**California Debt and Investment Advisory Commission**

**Webinar Transcript**

# Disclosure Policies: What Every Issuer Should Consider

**October 14, 2015**

(Editor's Note: This transcript has been prepared by the California Debt and Investment Advisory Commission (CDIAC) and it believes it to be a fair and accurate reproduction of the comments of the speakers. Any errors are those of CDIAC and not the speakers.)

*The Securities and Exchange Commission (SEC) had stressed the importance of adopting written disclosure policies and procedures for issuers to ensure the accurate and timely communication of material information to the municipal market. More recently, various SEC enforcement actions coming out of the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative have imposed written disclosure policies and associated training as an element of the settlements. The results of the SEC's review of issuers' disclosure practices under the MCDC Initiative are expected to be released in the near future. In an effort to provide guidance to the market, the National Association of Bond Lawyers has released a report titled Crafting Disclosure Policies, which explores the benefits and practical considerations in drafting written policies and procedures. This webinar will provide a detailed discussion of the report as well as the key elements to address in the policy development process.*

**Title Slide – Disclosure Policies: What Every Issuer Should Consider**

**Mark Campbell:** Good morning, everyone. This is Mark Campbell, executive director here at CDIAC. I want to welcome you all to the webinar program today – Disclosure Policies: What Every Issuer Should Consider. Our program will run from 10:00 until 11:45. We expect that will be jam-packed with good information in our never-ending belief that you can never get enough education on disclosure. I'm going to run through a couple of housekeeping things quickly and then we'll start the program.

First, and to call to your attention modifications in the format on your screen. You will see on the right hand border a Handout section that you can access handouts for the program as well as the NABL paper on disclosure, and that will be referenced. One of our speakers was instrumental in developing that paper. So that is a resource to you. So, again, on the right hand side of your screen you'll see a tab for handouts. Captioning is provided during the program. Participants may click on the link in the chat section at the bottom of the control panel to access remote captioning. To submit questions at any point through the program, use the GoToWebinar control panel. Send us comments or questions in the box marked "Questions" near the bottom of the control panel. We'll try and handle questions as we go through the program, and we'll certainly follow-up with any we don't address. If you need a certificate of attendance, you must register and be logged into the webinar under your own name. A certificate will be emailed to participants by the end of the week. For MCLE credit, email us at cdiac_education@treasurer.ca.gov.

So before I introduce today's speakers, I want to take a polling question to give the speakers a sense of the work that participants have done in the area of disclosure policies and policy development.

**Polling Question (02:16)**

**Mark Campbell:** So our first polling question, if we can go to that. Does your agency have or are you considering implementing a disclosure policy? You've got five choices there if you'll take the time to respond.

**Polling Results (02:46)**

**Mark Campbell:** All right. We're going to close polling. It looks like a good number have disclosure policies, a fair number are considering, and then quite a few that are not applicable, or do not find that disclosure policies are applicable for one reason or another. Okay, with that let me introduce our speakers.

**Slide 2 – Disclosure Policies: What Every Issuer Should Consider (03:07)**

**Mark Campbell:** The facilitator for the program today is Dan Deaton, a partner with Nixon Peabody. He represents governmental agencies, non-profit corporations, underwriters and others as bond counsel, disclosure counsel and underwriter's counsel in a wide variety of tax-exempt and taxable public finance transactions. He has considerable experience in general fund, water, transportation, university, and cultural institution financing.

Next is Peter Chan, partner with Morgan Lewis & Bockius and brings two decades of experience at the U.S. Securities and Exchange Commission to his litigation counseling work. He represents public companies, financial services firms, and other organizations in litigation, investigations, and regulatory actions by federal agencies. Peter is a former head of the SEC's Chicago office of Municipal Securities and Public Pensions Unit and advises clients on compliance and regulatory matters impacting the municipal securities market and investments by public pensions and other institutions.

Last, John McNally, partner with Hawkins, Delafield & Wood in the Washington, D.C. office and formerly was president of the National Association of Bond Lawyers during the 2010-2011 term. He is a frequent speaker regarding the application of federal securities laws to municipal securities and served as project coordinator for the Third Edition of *Disclosure Roles of Counsel in State and Local Government Securities Offerings*, a joint publication of the American Bar Association and NABL that was published in 2009. So with that, I'll turn it over to the panel for some preparatory statements. Dan, thank you.

**Slide 3 – What do we intend to cover today? (05:05)**

**Daniel Deaton:** Yes, and good morning. And thank you for joining us this morning. The topic of disclosure policies and procedures is a topic that has been at the forefront of the municipal securities market now for several years. And it is an area that has received a lot of attention both

by market participants but also by the SEC and so much of what it has done during that period. This topic is a topic that has been of particular interest and focus to the three of us. And we have, the three of us have done a couple of panels for NABL before. In addition, John and I were both involved in the *Crafting Disclosure Policies* paper that you can access there. And so this is an area of intellectual focus and interest, the three of us, that we have talked about and worked through and developed over the last several years. I want to turn it over to both John and then Peter and talk about their history with this issue and why it is that this is an area of intellectual focus for them as well. So John, you want to start and then hand it over to Peter?

**John McNally:** Yes, be happy to. So just a broad outline. Hawkins was engaged as disclosure counsel to the City of San Diego. There were some concerns about their disclosures in 2002, 2003. And in anticipation of a SEC enforcement action, San Diego adopted in October of 2004 a broad disclosure ordinance that was basically modeled on Sarbanes-Oxley principles. I can get into that in more detail later. But basically San Diego, I think, was the initial major issuer to adopt basically a corporate regime of disclosure controls and disclosure procedures. Since then, I have been involved with other cities and states, been away across the country. I've done procedures for, as I said, San Diego, San Francisco, the State of Rhode Island, and more recently for the City of Philadelphia as well as a number of smaller issuers that are firm clients. So a broad spectrum of issuers, different sizes, different needs, and as we'll discuss later, different approaches about how to structure the procedures. Peter?

**Peter Chan:** Hi. I was at the SEC until approximately a year ago. And while at the SEC focusing on municipal securities and public pensions, I oversaw the investigation that resulted in SEC enforcement actions involving the State of Illinois; the City of Harvey, Illinois; City of Allen Park, Michigan; UNO Charter School; and also, in terms of school districts, the West Clark School District, just to name a few. And in doing so, part of my task while working for the Commission was to also identify the causes and the reason that resulted in what were alleged to be securities law violation. Since about a year ago, I have been in private practice at Morgan Lewis, and a big part of my practice involves advising clients, institutions and individuals how not to get into trouble with the SEC. And in doing so, disclosure policy continues to be a big part of that practice. And finally, because CDIAC is all in favor of full disclosure, I do want to fully disclose to the audience that I am an ardent Chicago Cubs fan and knowing that, I want to make sure that for those of you who are from Los Angeles, that you understand my bias.

**Daniel Deaton:** And my experience with this issue comes in sort of a different way entirely, which is that just as a practitioner of bond disclosure counsel in Los Angeles at Nixon, I a few years ago was sort of struck by the lack of a coherent paradigm for understanding what we meant by disclosure policies and procedures in the industry. And in my discussions with other counsel, in my discussions with other issuers, I was concerned that there was a very broad spectrum of understanding what that term meant. And what I had a lot of intellectual interest in was bringing a coherent paradigm to the topic so that we could understand what that phrase means and what we should be doing.

Because that's my background and my perspective, my role today is to channel my best inner issuer that I can. In other words, what I want to do is I want to ask the questions that issuers have asked. And I want to put it to John, who is the practitioner, and Peter, who came out of the SEC

Enforcement Division and actually had a hand in many respects in actually drafting some of the language we have looked at in terms of disclosure policies and procedures, and I want to ask them the questions that the issuers were asking me, and in the hope of being able to leave the audience with that coherent paradigm that they can understand what's being done.

