sup> Rule 15c2-12(f)(3) provides—

The term *final official statement* means a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to the Participating Underwriter(s) and that sets forth information concerning the terms of the proposed issue of securities; information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the Offering; and a description of the undertakings to be provided pursuant to paragraph (b)(5)(i), paragraph (d)(2)(ii), and paragraph (d)(2)(iii) of this section, if applicable, and of any instances in the previous five years in which each person specified pursuant to paragraph (b)(5)(ii) of this section failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in paragraph (b)(5)(i) of this section. Financial information or operating data may be set forth in the document or set of documents, or may be included by specific reference to documents available to the public on the Municipal Securities Rulemaking Board’s Internet Web site or filed with the Commission.

With respect to continuing disclosure, the Commission already has imposed *requirements* that the following information be disclosed<sup>1041</sup>—

- Annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement, or, for each obligated person meeting the objective criteria specified in the undertaking and used to select the obligated persons for whom financial information or operating data is presented in the final official statement, except that, in the case of pooled obligations, the undertaking shall specify such objective criteria
- If not submitted as part of the annual financial information, then when and if available, audited financial statements for each obligated person covered by the foregoing requirement
- Principal and interest payment delinquencies
- Unscheduled draws on debt service reserves reflecting financial difficulties
- Unscheduled draws on credit enhancements reflecting financial difficulties
- Substitution of credit or liquidity providers, or their failure to perform
- Defeasances

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<sup>1041</sup> Rule 15c2-12(b)(5).

The disclosure is to occur pursuant to continuing disclosure undertakings into which issuers and obligors must enter in order for underwriters to be in compliance in offerings subject to the Rule.

In certain cases, information must be “material” before the Rule requires its disclosure.

- Rating changes
  
- Bond calls
  
- Tender offers
  
- Bankruptcy, insolvency, receivership or similar proceeding of the obligated person
  
- Certain tax-related events affecting the securities
  
- Appointment of a successor or additional trustee
  
- 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
  
- Certain changes of name of a trustee
  
- Notice of a failure of persons specified in Rule 15c2-12 to provide required annual financial information, on or before the date specified in the written agreement or contract

Having taken those steps, what precludes the SEC from imposing other, perhaps more detailed disclosure requirements, either generally for all municipal securities or for particular categories of riskier municipal securities?

Either the SEC has affirmative authority, such as the authority it already purports to have used to achieve this indirect regulation of disclosure content through dealers or it doesn't.

If the Commission has that authority, then, as evidenced by its recent adoption of its recent continuing disclosure amendments to for Rule 15c2-12, it could adopt additional amendments requiring further detailed disclosure content, including content requirements directed to specific market sectors most in need of such regulation.<sup>1042</sup>

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<sup>1042</sup> For example, in adopting its most recent changes to Rule 15c2-12, the SEC indicated that it might impose further municipal securities disclosure requirements, stating—

Several commenters advocated additional changes to the Rule. Two commenters suggested that the Commission establish a definitive time period within which the delivery of required ongoing financial information should be provided. Some commenters also suggested that the Commission add other disclosure events to the Rule. These events included: (i) long term funding commitments for payments; (ii) potential termination liabilities for an issuer's interest rate swaps; (iii) the creation of any material financial obligation (including contingent obligations); (iv) a "catch all" event subject to a materiality determination; (v) clarification of the tax-exempt status of a bond; (vi) modifications to escrow agreements or escrows; (vii) various events related to swap transactions; (viii) the conversion of bank bonds to a loan or term note; and (ix) the termination of a conditional liquidity facility. Two commenters requested that the Commission provide interpretative guidance clarifying that climate risk disclosure is material information that should be disclosed to bondholders. Finally, one commenter recommended that the Rule should require every continuing disclosure agreement to include language that successor parties will be bound by the terms of the agreement.

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The Commission welcomes the foregoing views and suggestions to revise Rule 15c2-12 and improve the transparency and other aspects of the market for municipal securities. As evidenced by its adoption of the 2008 Amendments and today's amendments, the Commission is committed to considering proposals to further enhance the scope of municipal market disclosures and their dissemination to investors. Although the Commission, in this rulemaking, is taking a targeted approach at this time, it will

If the SEC does not have that authority, that would call into question the specific indirect disclosure requirements the Commission began to adopt more than 20 years ago.

Another issue is the reach of the MSRB's affirmative authority regarding disclosure content. Putting aside whatever limitations there may be on the Commission's affirmative authority to use its Rule 15c2-12 as a regulatory vehicle reaching disclosure content to be provided by issuers and private obligors, Congress gave the Board explicit broad authority to adopt rules, among other things, that meet the following parameters—

(C) be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, ... to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest[.]

With EMMA's emergence, the Board (with the Commission's approval of Board rules) would appear to be able to identify ways to continue actively to utilize incentives to "encourage" voluntary disclosure by issuers and obligors, and disclosure through dealers, at the least in the riskiest municipal securities transactions by private "issuers of separate securities" and perhaps by nonissuer private "obligated persons."

In terms of Commission reticence, political considerations relating to governmental issuers, rather than the Tower Amendment, offer a more straightforward rationale for

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consider commenters' views as it continues its efforts to bring greater transparency and other improvements to the municipal securities market.

SEC Rel. No. 34-62184A at 83-85 (May 26, 2010), 75 F.R. 33100 at 33122 (June 10, 2010). [Footnotes omitted.]

limitations on action. Yet, with respect to disclosure by private obligors in the riskiest municipal securities transactions, the political landscape is not as hazardous.

The author's view, once again, is that the most significant disclosure progress in the municipal securities market could be made by focusing attention on disclosure practices in those readily-identifiable riskiest municipal securities market sectors.

### **State Regulation**

Although state officials have not been prominent as a general rule in terms of regulation or oversight of municipal securities disclosure,<sup>1043</sup> certain states have shown a recognition that local governments or state authorities may need assistance, especially in complex transactions.

In addition, numerous states took enforcement action in 2008 and 2009 regarding ARS.<sup>1044</sup>

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<sup>1043</sup> The California Debt and Investment Advisory Commission (CDIAC) publishes at [treasurer.ca.gov/cdiac/debt.asp](http://treasurer.ca.gov/cdiac/debt.asp) online reports of selected information, such as defaults, regarding certain land-based and pooled financing structures.

In the 1990s, the California Department of Corporations and the California Attorney General investigated and pursued litigation against a series of land-based financings involving a specific dealer firm, certain of its officials, a number of developers, developer officials, and lawyers. See, e.g., *People v. Pacific Genesis, Inc., et al.*, Case No. 97 AS 05845 (CA Sup. Ct. Sacramento County); *People v. Gnass*, 101 Cal. App. 4th 1271 (CA Ct.APP. 5th Dist.)

Certain states exercise varying degrees of oversight of local governments' financing activities, but not with respect to disclosure practices.

<sup>1044</sup> See n. 1347 and accompanying text.