

*Quarles & Brady* LLP



# Disclosure Responsibilities of Issuers

Ehlers' Wisconsin Public Finance Seminar

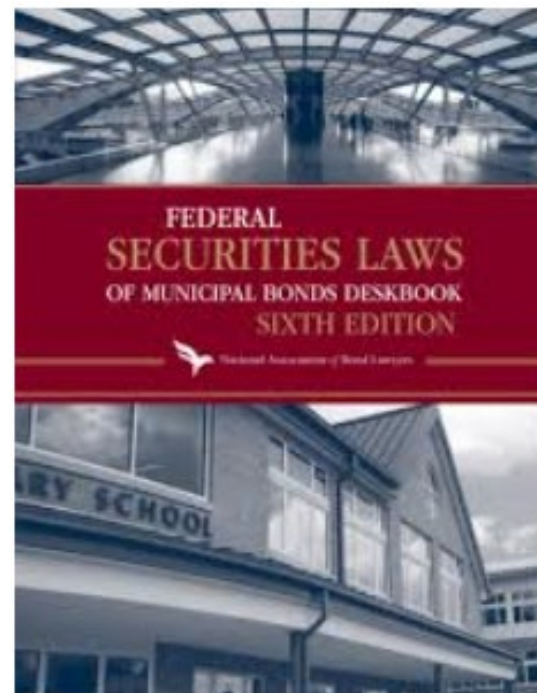
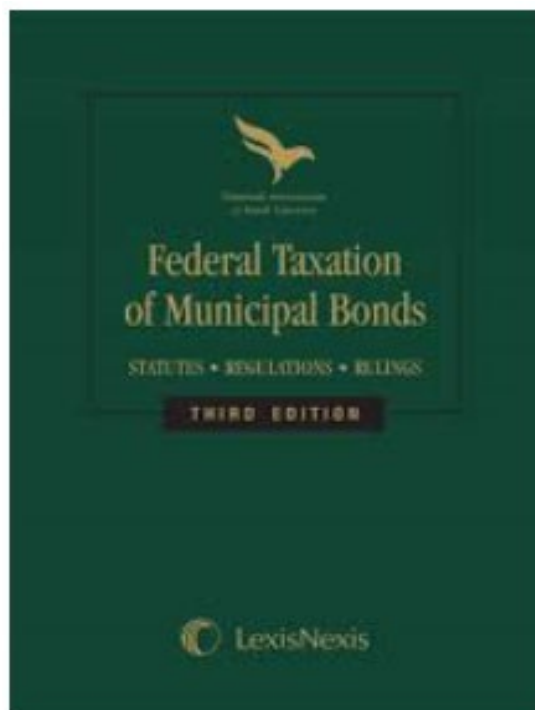
February 2023

# Roadmap:

- Understand basic securities law considerations
- Understand the role of primary disclosure (the Issuer's offering document)
- Understand the role of secondary / "continuing" disclosure
- Understand nature of enforcement trends and what the regulators are currently focused on
- Best Practices and the use of Disclosure Counsel

Part I: Securities Law – Basic Considerations

## Securities Law – Increasingly Important



## **Securities Law – Increasingly Important**

- Securities Act of 1933, Securities Exchange Act of 1934
- 1975 Amendments creating the Municipal Securities Rulemaking Board
- 1989 Rule 15c2-12 (Preliminary Official Statement requirement)
- 1994 Amendments to 15c2-12 (Continuing disclosure)
- 2008-09 Great Recession . . . Dodd Frank Wall Street Reform Act
- 2012 SEC Enforcement Division Office of Municipal Securities
- 2012 SEC Risk Alert
- 2014 SEC Municipal Advisor Rules
- 2014-2016 MCDC Initiatives and Resulting Fines
- 2019 Rule 15c2-12 Amendments for "Financial Obligations"
- 2020 and later – COVID disclosure guidance, ESG guidance, cybersecurity guidance, etc.

