Federal Securities Law

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A significant number of securities regulatory matters worthy of your attention have occurred this summer:

- the Securities and Exchange Commission (SEC) updated and expanded the definitions of "accredited investor" and "qualified institutional buyer"[1];
- the SEC modernized the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosures that registrants are required to make pursuant to Regulation S-K;[2]
- two SEC Commissioners were sworn into office: newly appointed SEC Commissioner Caroline A. Crenshaw and Commissioner Hester M. Peirce, reappointed to a new term;[3]
- Steven Peikin stepped down as co-Director of the Division of Enforcement, while Stephanie Avakian remains as Director;[4]
- in the SEC's ongoing investigation into "flipping" in the municipal bond market, one firm agreed to pay more than $10 million to resolve charges that it circumvented the priority given to retail investors in certain municipal bond offerings[5] and, not directly related to that firm, the SEC secured summary judgment in federal district court against certain individuals as municipal bond "flippers;"[6]
- the SEC virtually hosted the 2020 Municipal Securities Disclosure Conference, originally scheduled for March 10, on June 16;[7]
- on the same day, the SEC issued an order granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors;[8] and

[1] Amending the "Accredited Investor" Definition, Release Nos. 33-10824; 34-89669 (Aug. 26, 2020), *available at*: https://www.sec.gov/rules/final/2020/33-10824.pdf.
[2] Modernization of Regulation S-K Items 101, 103, and 105, Release Nos. 33-10825; 34-89670 (Aug. 26, 2020), *available at*: https://www.sec.gov/rules/final/2020/33-10825.pdf.
[3] Caroline A. Crenshaw and Hester M. Peirce Sworn-In As SEC Commissioners (Washington D.C., Aug. 17, 2020), *available at:* https://www.sec.gov/news/press-release/2020-184.
[4] Enforcement Co-Director Steven Peikin to Depart (Washington D.C., Aug. 5, 2020), *available at:* https://www.sec.gov/news/press-release/2020-174.
[5] UBS to Pay $10 Million for Violating Rules Which Give Priority To Retail Investors in Municipal Offerings, Exchange Act Release No. 89348 (July 20, 2020) *available at*: https://www.sec.gov/news/press-release/2020-159.
[6] SEC Obtains Summary Judgment Against Municipal Bond "Flippers", Litigation Release No. 24872 (August 24, 2020), *available at:* https://www.sec.gov/litigation/litreleases/2020/lr24872.htm.
[7] Opening Remarks at 2020 Municipal Securities Disclosure Conference (June 16, 2020), *available at*: https://www.sec.gov/news/public-statement/olsen-2020-municipal-securities-disclosure-conference-061620.

- on August 14, the Securities Industry and Financial Markets Association petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC's June 16, 2020 Order.[9]

Accredited Investor and Qualified Institutional Buyer (QIB)

Although municipal securities are "exempt securities," so may be offered without registering with the SEC, under SEC Rule 131 certain offerings of municipal securities are deemed to include non-exempt underlying loan, lease, or installment sale obligations, so must resort to a so-called private placement exemption to avoid registration. In addition, even when not required to avoid registration, issuers of municipal securities sometimes choose to limit sales of their bonds to limited numbers of sophisticated investors, either to keep higher risk bonds out of the hands of retail investors or to avoid continuing disclosure requirements under SEC Rule 15c2-12. One technique for doing so has been to use the minimum denomination of $100,000. In some instances, the number of purchasers has also been limited and purchasers have been required to state that they are "accredited investors," purchasing for investment and not with an intent to resell. Some or all of these techniques continue to be used today, whether or not the intention is to avoid registration that would otherwise be required or to take advantage of the "private placement" exemption in Rule 15c2-12. A brief review of the creation of the latter exemption may provide perspective on the changes made in the modernizing amendments to the definitions of "accredited investor" and "qualified institutional buyer."

