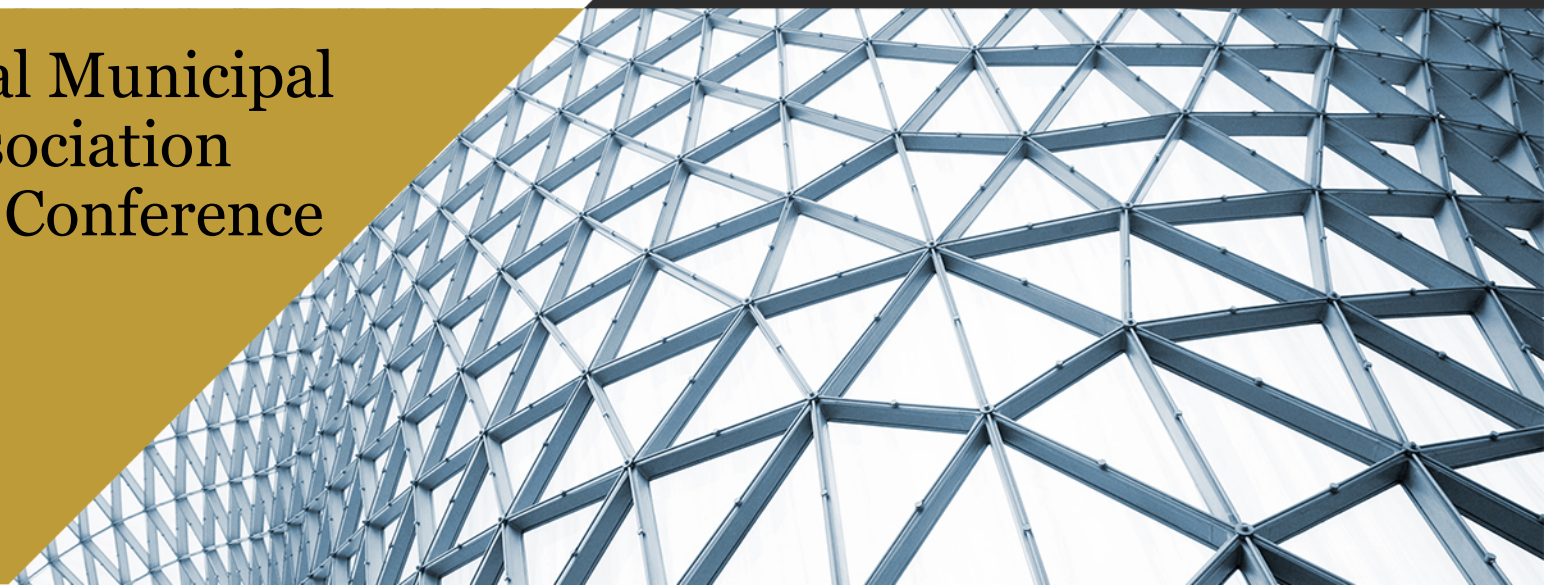
GT GreenbergTraurig FMPA MUNICIPAL POWER

www.gtlaw.com

International Municipal Lawyers Association
85th Annual Conference



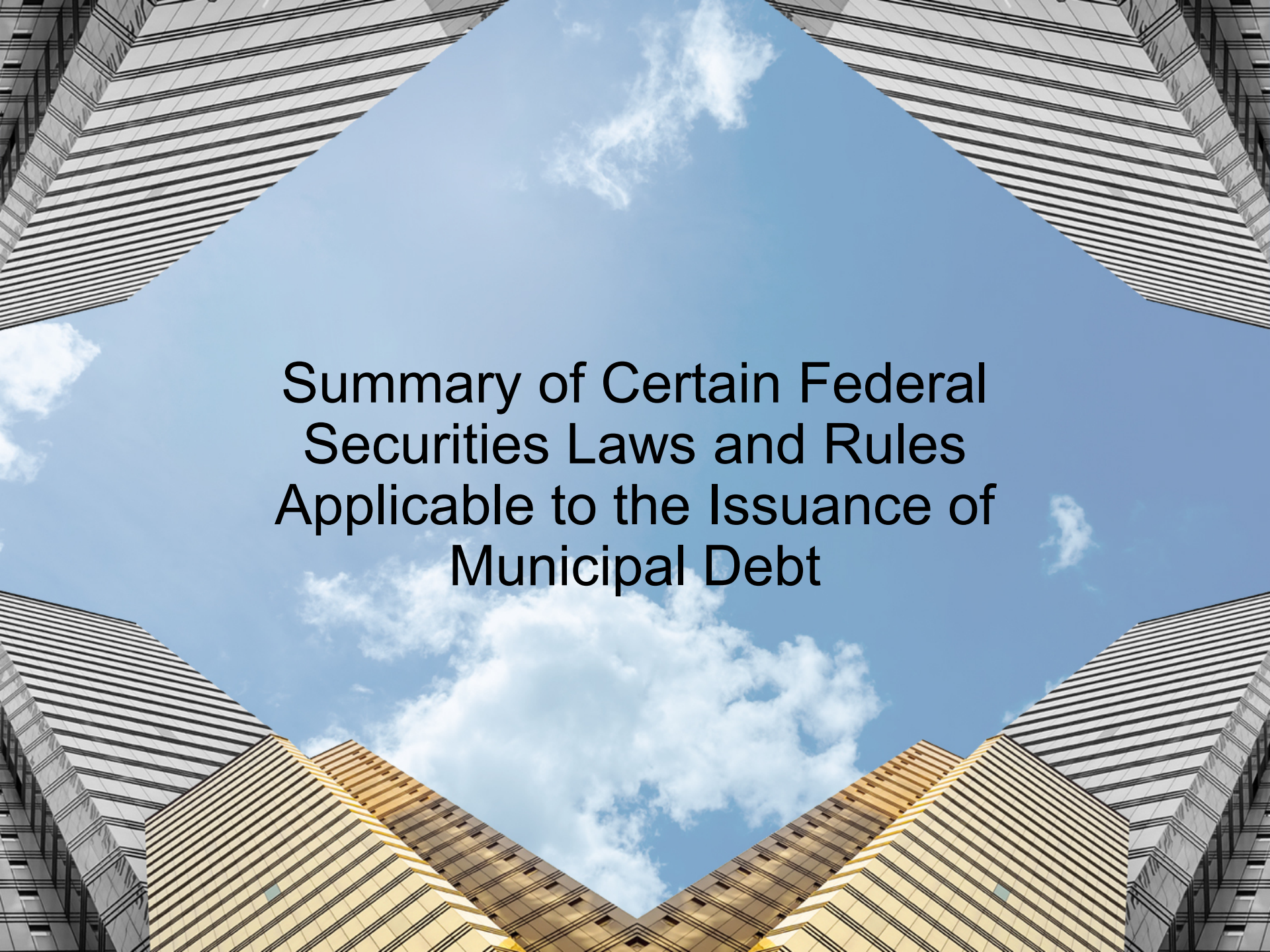
Municipal Finance: 2020: COVID-19, WAP, Disclosure Traps, Oh My!