## Overview of Federal Securities Laws

- **General**
  - State and local governmental bonds are exempt from the registration requirements of the federal securities laws
  - But such bonds are subject to the “anti-fraud” rules which prohibit materially misleading statements or omissions
  - So how do the Federal Securities Laws apply to Issuers:
    - Primary Disclosure
    - Secondary (Continuing) Disclosure

## Anti-Fraud Rules

- Under the Securities Laws that apply to municipal issues, Rule 10b-5 states:
  - In connection with the purchase or sale of securities, is unlawful to:
    - make an untrue statement of a material fact or
    - make a statement that is misleading, in light of the circumstances, due to the omission of a material fact
- "Material" = would a reasonable investor consider it important, and if disclosed, would it alter the total mix of available information in a significant way

Part II: Primary Disclosure

# Primary Disclosure



## Part II: Primary Disclosure

# Official Statement

FINAL OFFICIAL STATEMENT DATED JUNE 24, 2020

*In the opinion of Quarles & Brady LLP, Bond Counsel, assuming continued compliance with the requirements of the Internal Revenue Code of 1986, as amended, under existing law interest on the Notes is excludable from gross income and is not an item of tax preference for federal income tax purposes. See "TAX EXEMPTION" herein for a more detailed discussion of some of the federal income tax consequences of owning the Notes. The interest on the Notes is not exempt from present Wisconsin income or franchise taxes.*

*The Village will designate the Notes as "qualified tax-exempt obligations" for purposes of Section 265(b)(3) of the Internal Revenue Code of 1986, as amended, relating to the ability of financial institutions to deduct from income for federal income tax purposes, interest expense that is allocable to carrying and acquiring tax-exempt obligations.*

**New Issue** **Rating: S&P Global Ratings "AA- Stable"**

### VILLAGE OF SOMERS, WISCONSIN (Kenosha County)

#### \$1,660,000 GENERAL OBLIGATION PROMISSORY NOTES, SERIES 2020A

**PURPOSE/AUTHORITY/SECURITY:** The \$1,660,000 General Obligation Promissory Notes, Series 2020A (the "Notes") of the Village of Somers, Wisconsin (the "Village") are being issued pursuant to Section 67.12(12), Wisconsin Statutes, for public purposes, including financing street improvement projects and refunding certain obligations of the Village. The Notes are general obligations of the Village, and all the taxable property in the Village is subject to the levy of a tax to pay the principal and interest on the Notes as they become due which tax may, under current law, be levied without limitation as to rate or amount. Delivery is subject to receipt of an approving legal opinion of Quarles & Brady LLP, Milwaukee, Wisconsin.

**DATE OF NOTES:** July 15, 2020

**DATE OF DELIVERY:** July 15, 2020

**SERIAL MATURITIES:** May 1 as follows:

Year	Amount	Interest		CUSIP Base 83459C	Year	Amount	Interest		CUSIP Base 83459C
		Rate	Yield				Rate	Yield	
2021	\$165,000	2.000%	0.300%	BY0	2026	\$235,000	2.000%	0.800%	CD5
2022	\$165,000	2.000%	0.350%	BZ7	2027	\$125,000	2.000%	0.950%*	CE3
2023	\$125,000	2.000%	0.400%	CA1	2028	\$125,000	2.000%	1.050%*	CF0
2024	\$235,000	2.000%	0.550%	CB9	2029	\$125,000	2.000%	1.150%*	CG8
2025	\$235,000	2.000%	0.650%	CC7	2030	\$125,000	2.000%	1.200%*	CH6

**INTEREST:** May 1, 2021 and semiannually thereafter.

**OPTIONAL REDEMPTION:** Notes maturing on May 1, 2027 and thereafter are subject to call for prior optional redemption on May 1, 2026 or any date thereafter, at a price of par plus accrued interest.