In 1988, together with publishing its interpretation of municipal underwriter responsibilities, the SEC initially proposed Rule 15c2-12. As proposed and promulgated, the Rule predicated municipal securities underwritings in excess of $10 million upon review by the underwriter of a nearly final official statement prior to offering, bidding on or purchasing the securities and contracting to obtain final official statements in sufficient quantities to make available to purchasers.[10] Aside from the $10 million threshold, the proposed rule contained no exemptions. The Commission explained "the primary intent of the rule is to focus on those offerings that involve the general public, and which are likely to be traded in the secondary market."[11] While there may have been reasons for an exemption similar to the registration exemptions under Section 4(2) of the Securities Act for private placements, the Commission was concerned that "in the absence of trading restrictions, the bonds could be resold immediately to numerous secondary market purchasers lacking the sophistication of the initial purchasers of the

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[8] Order Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors, Release No. 34-89074 (June 16, 2020), *available at*: https://www.sec.gov/rules/exorders/2020/34-89074.pdf. All four Commissioners (there was one vacancy) voted to approve. *See* https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml.

[9] SIFMA Files Suit Seeking to Vacate SEC's Temporary Conditional Exemption for Municipal Advisors (Washington, D.C., August 14, 2020), *available at:* https://www.sifma.org/resources/news/sifma-files-suit-seeking-to-vacate-secs-temporary-conditional-exemption-for-municipal-advisors/.

[10] Municipal Securities Disclosure, Release No. 34-26100 (Sept. 22, 1988), 53 F. R. 37778, available at: https://www.sec.gov/rules/proposed/1988/34-26100.pdf. The proposed Rule 15c2-12 overshadowed the interpretation of municipal underwriter responsibilities, and the document became known as "the proposing release."

[11] *Id.*, 37783.

bonds."[12] The Commission requested comment "[i]n order to consider whether any rule that is adopted should contain some type of 'private placement exemption.'"[13]

The Commission's invitation to suggest a type of private placement exemption essentially asked how Securities Act exemption concepts applied trade by trade (i.e., resales, too, must use it or some other exemption) could (and if they should) be applied to an initial offering without future trading restrictions, yet still prevent resales "to numerous secondary market purchasers lacking the sophistication of the initial purchasers of the bonds."[14]

NABL, among many others, accepted the invitation. NABL's January 31, 1989 comment letter pointed out that, absent exemptions, the Rule would impede certain efficient market practices. NABL suggested that the Rule exempt offerings of securities with a $100,000 minimum denomination, which it submitted would assure that only sophisticated purchasers were sold securities in offerings not subject to the Rule and would not interfere with a variety of cost-saving financing programs; "not require elaborate development of concepts such as accredited investor, safe harbor, restricted resale, etc.; … not adversely affect the institutional market, where investors are often loath to purchase (or are prohibited from purchasing) restricted or legended securities," and result in other possible benefits.[15]

In adopting Rule 15c2-12, the Commission used the $100,000 minimum denomination requirement as the basis for three exemptions, then numbered 15c2-12(c)(1), (2), and (3). The 1989 adopting release explained, "in choosing the $100,000 minimum denomination, the Commission was persuaded by the comments of NABL and others that, in this context, minimum denominations on the securities would not unnecessarily interfere with the ability of underwriters to sell securities to sophisticated investors in situations where the investors currently obtain adequate information."[16]

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[12] *Id.*

[13] *Id.* The Commission proposed Rule 15c2-12 in part to get official statements into the hands of the general public being offered the bonds. Under federal securities law, the gateway for most securities sales to the general public is through the registration requirement of Section 5 of the Securities Act. Securities Act Section 3(a)(2) exempts most municipal bonds from registration and all other provisions of the Securities Act except the antifraud provisions. While an issuer or other party involved in the offer or sale of a municipal bond could be charged after the fact for fraud under Section 17(a) of the Securities Act, nothing in the Securities Act supports conditioning the initial offer or sale of municipal bonds upon the provision of official statements to purchasers. Once an official statement was used in connection with the offer or sale of a municipal bond, it would, of course be subject to the antifraud provisions of the Securities Act, but the Securities Act did not provide the vehicle to put the official statement in investor hands. That vehicle would be the Securities Exchange Act of 1934. Municipal bonds are bought by the general public through brokers, dealers, and municipal securities dealers regulated by the SEC under the Exchange Act. The Commission's authority to regulate brokers, dealers, and municipal securities dealers in the initial offer and sale of municipal bonds as well as in secondary market transactions provided the means to assure that official statements would be provided to the general investing public. As explained in the proposing release, prior to the adoption of Rule 15c2-12, MSRB Rule G-32 required underwriters to deliver to a customer, no later than settlement, a copy of any official statement prepared by or on behalf of an issuer, but if none was prepared, to deliver merely notice of that fact. The Tower Amendment (Exchange Act Section 15B(d)(2)) prohibited the MSRB from requiring issuers, directly or indirectly, to furnish the MSRB or prospective investors with any documents including official statements.

