



Municipal Securities Disclosure

2020 Annual Training



Presenters



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Disclosure Training Agenda

- Disclosure Basics
- Recent Amendments
- Evolving Role of the SEC
- Policies and Procedures
- Questions and Answers

Disclosure Basics

Glossary of Terms
Role of Counsel
Federal Regulatory Framework

Glossary of Terms

Important Parties

- **Issuer** – Governmental entity that issues bonds
- **Underwriter** – Purchaser of bonds
- **Municipal Advisor** – Advises issuer about municipal securities
- **SEC** – Federal Securities and Exchange Commission; enforces federal securities laws

Documents

- **OS** – Official Statement
- **CDC** – Continuing Disclosure Certificate
- **Dissemination Agent Agreement** – Issuer’s contract with company to post disclosures on Electronic Municipal Market Access (“EMMA”) website, <http://emma.msrb.org>

Role of Counsel

Bond Counsel

- **Assess tax qualifications** of issuer and bond offering
- **Prepare operative and closing documents** (e.g. resolutions, bonds, loan agreement, CDC, closing certificates)
- **Deliver opinion** that bonds are valid and legal obligations of the issuer
- **Deliver opinion** as to tax-exempt status of the bonds

Disclosure Counsel

- **Assess risks** associated with issuer and bond offering
- **Prepare OS** (or closely review) in conjunction with issuer
- **Review issuer’s compliance** with previous CDCs in depth
- **Deliver “10b-5” opinion** to issuer (and to underwriter)
- Does not prepare or confirm financial info

Federal Regulatory Framework

- **Statutes:** 1933 Act and 1934 Exchange Act
- **Antifraud Rules:** SEC Rule 10b-5
 - No false or misleading statements or omissions of material fact
 - “Material” means a substantial likelihood that a reasonable investor would view a fact as significantly altering the “total mix” of info made available
 - Consequences of fraud allegations:
 - Civil or criminal penalties; reputational harm
 - Governing body, employees & officials may be personally liable
 - Underwriters: due diligence defense

Federal Regulatory Framework

- **Disclosure rules:** SEC Rule 15c2-12
 - Regulates underwriters directly, issuers indirectly (via CDC)
 - Underwriters must reasonably determine issuers of certain bonds commit to provide the following disclosures on ongoing basis:
 - (1) **Annual financial info** (audited financials, operating data)
 - (2) **Material event notices** (10 business days)
- **Disclosing material noncompliance:** SEC Rule 15c2-12
 - Final OS must disclose material noncompliance with CDC duties
 - Material Noncompliance: 5-year lookback period
 - e.g. - failure to file/timely file financial info or material event notices
- **Disclosure documents are subject to Antifraud Rules**

Federal Regulatory Framework

15c2-12: Listed Events

- 1) Payment delinquencies
- 2) Non-payment related defaults, if material
- 3) Unscheduled draws on debt service reserves reflecting financial difficulties
- 4) Unscheduled draws on credit enhancements reflecting financial difficulties
- 5) Substitution of credit or liquidity providers, or their failure to perform
- 6) Adverse determinations with respect to the tax status of the bonds
- 7) Modifications to rights of holders, if material
- 8) Bond calls, if material, and tender offers
- 9) Defeasances
- 10) Release, substitution, or sale of property securing repayment of the securities, if material
- 11) Rating changes
- 12) Bankruptcy, insolvency, receivership or similar event of the issuer
- 13) Merger, consolidation or acquisition involving issuer, if material
- 14) Appointment of a successor or additional trustee or the change of name of a trustee, if material
- 15) Incurrence of financial obligation of issuer or agreement to covenant, event of default, remedy, priority right or similar term, if material*
- 16) Default, acceleration, termination, modification or similar event under financial obligation of issuer reflecting financial difficulties*

* Affect bonds issued after 02/27/2019



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Recent Amendments

- Overview of New Events
- Interpreting Events 15 & 16
- Compliance Considerations

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Overview of New Events

- **Context:** Increased use of private placements and bank loans
- **Two new listed events**
 - 15) 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 the same, any of which affect security holders, **if material**
 - 16) Default, event of acceleration, termination event, modification of terms, or other similar events under terms of a **financial obligation** of the obligated person, any of which **reflect financial difficulties**
- **Definitions**
 - “Financial obligation” includes:
 - i. a **debt obligation**;
 - ii. a **derivative instrument** entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or
 - iii. a **guarantee** of either (i) or (ii).
 - A “financial obligation” does not include municipal securities for which a final OS has been provided to the MSRB consistent with Rule 15c2-12

Interpreting Events 15 & 16

- **SEC guidance on meaning of financial obligation**
 - **“Financial obligation”**
 - Debt, debt-like and debt-related obligations
 - Obligations that could impact liquidity, overall creditworthiness or an existing security holder’s rights
 - Not ordinary financial and operating liabilities
 - **“Debt obligation”**
 - Short- or long-term debt obligations of an issuer under an indenture, loan agreement or similar contract to be repaid over time
 - Leases operating as vehicle to borrow money (i.e. capital leases)
 - May be broader than state law or accounting definitions of debt
 - **“Material”**
 - A financial obligation that a reasonable investor is substantially likely to view as significantly altering the “total mix” of info available
 - Flexible, facts-and-circumstances approach
 - Relevant factors include principal amount, security, priority rights, covenants, overall debt portfolio, etc.

