



Alliance of the Ports of Canada, the Caribbean,
Latin America and the United States

**PORT ADMINISTRATION AND
LEGAL ISSUES SEMINAR**

PUBLIC FINANCING: GETTING IT RIGHT

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Discussion Outline

- Introduction to disclosure in public financing transactions
- Legal framework
- Initial transaction disclosure
- Post-transaction continuing disclosure
- Your role as Port counsel

Legal Framework

The Securities and Exchange Commission (SEC) is statutorily barred from regulating municipal securities issuers but does regulate broker-dealers, *i.e.*, underwriters.

The SEC communicates its views on disclosure matters to the bond community through various releases and enforcement proceedings.

In January 2010, the SEC announced the formation of a new Municipal and Public Pension Unit.

Securities Act of 1933

Generally – It is unlawful to sell securities using means of interstate commerce by fraud or 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.

Securities & Exchange Act of 1934

Generally – It is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, in connection with the purchase or sale of any security, to employ 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.

SEC Rule 10b-5

Generally - It is unlawful to employ any device, scheme, or artifice to defraud or 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 as a fraud or deceit in connection with the purchase or sale of any security.

Supreme Court Definition of *"Material"*

A statement or omission is material if there is a *substantial* likelihood that a *reasonable* (not "any") investor *would* (not "could") consider it *important* (not "interesting") in making the *decision* to purchase or sell the securities.

SEC Rule 15c2-12

Purpose:

- To ensure that brokers and dealers review secondary market disclosure practices of issuers and other “Obligated Persons” at the time of an offering of municipal securities

The text of the Rule may be found at
www.sec.gov

Other Sources of Guidance

- Government Finance Officers Association
- Municipal Securities Rulemaking Board
- National Federation of Municipal Analysts
- Securities Industry and Financial Markets Association
- California Public Securities Association
- Financial Institution Regulatory Authority
- National Association of Bond Lawyers

Application of Rule 15c2-12

- Rule 15c2-12 prohibits underwriters from underwriting *unless* an exemption applies or the Issuer or an Obligated Person agrees to provide certain ongoing information
- This consists of Annual Reports and Material Event Disclosures, when applicable
- A major Release was issued on May 26, 2010 which substantially amends Rule 15c2-12 regarding municipal disclosure
- New rules become effective for transactions closing on and after December 1, 2010

Initial Transaction Disclosure

- Initial disclosure is usually made using an offering document entitled “Official Statement”
- During marketing a “Preliminary Official Statement” (POS) may be used
- The Official Statement describes the debt, issuer and sources of repayment
- The anti-fraud rules require that the Official Statement to disclose all material facts, and to be free of material omissions

Disclosure Procedures

- Conduct due diligence and allow the underwriter(s) to do so
- Create a culture and systems that facilitate the process
- Create awareness to make it easier to obtain, analyze and deliver the data to the preparer of the offering document

Good Disclosure— *It's In the Process*

Develop internal controls and procedures

Inform staff and elected officials of their responsibilities

Gather and filter the information

Prepare the information for distribution

Coordinate approval

Remember: The content is the issuer's responsibility

OFFICIAL STATEMENT

Who Prepares?

Who Reviews?

OFFICIAL STATEMENT (Cont'd.)

Disclaimer Language

- Issuer (no guarantee of third party data)
- Underwriter
 - Review but not guarantee
 - “Due diligence” - reasonable investigation

Rule 15c2-12

- POS deemed final
- Permitted omissions of pricing data from POS

OFFICIAL STATEMENT (Cont'd.)

Contents

- Description of Securities
- Security and Sources of Payment
- Estimated Sources and Uses
- The Leased Premises
- The Project
- The Issuer
- Risk Factors
- Continuing Disclosure

OFFICIAL STATEMENT (Cont'd.)

Contents (cont'd)

- Concluding Information
 - Tax Matters
 - Ratings
 - Litigation
 - Financial Interests
- Appendices
 - Economic and Statistical Data re Issuer (in forepart sometimes)
 - Audited Financials
 - Form of Bond Counsel Opinion
 - Summary of Legal Documents
 - Credit Enhancement

OFFICIAL STATEMENT (Cont'd.)

