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MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Our Spring 2012 Observer covers several areas of business activity, anticipating problems, and how to deal with them before they become insurmountable. For Venture Capitalists, whose portfolio companies are incorporated in Delaware, recent Delaware Chancery Court decisions have cast doubt on the ability of VCs to sell a company and retain all of the proceeds for the preferred shareholders, to the exclusion of the common shareholders, if the proceeds of the sale are inadequate to return any investment to the common shareholders. Directors' fiduciary duties may be breached. The lead article analyzes the cases.

Managing risk is all important, and two articles look at two different kinds of risk. Given the uncertainty and dysfunction in the federal legislative process, managing government risk has become a prime area of concern. Will legislation be enacted, which businesses will be affected, and will regulations be promulgated as a consequence? How and when will this impact your organization? Also you should consider intellectual property litigation risk. It is imperative that before investing in a company, or undertaking an acquisition, IP litigation involving the target company should be explored as thoroughly as the other aspects of due diligence.

Those of you who are involved in the municipal bond market should be aware of recent SEC hearings, focusing on bringing the regulation of that market more in line with the corporate securities market. Our article discusses the possibility of tougher regulation, and its impact on investors and issuers. An area of growth is the ever-expanding commerce between the United States and China, and how dispute resolution may be effectuated, notwithstanding problems of enforceability in China.

Our business practice covers these and many other areas, including tax, real estate, wealth management, government relations, and much more. We welcome your inquiries and will be responsive to your needs.

Best Regards,

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DELAWARE COURTS POSE PROBLEMS FOR VENTURE CAPITALISTS WITH NO CLEAR SOLUTIONS

Venture capital investors have many reasons to exit underperforming investments. For a typical venture capital fund, holding an investment in a distressed company will be administratively time consuming and divert resources from other opportunities with a greater potential to achieve a meaningful return to the funds limited partners. In these circumstances, venture capital investors may look to exit the investment through a sale of the company, even where the sale proceeds cover only a portion of the venture fund's original investment. With a right to receive the sale proceeds prior to other stockholders under their liquidation preference, venture capital investors may conclude that a sale of the company is more feasible than a put right, which may be subject to statutory limitations on the company's ability to redeem its shares. Further, as the board of directors of venture-backed companies often include members elected by the venture capital holders of the company's stock, venture capital investors may believe they have a right to approve a sale transaction, even when their liquidation preference would consume the entire proceeds of the sale.

Recent decisions of the Delaware Chancery Court, however, cast doubt on the ability of venture capital investors to seek a sale of a portfolio company as a means to exit an underperforming investment without incurring risk. A substantial litigation risk has arisen for venture-backed companies when proceeds of a sale are used to satisfy the liquidation preference of preferred stockholders and common stockholders are left with little or nothing. For companies incorporated in Delaware or any jurisdiction that follows Delaware corporate law, a board of directors dominated by preferred stockholder designees may be in breach of its fiduciary duties to common stockholders by voting in favor of a transaction that provides little or no consideration to holders of common stock.

In a 2009 Delaware Chancery Court case, *In re Trados Incorporated Shareholder Litigation*, the court refused to dismiss a class action suit brought by common stockholders against six directors who approved a sale of the company that yielded the common stockholders zero return. Four of the six defendant directors in *Trados* were elected by venture capital holders of preferred stock, while the other two defendant directors were executives who were paid cash bonuses upon consummation of the sale transaction. The plaintiff common stockholders alleged that the company's prospects were improving and a future transaction could have yielded the common stockholders a higher return. The court refused to apply the business judgment rule, which may have shielded the board from the plaintiffs' challenge, because it found the majority of the board were unable to exercise independent and disinterested business judgment on account of their ties to the preferred stockholders. Instead, the court held that the transaction should be reviewed under the more stringent entire fairness standard, shifting the burden to the board members to prove the transaction was economically and procedurally fair to the common stockholders.

"Under Trados, the board designees of preferred stockholders will not be considered independent and disinterested … "

If, under *Trados*, the board designees of preferred stockholders will not be considered independent and disinterested when substantially all of the proceeds are used to satisfy their liquidation preference, then approval by disinterested directors, a committee of independent directors or disinterested stockholders may overcome a challenge to the application of the business judgment in this scenario. But these alternatives are not likely to prove effective in shielding venture-backed companies with a traditional board composition from claims like the one brought by the plaintiffs in *Trados*. When the common stockholders receive little or no consideration in the transaction, it is highly unlikely that they or any members of the board elected by them would approve the transaction. Moreover, another recent Delaware Chancery Court case makes obtaining the vote of independent directors in favor of the transaction problematic.