You know, we are going to be covering three topics today. And quite simply it is why, what, and how. Okay. Why, what, and how. Why are disclosure policies and procedures important, number one? Number two, what should they contain? And number three, how? What is the process by which an issuer ought or should consider going about crafting them and then adopting them and then following them. So let's start with the first topic: why? In terms of that, and let me just ask the question to both Peter and John straight up, you know, is there an actual requirement that issuers adopt disclosure policies and procedures? Are they required to do that?

**Slide 4 – Why are Disclosure Policies and Procedures Important? (11:10)**

**Peter Chan:** This is Peter…

**Daniel Deaton:** Let's start with John.

**Peter Chan:** …the answer is no.

**John McNally:** And the answer is clearly no, and the reason for that is that the SEC, unlike what they can do with municipal securities brokers and dealers, they don't have direct regulatory jurisdiction over issuers. They do have anti-fraud jurisdiction. That's how they can bring cases under Section 17 and 10b5. But as far as the SEC's ability to say, you shall do the following, they don't have that jurisdictional authority and therefore it's not required.

**Daniel Deaton:** Okay, so like on the corporate side, where there actually is, there's just laws on the books saying, thou shalt adopt disclosure policies and procedures or their comparable, there isn't here. So Peter, if there's no requirement to adopt disclosure policies and procedures, why is it that in almost every enforcement action or activity of the SEC in its enforcement activities, they have talked about the importance of disclosure policies and procedures. If it's not required, why do they keep talking about it?

**Peter Chan:** And following up on what John said, one of the ways that the SEC brings cases against issuers has been based on the anti-fraud provisions of the federal securities laws. And as John mentioned in terms of Section 17, one of the abilities – and this is important – one of the abilities for the SEC to bring enforcement cases is based on the anti-fraud provision 17 that involves negligence. So not intent, negligence. Was the entity reasonable? And in many respects, one way of looking at the legal theory of the SEC in enforcing anti-fraud provisions is whether an issuer had material misstatements or omissions as a result of negligence. And in that exercise, in analyzing whether something is negligent, the mirror image of negligence is reasonableness. And in many respects the SEC in its orders have outlined how misstatements came about due to the negligence, and very often, it is because of the lack of disclosure process and procedures that created, for lack of a better word, a fog that end up having otherwise well-intentioned people to act unreasonably in either gathering the information or drafting the information such that there were misstatements. So it is important to understand the mirror image, which is the SEC's fraud

theory can be based on unreasonable behavior. And the mirror image of unreasonable behavior is reasonable process and procedures that can provide an important avoidance of getting in trouble with the SEC, but more importantly, getting the statements and disclosure right.

**Daniel Deaton:** Okay. And John, you know, what Peter is saying as an issuer has come as a surprise in the sense that I thought the only rule that was out there is we're not supposed to lie. I thought the rule was that, you know, like you said, I mean they can't directly regulate us, and so I understand I'm not supposed to lie, but I don't know what Peter is talking about. What is this other, this whole entire area that you could like, fraud – the saying "committing fraud" – when does reasonable care come into play on that?

**John McNally:** Well, I mean, stepping back from it, realize that the SEC, their jurisdiction in the enforcement, if it's a private plaintiff, they have to prove both damages and either recklessness or intent. But as Peter said, when you're dealing with the SEC, they don't have to show damages, they don't have to show reliance, and they can use negligence as a theory. So what you're trying to do is a couple of things as far as why you'd want to adopt the procedures even though they're not required. One is, and some of these are going to be obvious, but it should improve the quality of the disclosure you have and not only make it more comprehensive and understandable, but also then lessen the possibility that you might have a material misstatement or omission. And I think as a municipal entity, as you're looking at that and keeping a perspective, realize that if you're dealing with a corporate issuer – and you're dealing with a corporate issuer, by that I mean an entity that's otherwise required to register their securities with the SEC – were there to be a material misstatement, that issuer would have absolute liability. There is a concept of due diligence in that context, in the 1933 Act, but it's a due diligence concept for the other players, for the underwriters, for the engineers, etc.

But the important thing for a municipal issuer is because there is not this direct jurisdictional authority, absent the anti-fraud, there is no absolute liability for an issuer. So what the issuer wants to do, as Peter was mentioning, you want in addition to lessening the possibility of having a material misstatement or omission in the first instance, I think equally important, were there to be one, for whatever reason, and it clearly can happen, then you want to establish a defense. And to the extent you can show that you have proper procedures, comprehensive procedures – and moving into the detail of what that means: procedures, understanding of the procedures, training to the procedures – then you are able to in addition to lessening the possibility of a problem. You're able to establish a defense to an SEC cause of action. And that's really what you're trying to do here because it's in the very rare instance that at the end of the day the issuer's not going to end up paying the investors. So despite the fact there has been hundreds and hundreds of SEC enforcement actions, there has been very few accompanied by a private cause of action just because there has not been the damages. But that doesn't mean that were you to become what I would call "ensnared" in one of these SEC investigations, it can be extremely expensive, extremely time consuming. So you want to be able to, considering I think how straightforward it can be done, is establish a defense to that possibility.

**Peter Chan:** And Dan and John, you know, one thing I would want to add to the description is that ultimately the goal is to get the disclosure right. So when we talk about reasonable disclosure process and procedures, we're not talking about just something on paper that will

magically avoid the scrutiny or an enforcement action by the SEC. As part of our discussion today, what is clearly something we want to emphasize is that the process and procedures have to be meaningful and real. We are definitely not saying that just because something is on paper that it's sufficient. In order for it to be reasonable, it has to actually live and in the real world actually is meant to create full disclosure. And also going back to the theme here, which is, you know, getting the disclosure right, the goal of the disclosure process that we'll describe will avoid situations I have seen when I was at the SEC with a number of these cases. One, the left hand and right hand aren't knowing what each other are doing – the silo effect – so that the right people actually who knows the information will get the information right. But also even in the fraud cases that I was involved in, the disclosure process and procedure to the extent it's meaningful and robust could help deflate some of the political and other types of temptation not to be fully transparent to the investing public. So, again, the key emphasis here is, yes, it can create a defense, but only if the disclosure processes are meaningful and real.

**Daniel Deaton:** Let me drill down on that a little bit, Peter, because you had been very involved in the State of Illinois investigation. And the *State of Illinois Order* that we have is one of the significant sources of discussion of disclosure policies and procedures, and it follows a long line from New Jersey and all the way back ultimately to San Diego, but there's a real focus in the Illinois action on disclosure policies and procedures. And let me start by saying, did, in fact, the State of Illinois have disclosure policies and procedures?

**Peter Chan:** At the time of the period that we investigated, they on paper and in appearance, and I want to emphasize that, did have a process for disclosure that involved among other things what I call a page-flipping session. And maybe if I can go into it a little bit more to sort of bring the issue of on paper versus real. One of the things that we discovered which was highlighted – and I say "we," the former "we" at the SEC – one of the things that the SEC staff discovered, as outlined in the settlement order with the State of Illinois, was the fact that the various participants in the bond offering process – and again, as many of you know, the State of Illinois case involved material misstatements and omissions regarding its public pension funding program and the pension liability – but as part of that process the various participants, both within the State of Illinois but also underwriter, outside consultants and so forth, had a page-flipping session where they would go through each page and basically have people looking at each other, saying, "Is this page okay?" And if no one said anything, they would move on.