**PAYING AGENT:** Bond Trust Services Corporation.

**BOND & DISCLOSURE**

**COUNSEL:** Quarles & Brady LLP.

**MUNICIPAL ADVISOR:** Ehlers and Associates, Inc.

**BOOK-ENTRY-ONLY:** See "Book-Entry-Only System" herein (unless otherwise specified by the purchaser).

The Notes are offered, subject to prior sale, when, as and if accepted by the Underwriter named below and subject to an opinion as to the validity and tax exemption by Quarles & Brady LLP, Milwaukee, Wisconsin, Bond Counsel, and certain other conditions. Quarles & Brady LLP will also act as Disclosure Counsel to the Village. It is expected that delivery of the Notes will be made on or about July 15, 2020 against payment therefor. Subject to applicable securities laws and prevailing market conditions, the Underwriter intends, but is not obligated, to effect secondary market trading in the Notes. For information with respect to the Underwriter, see "Underwriting" herein.

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## Part II: Primary Disclosure

# Official Statement – General

- The Official Statement is the "offering document" that is used to market and sell the securities
- The primary responsibility for the offering document rests with the Issuer – regardless of who prepared the document
- The purpose of the Official Statement is to include the information about the securities and the issuer to permit potential investors to make an informed investment decision in securities
- The Official Statement provides a description of the securities, a variety of information about the issuer (e.g. financial information, pension/OPEB, socioeconomic and demographic data, etc.) and discusses potential risks
- Attention should also be focused on areas the regulators and market participants are focused on (more to come on this!)

## Official Statement – Important Considerations

- The Official Statement is legally the Issuer's document
- The securities law (including Rule 10b-5) requires that the issuer conduct due diligence to ensure that the Official Statement is accurate and complete
- From the Securities & Exchange Commission:
  - Although the Official Statement may be prepared by the underwriter or financial advisor, "the official statement is legally the issuer's document. The issuer has ultimate responsibility for the ensuring its official statements meet the disclosure standards of the securities laws and primary liability for failure to meet them."

## Official Statement – Important Considerations

- Complying with the anti-fraud rules requires Issuers to conduct satisfactory due diligence regarding the Official Statement used to sell bonds to investors
- Officials of the Issuer sign certifications attesting that the Official Statement is accurate and complete
- There is a lower standard for certain "expertized" sections
- But a higher standard for sections for which the issuer is the ultimate source of information
- The underwriter and/or financial advisor's preparation or review of the Official Statement does not eliminate or diminish the Issuer's responsibilities regarding review of the Official Statement

# Secondary / "Continuing" Disclosure

## Part III: Secondary Disclosure

# Continuing Disclosure Agreement

- Issuer's agreement to provide information for the life of the bonds

### CONTINUING DISCLOSURE CERTIFICATE

This Continuing Disclosure Certificate (the "Disclosure Certificate") is executed and delivered by the Village of Somers, Kenosha County, Wisconsin (the "Issuer") in connection with the issuance of \$1,660,000 General Obligation Promissory Notes, Series 2020A, dated July 15, 2020 (the "Securities"). The Securities are being issued pursuant to a resolution adopted on June 23, 2020 (the "Resolution") and delivered to BOK Financial Securities, Inc. (the "Purchaser") on the date hereof. Pursuant to the Resolution, the Issuer has covenanted and agreed to provide continuing disclosure of certain financial information and operating data and timely notices of the occurrence of certain events. In addition, the Issuer hereby specifically covenants and agrees as follows:

**Section 1(a). Purpose of the Disclosure Certificate.** This Disclosure Certificate is being executed and delivered by the Issuer for the benefit of the holders of the Securities in order to assist the Participating Underwriters within the meaning of the Rule (defined herein) in complying with SEC Rule 15c2-12(b)(5). References in this Disclosure Certificate to holders of the Securities shall include the beneficial owners of the Securities. This Disclosure Certificate constitutes the written Undertaking required by the Rule.

**Section 1(b). Filing Requirements.** Any filing under this Disclosure Certificate must be made solely by transmitting such filing to the MSRB (defined herein) through the Electronic Municipal Market Access ("EMMA") System at [www.emma.msrb.org](http://www.emma.msrb.org) in the format prescribed by the MSRB. All documents provided to the MSRB shall be accompanied by the identifying information prescribed by the MSRB.

