

## On the To Do List for Municipal Bond Issuers: Disclosure Policies and Procedures

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*The federal securities laws prohibit fraud in connection with the sale of securities including state and municipal bonds. Specifically, it is unlawful to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the sale of bonds. A state or municipal issuer may be liable to investors in connection with an intentional or even reckless material misstatement or omission in bond offering documents and other communications to the bond market. The SEC also has pursued enforcement actions based on negligence (that is, based on an issuer's failure to take reasonable care in reviewing its disclosure documents for accuracy and completeness).*

*The following article recommends that issuers adopt and follow written disclosure policies and procedures, in part to evidence that the issuer took reasonable care in preparing, reviewing and approving its disclosure documents. The article also identifies key components of these policies and procedures, and suggestions for developing workable policies and procedures.*

The Securities and Exchange Commission ("SEC") continues to focus on the municipal bond market, through both voluntary initiatives and through enforcement actions against state and municipal issuers including school districts, cities and utility districts. Two consistent take-aways from these initiatives and enforcement actions are: (1) the emphasis on adopting written disclosure policies and procedures and (2) the importance of periodic training regarding issuer responsibilities under the federal securities laws.

The settlement terms for issuers participating in the Municipalities Continuing Disclosure Cooperation (MCDC) initiative require that issuers "establish appropriate policies and procedures and training regarding continuing disclosure obligations within 180 days." Likewise, recent SEC enforcement orders emphasize the role of written disclosure policies and procedures and training in preventing or remediating disclosure missteps. For example, in its recent settlement with the Westlands Water District, the SEC noted that it took into account the district's "cooperation and prompt remedial actions, including the development of written financial disclosures policies, and staff training related to Westlands' debt offerings," and in the recent settlement with Allen Park, Michigan, the city agreed to adopt written policies and procedures. In its settlement with the West Clark School District, the SEC was relatively specific about the procedures and trainings required of the district, requiring the district to enhance its continuing disclosure procedures, to identify a responsible individual to ensure compliance and to provide an annual

certification to the superintendent, and to provide annual trainings reviewing the district's procedures and its obligations under the federal securities laws.

Written policies and procedures should formalize – and where necessary enhance – the steps that issuers already are taking to ensure disclosure documents are accurate and complete. Periodic trainings can help create widespread organizational awareness of these steps. Policies, procedures and trainings also can be helpful in evidencing that the issuer took reasonable care in preparing and reviewing disclosure documents for accuracy and completeness in an active enforcement environment.

The National Association of Bond Lawyers (“NABL”) issued a recent publication *“Crafting Disclosure Policies”* (August 2015) that provides an overview of issuer responsibilities under the federal securities laws, suggestions for developing disclosure procedures, sample annotated policies and procedures, and links to policies and procedures adopted by a range of issuers. The Government Finance Officers Association (“GFOA”) also has issued a series of best practices guides relating to disclosure, including the use of technology and maintaining an investor relations program. These materials – as well as SEC staff remarks and enforcement orders – can be synthesized generally to recommend that policies and procedures address the following components:

- Identify the individuals responsible for preparing, reviewing and approving preliminary official statements, official statements and other disclosure documents
  - Including individuals who can take a step back and provide input on:
    - the “big picture” and
    - new developments
- Outline the steps involved in drafting, reviewing and approving disclosure documents, for example:
  - Review by the finance team
  - Review by internal subject matter experts
  - Confirmation of financial and operating information to source documents
  - Cover to cover review by appropriate responsible officials
  - Auditor or other outside expert involvement, if applicable
- Provide for periodic training to create and reinforce broad organizational awareness
  - That the issuer has legal responsibility under the federal securities laws to provide materially accurate and complete disclosure when speaking to the bond market
  - That the issuer may be deemed to be speaking to the bond market through a range of communications, including disclosure documents, press releases, web or social media postings, remarks by elected officials, responding to investor questions or other investor communications, and voluntary disclosure filings
  - That the issuer has disclosure policies and procedures, and the importance of following these policies and procedures in preparing, reviewing and approving disclosure documents

A few practice points for consideration. First, most issuers have adopted written tax post-issuance compliance procedures, spurred by the Internal Revenue Service focus in recent years on the role of these procedures in preventing or remediating private use, arbitrage rebate or other post-issuance tax concerns. Often post-issuance tax compliance procedures also note the issuer's continuing disclosure obligations. Few issuers have adopted broader disclosure policies or procedures to address the initial disclosure provided at the time that bonds are sold or to address other communications to the bond market. Given the consistent SEC emphasis on the importance of procedures, issuers would be well served to adopt such procedures and complete periodic training to reinforce them.

As issuers develop disclosure policies and procedures, note that there is no single required form or template. To be most useful, policies and procedures can and should start by capturing the steps that issuers are already taking to prepare, review and approve disclosure documents, and then be supplemented to fill gaps (if any) by reference to the above list of recommended components or other best practice materials. Policy statements – such as the issuer's commitment to securities law compliance as well as to investor and constituent transparency – can be addressed in a debt policy, while the implementing steps can be outlined in procedures. Procedures can be more or less detailed depending on the issuer, its personnel and its specific processes. It may be helpful to integrate disclosure procedures into the issuer's tax procedures to create unified "bond issuance and post-issuance procedures," organized chronologically (i.e. steps at issuance, followed by post-issuance steps). Or an issuer could adopt separate tax and disclosure procedures. A checklist may be beneficial in providing further detail, assigning tasks to specific personnel and confirming that tasks have been completed. Finally, periodic training can help to hard wire or make these procedures routine.

Please call any of our public finance attorneys if you have questions about disclosure policies and procedures. Contact information is provided below.

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Alison Benge	<a href="mailto:Alison.Benge@pacificalawgroup.com">Alison.Benge@pacificalawgroup.com</a>	206.602.1210
Deanna Gregory	<a href="mailto:Deanna.Gregory@pacificalawgroup.com">Deanna.Gregory@pacificalawgroup.com</a>	206.245.1716
Faith Li Pettis	<a href="mailto:Faith.Pettis@pacificalawgroup.com">Faith.Pettis@pacificalawgroup.com</a>	206.245.1715
Stacey Lewis	<a href="mailto:Stacey.Lewis@pacificalawgroup.com">Stacey.Lewis@pacificalawgroup.com</a>	206.245.1714
Jon Jurich	<a href="mailto:Jon.Jurich@pacificalawgroup.com">Jon.Jurich@pacificalawgroup.com</a>	206.245.1717
Will Singer	<a href="mailto:Will.Singer@pacificalawgroup.com">Will.Singer@pacificalawgroup.com</a>	206.602.1216

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Dated: July 21, 2016

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To subscribe to our mailing list, please contact Mia Wiltse at [Mia.Wiltse@pacificalawgroup.com](mailto:Mia.Wiltse@pacificalawgroup.com).