[14] *Id.*

[15] Municipal Securities Disclosure, Release No. 26985, Final Rule (July 10, 1989), 54 F. R. 28799, 28808, nn. 66 and 69, *available at*: https://www.sec.gov/rules/final/1989/34-26985.pdf.

[16] *Id.*

The exemption in Rule 15c2-12(c)(1), as adopted (and retained today as Rule 15c2-12(d)(1)(i)), applied to securities with authorized denominations of $100,000 or more that:

Are sold to no more than thirty-five persons each of whom the Participating Underwriter reasonably believes:

(A) Has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment; and

(B) Is not purchasing for more than one account or with a view to distributing the securities."[17]

The exemption in Rule 15c2-12(c)(2), as adopted (and retained today as Rule 15c2-12(d)(1)(ii)),applied to securities with authorized denominations of $100,000 or more that "[h]ave a maturity of nine months or less."[18]

The exemption in Rule 15c2-12(c)(3), as adopted (and retained in part today as Rule 15c2-12(d)(5)), applied to securities that:

At the option of the holder thereof may 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.[19]

In providing the exemptions in Rule 15c2-12, the Commission did not transfer "accredited investor," "qualified institutional buyer," or other Securities Act terms for use in an Exchange Act rule, although Securities Act sophisticated investor concepts were certainly employed. As the Commission explained:

Rather than imposing specific transfer restrictions, the Commission has chosen to require that the securities be issued in relatively large denominations and that the underwriter have a reasonable belief that the securities are being acquired by the purchaser for investment. Consistent with current practice, the Commission believes that an underwriter will satisfy its obligation under paragraph (c)(l) if it obtains a statement indicating that the investor has purchased the securities with investment intent. Furthermore, as suggested by the American Bar Association, in order to maintain the integrity of the 35 person limit, the Rule requires that each of the purchasers acquire securities for only one account.

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[17] Release No. 26985, *supra* n. 15, 54 F.R. at 28813.
[18] *Id*.
[19] *Id*. Renumbered in 1995 as 15c2-12(d)(iii) and deleted in 2010, when Rule 15c2-12(d)(5) was added to rplace it in part: "(5) With the exception of paragraphs (b)(1) through (b)(4), this section shall 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; provided, however, that paragraphs (b)(5) and (c) of this section shall not apply to such securities outstanding on 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." Amendment to Municipal Securities Disclosure, Release No. 34–62184A (May 26, 2010), 75 F.R. 33155, *available at:* https://www.sec.gov/rules/final/2010/34-62184afr.pdf.

Finally, the Rule requires that the underwriter make a subjective determination that each investor have the knowledge and experience required to evaluate the merits and risks of the prospective investment. The Commission believes that this procedure also is consistent with the current practice in the municipal securities markets, where limited placements are generally made only to institutional purchasers.[20]

While the terms "accredited investor" and "qualified institutional buyer" are not part of Rule 15c2-12, in practice many issuer agreements with placement agents or underwriters use the terms as both satisfying item (A) in Rule 15c2-12(d)(1)(i) and referring to a readily identifiable investor group under Securities Act of 1933 exemption terminology as existing or potential customers.[21]

The scope of the terms "accredited investor" and "qualified institutional buyer," as used in Securities Act rules, will soon broaden. On August 26, 2020, the SEC adopted amendments to update and, in its view, improve the definition of "accredited investor" in the Commission's rules and the definition of "qualified institutional buyer" in Rule 144A under the Securities Act of 1933. As described in the SEC press release, the amendments to the accredited investor definition add new categories of qualifying natural persons and entities and make certain other modifications to the existing definition. The amendments to the qualified institutional buyer definition similarly expand the list of eligible entities under that definition.[22] The amendments will take effect 60 days after publication of the final rule in the Federal Register. As explained in the SEC's press release,[23] "the amendments to the accredited investor definition in Rule 501(a):