**Section 2. Definitions.** In addition to the defined terms set forth in the Resolution, which apply to any capitalized term used in this Disclosure Certificate unless otherwise defined in this Section, the following capitalized terms shall have the following meanings:

"Annual Report" means any annual report provided by the Issuer pursuant to, and as described in, Sections 3 and 4 of this Disclosure Certificate.

"Audited Financial Statements" means the Issuer's annual financial statements, which are currently prepared in accordance with generally accepted accounting principles (GAAP) for governmental units as prescribed by the Governmental Accounting Standards Board (GASB) and which the Issuer intends to continue to prepare in substantially the same form.

"Final Official Statement" means the Final Official Statement dated June 24, 2020 delivered in connection with the Securities, which is available from the MSRB.

"Financial Obligation" means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). The term Financial Obligation shall not include municipal securities as to which a final official statement has been provided to the MSRB consistent with the Rule.

**Section 4. Content of Annual Report.** The Issuer's Annual Report shall contain or incorporate by reference the Audited Financial Statements and updates of the following sections of the Final Official Statement to the extent such financial information and operating data are not included in the Audited Financial Statements:

1. DEBT - Direct Debt
2. DEBT - Debt Limit
3. VALUATIONS - Current Property Valuations
4. TAX LEVIES AND COLLECTIONS - Tax Levies and Collections

Any or all of the items listed above may be incorporated by reference from other documents, including official statements of debt issues of the Issuer or related public entities, which are available to the public on the MSRB's Internet website or filed with the SEC. The Issuer shall clearly identify each such other document so incorporated by reference.

### Section 5. Reporting of Listed Events.

(a) This Section 5 shall govern the giving of notices of the occurrence of any of the following events with respect to the Securities:

1. Principal and interest payment delinquencies;
2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the Securities, or other material events affecting the tax status of the Securities;
7. Modification to rights of holders of the Securities, if material;
8. Securities calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution or sale of property securing repayment of the Securities, if material;
11. Rating changes;

## Continuing Disclosure Agreement

- Municipal bonds and notes are subject to SEC Rule 15c2-12, which regulates the timing and production of disclosure documents by brokers, dealers and underwriters of municipal securities
- SEC Rule 15c2-12 requires continuing disclosure agreements to be entered into by most issuers of municipal bonds and notes to provide annual reports and notices of "material events"
- Antifraud rules apply in the case of continuing disclosure filings
- Failure to comply with continuing disclosure obligations must be disclosed in subsequent Official Statements
  - Heightened SEC scrutiny on this (MCDC Initiative)

## Continuing Disclosure and Securities Laws

- The anti-fraud rules can attach to issuer statements other than just primary disclosure (official statements) and secondary disclosure on EMMA
  - 2021 Staff Legal Bulletin – securities laws standards apply where an issuer/its officials are deemed to be "speaking to the market"
- SEC's position = when the issuer releases information to the public that is reasonably expected to reach investors and the trading markets
- "Puffery" (statements too general for a reasonable investor to rely on) generally ok, but be careful if sufficient factual information is not otherwise provided
- Be aware of selective disclosure to only certain investors



## Part III: Secondary Disclosure

# New Material Events – Financial Obligations

- For CDAs entered into after 2/27/19 – two new material events regarding "Financial Obligations":
  - *“(15) Incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and*
  - *(16) Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties”.*
- A “financial obligation” means a debt obligation; derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or a guarantee of either a debt obligation or a derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt
- Financial obligations can include things like bank loans, State Trust Fund Loans, privately placed debt, guarantees, and leases (in certain circumstances)

# Enforcement Trends and SEC Priorities

## Part IV: Enforcement Trends

# Securities Law – Increasingly Important

- Securities Act of 1933, Securities Exchange Act of 1934
- 1975 Amendments creating the Municipal Securities Rulemaking Board
- 1989 Rule 15c2-12 (Preliminary Official Statement requirement)
- 1994 Amendments to 15c2-12 (Continuing disclosure)
- 2008-09 Great Recession . . . **Dodd Frank Wall Street Reform Act...**
- **2012 SEC Enforcement Division Office of Municipal Securities**
- **2012 SEC Risk Alert**
- **2014 SEC Municipal Advisor Rules**
- **2015 MCDC Initiatives and Resulting Fines**
- **2019 Rule 15c2-12 Amendments for "Financial Obligations"**
- **February 9, 2021 – Acting SEC Chair announces the SEC would allow more enforcement supervisors to authorize investigations, reversing scale back during Trump administration**