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In a 2010 case, *LC Capital Master Fund Ltd. v. James*, the Delaware Chancery Court reaffirmed that, under Delaware law, when the rights of preferred stockholders are contractually provided with respect to a transaction, a company's board of directors has no obligation to provide further fiduciary consideration to the preferred stockholders. In *LC Capital*, the preferred stockholders challenged a merger on the basis that the proceeds to be received by the preferred stockholders were insufficient. In an unusual circumstance for a venture-backed company, the company's certificate of incorporation in *LC Capital* did not grant preferred stockholders the right to vote on the merger, but rather provided the company with a right to force the conversion of the preferred stock into common stock in connection with the transaction. As a result, the liquidation preferences of the preferred stockholders did not apply. The preferred stockholders sought to enjoin the merger, alleging that the board of directors had a fiduciary duty, rather than a contractual obligation, to consider the value of the rights of the preferred stockholders outside the merger context, including their liquidation preference and dividend rights, and allocate more of the merger consideration to the preferred stockholders. The court declined to enjoin the merger, concluding that once the contractual rights of the preferred stockholders are fully satisfied, the board's fiduciary duties are owed solely to the common stockholders.

"LC Capital may provide a basis for an independent director to vote against a transaction similar to the one at issue in Trados."

It is tempting to dismiss the holding in *LC Capital* because venture capital investors can require a right to vote on and receive at least their liquidation preference from the proceeds of a merger when negotiating their original investment in a portfolio company. Beyond the specific facts of the case, however, *LC Capital* may provide a basis for an independent director to vote against a transaction similar to the one at issue in *Trados*. In light of *LC Capital*, where the contractual rights of the preferred stockholders do not mandate a sale, and the common stockholders will receive little or no consideration, it is difficult to see how an independent director can approve the transaction in a manner consistent with the fiduciary duties a director owes to the common stockholders.

Responding to the *Trados* case, the National Venture Capital Association (NVCA) modified its model form investment documents to provide venture capital investors with additional, contractual alternatives to protect the board of directors from *Trados* like claims. In their model Voting Agreement, the NVCA inserted a sales rights provision, allowing certain holders of preferred stock to cause the company to initiate a sales process. In the event a sale is identified in the sales process, but not approved by the board of directors, the preferred stockholders would have a right to sell back their shares of preferred stock to the company in exchange for their liquidation preference.

It is unclear, however, whether the sales rights alternative offered by the NVCA provides a solution to the problem created by *Trados* and *LC Capital*. Ultimately, the board of directors must approve the sale transaction identified in the sale process. Directors elected by venture capital holders of preferred stock are no more independent or less disinterested on account of the exercise of the preferred stockholder right to force the company to initiate a sale process. It will be similarly problematic for independent directors, or a committee of independent directors, to vote in favor of a sale that leaves common stockholders with little or no return. The suggested sales rights provision also fails to address the potential legal limitations on redemption of stock under Delaware law, in particular where the company is distressed and less likely to have the financial ability to redeem the preferred stock without a sale of the company, which requires consent of the board of directors.

In addition to the sales rights provision, in new commentary to its model form Voting Agreement, the NVCA suggests that venture capital investors consider eliminating the requirement that a company's board of directors approve a sale transaction before the preferred stockholders may exercise their drag-along rights. Under a typical drag-along rights provision, all stockholders are contractually obligated to participate in and approve a sale transaction provided

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certain conditions are met, usually the prior approval of the transaction by the company's board of directors and preferred stockholders. Without the prerequisite board approval, preferred stockholders would have a contractual right to mandate a sale of the company unilaterally. This approach has significant issues as well, as it may not be feasible to have every stockholder execute an appropriate agreement, and a purchaser may want to acquire the company in a merger or sale of assets, either of which will require board approval under Delaware law notwithstanding the drag-along rights of the preferred stockholders.

It remains to be seen whether the NVCA's suggested approaches will be widely adopted or prove effective in addressing the issues raised by *Trados* and *LC Capital*. Although there is currently no general consensus on how venture capital investors should address these issues, investors should be mindful of these recent developments in structuring new investments.

Cozen O'Connor's corporate attorneys regularly work with venture capital firms as well as directors and stockholders in corporate disputes and shareholder claims. David Nelson is a member in our Philadelphia office. He can be reached at dnelson@cozen.com.