- add a new category to the definition that permits natural persons to qualify as accredited investors based on certain professional certifications, designations or credentials or other credentials issued by an accredited educational institution, which the Commission may designate from time to time by order. In conjunction with the adoption of the amendments, the Commission designated by order holders in good standing of the Series 7, Series 65, and Series 82 licenses as qualifying natural persons. This approach provides the Commission with flexibility to reevaluate or add certifications, designations, or credentials in the future. Members of the public may wish to propose for the Commission's consideration additional certifications, designations or credentials that satisfy the attributes set out in the new rule;

- include as accredited investors, with respect to investments in a private fund, natural persons who are 'knowledgeable employees' of the fund;

[20] Release No. 26985, *supra* n. 15, 54 F. R. at 28809.
[21] *See*, for example, SIFMA Municipal Model Placement Agent Engagement Agreement Exhibit C Investor Letter, *available at:* https://www.sifma.org/resources/general/municipal-securities-markets/#placer with the following option: [The Investor is (a) a "qualified institutional buyer" as that term is defined in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), or (b) an "accredited investor" as that term is defined in Rule 501(a)(1),(2),(3), or (7) under the Securities Act.]
[22] SEC Modernizes the Accredited Investor Definition (Washington D.C., Aug. 26, 2020), *available at:* https://www.sec.gov/news/press-release/2020-191.
[23] Release Nos. 33-10824; 34-89669, *supra* n. 1.

- clarify that limited liability companies with $5 million in assets may be accredited investors and add SEC- and state-registered investment advisers, exempt reporting advisers, and rural business investment companies (RBICs) to the list of entities that may qualify;

- add a new category for any entity, including Indian tribes, governmental bodies, funds, and entities organized under the laws of foreign countries, that own 'investments,' as defined in Rule 2a51-1(b) under the Investment Company Act, in excess of $5 million and that was not formed for the specific purpose of investing in the securities offered;

- add 'family offices' with at least $5 million in assets under management and their 'family clients,' as each term is defined under the Investment Advisers Act; and

- add the term 'spousal equivalent' to the accredited investor definition, so that spousal equivalents may pool their finances for the purpose of qualifying as accredited investors."

The amendments expand the definition of "qualified institutional buyer" in Rule 144A to include limited liability companies and RBICs if they own and invest on a discretionary basis at least $100 million in securities of unaffiliated issuers. The amendments also add to the list any institutional investors included in the accredited investor definition that are not otherwise enumerated in the definition of "qualified institutional buyer," provided they satisfy the $100 million threshold.

"Today's amendments are the product of years of effort by the Commission and its staff to consider and analyze approaches to revising the accredited investor definition," said Chairman Jay Clayton. "For the first time, individuals will be permitted to participate in our private capital markets not only based on their income or net worth, but also based on established, clear measures of financial sophistication. I am also pleased that we have expanded and updated the list of entities, including tribal governments and other organizations, that may qualify to participate in certain private offerings."[24]

Not all agreed. The amendments were approved in a 3-2 vote, with Chairman Clayton and Commissioners Pierce and Roisman approving and Commissioner Lee and newly sworn-in Commissioner Crenshaw opposing. Commissioners Lee and Crenshaw issued a Joint Statement on the Failure to Modernize the Accredited Investor Definition,[25] stating:

The accredited investor definition is the single most important investor protection in the private market. Today's amendments purport to 'update' that definition while leaving in place 38-year old wealth thresholds, declining to index the thresholds to inflation, and declining to provide economic analysis to show how the failure to index will affect American investors—the bulk of whom are seniors—going forward.

[24] *Id.*
[25] Joint Statement on the Failure to Modernize the Accredited Investor Definition (Aug. 26, 2020), *available at*: https://www.sec.gov/news/public-statement/lee-crenshaw-accredited-investor-2020-08-26.

