Securities Law Considerations for Higher Education Bonds

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Introduction

Bonds, notes, and other debt instruments issued by state institutions of higher education and other state and local governmental entities (referred to in this memorandum as *"municipal securities"* or "*municipal bonds"*) are closely regulated under federal securities law. The United States Securities and Exchange Commission (the *"SEC"*), the Municipal Securities Rulemaking Board *("MSRB"*), and other regulatory agencies continue to steadily increase their oversight of the municipal bond industry through the proliferation of investigations, public pronouncements, and regulatory and rulemaking activity. In its 2012 report on the municipal bond market, the SEC highlighted a number of concerns relating the sufficiency and timeliness of disclosure in the primary and secondary municipal bond markets,[1] and the SEC's current chairman, Mary Jo White, has promised to address these and other securities law concerns through "aggressive and creative" enforcement.

The SEC's controversial Municipalities Continuing Disclosure Cooperation initiative (*"MCDC"*), an enforcement initiative that incentivizes issuers and underwriters to report themselves and each other for certain securities law violations (as discussed below) is only one of the latest of these "aggressive and creative" efforts to enforce securities law compliance in the municipal bond market. The creation of a municipal securities and public pensions enforcement unit in 2010, the volume of regulatory activity by the SEC in recent years, the MCDC initiative, and the increasing frequency of public statements by the SEC and its staff directed at state and local governmental issuers (referred to herein as *"municipal issuers,"*),[2] suggest that the SEC will, in 2015 and beyond, continue to ratchet up its focus on municipal securities disclosure in order to address securities law concerns, including with respect to municipal bonds issued by or on behalf of public and private institutions of higher education.

Competent bond counsel, disclosure counsel, underwriter's counsel, and other professionals involved in a municipal bond transaction can provide municipal issuers and institutions that borrow proceeds of municipal bonds with much of the guidance needed to ensure that their bonds comply with federal and state securities law. However, the thoroughness of such guidance at the time of issuance of the bonds, as well as its effectiveness in helping municipal issuers and borrowers[*] ensure compliance with securities laws throughout the life of the bonds, is greatly enhanced where key personnel of the issuer or borrower themselves have a sufficient understanding of the securities law principals discussed in this memorandum.

The purpose of this memorandum is to provide (1) public institutions of higher education that issue municipal securities and (2) nonprofit 501(c)(3) universities and colleges that borrow proceeds of municipal securities issued by governmental "conduit" issuers on behalf of such private institutions,[*] with a summary of, and practical guide to, the principal requirements of federal securities laws relating to municipal bonds. Armed with a greater understanding of federal securities laws, municipal issuers and borrowers will be better equipped to communicate thoroughly and effectively with counsel and other working group

[*] Nonprofit 501(c)(3) institutions that borrow proceeds of conduit bonds issued on their behalf are sometimes referred to in this memorandum as *"borrowers."* In addition, for ease of reference, except in this Introduction and the Executive Summary and where the context otherwise distinguishes between the actual issuer of bonds and the borrower of proceeds of conduit bonds, the term, *"municipal issuer,"* is generally used in this memorandum to refer to the underlying borrower/obligor with respect to municipal securities–that is, the entity that is primarily responsible for repayment of the bonds–whether such obligor is a governmental entity that issues bonds directly for its own purposes or a private or public institution that borrows the proceeds of municipal bonds from a conduit issuer. It is recognized that conduit issuers generally do not have substantive disclosure obligations with respect to the conduit bonds they issue, and that the primary disclosure obligation with respect to conduit bonds lies with the ultimate obligor. See *"Conduit Financings"* below.

professionals during the bond transaction, thereby increasing the quality of disclosure and the likelihood of compliance with securities laws at the time of issuance and throughout the life of the bonds.

Much of the information discussed in this memorandum applies to both higher education bonds and other municipal securities, while certain sections (including, for example, "Disclosure Checklist for Higher Education Bonds") focus on securities laws as applied to the higher education sector, in particular.

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Chapman and Cutler LLP has been one of the nation's preeminent law firms in public finance since our founding in 1913. Our attorneys have an extraordinary history of providing innovative and practical legal solutions for complex financial transactions in public finance and a wide variety of other finance-focused practice areas. Our prominence as Bond Counsel is shown in tabulations released by Thomson Reuters, in which we have consistently ranked first or second nationally in the total number of long-term municipal new issues handled as Bond Counsel in each year. We have also ranked at or near the top nationally in the total number of new issues handled as disclosure counsel in each year, including during 2012 and 2013, during which we served as disclosure counsel on more bond issues than any other law firm in the nation.

Executive Summary

Municipal securities disclosure is governed primarily by the Antifraud Rules of the 1933 Act and the Exchange Act, and by SEC Rule 15c2-12 (each defined below). The principal purposes of these rules are to (1) require the disclosure of material information about securities to investors and (2) prohibit fraud and misrepresentations in connection with the purchase and sale of securities.

The "materiality" standard is the key legal principle to which both primary and secondary-market municipal securities disclosure is subject. Information is considered material if, based on the facts and circumstances, a reasonable investor would want to know such information before making an investment decision. Primary disclosure (disclosure to prospective investors at the time of the initial offering of municipal bond transaction) is generally provided by means of an Official Statement or similar document. Statements contained in an Official Statement for a municipal bond offering must (1) be accurate in all material respects and (2) must not omit any material information. Official Statement templates and disclosure checklists, such as the suggested form of checklist for higher education bonds included as *Exhibit A* to this memorandum, can be valuable tools for ensuring complete primary disclosure.

Although federal securities law generally does not specify in detail what information is to be disclosed in connection with municipal bond offerings, guidance is provided by the SEC through enforcement actions and pronouncements. An understanding of the failings of other municipal issuers and borrowers, as contained in SEC pronouncements relating to such enforcement actions, can provide issuers and borrowers with a broader understanding of their own disclosure obligations. Accordingly, a review of such actions (including the municipal bond enforcement actions summarized in *Exhibit B*) by issuer and borrower officials responsible for preparing and reviewing disclosure documents and implementing disclosure procedures, can be extremely useful in protecting the issuer or borrower from committing unintended disclosure violations. Various industry groups also promulgate disclosure guidance in order to promote uniformity of disclosure within the municipal securities market.

Rule 15c2-12 requires municipal issuers to provide post-issuance disclosure to the secondary municipal bond market. Under Rule 15c2-12, issuers or obligated persons enter into a continuing disclosure undertaking that requires the issuer or obligated person to (1) annually file financial statements and other operating information and (2) file notices of certain events that are likely to be material to bondholders and potential investors, if and when such events occur.

Issuers and borrowers of municipal securities are strongly encouraged to establish written disclosure policies and procedures and familiarize appropriate staff members and governing board members with those procedures as well as the principles discussed in this memorandum. Given the SEC's increasing vigor in monitoring municipal securities and enforcing securities laws, establishing and implementing adequate disclosure procedures and providing staff and board members with securities law training has become more critical than ever.

Overview of Federal Municipal Securities Regulation

The 1933 Act and the Exchange Act

The principal federal securities laws are the Securities Act of 1933 (the *"1933 Act"*),[3] which primarily governs primary offerings of securities (offerings in connection with the initial issuance of securities), and the Securities Exchange Act of 1934 (the *"Exchange Act"* and, collectively with the 1933 Act, the *"Securities Acts"*),[4] which primarily governs secondary market transactions (trades among investors following the initial issuance of securities). The 1933 Act was enacted in the wake of the stock market crash, at the height of the Great Depression, and represents the first major federal legislation regulating the offer and sale of securities. Prior to this act, the issuance of securities was governed by state "blue sky" laws.

The primary purposes of the Securities Acts are to (1) require the disclosure of material information about securities to investors and (2) prohibit fraud and misrepresentations in connection with the purchase and sale of securities. The 1933 Act generally prohibits the sale of securities through interstate commerce without the filing of a registration statement with the Securities and Exchange Commission. The 1933 Act and related regulations establish detailed requirements for disclosures to be included in registration statements and require that the SEC review and approve these offering documents before they are released to the public. The registration rules generally also apply to "separate securities," or underlying obligations that support or provide security for the primary securities.

However, the 1933 Act exempts various categories of securities from these registration requirements, including securities issued by a "state or political subdivision or public instrumentality thereof."[5] While loan agreements that provide for 501(c)(3) corporations to borrow the proceeds of bonds issued by a governmental conduit issuer are considered "separate securities" within the meaning of the Securities Acts, such loan agreements are likewise exempt from the registration requirements of the 1933 Act securities under a separate exemption for not-for-profit entities. Letters of credit and bond insurance policies that provide security for bonds are also considered separate securities within the meaning of the Securities Acts, but these instruments are also exempt from the registration requirements of the 1933 Act. Thus, bonds issued by or on behalf of public institutions of higher education or nonprofit 501(c)(3) colleges and universities, as well as related loan agreements, letters of credit or bond insurance policies, are generally exempt from the registration requirements of the Securities Acts.

The Exchange Act governs secondary market transactions by regulating the securities exchanges and broker-dealers in order to protect investors. The Exchange Act established the SEC and authorized the SEC to enforce the provisions of both Securities Acts. The Exchange Act requires securities to be registered on a national securities exchange, unless exempt. The Exchange Act provides exemptions to this registration requirement for securities issued by governmental entities and nonprofit corporations. Thus, public institutions of higher education and nonprofit 501(c)(3) colleges and universities are also exempt from the registration requirement of the Exchange Act.

The Antifraud Rules

Section 17(a) of the 1933 Act prohibits the sale of securities by the use of any fraudulent means, including any untrue statement of material fact or omission of a material fact. Similarly, Rule 10b-5, promulgated by the SEC pursuant to Section 10 of the Exchange Act, prohibits the purchase or sale of any security using fraudulent means, including any untrue statement of material fact or omission of a material fact. Section 17(a) of the 1933 Act and Rule 10b-5 of the Exchange Act are collectively known as the *"Antifraud Rules."* All securities, including municipal securities and securities issued by nonprofit corporations, are generally subject to the Antifraud Rules, even if exempt from the registration requirements of the Securities Acts.

Under the Antifraud Rules, members of the governing board or other officers and staff of municipal securities issuers* may be found liable for false, incomplete or fraudulent statements. Such individuals may be penalized with injunctions, fines, or even incarceration, depending on the nature and severity of the offense. Government immunity protections do not apply to violations of the Antifraud Rules. To prove a violation of Rule 10b-5, the SEC must prove that the person or entity intended to commit manipulation or deception, knew it was manipulating or deceiving, or recklessly disregarded a manipulation or deception, in connection with the purchase or sale of securities. However, under Section 17(a) of the 1933 Act, the SEC need only show mere negligence. In other words, an issuer official could be found liable under Section 17(a) for failure to be aware of and disclose financial concerns that the official should have been aware of.

In determining what information to disclose in a municipal bond offering document, issuers and their governing board members, officers and staff may rely, in part, on the advice of attorneys, financial advisors, consultants, and other professionals. However, the SEC has held that "public entities that issue securities are primarily liable for the content of their disclosure documents."[6] Accordingly, municipal issuers and their governing boards, officers and staff must exercise independent judgment in approving disclosures regarding municipal securities, and reliance on professional advice may not suffice to avoid antifraud liability where such reliance is found to be unreasonable.