Melissa López Rogers, Esq. | Greenberg Traurig | rogersmel@gtlaw.com

Lorraine M. Tyson, Esq. | Greenberg Traurig | tysonl@gtlaw.com

Linda S. Howard, CFO | Florida Municipal Power Agency | linda.howard@fmpa.com

Peter J. Andrews, Esq. | Greenberg Traurig | andrewsp@tlaw.com



Summary of Certain Federal Securities Laws and Rules Applicable to the Issuance of Municipal Debt

The Securities Act of 1933

- The Securities Act of 1933 (the "Securities Act") is often referred to as the "truth in securities" law. The Securities Act has two basic objectives:
  - to require that investors receive financial and other significant information concerning securities being offered for public sale; and
  - to prohibit deceit, misrepresentations, and other fraud in the sale of securities.

© 2020 Greenberg Traurig, LLP

The Securities Act of 1933

- Section 5 of the Securities Act imposes a registration requirement for securities.
  - However, Section 3(a)(2) of the Securities Act provides that exempted securities, including "any security issued or guaranteed by the United States or any Territory thereof . . . or by any State of the United States, ***or by any political subdivision of a State*** or Territory," are exempt from the registration requirement.

© 2020 Greenberg Traurig, LLP

Section 17(a) of the Securities Act

- It shall be unlawful for any person ***in the offer or sale of any securities*** . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly--
  - to employ any device, scheme, or artifice to defraud, or
  - to obtain money or property by means of any ***untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading***; or
  - to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

© 2020 Greenberg Traurig, LLP

The Securities Exchange Act of 1934

- The Securities Exchange Act of 1934 governs the secondary trading of securities.
  - The Exchange Act also created the U.S. Securities and Exchange Commission and empowered it with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations.
  - The Exchange Act also identifies and prohibits certain types of conduct in the financial markets and provides the SEC with disciplinary powers over regulated entities and persons associated with them.

© 2020 Greenberg Traurig, LLP

The Securities Exchange Act of 1934

- Municipal securities are exempt from the:
  - registration requirements;
  - reporting requirements; and accounting standards, books and records and internal control requirements.
- However, municipal securities are still subject to antifraud provisions of the Exchange Act.

© 2020 Greenberg Traurig, LLP

Section 10(b) of the Exchange Act

- It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
  - To use or employ, ***in connection with the purchase or sale of any security*** registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

© 2020 Greenberg Traurig, LLP

SEC Rule 10b-5

- It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
  - To employ any device, scheme, or artifice to defraud,
  - To make any ***untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading***, or
  - To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
- in connection with the purchase or sale of any security.

© 2020 Greenberg Traurig, LLP

The Tower Amendment

- The Securities Act and the Exchange Act were both enacted with ***broad exemptions for municipal securities*** from all their provisions, except for:
  - Antifraud provisions of Section 17(a) of the Securities Act; and
  - Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.
- Thus, the municipal securities market ***has not been*** subject to the same level of regulation as the corporate markets.

© 2020 Greenberg Traurig, LLP

The Tower Amendment

- Pursuant to the provisions of the Securities Act Amendments of 1975, commonly known as the "Tower Amendment," Congress expressly limited the SEC's and the MSRB's authority to require municipal securities issuers, either directly or indirectly, to file any application, report, or document with the SEC or the MSRB prior to any sale of municipal securities by a municipal issuer.
- As a result of the lack of regulatory authority over municipal issuers pursuant to the Tower Amendment the SEC's efforts in the municipal securities market have been accomplished primarily through regulation of broker-dealers pursuant to Rule 15c2-12, SEC interpretations, enforcement of the antifraud provisions of the federal securities laws and its oversight of the MSRB.

© 2020 Greenberg Traurig, LLP

SEC Enforcement Powers

- Investigations
  - The SEC is authorized to conduct investigations and issue reports under Section 21(a) of the Exchange Act. The SEC has significantly increased its enforcement presence in the municipal market, mainly through its power to conduct investigations.
- Administrative Proceedings
  - The SEC may also initiate administrative proceedings, which usually involve negligence-based charges, and do not require investor loss.

© 2020 Greenberg Traurig, LLP

SEC Enforcement Powers

- Criminal Proceedings
  - The securities laws allow for criminal prosecutions for "willful" violations. See, e.g., Exchange Act Section 32(a).
- Temporary Restraining Order
  - The SEC has the ability to seek a temporary restraining order if it believes investors are in imminent danger of harm.

© 2020 Greenberg Traurig, LLP

Elements of SEC Enforcement Action

- The following are the elements of an SEC enforcement action:
  - **scienter** (if it is a Section 17(a)(1), Section 10(b) or Rule 10b-5 claim) or merely negligence (if it is a Section 17(a)(2) or (3) claim);
  - A **material** misrepresentation; and
  - in connection with the purchase or sale of a security.

© 2020 Greenberg Traurig, LLP

Elements of SEC Enforcement Action

- Scienter (Mental State): mental state embracing intent to deceive, manipulate or defraud
  - Required to establish violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5, although recklessness has been held by some courts and the SEC to be sufficient to establish scienter.
  - Scienter is not required to prove violations of Sections 17(a)(2) or (3) of the Securities Act. For these sections, violations can be established merely by showing negligence.

© 2020 Greenberg Traurig, LLP

Elements of SEC Enforcement Action

- Materiality and the "Total Mix" of Information
  - There is relatively little SEC guidance on materiality determinations. SEC staff guidance universally accepts and adopts the materiality standard under various Supreme Court cases.
  - Information is material if there is a ***substantial likelihood that the information would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available***.