With its actions today, the Commission continues a steady expansion of the private market, affording issuers of unregistered securities access to more and more investors without due regard for the risks they face, and without sufficient data or analysis to ensure that our policy choices are grounded in fact rather than supposition. [26]

Regulation S-K Amendments

On the same day that it adopted revisions to the definitions of "accredited investor" and "qualified institutional buyer," the Commission also adopted amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105) that registrants are required to make pursuant to Regulation S-K. [27] Since municipal securities offerings are almost always exempt from registration with the SEC, the amendments have no mandated impact on municipal securities disclosure. However, the line item disclosure requirements of Regulation S-K have served as a point of reference for disclosure in offerings of private activity bonds backed by corporate credits, given the absence of bright line disclosure rules for exempt offerings. Accordingly, the amendments could affect disclosure practices in such offerings.

The Regulation S-K disclosure requirements have not undergone significant revisions in over 30 years. The amendments update these items to reflect the changes in capital markets and the domestic and global economies in recent decades. As with the vote on revising the accredited investor definition, the amendments were approved in a 3-2 vote, with Chairman Clayton and Commissioners Pierce and Roisman approving and Commissioners Lee and Commissioner Crenshaw opposing adoption. [28] Commissioner Lee and Commissioner Crenshaw issued separate statements explaining their opposition. [29] More will follow on Modernization of Regulation S-K Items 101, 103, and 105 [30] in next quarter's column.

Commissioners

New Commissioner Crenshaw and reappointed Commissioner Peirce were unanimously confirmed by the U. S. Senate on August 6, 2020. A video of their July 21, 2020 nomination hearing as well as copies of their written statements may be found on the website of the Senate Committee on Banking, Housing,

[26] *Id*.
[27] SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K, *supra* n.2.
[28] Final Commission Votes for Agency Proceedings (August 2020), *available at*: https://www.sec.gov/about/commission-votes/2020/commission-votes-2020-08.xml
[29] Commissioner Lee's statement is available at: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 and Commissioner Crenshaw's at: https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k.
[30] *See supra n. 3.*

and Urban Affairs.[31] As described above, they both were quickly at work. Additional biographical material is available in the announcement of their swearing in.[32]

Enforcement

Division of Enforcement Co-Director Steven Peikin departed the SEC on August 14, 2020 and Co-Director Stephanie Avakian is now Director of the Division. With regard to recent municipal market enforcement actions, the SEC resolved two matters relating to "flipping"—one by settlement, one by summary judgment.

On July 20, 2020, the SEC entered an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order to which UBS Financial Services Inc. ("UBS") consented without admitting the findings.[33] According to the Order, UBS violated Municipal Securities Rulemaking Board ("MSRB") Rules G-11(k) and G-17 as well as MSRB Rule G-27, and failed reasonably to supervise, within the meaning of Section 15(b)(4)(E) of the Exchange Act, its registered representatives with respect to their violations of the federal securities laws and MSRB rules. According to the Order, UBS also violated Section 15B(c)(1) of the Exchange Act.

According to the Order, UBS's rule violations occurred in connection with negotiated offerings of new issue municipal bonds between August 2012 and June 2016, when UBS allegedly violated retail order period restrictions by allocating bonds intended for retail customers to certain customers that were known in the bond industry as "flippers." The flippers obtained allocations of negotiated new issue bonds from UBS and then immediately resold or "flipped" the bonds to other broker-dealers at a profit. During the relevant period, the SEC found, UBS improperly allocated bonds to the flippers on hundreds of retail orders when those flippers were not eligible for retail priority. In addition, the SEC found that UBS, through certain registered representatives, improperly obtained negotiated new issue bonds for UBS's inventory by placing indications of interest with the flippers, who then placed customer orders with the underwriting syndicate, instead of UBS submitting dealer orders directly with the syndicate on its own behalf. This practice circumvented the priority of orders and improperly gave UBS access to a higher priority in the bond allocation process, according to the Order.

