

DISCLOSURE PRACTICES

GFOA ANNUAL CONFERENCE

ATLANTA

JUNE 9, 2010

SPEAKERS

- Susan Gaffney, Director, Federal Liaison Center, GFOA
- John McNally, Partner, Hawkins Delafield and Wood
- Frank Hoadley, Capital Finance Director, State of Wisconsin
- Harlita Robinson, Finance Director & Tax Commissioner, City of Forest Park, Ohio

RECENT ACTIVITIES

- SEC changes to Rule 15c2-12
 - New Disclosure Standards for Variable Rate Debt
 - Material Event Notices Must be Filed Within 10 days of Event
 - Stripping of 'materiality standards' in some areas
 - IRS Audits

RECENT ACTIVITIES

- Changes to EMMA
 - New Voluntary Disclosure Fields
 - Submitting Annual Financial Information Within 120/150 Days of the End of the Fiscal Year
 - Follow GAAP/GASB-FASB
 - Include Links to Financial Information on Governments' Web Sites

SEC

- Very Interested in Municipal Securities Market
- “Field Hearings” Being Held in 2010
- Propose Legislation to Repeal the “Tower Amendment” – Giving the SEC the Authority to Regulate Issuers of Municipal Securities
- Different Standards for Governmental vs. Other Debt
- More Frequent/More Timely Disclosure

CONGRESS

- Senate Version of Regulatory Reform Includes a Study on Municipal Securities Disclosure Standards
- Currently, Neither Bill Addresses Tower Amendment

INVESTORS

- Would Like More Timely Filing of Audited Annual Financial Information
- Would Like SEC-Mandated Interim Financial Filings
- Would Like “More” Information
- NFMA Best Practices

GFOA BEST PRACTICES

- Maintaining an Investor Relations Program
- Using a Web Site for Disclosure
- Understanding Your Continuing Disclosure Responsibilities
- Web Site Presentation of Official Financial Documents

SEC Reform Initiatives; Rule 15c2-12

Hawkins Delafield & Wood LLP
John M. McNally

Key Differences between Corporate and Municipal Securities

- Registration of Securities
 - Section 5 of the Securities Act of 1933 (“33 Act”) prohibits the offer or sale of any security unless registered with the SEC
 - Exemptions for certain *securities* under section 3 of the 33 Act
 - Exemptions for certain *transactions* under section 4 of the 33 Act

Key Differences between Corporate and Municipal Securities

- Registration of Securities (continued)
 - Corporates: Required to register under the 33 Act, absent an exemption
 - Munis: Securities exemption under section 3(a)(2) of the 33 Act

Key Differences between Corporate and Municipal Securities

- Form and Content of Disclosure

- Corporates: Prescribed by SEC Guidelines and Forms; also must satisfy Antifraud Provisions generally (i.e., no material mistakes or omissions)
- Munis: Because exempt from registration, based solely on satisfying Antifraud Provisions

Key Differences between Corporate and Municipal Securities

- Express Remedies for Investors
 - The 33 Act provides expressly for suits by individual investors, pursuant to sections 11 and 12 of the 33 Act
 - Munis: Does not apply, because sections 11 and 12(a)(1) only apply to securities subject to SEC registration, and section 12(a)(2) regarding prospectus and oral communications liability expressly exempts munis

Key Differences between Corporate and Municipal Securities

- Implied Remedies for Investors

- Section 10(b) of the Securities Exchange Act of 1934 (“34 Act”) and associated Rule 10b-5 are part of the “General Antifraud Provisions” of the securities laws
- Applies to Corporates and Munis

Key Differences between Corporate and Municipal Securities

- 10b-5 Cause of Action (Private)
 - Material misrepresentation or omission by the defendant
 - Scierter
 - In connection with the purchase or sale of a security
 - Reliance upon the misrepresentation or omission
 - Economic loss; and
 - Loss causation

Key Differences between Corporate and Municipal Securities

- 10b-5 Cause of Action (SEC)
 - Material misrepresentation or omission by the defendant
 - Scierter
 - In connection with the purchase or sale of a security

Key Differences between Corporate and Municipal Securities

- 17(a)(2) or (3) of the 33 Act (SEC)
 - Material misrepresentation or omission
 - Negligence
 - In the offer or sale of a security

Key Differences between Corporate and Municipal Securities

- Standard of Liability for Issuers
 - Corporates:
 - Absolute liability to *investors* under section 11 of 33 Act for material mistakes or omissions in registration statements, unless investor knew of mistake or omission
 - *SEC* must prove negligence or scienter
 - Munis:
 - *Investors* must prove scienter
 - *SEC* must prove negligence or scienter

Key Differences between Corporate and Municipal Securities

- SEC Staff Review of Disclosure Materials
 - Corporates: Applies, by operation of the review process required before a prospectus can become “effective”
 - Munis: Because of exemption from registration, does not apply

Key Differences between Corporate and Municipal Securities

- SEC Staff Review of Disclosure Materials
(continued)
 - Tower Amendment: Neither SEC nor MSRB can require a municipal securities issuer, directly or indirectly, to file any document with the SEC or MSRB prior to the sale of such securities

Key Differences between Corporate and Municipal Securities

- Continuing Disclosure
 - Corporates: Applies; done on prescribed forms - e.g., 8-K (material events), 10-K (annual filing), 10-Q (quarterly filings)
 - Munis: Applies, but indirectly by operation of Rule 15c2-12

Key Differences between Corporate and Municipal Securities

- Financial Statements
 - Corporates: governed by Financial Accounting Standards Board
 - Munis: governed by Governmental Accounting Standards Board