© 2020 Greenberg Traurig, LLP

Elements of SEC Enforcement Action

- Materiality and the "Total Mix" of Information
  - Whether a statement significantly alters the total mix of information for purposes of Section 10(b) of the Exchange Act and Rule 10b-5 is determined ***based on the facts and circumstances in each instance***.
  - The extent to which other statements have been made may increase or decrease the risk that the statements may significantly alter the total mix of information.

© 2020 Greenberg Traurig, LLP

Liability for Fraud

- Liability for fraud may attach to an issuer and its directors, governing board members, officers, ***and staff***. In addition, ***individuals*** may be subject to penalties, fines, injunctions or, in extreme cases, incarceration. Issuers and their directors, governing board members, officers, and staff may rely on professionals, ***but*** their reliance ***must be reasonable***. There is no official immunity.
- Controlling person liability under Section 20(a) of the Exchange Act can be used to hold public officials responsible based on their control of the municipal entity that engaged in the fraud.

© 2020 Greenberg Traurig, LLP

Liability for Fraud

- In June 2018, the SEC obtained lifetime bars prohibiting three officials of the Town of Ramapo, New York, who allegedly hid a deteriorating financial situation from investors, from participating in municipal bond offerings.
- In addition to the lifetime municipal security bars, the final judgments, also ordered certain individuals to pay up to $25,000 in civil penalties and resign from their employment with an issuer of municipal securities.

© 2020 Greenberg Traurig, LLP

Issuer Defenses

- Municipal issuers are not subject to strict liability, but can be liable in an SEC enforcement action for negligently misstating facts and can be liable in a civil action for recklessly doing so.
- Due Diligence
  - Under pertinent cases, due diligence procedures routinely followed in the preparation of disclosure materials should serve as a defense to a charge of negligence or recklessness.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12

- The SEC designed Rule 15c2-12 to address fraud and manipulation in the municipal securities market by prohibiting the underwriting of municipal securities and subsequent recommendation of those municipal securities by brokers, dealers, and municipal securities dealers for which adequate information is not available.
- Rule 15c2-12 ***applies to underwriters directly***, and, as a result of the Tower Amendment, ***only applies to governmental issuers indirectly***.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Primary Disclosure

- Generally, Rule 15c2-12 requires underwriters participating in primary offerings of municipal securities to obtain, review and distribute to investors copies of a preliminary official statement that the issuer has "deemed final" as of its date, except for the omission of no more than the following information:
  - offering price(s);
  - interest rate(s);
  - selling compensation;
  - aggregate principal amount;
  - principal amount per maturity;

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Primary Disclosure

- Generally, Rule 15c2-12 requires underwriters participating in primary offerings of municipal securities to obtain, review and distribute to investors copies of a preliminary official statement that the issuer has "deemed final" as of its date, except for the omission of no more than the following information:
  - delivery dates;
  - any other terms or provisions required by an issuer of such securities to be specified in a competitive bid;
  - ratings;
  - other terms of the securities depending on such matters; and
  - the identity of the underwriter(s).

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Primary Disclosure

- Rule 15c2-12, also requires that any final official statement prepared in connection with a primary offering of municipal securities contain:
  - 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;
  - a description of the continuing disclosure undertakings; and
  - a description of any instances in the previous five years in which the obligated person failed to comply, ***in all material respects***, with any previous undertakings.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Primary Disclosure

- There are no established rules or regulations regarding the content or format with respect to municipal official statements. This is in contrast to the corporate context, where there are established rules on what to include in offering materials (Regulation S-K; "plain English" rule; "risk factors," etc.).

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Primary Disclosure

- However, several organizations have developed voluntary disclosure guidelines, including:
  - Government Finance Officers Association (GFOA);
  - National Federation of Municipal Analysts (NFMA);
  - Securities Industry and Financial Markets Association (SIFMA); National Association of Bond Lawyers (NABL).
- Pointing to the "widespread acceptance" of such resources, the SEC has characterized some of them as "in essence obligatory rules." See Release Nos. 33-7049; 34-33741 (March 9, 1994).

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Subject to certain exemptions, Rule 15c2-12 requires the underwriter to obtain a commitment from the issuer or obligated persons to provide:
  - Annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement, including audited financial statements for each obligated person; and
  - Notice of certain listed events with respect to the securities being offered.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- In addition, the continuing disclosure undertaking:
  - must identify each person for whom annual financial information and notices of material events will be provided, either by name or by the objective criteria used to select such persons, and, for each such person:
    - Specify, in reasonable detail, the type of financial information and operating data to be provided as part of annual financial information;
    - Specify, in reasonable detail, the accounting principles pursuant to which financial statements will be prepared, and whether the financial statements will be audited; and
    - Specify the date on which the annual financial information for the preceding fiscal year will be provided.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- In addition, the continuing disclosure undertaking:
  - may provide that the continuing obligation to provide annual financial information and notices of events may be terminated with respect to any obligated person, if and when such obligated person no longer remains an obligated person with respect to such municipal securities.
  - must provide that all documents provided to the Municipal Securities Rulemaking Board shall be accompanied by identifying information as prescribed by the Municipal Securities Rulemaking Board.

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events:
  - Principal and interest payment delinquencies;
  - Non-payment related defaults, if material;
  - Unscheduled draws on debt service reserves reflecting financial difficulties;
  - Unscheduled draws on credit enhancements reflecting financial difficulties;

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events :
  - Substitution of credit or liquidity providers, or their failure to perform;
  - 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 status of the security, or other material events affecting the tax status of the security;
  - Modifications to rights of security holders, if material;

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events:
  - Bond calls, if material, and tender offers;
  - Defeasances;
  - Release, substitution, or sale of property securing repayment of the securities, if material;
  - Rating changes;

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events:
  - Bankruptcy, insolvency, receivership or similar event of the obligated person;
  - 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;

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events:
  - Appointment of a successor or additional trustee or the change of name of a trustee, if material;
  - 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; and

© 2020 Greenberg Traurig, LLP

Rule 15c2-12: Continuing Disclosure

- Notice of the following listed events, with respect to the securities being offered, is required to be filed in a timely manner ***not in excess of ten business days after the occurrence of the event***. Listed events include any of the following events:
  - 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; and
- Notice of a failure to provide required annual financial information, on or before the date specified in the written agreement or contract, is required to be filed in a timely manner.

