

Presenting a live 90-minute webinar with interactive Q&A

Effectively Managing Municipal Market Responsibilities in the Face of SEC Scrutiny and Enforcement

Complying With Disclosure Requirements to Avoid "Control Person"
Liability, Penalties and Bars on Participation in Bond Offerings

WEDNESDAY, MAY 31, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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**EFFECTIVELY MANAGING MUNICIPAL MARKET
RESPONSIBILITIES IN THE FACE OF
SEC SCRUTINY AND ENFORCEMENT**

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Presented to

Strafford Webinar

May 31, 2017

WEBINAR OUTLINE

- **Federal Securities Law Requirements**
- **Proposed Amendments to SEC Rule 15c2-12**
- **MCDC Initiative (Recap)**
- **Post-MCDC Actions**
- **Non-MCDC Issuer Enforcement Since Early 2013**
- **Non-MCDC Underwriter Actions Since Early 2013**
- **Non-MCDC Municipal and Financial Advisor Actions Since Early 2013**
- **Practice Tips—Municipal Issuer Practice Considerations**
- **The Future??**

FEDERAL SECURITIES LAW REQUIREMENTS

FEDERAL SECURITIES LAW REQUIREMENTS

- **Municipal Securities Are Exempt from the SEC's Registration and Reporting Requirements**
- **They are NOT Exempt from the Antifraud Provisions**
- **Municipal Securities Issuers, Underwriters, Others Can Be Liable for Violations**
- **1933 Act Section 17(a) and 1934 Act Section 10(b) and Rule 10b-5 Thereunder Make It Unlawful, In Connection with the Offer, Purchase, or Sale of Securities, to:**

FEDERAL SECURITIES LAW REQUIREMENTS

- Employ Any Device, Scheme, or Artifice to Defraud**
- Make Any Untrue Statement of a Material Fact or to Omit to State a Material Fact Necessary in Order to Make Statements Made, in Light of Circumstances under Which They Were Made, Not Misleading**
- Engage in Any Transaction, Practice, or Course of Business Which Operates or Would Operate as a Fraud or Deceit upon any Person**

FEDERAL SECURITIES LAW REQUIREMENTS

Rule 15c2-12 Indirectly Regulates Municipal Issuers by Directly Regulating the Actions of Underwriters

- **Requires an Underwriter, Prior to Bidding for, Purchasing, or Selling Municipal Securities in a Primary Offering, to:**
 - **Obtain and Review a “Deemed Final” Official Statement**
 - **Reasonably Determine that an Issuer, or Obligated Person, Has Undertaken in a Written Agreement for Benefit of Holders of the Securities, To Provide to MSRB Certain Continuing Disclosures, Including Annual Financial and Operating Information, and Notices of Certain Events**

FEDERAL SECURITIES LAW REQUIREMENTS

- **Rule 15c2-12, Then, Applies to Only Underwriters,
Not Directly to Issuers**
- **But Underwriters Cannot Underwrite Bonds Unless Issuers Enter into Continuing Disclosure Agreements**
- **Issuers Must Agree to Make Annual Disclosure of Operating and Financial Information**
- **Issuers Must Also Agree to Make Disclosure within Ten Days of Certain Events**

**PROPOSED AMENDMENTS TO
SEC RULE 15c2-12**

SEC RULE 15c2-12

Proposed Amendments

➤ **Add Two Proposed Events—**

(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*.

[Emphasis added.]

SEC RULE 15c2-12

Proposed Amendments

➤ Added Definition of “Financial Obligation”—

The term *financial obligation* means a (i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding. The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.

SEC RULE 15c2-12

Considerable Market Criticism

- **Details of Required Issuer Disclosures**
- **Issuer Burdens to Identify New Debt Obligations**
- **Issuer Burdens to Identify Impacts on Investors**
- **Issuer Ability to Determine Materiality**
- **Issuer Burdens to Identify Financial Difficulties**
- **Underwriter Due Diligence Burdens in Offerings Regarding Prior Issuer CDA Compliance**

SEC RULE 15c2-12

Comment Period Ended May 15

**Unclear How Proposal Will Fare
with New Commission**

SEC MCDC INITIATIVE
(Recap)

MCDC INITIATIVE

SETTLED ENFORCEMENT ACTIONS

- **Underwriters—**
 - ❖ **Three Separate Announcements**
 - ❖ **72 Firms**
 - ❖ **SEC Noted: Approximately 96% of Market Share for Municipal Underwritings**