SEC Reform Initiatives

- Reform Under Current SEC Authority
 - Rule 15c2-12 amendments
 - Increase current antifraud activity
 - Update the 1994 Interpretive Release
 - Enhance EMMA

SEC Reform Initiatives

- Legislative Reform
 - Changes to the MSRB composition
 - Combine the enforcement and regulatory authority over the municipal market into one self-regulatory organization
 - Apply the registration and disclosure standards to non-governmental conduit borrowers that would apply if they issued their securities directly without using municipal issuers as conduits

SEC Reform Initiatives

- Legislative Reform (continued)
 - Regulatory authority over all financial intermediaries involved in the municipal securities market
 - Repeal Tower Amendment

SEC Reform Initiatives

If Tower repealed:

1. The SEC could require that municipal issuers make available to investors offering documents and periodic reports that contain information similar, although not identical, to that required of issuers and offerings of corporate securities

SEC Reform Initiatives

If Tower repealed: (continued)

2. Establish time periods for release of critical information
3. Give the SEC the authority to mandate that municipal issuers use “generally accepted” governmental accounting standards

SEC Reform Initiatives

If Tower repealed: (continued)

4. Congress should provide an independent funding mechanism for the GASB and permit Commission oversight of the GASB

Amendments to SEC Rule 15c2-12

- On May 26, 2010, the SEC approved amendments to Rule 15c2-12 relating to the continuing disclosure provisions and certain exemptions. The primary disclosure provisions of the Rule were not amended.
- The Amendments will apply to primary offerings that occur on or after December 1, 2010

Amendments to SEC Rule 15c2-12

- Complete exemption from the Rule for VRDOs was deleted. New primary offerings of VRDOs will be subject to the continuing disclosure provisions of the Rule but would continue to be exempt from the primary offering provisions

Amendments to SEC Rule 15c2-12

- Materiality determination was removed from the following events:
 - Principal and interest payment delinquencies
 - Unscheduled draws on debt service reserves reflecting financial difficulties
 - Unscheduled draws on credit enhancement reflecting financial difficulties

Amendments to SEC Rule 15c2-12

- Materiality determination was removed from the following events: (continued)
 - Substitution of credit or liquidity providers, or their failure to perform
 - Adverse tax opinions
 - Defeasances
 - Rating changes

Amendments to SEC Rule 15c2-12

- The following new events were added:
 - The issuance by the IRS 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 securities
 - Tender offers

Amendments to SEC Rule 15c2-12

- The following new events were added:
(continued)
 - Bankruptcy, insolvency, receivership or similar event of the obligated person
 - The consummation of a merger, consolidation, or acquisition or certain asset sales, if material
 - Appointment of a successor or additional trustee, if material

Amendments to SEC Rule 15c2-12

- The current requirement to provide notices “in a timely manner” will be subject to an outside limit of ten business days after the occurrence of the event

DISCLOSURE PRACTICES



104th Annual Conference
at the Georgia World Congress Center

Speaker: Harlita H. Robinson, CPA



City of Forest Park

Agenda

- A. The Approach to Disclosure Without a Dedicated Debt Management Office
- B. Using GFOA Best Practices
- C. EMMA – An Important Debt Management Tool



Finance Officer Focus for Disclosure

- In making disclosure decisions the focus should be:
 - To ensure the accuracy of all information presented to investors, and
 - To ensure that there are no “material omissions” that could make any disclosure documents misleading



Making Disclosures Decisions

- Be careful not to over-disclose
 - Risk of confusing investors
 - Remember the key is:
 - Simplicity and
 - Clarity
- The essence of good disclosure is accurate financial information
 - Any variations to GAAP should be explained
 - Explain financial information is your audit opinion is not “Unqualified”



Making Disclosure Decisions continued

- What to do if there is no Debt Management Office?
 - When making a decision on whether or not to disclose remember:
 - Determine if the event is material first
 - Determine if the market price will be effected by the information disclosed
 - Determine if the information disclosed will explain or provide more clarity to the event



Continuing Disclosures

- Annual Disclosures required on a continuing basis:
 - Material events disclosures
 - Annual financial information
- In accordance with changes made in 2009 to Rule 15c2-12, these filings must be made electronically at the Electronic Municipal Market Access (EMMA) portal at www.emma.msrb.org



Why should I disclose?

- Enhance credibility in the marketplace
- Foster liquidity of your securities in the marketplace
- Have a favorable disclosure record with marketplace investors
- Have a more favorable standing with credit rating agencies



GFOA Best Practices

- Understanding Your Continuing Disclosure Responsibilities (2010)
- Using a Web Site for Disclosure (2002)
- Maintaining an Investor Relations Program (2003)
- Using the Comprehensive Annual Financial Report to meet SEC Requirements for periodic Disclosure (2006)



Additional References

- GFOA Publication – *Making Good Disclosure*, Government Finance Officers Association, 2002
- *Disclosure Role of Counsel*, National Association of Bond Lawyers, 2009
- Sec Rule 15c2-12,
<http://www.sec.gov/rules/final/adpt6.txt>
- *Disclosure Handbook for Municipal Securities*, National Federation of Municipal Analysts, 1992



EMMA

- Definitions:
 - MSRB = Municipal Securities Rulemaking Board
 - EMMA = Electronic Municipal Market Access
- What is EMMA?
 - EMMA is the comprehensive source for official statements, continuing disclosure documents, advance refunding documents and real-time trade price information on municipal securities.
- Location: www.emma.msrb.org



Questions?