© 2020 Greenberg Traurig, LLP


SEC's Perspective and Approach
to Enforcement

The SEC's Perspective and Approach

- The SEC has continually expressed concern about the risk of abuses in the municipal securities market.
- Over time, there have been some important enforcement matters dealing with public finance.
- In 2010, the SEC created a specialized enforcement unit to address misconduct in the municipal securities market.

© 2020 Greenberg Traurig, LLP

The SEC's Perspective and Approach

- In 2012, the SEC produced a report on the municipal securities market which included a number of recommendations including legislative changes and SEC rulemaking designed to, among other things, improve the municipal securities market, including transparency for municipal securities investors.
- The SEC maintains such recommendations would not result in the repeal or modification to the Tower Amendment.
  - However, the aggregate impact of such changes would obliterate the proscriptions on the SEC and MSRB under the Tower Amendment from requiring municipal issuers to file/register disclosure documents as a condition to accessing the capital markets.

© 2020 Greenberg Traurig, LLP

The SEC's Perspective and Approach

- In 2014, the SEC announced the Municipalities Continuing Disclosure Cooperation Initiative, which the SEC stated 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 official statements.
- Under the MCDC Initiative, the Division of Enforcement of the SEC recommended favorable settlement terms to issuers and obligated persons involved in the offer or sale of municipal securities as well as underwriters of such offerings if they self-reported possible violations involving materially inaccurate statements relating to prior compliance with the continuing disclosure obligations specified in Rule 15c2-12 under the Exchange Act.

© 2020 Greenberg Traurig, LLP

The SEC's Perspective and Approach

- Increased Enforcement Activity in Public Finance
  - From 2013-2016, the SEC brought enforcement actions against 76 state or local government entities (including four U.S. states), 13 obligated persons and 16 public officials. In contrast, for the entire 10-year period from 2002 to 2012, there were enforcement actions brought against only six government entities, six obligated persons and 12 public officials.

© 2020 Greenberg Traurig, LLP

The SEC's Perspective and Approach

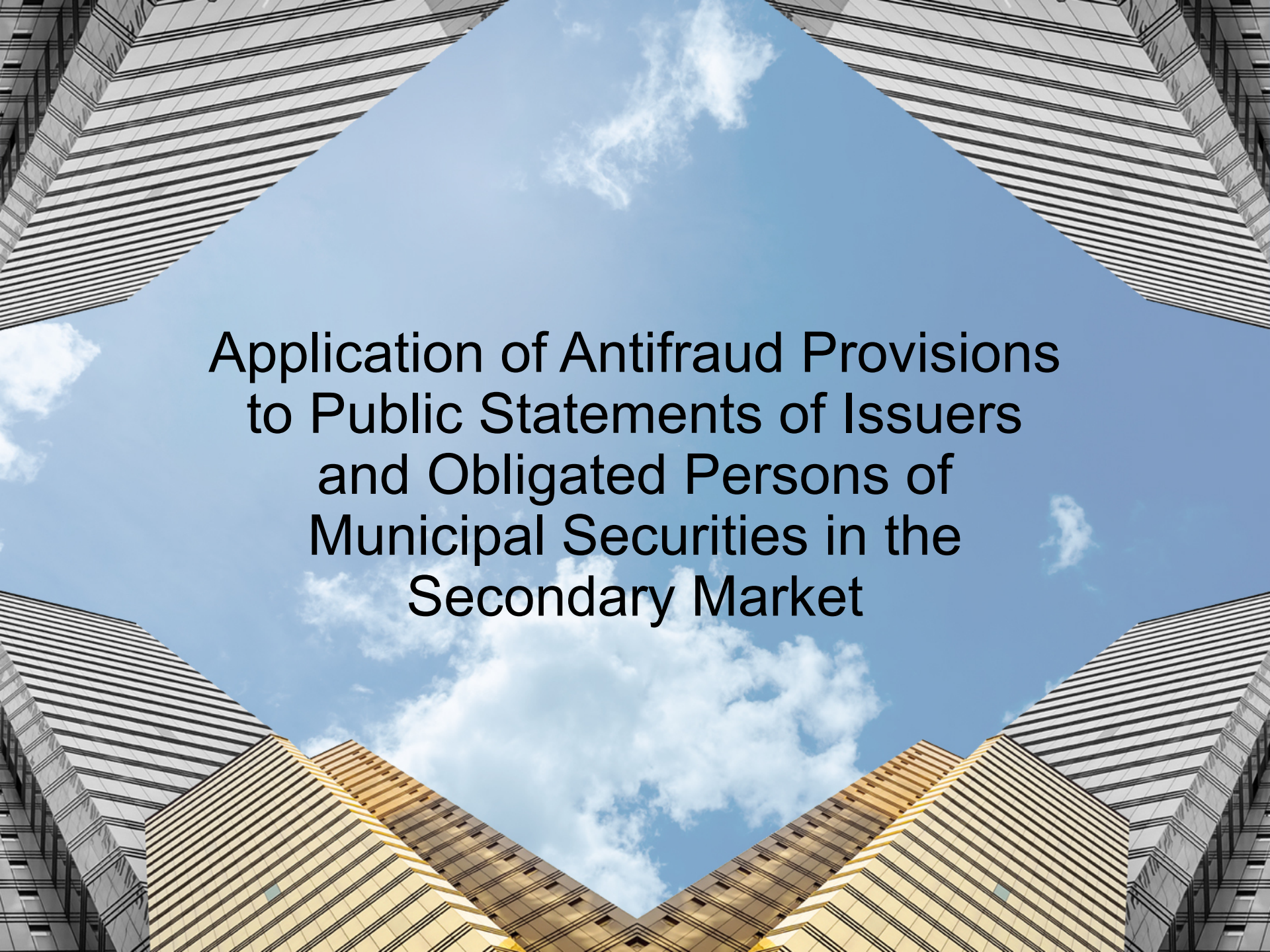
- Penalties Against Municipal Issuers
  - Although the SEC historically has not sought penalties against municipal issuers, that has changed in recent years.
    - In November 2013, the SEC found that a public facilities district in the state of Washington had misled investors in an offering to finance the construction of a regional events center by, among other things, falsely stating that there had been no independent reviews of the financial projections for the events center. ***In a "first" for the SEC, a civil penalty was imposed against the issuer***.
    - In March 2016, the SEC charged California's largest agricultural water district for misleading investors about its financial condition in connection with a $77 million bond offering in 2012. ***A civil penalty of $125,000 was imposed against the issuer***.