THE IMPORTANCE TO INSTITUTIONAL INVESTORS OF MONITORING INTELLECTUAL PROPERTY LITIGATION

During the last 15 years there has been a dramatic increase in patent litigation due primarily to the rapid growth of advanced technology and the desire to protect and enforce intellectual property. Over this period, we have witnessed the effect of the uncertainty created by complex patent litigation in the wide swings in the stock prices of the companies affected by the litigation. Publicly traded companies on the forefront of technology innovation use their patent portfolios to initiate courtroom battles with their competitors, battles that were traditionally fought in the product marketplace. While IP litigation can scare away even the most savvy investors, with the right diligence and litigation monitoring, investors can use litigation to their advantage.

An example is the recent *TiVo v. EchoStar* case. In 2004, TiVo brought a patent infringement lawsuit in the U.S. District Court for the Eastern District of Texas, alleging that EchoStar's DVR system improperly used TiVo's patented "time warp" technology. In 2006, the jury ruled in favor of TiVo and awarded TiVo $73,991,964 in damages. Immediately following the verdict, TiVo's stock jumped more than 10 percent. In January 2008, after the jury's verdict was upheld on appeal, TiVo's stock price increased more than 28 percent. Finally, when the appeals court upheld a lower court's ruling that EchoStar had violated a court order by continuing to sell infringing products, TiVo shares soared nearly 62 percent.

There are many examples like *TiVo* in which an understanding of the underlying merits of a case and its likely outcome can provide institutional investors with a significant edge over their competitors. Unfortunately, the potential impact of litigation is often either minimized or overlooked altogether in favor of more traditional and widely understood financial indicators of a company's health and stability (or lack thereof).

> *"For litigation due diligence to be of real value to investors, the first critical step is to conduct an in-depth legal review of the merits of the case."*

For litigation due diligence to be of real value to investors, the first critical step is to conduct an in-depth legal review of the merits of the case. Every substantive court filing in the case should be analyzed carefully with the goal of determining which party has the stronger case and the greater likelihood of success on the merits. In addition, a thorough review of the applicable legal precedent (prior case law) should be performed, coupled with a review of which party that precedent favors.

Furthermore, while an analysis of the merits of the litigation is important, the real edge is often found by digging beneath the surface and evaluating the intangible factors that often go unnoticed. These intangible factors can often provide an advantage in capitalizing on the uncertainty inherent in litigation. First and foremost, it is

vitally important for the institutional investor to have a representative with a legal background attend *in person* as many of the court hearings as possible regardless of how inconsequential those hearings may seem. The value of attending these hearings cannot be overstated. For example, a judge may offer a spontaneous remark about a party's position or the merits of the case that will not appear in any written material but may serve as a vital clue to the judge's general impressions of the case and how he or she is likely to rule on the issues presented. Likewise, it may become apparent that the judge has established a good rapport with the attorneys of one party and while this should have no effect on the outcome of the case it may have a significant impact on the other party's desire to settle.

It is essential to learn the personality, demeanor and habits of the judge. A recent personal anecdote illustrates this point. While following a case for a client, I discerned that the judge hearing the client's case was always punctual, so much so that "on-time" meant five minutes early. So, when the trial date arrived and the judge was not on the bench at the appointed time, it was clear to me that the judge's absence was significant. After an hour's delay, and based solely on the judge's uncharacteristic tardiness, I advised the client that it was likely that the parties were progressing towards settlement. With this knowledge the client was able to react in real time and make appropriate adjustments to its portfolio. As anticipated, the case settled and the market reacted the next day following the public announcement of the settlement.

Armed with the right information, not only can institutional investors mitigate the uncertainty inherent in technology litigation, but they can also use it as an investment opportunity.

Cozen O'Connor's intellectual property attorneys handle patents, copyrights and trademarks and related litigation, including assisting our investor clients in monitoring intellectual property litigation to preserve their portfolios. David Sunshine is a member in our New York office. He can be reached at dsunshine@cozen.com.

MANAGING GOVERNMENTAL RISK

In 2012, the words "dysfunctional" and "government" go hand in hand. As a result, the stakes for businesses that are regulated by, receive funding from or otherwise intersect with government at its various levels never have been higher.

