

STEPS FOR PRO-ACTIVE ISSUERS

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STEPS FOR PRO-ACTIVE ISSUERS

COMPETING WITH TENS OF THOUSANDS OF CREDITS, PRO-ACTIVE ISSUERS NEED TO—

- **Distinguish themselves in a positive light**
- **Conduct internal due diligence**
- **Prepare effective disclosure**
- **Adopt pro-active policies**

CHALLENGES CONFRONTING ISSUERS

- **Great Recession**
- **Declining property values & property tax receipts**
- **Properties in foreclosure**
- **Declining economic activity & sales tax receipts**
- **Increased unemployment & associated demands for social services**

CHALLENGES CONFRONTING ISSUERS

- **Increasing pension contributions due to portfolio losses**
- **Declining revenues from the State**
- **State capture of redevelopment funds**
- **Continued slow growth & even some potential for a “double-dip”**

THE NEW MUNICIPAL MARKET

- **Significant reduction in bond insurance competition & use of bond insurance**
- **Increasing liquidity costs for variable rate debt**
- **Substantial liabilities associated with interest rate swaps**
- **Adverse publicity in media (although investors are beginning to return)**

THE NEW MUNICIPAL MARKET

- **Recent rating downgrades**
- **Public dominance at MSRB**
- **Regulation of municipal advisors**
- **Enhanced regulatory activity & active proposals for more**
- **GOOD NEWS: Interest Rates Have Been Low!**

SEC'S BASIC PRINCIPLE

- **Issuer is Primarily Responsible**
- **Ultimately Liable**

SEC EXAMPLES

- **State of New Jersey—Focus on Pension Disclosures**
- **Failure to Disclose Funding Status & Unfunded Liabilities**

SEC EXAMPLES

- **San Diego—Pensions & Health Plans for Retirees**
- **Again, Failure to Disclose Funding Status & Unfunded Liabilities**
- **Official Statements, Rating Presentations, Continuing Disclosures**

SEC EXAMPLES

- **San Diego Former Officials—City Manager, Deputy City Manager for Finance, City Treasurer, Auditor & Comptroller**
- **\$25,000 Personal Liability for Three Former Officials (\$5,000 for One)**

SEC EXAMPLES

- **Miami & Officials**
- **Insured Securities**
- **Failure to Disclose Deteriorating Financial Condition**
- **Misleading Information Regarding Remedial Financial Program**
- **Official Statements, Continuing Disclosure, Rating Agencies**
- **“Stale” Information**

SEC EXAMPLES

- **Maricopa County**
- **Failure to Disclose Adverse Financial Developments in Certain Funds**
- **Misrepresentation Regarding Use of Proceeds**
- **“Stale” Information**

SEC EXAMPLES

- **Orange County, Board of Supervisors & Officials**
- **Also Other Local Governments Investing in Pool**
- **Failure to Disclose Adverse Developments & Risks Regarding County Investment Pool**
- **“Stale” Information**

SEC EXAMPLES

- **Syracuse & Officials**
- **Presentation of Unaudited Financial Statements as Audited**

SEC EXAMPLES

- **Numerous Small Local Governments & Officials, e.g.—**
- **39 Mississippi Communities—Relied on Underwriter & Bond Counsel, Did Not Read Official Statements, Tax Certificates**
- **Nevada County, Ione & Wasco, CA—Relied on Underwriter, Financial Advisors, Bond Counsel**
- **Dauphin County (PA) General Authority—Board Members Did Not Read Official Statement, Relied on FA, Underwriter, Counsel**
- **Neshannock Township (PA) School District—Relied on Underwriter, Bond Counsel, Did Not Read Tax Certificate**
- **Many Others**

PRIVATE LITIGATION

- **Especially Institutional Investors**
- **Bond Insurers**
- **Sovereign Immunity under State Law on Appeal**

PRIVATE LITIGATION

- **Multiple State Laws May Apply (and Common Law)**
- **May Be Sued Outside California under Other States' Laws**
- **Litigation Lasts for Years**

POTENTIAL ISSUER STEPS

THERE ARE NO PRESCRIBED STANDARDS

Issuers Are Lacking Guidance

This Presentation Is for Discussion & Suggestion

POTENTIAL ISSUER STEPS

Incredible Cost If Something Goes Wrong (San Diego >\$20 MM)

No Default Is Necessary

Bond Insurance Not a Protection—Insurer Will Sue

POTENTIAL ISSUER STEPS

- **Importance of distinguishing selves in positive light—**
 - ❖ **Homogenization is gone**
 - ❖ **Tens of thousands of issuers**
(50,000 to 80,000 estimated by SEC, MSRB)
 - ❖ **How can issuers attract positive attention in market?**

POTENTIAL ISSUER STEPS

- **Undertakings to accept incentives for recognition offered by the MSRB—**
 - ❖ **Compliance with GAAP**
 - ❖ **Publication of audits within 150 days after fiscal year-ends (120 days after 2013)**
 - ❖ **Links to investor pages on websites**

POTENTIAL ISSUER STEPS

- **Creating investor pages on issuer websites with current information (involve counsel & advisors)**
- **Filing voluntary information with MSRB**
 - ❖ **Budgets**
 - ❖ **Current & interim information**
 - ❖ **Updates**
 - ❖ **Preliminary official statements & notices of sale**
- **Obtaining underlying ratings on insured securities**

POTENTIAL ISSUER STEPS

RELIANCE ON PROFESSIONALS

- **Must Rely “Reasonably”**
- **Cannot Rely “Blindly”**

RELIANCE ON PROFESSIONALS

Miami Administrative Law Judge—

“To establish a good faith reliance defense based on the advice of an accountant or an attorney, one must show that she—

- (1) **made complete disclosure,**
- (2) **sought the advice** as to the appropriateness of the challenged conduct,
- (3) **received advice** that the conduct was appropriate, and
- (4) **relied on the advice in good faith. ...**

The City has not satisfied those elements. ...”