© 2020 Greenberg Traurig, LLP

The SEC's Perspective and Approach

- Penalties Against Municipal Issuers
  - Although the SEC historically has not sought penalties against municipal issuers, that has changed in recent years.
    - In September 2016, the SEC sought a substantial civil penalty against the City of Miami after prevailing in a federal jury trial against it and its former budget director. ***The jury in that case found that the defendants engaged in fraud in connection with three bond offerings totaling more than $150 million***.
    - In January 2017, the SEC announced that the Port Authority of New York and New Jersey had agreed to admit wrongdoing and pay a $400,000 penalty to settle charges that it was aware of risks to a series of New Jersey roadway projects but failed to inform investors purchasing the bonds that would fund them. ***The Port Authority of New York and New Jersey was the first municipal issuer to admit wrongdoing in an SEC enforcement action***.

© 2020 Greenberg Traurig, LLP


Application of Antifraud Provisions
to Public Statements of Issuers
and Obligated Persons of
Municipal Securities in the
Secondary Market

Public Statements

- The Commission's principles-based approach to the application of the antifraud provisions ***applies to <u>all</u> statements of municipal issuers that are reasonably expected to reach investors and the trading markets*** notwithstanding changes in municipal issuer disclosure practices, technology, investor expectations, and regulatory framework.

© 2020 Greenberg Traurig, LLP

Information Reasonably Expected to Reach Investors

- The SEC observed in the 1994 Interpretive Release:
  - As a practical matter . . . municipal issuers do not have the option of remaining silent. Given the wide range of information routinely released to the public, formally and informally, by these issuers in their day-to-day operations, the stream of information on which the market relies does not cease with the close of a municipal offering.

© 2020 Greenberg Traurig, LLP

Information Reasonably Expected to Reach Investors

- Municipal issuers disclose current information about themselves in a variety of ways, including:
  - continuing disclosure documents filed on the EMMA system;
  - public announcements;
  - press releases;
  - interviews with media representatives;
  - discussions with groups whose members have a particular interest in their affairs; and
  - Information about municipal issuers collected by state and local governmental bodies and routinely made publicly available.

© 2020 Greenberg Traurig, LLP

Information Reasonably Expected to Reach Investors

- The SEC has noted, access to "current and reliable information is uneven and inefficient" in the municipal securities market, ***these types of statements are "a principal source of significant, current information about the issuer of the security, and thus reasonably can be expected to reach investors and the trading markets."***

© 2020 Greenberg Traurig, LLP

Information Reasonably Expected to Reach Investors

- The antifraud provisions apply to ***all*** municipal issuer statements that provide information that is reasonably expected to reach investors and the trading markets, ***whoever the intended primary audience and whatever the medium of delivery***.
- Standard applies to statements:
  - Whether on the MSRB's EMMA system or elsewhere;
  - Whether written or oral; and
  - Regardless of the extent to which the municipal issuer has fulfilled its contractual continuing disclosure obligations.

© 2020 Greenberg Traurig, LLP

Information on Municipal Issuer Websites

- General
  - Municipal issuers should ensure that the information on their websites is accurate and not misleading.
  - The SEC stated ***"it is important for issuers, including municipal securities issuers, to keep in mind that the federal securities laws apply in the same manner to the content of their websites as to any other statements made by or attributable to them,"*** and these laws include the antifraud provisions.

© 2020 Greenberg Traurig, LLP

Information on Municipal Issuer Websites

- Historical Information
  - The SEC noted, in circumstances where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, ***previously posted materials or statements that have been put on a website should be separately identified as historical or previously posted materials or statements, and located in a separate section of the website***.

© 2020 Greenberg Traurig, LLP

Information on Municipal Issuer Websites

- Hyperlinks
  - The SEC has noted that liability under the "entanglement" theory would depend upon an issuer's level of pre-publication involvement in the preparation of the information, whereas liability under the "adoption" theory would depend upon whether, after its publication, an issuer, explicitly or implicitly, endorses or approves the hyperlinked information.
  - Factors that may be relevant in determining whether an issuer has adopted hyperlinked information, including:
    - the context of the hyperlink;
    - the risk of confusing investors; and
    - the presentation of the hyperlinked information.

© 2020 Greenberg Traurig, LLP

Information on Municipal Issuer Websites

- Hyperlinks
  - Focus in evaluating liability for hyperlinked information should be on whether the issuer has explicitly or implicitly approved or endorsed the statement of a third party.
  - The SEC noted that issuer statements about the hyperlink, including why the issuer is including the hyperlink on its website, the nature of the hyperlink, and use of disclaimers, "exit notices," or "intermediate screens," could all be factors in the analysis.

© 2020 Greenberg Traurig, LLP

Information on Municipal Issuer Websites

- Summary Information
  - Municipal issuers often provide on their websites summaries or overviews of information, particularly financial information.
    - Must consider the context in which such summary information is provided to avoid confusing or misleading investors.
    - Use summaries and overviews to highlight the nature of such information, including the use of appropriate titles and explanatory language, the use and placement of hyperlinks to the more detailed information being summarized, and the use of "layered" or "tiered" formats in presenting such information.

© 2020 Greenberg Traurig, LLP

Public Reports Delivered to other Governmental or Institutional Bodies

- Municipal issuers prepare and disseminate reports or other documents containing financial information and/or operating data to various governmental or institutional bodies, or to the public.
- The SEC has cited certain of these reports, including Comprehensive Annual Financial Reports, budgets, and mid-year financial reports, as information reasonably expected to reach investors and the trading markets, and therefore subject to the antifraud provisions, ***even if not filed with EMMA***.

© 2020 Greenberg Traurig, LLP

Public Reports Delivered to other Governmental or Institutional Bodies

- Though the SEC has not specifically identified other types of reports which, once public, would be subject to the antifraud provisions, the SEC staff believes that ***additional types of reports could be covered by the antifraud provisions depending on the facts and circumstances***, including (but not be limited to):
  - Reports submitted by a municipality to a state agency;
  - Reports made by a state or local official to a legislative body (such as a state legislature or city council);
  - Other reports made part of a public record and available to the public.
- In the SEC staff's view, depending on the facts and circumstances, such reports could be a source of significant, current information about the municipal issuer and thus could reasonably be expected to reach investors and the trading markets.