## Securities Law – 2012 Risk Alert

- **2012 SEC Publishes National Examination Risk Alert: *Strengthening Practices of the Underwriting of Municipal Securities***
  - It endorses industry guidance (GFOA, NFMA), urges the use of checklists and due diligence calls, and describes levels of responsibility for due diligence
- **Recent SEC examination priority releases indicate that the SEC will focus on a variety of subjects including:**
  - stale financial statements;
  - offering documents that do not reflect changes in conditions;
  - undisclosed conflicts of interest;
  - misuse of bond proceeds;
  - municipal asset valuation (e.g., pension/OPEB);
  - "pay to play" violations;
  - municipal bankruptcy statutory frameworks;
  - bank purchases and related "municipal securities" analysis
  - COVID disclosure
  - *Cybersecurity risks (more later!)*
  - *ESG (more later!)*

## Securities Law – Significant Increase in Enforcement Actions

- Martha Haines, former SEC Office of Municipal Securities chief:
  - "Issuer officials who approve the issuance of bonds and/or the form of disclosure document should be aware that they have personal responsibilities under the securities laws. For example, a public official who approves the issuance of securities and use of a disclosure document may not authorize disclosure that the public official knows to be materially false and misleading; nor may that public official authorize disclosure while recklessly disregarding facts that indicate that there is a risk that the disclosure may be misleading. Of course, municipal officials can rely on experts, lawyers and financial advisors - just as officials in public companies do. However, that reliance must be *reasonable*. Officials who hide their head in the sand are not protected from potential liability."

## Securities Law – Significant Increase in Enforcement Actions

- Andrew Ceresney, SEC Enforcement Director, speaking in 2016:
  - "The Commission is bringing actions against more municipal issuers and public officials. For example, since the beginning of 2013, the Commission has brought enforcement actions against 76 state or local government entities...and 16 public officials. In contrast, for the entire 10 year period from 2002 to 2012, there were enforcement actions against 6 government entities and 12 public officials...**the most effective deterrent is individual liability**"

## Part IV: Enforcement Trends

# Transparency - EMMA

- EMMA = Electronic Municipal Market Access Dataport

### Issue Details

WAUKESHA COUNTY AREA TECHNICAL COLLEGE DISTRICT WISCONSIN GENERAL OBLIGATION  
PROMISSORY NOTES SERIES 2011A (WI)

WAUKESHA CNTY WIS AREA TECH COLLEGE DIST PROM NTS-SER A (WI)\*

Dated Date: 05/03/2011

Underwriting Spread Amount: Not Disclosed - Competitive Sale

Closing Date: 05/03/2011

→ View issuer homepage: WAUKESHA CNTY WIS AREA TECH COLLEGE DIST | → See other issues by this issuer

Final Scale Official Statement **Continuing Disclosure** Trade Activity

View continuing disclosure or advance refunding document, which provides important information about the security after initial issuance.

### FINANCIAL INFORMATION & DOCUMENTS

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**Most Recent** FY 18 Adopted Budget for the year ended 06/30/2018 posted 06/14/2017 (7.3 MB) [details](#)

#### Audited Financial Statements or CAFR

[FY 16 Approved CAFR for the year ended 06/30/2016 posted 01/11/2017 \(6.1 MB\)](#) [details](#)  
[2014/15 CAFR for the year ended 06/30/2015 posted 11/12/2015 \(24.4 MB\)](#) [details](#)  
[2013/14 CAFR for the year ended 06/30/2014 posted 11/18/2014 \(62.7 MB\)](#) [details](#)  
[2012/13 CAFR for the year ended 06/30/2013 posted 11/13/2013 \(4.9 MB\)](#) [details](#)  
[2011/12 Comprehensive Annual Financial Report \(CAFR\) for the year ended 06/30/2012 posted 11/20/2012 \(12.9 MB\)](#) [details](#)  
[FY 11 Official CAFR for the year ended 06/30/2011 posted 11/16/2011 \(8 MB\)](#) [details](#)