The other thing that was highlighted was that a lot of the disclosure was based on past offering documents. And one of the things that the SEC staff highlighted in the order is the fact that doing that page-flipping session, each participant assumed that if there was something wrong or lacking with the disclosure, that someone else across the table would highlight the issue. And in fact in one situation, you know, one of the experts basically said, "I assumed it was not my role, but someone else, to highlight any issues dealing with the pension disclosure." But also in addition to that, there were actually, as part of that page-flipping, a silo issue, which was that everyone assumed that if anyone had the right information that they will find it. However, as highlighted in the order, there was actually an entity within the State of Illinois legislative body called COGFA that had all the correct information regarding the pension liability issue. It's just that no one actually thought of including them in the disclosure process. So, yes, there was on paper and as part of this process, a page-flipping process, but because of the lack of clarity on who was

responsible for what, because there was a lack of process in identifying otherwise material information, the process on paper created the illusion of adequacy that ended up leading to misstatements and omissions by the State of Illinois. And the order took great pain to highlight the lack of the procedures, but interestingly, also highlighted the subsequent remedial measures taken by the State in terms of process and procedures in explaining why the sanctions were not more severe.

**John McNally:** This is John. I'm going to assume, and Peter – those of you listening, the introduction was 20 years at the SEC – I'm assuming that the written procedures didn't have a section entitled "Page Flipping." Those of us that are doing it out there, we refer to it as careful, deliberate page-turning sessions. Because I think it is important. I mean, what I have found, it is very important to do it properly, and as Peter has said, it can be done improperly. But I have actually attempted to make sure that there is at least one what I call page-turning session. And by that I mean that you do in fact have people around a table, in person. You have all the ones that are responsible. They each know who's responsible for what. But it's also important there be communication among them because some of the concerns that came out of the enforcement actions were that the information the critical information that was not disclosed, or it was improperly disclosed, that there were people within the issuer who knew it, but they were not there part of the drafting team. So I think the first thing is to make sure you properly identify who should be part of the review so that you have the right person, the right groups looking at the right sections of the OS and then making sure, as both Peter and Dan have pointed out, that you don't have silos, meaning things don't fall through the cracks, that there's a communication that goes on. And what I have found is that, once again, I think these page-turning sessions are very important, because there has been a tendency, particularly as we've watched the speed with which deals come to market, the amount the issuers are willing to pay for the service, etc., there's a tendency to take the last deal off the shelf, to simply send it out within the issuer to mark it up, and what I would call sort of rote updates. And I think there's a deliberative process by which you have a page turning session, you have the key players, can be critical.

So, you know, we're coming down to sort of I think the same points: the lack of communication referred to here as the silo, that updates are done all too often in sort of a rote manner, which we think the page turning session can correct. And the other thing I think it can correct, which was referred to the enforcement cases is the elephant in the room concern, which is something like a large pension liability which is obvious to everybody on the core financing team, but is so obvious to them that they don't it somehow doesn't make its way into the OS. They're not realizing the readership is not those around the table. The readership is the broader investor public. I know Peter was referring to page-flipping meaning it was on paper and they weren't doing it properly, but I think all three of us would agree that having an in person deliberative meeting is a very important part of this process to make sure you do have the communication you want to have among the key players.

**Daniel Deaton:** Yeah, and I think, just pulling back, unpack a lot of what Peter and John talked about. Peter, why don't you start by as a person coming in, as an investigator of what was going on, what did you expect? What were your expectations for what they would have, and how did that not meet your expectations? In paragraph 23 of the order, it says, "The State failed to adopt or implement sufficient controls, policies or procedures designed to ensure that material

information was assembled and communicated to individuals responsible for disclosure determination." When you went in there, what did you find? And what had you expected would have been there?

**Peter Chan:** Sure. And I think it all starts with the idea that there is actually a thoughtful – and again, I want to identify the word "thoughtful" – process in identifying information that would be material to investors, and then making sure that thoughtful process will allow, you know, the proper drafting in the disclosure. The reason I keep mentioning thoughtful in terms of what I would have expected – and again, just focusing on the State of Illinois, and frankly, I think that would apply to Kansas also – this idea that even when you have well-meaning people who are trying to do the right thing, what the SEC would expect is, one, at a very basic fundamental level that there is a process that is absolutely focused on the principle and goal of getting information to the public that the investors, the investing public, would care about, i.e. would find material. So that's important. Everything that the SEC would expect all comes down to a process where the ultimate goal is getting information that the investing public would care about.

And in doing that, I think, the SEC, I think, as mentioned in the numerous orders would expect that the process have a process to identify what kind of information was available that would be material to the investors. Again, going back to this silo effect, and I would think particularly getting to a large public entity such as the state or a major city – you know, I came from a large bureaucracy, so I get it – which is that different parts of a particular entity would have important information for the investors, but that doesn't mean that the folks doing the actual drafting would be aware of the existence of the information or who would know, who would know this type of information. So one of the things the SEC would expect from that process in terms of determining reasonableness, is that process, again, as an ongoing, living process, would identify the people, the departments, and the individuals who may have access to information that would be material to investors. And the reason why I keep emphasizing thoughtful and living and breathing is that there is always a danger within a bureaucracy where there is a particular checklist, and say, here are the ten things that would be material to investors. And then you just go by that checklist.

But lo and behold, if, let's say because of a sudden change in the economy, in a political situation, or for that matter, anything that effects the financial status of a city or state, happens and that particular event or type of information is not part of the ten things on that checklist, that checklist may end up being not only stale, but would become an obstacle to the living, breathing process for that entity to find that particular piece of information. So the SEC, as part of the analysis of what is reasonable, would expect this living, thoughtful process of constantly saying, where could there be material information, what could this information be, and ultimately be able to break through all the silos, go through all the bureaucracy to gather the information each time and so that the investing public will get what it deserves. So, again…

**John McNally:** Yeah, Peter, I mean, to be clear, let me…

**Daniel Deaton:** John, let me ask you…

**John McNally:** Go ahead. Go ahead.

**Daniel Deaton:** I'm going to turn it right over to you so you can add into that, John, which is, what Peter is describing is the silo effect. Have you seen that out and around? And how does that look in the way that you see it in your practice? And how do you think the disclosure policies and procedures can fix that problem to the extent that you see it, and you can…? So let me turn it over to you.

**John McNally:** Yeah, I think it's exactly what we have been talking about. And just following up on Peter's remarks, I'm sure Peter's not saying don't have a checklist. It's rather: don't use that as a crutch. Don't be dependent on it.

**Peter Chan:** That's right.

**John McNally:** I mean, I think the checklist can serve the purpose of making sure that the so-called elephant in the room is not missed, that you would sit down initially and say what do we think are the key issues? That may be the checklist for deal one and then for deal two, as Peter is saying, it has to evolve. But I think it does also serve to make sure you're not dealing with people so intimately involved that major issues can somehow get missed. It's a combination of two things. It's a combination of making sure the things what I'm calling the lack of communication among the staff, what is being referred to as the silo effect, that that can be overcome and addressed by these open meetings. But in addition, having some road map, flexible road map, to make sure the key issues, that somebody not, once again, so intimately involved, would say, gee, how did you miss something? It was front page of the newspaper for the last six months. So I think it's a matter of addressing both parts of it. So you want to address the silo effect, the lack of communication. You want it make sure that the updates are not perfunctory; they're not simply rote updates. The phrase I use is, make sure you step back and view the material in its entirety. You know, when we send you a paragraph, I don't want you to simply change the dates and the numbers. I want you to say, where does this fit in? Is there something else that should be added? Is this paragraph frankly still material to where we are today? It's something that has to change and evolve and live on a deal by deal basis.