While the Fall elections are on everyone's mind, regardless of the outcome, the country again will experience serious political brinksmanship shortly thereafter. Congress will grapple in its lame duck session with the expiring Bush tax cuts, the need to again raise the debt ceiling, looming cuts to the federal budget, expiration of the payroll tax cut, and appropriations for the upcoming government fiscal year – and those are just a few of the issues. Congress will try to address these issues against a backdrop of a still struggling economy, financial regulatory reform, health care reform, and a lingering political hangover from the 2008 financial crisis.

"Governmental risk is intertwined with a variety of other risks facing the enterprise, including, among others, reputational risk and compliance risk."

Uncertainty reigns, and the government is playing a historically disproportionate role in the private sector. So, how does an organization effectively manage its governmental risk, i.e., the potential for government action or inaction to frustrate its business objectives, and turn that risk into a business opportunity?

First, analyze governmental risk as its own distinct risk category. Second, develop a basic understanding of the ways in which government can impact the organization. And third, develop and execute a macro and micro strategy for addressing governmental risk.

Governmental risk is intertwined with a variety of other risks facing the enterprise, including, among others, reputational risk and compliance risk. To effectively address governmental risk, however, an organization should conduct an annual governmental risk assessment and

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inventory governmental risks across the enterprise. Senior management should prioritize addressing those risks that pose the greatest threat to the organization.

To evaluate the risks that an organization faces at its intersections with government, management needs to have a framework for understanding government. The "three Ps" – policy, politics, and process – guide government decision making and provide a useful reference for a management team thinking about how to mitigate governmental risk.

Government policy is the public goal that the government is attempting to achieve, and it is, at times, hard to comprehend or rationalize, from a private sector perspective. Government policy usually reflects an effort to balance various interests, as opposed to profit and loss that guide private sector activity.

Politics influences government decision making at a number of levels. The public is most accustomed to thinking about this in the context of the two party system, Republicans and Democrats. And while those politics surely matter, more often politics revolves around things such as home state interests, job creation, and the need to show progress on signature initiatives.

Process – the manner in which the government arrives at and executes decisions – is the most misunderstood component of government. For example, if one is attempting to influence legislation, knowledge of the legislative process is as important as enlisting policy support for a bill. Likewise, in the executive branch, it's critical to understand that there are stark differences between the way career civil servants and political appointees look at and address issues.

Depending upon your organizational needs – for example, getting business from the government or keeping the government out of your business – an organization may employ offensive or defensive strategies or both. Simply knowing a member of Congress or other Washington "big wigs" is not a strategy. A strategy needs to account for every moving part in government that impacts your risks.

Identify your political assets and liabilities. Who are your friends? Who are your enemies? How does the geography of your organization impact your influence in Washington? Map out the government decision makers impacting your organization and think through those officials' perspectives on key issues and develop a plan to advance your interests.

In executing a strategy there are a few keys. Build relationships early enough in the process of the particular initiative you are trying to advance to be able to have a meaningful dialogue with decision makers. Follow the "no surprises rule" – stay out in front with key officials on all issues, good and bad. Perhaps, most importantly, the most difficult time to mitigate any risk, but particularly governmental risk, given the potential legal and public relations consequences, is when crisis already has struck. So don't wait.

Cozen O'Connor Public Strategies professionals provide government relations services at the federal, state and local levels, including legislative and executive branch advocacy, policy analysis, government programs and crisis management. Howard Schweitzer is a member of Cozen O'Connor Public Strategies and can be reached at hschweitzer@cozen.com.

LOOKING FOR A VIABLE DISPUTE RESOLUTION FORUM FOR CHINA DEALS

Chinese law and Chinese courts are often excluded from the international commercial dispute resolution arena because of uncertainty occasioned by China's underdeveloped legal system including a lack of precedential authority of Chinese courts judicial decisions, fear of local participants' undue influence on judges and arbitrators, and broadly rumored corrupt courts. As a result, Western companies include in their contracts with Chinese companies provisions requiring litigation or arbitration in their home countries or in a third country, rather than in China. But, even the victorious litigant may have a "now what?" moment as it seeks to collect its award using Chinese courts or arbitration tribunals.

Chinese law provides that a foreign court judgment may be enforced in China only if China and the country of the court issuing the judgment are both parties to an international treaty concerning the reciprocal enforcement of court judgments or if there is de facto reciprocity between the two jurisdictions. Many international litigants find out to their dismay that China and the United States, and China and many European countries, are not parties to reciprocal international treaties and that de facto reciprocity does not exist between such countries and China. Establishing reciprocity in the absence of an international treaty has been virtually impossible. In fact, there is no reported case in which a foreign court judgment has been enforced in China on "reciprocity" grounds, in lieu of an international treaty.