#### Budget

[FY 18 Adopted Budget for the year ended 06/30/2018 posted 06/14/2017 \(7.3 MB\)](#) [details](#)  
[2016/17 Adopted Budget for the year ended 06/30/2017 posted 06/21/2016 \(19.4 MB\)](#) [details](#)  
[2015/16 Adopted Budget for the year ended 06/30/2016 posted 06/12/2015 \(6.5 MB\)](#) [details](#)  
[FY 15 Adopted Budget for the year ended 06/30/2015 posted 06/11/2014 \(23.6 MB\)](#) [details](#)  
[2013/14 Adopted Budget for the year ended 06/30/2014 posted 06/12/2013 \(27.3 MB\)](#) [details](#)  
[2012/13 Adopted Budget for the year ended 06/30/2013 posted 06/13/2012 \(6.9 MB\)](#) [details](#)  
[FY 12 Adopted Budget for the year ended 06/30/2012 posted 06/15/2011 \(7.6 MB\)](#) [details](#)

### EVENT NOTICES

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**Most Recent** Cusip linkage dated 08/08/2016 posted 08/08/2016 (38 KB) [details](#)

## Enforcement Against Individual Entities & Officials

- Recent Years = Unprecedented Number of Enforcement Actions
  - City of Harrisburg (misleading budget report in mayor's public address)
  - City of Allen Park (control person liability)
  - City of Harvey and its Comptroller (enjoined offering of bonds)
  - State of Illinois (inadequate pension liability disclosure)
  - Town of Ramapo and Town officials (criminal charges)
  - Beaumont Financing Authority (failure to provide continuing disclosure)
  - College of New Rochelle (former controller made fraudulent statements in audits)



## Recent Enforcement Against Issuers and Individuals

- The SEC has brought actions against small issuers and for small transactions in recent years, not only large issuers and/or transactions.
  - Sterlington, Louisiana (pop = 2,045)
    - SEC charged town and former mayor in connection with \$5.8m revenue bond deal in which the offering document overstated historical and projected sewer connections and failure to disclose prior use of bond proceeds for reasons other than stated in the related offering document
  - Crosby ISD (student pop ~ 6,000)
    - SEC charged the district and the former CFO in connection with a \$20m bond issue for failure to disclose certain payroll and construction liabilities and overstating reserves

## Recent Enforcement Against Issuers and Individuals, Continued...

- Johnson City, Texas (pop = 1,717)
  - SEC charged chief administrator with fraud for falsifying documents and delaying audits to conceal fraud
- Rochester, NY
  - SEC charged the city, its former finance director and former school district CFO (and the city's financial advisor) in connection with a \$119m bond financing. The offering documents included outdated financial statements for the school district and did not disclose that the school district was experiencing financial distress due to overspending on teacher salaries, and the city and the district misled the credit rating agency regarding the size of the expected budget shortfall.
  - Lesson – Stale financial statements pose a risk in offering documents and it is necessary to closely examine the issuer's financial condition in the interim period after the date of the financials.

## Recent Enforcement Against Issuers and Individuals, Continued...

- Oyster Bay, NY
  - SEC charged town and its former supervisor in connection with bond offerings that failed to disclose that the town had indirectly guaranteed four separate private loans totaling more than \$20 million.
- Sweetwater Union High School District, CA
  - SEC charged district and its former CFO in connection with \$28m bond financing over misleading budget projections when in fact district was on track for a negative ending fund balance.
- A common theme in recent enforcement actions against issuers has been the lack of internal financial controls when one individual has control of all financial information or use of funds
- Another theme – stale and/or misleading financial information or projections
- Another theme – the SEC pursues not only issuers but also culpable issuer officials!