Underwriters, financial advisors, lawyers, accountants and other bond transactions participants are also subject to the Antifraud Rules. In particular, the SEC has long held that, by participating in an offering, an underwriter makes an implied recommendation about the securities it is underwriting.[7] By holding itself out as a securities professional and, especially in light of its relationship with the issuer, a municipal securities underwriter also makes a representation that it has a reasonable belief in the truthfulness and completeness of the "key representations" made in any disclosure documents used in the offering. Thus, if the underwriter fails to undertake efforts to form such a reasonable belief, it may violate the Antifraud Rules.[8]

Sections 11 and 12 of the 1933 Act establish a due diligence defense for underwriters, accountants and certain other potential defendants. However, such defense is not available to municipal issuers themselves. An underwriter or other non-issuer defendant avoids liability if he can prove that "he had, after reasonable investigation, reasonable ground to believe" that there were no misstatements or omissions of material facts in the document. In order to establish this defense as well as to assist the issuer in meeting its own obligation

* As noted above, for ease of reference, governmental issuers of municipal securities as well as institutions that borrow proceeds of conduit bonds issued on their behalf are sometimes referred to collectively in this memorandum as *"municipal issuers,"* except where the context otherwise indicates. It is recognized that conduit issuers generally do not have substantive disclosure obligations with respect to the conduit bonds they issue, and that the primary disclosure obligation with respect to conduit bonds lies with the ultimate obligor. See *"Conduit Financings"* below.

under the Antifraud Rules to ensure that information provided in any offering document is accurate and complete, municipal bond transaction participants commonly hold drafting sessions, document review meetings, or separate due diligence meetings involving key issuer personnel, attorneys and consultants. It is also common for transaction participants or their attorneys to request that issuers provide certain documents and other written information in response to "due diligence" document requests and questionnaires. It is also standard practice for transaction participants to obtain certificates from each other regarding the accuracy and completeness of disclosures relating to, or provided by, the other transaction participants for inclusion in the offering document.

1975 Amendments to the Securities Acts

Until 1975, the Securities Acts did not apply to municipal securities, due in part to the perception at the time of enactment of the Securities Acts that abuses in the municipal securities market were relatively limited. However, in response to a series of congressional hearings in the early 1970s regarding questionable activities of municipal securities dealers as well as concerns about the adequacy of disclosures made in connection with bond offerings by the City of New York during its financial crisis, the Securities Acts were amended in 1975 to subject municipal broker-dealers to the Securities Acts and establish the Municipal Securities Rulemaking Board (the *"MSRB"*) to further govern municipal broker-dealers.[9] (Several decades later, the Wall Street Reform and Consumer Protection Act of 2010 (the *"Dodd-Frank Act"*) also brought municipal advisors within the reach of the MSRB.[10]) Although the 1975 acts brought municipal securities within the scope of the Antifraud Rules, the amendments included what is known as the "Tower Amendment" (named for its author, Senator John Tower), which preserved the municipal bond registration exemption by prohibiting the SEC and MSRB from either directly or indirectly requiring issuers to file any document with those agencies in connection with the sale of municipal securities.[11]

Regarding the Tower Amendment and the applicability of the Antifraud Rules, former SEC lawyer Peter Chan stated in a recent interview reported in an October 7 article in the *Bond Buyer*, "[B]ecause of the Tower Amendment, the SEC cannot dictate what needs to be disclosed, but… the SEC can enforce the antifraud provisions of the securities law. The corporate bond market is very different from the municipal bond market because corporate securities disclosure requirements are mandated and predictable, and those requirements serve as "guardrails." In contrast, "because of the Tower Amendment, there are no guardrails [in the municipal securities market." The general view in the municipal bond market has been that the Tower Amendment shields issuers from overbearing SEC and MSRB micromanagement. But Chan said market participants might want to reconsider whether that is the regulatory system they really want.[35]

In any event, according to Chan, and based on the steady drumbeat of SEC pronouncements in recent years, it is clear that the SEC will continue to use the Antifraud Rules to spur improvements in municipal disclosure practices, and issuers would be well-serviced to build their disclosure policies and procedures on the assumption that the SEC will continue to hold issuers accountable under the Antifraud Rules.[35]

Rule 15c2-12: Indirect Regulation of Municipal Securities Issuers

While the Tower Amendment prohibits the SEC or MSRB from requiring municipal issuers to file any document with those agencies, and although the MSRB does not directly regulate municipal issuers, municipal issuers are, as discussed above, nevertheless subject to the Antifraud Rules of the Securities Acts. In addition, the disclosure practices of municipal issuers are indirectly regulated through SEC Rule 15c2-12 (*"Rule 15c2-12"* or the *"Rule"*).[12] Rule 15c2-12 was adopted by the SEC in 1989 pursuant to the Exchange Act.

The rule requires underwriters of municipal securities to obtain and review an "official statement" that provides investors with primary offering disclosure about the municipal bonds and the issuer. The rule was originally enacted as a mechanism to get a "deemed final" official statement to the underwriter for its review in order to meet its obligation to have a "reasonable basis" for believing in the accuracy of the key representations of the issuer.*

Amendments to Rule 15c2-12 adopted by the SEC in 1995 addressed the need for secondary-market municipal bond disclosure. These amendments require an underwriter of municipal securities to confirm that the issuer has undertaken to provide annual financial and operating data as well as certain event disclosures relating to the bonds, in order to provide continuing secondary market disclosure to investors (a *"Continuing Disclosure Undertaking"* or *"Undertaking"*).

In 2010, the SEC adopted additional amendments to the rule which, among other things, (i) added the MSRB's Electronic Municipal Market Access system (*"EMMA"*) as the means for reporting bond disclosure information and other market data; (ii) expanded, clarified, and accelerated the timing for certain event disclosures required to be reported under the Rule; and (iii) eliminated an exemption for variable rate demand option bonds, which had previously been exempt from the rule.

Primary Disclosure for Municipal Securities

Official Statements

In publicly-offered municipal securities transactions, municipal issuers prepare–or, more commonly, cause disclosure counsel, underwriter's counsel, or other transaction participants to coordinate the preparation of–an offering document, commonly called an "official statement." Depending on the scope of the offering and whether the offering document relates to the initial issuance or a remarketing of the bonds, the offering document might also be titled as an offering memorandum, offering circular, limited offering memorandum, private placement memorandum, remarketing memorandum or remarketing circular. For ease of reference, such offering documents will be referred to collectively in this memorandum as *"Official Statements"* or, if applicable, *"Preliminary Official Statements*." Official Statements are used to market municipal bonds and to provide investors with information regarding the issuer and its credit strength, the bonds, the security for the bonds, and risks relating to the bonds.

The Official Statement is analogous to the prospectus used in offerings of corporate securities. However, unlike corporate securities, which are subject to detailed registration and disclosure requirements, municipal securities are, as discussed above, exempt from the registration requirements of the 1933 Act. As a result, there are very few formal requirements established by the Securities Acts for municipal securities. Rule 15c2-12 indirectly governs municipal issuers' preparation of Official Statements by requiring underwriters to

* Rule 15c2-12 does not apply to municipal bond transactions for which there is no underwriter, such as where bonds are sold directly to the lender (commonly known as a "private placement" transaction). Thus, customarily no Official Statement or other offering document is prepared in connection with such transactions. However, issuers are nevertheless required to provide lenders with all material information relevant to the issuer and the bonds in order to satisfy their obligations under the Antifraud Rules in connection with such private placement transactions, and occasionally issuers are asked to prepare a private placement memorandum or other offering document for such transactions.

provide investors with an Official Statement. But even Rule 15c2-12 provides only a very general description of what the Official Statement should contain. The Rule's definition of "Official Statement" requires that the document contain "information concerning the terms of the proposed issue of securities" and "information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the offering." The Rule also specifically requires that Official Statements include a description of the Continuing Disclosure Undertaking that will be entered into in connection with the bonds and any instances in the previous five years in which the issuer or other obligated person that has entered into a Continuing Disclosure Undertaking failed in a material way to comply with any previous Undertakings.

Sources of Guidance Regarding Official Statement Disclosure. Aside from the general definition of "Official Statement" and those few specific disclosure requirements set forth in Rule 15c2-12, disclosure for municipal bonds is primarily driven by (1) the Antifraud Rules of the Securities Acts (including SEC guidance interpreting such rules), (2) demands for information by investors and other market participants, and (3) guidelines suggested by various industry groups to promote market disclosure standards, such as guidelines suggested by the National Federation of Municipal Analysts (NFMA), the Government Finance Officers Association (GFOA), the Securities Industry and Financial Markets Association (SIFMA), and the National Association of Bond Lawyers (NABL).

"Materiality" Standard. The legal test to which Official Statements are subject under the Antifraud Rules is that (1) all information contained in the Official Statement must be accurate in all material respects and (2) the Official statement must not omit any material information. The Supreme Court has defined materiality to mean information that a reasonable investor would want to know before making an investment decision. While the Official Statement can be structured to incorporate publicly available documents by reference (for example, financial statements or other documents previously posted on the MSRB's EMMA website), the Official Statement, together with any such incorporated information must be complete, such that an investor need not look beyond the Official Statement in making an investment decision with respect to the bonds.

Preliminary Official Statements. Under Rule 15c2-12, an Official Statement that is "deemed final" by the issuer must be reviewed by the underwriter before it bids for, offers, purchases, or sells municipal bonds. However, in many transactions, including fixed-interest-rate transactions, the Official Statement cannot describe all material terms of the bonds until after the bonds have been priced on the sale date. In order to market the bonds (*i.e.*, solicit interest from investors in the bonds) in advance of the bond pricing, it is customary for a *"Preliminary Official Statement"* to be prepared. The Preliminary Official Statement is typically distributed by the underwriter to potential investors a week or so in advance of the sale date. Rule 15c2-12 requires the Preliminary Official Statement to be "final" except for "the offering prices, interest rates, selling compensation, aggregate principal amount, principal amount per maturity, delivery dates, any other terms or provisions required by an issuer of such securities to be specified in a competitive bid, ratings, other terms of the securities depending on such matters" (such as optional redemption call dates and prices and, in some cases, the determination of whether bonds will be secured by a bond insurance policy or other credit facility), "and the identity of the underwriter" (collectively, the *"Omitted Information"*).*

* Because Preliminary Official Statements, as supplemented to reflect any material information that comes to light prior to bond pricing, should be substantially identical to the final Official Statement, with the exception of such Omitted Information, references throughout this memorandum to the "Official Statement" generally refer to both Preliminary Official Statements and final Official Statements, except in this section when distinguishing between the preliminary and final versions of the offering document.

Although the Preliminary Official Statement speaks only as of its date, material information (other than Omitted Information) not disclosed in the Preliminary Official Statement may come to light between the time of distribution of the Preliminary Official Statement and the sale of the bonds. Such information may arise or become known by the issuer or underwriter, for example, as a result of a change in the issuer's circumstances or as a result of questions raised by prospective investors on investor calls or during investor "roadshows." (see "Roadshows" below). If material information arises or becomes known between the distribution of the Preliminary Official Statement and the bond sale, a supplement to the Preliminary Official Statement must be prepared and distributed to potential investors prior to the sale. Supplemental information is typically provided in the form of either an electronically-disseminated "sticker" or supplement to the Preliminary Official Statement or in the form of a re-circulated Preliminary Official Statement, with the changes highlighted for investors. As so updated and supplemented, the disclosure in the Preliminary Official Statement should be identical to the disclosure in the final Official Statement, with the exception that the Omitted Information is presented in the Preliminary Official Statement in blank or preliminary form.