And I think in addition to these key failures, potential failures that we're identifying, it's important that – and we will get into this in more detail – there be associated with it a training. Because it's all well and good as the three of us as respective counsel to know this, and it's all well and good for us to tell it to the three or four key people we interact with, but when these updates are done, they're going out to 20, 30, 40 different people who are updating various sections. They need to know how that all fits together and the importance of it. So a key part of what we're discussing, in addition to the list is communicating to everyone how this all fits together, what their role is, and how something that they may not even realize why they're doing it, we try to sensitize them. No, here's how it works, here's where this happens, here's where it comes into the official statement, and here's why we need you to pay particular attention to this when you're doing it.

**Daniel Deaton:** Yeah, and actually Peter, in that same paragraph 23, it says, and that kind of transitions us well away from – so there is this silo effect of people being separated off from the process and not communicating effectively. But paragraph 23, Peter, also said the State also

failed to – and one of the things, it mentions sort of three things – adopt sufficient controls. The last one is retain disclosure counsel, but the second one was to train personnel involved in the disclosure process adequately. What is the failure that you were seeing from your perspective, like John is saying, what are we talking about in terms of training? These are, you know, sort of almost always highly-educated people. These are very smart people that are in high levels of government, you know, sort of usually. What do we mean by training personnel adequately?

**Peter Chan:** Sure. And I think it goes back to really understanding the purpose and the process of disclosure under the securities law with regard to bond offering. And just to step beyond just the State of Illinois to give you an example without getting into specifics, you know, hypothetically, there was once a school district superintendent who, when asked what was his understanding of the bond offering process, answered by saying – and by the way, with great honesty and in good faith – that when the school district needed money, he would go to the underwriter and then to basically say, I need money. And then he would get a pile of paper. He would sign that pile of paper and the money came. And I'm, you know, perhaps overemphasizing that a bit because obviously, you know, there's a cross-spectrum of understanding, but that gives you an idea sometimes of the lack of understanding of the goal and the process. There's also situations where the truth is, is that, you know, many, many of the participants in this core who are public servants, you know, a bond offering process and the disclosure is not their full-time day job. And most of the time they actually deal with other things such as running a school, running a water, you know, entity, and so forth.

And so one of the concerns of the SEC, as highlighted by the *State of Illinois Order*, and frankly a number of other orders, is the fact that there be adequate training as to the process, but primarily, what this is all about. I think, if at the end of the day, at the minimum, if the participants in the disclosure process by the issuer understands that the goal is to get out to investors information that the investing public would care about, that would be a very important foundation for the training. And again, it goes back to the idea that when a state or a city or an entity does not provide adequate training as to the process and also goal for disclosure in the bond offering, it would be tough to argue, if there was a material misstatement later, that state or city was acting reasonably because without training there's no understanding. Without understanding, it's hard to imagine how any process could actually work.

**Daniel Deaton:** Yeah, and John, how when you're out and about in your practice, you know, and you just mentioned it, that there's a real need for training in a lot of these different issuers. What need do you see that's out there and what have you encountered as to why training sort of meets that need?

**John McNally:** Well, we have been discussing at a fairly high level some of the elements of what should be in these procedures, why they're important. But that is the…what has to dovetail with is the training. And it depends in some degree as to how comprehensive your procedures are. For example, for one issuer, we have the mayor and the city attorney actually certify in writing, similar to the corporate standards, certify in writing to the official statement. We also have the official statement approved and reviewed with care by the city council. So in that case, we conduct three separate trainings: we have a training for the city council, a training for the mayor and his or her executive staff, and then a training for the financial staff. The more

common situation is training for what I would call everyone that touches the official statement. In other words, they're either involved in the approval process or they're involved somehow in either drafting or reviewing it. So approving, drafting, reviewing – those three components for the disclosure documents.

And once again, as I mentioned before, the concern too often is that if you send something out and you're in the finance department, you're in the treasurer's department, you send it out to whatever, the waste water department, and say, please update the following three paragraphs, the tendency is, once again, to change the dates, to change the numbers for the next year. So what you're trying to do through the training is sensitize people to the fact, an overall view as to how this all fits in, the whole SEC jurisdictional concerns about anti-fraud, what their role is, and why they need to do more than simply a rote update and look at it in its entirety. And then sometimes people, depending how far down they are in this chain, may not even realize that the request relates to something that will eventually make its way into the official statement.

So what we try to do in addition to the comprehensive training is to then, when the requests are sent out, is to have them accompanied by a cover note, email or otherwise, that basically reminds them, by the way, you attended this training and as we reminded you then, we want you to look at this in its entirety, we want you to review it carefully, and we want you to certify that you attended a training and you're bringing that to bear when you do this. And what I've found is that that additional level of nothing more than a cover note when you're requesting the information is enough to trigger it.

Another thing that I think is very important to the training is certifications. By that I mean personal responsibility for the material. Because at least for the larger issuers, for what I would call the key areas of the official statement, whether it be the financials, the pension section, whatever, we get the department directors to personally certify in writing that they've reviewed that section. When they do that, they in turn attach a list of the names of the people that were what we call contributors to the disclosure. So when you have the training, when you advise people as to the potential ramifications of misleading disclosure, and sensitize them to that, and then you tell them, oh, by the way, here's what you should be doing and we're going to attach your name to this document that goes into the files to establish this auditable trail, that heightened level of sensitivity, I'd like to think, produces very strong, accurate, comprehensive, carefully considered disclosure.

**Peter Chan:** And, you know, as a follow-up to that, I wonder from both of your perspectives because you guys are obviously more closely tied to, you know, advising clients on the offering process. You know, one of the things that, you know, I've seen in a number of cases, you know, so far we have been talking about negligence, are situations where senior officials were tempted not to be transparent. Without getting into the details, for instance, in the City of Allen Park based on the allegations…

**Daniel Deaton:** Well, and Peter, actually that – let me introduce that topic and then you can kind of go with it because that's exactly where I was going to go next, which was, you mentioned a third issue there earlier on, which is…. So we've talked about a silo effect, we talked about training. There's a third issue that's lingering out there that has become a major focus of the SEC,

and that focus is the fact how political influence, either direct or indirect, on the disclosure process has been, has led to some material misstatements or omissions in disclosure. And can you just talk briefly about what the Commission has found in terms of how that political influence has done that, and then can you turn it over to John? And John, can you talk about how you think that disclosure policies and procedures can help to fix that problem?

**Peter Chan:** Sure. And I think it's just to continue, you know, your question and your thought. You know, in looking at a number of the past enforcement cases by the SEC, what should be apparent is that there's not always negligence and that there have been a number of cases where intent or recklessness was alleged. And I guess in looking at some of these cases, one can glean from the underlying, you know, theme is that you have what we call political pressure, and I would also call political temptation, not to be as transparent as possible. So, for instance, you know, if we look at the City of Allen Park based on the allegations that involved a matter where the movie studio project was a very important project to the mayor of the city. And the mayor ultimately was charged with being a control person. But in doing so, the SEC alleged public misstatements to the voting public regarding how the movie studio was going. You can easily imagine other situations where the temptation is very strong at the highest level not to be as transparent and sometimes to make things appear better than they actually were because of the nature of the beast, which is that of appealing to the voting public.

And I think that these were situations that the SEC have long recognized and frankly are very concerned about, you know, the other elephant in the room, which is the political pressure/temptation not to be transparent to the voting public. And that temptation would translate then to a lack of transparency to the investing public. And as a continuation of my question, I'm interested because you guys are more closely tied to advising clients in the bond offering, you know, and John, in particular, how were the training process and certifications, whether that could be something that could balance against the political pressure and temptations.