© 2020 Greenberg Traurig, LLP

Statements Made by Public Officials

- Statements of municipal issuer officials are subject to the antifraud provisions if their statements are reasonably expected to reach investors or the securities markets.
  - Statements by municipal issuer officials ***"who may be viewed as having knowledge regarding the financial condition and operation of a municipal issuer"*** could be a principal source of significant, current information about the issuer of the security and thus be reasonably expected to influence investors and the secondary market.

© 2020 Greenberg Traurig, LLP

Statements Made by Public Officials

- Accordingly, depending on the facts and circumstances, the statements of municipal issuer officials that may be subject to the antifraud provisions could include:
  - verbal statements made by municipal issuer officials;
  - speeches;
  - public announcements;
  - interviews with media representatives;
  - statements disseminated through other avenues such as ***social media***



© 2020 Greenberg Traurig, LLP

Role of Policies and Procedures

- Public Statements should be carefully evaluated to assure that they are not materially false or misleading.
- Establish practices and procedures to identify and timely disclose, in a manner designed to inform the trading market, material information reflecting on the creditworthiness of the issuer and obligor and the terms of the security.
- In the SEC staff's view, reasonably designed policies and procedures, when consistently implemented, can help a municipal issuer regularly provide more accurate, timely, and comprehensive information to investors; better manage communications with their investors; and comply with the antifraud provisions.

© 2020 Greenberg Traurig, LLP

Role of Policies and Procedures

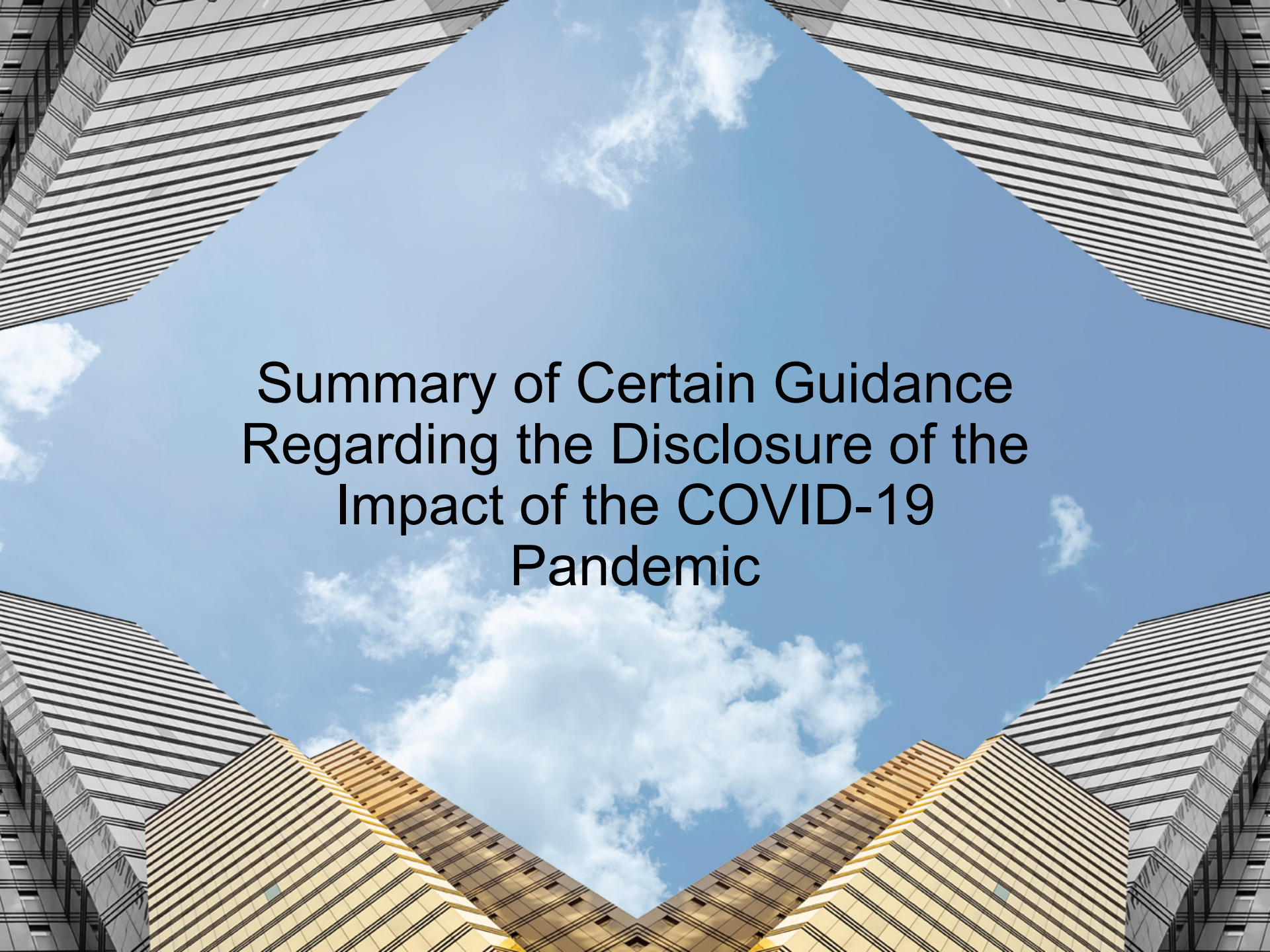
- Policies and procedures should:
  - Be reasonably designed to result in accurate, timely, and complete public disclosures;
  - Identify those persons involved in the disclosure process;
  - Evaluate other public disclosures that the municipal issuer has made, including financial information and other statements, prior to public dissemination;
  - Assure that responsible individuals receive adequate training about their obligations under the federal securities laws;
  - designate an individual responsible for compliance with such policies and procedures;

© 2020 Greenberg Traurig, LLP

Role of Policies and Procedures

- Policies and procedures should:
  - establish a periodic training schedule for issuer staff and officials responsible for developing, reviewing, and disseminating issuer disclosures;
  - identify the documents, reports, etc. which customarily contain current information about the financial and operational condition of the issuer and establish a process by which the issuer makes such documents, reports, etc. regularly available to investors;
  - identify the place or places at which the issuer makes such documents, reports, etc. regularly available to the public, which may include a central repository, such as the EMMA system, and/or an investor-relations website.

