

Preparation of Official Statements – Interplay between Disclosure Counsel and the Client

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Overview of Presentation

- **Brief overview of bond sale process.**
- **Contents of a POS/OS.**
- **Legal Standard for Contents of a POS/OS.**
- **Role of Disclosure Counsel.**
- **Process/Interplay Between Issuer/Issuer's Counsel (e.g. City Attorney) and Disclosure Counsel to prepare POS/OS.**
- **Finalizing OS/Closing Process.**

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Brief Overview of Bond Sale

- Issuer or entity, on behalf of the Issuer, sells bonds to finance projects or to refinance for lower debt service payments.
- Bonds are offered to investors by the **POS**.
- Bonds are sold in one of two ways:
 1. Negotiated Sale: To Underwriters pursuant to Purchase Contract between Issuer and Underwriters; or
 2. Competitive Sale: Pursuant to Notice of Sale, bonds awarded to lowest bidder.
- Final **Official Statement (OS)** delivered after pricing of bonds.
- Closing and delivery of bonds.

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Overview of Official Statement

POS/OS is offering document to investors for public offerings of securities.

- Equivalent to prospectus in corporate market.
- **Must contain all material information for the particular bond sale.**
 - Terms of the bonds (e.g. payment structure, maturities, interest rates, call features).
 - Security for the bonds (pledge, funds and accounts).
 - Material information relating to the security (general fund, land-secured assessment/tax, enterprise/project revenue).

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Overview of Official Statement (cont.)

- POS/OS is the Issuer's document.
- Underwriters, municipal advisers and lawyers can help develop the POS/OS.
- Issuer may ask for certifications from parties contributing information.
- However, Issuer is ultimately responsible for content of POS/OS.

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Legal Standard - Federal Securities Laws

- Securities Act of 1933 and Securities Exchange Act of 1934 contain antifraud provisions applicable to municipal securities.
- Rule 10b-5 provides that:
 - “It shall be unlawful for any person . . .
 - a) To employ any device, scheme or artifice to defraud,
 - b) 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”

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The “Materiality” Standard

- “[w]hether or not there is a substantial likelihood that a reasonable investor or prospective investor would consider the information important in deciding whether or not to invest.”
- Materiality is determined in context of all the facts and circumstances.
- Guidance comes primarily from court decisions and SEC enforcement cases.

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Consequences of Bad Disclosure

- Fines by the SEC against the issuer and against individual officers.
- Officers can be barred from participation in securities offerings.
- Legal costs to respond to SEC investigation.
- Reduced market access and/or increased borrowing costs.
- May be required to implement additional procedures and policies for future securities offerings.

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Role of Disclosure Counsel

- Performs many tasks historically handled by Underwriter's counsel, including acting as the primary drafter of all/portions of the POS/OS.
- Hired by and represents the *Issuer* and has Attorney-Client privilege with the Issuer.
- Common for Disclosure Counsel to be the same law firm as Bond Counsel on a deal (usual exceptions – larger issuers).

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Preparation of Official Statement (cont.)

POS preparation/diligence depends on the security:

- Land-secured assessment/Mello-Roos bonds:
 - Largely developer/property owner driven; developer has “boots on the ground” at project site.
 - Disclosure Counsel communicates frequently with developer and developer's counsel as well as Issuer and Issuer's counsel.
- General Fund/Enterprise bonds:
 - Disclosure counsel primarily communicates with Issuer staff and Issuer's counsel.

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Preparation of Official Statement (cont.)

Interplay Between Issuer/Issuer's counsel and Disclosure Counsel

- Drafts of the POS is reviewed by Issuer staff, Issuer's counsel and financing team.
- Discussions on several document review sessions and input provided.
- Full and open discussion to prevent material omissions and misstatements.

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Preparation of Official Statement (cont.)

Interplay Between Issuer/Issuer's counsel and Disclosure Counsel

- Key takeaways:
 - If Issuer staff and Issuer's counsel think something may be a concern, raise the issue with Disclosure Counsel.
 - Disclosure Counsel cannot always uncover all material issues without help from Issuer/Issuer's counsel.

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Preparation of Official Statement (cont.)

Examples of Potential Disclosure Issues Affecting Land-Secured Financings:

- Hazardous materials/soils.
- Prevailing wages.
- Flood, seismic and high fire zone risks.
- Public contracting requirements.
- Entitlement status/issues.
- Pending or threatened litigation related to project or security.

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Preparation of Official Statement (cont.)

Examples of Potential Disclosure Issues Affecting General Fund/Lease Revenue Financings:

- Developments affecting the Issuer impacting general fund revenues.
- Ballot measures affecting general fund revenues.
- Flood, seismic and high fire zone risks affecting leased property.
- Use restrictions (e.g. reversionary rights) affecting leased property.
- Prior leases and liens affecting leased property requiring subordination.
- Easements impacting leased property.
- Pending or threatened litigation related to leased property or security.

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Preparation of Official Statement (cont.)

- **POS is finalized**
- **Rule 15c2-12 Certificate.**
 - Issuer deems the POS final per Securities and Exchange Commission Rule 15c2-12 to allow Bonds to be offered for sale.
 - Other financing participants (e.g. developers) sign certifications.
- **POS is released to investors to market bonds.**
- **POS becomes “final OS” after bonds are priced.**
- **Final OS provided to investors.**

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Closing Process

- **Bond Purchase Contract/Notice of Sale lists required closing items.**
- **Closing approximately two weeks after bond sale.**
- **Disclosure Counsel provides “negative assurance” letter.**
- **Issuer’s counsel may also be required to cover POS/OS (or portions) in its closing opinion.**

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Key Points/Summary

- POS/OS is subject to federal securities laws.
- Disclosure counsel hired as expert on federal securities laws and to be drafter of POS/OS.
- Issuer staff and Issuer's counsel are experts on Issuer's operations and ongoing issues.
- Open dialogue and communication key to ensuring POS/OS complies with federal securities laws.

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Questions?

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