Rule 15c2-12 requires underwriters to contract with issuers (ordinarily by means of a bond purchase agreement) for the issuer to provide a final Official Statement within seven business days following the bond pricing date. MSRB Rule G-32 requires the underwriter to file the Official Statement on the EMMA system and provide the document to all purchasers by the time of settlement of the municipal bond transaction.

Under Rule 15c2-12, a municipal issuer is required to supplement the final Official Statement in the event that material information comes to light between the time of distribution of the final Official Statement and a date not less than 25 days after the "end of the underwriting period" (defined in the Rule as the later of the closing date or other date that the underwriter no longer retains an unsold balance of the securities for sale to the public). The bond purchase agreement typically gives the underwriter the option to terminate its obligation to underwrite the transaction prior to the issuance of the bonds in the event that a material change is made to the final Official Statement or upon the occurrence of other specified events that materially affect the issuer's credit or the market for the bonds (although it is not common for underwriters to exercise this option other than in circumstances of particularly significant material changes to the issuer's circumstances).

Conduit Financings. Governmental entities sometimes issue bonds on behalf of private entities, such as 501(c)(3) non-profit colleges and universities. In such cases, the governmental entity typically acts as a "conduit" issuer by issuing the bonds, loaning the bond proceeds to the private entity, and entering into a loan agreement with the private entity under which the private entity agrees to make the debt service payments on the bonds, while retaining no substantive obligation to repay the bonds from the issuer's own funds. In other words, conduit bonds are generally payable solely from amounts received from the borrower pursuant to the loan agreement. This structure is typically used to enable the private entity to access tax-exempt financing, which generally must be done through a governmental issuer. In such transactions, financial information regarding the conduit issuer should not be included in the Official Statement. Such issuer information is not necessary because the issuer has no substantive obligation to repay the bonds and thus investors may not rely on the issuer's credit. Moreover, inclusion of financial information regarding the conduit issuer could be misleading because inclusion of the information could create an incorrect perception that the issuer has more than a non-substantive, pass-through financial obligation with respect to the bonds.

Official Statements for such conduit financings should affirmatively state that the issuer is assuming responsibility only for the limited information regarding the issuer that is included in the Official Statement. This information generally consists only of a brief description of the issuer and a statement that there is no pending litigation against the issuer that could have a material effect on the financing. In contrast, conduit

borrowers are subject to the Antifraud Rules to the same extent as municipal issuers are in non-conduit financings. Therefore, the conduit borrower must disclose all material information regarding the municipal securities and the borrower.*

Issuer Roles in Preparing the Official Statement. Officials of municipal issuers may be held responsible under the Securities Acts for disclosure in an Official Statement if they approve the document, are sufficiently involved in its preparation, or have knowledge of material facts and do not make appropriate inquiry regarding the treatment of such facts in the Official Statement. Ordinarily, a substantially final draft of the Preliminary Official Statement is provided to the governing board of the issuer for its review and approval and the board adopts a resolution or takes other formal board action approving the Preliminary Official Statement, authorizing its use by the underwriter in the public offering of the bonds, and delegating authority to finalize the Official Statement to certain officers of the issuer. The SEC has stated that (i) a public official may not authorize disclosure that the official knows to be false and (ii) a public official may not authorize disclosure while recklessly disregarding facts that indicate that there is a risk that the disclosure may be misleading. An official acts recklessly if he has "knowledge of facts bringing into question the issuer's ability to repay the securities" and yet fails to take steps "appropriate under the circumstances to prevent the dissemination of materially false or misleading information regarding those facts." Such steps "could include becoming familiar with the disclosure documents and questioning the issuer's officials, employees or other agents about the disclosure of those facts."

Although board members are not expected to know or personally verify all of the details of an Official Statement before approving it, board members should be satisfied that the information in the Official Statement is consistent with their own reasonable understanding of the facts and that it does not omit any material fact know to them. Board members can accomplish this by reading the Official Statement or determining that sufficient procedures for preparation and review of the Official Statement have been established and followed by the issuer, and by questioning those staff members or attorneys who are directly responsible for preparing the Official Statement regarding any potential disclosure items with which they have a concern.

Officials of the issuer may rely in part on lawyers, financial advisors, underwriters and governmental employees. Although reliance on such persons may help to establish a defense against charges of negligence or recklessness, such reliance must be reasonable. Where a board member has knowledge of facts that call into question the issuer's ability to repay the securities, reliance on those that are more directly involved in the transaction and the preparation of the Official Statement may not be sufficient to establish a defense against charges of violations of the Antifraud Rules.

Disclosure Checklist for Higher Education Bonds

As noted above, municipal securities are not governed by a formal legal framework that details what information must be disclosed in the Official Statement. Other than the general definition of "Official

* As discussed above, nonprofit 501(c)(3) institutions and other institutions that borrow proceeds of conduit bonds issued on their behalf are sometimes referred to in this memorandum as *"borrowers."* In addition, since the disclosure obligations of nonprofit borrowers of municipal conduit bond proceeds are conceptually similar to those of governmental issuers that issue bonds for their own purposes, for ease of reference, except in this "Conduit Financings" section and where the context otherwise distinguishes between the actual issuer of bonds and the borrower of proceeds of conduit bonds, the term "issuer" is generally used in this memorandum to refer to the underlying obligor with respect to municipal securities, whether such obligor is a governmental entity that issues bonds directly for its own purposes or an institution that borrows the proceeds of municipal bonds from a conduit issuer.

Statement" and the few specific disclosure requirements for Official Statements contained in Rule 15c2-12, federal securities law offers little guidance regarding the particular contents of the Official Statement. Rather, the information to be disclosed in the Official Statement is primarily dictated by (i) the "materiality" standard established by the Antifraud Rules, (ii) investor demands for information, and (iii) guidelines promulgated by various industry groups. In determining what disclosures are to be included in an Official Statement in order to satisfy such legal and industry-driven requirements and guidelines, many issuers begin with a template consisting of an Official Statement that was prepared for a prior transaction by the issuer or a similar entity or with respect to similarly-structured bonds. In addition, many issuers rely in part on disclosure checklists. In some cases, disclosure checklists are formalized as part of the issuer's written disclosure policies and procedures. Checklists can be effective in highlighting disclosure items that are common to the applicable type of bonds and avoiding under-disclosure resulting from a failure to consider various aspects of the issuer or the bonds that may be material.

Attached as *Appendix A* is a suggested checklist of potential disclosure items to be considered for inclusion in Official Statements for municipal securities issued by or on behalf of public institutions of higher education or by state or local governmental entities as conduit issuers for the benefit of nonprofit 501(c)(3) colleges and universities (collectively, such securities are referred to in this memorandum as *"Higher Education Bonds"*). The checklist is based in part on (1) a sampling of approximately 50 Official Statements for recently-issued Higher Education Bonds; (2) suggested disclosure items listed in NFMA's whitepaper entitled, "Recommended Best Practices in Disclosure for Private College and University Transactions"[13] (many of which are relevant for public institutions of higher education as well as the private institutions to which the white paper directly relates); (3) NFMA's January 14, 2014 Draft White Paper on Best Municipal Bond Issuance and Disclosure Practices; and (4) general due diligence questionnaires used by Chapman and Cutler in certain recent Higher Education Bond transactions.

Although the use of templates, checklists and other guidelines can be invaluable in assisting issuers and other transaction participants in avoiding material omissions, no checklist should be used at the exclusion of independent judgment applied to the facts and circumstances as they exist at the time of the specific transaction. A fresh review of the Official Statement based on all then relevant circumstances relating to the issuer, the bonds, market developments, market preferences, or other circumstances relevant to the bonds, should be undertaken at the time of preparation and dissemination of any Official Statement. Accordingly, in addition to the specific disclosure items listed in *Appendix A*, the checklist includes several broad and open-ended "catch all" due diligence questions that are intended to assist the issuer in keeping the big picture in mind in order to address any additional information that may be material to prospective investors.

Of course, neither this checklist, nor any other checklist, can serve as a "one size fits all" list of possible disclosure items for all Higher Education Bonds, or even bonds of a particular institution, since the circumstances relevant at the time of one transaction may differ widely from those of a different point in time. Furthermore, not all disclosure items and inquiries contained in this checklist will apply to any issuer in any particular transaction. And some items, though applicable, may not necessarily be material.

We recommend that municipal issuers and borrowers–particularly those which access the bond market with any regularity–incorporate a disclosure checklist of some form as part of their written disclosure policies and procedures (and adopt written disclosure policies and procedures if they currently have none). Such checklist could take the form of the suggested list below or be modified by the issuer to reflect additions, deletions, or other revisions tailored to the issuer's organizational structure, the bond structure, and other

relevant circumstances. The checklist should be routinely updated, as necessary to address relevant or potentially relevant disclosure items as new circumstances arise or as market demands for additional information evolve.

Roadshows

In addition to providing investors with information regarding the issuer and the bonds by means of Official Statements, it is becoming increasingly common for issuers to host in-person, internet-based, or telephonic "roadshows" presented to prospective investors during the marketing period for the bonds (between the time of dissemination of the Preliminary Official Statement and the bond sale date). Roadshows, which are typically conducted with the assistance of the underwriter, are intended to provide a high-level overview of the bonds and the issuer and to allow prospective investors to hear directly from the issuers' management. In its January 14, 2014 Draft White Paper on Best Municipal Bond Issuance and Disclosure Practices, The National Federation of Municipal Analysts recommends that roadshows include a "live" questions-and-answer session following the prepared presentation, and that the Q&A session be included in the recorded material for replay following the presentation.

Ordinarily the summary information presented in a roadshow is derived from, and consistent with, the material presented in the Preliminary Official Statement. If roadshow information includes material information that is not contained in the Preliminary Official Statement, the Preliminary Official Statement should be supplemented to include the information.

Continuing Disclosure

Rule 15c2-12–General Rule

Rule 15c2-12 is the legal basis for municipal issuers' and borrowers' post-issuance, ongoing disclosure obligation. Rule 15c2-12 indirectly requires municipal issuers and borrowers to provide disclosure to the secondary municipal bond market by requiring underwriters of municipal securities, as a condition to underwriting the bonds, to confirm that the issuer or other obligated person for whom financial or operating data is presented in the Official Statement, has entered into a commitment to provide ongoing disclosure. If the issuer of the bonds is a conduit issuer or is otherwise not the only party responsible for repaying the securities, the ultimate obligor or obligors are required to execute the undertaking and provide ongoing disclosure. This commitment to provide ongoing disclosure typically takes the form of a continuing disclosure undertaking, certificate, or agreement (referred to herein as an *"Undertaking"* or *"Continuing Disclosure Undertaking"*), executed by the issuer or obligated person at closing. The Rule defines "obligated person" as any person, including the issuer, that "generally or through an enterprise, fund or account [has committed, by contract or other arrangement] to support payment of all or a part of the obligations on the municipal securities."

Pursuant to Rule 15c2-12, the undertaking requires issuers or obligated persons to provide (1) an annual report and (2) notices of certain events, if and when any occur. The annual report is required to contain (a) the obligor's most recent audited financial statements and (b) annual financial information and operating data for the obligor of the type contained in the final Official Statement, as specified in the Continuing Disclosure Undertaking. Undertakings ordinarily provide for the obligor to file its annual report

within six to nine months after the close of each fiscal year. If audited financial statements have not been prepared in time to meet such deadline, unaudited financial statements must be submitted by the specified deadline, followed by the audited financial statements when they become available.