RELIANCE ON PROFESSIONALS

Best Issuer Reasonable Protections

- Place Competent People in Charge
- Employ Qualified Professionals, Review Scopes of Services
BUT Don't Rely "Blindly"
- Develop & Follow Reasonable Internal Procedures
 - ❖ Perform Own Due Diligence
 - ❖ Conduct Own Disclosure Process
- Pay Attention

RELIANCE ON PROFESSIONALS

- **Underwriters—Adverse**
- **Underwriter Counsel—No Contract with Issuers,
Do Not Advise Issuers, Represent Underwriters**

RELIANCE ON PROFESSIONALS

- **Bond Counsel & Disclosure Counsel
(Reduce Underwriter Counsel Costs)**
- **“Municipal Advisors”—Fiduciary Duty**
- **Pay Attention to Scope of Services**
- **Avoid Contingent Fees**

RELIANCE ON PROFESSIONALS

- **Don't Just Rely on Counsel's Participation in Transaction**
- **If You Have a Concern, Obtain a Specific Unqualified Legal Opinion in Writing**

RELIANCE ON PROFESSIONALS

LIMITS OF LEGAL OPINIONS

- “*We have not verified the information* contained in the Official Statement (including the Appendices thereto) and *we do not assume any responsibilities for the accuracy, completeness or fairness* of any statements contained in the Official Statement.”
- “In the course of such discussions and based upon our review of the documents discussed above, *nothing has come to our attention ...*”
- “(*except* with respect to the information contained in *Appendices A, B and C thereto and to financial and statistical data and feasibility study and projections* included in the Official Statement as to which we make no comment)”

POTENTIAL ISSUER STEPS

- **No Standards**
- **These Are Discussion Points**
- **Key Is Reasonableness**

GOVERNING BOARDS

- **Establish Disclosure Group & Define Responsibilities**
- **Charge Group with Responsibility to Prepare Disclosure Policies & Procedures (“DP&P”)**
- **Designate Key Staff for Disclosure Group & Give Them “Clout”**

GOVERNING BOARDS

- **Provide Disclosure Group with Adequate Funding**
- **Direct Group to Employ Qualified Professionals to Assist**
 - ❖ **Legal**
 - ❖ **Financial**

GOVERNING BOARDS

- **Approve DP&P**
- **Direct Disclosure Group to Implement**

POTENTIAL ISSUER STEPS

DISCLOSURE POLICIES & PROCEDURES

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- **Define Documents To be Reviewed**
 - ❖ **Official Statements**
 - ❖ **Continuing Disclosure Documents**
 - ❖ **Website Investor Page**
 - ❖ **Rating Agency Presentations**

DISCLOSURE POLICIES & PROCEDURES

- **Train Staff on Disclosure**
- **Clear Lines of Responsibilities & Authority as to Approval of Disclosure Documents**
- **Channel Investor Communications Through Designated Official**
 - ❖ **Consistency in Communications**
 - ❖ **Disclose Important Information Publicly**

DISCLOSURE POLICIES & PROCEDURES

- **Provide for Re-Evaluation of DP&P**
- **Revise as Appropriate**
- **ALWAYS Follow DP&P**
Can Be a Problem, If Don't

POTENTIAL ISSUER STEPS

SENIOR ISSUER OFFICIALS

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- **Disclosure Group Should Implement DP&P**
- **Disclosure Documents Should Be Reviewed Page by Page**
 - ❖ **Review in Meetings**
 - ❖ **Don't Just Mark Up Old Documents**

SENIOR ISSUER OFFICIALS

- **For Each Offering, Develop a Plan for Due Diligence & Disclosure Based upon Credit & Securities Structure**
- **Employ Qualified Professionals & Review Their Contracts & Scopes of Services**

SENIOR ISSUER OFFICIALS

- **Question Information**
- **Verify Information**
- **Review with Appropriate Staff**
- **Check with Original Sources, Documents**
- **Be Careful in Relying on Professionals**

SENIOR ISSUER OFFICIALS

- **Obtain Written Certifications from Third Parties**
- **Only Use Third Party Information from Reliable Sources**
- **Question, Check, Identify Third Party Information**
- **Review, Question Feasibility Studies, Projections, Appraisals**
 - ❖ ***E.g.*, Assumptions & Reasonableness**
 - ❖ **Standards, Potential Conflicts, Methodology**

COMPLETION

- **Senior Officials Sign Off**
- **Governing Body Opportunity for Review, Questions, Comments**

WEBSITES & POST-ISSUANCE COMPLIANCE

**NOTE: These are Important Subjects,
But Beyond Scope of this Presentation**

OTHER SOURCES

- **IMLA, Draft Financing Procedures Checklists (2007)**
- **GFOA, et al., Questions To Ask Before You Approve a Bond Issue (1996)**
- **NFMA, Best Practices in Disclosure, White Papers at www.nfma.org**
- **GFOA, Best Practices at www.gfoa.org**
- **NABL, Pending Project on Pension Disclosure**

THE END