**John McNally:** Right. Right. So let me make a couple of notes on this. I mean, Allen Park – we're going from negligence all the way over to Allen Park, which I would argue is actually deliberate, intentional deceit. And just a side note on this negligence, I mean, for years and years and years, the SEC always had the authority to bring a charge based on negligence, and you would see negligence in a lot of the enforcements actions. But what the SEC staff would tell us was, frankly, we're a small group, we don't have the resources, we're going to bring a case if we think we have a real concern here with either recklessness or scienter. And at the end of the day with the back and forth with SEC defense counsel, it would frequently get brought down to a negligence charge.

We have seen a major change here which really Peter, coming out of the SEC, has pointed out, which is we now have not three or four or five people at the SEC working on municipal enforcement, we have 30 people across the country. They have people in every regional office working on municipal enforcement. And in addition, they have also taken the approach of being willing in the first instance to bring an action for negligence. It's not simply a backstop based on back and forth. It is the initial. So I think, you know, issuers had to be very concerned that there is, if you will, a much broader group of people out there. It's being viewed. All the disclosures

are in some random basis at least getting careful review, and negligence is going to be sufficient to bring a count.

And let me just mention, you mentioned Allen Park where there is this desire of the mayor to make sure it was shown in a good light. The other one I think that brought to mind as you were talking, Peter, was the MassHousing, which was a situation where it was a major construction project and the chair had some back of the envelope, if you will, sense of how high the cost increases could be. And they came to market and none of that got disclosed. The defense was, gee, we were afraid that if we had disclosed that, it would tip our hand to the very contractors that we're dealing with, and we didn't therefore want to show what the number could be. I mean, that's a situation where I think they really, with that number, either they could have disclosed it and tried to put it into some context that it was simply a rough estimate and was subject to further negotiation, or if it was that sensitive, simply delay the offering until they had a number more closely pegged. So, you know, there is a spectrum here. It can be simply negligence. It can be something like Allen Park where you have one or two individuals. Or it can be something like MassHousing where one could argue in defense that they thought they were doing something that was for the betterment of MassHousing as a whole, and that ended up being a negligence count.

But how do you address it? I think one key way to address it is, once again, making sure the group is broad enough, the financing group is broad enough, there's enough eyes looking at this, that you're not going to have one person, whether it be the mayor or someone else controlling the disclosure. It's referred to by the SEC as an element. Making sure there's sufficient checks and balances, making sure you have the right people involved, and sensitizing through the training all of them about how important this is, so if you do have a situation where you have one or two individuals wanting to basically mislead information, somebody's going to raise their hand. Or you have a situation like MassHousing where there was this desire not to not to tip the hand during construction and somebody just stepping back and saying, no, we really need to have the perspective of not the taxpayers, but the perspective of the bond investors and what's best for them. So I think I think the political influence is similar to a lot of these factors, which is making sure that there's a broad enough group of people, all of whom have the proper training, so that once again you can bring these checks and balances to bear.

**Daniel Deaton:** Okay, and in essence sort of tie this entire topic up, and obviously we spent sort of, most of the time is going to be spent on this question of why. And there's the reason why we would spend so much time on this topic is because it creates the intellectual rails on which the rest of everything that goes with disclosure policy and procedures are there. And to tie that up is that although there is no direct requirement or affirmative requirement on the part of issuers to adopt disclosure policies and procedures, it has emerged as a major talking point by the SEC Enforcement Division and by the Commission itself simply because the Enforcement Division has repeatedly run into these problems of silos and lack of training and political influence. And the SEC sees disclosure policies and procedures as key in solving those consistent problems that they are running into over and over again.

**John McNally:** And I think it's worth pointing out, Dan, on that note, too, that the MCDC Initiative, in addition to the SEC highlighting this in a lot of enforcement actions and using the phrasing in *New Jersey* that but for the lack of it, they wouldn't have had the bad disclosure, in

the MCDC Initiative, as a condition to settlement for both the underwriters – once again, this is a voluntary initiative dealing with the adequacy of your disclosure about your compliance with 15c2-12 – as a condition of settlement for both the underwriters and issuers, they are requiring, if you want this settlement on these favorable conditions, you shall adopt disclosure procedures.

**Slide 5 – What Should Disclosure Policies and Procedures Cover? (54:08)**

**Daniel Deaton:** Yeah. And it's really become just right on the forefront of everything the SEC's been doing. So John, can you lay out from your perspective, what are the core components of a good disclosure policy and procedure?

**John McNally:** Okay. There's a number of elements. I'll just hit the major ones. But clearly you want to have it in writing. You want to identify who's going to be responsible for which portions. You want to have the checks and balances we discussed. The first thing you have to do is identify exactly what documents are going to be part or going to be subject, if you will, to these written procedures. And there's different ways of doing that. Now, the one way of doing that would be to make sure that every document that could potentially subject the issuer to securities or liability would be covered through these procedures. But that can get, frankly, very comprehensive. You're talking about preliminary and final official statements, you're talking about information that's both the annual financial information that you are contractually obligated to be filed, you are talking about voluntary filings with EMMA, rating agency presentations, investor road shows, material that you give to institutional investors, investor web page, etc.

So the first thing, the key questions and I can come back in how to do this. One, what documents are the procedures? Once you decide, yes, I've listened to these folks, it makes a lot of sense, it's going to provide us a defense, how do we do this? What documents are you going to cover? I think at a minimum, it should cover your POSs and whatever you're filing with EMMA. And then you can consider how much more broadly you want to have the documents covered.

You need to identify who's going to do the reviewing of the procedures. You need to speak to how is that reviewing done? And by that I meant, is it simply conference calls? Are you going to have in person sessions of some sort? Are you going to have regular meetings? Who at the issuer level is required to authorize the distribution? In some jurisdictions, it has to go to city council. In others, it can be done by the finance director.

How do you evidence the approval? What kind of certifications are you going to develop? So they're what I would call the key questions, at least, you have to wrestle with. What documents to cover, who's going to do it, how is it done, what is the nature of the meetings and the training, and then how do you integrate the training into it. And we have done it different ways, and we can discuss that in different jurisdictions. But I think there are the key elements that need to be addressed.

**Daniel Deaton:** Okay and Peter, from your perspective when you came in, what were the…of those core components that John just described, which ones do you think are the key ones that you ran into in your investigation that seemed to be lacking?

**Peter Chan:** Yeah, I think, you know, there are actually a number. One is really the accountability. Because, you know, if you were to focus on let's just say the negligence theory first, it is when people don't know that they are accountable, they obviously act differently and also then, they look at other people and expect other people will take care of things as we saw in the State of Illinois. I think, for instance, when John mentioned things like the certification process and approval, that goes back to the core idea of being accountable in an individual way to the process. So I think one of the key things is really accountability. And along the line of that accountability and identifying, as John mentioned, the right people that will necessarily then allow a process where people will go out and try to make sure all the right information is collected. So accountability is really, from the SEC's perspective, one of the key components of the process.

**John McNally:** And I would say it on these lines, Peter, as I was mentioning, it is one thing in the procedures to say, Bill is accountable for this, Mary is accountable for that, etc. But when you take it a step further and say, and by the way, we want for the files a written certification which contains the 10b5-like language that speaks to the fact that you did attend the training and you're bringing those lessons to bear when you sign that certificate, and you're going to attach a list of who helped to put that together, and you attach a list of the sources – we have done that as well – it's amazing the heightened sensitivity you have. So the very same person can be held accountable for it and perhaps has been held accountable for years. But the mere fact that they're certifying it in writing and that certification goes into the deal file, the due diligence file, has brought up what I would call a heightened level of sensitivity to the importance.