The Continuing Disclosure Undertaking also requires the issuer or obligated person to provide notice of certain events specified by Section (b)(5)(C) of Rule 15c2-12 (the *"Listed Events"*) that are likely to be material to bondholders and potential investors. Rule 15c2-12 requires that notice of each such event be disclosed on EMMA in "a timely manner" and, in any event, not more than ten business days after the occurrence" of the event. Such events consist of the following:*

(1) Principal and interest 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 tax opinions, the issuance by the Internal Revenue Service 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 security, or other material events affecting the tax status of the security;

(7) Modifications to rights of security 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 obligated person;

(13) The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action, or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and

(14) Appointment of a successor or additional trustee or the change of name of a trustee, if material.

* In 2010, the SEC adopted its most recent amendments to Rule 15c2-12, which, among other things, (i) added the MSRB's EMMA system as the means for reporting bond disclosure and other market data; (ii) expanded the list of disclosure events to consist of these items, (iii) clarified and accelerated the timing for disclosure of Listed Events; and (iv) eliminated an exemption for variable rate demand option bonds, which had previously been exempt from the Rule.

Pursuant to amendments to the Rule adopted by the SEC in 2008, EMMA is now the sole repository for mandatory continuing disclosure filings. Continuing disclosure documents must be submitted with accompany identifying information, including the following: (i) the category of information being provided (*e.g.,* annual report or material event filing); (ii) the period covered by any annual financial information, financial statements, or operating data; (iii) the issues or specific securities to which such document is related (including the CUSIP number, issuer name, state, issue description, dated date, maturity date, and coupon rate); (iv) the name of any obligated person other than the issuer; (v) the name and date of the document; and (vi) contact information for the submitter. Documents must be filed in word-searchable PDF format. (Scanned documents are not accepted unless they are also fully word-searchable.) EMMA filings may be made through password-protected accounts by issuers, obligated persons, and designated agents of issuers or obligated persons. For additional information on how to submit continuing disclosure documents on EMMA and otherwise use the EMMA system, see the MSRB's Emma Dataport Manual for Primary Market Submissions, which can be accessed at: http://www.msrb.org/msrb1/emma/pdfs/EMMAPrimaryMarketManual.pdf.

Issuers are encouraged to include in their bond-compliance policies and procedures, appropriate procedures for (i) designating an appropriate disclosure compliance point person (or persons), (ii) monitoring Listed Events, and (iii) ensuring timely and complete preparation and filing of annual financial information and Listed Event notices. We have seen many instances in which even very conscientious issuers who consistently file their audited financial reports on time each year have failed to file one or more items of the additional operating data that they have committed in their Undertakings to filing. Accordingly, we recommend that such disclosure procedures include a checklist that details each item in each Undertaking that is required to be filed, either as annual information or as a Listed Event, and that such checklist be routinely referenced by the appropriate point persons in preparing continuing disclosure filings.

In addition, one or more of the following suggestions may be implemented in order to facilitate and streamline the process of preparing and filing annual reports: (1) First, issuers and other obligated persons should carefully review each Undertaking prior to its execution and, subject to the requirements of Rule 15c2-12 and investor demand for information, may wish to (a) limit the information required by the Undertaking to information that the obligor already updates, or plans to update, each year, (b) ensure that the annual information required in Undertakings for its various bond issues is consistent (at least among Undertakings for similarly-structured bonds), and (c) ensure that the filing due dates are consistent among Undertakings. (2) Second, issuers and other obligated persons may wish to include supplemental financial and operating data of the type required by the Undertakings within the obligor's Comprehensive Annual Financial Reports (CAFRs) so that both the financial statements as well as any other financial and operating data required to be filed pursuant to the Undertaking can be prepared and filed as a single document (*i.e.,* so that the audit template for the issuer includes both the financial statement and other operating information components of its annual filing, thereby eliminating one possible area of oversight). For some issuers, the CAFR may already include all annual financial and operating information required to be filed by the Undertaking, in which case there is no need to submit annual filings separate from the CAFRs.

Common mistakes among issuers arises when, due to auditing delays, the audited financed statements are not made available to the issuer prior to the general filing deadline for annual information set forth in the Undertaking. In accordance with Rule 15c2-12, Undertakings typically require the issuer to submit unaudited financial information by the deadline, followed by an additional filing of audited financial statements upon their availability. In this circumstance, some issuers neglect to file their unaudited financial statements by the due date. In addition, some issuers fail to file the additional financial and operating information required by the Undertaking by the time of the deadline, waiting instead to file it until the audit

is complete. Under Rule 15c2-12, notice of these or any other material failure to file in accordance with an Undertaking must be (i) filed with EMMA and (ii) disclosed in any Official Statement during the five-year period following such failure.

Exceptions to Rule 15c2-12

Rule 15c2-12 applies only to municipal bond transactions for which a broker, dealer or securities dealer will act as an "underwriter" in a primary offering of municipal securities with an aggregate principal amount of at least $1,000,000. The Rule defines "underwriter" as a person who purchases bonds from an issuer of municipal securities with a view to selling or offering the securities to others. Thus the Rule generally does not apply to private placement transactions, such as direct loans from a bank. The Rule also exempts municipal securities in authorized denominations of $100,000 or more if (a) the bonds are sold to no more than 35 sophisticated investors purchasing for their own accounts or (b) the bonds mature in not more than nine months (most commonly, short-term obligations sold pursuant to a commercial paper program).

Prior to 2010, Rule 15c2-12 also contained an exemption for bonds in authorized denominations of $100,000 or more if the bonds could be tendered at the option of the bondholder at least every nine months, but such exemption for variable rate demand bonds was eliminated by the 2010 amendments to the Rule (although bonds that were outstanding as of November 30, 2010 can be remarketed or reoffered without a Continuing Disclosure Undertaking, so long as the bonds continuously maintain a $100,000 minimum denomination and tender rights of nine months or less).

Enforcement of Continuing Disclosure Obligations

As a means of enforcing issuers' continuing disclosure obligations, Rule 15c2-12 requires that issuers file, through the EMMA system, notices of any instances of material noncompliance with an Undertaking, and that such failures also be disclosed in the issuer's Official Statements for the five-year period following a failure, even if the failure has since been cured. Until recently, such reporting requirements seemed to have little impact on the market price of issuers' bonds, and thus, limited impact on deterring many issuers from violating the Rule. Statements filed with EMMA or included in Official Statements that an issuer failed to comply with its prior Undertakings did not seem have a negative impact on the yield at which the bonds were sold or on the extent to which prospective investors were willing to invest in the bonds.

A NFMA survey cited in the SEC's 2012 Report on the Municipal Securities Market showed that 41% of issuers' fillings were either somewhat inadequate or substantially inadequate and, of those, 58% failed to deliver all information required to be filed by the Undertaking. Concerned with the high level of continuing disclosure noncompliance, and determined to enforce the Rule, the SEC has, in recent years, significantly increased its focus on continuing disclosure by issuing frequent public comments regarding the issue, initiating enforcement actions relating to continuing disclosure failures, and, most recently, by implementing the MCDC initative (described below).

The SEC has long interpreted the Antifraud Rules as requiring underwriters of municipal securities to have a reasonable basis for recommending municipal bonds. The adopting release issued by the SEC in connection with the 2010 amendments to Rules 15c2-12 reaffirmed that, to have a reasonable basis to recommend a security, underwriters of municipal securities must carefully evaluate the likelihood that a municipality will make the ongoing disclosure required by the Rule. The 2010 adopting release also states that "it is doubtful that an underwriter could form a reasonable basis to recommend a security if the

municipality [has] a history of persistent and material non-disclosure." As a consequence of the SEC's increased focus on continuing disclosure, as highlighted by this pronouncement, most underwriters now customarily review issuers' EMMA filings independently and conduct more in-depth due diligence regarding issuers' continuing disclosure practices, whereas many underwriters had previously been content to make passing inquiries of issuers regarding continuing disclosure compliance, without further investigation.

In July 2013, the SEC, for the first time, charged an issuer with falsely claiming in an Official Statement that the issuer had met its continuing disclosure obligations. In its Official Statement for a series of municipal bonds, West Clark Community Schools (Indiana) claimed that it had not failed to meet its ongoing disclosure obligations during the previous five years. In actuality, however, the issuer had not filed any disclosure documents between at least 2005 and 2010. In its settlement with the SEC, West Clark agreed to cease and desist from further violations of the securities laws and to take remedial actions.

As a further response to pervasive noncompliance with ongoing disclosure obligations in the municipal market, in March 2014, the SEC announced its Municipalities Continuing Disclosure Cooperation initiative ("*MCDC*"). MCDC addresses misrepresentations made by issuers in Official Statements about past continuing disclosure compliance. As noted earlier, Rule 15c2-12 requires a municipal issuer's Official Statements to disclose any time within the last five years that the issuer materially failed to meet its continuing disclosure obligations. MCDC incentivizes underwriters and issuers to review official statements for prior offerings and "voluntarily" submit a report to the SEC identifying any Official Statements during the past five years that contain material misstatements regarding whether the issuer had been in compliance with its prior continuing disclosure obligations. In other words, the initiative is not about whether an issuer has complied with its continuing disclosure undertakings, but rather, whether an issuer's statements about past continuing disclosure compliance, as set forth in its Official Statements, were accurate. The MCDC reporting deadline for underwriters was September 10, 2014, and the deadline for issuers was December 1, 2014.

Issuers and underwriters who participate in the MCDC agree to standardized settlement terms. MCDC incentivized underwriters to self-report violations by attaching specific monetary penalties on each reported misstatement (equal to $20,000 per offering of $30 million or less involving an Official Statement with a material misstatement about continuing disclosure failures, and $60,000 for offerings of more than $30 million involving an Official Statement with such a misstatement) and by placing a cap of up to $500,000 (depending on the size of the underwriter) on all instances of such material misstatements contained in the underwriter's self-disclosure report. Issuers who self report under MCDC agree to, among other things, comply with current continuing disclosure obligations, including by updating past delinquent filings; enter into an agreement with the SEC to cease and desist from any future securities law violations; implement policies and procedures designed to ensure future compliance with the issuer's continuing disclosure obligations; and cooperate in any subsequent investigations made by the SEC regarding the false information in Official Statements about continuing disclosures, including investigations relating to the roles of individuals and other parties involved in the applicable transactions. Notably, the fact that an issuer self-reports and enters into a settlement agreement under the MCDC initiative, does <u>not</u> limit the personal liability of issuer officials and may expose an issuer or official to further SEC investigation and enforcement. Thus, even though the SEC is not likely to impose monetary penalties against issuers for misstatements reported under the MCDC initiative, issuers who participate in MCDC will be subject to significant legal consequences. Accordingly, issuers should thoroughly evaluate the risks and benefits of participating in the program with the assistance of counsel.