© 2020 Greenberg Traurig, LLP



Summary of Certain Guidance Regarding the Disclosure of the Impact of the COVID-19 Pandemic

SEC Staff Guidance and Public Statements

- Staff guidance represents the views of staff:
  - ***NOT*** a rule, regulation or statement of the SEC;
  - SEC has neither approved nor disapproved its content; and
  - Has ***NO*** legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

© 2020 Greenberg Traurig, LLP

Importance of Disclosures Even Greater as a Result of COVID-19

- SEC Staff's Perspective
  - The fluid and unpredictable nature of the public health crisis and its financial and economic impacts on municipal issuers has placed investor need for timely financial information into stark relief.
  - The typical practice of providing historic financial information in the form of an annual information filing or similar disclosure may not enable investors to make informed assessments of the municipal issuer's current and expected future financial condition.

© 2020 Greenberg Traurig, LLP

Considerations in Providing Updated Disclosures

- Developing voluntary, unaudited, and non-routine disclosures regarding current financial status and operating conditions may be challenging, particularly under the current circumstances.
  - Such disclosures likely would not have the benefit of a formal audit process or an established framework; and
  - Certain financial disclosure would be based on estimates and assumptions as well as projections regarding future circumstances.
- SEC staff encouraged municipal issuers to provide investors with forward-looking information regarding the potential future impact of COVID-19 on their financial and operating conditions.
  - Providing detailed information regarding future operating conditions and resource needs is challenging, particularly as response strategies designed to mitigate and more effectively treat COVID-19 are evolving rapidly and are likely to change in the future.

© 2020 Greenberg Traurig, LLP

Considerations in Providing Updated Disclosures

- The issue of liability often is raised when voluntary disclosures—or the expansion of required disclosures—are considered.
  - Each issuer, in many cases in consultation with legal counsel, will have to assess this risk in the context of its particular circumstances.

© 2020 Greenberg Traurig, LLP

Considerations in Providing Updated Disclosures

- Disclosure of the current financial and operating condition will not only aid investors in making informed investment decisions, but will also be important to the issuer-specific and more general functioning of the municipal securities market, including the ability to refinance existing obligations and raise new capital.
  - Accompanying those disclosures with meaningful cautionary language—including, for example, (1) a description of relevant facts or assumptions affecting the reasonableness of reliance on and the materiality of the information provided, (2) a description of how certain important information may be incomplete or unknown, and (3) the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information—will not only improve the quality of the disclosure but also will reduce legal and other risks.

© 2020 Greenberg Traurig, LLP

Considerations in Providing Updated Disclosures

- Issuers may be required to disclose similar information to other parties, including, for example, in connection with:
  - efforts by federal and state governments to assess the financial impact of COVID-19 on states, municipalities and special purpose entities; and
  - the pursuit by municipal securities issuers of funding or other support from governmental authorities and private parties.
- For various legal and other reasons, ensure that disclosure is:
  - consistent across all contexts, regardless of the purpose; and
  - kept confidential until disclosed and, when disclosed, disclosed broadly.

© 2020 Greenberg Traurig, LLP

Considerations in Providing Updated Disclosures

- SEC Staff does not ***EXPECT*** good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.
- While the ***safe harbors for forward looking statements*** that are available to certain corporate issuers ***are not available to issuers of municipal securities***
  - SEC staff believes that a municipal issuer's approach to forward-looking disclosures should be informed by the judicially developed "bespeaks caution" doctrine.
- Timing is an ongoing consideration.

© 2020 Greenberg Traurig, LLP

Examples of Information Municipal Issuers Could Provide to Investors

- Information Regarding the Impact of COVID-19 on Operations and Financial Condition
  - Disclosures should reflect the issuer's assessment of this state of affairs and outlook and, in particular municipal issuers should provide information regarding:
    - their current operational and financial status, including decreases in revenues and delays in collection of revenues;
    - how their COVID-19 response including efforts to protect the health and well-being of residents and employees has impacted their operational and financial condition, including un-budgeted costs; and
    - how their operational and financial condition may change as efforts to fight COVID-19 evolve. ***In these circumstances, comparisons to historical information may be relatively less significant.***