Under the Order, UBS is to cease and desist from committing or causing any future violations of Section 15B(c)(1) of the Exchange Act and MSRB Rules G-11(k), G-17, and G-27; censured; and ordered to pay

[31] Nomination Hearing, Tuesday, July 21, 2020, *available at*: https://www.banking.senate.gov/hearings/07/10/2020/nomination-hearing
[32] *See supra* n. 3.
[33] In the Matter of *UBS Financial Services Inc*. Exchange Act Release No 89348 (July 29, 2020), available at: https://www.sec.gov/litigation/admin/2020/34-89348.pdf. Consent was solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party. *See supra* n. 5.

disgorgement of $6,740,000 and prejudgment interest of $1,549,336 and to pay a civil money penalty in the amount of $1,750,000 to the SEC.[34]

In a separate matter, on August 17, 2020, the U.S. District Court for the Southern District of California granted the SEC's motion for summary judgment against former associates of RMR Asset Management Company—Jocelyn M. Murphy, Michael Sean Murphy, and Richard C. Gounaud.[35] According to the SEC's complaint, filed August 14, 2018, the defendants purchased new issue municipal bonds on behalf of RMR so that the defendants and RMR could quickly resell or "flip" the bonds to broker-dealers at a pre-arranged markup. The complaint further alleged that defendant Jocelyn Murphy fraudulently obtained new issue municipal bonds by posing as a retail investor residing in the issuer's jurisdiction so that her orders would receive the highest priority.

In granting the SEC's motion for summary judgment, the court ruled that the defendants operated as unregistered brokers by regularly engaging in securities transactions on behalf of RMR in exchange for transaction-based compensation, in violation of Section 15(a) of the Exchange Act. The court also ruled that Jocelyn Murphy committed fraud by submitting false zip codes with her orders to secure the higher priority reserved for local retail investors, in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The court will determine remedies at a later time.

Temporary Conditional Exemption

On June 16, 2020, the SEC issued an order granting a temporary conditional exemption ("TCE") from broker registration under Section 15 of the Exchange Act for registered municipal advisors.[36] The TCE permits registered municipal advisors to solicit banks, their wholly-owned subsidiaries that are engaged in commercial lending and financing activities, and credit unions in connection with direct placements of securities issued by their municipal issuer clients, subject to the requirements describe below. The TCE was adopted to address disruption in the municipal securities markets as a result of the coronavirus disease 2019 ("COVID-19") pandemic.

As stated in the overview provided in the TCE Release:

The Commission continues to closely monitor the impacts of the COVID-19 pandemic. The Commission understands that the outbreak has had far-reaching and unanticipated effects, including disruption to the municipal securities market. Municipal issuers have been experiencing COVID-19-related stress, but must continue to operate despite facing increased unbudgeted costs coupled with revenue uncertainty. Timely and efficient access to the capital markets is critical in order for municipal issuers to continue to meet their operational needs. On June 3, 2020, the Federal Reserve Board announced the revised terms

[34] While all four then sitting Commissioners approved the Order, Commissioner Peirce did so with exception to the disgorgement and prejudgment interest. *See* Final Commission Votes for Agency Proceedings, Calendar Year 2020, *available at:* https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml.
[35] *Supra* n. 5. A copy of the complaint is available at: https://www.sec.gov/litigation/complaints/2020/comp24872.pdf.
[36] *Supra* n. 8.

of its Municipal Liquidity Facility, originally established in April 2020 to purchase debt from state and local governments. The revised facility will support lending to U.S. states and the District of Columbia, U.S. cities with a population exceeding 250,000 residents, and U.S. counties with a population exceeding 500,000 residents that had an investment grade rating as of April 8, 2020, from at least one credit rating agency that the Federal Reserve has classified as a "major nationally recognized statistical rating organization." In addition to the population and ratings requirements, in order to access the facility, an eligible issuer must also provide a written certification that it is unable to secure adequate credit accommodations from other banking institutions and that it is not insolvent. Most municipal issuers, including many small cities, towns and villages, facing significant budget shortfalls do not meet the population thresholds and are not eligible to access the facility. At the same time, municipal issuers have faced challenges accessing the primary market, and as an alternative many municipal issuers have turned to other means of financing, such as private placements, loans, and lines of credit with banks. . .