The MCDC initative and other recent SEC enforcement actions and pronouncements highlight the fact that the SEC is prepared to vigorously pursue issuers that violate the Rule or other securities laws in connection with their continuing disclosure obligations. In addition to avoiding SEC sanctions, consistent, complete and timely continuing disclosure compliance can enhance issuers' relations with existing investors and potential investors for future financings, as investors consider such information highly valuable and also view timely and complete continuing disclosure as an indicator that the issuer is managing its affairs well. Conversely, some investors are now reporting that, where an issuer has a history of poor ongoing disclosure, they will choose not to purchase, or will insist on more spread or higher bond yields. Thus, even if an underwriter determines to underwrite municipal bonds notwithstanding an issuer's past failures (such as where the issuer "repents" and establishes appropriate procedures to ensure future compliance), the issuer's failures may nevertheless result in increased borrowing costs in future transactions or, in the case of variable rate demand bonds (the interest rates of which reset regularly based on current market conditions), borrowing costs of currently outstanding bonds.

Voluntary Continuing Disclosure

Municipal issuers generally have no affirmative duty to disclose information unless they are engaged in the offering or sale of securities or unless disclosure is required under a Continuing Disclosure Undertaking or other agreement. However, if an issuer chooses to make additional statements that it should reasonably expect will reach the securities market, it has an obligation to ensure that those statements are not materially misleading and do not omit a material fact "in light of the circumstances" in which such information is disclosed. The SEC stated in its 1994 Interpretive Release that, although a municipal issuer may not be subject to the continuous reporting requirements of the Exchange Act that generally apply to corporations, "when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions."[14] Notably, the SEC refers in such statement to information that is reasonably *expected* to reach investors, even where the issuer does not *intend* for such information to reach investors. The SEC further advised in the 1994 release that, under some circumstances, such as where the issuer makes public statements that are a source of current information to investors about the issuer, annual information may not be sufficient. Investors may need more frequent financial information. Moreover, if the annual financial information specifically required to be provided by an Undertaking is materially misleading in view of the circumstances, an issuer may need to disclose supplemental information in order to give the market a more accurate and complete picture of the issuer.

In 2013, the SEC issued guidance regarding the importance of accurate secondary market municipal bond disclosure in a settled cease and desist proceeding against the City of Harrisburg, Pennsylvania and a related SEC report of the investigation. The SEC cited the city's budgets and accompanying transmittal letters as the misleading statements at issue. The SEC charged Harrisburg with failing to adequately disclose its deteriorating financial condition and credit ratings in such documents during the period 2009 to 2011. The SEC described the City as "a near-bankrupt city under state receivership" as a result of $260 million in debt guarantees for a municipal resource recovery facility. The SEC found the public disclosures in question to be of particular importance because the city also failed to file its annual CAFR and did not file material event notifications to report its rating downgrades, thereby leaving investors dependent on other public information from the city regarding its financial situation. The SEC's action against Harrisburg represents the first time the SEC has charged a municipal issuer for misleading statements outside the scope of the bond documents.

The GFOA encourages municipal issuers to provide voluntary disclosure. In order to promote transparency, timely secondary market disclosure, market credibility and investor relations with respect to municipal securities, the GFOA has advised that "Governments, in consultation with internal and external counsel, may wish to submit other financial information to EMMA … that goes beyond what is specified in the [Continuing Disclosure Undertaking, including] annual budgets, financial plans, financial materials sent to governing bodies for council or board meetings, monthly financial summaries, investment information, and economic and revenue forecasts. Additionally, governments are encouraged to place this interim financial information on their web sites and by means of a new feature within EMMA that allows governments to post a link to their web site so that investors and the public can directly access the information."[15] Care should be taken, however, to ensure that such additional disclosures comply with the Antifraud Rules.

Voluntary Disclosure of Bank Loans. As an alternative to public bond offerings, municipal issuers are increasingly applying to banks or other private lenders for capital funding. The private placement of bonds or the securing of a bank loan can, depending on the interest rates offered by the lender, sometimes be easier or cheaper than issuing publicly offered bonds, since such financings do not require the issuer to prepare an Official Statement or obtain bond ratings. In addition, in contrast with most publicly-offered variable rate demand bonds, privately placed variable rate bonds can often be issued without a letter of credit or other liquidity support instrument (which is typically otherwise required as a liquidity backstop to support the issuer's obligation to buy back bonds that are tendered by the bondholder but not remarketed). Furthermore, issuers can sometimes get lower yields on their bonds by negotiating directly with a bank, as compared to rates obtained through a public offering in the open market–particularly in the case of short or medium-terms obligations.

Although the disclosure of bank loans is not required under Rule 15c2-12 because the Rule does not apply to private placements, the GFOA advises that information regarding bank loans be voluntarily disclosed on EMMA "[i]n order to enhance communication to [the issuer's] citizens and other parties interested in reviewing a government's credit profile…."[16] Such disclosure regarding bank loans is especially relevant to the securities market where the loan is secured by all or part of the same revenues as an issuer's outstanding bonds, where the size of the loan is material relative to the issuer's overall debt portfolio, or where the issuer enters into multiple loan arrangements that, in the aggregate, are material to the issuer's creditworthiness.

Voluntary disclosures of bank loans may be made by submitting the loan agreement (with redacted pricing information, where applicable) or a summary of its key terms with EMMA or by posting such information on the issuer's website.*

Voluntary Disclosure on Issuer Websites. Many municipal issuers disclose information to residents, investors, and other interested parties on issuer-sponsored internet websites. Such information may include information regarding budgets, investments, capital improvement plans, and fund balance policies, or other interim financial information. Since, much of investors' analysis of municipal securities is now conducted from their computers, the process of evaluating such securities commonly involves the review of an electronic copy of the Official Statement and extends to a review of information posted on the issuer's website. Thus, information posted on municipal issuers' websites has become increasingly likely to "reach the securities

* Note that, since bank loans do not have CUSIP numbers, bank loan information filed with EMMA would need to be uploaded as "other information" connected with outstanding bonds listed on EMMA.

market" and be subject to the Antifraud Rules, notwithstanding that such information may not be specifically intended for investors.

The GFOA and other market participants generally encourage such voluntary disclosure. However, municipal issuers should be aware of risks associated with this type of disclosure. In particular, the risk of disclosing incomplete or otherwise misleading statements escalates where such information is not prepared with the same level of care as are documents prepared in connection with a bond offering (*e.g.*, the Official Statement or annual disclosure reports filed with EMMA pursuant to an Undertaking). In addition, information contained on extraneous websites that are cross-referenced, either directly or implicitly, through hyperlinks contained on the issuer's website may contain inconsistent or misleading information.

To mitigate these risk, an issuer may wish to establish an "investor relations" page within its website for the purpose of disclosing issuer documents, statements and other information that may be relevant to the market. The investor relations page, as well as other pages of the issuer's website should include a disclaimer to the effect that the information has not been prepared, and may not be relied on, in connection with the purchase or sale of any securities. Any disclosures contained on the investor relations page should be dated, and the investor page should indicate that such information speaks only as it its date and that the issuer does not obligate itself in any manner to update the information or maintain the availability of such information after such date.

SEC Enforcement Actions

The Exchange Act authorizes the SEC to conduct "such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision" of the federal securities laws, the MSRB rules, and the rules of certain other regulatory agencies. The Exchange Act also authorizes the SEC to publish information concerning any such violations. One of the most significant developments in the application of the securities laws to municipal securities during the past two decades has been the substantial and steady increase in SEC enforcement actions related to municipal bonds. In such enforcement actions, the SEC has routinely and aggressively asserted its authority to police the accuracy and completeness of municipal securities disclosure documents. SEC releases and orders relating to its municipal securities enforcement actions describe circumstances in which the SEC has found municipal securities disclosures to violate the Antifraud Rules. These SEC releases and orders represent some of the most useful guidance available regarding municipal securities disclosure, particularly given the absence of a detailed statutory framework for municipal securities disclosure.

An understanding of the failings of other municipal issuers can provide issuers with a broader understanding of their own disclosure obligations. Accordingly, a review by municipal issuer officials responsible for preparing and reviewing disclosure documents and implementing disclosure procedures can be extremely useful in helping such officials protect the issuer from committing unintended disclosure violations. ***Appendix B*** of this memorandum contains a table that briefly summarizes certain notable SEC municipal securities enforcement actions and the key findings and pronouncements relating to those actions. We recommend that members of issuers' governing boards and other key issuer personnel familiarize themselves with this table.[20]

The SEC's commitment to aggressive enforcement in the municipal securities arena is not only reflected by the formation in 2010 of a specialized municipal securities and public pensions enforcement unit

and by the steady rise in the number of municipal securities fraud cases in each year since that time, but by the expansion in recent years of the types of actions brought by the SEC against municipal issuers and the imposition of new sanctions against issuers that were previously unheard of in the context of municipal securities enforcement actions. Notably, a provision of the 2010 Dodd-Frank Act authorizes the SEC to impose civil penalties of up to $150,000 on "any person" as part of an administrative cease-and-desist proceeding if the SEC finds that the person violated any provision of the Exchange Act or any rule or regulation issued thereunder, thereby increasing the risks to issuers associated with an SEC enforcement action. In addition, the Dodd-Frank Act created new whistleblower provisions under which individuals who report wrongdoing can receive 10-30% of SEC recoveries of more than $1 million. Such whistleblower provisions will likely lead to additional investigations and enforcement actions directed at municipal issuers and their officials and employees.

The period 2010 through 2014 has seen a number of "firsts" in SEC municipal enforcement tactics. In 2013, for the first time, the SEC assessed a financial penalty against a municipal issuer and, more recently, has stated that it will impose financial penalties on other issuers, particularly where issuers have made false statements in Official Statements about ongoing disclosure compliance but choose not to self report under the MCDC initiative.[22] 2013 also marked the first time that the SEC charged a municipality for misleading statements made outside of bond disclosure documents (the Official Statement and continuing disclosure filings), as described above under "Voluntary Continuing Disclosure." In 2013, the SEC, also for the first time, brought an action against a municipal issuer and its underwriter based on the issuer's false statements in offering documents that it was compliant with its continuing disclosure obligations and the underwriter's due diligence failure to discover such noncompliance. 2014 marks the first time that the SEC has obtained an injunction to block the sale of a municipal bond offering in order to prevent bonds being sold pursuant to an offering document containing material statements or omissions,[18] and in 2010, the SEC, for the first time, issued a cease-and-desist order against a municipal issuer based solely on negligence, as opposed to the higher threshold of intent or recklessness.[24]

Disclosure Policies and Procedures

Consistent with the SEC's current emphasis on municipal disclosure policies, we strongly recommended that issuers establish formal written policies and procedures for the preparation of Official Statements, the preparation and filing of disclosures required by Continuing Disclosure Undertakings, and the preparation and posting of any additional voluntary disclosures that could potentially reach the securities market. Implementation of adequate disclosure policies and procedures makes disclosure misstatements and omissions much less likely to occur. In addition, disclosure policies and procedures help municipal issuers establish a defense from liability where disclosure failures inadvertently occur despite the establishment and use by the issuer of such policies and procedures. Where an issuer is found to be liable for disclosure failures, the existence and application of internal disclosure controls may result in reduced penalties.

At a minimum, disclosure procedures should:

(1) establish which officials are responsible for preparing, reviewing, and approving municipal securities disclosures,

(2) establish procedures for providing periodic training to such officials,

(3) establish procedures for ensuring accountability for the preparation and review of disclosures and otherwise ensuring that disclosure policies and procedures are actually and consistently followed.