- **Issuers—**
 - ❖ **Announced Aug. 24, 2016**
 - ❖ **71 Issuers and Obligated Persons**

MCDC INITIATIVE

KEY FACTS—ISSUER SETTLEMENTS

- **71 Settlements**
- **45 States**
- **Issuers—**
 - ❖ States, counties, cities, school districts, airport authorities, sanitary districts, fire protection district, power agency, housing authorities

- **Obligated Persons—**
 - ❖ Universities, hospitals, college foundation, retirement residence, health care corporation, waste management company

MCDC INITIATIVE

KEY FACTS—ISSUER SETTLEMENTS

- **Misleading Statements in OSs About Compliance**
- **No Statement in Situations of Non-Compliance (Arkansas Tech Univ.)**
- **Failure to File Audited Financial Statements**
- **Failure to File Financial Information\Operating Data**

MCDC INITIATIVE

KEY FACTS—ISSUER SETTLEMENTS

- **Material Event Notice**
(Defeasance: Ascension Health Alliance)

- **Look-Back Period**
 - ❖ **Cited 2012 and 2014 OSs That Did Not Mention Failure to File 2009 Audits (Delaware Transportation Auth.)**

MCDC INITIATIVE

SETTLEMENT TERMS FOR ISSUERS

- **Establish Appropriate Continuing Disclosure Policies and Procedures**
- **Training Regarding Continuing Disclosure Obligations**
- **Comply with Existing Continuing Disclosure Undertakings**
- **Including Updating Past Delinquent Filings**
- **All Within 180 days of the Settlement Order**

MCDC INITIATIVE

SETTLEMENT TERMS FOR ISSUERS

- **Cooperate with Subsequent Investigation by SEC's Division of Enforcement Regarding the Misleading Statements, Including Roles of Individuals or Other Parties**
- **Disclose in a Clear and Conspicuous Fashion Settlement Terms in Official Statement for Offering by Issuer within Five Years of Settlement Order**
- **Provide to SEC Staff a Compliance Certification Regarding the Applicable Undertakings by the Issuer on the One-Year Anniversary of Settlement Order**

No Civil Penalty

MCDC INITIATIVE

SETTLEMENT TERMS FOR UNDERWRITERS

- **Civil Penalties—\$20,000 Per Offering for Offerings of \$3 million or Less; \$60,000 Per Offering for Larger Offerings (Caps from \$100,000 to \$500,000 Depending on Firm's 2013 Revenues)**
- **Retain Independent Consultants, Not Unacceptable to the Commission Staff, To Conduct Compliance Reviews, Make Recommendations Regarding Due Diligence Process, Procedures, and Enact the Recommendations (Subject to Appeal to SEC Staff)**
- **Cooperate in Subsequent Investigations**
- **Certify Compliance on One-Year Anniversary**

MCDC INITIATIVE

PRACTICE TIPS—NEW OFFICIAL STATEMENTS

- **Better Practice: Disclose ALL Failures to Comply Within Preceding Five Years Regardless of Materiality**
- **If There Were No Failures: Would NOT make Affirmative Statement**
 - ❖ **If Underwriter Requests Representation: Represent in BPA (or Notice of Sale), as Opposed to OS**
- **If There Were Failures: Would NOT Include Prefatory Language to Effect “Issuer Complied in All Material Respects Except X and Y”**
- **Use Care in Defining Future Information To Be Disclosed**

POST-MCDC ACTIONS

POST-MCDC ACTIONS

BOKE, N.A.

- **Role—**
 - ❖ **Bond Trustee and Dissemination Agent for Multiple Conduit Obligor (Brogdon Entities)**

POST-MCDC ACTIONS

BOKF, N.A.

➤ Allegations—

- ❖ Awareness at Senior Level of Obligor's Failure to File Numerous Required Continuing Disclosure Documents with EMMA for Multiple Bond Issues for Conduit Obligors**
- ❖ Senior Supervisory Trust Officer's Failure to Act Despite Awareness of Substantial Continuing Disclosure Violations**
- ❖ Officer Told Other Staff Not to Provide Required Failure-to-File Notices to EMMA**
- ❖ Acceptance of New Obligor Business Despite Awareness of Violations**

POST-MCDC ACTIONS

BOKF, N.A.

➤ Allegations—

- ❖ BOKF’s Failure to Provide Required Notices of Obligor’s Failures to Replenish Reserve Fund Draws, Failures to Provide Required Financial Statements to BOKF, Late Payments (and Bounced Checks), Closure of One Facility Serving as Collateral**
- ❖ Officer Sought to Protect Obligor and “Underwriter A,”
Then Under FINRA Investigation**

POST-MCDC ACTIONS

BOKF, N.A.