## **Broad-Based / Systematic Enforcement**

- Municipalities Continuing Disclosure Cooperation ("MCDC") Initiative
  - Subject matter: inaccurate Official Statement statements regarding past compliance with continuing disclosure obligations
  - Actions against 72 municipal underwriting firms (96% of the market)
  - Actions against 71 issuers including at least one in each State

## Special Topic: COVID Disclosure

- On April 8, 2020, SEC Chairman Jay Clayton and the Director of the SEC's Division of Corporation Finance issued a statement urging public companies to provide as much information as it practicable regarding current financial and operating status, as well as their future operational and financial planning
- On May 4, 2020, Rebecca Olsen, the Director of the Office of Municipal Securities issued a statement with similar sentiments for municipal issuers
- The May 4 guidance included many questions for issuers to consider, and encouraged issuers to provide forward-looking information regarding the potential future impact of COVID-19 on financial and operating conditions
- This type of direct market guidance by the SEC was unique!

## Special Topic: ESG (Environmental, Social and Governance)

- In early 2021, the SEC created the "Climate and ESG Task Force" in the SEC's Division of Enforcement
- In March 2022, the SEC proposed rules that would require public companies to make certain climate-related disclosures
- The proposed rules would require disclosure in annual reports of climate related risks, including:
  - whether climate risks have had or are likely to have a material impact on the company's business and its financials
  - the company's process for identifying, assessing and managing climate risk
  - impact of significant climate-related events on the business and its financials
  - how the company's strategy and business model have been or are likely to be impacted by climate-related risks
  - the company's climate-related goals or targets
  - oversight and management strategies for climate risks

## Special Topic: ESG (Environmental, Social and Governance)

- The municipal market is likely to see an increased push by investors and regulators to disclose relevant climate-related risks and other information similar to that being required of public companies by the proposed rules
  - As with all disclosure, materiality is the key consideration – focus should be on risk disclosure
- In May 2022, the SEC proposed amendments to requirements for investment funds using terms like "ESG," "green," "social," or "sustainable" in their names
  - SEC guidance focused on the lack of "consistent, comparable and reliable information" regarding such terms
  - While not directly applicable to the municipal market, there has been much discussion about the qualifications necessary for municipal bonds to carry designations like "Green Bonds" or "Social Bonds"

## Special Topic: Cybersecurity

- In early 2022, the SEC proposed new disclosure rules regarding cybersecurity risk management for public companies
- SEC proposed timely disclosure of material cybersecurity incidents
  - Compromises of the company's "information system"
  - Periodic updates of previously disclosed incidents
  - In the municipal market, such events would not be a "listed event" under Rule 15c2-12; however, consider whether such events should be disclosed in offering documents
- SEC proposed periodic disclosure of "whether or how the board [of directors] considers cybersecurity risks as part of its business strategy, risk management, and financial oversight."
  - Also would require disclosure of whether the company has a Chief Information Security Officer and disclosure of that person's qualifications
  - Consider disclosure issues around cybersecurity policies and personnel



## Special Topic: Cybersecurity

- Questions to consider in diligence and disclosure:
  - Does the issuer have cybersecurity policies and procedures in place?
  - Does the issuer have adequate cybersecurity insurance? Have there been any recent claims?
  - Have there been recent incidents resulting in breach of the issuer's information system?
  - How has the issuer's governing body addressed cybersecurity risk? How often is the issue considered by the governing body?
  - Does the issuer conduct periodic cybersecurity training for its employees?
  - Does the issuer have a Chief Information Security Officer (or equivalent)?
  - Have there been any third-party risk assessments performed?