Issuers may also wish to adopt procedures that establish:

(1) a disclosure document review committee;

(2) a process for compiling information for inclusion in disclosure documents, including authorization of a responsible officer of the issuer to obtain the assistance of other officers or staff of the institution in assembling the necessary information;

(3) a process for staff review and sign-off on disclosure documents (for example, such procedures could include requirements that one or more "due diligence" or document review sessions be held during which designated staff members are to consult with bond or disclosure counsel and other members of the bond transaction working group, to ensure discussion of any financial, operating, legal, or other issues and to otherwise consider whether any additional information should be included in the disclosure document for the purpose of making the disclosure documents materially complete and accurate); and

(4) provide for the Official Statement to be provided to the institution's governing body with a cover sheet summarizing the basic terms of the bonds, the security for the bonds, and any repayment risks.

Additional policies relating specifically to continuing disclosure may include procedures for:

(1) identifying officers of the municipal issuer that are responsible for speaking on behalf of the institution and establishing a protocol for such persons to approve external communications to the media, by means of the institution's website, etc.

(2) monitoring website information,

(3) specifically identifying each information item to be included in annual disclosure filings, the various timing requirements applicable to such disclosures, as set forth in the Undertakings, and the persons responsible for obtaining such information,

(4) identifying persons responsible for monitoring events for which Listed Event notices are required to be filed with EMMA and, if there is a materiality requirement with respect to such event, for determining materiality (*e.g.*, in consultation with the institution's financial advisor or counsel),

(5) reviewing the forms of Undertakings to be entered into in connection with bond transactions (for example, to ensure consistency with existing Undertakings as to annual disclosure content and deadlines and to confirm that the annual information that the issuer agrees to provide is the type of information that the institution already prepares or can readily prepare in the future); and

(6) coordinating continuing disclosure filings with primary disclosure documents (Official Statements) to ensure accuracy and consistency.

With respect to all disclosure procedures, issuers should ensure that the procedures work from a practical standpoint within the framework of the issuer's organization, since procedures will only be effective in limiting securities liability to the extent actually implemented. Furthermore, an issuer may be subject to even greater liability if it has adopted disclosure procedures that it neglects to follow.

Please feel free to contact us for a suggested form of disclosure policy that can be tailored to fit the needs of your institution.

Conclusion

Municipal securities disclosure is governed primarily by the Antifraud Rules of the 1933 Act and Exchange Act and by SEC Rule 15c2-12. The "materiality" standard is the key legal principle to which both primary and secondary-market municipal securities disclosure is subject. Although federal securities law does not specify in detail what information is to be disclosed in offering documents for municipal bonds, additional guidance is provided by the SEC through enforcement actions and pronouncements, and by various industry groups that promulgate disclosure guidance in order to promote uniformity of disclosure within the municipal securities market.

Official Statement templates and disclosure checklists can be invaluable resources for ensuring complete disclosure. We also strongly recommend that municipal issuers and borrowers establish written disclosure policies and procedures and familiarize appropriate staff members and governing board members with those procedures as well as the principles discussed in this memorandum. Establishing and implementing adequate disclosure procedures and providing training for issuer staff and board members has become even more critical in light of the SEC's increasing vigilance in monitoring and enforcing the federal securities laws.

For More Information

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Appendix A: Disclosure Checklist for Higher Education Bonds

I. Basic Bond Terms and General Information

A. Name of bonds

B. Identity of issuer and other obligor(s)

C. principal amounts; maturity dates; interest rates; method(s) for determining interest rates, if variable rate bonds; interest payment dates; day-count method for calculating interest

D. Redemption provisions (optional call provisions; mandatory sinking fund redemption provisions; extraordinary call features; redemption price, process of selection of partial maturities for redemption; notice of redemption provisions)

E. Optional and mandatory tender provisions

F. Initial offering prices/bond yields, underwriter's discount

G. Authorized denominations

H. Record date

I. Provisions regarding the transfer and exchange of bonds; description of book-entry system and Depository Trust Company

J. CUSIP Numbers

II. Purpose of the Bonds

A. Description of uses of bond proceeds (*e.g.*, finance capital facilities, fund debt service reserve, pay costs of issuance, pay capitalized interest, provide for working capital); sources and uses of funds table, by amount

B. Financed facilities/project description, including cost, timing, and status of construction, construction delays or overruns; sources of equity to be contributed by the institution for the project (including timing of receipt); status/nature of construction contracts; reimbursements from bond proceeds. In addition, it may be necessary to disclose more extensive project information (*e.g.*, additional details, pro forma revenue projections, feasibility studies, etc.) to the extent that a significant portion of the source of repayment or security for the bonds is tied to revenues to be derived from the project

C. Plan of refunding (including debt to be refunded, redemption date, description of any escrow fund, reason for refunding (economic, legal, etc.), and whether the bonds to be refunded are being legally defeased pursuant to the indenture or only economically defeased

D. Other purposes of the bonds

III. Authority for the Bonds

A. Authorizing laws

B. Authorizing documents (*e.g.*, board resolution, indenture)

IV. Security for the Bonds; Other Bond Document Provisions

A. Name and date of bond documents;

B. Trustee, paying agent, bond registrar, tender agent

C. Revenues, tax receipts, assets pledged to secure the bonds

D. Description of the limited nature of the obligations, if applicable (*e.g.*, to the extent applicable, indicate that the bonds are payable solely from pledged revenues, not a debt of other specified entities, not general obligations, not secured by the physical assets of the institution, not secured by legislative appropriations to the institution, etc.)

E. Reserve fund requirements

F. Flow-of-funds provisions (pre- and post-default flow of funds)

G. Rate covenant

H. Liquidity covenant

I. Requirements for issuing additional debt

J. Description of credit enhancement instrument (*e.g.*, bond insurance policy or letter of credit) or liquidity support instrument (such as a standby bond purchase agreement); forepart summary of the instrument; copy of full instrument attached as an appendix; description of credit enhancement provider

K. Events of default and remedies

L. Other bond covenants

M. Requirements for, and limitations on, amending bond documents

N. Requirements for defeasing bonds and discharging the bond documents

O. Copies of bond documents or summaries (in an appendix to the Official Statement) of material bond document provisions not covered in the body of the Official Statement

P. Any indenture amendments or other bond document provisions to which the bondholders will be deemed to consent

Q. If the bond documents permit an underwriter to consent to amendments to the indenture or other bond documents on behalf of, or instead of, bondholders, specifically disclose this.

V. General Information Regarding the Obligor*

A. Brief history of the institution

B. Mission/niche of the institution

C. Summary of degree programs offered

D. Management, faculty and staff

1. Board of trustees members and their terms of office and years of service

2. Key administrators and their professional background, terms of office, and years of service

3. Appointment process and governing powers of board of trustees members and principal administrators

4. Number of full-time and part-time faculty, five-year trend, number and percent tenured

5. Name and contact information of an officer of the institution whom investors may contact for information regarding the bonds

6. Number of other staff

7. Status of any material labor issues or disputes, or any material disputes between management and the institution's governing board

8. Status of retirement plans (see "Financial and Operating Information Regarding the Institution–Pension and OPEB" below)

E. Degrees and programs

1. Degrees and programs offered

2. Enrollment statistics, by degree

3. Recent and projected changes to programs offered

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* In conduit financings in which the issuer is obligated to pay the bonds solely from amounts received from the borrower pursuant to loan agreement between the issuer and the borrower, inclusion of substantive financial and operating information about the issuer in the Official Statement it is not necessary and could be misleading. Accordingly, in the case of conduit bonds, references to the *"institution"* or the *"issuer"* contained in this table generally refer to the underlying borrower, as opposed to the conduit issuer. The Official Statement for such a conduit financing should state that the conduit issuer is assuming responsibility only for the limited information regarding the issuer that is included in the Official Statement, which generally should consist only of a brief description of the conduit issuer and a statement that there is no pending litigation against the conduit issuer that could have a material effect on the financing. Conversely, the underlying borrower must disclose all material information regarding the municipal securities and the borrower.

4. Corporate or other affiliations with university programs

F. Cost of tuition, room and board, and fees; university policies relating to fees and tuition; five-year historical information and any projected increases

G. Financial aid programs and policies and percentage of students receiving financial aid, by type of student and type of aid (*e.g.*, federal, state, and university aid); student loan default rate; five-year historical information

H. Enrollment

1. Head count and full-time-equivalent, broken down by undergraduate, graduate, and continuing education students; five-year historical information

2. Acceptance, matriculation, retention, and graduation rates

3. Average ACT and/or SAT scores

4. Enrollment policies, goals, and projections

5. Competing schools and the cost of tuition at such schools

I. Endowment information, including size (broken down by expendable, permanent, restricted, and unrestricted); makeup of current endowment investments; endowment policies; description of recent, current, and planned fundraising drives (including status and goals); description of foundation; five-year historical information

VI. Plant and Facilities

A. Description of physical plant, including the size of the campus and a description of campus sites

B. Parking availability

C. Description of property insurance, liability insurance, and worker's compensation policies, and any material changes to the risk management policy, self-insurance, or other insurance coverage amounts

D. Major construction projects and improvements (current and planned)

E. Student housing facilities (including on- and off-campus, college-owned and privately run), relevant student housing policies (*e.g.*, policies requiring freshmen to live on campus), and student housing statistics (*e.g.*, percent of students living on campus and occupancy trends)

F. Status of campus technology (*e.g.*, upgrades, costs)

G. Deferred infrastructure maintenance

VII. Financial and Operating Information Regarding the Institution*

A. Audited financial statements, including auditor's management letters and management's responses (NFMA recommends that private higher-education institutions include a "minimum of three years (summary of five)" of financial statements in their Official Statements, although some or all of those can be incorporated by reference to documents posted on EMMA)

B. Statement identifying the auditor of the included audited financial statements and whether or not the auditor has consented to, or performed any procedures with respect to the financial statements in connection with the Official Statement

C. Unaudited financial statements or stub-period financial information, particularly, if the previous year's audit is over 12 months old or if any material occurrences or trends have occurred or developed since the end of the last fiscal year for which audited information is included; statements clearly indicating that such information is unaudited

D. Budget:

1. Current year budget

2. Year-to-date financial statements compared with budget

3. Material changes in effect or anticipated for the current or upcoming budget year

E. Tuition, fee, and other revenue; projected increases or decreases in revenues

F. Debt structure (including lease and contractual obligations and contingent liabilities)

1. Amount, nature of the security, priority of liens (*e.g.*, senior, subordinate, or parity obligations)

2. Debt service schedule of current issue and aggregated debt service schedule for outstanding issues; indicate any interest rate assumptions, *e.g.*, for variable rate debt; in the case of build America bonds, indicate whether the debt service schedule includes or excludes federal interest subsidy payments and the effect of any sequestration of amounts otherwise allocable to subsidy payments

3. Projected debt

4. Historical and pro forma debt service coverage

5. Capital plans for the next five years and expected debt or other funding sources

6. Long-term debt attributable to plant (typically covered by the financial statements)

7. Debt management policy (including any discrepancies between currently outstanding debt and anticipated financing plans)

* Provide five-year historical information, as appropriate.