**Peter Chan:** And Dan and John, this may be also a good time to mention the importance of having a process and procedures that are reasonable for the particular entity and therefore likely to be followed. Because the flip side of all of this is that if an entity has a written process and procedures that end up not being followed, and if the SEC comes looking because you are identifying what they believe to be a material misstatement, the mere fact that what are written on a book and not followed could very well make the case for the SEC in terms of proving negligence. So, again, what's on paper has to be reasonable, living, and breathing and fit the particular entity because ultimately it's good for disclosure. But the flip side of it is if a process is such that it is likely not to be followed, it would have the opposite effect of increasing the risk for the entity.

**Daniel Deaton:** Yeah. I think that's right. And let me go in a little bit just in a very focused way down these four elements that you talked about, John – the disclosures, reviews, documentation and training – and sort of highlight the point that Peter just made, which is that, you know, looking at kind of what disclosure should be covered, which disclosures would you say every issuer should make sure is in there? And which disclosures, John, or which information that would go out to the marketplace would you say may not be for everybody? And when would you say that an issuer should include them and when should they not? And Peter, if you could just add color commentary, that would be great.

**John McNally:** Well, yes. And, you know, I've done this for jurisdictions across the country. I've done it for large jurisdictions and small jurisdictions. And as Peter is mentioning, yes, as counsel we have to be sensitive and get a sense of how many people can, in fact, at the respective

issuer, be working on this? Are we developing procedures that go beyond what they need to do? And we have mentioned San Diego, and I will mention that one because that was the first one, I think, of any of these that was worked on. Just by way of background, there was the Sarbanes-Oxley Act of 2002 which applies to corporate entities. And what San Diego did was basically adopt an ordinance that brought, if you will, Sarbanes-Oxley concepts to a city. So the concept was: here we are; we had some concerns with disclosures in 2003, 2004; we have an ongoing SEC investigation; what can we do to show that we know what we're doing? So we worked on it, as did other counsel. There was an ordinance adopted. We then adopted comprehensive rules and procedures. And the SEC, in addition to the federal statute, the SEC published rules in August, 2002, and let me just quote from the summary, the SEC summary, "We are adopting proposed rules to require issuers to maintain and regularly evaluate the effectiveness of disclosure controls and procedures designed to ensure the information required to be filed under 1934 Act is recorded, processed, summarized and reported."

So we came in and said, okay, let's adopt how we would do this were it to be a municipality. So we very broadly defined what a disclosure document was to be basically anything that could potentially get them in trouble, ranging from the POS, all the way down to things like what I would call the text portion of their financials, namely, for example, the notes and the MD&A. So you define the disclosure document. We required that any disclosure document as broadly defined, go through and be approved by a separately established by ordinance working group, which is a broad cross section of area city officials. We had the key sections of at least the official statement certified by department directors. We require the city to keep what we call an auditable trail. So for the official statement we know not only the persons, but the source materials they use for each section. Using the Sarbanes-Oxley concept of wanting management to take responsibility personally, we had the counterpart, the mayor and the city attorney, sign the OS. And as I mentioned before, it's approved by the city council. And then we have the comprehensive training. And then require the city at least annually to review the efficacy of the procedures.

So that is one standard. If one were to take corporate standards and apply them to a municipality, how would you do it? We had another issuer, a relatively small issuer. They had no procedures. They were starting from ground zero. The question was what to do. We decided in that case to get them used to the concept of having a review by committee, having the training, sensitizing them to the importance of it. But we limited that to their continuing disclosure to make sure that their annual filings were timely done, were accurate and that they carefully reviewed it. Because we felt comfortable that when they came to the market with their official statements, that there would be a very comprehensive financing team working on it. So we went from comprehensive corporate-like standards all the way down to saying, you know, in the first instance let's at least sensitize them to the importance, let's get the training and let's get the continuing disclosure under control. And then the middle ground which we did for another jurisdiction, we did have the certification process. We didn't go with all the litany of disclosure documents, but we did require them to subject to the procedures both their official statements and any filings that they were doing with EMMA, whether it be contractual or voluntary.

So I think a theme here, as much as we're emphasizing the importance of these procedures, the importance of the training, what ideally would be the components, each one of us as counsel has

to say what is going to work for this issuer at this point in time? What are the resources can they dedicate to it? And as Peter was mentioning, not having it be so cumbersome, if you will, that they'll not be complied with and therefore makes it all too easy to prove they were not reasonable in the approach they took. What I'm finding is that for those issuers that are under SEC enforcement action and investigation, there's a sensitivity by which they say, well, whatever. But in other cases, it's, okay, what do we think is appropriate at this juncture? Once again, a tremendous spectrum. The National Association of Bond Lawyers website does have examples of all these up there. And in addition, Dan, you might want to mention that the paper that you helped to chair, that there is not what we call a template, but rather some guidelines that's annotated about how to do these disclosures, how to do these procedures.

**Daniel Deaton:** Yeah and what factors would be included into that. Yeah.

**John McNally:** Right.

**Daniel Deaton:** And let me ask and I think on the reviews, what reviews should be managed. You know, we've touched on that in terms of, you know, most importantly making sure that there's enough accountability, making sure that whatever silos – I mean, the reviews really go a lot to the silos, the silo effect and so on, which makes sense with making sure that everybody who ought to be involved is involved in the process. But what about documentation? You talk about certification and you talk about people signing their name to a piece of paper. I mean, is that the only way? In other words, what is sort of the spectrum of documentation? And let me ask that question to John, and then Peter, if you could answer the question from an SEC Enforcement Division investigator's perspective, what kind of documentation would you expect to exist concerning whether people comply with their disclosure policies and procedures. So John, describe the spectrum of what you think are the available options there for reasonable approaches and why one would be good versus the other. And Peter, what your perspective on that would be.

**John McNally:** Well, I mean, ideally, if I'm disclosure counsel and I can draft what I think are comprehensive certifications, once again, I'm going to want that person to tell me that they reviewed the document in its entirety. They're not simply updating it. They understand how this fits into the disclosure as a whole, that they have participated in the training, and then also that they're going to give me a list of those persons that assisted in the compilation, and that those persons assisted in the training. And then I do request that if possible, they give me as attachments both the names of the contributors as well as the documents that support. So they're going to certify, let's say, to the whatever, the pension section. They're going attach that certification to the pension section. They're going to give me a list of those persons that worked on it within the respective issuer. And then they're going to give me the auditable trail. They're going to tell me the source for this was the following documents.

Just as an aside, and this relates to the disclosure procedures, you know, we have been talking about making sure that we have the comprehensive review, for example, by city officials. Some areas like pension in particular, more recently what we have been doing, if we can, is also get outside parties not to certify in writing because I understand the reluctance of actuaries to do that, but at least to have the benefit of their review to make sure that we're not missing something

as we are trying to put this together. So that is another element we haven't mentioned, which is going beyond, if you will, the immediate working team. And who else do you possibly want to bring in to at least have review it and get the benefit of their review?

So that's one end of it. You know, the other I guess the other end of the spectrum would be as disclosure counsel, keeping a careful list of who's sending you what, so at least you can then keep for yourself, if not for the issuer, a comprehensive file as to the as to the sources, which is something shy obviously of the written certification. But the reason I emphasize the written certification is because I've seen it, and it's not that hard to simply write it. It's not that hard for the issuer to do it. But, yes, you get resistance, but it brings, it brings really a heightened level of sensitivity and responsibility where I have seen disclosures that were routinely updated suddenly getting carefully revised. It just it just brings, once again, a focus that I think is missing if you don't do that additional step.