© 2020 Greenberg Traurig, LLP

Examples of Information Municipal Issuers Could Provide to Investors

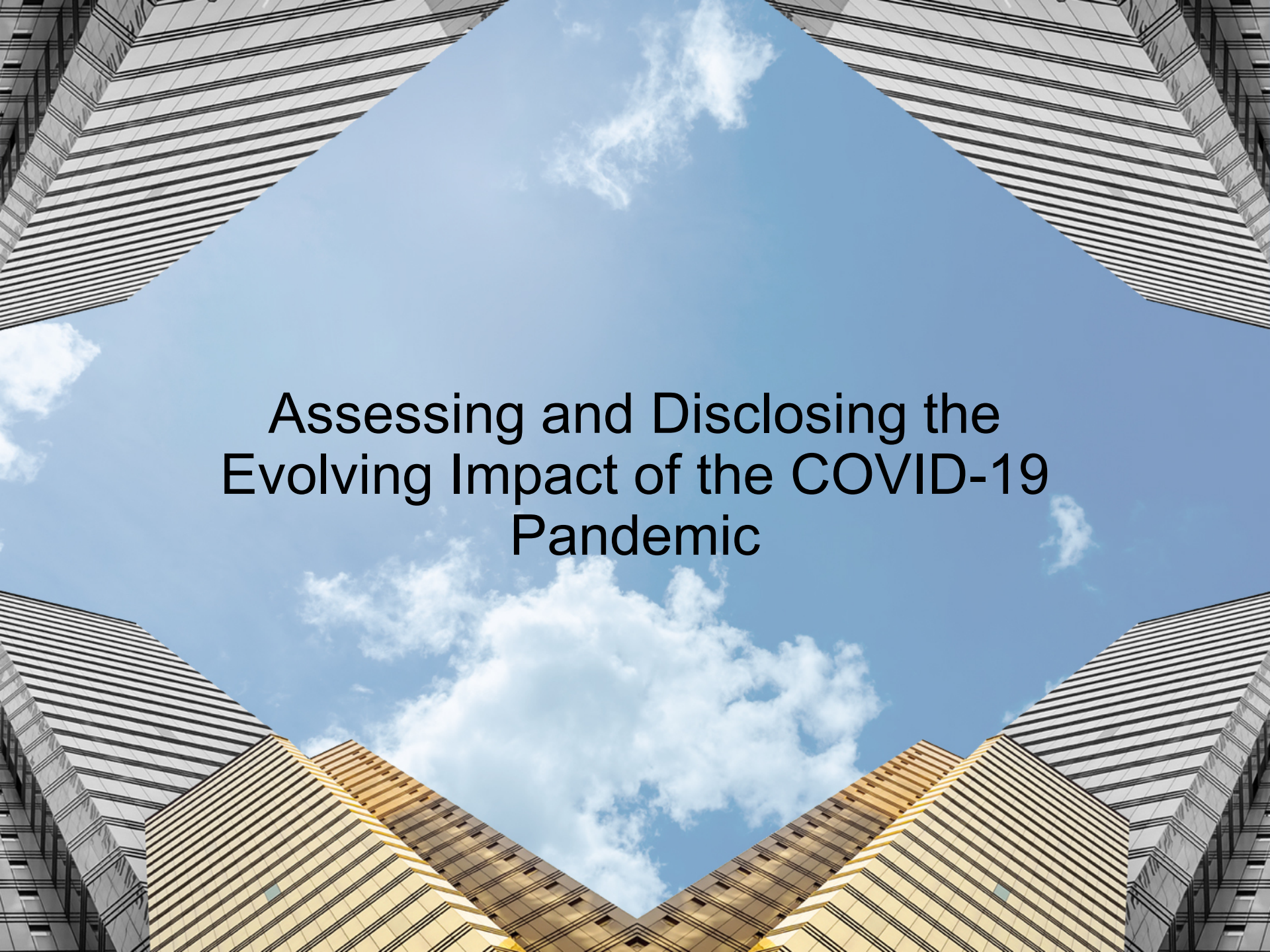
- Information Regarding Sources of Liquidity
  - A description of cash on hand, access to reserves or other funds (and to what extent such access is limited), access to liquidity facilities and whether current liquidity is expected to be adequate to fund essential services and make timely debt service payments.
  - If not otherwise disclosed, material terms of any liquidity facility the issuer has used or expects it may use.
- Information Regarding Availability of Federal, State and Local Aid
  - A description of available federal, state or local aid the issuer has sought or is planning to seek and the anticipated timing of such aid.
  - In addition, if the municipal issuer has obtained any such aid, it should disclose the nature, amount, and other material terms of the aid if it materially affects or reasonably likely will materially affect its operational or financial condition.

© 2020 Greenberg Traurig, LLP

Examples of Information Municipal Issuers Could Provide to Investors

- Reports Prepared for Other Governmental Purposes
  - Municipal issuers routinely prepare reports for governance purposes that may be significant sources of current information. As front-line responders, these reports could provide powerful insight into local, regional, and sector-specific strategies to fight and recover from COVID-19.

© 2020 Greenberg Traurig, LLP



Assessing and Disclosing the Evolving Impact of the COVID-19 Pandemic

Assessing and Disclosing the Evolving Impact of COVID-19

- Assessing the evolving effects of COVID-19 and related risks will be a ***facts and circumstances analysis***.
- Disclosure about these risks and effects, including how municipal issuers are responding to them, should be specific to a municipal issuer's situation.

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - How has COVID-19 impacted your financial condition and results of operations?
  - In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?
  - Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
  - How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change?
  - Have your sources or uses of cash otherwise been materially impacted?
  - Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
  - If a material liquidity deficiency has been identified, what course of action has the municipal issuer taken or proposed to take to remedy the deficiency?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Consider any trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements.
  - Do you expect to disclose or incur any material COVID-19-related contingencies?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?
    - If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting?
    - What challenges do you anticipate in your ability to maintain these systems and controls?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Have you experienced challenges in implementing your continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
  - Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
  - Are travel restrictions and border closures expected to have a material impact on your ability to operate?
  - What are the material operational challenges that management and the elected officials are monitoring and evaluating?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - How and to what extent have you altered your operations, such as implementing health and safety policies for employees, contractors, and the public, to deal with these challenges, including challenges related to employees returning to the workplace?
  - How are the changes impacting or reasonably likely to impact your financial condition and short- and long-term liquidity?
  - How is your overall liquidity position and outlook evolving?
  - Are you at material risk of not meeting covenants in your credit and other agreements?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - To the extent COVID-19 is adversely impacting your revenues, consider whether such impacts are material to your sources and uses of funds, as well as the materiality of any assumptions you make about the magnitude and duration of COVID-19's impact on your revenues. Are any decreases in cash flow from operations having a material impact on your liquidity position and outlook?
  - How has a change, or a potential change, to your credit rating impacted your ability to access funding?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Do your financing arrangements contain terms that limit your ability to obtain additional funding? If so, is the uncertainty of additional funding reasonably likely to result in your liquidity decreasing in a way that would result in you being unable to maintain current operations?
  - Are you able to timely service your debt and other obligations? Have you taken advantage of available payment deferrals, forbearance periods, or other concessions? What are those concessions and how long will they last? Do you foresee any liquidity challenges once those accommodations end?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Have you altered terms with your customers, such as extended payment terms or refund periods, and if so, how have those actions materially affected your financial condition or liquidity?
  - Did you provide concessions or modify terms of arrangements as a landlord or lender that will have a material impact?
  - Have you modified other contractual arrangements in response to COVID-19 in such a way that the revised terms may materially impact your financial condition, liquidity, and capital resources?

© 2020 Greenberg Traurig, LLP

Assessing and Disclosing the Evolving Impact of COVID-19

- As municipal issuers assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:
  - Have you received assistance under the CARES Act, from FEMA or other federal or state agencies?
  - What is the impact of such funds on your financial condition, liquidity and capital resources?
  - What are the material terms and conditions of any assistance you received, and do you anticipate being able to comply with them?
  - Do those terms and conditions limit your ability to seek other sources of financing?

© 2020 Greenberg Traurig, LLP