G. Swap and other derivative instruments (*e.g.*, interest rate swaps used to hedge variable rate bonds), including:

1. Objective of swap transaction (*e.g.*, used for hedging of investments or bond issue)

2. Basic transaction information, including counterparty (and its current ratings) notional amount, termination date, the bonds to which the swaps apply, and required cash flows under the swaps

3. Use of any up-front payment made in connection with the swap to meet the issuer's budgetary or cash flow needs, and terms of any such arrangement

4. Collateral requirements, including conditions requiring collateral as provided in any Credit Support Annex to the ISDA Master Agreement or other collateral agreement, as well as the type of collateral permitted and whether it is held in trust

5. Early termination provisions and events of default

6. Potential exposure/termination payments (fair value of the swap/issuer's swap exposure as of the reporting date)

7. Source of payment of swap periodic interest payments and termination payment relative to debt service obligations, and the priority of such payments relative to debt service on the bonds and other payments under the indenture

8. Other material associated risks, such as basis risk (with respect to variable rate bonds, the difference between the variable rate payable by the issuer on the bonds and the variable rate paid under the swap to the issuer for the purpose of hedging its interest rate risk)

9. See NFMA's White Paper on Disclosure for Swaps, Feb. 2004, for additional considerations regarding swap disclosure.

H. Investment information for endowment and other funds, including asset breakdown (including, in particular, any concentration of over 10% of the institution's investment portfolio) and investment policies, and historical return-on-investment information

I. *Pension and OPEB.* Obligations to fund pension funds and other post-employment benefits (*"OPEB"*). Disclosure regarding issuers' pension and OPEB funding obligations will vary depending on, among other things, the type of bonds being issued and the type of pension plan (*e.g.*, defined benefit versus defined contribution plan) and OPEB obligations (such as health, dental, and life insurance), the funding status, and extent of the funding obligations relative to the issuer's overall budget. In its 2012 release entitled, "Best Practice–Including Disclosures in Official Statements Related to Pension Funding Obligations," the GFOA advised municipal issuers that more extensive disclosure regarding pension funds may be necessary if an issuer answers "yes" to any of these following questions:*

* The National Association of Bond Lawyers (NABL) has similarly advised: "Official Statement disclosure is about the credit quality of the bonds being offered. Disclosure about an issuer's pension obligations that is included in the OS should reflect the degree to which such obligations could affect the issuer's ability to make bond payments to investors, or place pressures on the

1. Is the debt service on the proposed bond issue and the funding of the issuer's pension plan dependent on the same specifically identified revenue source or sources?

2. Is the current and future funding of the pension plan material in relation to the issuer's current and projected budgets?

3. Is the funding of pension obligations currently stressing the issuer's budget or "crowding out" other expenditures, or does it have the potential of doing so in the future?

4. Are there legal restrictions or requirements related to pension funding that reasonably might be considered [as] placing pension funding senior to debt service payments? [For example, are pension obligations payable as an operating expense of the institution, prior to payment of debt service on bonds?]

5. Are there known and determinable trends or issues related to pension funding that may be considered material to investors?

Similar questions should be asked with respect to OPEB funding obligations. Some or all of the following may be material to an understanding of the credit quality of the issuer and the bonds (some or all of which information may be contained in a CAFR attached to the Official Statement):

1. Description of the plan type or OPEB funding obligation

2. Actuarial accrued liability, actuarial value of the funding assets, and the unfunded actuarial accrued liability (UAAL)

3. Explanation of assumptions used to arrive at UAAL calculation (*e.g.*, discount rate, medical inflation rate, employee turnover rate, and retirement and mortality assumptions)

4. The most recent actuarial report relating to the funding obligation

5. Any other study, report, or other supplemental disclosure necessary to adequately explain the issuer's funding obligation and funding approach

For additional disclosure considerations, particularly in connection with defined benefit pension plans, see NABL, May 15, 2012, Considerations in Preparing Disclosure in Official Statements Regarding an Issuer's Pension Funding Obligations (Public Defined Benefit Pension Plans).

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basic functions of government that would affect the creditworthiness of the bonds. This may depend, to varying degrees, on matters such as size of those obligations relative to the issuer's overall budget, the funding status of the pension plan, and identifiable trends and problems that are material to an investor. It will also depend on the degree to which the pension obligation payments and debt service payments are payable from the same source of revenue. The goal of this disclosure, as with all disclosure in an OS, is the appropriate level of information for the issuer's specific situation. Neither too much information nor too little information is helpful to the investor." See NABL, May 15, 2012, Considerations in Preparing Disclosure in Official Statements Regarding an Issuer's Pension Funding Obligations (Public Defined Benefit Pension Plans) .

J. Financial statements and/or other information regarding separate enterprise funds or off-balance-sheet housing and/or other privatized operations (for example, a university that operates a hospital will likely have separate financial statements for the hospital enterprise, which should be disclosed to the extent material to the bonds)

K. Management discussion and analysis (although financial statements may already include an "MD&A" section, additional MD&A discussion may be useful or necessary for inclusion in the forepart of the Official Statement if there are particular trends or other observations with respect to the issuer that are not easily ascertainable from the financial statements or that bear additional or different emphasis in the context of the issuance of the bonds)

L. Discuss impact of any accounting changes

M. Asset information recommended by the NFMA Private Higher-Education Institution Whitepaper: Realized and unrealized earnings, broken down by asset class; key components of unrestricted net assets, including net investment in plant and accumulated gains on endowments; key components of net assets released from restriction (including, specifically, releases related to construction or acquisition of fixed assets and releases related to endowment spending policies)

N. Any recent or expected material off-balance-sheet activities, material write-offs or other unusual or infrequent items with respect to the most recent audit or the upcoming audit

O. Any material concerns regarding competing institutions or their impact on the issuer's financial position

P. Any revenue stabilization/reserve policies of the institution and current fund balances with respect to any such reserves

Q. Liquidity and cash position

VIII. Legal Information

A. Pending or threatened litigation (proceedings that could affect the bonds or the institution's ability to meet its obligations)

B. Other material disputes

C. Tax status of the bonds (state and federal), including covenant to maintain tax-exempt status and risks to such status

D. Description/form of bond counsel opinion. (If bond counsel is relying on an opinion of special tax counsel or on the opinion of another law firm in rendering its own opinion, that reliance should be disclosed in the body of the Official Statement and the supporting legal opinions should be attached.)

E. Names of counsel to transaction parties and brief summary of other opinions to be obtained in connection with the bonds

F. Summary and description of Continuing Disclosure Undertaking, including a description of the event notices and annual financial information to be filed and the timing requirements for such filings

G. Description of any material failures to file continuing disclosure information during the past five years and, if applicable, a statement that the institution is in compliance with previous Undertakings

H. Bankruptcy/receivership risk (*e.g.*, potential adverse effects on bondholders, including delays in the enforcement of remedies, subordination of claims, imposition without consent of bondholders of a reorganization plan reducing or delaying payment on the bonds; for governmental obligors, indicate whether a state statute authorizes relief in federal bankruptcy court and, if not, that there is no assurance that future legislations authorizing such bankruptcy will not be enacted in the future)

I. Proposed or pending state or federal legislation, rulemaking, or regulations that could have a material impact on the institution

J. Any recent or pending IRS, SEC, or other regulatory audits, investigations, or actions that could impact the bonds or have a material impact on the institution

K. Standard legal disclaimers:

1. Official Statement is not a contract between the issuer and the bondholders

2. Summaries and explanations of laws and documents are not complete and reference is made to such laws and documents for full statements of their provisions

3. Certain information is obtained from sources other than the institution and is not guaranteed as to its accuracy or completeness

4. The Bonds are not registered under the 1933 Act or any state securities laws and will not be listed on any stock or other securities exchange, and neither the SEC nor any other federal state or other governmental agency will pass on the accuracy, completeness, or adequacy of the Official Statement

5. In connection with the offering of the bonds, the underwriters may over-allot or effect transactions that stabilize or maintain the market price of the bonds at levels above that which might otherwise prevail in the open market, and such stabilizing may be discontinued at any time

6. The Official Statement speaks only as of its date

7. Statements involving estimates, assumptions and matters of opinion, are intended as such and are not representations of fact

8. Assumptions and disclaimers regarding any forward-looking statements (although financial and operating data should primarily be historical, projections regarding financial performance, including, for example, projections regarding future revenues and debt service coverage, may be important, particularly where future years are

expected to trend differently from the historical data presented. Where projections are included, the document should clearly identify the statements as forward-looking statements, indicate the assumptions and qualifications on which they are based, and indicate that the expected results are subject to uncertainties, including the occurrence or nonoccurrence of future events.)

9. Other relevant disclaimers

IX. Miscellaneous

A. Bond ratings (including risk of reduction or withdrawal, and language indicating that the bondholder can obtain further explanation regarding the significance of the ratings from the rating agencies); include rating outlook modifiers (*e.g.,* "outlook negative" or "stable outlook")

B. Risk factors/investment considerations section, spotlighting special risks or disclosing risks, particularly those that are not easily worked into the general discussion; (*e.g.,* practical/legal limitations on bondholder remedies (NFMA recommends that every Official Statement include a risk factors or investment considerations section, with transaction-specific risks placed in the beginning of this section and more generic investment risk disclosure placed later in order of priority.)

C. Conflicts of interest of, or among, the transaction participants

D. Delivery/closing date

E. Copies or summaries of expert consultant reports or feasibility studies, if applicable

F. Information that is of only indirect importance (such as certain demographic or economic information) may be included as an appendix to the Official Statement so as to avoid interrupting the flow of the discussion contained in the main body of the Official Statement

G. Institution's biggest challenges or concerns (e.g., concerns with existing or projected revenues or expenditures that may materially impact the institution's financial position or ability to repay the bonds

H. Material changes in auditor

I. Underwriter(s)

J. Financial Advisor

K. Any other matters that may be material to investors that are not described above

Appendix B: Summary of Certain SEC Municipal Securities Enforcement Actions

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
State of Kansas, 2014[17]	State of Kansas charged with violating federal securities laws by failing to disclose in offering documents that the state's pension system was significantly underfunded, creating a repayment risk for bond investors. As of 2008, the total unfunded actuarial accrued liability of the state pension system was $8.3 billion and was only 59% funded. Although the Kansas Public Employees Retirement System (KPERS) disclosed the underfunding in its own annual financial statements, the underfunding was not disclosed in the state's annual financial information in official statements for various bond offerings.
City of Harvey, Illinois, 2014[18]	SEC charged the city of Harvey, Illinois and its comptroller, Joseph Letke, with diverting bond proceeds for improper purposes that were not disclosed to investors, including improper payments to private firms owned by Mr. Letke and at least $1.7 million in payments of city payroll and other operating expenses. While investigating such misconduct in connection with offerings during 2008, 2009, and 2010, the SEC learned that the city was planning to issue a new bond. Finding that the offering document for the new bond was materially misleading in that it did not disclose certain risks of investing in the city's bonds and omitted to disclose that past bond proceeds had been misused, the SEC successfully obtained a restraining order in U.S. District Court for the Northern District of Illinois, preventing the city from offering or selling any bonds, pending additional hearings. *Although it is not unusual for the SEC to seek emergency action from a court to block an issuer from making a offering based on an offering document containing materially misleading statements or omissions, the Harvey case represents the first time such an injunction has occurred in a municipal bond offering.*
West Clark Community Schools (Clark County, Indiana), 2013[19]	Issuer falsely stated in an Official Statement that it had not failed to meet its disclosure obligations during the previous five years, though the issuer had not submitted any disclosure documents between 2005 and 2010. The SEC also charged the underwriter with violating the Antifraud Rules in connection with such statement by the issuer, as the underwriter improperly relied solely on the issuer's assertions that it had satisfied its continuing disclosure obligations.