# Disclosure Counsel and Best Practices

## Function

- Assist the issuer in meeting its legal obligations in primary offerings
  - i.e., assist the issuer in conducting due diligence with respect to the Official Statement
  - i.e., other words, protect the issuer vis-a-vis securities law concerns
- Process:
  - Build a due diligence file of supporting backup materials
  - Conduct due diligence with respect to the Official Statement
  - Conduct a due diligence call
  - Provide a "10b-5 opinion"

## Conduct Due Diligence – the Official Statement

- 2012 SEC Risk Alert sets forth guidance
- Disclosure Counsel due diligence consists of reviewing the Official Statement against the due diligence file:
  - e.g., review financial representations and tables against the audit
  - e.g., review unfunded liability statements against actuarial reports
  - e.g., review litigation dockets and media results against applicable Official Statement sections
  - e.g., review continuing disclosure compliance statements against EMMA filings
- Disclosure Counsel helps surface disclosure issues and develop language for the Official Statement

## Conduct Due Diligence Conference Call

- Regulatory guidance endorses use of due diligence checklists and questionnaires
- The diligence call also facilitates an in-depth discussion of the Official Statement
- Provides an opportunity to have an in-depth discussion regarding recent areas of enforcement focus, such as cybersecurity, ESG, financial controls, etc.
- The questionnaire memorializes the issuer's due diligence and would help rebut any claim of negligence
- The conference call shows that the process was more than a paperwork exercise

## 10b-5 Opinion

- Upon closing, disclosure counsel delivers a "10b-5" opinion letter to the issuer
- Rule 10b-5 is one of the "anti-fraud" provisions of the Federal securities laws
- Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, to make any untrue statement of a material fact or to omit to state a material fact
- The "10b-5" opinion letter is another way to evidence the issuer's careful review and diligence with respect to the Official Statement

## Use of Disclosure Counsel – SEC Statements

- The SEC has long indicated in speeches and enforcement actions a preference for issuers to use disclosure counsel
- In an enforcement action against the City of San Diego, the SEC recognized the city's hiring of new disclosure counsel for all of its future offerings to have "better and more continuous knowledge of the City's financial affairs" as an important remedial measure the City had taken
- Martha Haines, the former chief of the SEC's Office of Municipal Securities, said in a speech to a state's municipal finance officers association:
  - *"Municipal bond issuers have primary responsibility for disclosure. As a result, it is important that they use experienced, qualified attorneys...who are familiar with the securities laws on their transactions...**Many issuers are unaware that bond counsel's role does not automatically include overall disclosure responsibilities on the issuer's behalf. You may wish to add it to the scope of bond counsel's engagement or hire separate disclosure counsel.**"*

## Use of Disclosure Counsel – Industry Statements

- The GFOA recommends that in allocation responsibilities for preparing the Official Statement:
  - "If a government does not have sufficient in-house expertise or is an infrequent issuer of debt, it needs to engage outside professionals to assist with the debt issue."
- The League of Cities in California has stated that:
  - "Issuers and their officers can best protect themselves by [among other actions] engaging competent disclosure counsel and following industry standards for disclosure in connection with new issues."



## Additional Considerations

- The “anti-fraud” rules prohibiting material misstatements and omissions applies not only to offering documents, but also to other statements that are “reasonably expected to reach investors and the trading markets”
  - Continuing Disclosure Filings
  - Issuer Website
    - Consider separate "investor relations" page
    - Use of disclaimers / cautionary language
    - Dating and archiving old information to avoid confusion
  - Audited Financial Statements
  - Other Statements
    - Press Releases
    - Media Interviews
    - Elected Official Speeches
    - SOCIAL MEDIA

## Part V: Disclosure Counsel

# Best Practices to Consider

- Developing a general disclosure policy may help (1) reduce chance of making material misstatements or omissions; and (2) establish a reasonableness defense for any such errors
- Recent National Association of Bond Lawyer guidance suggests such a policy should include:
  - (1) description of type of disclosures covered;
  - (2) statement of process by which (and by whom) such disclosures will be drafted, reviewed, approved and documented;
  - (3) adequate supervision and disbursement of responsibilities; and
  - (4) provision for training of officials and employees
- Include duties related to bond financing and post-issuance compliance in job descriptions
- Periodic training of officials responsible for compliance
  - GFOA Publications (<http://www.gfoa.org/>)
  - EMMA training (<http://emma.msrb.org/EmmaHelp/EmmaHelp.aspx>)

**Questions?**

# Disclaimer

This document provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.