**Peter Chan:** And Dan and John, I think as a follow-up to that, a classic example from, you know, if you look at, let's say, if there's an unfortunate situation where an entity is being looked at by the SEC enforcement staff because of concern about a material misstatement potentially, one way to look at the documentation is that this would be potentially the evidence of the entity's reasonableness and good faith. So to give you an example, hypothetically speaking, let's say if within the participants in a disclosure process by an entity, there was a difficult issue as to whether something needed to be disclosed or not, either because of materiality or other issues. And let's say if that group of people in good faith, you know, tried to get the right decision making, tried to get all the right information, decide that on this very difficult issue, this is the best way to, you know, disclose the issue and other facts may not be necessary.

You know, it's one thing to then have documentation contemporaneously, or soon thereafter, that in writing, document that deliberation in good faith. It's another thing to, when if the SEC comes back in later, looks at that same issue to just have all the participants say, yes, we don't really have documentation on this high-risk issue, but trust us. We talked it through and decided this was the right thing. I think obviously the former, i.e. contemporaneous documentation on the good faith deliberation would be much more appealing and convincing to the SEC enforcement staff than an after the fact verbal recollection saying, you know, I think we talked to the right people. Just trust us. Because obviously enforcement staff, if it sees potential misstatement, it's going to necessarily have that skepticism as to whether the right things are done.

But the other thing about documentation, particularly on high-risk issue, is that the process itself creates a discipline, which is, if you're going to document how as a group you have arrived at the right decision, in looking at that documentation, which obviously has to be accurate, you are going to look at it and say, gee, if someone else, such as the SEC, look at what we have just written down as our good faith deliberation, does that sound right? And very often, particularly some of my clients, when they look at the documentation that they start drafting about how they're in compliance, how they exercise good faith, in looking at that documentation, they realize, you know what? Now that I look at it in writing, sounds to me we need to take additional steps or maybe we should be disclosing after all on this particular issue because in looking at the documentation, it doesn't sound right to me. So it is both for outward in terms of showing good

faith in a concrete, convincing way, but also it creates a discipline of double-checking to make sure you have done the right things.

**John McNally:** Peter, a true story is. That's an excellent point. And the three of us have done these panels before and you have raised that before. I have used exactly that where I quote a distinguished former official from the SEC to the effect that if the SEC comes in and thinks the answer is X, but the issuer, after careful, deliberate process following its procedures quoted the answer as Y, the way you phrase it is, when I come in there and see that, I'm probably not going to bring an enforcement action. And that's a very strong point as far as making the issuers understand how critical the certifications and the documentation can be.

**Peter Chan:** And as a follow-up to that, one is that that's exactly right. The SEC enforcement staff, you know, the staff is trying to promote the public interest, so they're not out there trying to play gotcha. They are trying to identify situations where it would make sense to do a case. And so when the staff sees evidence of reasonableness and good faith, just as a matter of prosecutorial discretion, they're not going to chase after people just to do it. I guess my second point is I very much appreciate, John, you recognizing me formally as a distinguished SEC official.

**Daniel Deaton:** As distinguished. As distinguished.

**John McNally:** Absolutely.

**Slide 6 – What is the right way to develop good Disclosure Policies and Procedures? (1:17:20)**

**Daniel Deaton:** So let me move on to the next topic of how. And, you know, there's been sort of a couple of considerations we have already sort of talked about here. You know, one is that the disclosure policies and procedures in many regard is really tackling these sort of reoccurring problems and identifying exactly where the unique aspects of an organization and being able to sort of tackle those. And the second one is the one that Peter mentioned, which is that, you know, the danger that is associated with a disclosure policy and procedure being on record and not being followed and can actually hurt an issuer rather than help an issuer.

And, you know, we with respect to the NABL disclosure policy and procedure paper, there was an enormous amount of concern, and justifiably so, that issuers don't just sort of drag that friendly form from some neighboring jurisdiction, or from somebody that they found, change the names and dates to protect the innocent and just adopt that. But, you know, John, you know, as you have dealt with this, then if that's the case, you don't just drag the form, and you've got these considerations. Two questions. I mean, how do you go about doing this? What's a good way you sit there and go, I'm convinced. I'm converted. I'm going to go adopt these disclosure policies and procedures. And I'm going to make sure that they contain the right thing. What's the first step? How do you go about putting these in place? And can you talk about maybe, you have alluded to it earlier, but give us sort of three examples that range from one end of the spectrum to the other of how you've gone about the process of putting disclosure policies and procedures just to give a context for how that happened.

**John McNally:** Yeah. And I did go through sort of the range of what can be done. Once again, San Diego goes all the way back to adopting it in 2004. In some sense, even though that's very

comprehensive and basically is a corporate standard, it was, once again, under, if you will, the then current SEC investigation. It was relatively easy to get by in by saying we think, if you will, this is the gold standard. This is the standard that applies to corporate entities. And it was a relatively smooth process.

The two things we have been emphasizing here. I think the first question going into – so leaving San Diego aside – going into other jurisdictions, it's a question of initially just sitting down with them and finding out what are they doing now, because if they're, assuming they're an experienced issuer, there is some method by which they're getting the official statement disclosure put together. There is some method by which the continuing disclosure is prepared and filed. So, you know, one end of the spectrum about how easy or hard this is would be, you sit down with a finance director and perhaps a law department, go through how they do things now, and it may be that it's nothing more than putting into writing what they otherwise do. That would be the ideal situation. So I think and even if they don't have something as comprehensive as you'd ultimately like to see, you do need to find out just what are the resources they can bring to this, how they do it now, so when you do implement something which would have some of the core elements we discussed, that they can see it as integrated into what they do.

And I think, in addition to finding out what they do now, it's being sensitive as counsel and listening to the issuer as to what they think is realistic because when we did introduce or recommend, or at least give as a model San Diego to another jurisdiction, there were a number of things where they said, well, we don't want to take it to the city council. And just as an aside, Orange County does not require that. There was some concern that having every document that could potentially subject them to liability was much too comprehensive. So you just have to be sensitive to that. Find out what they're doing now. Make sure at least it has the core elements in it. And once again we keep referring to this paper that was put together. It does list on page 2 what are the core elements, what disclosures are covered, a clear statement of the process by which the disclosure's going to be prepared, inclusion of adequate supervision and reasonable disbursement of responsibility, and then provision of training.

So you have the four core elements there. And this is not simply NABL's position. These were laid out by the SEC in a speech that we drew upon in putting that paper together. But with those core elements, there then is this full range we have been discussing. So once again, at a minimum, have the core elements. Interview the officials to find out what they do now to make sure you have a sense of what is realistic and how it can be seamlessly integrated. And then a sensitivity to just what they can realistically be able to obtain. Dan, back to you.

**Peter Chan:** And Dan and John, just as a follow-up to that just to re-emphasize John's point. I think understanding the culture and the practical stress points of an entity as part of the interview and understanding of the issuer is important. To give an example, I suspect that in some situations the stress point is going to be resource, but also the nature of the personnel. You know, just to highlight from my past example from a case study standpoint where you have school districts where most of the people that otherwise might be participating in the disclosure process are also busy running a school district and running a school. And situations where, you know, there might be a history of turnovers, and understanding that stress point will necessarily inform the types of policy and procedures. There will be situations in culture where because of a large

entity, different departments typically either because of a variety of reasons do not and don't like to communicate with each other. And with that kind of culture that will necessarily inform a particular type of process and procedure. So understanding the culture and the stress points of the particular entity is a very important starting point.