- **Remedies—**
 - ❖ **Cease and Desist Order**
 - ❖ **Compliance with Undertakings to Implement Policies and Procedures Regarding New Business, Upgrade Tickler and Reporting Systems, Train Staff**
 - ❖ **Disgorgement—\$984,200.73**
 - ❖ **Prejudgment Interest—\$83,520.63**
 - ❖ **Civil Penalty—\$600,000**

POST-MCDC ACTIONS

MERRIEN NELSON

- **Role—Former Senior BOKF Trust Officer**

- **Allegations—**
 - ❖ **“Chiefly Responsible for the Failures of the Bank’s Corporate Trust Department While Overseeing What Turned Out To Be a Series of Fraudulent Bond Offerings Managed by Christopher F. Brogdon”**

 - ❖ **“Aiding and Abetting Brogdon’s Violations”**

POST-MCDC ACTIONS

MERRIEN NELSON

- **Remedies—**
 - ❖ **Injunction**
 - ❖ **Disgorgement—\$29,624.03—**
Representing Bonuses for Work on
Obligors' Accounts
 - ❖ **Interest—\$4,208.92**
 - ❖ **Civil Penalty—\$21,167.05**
 - ❖ **Bar Against Future “Corporate Trust**
Work
Related to Municipal Securities”

POST-MCDC ACTIONS

LAWSON FINANCIAL CORPORATION AND CEO

➤ **Role—**

- ❖ **Underwriter of Multiple Conduit Offerings
(Brogdon Entities)**

NOTE FINRA ENFORCEMENT DEVELOPMENT:

Firm previously expelled and CEO barred by FINRA in connection with allegations of misuse of customer trust account funds and transferring funds to financially-troubled borrowers issuing bonds the firm underwrote; another principal fined \$30,000 and suspended for two years by FINRA

POST-MCDC ACTIONS

LAWSON FINANCIAL CORPORATION AND CEO

➤ Allegations—

- ❖ Failure to “Conduct Reasonable Due Diligence” Regarding Conduit Obligor’s (Brogdon Entities) CDA Compliance in Multiple Offerings Despite Represented Compliance**
- ❖ “Only cursory inquiry,” “Relied upon oral assurances,” No review of EMMA**
- ❖ Awareness of Obligor’s Compliance Violations (Notified by BOKF, Issuer Counsel, Lawson Trading Dept.)**
- ❖ Underwrote new offerings despite awareness of noncompliance and false OS representations of compliance**

POST-MCDC ACTIONS

LAWSON FINANCIAL CORPORATION AND CEO

- **Allegations—**
 - ❖ **Failure in One Offering to Obtain Obligor's CDA, Despite Representation to Contrary**
 - ❖ **No Due Diligence Checklist**
 - ❖ **Written Procedures Required Rule 15c2-12 Activities, But Not Much More**
 - ❖ **Misrepresentation Regarding Facility as Collateral, When That Facility Had Closed**
 - ❖ **Misrepresentation Regarding Underwriter Counsel— Unlicensed Individual (Also Was Banker in Same Transactions)**

POST-MCDC ACTIONS

LAWSON FINANCIAL CORPORATION AND CEO

- **Remedies—**
 - ❖ **Firm Censured**
 - ❖ **CEO Barred from Industry**
(Can Re-Apply After Three Years)
 - ❖ **Firm and CEO Jointly/Severally Ordered to Pay—**
 - **Disgorgement—\$178,750**
 - **Prejudgment Interest—\$19,576.06**
 - ❖ **Firm Ordered to Pay Civil Penalty—\$198,326.06**
 - ❖ **CEO Order to Pay Civil Penalty—\$80,000**

POST-MCDC ACTIONS

JOHN LYNCH

- **Role—**
 - ❖ **Investment Banker and Underwriter's Counsel in Conduit Obligor Offerings (for Brogdon Entities) Underwritten by Lawson Financial**

POST-MCDC ACTIONS

JOHN LYNCH

➤ **Allegations—**

- ❖ **Responsibility to Conduct Lawson Due Diligence in Conduit Bond Offerings**
- ❖ **Failed to Conduct Adequate Due Diligence Regarding CDA Compliance in Multiple Offerings**
- ❖ **“Conducted Only a cursory inquiry”**
- ❖ **“Did Not Conduct or Cause To Be Conducted a Review of EMMA”**
- ❖ **“Failed To Obtain Written Continuing Disclosure Undertaking” in One Offering**
- ❖ **Awareness of Conduit Obligors’ Failures to Comply with CDAs Despite Contrary Representations in OSs (Notice from Issuer’s Counsel, Lawson Trading Dept.)**