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
City of Harrisburg, Pennsylvania, 2013[20]	The City of Harrisburg, which had guaranteed $260 million of debt issued by the Harrisburg Authority to finance improvements to a municipal resource recovery facility, and whose financial condition had significantly deteriorated since the issuance of such debt, failed during 2009-2011 to comply with its continuing disclosure obligations, including by failing to provide annual financial information. As a result of such continuing disclosure failures, investors had to rely on Harrisburg's other public statements to obtain information. The limited information that was available on Harrisburg's website (including its 2009 budget, a State of the City address, and 2009 mid-year fiscal report) were misleading and omitted material information about the city's financial condition, credit ratings, and debt guarantee obligations. Marks the first time that the SEC has charged a municipality for misleading statements made outside of bond disclosure documents such as the Official Statement or continuing disclosure filings. Statements that are reasonably expected to reach the securities markets, even if not prepared for that purpose, cannot be materially misleading. "… [A]t a time of increased public interest in Harrisburg's financial condition, and despite having entered into multiple written undertakings, Harrisburg failed to submit annual financial information, audited financial statements, notices of failure to provide required annual financial information and material event notices.... The statements by the Harrisburg public officials were part of, and could have altered, the *total mix* of information available to the market. There is a substantial likelihood that a reasonable investor would consider the financial condition of the City important in making an investment decision, and there were no other disclosures made by the City as part of the total mix of information available to enable investors to consider other information. These public officials' statements were the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market. Because statements are evaluated for antifraud purposes in light of the circumstances under which they are made, the lack of other disclosures by the municipal entity may increase the risk that municipal officials' public statements may be misleading or may omit material information."[(18)]
City of Victorville, California, 2013[21]	The SEC charged the City of Victorville, the Southern California Logistics Airport Authority controlled by the city, an assistant city manager, and the underwriter of securities fraud in connection with the issuance of tax-increment bonds issued for the purpose of refinancing hangar projects. The sizing of the bonds was based on a $65 million valuation of the financed property, although the transaction participants knew the county assessor valued the hangars at less than half that amount. The inflated figure allowed the airport authority to issue substantially more bonds than it otherwise could have, and investors were given false information about the value of the security available to repay them (increases in property tax revenues tied in part to the value of the improvements).

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
	The complaint also charged that the underwriter, working through a related party, misused more than $2.7 million of bond proceeds. "Investors are entitled to full disclosure of material financial arrangements entered into by related parties. Underwriters who secretly line their own pockets by taking unauthorized fees will be held accountable."
The Greater Wenatchee Regional Events Center Public Facilities District (Washington), 2013[22]	Official Statement for bonds issued to finance an events center stated that there had been no independent review of the financial projections for the events center, notwithstanding that an independent consultant had examined the projections twice and questioned the economic viability of the project. The Official Statement also failed to disclose that the financial projections had been revised upward based upon optimistic assumptions that the community would support the project. Marks the first case in which the SEC imposed a financial penalty against a municipal issuer.
State of Illinois, 2010[23]	The State of Illinois had chronically underfunded pension plans for state employees. The legislature established a funding plan in the 1990s, but failed to follow it. SEC charged Illinois for failing to provide adequate disclosure regarding its pension liabilities.
State of New Jersey, 2010[24]	SEC charged the State of New Jersey with securities fraud for failing to disclose certain material facts regarding its pension plan funding. The state had stopped contributing to the state employee pension plan in 1997 at a time when the fund was fully-funded, but then increased pension benefits in 2001 and revalued the pension fund assets at such time to correspond to 1999 levels to give the appearance that it could afford the new benefits, as 1999 values were $2.4 billion higher. The state was unable to make pension contributions after state actuaries advised that pension contributions must resume in 2004. The state subsequently used money set aside for increased benefits and established a five-year ramp-up plan to full funding, but later abandoned the five-year plan due to insufficient resources. SEC found that the state violated the Antifraud Rules by failing to disclose in various Official Statements over a period of several years the reason for the revaluation of assets, the $2.4 billion decline in asset value since the date to which assets were revalued, and the fact that set-aside funds were being used to temporarily pay for increased benefits. In addition, the state initially failed to disclose the five-year plan in various bond offering documents, and then, after disclosing the plan, failed to disclose that the state had abandoned the plan, giving the false impression that there was still a plan for full funding. Represents the first time the SEC issued a cease-and-desist order against a municipal issuer based solely on negligence, as opposed to the higher thresholds of intent or recklessness.

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
	In addition to the antifraud violations, the SEC criticized the state for (i) having no policies or procedures for updating offering documents, (ii) simply inserting new numbers into existing offering document templates instead of giving thoughtful consideration to current circumstances, (iii) not having the state treasurers review the Official Statement, and (iv) not providing disclosure training to employees responsible for preparing and reviewing disclosure documents.
Jefferson County, Alabama, 2008[25]	SEC charged the president of the county commission, an investment banker, and certain other parties for hiding a scheme to give the commission president $156,000 in kickbacks while he selected the investment banker's firm for bond sale and swap agreement transactions. "The record indicates that the [Official Statement] did not disclose the payments to the investing public.… The information omitted here was material in at least two respects. First, an investor, had he known the payments, could have reasonably concluded that investment in the District's bonds was unwise because the kickbacks increased the costs of the offering. Second, an investor could have concluded that the District's bonds were a poor investment because the quality of the District's management was suspect."
San Diego, California, 2006[26]	Disclosure documents failed to disclose the city's looming financial crisis, including billions of dollars of unfunded pension and OPEB (retiree health care) liabilities in disclosure documents. Four former city officials settled and paid fines ranging from $5,000 to $25,000.
Ira Weiss, 1996[27]	Bond counsel violated securities law by failing to disclose the incorrectness of a tax-exemption opinion.
Dauphin County General Authority, Pennsylvania, 2004[28]	Bonds sold by Dauphin County General Authority to fund the acquisition of an office building were secured solely by revenues received from office space leases and parking. Although the Official Statement disclosed that the terms of existing leases were scheduled to expire prior to the maturity of the bonds, and although the Official Statement disclosed that no assurance could be made as to whether current tenants would renew their leases upon expiration of the existing leases, the issuer failed to disclose its actual knowledge that the largest tenant intended to vacate the building following reconstruction of another building. The issuer also made material misstatements in Continuing Disclosure Undertakings regarding its financial position, including by overstating the issuer's and a subsidiary's net income through various accounting misclassifications.
Massachusetts Turnpike Authority, 2003[29]	Massachusetts Turnpike Authority failed to disclose in an Official Statement substantial cost overruns from a roadway and tunnel project. SEC stated that, where an issuer projects material increases in construction costs, it is not a valid defense that the information regarding such projections was withheld on the

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
	basis that, if the issuer's concerns regarding possible cost increases were publicly disclosed in the Official Statement, then such cost increases would become inevitable.
City of Miami, Florida, 2001[30]	The city failed to disclose in an Official Statement that its cash flow position was substantially worse than it had been at the close of the fiscal year for which audited financial statements were included in the Official Statement. The focus of the Official Statement should be on a "snapshot" of the issuer's financial condition at the time the bonds are offered, as opposed to the close of the issuer's most recent fiscal year for which financial statements are included in the Official Statement. SEC rejected the city's defense that it had relied on its auditors and other professionals in preparing the offering document. "Primary responsibility for the accuracy of information…disseminated among investors rests upon the municipality." The presence of bond insurance or other credit enhancement does not eliminate the need for full disclosure regarding the underlying obligor. "Bond insurance did not give Miami license to misrepresent its financial conditions or withhold material information from the market place." Notably, action was brought against the city notwithstanding that the city had never defaulted on the bonds.
Allegheny Health, Education and Research Foundation, 2000[31]	SEC charged a borrower of conduit bonds for material misstatements made in filings made pursuant to Continuing Disclosure Undertakings regarding its financial position, including by overstating the borrower's and a subsidiary's net income through various accounting misclassifications relating to uncollectible accounts receivable and inappropriate transfers used to address the resulting bad debt reserve shortfall.
Syracuse, New York, 1997[32]	The City of Syracuse falsely claimed a surplus for its general and debt service funds, materially overstated its ending fund balances in those funds, and misled investors by describing certain unaudited financial information as audited.
Orange County, California, 1996[33]	The county had issued $1.3 billion of notes to invest in the Orange County Investment Pools (the *"County Pools"*), the performance of which was closely tied to the financial condition of the county, and filed for bankruptcy following a large loss in value with respect to such investments. SEC found that the county failed to adequately disclose the county's financial situation in Official Statements, including the county's budgetary reliance on investment returns generated by the County Pools. County falsely stated that it had received consent from auditors to include the county's audit report in the Official Statement. SEC also concluded that certain tax and revenue anticipation notes were not sized properly for federal tax purposes and that failure to disclose that risk was materially misleading to investors.

SEC Action/Issuer	Synopsis of Key Disclosure Failures and SEC Findings/Guidance
	Public officials who approve the issuance of securities and related disclosure documents may not authorize disclosure that the public official knows to be materially false or misleading. Public Officials may not authorize disclosure while recklessly disregarding facts that indicate that there is a risk that the disclosure may be misleading. The issuer's legislative body has a duty to take steps appropriate under the circumstances to assure accurate disclosure regarding material information is made to investors. Members of the legislative body should be familiar with disclosure documents, and may need to question officials, employees, and agents regarding disclosure of material information to fulfill this duty. SEC penalized the county's treasurer with a cease and desist order, six years in jail, and $100,000 fine, and penalized the assistant treasurer with a cease and desist order, three years in jail and a $10,000 fine.
Maricopa County, Arizona, 1996[34]	SEC charged the county for failure to disclose known material declines in its financial condition and operating cash flow between the time of the close of the fiscal year covered by the audited financial statements in the Official Statements and the time of issuance of the bonds to which the Official Statements related. The county also indicated that the bond proceeds would be used to finance specific county projects and failed to disclose the actual use of bond proceed to temporarily alleviate the issuer's cash flow deficit, which investors "would have considered important in deciding whether or not to purchase the bonds." County also mislabeled certain unaudited financial information in an Official Statement as audited. Notably, the county's short-term deficit did not impact the county's ability to levy property taxes to pay its general obligation debt, and the county never defaulted on any debt service obligations, illustrating the SEC's view that information may be material even if it does not adversely affect the ability to pay the bonds.

Appendix C: Citations

1 Securities and Exchange Commission Report on the Municipal Securities Market (July 31, 2012).

2 *E.g.*, LeeAnn Gaunt, chief of the SEC enforcement division's municipal securities and public pensions unit, was quoted in the December 30, 2013 *Bond Buyer* as predicting "increased focus on municipal issuers and issuer officials…"; and SEC chair, Mary Jo White, promised "aggressive and creative" enforcement soon after taking office in 2013.

3 Securities Act of 1933 (48 Stat. 74, 15 U.S.C. 77a-77mm).

4 Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. 78a-78kk).

5 *See* Securities Act § 3(a)(2); Securities Act § 12(a)(2); Exchange Act § 3(a)(12); Exchange Act § 3(a)(29).

6 Exchange Act Release No. 36761 (1996).

7 *Id.*

8 Exchange Act Release No. 34-26100 (2010).

9 Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 131 (1975).

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