While the Commission is not moving forward with the proposed exemption at this time, it believes that it is important to issue the Temporary Conditional Exemption with the parameters and requirements specified to address the exigent circumstances during this unprecedented time. Specifically, the Temporary Conditional Exemption is designed to aid smaller municipal issuers that may be struggling to meet their unexpected financing needs in light of the COVID-19 pandemic. This Temporary Conditional Exemption will provide additional flexibility for registered municipal advisors to assist their municipal issuer clients in more efficiently obtaining financing during this market disruption in a way that remains consistent with investor protection. To the extent market participants have information or views related to the Proposed Exemption, including in light of actions taken pursuant to the Temporary Conditional Exemption, that information can be submitted to the comment file for the Proposed Exemption for the Commission's consideration.

The Temporary Conditional Exemption is subject to a number of conditions designed to protect investors. The Temporary Conditional Exemption requires that the Registered Municipal Advisor obtain written representations from the Qualified Provider, which limits the potential investor base for direct placements issued pursuant to the Temporary Conditional Exemption to institutions that routinely engage in credit risk analysis (and typically do so consistent with their commercial lending practices and regulatory obligations) and typically do not resell such securities to retail investors. The Temporary Conditional Exemption requires that the Registered Municipal Advisor make written representations, which protect potential investors by putting them on notice of what duties and obligations the municipal advisor will undertake in connection with the transaction. It also requires the Registered Municipal Advisor to obtain written representations from the Qualified Provider(s) regarding the Temporary Conditional Exemption's investor eligibility and transfer restriction conditions. The Temporary Conditional Exemption further requires Registered Municipal Advisors to notify the Commission staff of any instances of reliance on the exemption, which will inform the Commission about how the exemption may affect the municipal securities market.

The solicitation activities permitted under the Temporary Conditional Exemption, as discussed below, would be in addition to the core advisory activities in which a registered municipal advisor might otherwise engage under the existing regulatory regime. These core advisory activities include assisting municipal entities and/or obligated person clients in: (i) developing a financing plan; (ii) assisting in evaluating different financing options and structures; (iii) assisting in selecting other parties to the financing, such as bond counsel; (iv) coordinating the rating process, if applicable; (v) ensuring adequate disclosure; and/or (vi) evaluating and negotiating the financing terms with other parties to the financing, including the provider of the direct placement.

The text of the TCE is provided in the TCE release.[37] The TCE expires December 31, 2020.

The TCE requires a registered municipal advisor to notify staff in the Division of Trading and Markets of any direct placement for which it has relied on the TCE no later than 30 calendar days after the sale of securities in the direct placement. The notification must identify: (1) the municipal issuer; (2) the date of the direct placement; (3) the principal amount of the Direct Placement; (4) the qualified provider(s) that purchased the direct placement; and (5) the CUSIP, if available. Notification should be made by sending this information in an email to SEC staff at tradingandmarkets@sec.gov. Data regarding received notifications is provided on the web page for the Office of Municipal Securities on the SEC website. As of the date of this writing, data is provided for the reporting period of June 16 – July 31, 2020 and reflects three reported private placements by two issuers in principal amounts of $169,150, $752,205, and $967,630.[38]

On August 14, 2020, SIFMA filed a Petition for Review of Order of the United States Securities and Exchange Commission in the United States Court of Appeals for the District of Columbia Circuit. The Petition states simply: "Pursuant to 5 U.S.C. § 702, 15 U.S.C. § 78y, and Federal Rule of Appellate Procedure 15(a), the Securities Industry and Financial Markets Association hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the June 16, 2020 Order of the United States Securities and Exchange Commission Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors." A SIFMA press release the same day stated that the suit seeks to vacate the TCE, explaining:

"The TCE creates an uneven playing field that exclusively benefits municipal advisors at the expense of more regulated broker-dealers, and ultimately we believe at the expense of issuers and market transparency," said Kenneth E. Bentsen, Jr., president and CEO of SIFMA. "The SEC in effect suspended SEC regulatory requirements for one type of business entity, at the expense of another. Further, we believe the SEC failed to follow the proper procedure by taking such sweeping action absent a formal rulemaking with notice and comment, along with a genuine cost benefit analysis."[39]

[37] *Id.*
[38] https://www.sec.gov/files/data-for-reporting-period-061620-073120.pdf.
[39] *Supra* n. 9.

Stay tuned.

September 2020