POST-MCDC ACTIONS

JOHN LYNCH

- **Allegations—**
 - ❖ **Despite Awareness of Noncompliance, Continued Work on Additional Bond Issues in Which Compliance Was Represented**
 - ❖ **In One Offering, Collateral Facility Had Closed and Secured Other Bonds**
 - ❖ **Did Not Disclose Dual Roles as Banker and Underwriter's Counsel**
 - ❖ **While Serving as Underwriter's Counsel, Was Not Authorized to Practice Law in Arizona; Inactive in Pennsylvania Since 1983**

POST-MCDC ACTIONS

JOHN LYNCH

- **Remedies—**
 - ❖ **Cease and Desist Order**
 - ❖ **Denied Privilege of Practicing Law Before the Commission**
 - ❖ **Disgorgement—\$20,000**
 - ❖ **Prejudgment Interest—\$2,338**
 - ❖ **Civil Penalty—\$22,338**

**SEC NON-MCDC ISSUER
ENFORCEMENT SINCE EARLY
2013**

NON-MCDC ISSUER ENFORCEMENT ACTIONS (4 YEARS) AGAINST—

- **20 State or Local Governmental Entities**
- **17 State and Local Officials**
- **Includes 3 Actions Pending Against 4 Local Governmental Entities & 6 Officials**

CONTRAST:
IN 14 YEARS FROM 1999 THROUGH
2012—

- **11 State or Local Governmental Entities**
- **10 Local Officials**

SINCE EARLY 2013

- **States—Illinois & Kansas**
Added Hawaii and Minnesota in MCDC)
(Not First—New Jersey in 2010)
- **State Agencies—Rhode Island Commerce Corp. (formerly, Economic Development Commission)**

Port Authority of NY and NJ

Total—11 State Agencies Since 2013

(Not First—Massachusetts Turnpike in 2003)

**COMMISSION GOING TO
FEDERAL DISTRICT COURT
MORE OFTEN**

(As Opposed to Administrative Proceedings)

**Will Lose Some, But Also Will Produce Court
Decisions as Precedent**

**More Remedies in Federal Court
(e.g., Control Person Liability, Injunctions,
Emergency Relief to Halt Ongoing Conduct)**

To Date, Fairly Successful

**(Exception—Sanctions Against Miami's Former
Budget Director)**

NOTABLE “FIRSTS” & OTHER DEVELOPMENTS

FIRST TIME:

Issuer Admission of Violation

(Port Authority of NY and NJ)

PORT AUTHORITY OF NY AND NJ

➤ Allegations—

- ❖ Authority Issued Bonds without Disclosing Questions Actively Debated Internally at Senior Level Regarding Legal Authority to Issue Bonds for Certain Transportation Projects**
- ❖ “Without Disclosing Known Material Risks Surrounding the Potential Lack of Legal Authority To Fund Those Projects”**
- ❖ Authority’s Board Not Informed of Legal Issues**

PORT AUTHORITY OF NY AND NJ

- **Remedies—**
 - ❖ **Cease and Desist Order**
 - ❖ **Compliance with Undertaking
To Retain Independent Consultant and
Implement Recommendations**
 - ❖ **Civil Penalty—\$400,000**

FIRST TIME:

RHODE ISLAND COMMERCE COMMISSION

- **Governmental Issuer**
Alleged to Have Failed to Disclose—
 - ❖ **Information Regarding**
Private Conduit Borrower
 - ❖ **In Credit Enhanced Bond Issue**
(Two Enhancement Levels—
State Appropriation, Bond Insurance)
 - ❖ **Generalized Risk Disclosure,**
BUT NOT Certain Risks Specific to Transaction

RHODE ISLAND COMMERCE COMMISSION

➤ Allegations—

- ❖ Issuer of Bonds Loaning Funds to Private Company (38 Studios) Failed To Disclose That Funds Were Inadequate for Completion of 38 Studios' Massive Online Game**

➤ Remedies—

- ❖ Injunction**
- ❖ Civil Penalty—\$50,000**

FIRST TIME:

- **Liability in True Private Placement
(Under Section 4(a)(2) of Securities Act of
1933)**
- **Bonds Offered/Sold Solely to
Sophisticated Investors**
- **Investment Letters**
- **Action Against State Agency/Officials**
- **Placement Agent's Motion to Dismiss Denied
(Rhode Island Commerce Commission—
Still Pending Against Underwriter and Official)
(Two Officials Settled—Barred from Industry
& Civil Penalties)**

FIRST TIME:

**Emergency Injunction Against
Issuer To Halt Bond Offering in
Progress**

**(City of Harvey, Illinois)
(Pacific Genesis, Underwriter, in
2001)**

FIRST TIME:

**Prohibitions Against Issuers Issuing Bonds in Future
(Without Satisfying Conditions Precedent)**

**UNO Charter School Network—5 Years;
Conditions: Policies, Training, Responsible Official,
& More**

**City of Harvey, Illinois—3 Years;
Condition: Independent Disclosure Counsel**

**Allen Park, Michigan—2 Years;
Conditions: Disclosure of Order, Certification After
Consultation with Disclosure Counsel**

**FIRST TIME:
Civil Penalties Against Issuers**

**Greater Wenatchee, Washington, Regional
Events Center Public Facilities District—
\$20,000**

**(Also Operator of Center and Its President—
\$10,000 Each)**

Westlands Water District—\$125,000

Port Authority of NY and NJ—\$400,000

City of Miami—\$1 million

**Rhode Island Commerce Commission—
\$50,000**

FIRST TIME:

**SEC Won in District & Appellate
Courts on Issue of
Qualified Immunity of Public
Officials**

**Basis: SEC Seeking
Injunction & Civil Penalty
vs. Damages**

**(SEC v. Miami's Former Budget
Director)**

FIRST TIME:

Bars Against Officials—No Future Bond Issues

**Includes Two Mayors
(One Still Sitting—Can't Certify Bond
Disclosures)**

Includes Two State Agency Officials

**Extends to Bars Against Work in Finance
Industry**

FIRST TIME: Bars Against Officials

- **City of Harvey, Illinois—
Sitting Mayor & Former Comptroller**
- **City of Allen Park, Michigan—
Former Mayor & City Manager**
- **Rhode Island Economic Development
Commission—Former Executive Director &
Deputy Director**
- **United Neighborhood Organization of
Chicago—Former CEO**

FIRST TIME:

**Civil Penalties Against State Agency
Officials**

**(Executive Director and Deputy Director
of Rhode Island Commerce
Commission—\$25,000 Each)**

(Pending Action: NY Pension Official)

INCREASED USE OF CIVIL PENALTIES AGAINST OFFICIALS

\$195,000 Against 9 Officials

- **City of Harvey, Illinois—Sitting Mayor—\$10,000**
Former Comptroller—\$30,000 (plus disgorgement & interest)
- **City of Allen Park, Michigan—Former Mayor—\$10,000**
- **Westlands Water District—**
General Manager/General Counsel—\$50,000
Former Assistant General Manager—\$20,000
- **Rhode Island Economic Development Commission—**
Former Executive Director—\$25,000
Former Deputy Director—\$25,000
- **United Neighborhood Organization—Former CEO—\$10,000**
- **City of Miami—Former Budget Director—\$15,000**

CONTRAST:

Prior 15 Years—

**5 Officials (in two actions) \$85,000
(Primarily San Diego Officials)**

**LARGEST CIVIL PENALTY TO
DATE AGAINST ISSUER
OFFICIAL—\$50,000**

Double Prior Highest

**(Westlands, California, Water
District)**

**FIRST TIME:
BIG DEAL**

**“Control Person” Liability for Issuer Officials
(Joint & Several with Primary Violator)**

- **Mayors of—
Harvey, Illinois
Allen Park, Michigan**
- **Shift in Burden of Proof**
- **SEC Need Only Prove Control, Not Knowledge**
- **Participation in Fraud Unnecessary**

CONTROL PERSON LIABILITY:

- **To Establish Successful Defense,
“Control Persons” Must Prove—**
 - ❖ **“Good Faith”**
—and—
 - ❖ **Did Not “Directly or Indirectly”
Induce Action of Primary Violator**

CONTROL PERSON LIABILITY:

- **Poses Significant New Risks for Community Leaders—Mayors, Board Chairs, City Managers/Administrators, Department Heads**
- **Absolute “Control” Not Required**
- **Defense May Require Exercise of Oversight to Evidence “Good Faith”**
- **If Policies/Procedures Adopted & Implemented, May Be Helpful**