**Daniel Deaton:** Yeah. And I think that in the paper that we worked on in terms of crafting disclosure policies, that's, Peter, what you just described, I think from your perspective as a former member of the enforcement division of the SEC, you've stressed that over the years that really the issue is here is, and John you mentioned it a second ago, local governments, local issuers, have very good process usually. There's a lot of process there. And usually that process is there for good reason, right? And so one of the big concerns is overlaying some sort of mechanistic structure onto an extant process that actually makes it less likely for them to actually follow the process, but even more so can actually serve as an obstacle as Peter alluded to. Some sort of a mechanistic process that's counterintuitive. And so in that paper, we stressed heavily that issuers should start, or counsel advising issuers should start, with the processes they already follow, their practices. And what do you do now? And usually there's good reasons why those things are being done.

But really what you're saying, Peter, is the next step the paper really emphasized the importance of studying your culture. Okay? So you start with your practices. Now study your culture as an issuer. And ask, you know, sort of, you know, you've got these three problems that the SEC has identified in its enforcement actions. The silo effect has been well-documented, the lack of training which really is a way of saying that people in state and local government can tend to be focused on their own dynamics and not focused out to investors, and then in terms of political considerations. And what it really warrants is a studying effort by the issuer of saying, what are our obstacles? What are our issues? What are our cultural shortcomings potentially that could get us in the end in terms of disclosure? And the idea is to look at the practices, write them down, as John described, but make enhancements necessary to tackle problems that might exist within that culture. So if there are notable silos, if there’s a lot of problems in terms of getting the right kind of reviews, or whatever that is, whatever the unique issues or problems within the issuer, this is the time, the how question about disclosures and policies and procedures. This is the time to study your culture and make sure the disclosure policies and procedures compensate for any sort of potential gaps that may exist within the process. And Peter, I don’t know, from your perspective, you know, I think that in your investigations, I think you were a bit surprised to find that issuers really had never stopped to study themselves in that kind of a way. Do you think that's fair and can you give a couple of examples on that?

**Peter Chan:** Sure. You know, in one case where I dealt with a school district, again, perfectly fine people that were, you know, focused generally in terms of doing the right thing. But because of the turnover situations and so forth, no one ever had the bird's eye view of saying, you know, what are all the information? Is it correct? And so forth. Because they were so in the moment as I mentioned before, sometimes in the fog, such that it became a mechanical process of just getting a bunch of paper and then signing it within, you know, less than five minutes. And being able to step back and understand the culture and the stress point, what would have, frankly, taken care of the problem. But, again, I also have seen situations in large entities where, you know, within let's say a large state or city, it is not a single entity. There's so many moving parts, so many

departments. And some of them recognize their disclosure process, others did not, and no one actually ever stepped back and say, do we have a process that will include all the right people? And I think part of the danger here, you know, just to kind of crystallize everything, is that as far as the SEC is concerned, as far as a practical, reasonable reality is concerned, it is not good enough to say, this is how we have been doing things for the last 20 years, so it must be okay. Periodically, there needs to be that step back to say, how are we doing? What is the process? And again, I think, Dan, you once mentioned this in terms of explaining to the client, the most important thing, which is being able to get the issuer and this personnel sensitized to the fact that the ultimate goal is to get to the investing public the information that they care about. Start with that, end with that, and make sure that's sensitized to the entire process. And if that's part of the culture, I think that goes a long way in making sure that there's good compliance.

**Daniel Deaton:** Okay. Good. So we are at 11:30, so we're nearing the end. And I'm going to wrap up here. I'm just going to give my thoughts and then, you know, John and Peter, if you could give any closing thoughts. Just pulling back, as Peter just said. For me, the concept of disclosure policies and procedures is a lot more like what Peter described. It's not some form, it's not some mechanistic process. The disclosure policies and procedures is where an issuer studies its own processes, studies its own practices and does really sort of a couple things with them. First, they systemize it. An issuer systemizes it. I think one of the biggest issues is making sure that the process and the practice doesn't depend on a particular individual and that it is a written systemic process, that is followed by everybody and that everybody understands it needs to be followed. The second major step is one where the issuer takes that step back that Peter is talking about and studies their culture and says, you know, where could we get hung up? Where are our unique problems as an organization? And what kind of, what steps do we need to follow to make sure we don't follow that? And so in that sense the disclosure policies and procedures process is a very holistic process. It is very organic and unique to that issuer. And therefore, this is why there is so much concern about just downloading a form and adopting it, is that the process of going without disclosure policies and procedures is as important as the procedures themselves. John, do you have any closing thoughts and then Peter and then we'll close it out?

**John McNally:** Yes, thank you. So you were talking about the, you know, your closing comments were about the why. Let me just go back. Or rather to the how. Let me just go back to the why for my closing remarks. The two obvious ones. I like to think it improves the quality of disclosure, and by that I mean also not simply addressing everything, but doing it in a plain language way that the investor can understand. So I think these policies and procedures can improve the quality of disclosure. They can, we'd like to think, lessen the possibility of having either a material misstatement or an omission. And what is unique to governmental issuers is that there is no absolute liability. We're trying to establish a defense to either negligence or recklessness or intent. And we have been told by the SEC that comprehensive procedures, associated training, and following them, and showing that there was a comprehensive way in which they were utilized, you can establish this defense. So it's a good thing all the way around. The other thing we have been hearing is from the issuers is the receptivity they're getting both with the rating agencies and the institutional investors, that to the extent the rating agencies are actually asking, do you have procedures? What are the procedures that were brought to bear in order to produce this disclosure? So you're going to lessen the possibility of a problem, you're

going to have greater receptivity in the market, the rating analysts are focused on it, and once again, you can establish this defense. So, Peter.

**Peter Chan:** One of the things I want to highlight is that, you know, both John and Dan are a part of the NABL effort in drafting this white paper regarding disclosure policy. I want to congratulate both of them, but also NABL, on this very important proactive step because it really provides a very good starting point on how to deal with this critical issue on adequate disclosure to the investing public in bond offering. So one key takeaway of this entire webinar, and I see the large number of participants that are attending this webinar right now, so I would say as a shout out, is after this webinar, go take a look at what is attached. And just take a look at this white paper and I think that would be a very good start.

The other thing is that, you know, CDIAC has been very proactive in providing education to issuers and frankly even outside of the state of California on this important subject. And so I will say to those, the large number of people who are attending, you know, you already have taken the first important step in educating yourself, but spread the word. Spread the word to your colleagues as to the importance of disclosure policy because I think this is within the municipal market one of the key issues that will dominate how things are done for years to come. So spread the word and continue to get yourself educated, both through resources of NABL, CDIAC and other resources. Thank you very much.

**Daniel Deaton:** Okay. Thank you. I think that concludes our webinar. Mark Campbell, do you want to take this over now?

**Slide 7 skipped**

**Slide 8 – Upcoming Programs** **(1:35:21)**

**Mark Campbell:** I will, but only to say thank you. All of your closing comments there really covered what I would have addressed. Clearly, disclosure is an important topic for the market and therefore important to CDIAC. We have done programs in this area. Those are available on our website. We will continue to do them in the future. Your screen is indicating the upcoming programs that we have. We do have a webinar specifically directed to the Post-MCDC Initiative: What We Have Learned as Issuers. It will it will be conducted by the same three speakers here today. So please, I would suggest you get online. Registrations are being taken now. Register for that. It will be a slightly different perspective on disclosure, but, again, follow-up on the actions of the SEC through the MCDC program. So with that, we do have some upcoming seminars I will have you take a look at. And look forward to having you online in a future webinar. Thank you very much for your participation and your attendance throughout the program. We maintained the registration and the numbers, which is indicative of the content. Thank you, again, to Dan, John, and Peter for a great program. Take care.

**Peter Chan:** Thank you.

**Daniel Deaton:** Thank you.