- Due diligence includes questions about, for example:
 - Pending and threatened litigation
 - Loss of major taxpayers/tenants
 - Management Expectations
 - Existence of appraisals and feasibility studies
 - Environmental cleanup costs
 - Delays in audit/changes in auditors
 - Project progress, participants, agreements . . .
 - Existence of audits/regulatory inquiries
 - Material agreements, leases . . .
 - Other factors that can materially affect revenues

Proofread everything carefully!!

- There is **NO SUCH THING** as "boilerplate"!
- Don't forget the footnotes!



Continuing Disclosure Undertaking

Purpose: Provides undertakings of any obligated person (Issuer, Borrower . . .) to provide ongoing disclosure.

Format: The undertaking may be in the form of a certificate or an agreement with a dissemination agent.

Important provisions:

- Contents of annual reports
- Delivery/timing of annual reports
- Filing of audited financial statements and budgets
- Reporting significant events
- Note – changes in Rule 15c2-12 for post-December 1, 2010 transactions

Current Disclosure “Hot” Topics

- Pension and other post-employment benefits
- Swaps and derivatives
- Credit enhancers
- Issuer liquidity
- Scope of voluntary disclosures

What Happens When Issuers do not Provide Good Disclosure?

SEC actions

- State of New Jersey
- Orange County, California
- Miami, Florida
- Dauphin County, Pennsylvania
- San Diego, California

New civil penalties under Dodd-Frank

The New Electronic Age of Municipal Disclosure

Electronic Dissemination of Information

Electronic Bidding

Internet-Based Disclosure Dissemination Services

EMMA.msrb.org

Issuer Investor Relations Websites

- GFOA says: “Investor Relations Programs that go beyond the legally mandated requirements of SEC Rule 15c2-12 promote the efficient sale of debt instruments in both the primary and secondary markets and improve the reception of debt offerings.”

Recap of Disclosure Issues

- Financial statements must be accurate
- Issuer certifications must match the facts
- The POS, OS and Annual Financial Information are the Issuer's documents and the Issuer cannot rely solely on the professionals
- Public officials:
 - May not recklessly disregard disclosure of misleading facts
 - Must become familiar with offering documents and question officers about disclosure
- Issuers should encourage orderly and regular communication between staff and professionals
- Issuers should implement internal controls to ensure compliance with federal securities law

Your Role as Port Counsel

- Inform your colleagues about their disclosure responsibilities
- Prepare to conduct appropriate due diligence for your legal opinion
- Review the Bond Purchase Agreement early and often
- Consider what opinions are being given by others
 - When is a “10b-5 opinion” not an opinion?

More Practical Tips

- Limit personal liability
- Consider when opinions should be limited to the best of your knowledge
- Limit reliance solely to the addressees
- Disclaim an obligation to update the opinion after its date

More Practical Tips (Cont'd.)

- Include a list of documents reviewed
- If opining about a document, take care to exclude from your opinion information provided by others, such as bond insurers, underwriters, etc.
- Review closing documents and certificates

Sample Content of Port Counsel Legal Opinions

The City is a charter city and municipal corporation duly organized and validly existing under the Constitution and Laws of the State of California.

The Ordinance and the Resolutions were considered and adopted at meetings of the City Council which were duly called and held pursuant to law, with all public notices required by law having been given, and at which a quorum was present and acting throughout. The Ordinance and the Resolutions are not inconsistent with the Charter and were and remain valid and in full force and effect.

Sample Content of Port Counsel Legal Opinions (Cont'd.)

No approval, consent or authorization of any governmental body or public agency, authority or person, which has not been obtained, is required for the adoption by the City of the Ordinance and the Resolutions, the performance by the City of its obligations thereunder, or the issuance of the Bonds.

The documents executed by the City have been duly authorized, executed and delivered by the City and constitute the valid and binding obligation of the City, *except*, (for example) bankruptcy and creditors' rights, etc., equitable principles, limitations on actions against public entities.

Sample Content of Port Counsel Legal Opinions (Cont'd.)

- Other issues that are often addressed:
 - Absence of litigation affecting the City, its officials or the Bonds
 - Absence of conflict with other agreements, judgments, orders or consent decrees by which the City is bound
 - Contents of Official Statement



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