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## Incoming NABL President Kenneth Artin Discusses Group's Agenda

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WASHINGTON — Secondary market disclosure, issue price, the tax exemption for municipal bonds and private placements with banks are some of the topics the National Association of Bond Lawyers will focus on in the coming year, according to the group's incoming president, Kenneth Artin.

Artin, a shareholder at Bryant Miller Olive who splits his time between Orlando, Fla. and here, talked about the organization's agenda in a recent interview with *The Bond Buyer*. He will become the new NABL president on Wednesday at the group's annual meeting in Chicago, succeeding Antonio Martini, a partner at Hinckley Allen & Snyder in Boston.

Artin said he expects it "to be a busy year as the years in the past have been." NABL will continue reacting to situations that develop as part of the group's larger goal of confronting the challenges facing the muni market.

"I feel like the market itself is evolving and so, as an organization, we have to basically assist our members in understanding these changes and trying to help them work through some of the issues," Artin said. "As the market evolves, so do the lawyers."

A large portion of NABL's securities law efforts in the upcoming year will be devoted to improving secondary market disclosure, which Artin said "has been a mantra" for buy-side participants.

The disclosure efforts will include monitoring of the Municipalities Continuing Disclosure Cooperation initiative and the lessons learned from it, he said.

The MCDC initiative allowed issuers and underwriters to receive favorable settlements if they voluntarily alerted the Securities and Exchange Commission to instances during the past five years when they sold or underwrote bonds with materially misleading official statements about meeting their continuing disclosure obligations. The SEC released the first round of settlements on June 18, in which 36 underwriters agreed to pay a combined \$9.3 million. Commission enforcement officials have said the market should expect another round of underwriter settlements by the end of the year. After all of those are finished, the agency will then start releasing settlements with issuers.

Artin said he is waiting for the issuer round of MCDC settlements to draw further conclusions on how the enforcement action may be helping issuers and underwriters improve their continuing disclosures. The settlements should give a better idea of what the SEC deems materially significant, he said.

"The awareness of the responsibility to file secondary market disclosures and at least focus on it at the time [issuers and underwriters] go to market has improved" with MCDC, Artin said. But he added later that, "there's got to be a better way" to address key areas of disclosure than through an enforcement initiative.

Continuing disclosure practices can also be improved by ongoing talks NABL has planned with market participants and regulators over the upcoming year, Artin said. There will be a special focus on the time period between bond issues, where he said he believes there is room to "heighten [issuers'] awareness" of their responsibilities.

Artin noted that NABL's most recent disclosure project was a paper designed to help its members assist clients in drafting policies and procedures for continuing disclosures. It did not focus on MCDC, but instead drew conclusions from past cases discussing disclosure lapses, like those in Stockton, Calif., Vallejo, Calif., and Jefferson County, Ala.

The incoming president said he wants NABL to revisit a paper written on voluntary market disclosure in 2000 by updating the advice it provided on investor inquiries, such as when an analyst calls an issuer official for information.

"The forces have changed" since 2000 and the group wants to be able to educate its members so they can help their clients when investor calls come in, with emphasis on how the calls need to be handled and the fact that issuers can talk to analysts who call.

"I think one of the big issues with respect to secondary market disclosure is increasing the transparency of the market so the market is much more liquid and it can react to changes quicker," Artin said. He also warned that the amount of information released has to be balanced.

"The analysts and the buy-side want more and more information, but I think there has to be a focus on what it is they need rather than what they want," he said.

## **Tax Law Projects**

On the tax law front, the big issue right now is the issue price regulations that the Treasury Department and the Internal Revenue Service proposed in June. NABL's tax law committee is currently working on providing comments on the proposal to Treasury and the IRS, Artin said. The comments are due Sept. 22.

"The issue price regs have their pluses and their minuses," he said.

The general proposed rule is that the issue price of a maturity is the first price at which 10% is sold to the public. The public would be anyone other than the underwriters or a related party, with underwriters defined as the underwriting syndicate and anyone who enters into a contract or other arrangement to sell the bonds with any of the syndicate members.

If 10% of a maturity hasn't been sold by the sale date, an issuer could use the initial offering price to the public as of the sale date as the issue price if certain criteria are met. The criteria includes that the lead or sole underwriter certifies that no underwriter will fill an order from the public after the sale date and before the issue date at a higher price than the initial offering price

unless the market moves after the sale date. Another condition is that the issuer can't have reason to know, after exercising due diligence, that the underwriter's certification is false.

Artin said a benefit of the proposed rules is the definition of the public that they provide. However, underwriters have to try to figure out how to document market moves, and issuers aren't sure how to perform the due diligence. "I think part of our comments will be focused on those issues in order to provide guidance in that area," he said.

NABL also has a group that is looking at the rules for when management contracts do not give rise to private business use. One of the projects on the Treasury and IRS 2015-2016 guidance plan is to update guidance on management contracts issued in 1997. The group is "doing a rather deep dive, going back and taking a look at some of the underlying assumptions that were used in preparing the [1997] management contract rules and seeing if they're still valid," Artin said.

The management contract rules are important due to the increased use of public-private partnerships. P3s are increasingly being used to finance transportation projects, particularly because the popularity of the Transportation Infrastructure Finance and Innovation Act federal loan program among issuers, he said.

"You have these governmental projects that have increased private use by large concessionaires and there might be a way where the portion of the project that's used and operated by the governmental unit can be financed tax-exempt [bonds] and the private portion of it [can] be financed through the private concessionaire," Artin said. "All of that is sort of wrapped up in that project."