Interpreting Events 15 & 16

- **SEC guidance on event number 16**
 - “Default”
 - Any default reflecting financial difficulties, even if not an event of default
 - Payment defaults and nonpayment defaults
 - “Modification of terms”
 - Includes written or verbal waivers or changes to non-material terms
 - “Financial difficulties”
 - Includes difficulties with pledged revenue streams
- **Material event notices**
 - Filing deadline: 10 business days from incurrence
 - Notices should include:
 - Material terms of financial obligation (event 15 notices only)
 - Summary of relevant default and financial difficulties (event 16 notices only)

Compliance Considerations

Issuers

- **Adopt disclosure policies reflecting amended Rule**
 - Potentially broad scope of outstanding financial obligations
 - Fairly short timeframe for filing material event notices
- **Expect increased due diligence from underwriters**
- **Compliance depends upon:**
 - Timely internal communication of incurrence of new obligations
 - Identification and tracking of covenants in existing obligations
 - Timely determinations of materiality and financial difficulties
 - Timely preparation and filing of material event notices
- **Role of bond or disclosure counsel**

Evolving Role of the SEC

Expanding Role of SEC
SEC's Regulatory Agenda
Guidance on Public Statements

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Expanding Role of SEC

- **Expanding investor protections**
 - Regulation of broker-dealers and municipal securities dealers
 - 2018 Amendments to Rule 15c2-12
 - SEC oversight of MSRB
 - Antifraud actions to enforce CDC compliance
 - **2013:** Issuer charged with fraud for misstating past CDC compliance
 - **2014:** Issuers and underwriters asked to report past noncompliance with CDC obligations (MCDC initiative)
 - **2015–16:** MCDC settlements with SEC; underwriters fined
 - **2017–20:** Post-MCDC, very important to scrupulously review past CDC compliance and precisely describe any material noncompliance

SEC's Regulatory Agenda

- **Recent trends**
 - Pronouncements on need for timely and complete disclosure
 - Chair Clayton's remarks (December 2018)
 - MSRB discussion at board meeting (January 2019)
 - Chair Clayton call with GFOA, NABL and OMS (October 2019)
 - Voluntary filings of interim financials encouraged
 - MSRB "transmission calculator" on EMMA
- **Recommendations (February, 11 2020)**
 - Create statutory mechanism for SEC to enforce CDA compliance
 - Private liability safe harbor for certain forward-looking statements
 - More certain deadlines (i.e. not "when and if available")
 - Educate market regarding risks of poor disclosure so that yields start reflecting quality and quantity of disclosures

Guidance on Public Statements

- **2020 Staff Legal Bulletin: Office of Municipal Securities**
 - Antifraud rules apply to all issuer statements reasonably expected to reach investors and the trading markets
 - Statements include:
 - **Information on municipal websites** (accurate; not misleading)
 - **Historical information online** (okay if dated)
 - **Hyperlinks** (beware of entanglement or adopting liabilities)
 - **Summaries of financial performance** (mark as summaries)
 - **Reports to state or local governments** (part of public record)
 - **Statements made by municipal officials**
 - Speeches, announcements, interviews, and social media posts
 - Only if reasonably expected to reach investors and made by person with apparent knowledge of financial condition and operation
 - Full text at: [sec.gov/municipal/application-antifraud-provisions-staff-legal-bulletin-21](https://www.sec.gov/municipal/application-antifraud-provisions-staff-legal-bulletin-21)

Policies and Procedures

Dorsey Compliance Program: Annual Training

1. New Bond Offerings
2. Continuing Disclosure Requirements
3. Systematic Training

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Dorsey Compliance Program (the “Policy”)

Overview

- **The Policy: three aspects**
 - I. **New bond offerings**: Preparing and approving OS when issuing bonds (Appendix I of Policy)
 - II. **Continuing disclosure compliance**: Complying with ongoing disclosure requirements under a CDC (Appendix II of Policy)
 - III. **Systematic training**: Educating key staff and elected officials regarding disclosure matters on regular basis

