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.
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.

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).
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.

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 . . . .”
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.

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.
**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).

**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.
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.

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.
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.

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.
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.

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.
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.

Questions?

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