NABL is continuing to monitor the definition of a political subdivision for tax-exempt bond purposes, another project on the priority guidance plan, Artin said. The project was added to the guidance plan after the IRS issued a controversial technical advice memorandum in 2013 that concluded the Village Center Community Development District in Florida was not a political subdivision when it issued bonds from 1993 to 2004 on grounds that its board was and always will be controlled by the developer rather than publicly elected officials.

In June, the IRS issued another ruling that prevents the TAM from being applied retroactively. However, Artin pointed out there are many other special districts out there that aren't transitioning to control by residents.

Another item on the guidance plan is finalizing rules proposed in 2008 about public approval requirements for private-activity bonds. NABL would like to see these rules finalized given that the proposed rules were published a while ago. The final rules should update the public-approval requirements to take new technologies into account, Artin said.

NABL is engaged in an ongoing dialogue with the IRS tax-exempt bond office about revisions to the Internal Revenue Manual used by TEB staff. NABL and the Government Finance Officers Association are discussing a joint project on post-issuance tax compliance, Artin said.

## **Tax Exemption**

Artin vowed that, during his term, NABL "will remain vigilant with respect to monitoring tax exemption."

"Part of our mission is to continue to educate Congress with respect to the importance of tax exemption," he said. "We just have to keep driving that home and make sure that they understand this is how most of the local governments finance the infrastructure that is needed

for this country."

While Artin does not think that Congress will put forth a comprehensive tax-reform package next year, he said that NABL has to monitor two legislative areas where the muni exemption could be at risk.

One is the transportation bill. The current extension of transportation funding expires Oct. 29, and if Congress decides to move forward with a long-term transportation bill, it could consider paying for it by doing some form of limited tax reform, Artin said.

The other area is the debt limit, which will likely need to be raised or suspended by the end of the year. Congress could look to some type of tax reform to pay for an increase in the debt limit, he said.

NABL will also monitor proposals from the 2016 presidential candidates to see if and how they could affect munis.

"You can't get too excited because it's a campaign proposal, a campaign promise," Artin said. "And so the best you can do is monitor them, and if something were to become real serious, try to educate whoever's proposing it as to the true benefit of tax exemption and the purpose of tax-exempt bonds."

#### General Law Projects

Artin also discussed several projects that NABL's general law and practice committee is tackling.

One will explore the specific elements of issuers' private placements of bonds with banks and how they relate to the issuers' financial conditions or credit ratings. "[The paper] is going to give our membership some guidance or issues to consider when they are doing the private placements," Artin said.

Direct placements occur when securities are not offered publicly but are instead privately sold to a single or small number of institutional investors who are usually considered sophisticated, such as large banks, mutual funds, and insurance companies. Typically the sales do not have to be registered with the SEC because of the investors' institutional status.

"Ratings agencies are concerned about this," Artin said. "What are the provisions being granted to the banks that aren't being granted to the bonds being sold to regular retail investors? What special event is a default or [what] remedies [are] being granted to the banks versus regular bondholders? There are a lot of issues you have to take into concern with banks buying the debt versus a bondholder."

Another project is on disaster-relief bonds, Artin said. NABL is preparing a list of federal- and state-level recommendations that would be helpful in the wake of disasters. In the past, Congress has responded to disasters on a piecemeal basis, and NABL intends to make recommendations that could apply across the board, regardless of the type of disaster.

The general-law committee is also working on a project that explains the role of the Depository Trust Company in the municipal bond market.

The DTC, a subsidiary of the Depository Trust & Clearing Corp., is a registration system for muni bonds that has been used for years. All of the bonds in an issue can be registered in the name of DTC, which has broker-dealer participants that have customers. DTC is essentially the

sole bondholder of the issue and the individuals or businesses that paid money to buy the bonds are the beneficial owners. The question is, when bondholder consent is needed, how does information get from the DTC to the beneficial owners of the bonds, Artin said.

"We thought it was an important enough topic to basically demystify it," and explain how the DTC is supposed to work, he said.

### **A Career in Public Finance**

Artin went directly into public finance after completing his education.

He earned undergraduate and law degrees at the State University of New York at Buffalo in 1979 and 1982, respectively, and a master of laws in taxation from Southern Methodist University in 1983. He was recruited out of SMU to work as a junior tax lawyer with McCall, Parkhurst & Horton in Dallas and while there, rounded out his knowledge by training on bond law at the senior partners' urging, he said.

Artin left Texas and worked at Cobb, Cole and Bell in Florida for about nine years, practicing on both the bond and tax sides of public finance law. While he was at that firm, he started to pick up some securities law work, he said. Artin opened Bryant Miller Olive's Orlando, Fla., office in 2000 and has worked at the firm since, but has split his time between Florida and running the firm's Washington office for the last three years.

Artin said he primarily works as bond counsel but also does some disclosure work. His time with NABL has largely been devoted to working on the securities side of the group. He has been a speaker on various securities law panels during conferences and has served on and chaired the group's securities law committee.

"I think of myself as a bond lawyer with a heavy tilt toward securities law," Artin said.

Artin said his work has been "a very interesting practice over the years" and although he has spent his entire career in public finance, he has "never looked back."

His family is also well aware of his extensive work in the industry. Every time they pass by a bridge or airport that he has financed, he said his children are quick to say: "Yes Dad, we know you financed it Dad."