I. New Bond Offerings (Preparing and Approving OS)

5 steps for preparing and approving OS

- **Step 1—Establish plan and schedule**
 - At a financing's outset, Disclosure Officer is to ensure there is (i) **a plan** for preparing OS and (ii) **a schedule** allowing sufficient time for all work, including **review and participation** by financing team and staff
- **Step 2—Manage process of preparing OS**
 - Disclosure Officer is to **manage preparation process**, obtaining assistance from other participants as necessary and appropriate
- **Step 3—Coordinate review and sign-off**
 - Disclosure Officer is to develop program for **coordinating staff review of, and sign-off on**, disclosure info and documents

I. New Bond Offerings (Preparing and Approving OS)

5 steps for preparing and approving OS (cont'd)

- **Step 4—Disclose any prior failures to comply**
 - Disclosure Officer is to ensure OS **accurately discloses** any failure to fully comply with CDC obligations within last 5 years.
- **Step 5—Give governing body time to review**
 - Governing body must have at least **7 days to review OS** before voting on its approval (absent extenuating circumstances).
 - Elected officials on governing body must be directed to contact Disclosure Officer during review period to **discuss potential issues or comments** on the OS.

II. Continuing Disclosure Compliance (Meeting CDC Obligations)

Relevant Rules

- **Under SEC Rule 15c2-12, the issuer must**
 - file (or cause to be filed) necessary items under the CDC
 - in searchable electronic format (searchable pdf)
 - on EMMA (Electronic Municipal Market Access) portal (www.mma.msrb.org)
- **Adequate disclosure is responsibility of issuer**
 - Role of dissemination agent (if any)
 - Effects of noncompliance on pricing and marketability of bonds

II. Continuing Disclosure Compliance (Meeting CDC Obligations)

Six things to know

- 1. Who is responsible for compliance?**
 - Disclosure Officer has primary responsibility under the policy
 - CDC compliance, including (i) annual filings, (ii) material event notices, (iii) voluntary filings and (iv) other filings required by CDC
 - Accuracy of public statements that can be reasonably expected to reach investors (e.g. website updates, press releases, market notices, etc.)
 - Key employees and elected officials also responsible
- 2. Understand new CDC obligations**
 - Discuss new CDCs with (i) bond counsel, (ii) disclosure counsel, (iii) underwriter, and (iv) municipal advisor, if any

II. Continuing Disclosure Compliance (Meeting CDC Obligations)

3. Track disclosure obligations (Disclosure Officer)

- Maintain list of outstanding bonds subject to CDC, including filing deadlines, using “Disclosure Table, Part I” of Policy

Name of Bond Issue	Date of Issue	Final Maturity Date	Dissemination Agent?	CUSIP for Final Maturity	Deadline for Annual Report

- Maintain copies of OS, CDC, Dissemination Agent Agreements, and other disclosure documents for each bond issue
- Document any filing made on “Disclosure Table, Part II” of Policy

Description of Financial Information / Operating Data to file on EMMA	FY2013	FY2014	FY2015	FY2016
[audit]				
[list applicable tables in Official Statement]				

- Register for email reminders on EMMA (emma.msrb.org)

II. Continuing Disclosure Compliance (Meeting CDC Obligations)

4. File annual or quarterly reports (Disclosure Officer)

- Coordinate with any outside professionals (e.g. dissemination agent, municipal advisor) hired to assist with filing reports
- **30 days before deadline:** compile information for filing
- **10 days before deadline:** confirm information ready to be filed
- **3 days before deadline:** ensure information filed on EMMA
- After filing: confirm info available on EMMA; update Table II

5. File notice of any Listed Events (Disclosure Officer)

- Determine if any Listed Events have occurred (see next slide)
- Consult with external legal and financial professionals, as appropriate
- File notice on EMMA within 10 business days

6. Other responsibilities of Disclosure Officer

- Primary contact for investor inquiries
- Maintain any investor-relations content on issuer’s website
- File any voluntary info on EMMA after consulting with outside professionals

II. Continuing Disclosure Compliance (Meeting CDC Obligations)

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III. Systematic Training (Staff and Governing Body Members)

Relevant Considerations

- **Staff and elected officials must follow procedures**
 - Regular training important
 - Educate new and existing individuals about obligations under federal securities laws and CDCs
- **Three training formats to aid in maintaining effective disclosure policies and procedures:**
 - 1) Annual Training (certified by Disclosure Officer in writing)
 - 2) Specific Training (conduct as appropriate)
 - 3) Governing Body Training (at least biennially)

Conclusion

- **Key Takeaways**
 - Disclosure responsibilities do not end with closing
 - Annual report disclosure
 - Material event disclosure
 - Increased SEC scrutiny of post-issuance compliance
- **Compliance considerations for amended Rule**
 - Adopt or amend revised policies and procedures
 - Review and catalogue existing debt obligations
 - Consult bond or disclosure counsel for assistance

Municipal Securities Disclosure

Questions?

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