"There are no time frames requiring the Chinese Supreme Court to act in the context of an enforcement petition … "

In the absence of an international treaty, better-informed foreign companies seek to require dispute resolution by arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. The New York Convention, to which China and many Western countries are signatories, together with Chinese law, enable foreign petitioners to have foreign arbitral awards enforced by Chinese Intermediate Courts with jurisdiction over the respondents. But arbitration too has its flaws. Chinese law gives the Chinese Intermediate Courts two months to make a decision on an enforcement petition, and if the Intermediate Court decides not to recognize and enforce the award, the case must be referred to the Chinese Supreme Court for review. Unfortunately, there are no time frames requiring the Chinese Supreme Court to act in the context of an enforcement petition, so if an arbitration award is taken up by the Supreme Court for review, it may languish in the Supreme Court indefinitely. Arbitration of a China-related dispute in a non-Chinese jurisdiction may present another impediment that is occasionally overlooked by practitioners. Arbitrators are not traditionally given the power of granting equitable relief, such as an injunction. Consequently, if equitable relief is necessary or desirable, an arbitration tribunal's exclusive jurisdiction over a dispute may frustrate a party's attempt to seek this irreplaceable form of remedy against a Chinese party. For this reason, if equitable relief is sought, Western counterparties are forced to seek dispute resolution in the Chinese courts with the attendant risks noted above.

In reaction to this legal and political maze, a "defense mechanism" was fashioned to shield Western litigants from the risks often imbedded in traditional dispute resolution clauses for cross-border deal.

But even well-crafted dispute resolution provision with a "defense mechanism" in place may be confounded in China. If an arbitration petition for economic reparation and a court proceeding for equitable relief are pending simultaneously in connection with a dispute of the same issues, a litigant may petition for a stay or consolidation. Therefore, any dispute resolution provision should also include a stipulation waiving each party's right to move, stay or consolidate parallel arbitration and court proceedings so as to ensure that all remedies remain available to the litigants.

Cozen O'Connor attorneys regularly assist United States companies doing business in China and Chinese companies doing business in the United States. Pang Zhang-Whitaker is a member in our New York office. She can be reached at pzhang@cozen.com.

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MUNICIPAL SECURITIES DISCLOSURE: HOW MIGHT CORPORATE PRACTICE INFLUENCE MUNICIPAL MARKET REFORM PROPOSALS?

BACKGROUND AND PURPOSE

Municipal securities are varied and range from tax-supported bonds issued by general purpose governments to fund projects for essential services to bonds issued by industrial development authorities that loan the bond proceeds to private companies where repayment depends on the private company.

Multiple forces provide impetus for changes in the municipal sector: the momentum of Dodd-Frank legislation, the decline of bond insurance and other enhancements (which have emphasized the need to scrutinize underlying credits), and long-term structural issues that predated the financial crisis (e.g. pension and other legacy costs). Thus, certain problems were created by the financial crisis and others have been highlighted by the crisis.

In May 2010, the U.S. Securities and Exchange Commission (SEC) announced an effort to review the municipal market. Field hearings were held in 2010 and 2011. Ultimately, SEC staff will prepare a report including recommendations that may include rulemaking, changes in 'best practices,' or legislation. This article focuses on potential recommendations from such report, which as of July 6, 2012, had not been issued. One recurring strand in discussions among regulators and market professionals is that the corporate sector may provide guidance for changes in the municipal sector.

COMPARISON BETWEEN MUNICIPAL AND CORPORATE SECTORS

The general anti-fraud provisions of Rule 10b-5, which was issued pursuant to the Securities Exchange Act of 1934, as amended (the 1934 Act), also apply to the municipal sector. Municipal securities transactions rarely involve registration under the Securities Act of 1933, as amended (the 1933 Act). Municipal issuers are not subject to the periodic reporting requirements under the 1934 Act. However, issuers and certain other obligated persons are subject indirectly to certain continuing disclosure requirements under Rule 15c2-12 issued pursuant to the 1934 Act. Municipal disclosure is not subject to the technical details and specificity required in various SEC corporate filings. Specific content is shaped primarily by market expectations and Rule10b-5 anti-fraud concerns.

During the field hearings, Commissioner Walter addressed the corporate sector. She stated that the municipal securities market "lacks many of the protections customary in many other sectors of the U.S. capital markets"; referred to "the 'second class' treatment of municipal securities investors"; and stated that, "I believe that we can learn from the corporate world, but it is also essential that we recognize the differences in the municipal and corporate finance worlds and that we work together to evaluate what an appropriate framework for municipal finance disclosure should be in the future."

Five potential developments from the SEC's expected report are discussed below. These represent judgments based on issues raised in the field hearings and comments from professional trade organizations.

AGE OF FINANCIAL STATEMENTS

Market participants frequently comment on the age of financial statements. Due to timing, a number of local governmental issuers will offer bonds in official statements containing audited financial statements that are as of a date between 12-18 months prior to the date of the official statement. In these official statements, there often are no interim financial statements included. Regulatory guidance that borrows from the timeliness and age of financial statements provisions of Regulation S-X (which addresses various requirements for financial statements relevant to the 1933 and 1934 Acts and that generally require interim financial statements as of a date within 135 days of the relevant filing) might be a development.

CONTINUING DISCLOSURE

Continuing disclosure related to municipal securities is roughly analogous to periodic reporting for public companies under the 1934 Act. Certain annual information and notices of events are required to be filed with the Municipal Securities Rulemaking Board (the MSRB). However, there is not a parallel municipal provision to quarterly

reporting pursuant to Form 10-Q. Future amendments to Rule 15c2-12 or other guidance may address quarterly or other interim disclosures in the municipal sector. In 2010, the SEC adopted amendments to Rule 15c2-12 that require that material event notices be submitted within 10 business days of occurrence of the event. In its May 2010 adopting release (Release No. 34-62184A: File No. S7-15-09), the SEC referenced the four business days requirement for Form 8-K filings for context. Form 8-K is the form utilized by publicly traded companies to disclose material events. Form 8-K may provide a reference for future changes. For example, direct bank loans have been used increasingly in lieu of public bond offerings. Concerns have been voiced about disclosing these loans which are mostly in privately placed transactions without disclosure documents. Currently, Rule 15c2-12 does not have a listed event that would pick up these transactions. However, required disclosures under Form 8-K provide an analogous event — the creation of a direct financial obligation that is material to the registrant.

"The SEC might provide a formal safe harbor for forward looking statements in the municipal securities area … "

RISK FACTORS DISCLOSURE

"Risk Factors" disclosures are already used somewhat for certain municipal securities revenue bonds. These sections tend to be toward the middle of the offering document rather than following a summary section or the cover page/pricing section as is the case in corporate offerings under the 1933 Act. If keeping with the general practice of not mandating specific types of disclosures, guidance in this area would likely be more principles based and less likely to give specific municipal sector risk factor examples as is done in Item 503 of Regulation S-K, which regulation governs the risk disclosure for public companies (e.g., lack of operating history, lack of profitable operations).

FORWARD LOOKING STATEMENTS

Given recent developments focusing on pension and other post-employment benefit costs and on projections and fiscal sustainability (see the Governmental Accounting Standards Board's Preliminary Views, dated November 29, 2011, on major issues related to Economic Condition Reporting: Financial Projections), the SEC might provide a formal safe harbor for forward looking statements in the municipal securities area. The statutory safe harbors for forward looking statements provided by Section 27A of the 1933 Act and Section 21E of the 1934 Act in the corporate context are not applicable in the municipal context. Related to this development, the SEC might provide guidance regarding the appropriate use of disclaimers in terms of interim and unaudited information.

REGISTRATION

Last, and least likely to emerge, would be registration similar to registration under the 1933 Act. Registration might selectively be applied to industrial development bond (IDB) financings, which are effectively corporate financings given differences in default experiences (i.e., the traditional general purpose government tax supported bonds have a historically lower default rate experience). Moreover, the interposition of a municipal issuer (which in the IDB context usually has a very limited role beyond being a conduit for tax-exemption) is not particularly relevant to whether there is adequate protection for investors. However, necessary legislative changes (i.e., changes to the Tower Amendment dating back to the 1970s) and the anticipated administrative burdens on the SEC and municipal issuers make registration less likely.

CONCLUSION

While further proposals in the municipal securities markets are anticipated on the heels of recent rulemaking and proposals, much remains to be seen. A dramatic convergence toward the corporate sector is unlikely, but the corporate sector may be a source directly or by analogy for some of these proposals. It may also provide a lens to understand municipal developments.

Cozen O'Connor's Public and Project Finance practice represents issuers and underwriters in a variety of finance transactions and advises clients on the impact of the changing regulatory environment. Mark Vacha is a member in our Philadelphia office. He can be reached at mvacha@cozen.com.

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