FIRST TIME:
ANOTHER BIG DEAL

**Issuer Former CEO Fined and Barred
for NOT Reading Official Statement He Signed**

Not Charged with Knowledge of Misrepresentations

**OS Contained Material Misstatements/Omissions
He Should Have Known**

Only Charged with Negligence

Barred from Future Offerings; \$10,000 Civil Penalty

(CEO of United Neighborhood Organization of Chicago)

FIRST TIME:

**Action Against Issuer for Information on Website
(NOT Official Statement or Continuing Disclosure
Filing)**

**Information on General Webpage (Not Investor
Page)**

**Including Mayor's Political Speech
(Annual State of City—Posted on General
Webpage)**

(City of Harrisburg, Pennsylvania)

HARRISBURG:

Implications for Disclosure Regarding Outstanding Obligations

**(Contingent Liabilities for Debt of Troubled Waste
Authority)**

**Once Issuer Speaks About Obligations, Must
Speak Without Material Misstatements or
Omissions**

**(*e.g.*, on Website, in Official Statements, CAFRs,
Annual Financial Information Filed at EMMA)**

PRACTICE TIPS

HARRISBURG

**Illustrates Point That ALL Material Obligations
Should Be Disclosed**

**Including
“Bank Loans”
Non-Bank Loans,
ALL Material Obligations
(e.g., Judgments, Contingent Liabilities,
Contractual Liabilities)**

FIRST TIME:

**Action Against Issuer with Respect to Information
in Documents Investors Never Saw**

**Tax Certifications to Bond Counsel
& Pool Bond Issuer Regarding Private Use of
Project**

(City of South Miami, Florida)

PRACTICE TIPS

SOUTH MIAMI

**Illustrates Importance of
Internal Issuer Controls and Training
(Four Finance Directors—Not Trained)**

**Unsophisticated Issuer—
No Excuse**

Many Issuers Need Professionals to Assist

**Compliance with Tax Rules, Continuing
Disclosure & Bond Documents**

FIRST TIME:

Independent Conflicts Monitor

(UNO Charter School Network)

FIRST TIME:

Local Issuer Counsel

**(Westlands, California, Water
District & Ramapo, New York)**

FIRST TIME:

**Action Against Issuer Already
Subject to Cease-and-Desist
Order**

(City of Miami, Florida)

FIRST TIME:

**Federal Court Trial and Jury
Verdicts Against Issuer and Issuer
Official**

(City of Miami, Florida)

PRACTICE TIPS—
“REASONABLE” RELIANCE ON PROFESSIONALS
Four Factors Applied by Courts

- **Complete Disclosure to Professional Regarding Question**
- **Seeking Professional Advice as to Appropriateness of Specific Conduct (General Participation in Transaction Inadequate)**
- **Receipt of Advice that Conduct Is Appropriate (Not Merely Negative Assurance)**
- **Reliance on Advice in Good Faith**

Miami Jury Verdict Found None of the Factors Present

FIRST TIME:

**Announced Intention to
Coordinate with Justice
Department**

**(City of Ramapo, New York)
(Criminal Action Includes Local
Counsel)**

FIRST TIME:

**Local Official Pled Guilty to
Criminal Charges of Securities
Fraud**

**(City of Ramapo, New York,
Executive Director of
Development
Corporation/Assistant Town
Attorney)**

FIRST TIME:

**Local Official Found
Guilty of Criminal Charges in Connection
with Securities Offerings**

**(City of Ramapo, New York, Town
Supervisor)**

**11 Counts of Wire Fraud
8 Counts of Securities Fraud
1 Count of Conspiracy**

**Not Guilty of 1 Count of Securities Fraud
and 1 Count of Wire Fraud**

PENDING COURT CASES:

(SEC Seeking Broad Remedies Against State/Local Entities & Officials)

City of Miami's Former Budget Director—Post Trial Proceedings

**Southern California Logistics Airport Authority,
City of Victorville & Assistant City Manager
(Asserting City and Official Aided/Abetted Authority;
Underwriter Liability)**

**City of Ramapo, New York, Ramapo Local Development Corp.,
Town Supervisor/President of Development Corp., Town Attorney, Former
Executive Director of Development Corporation/Assistant Town Attorney,
& Town's Deputy Finance Director
(Asserting Misstated Financial Statements)
(Parallel Criminal Charges Are Pending Against Some Individuals)**

**Navnoor Kang—NY Pension Investment Official
(Asserting Gifts from Brokers) (Parallel Criminal Charges Are Pending)**

**NON-MCDC UNDERWRITER
ACTIONS
SINCE EARLY 2013**

PIPER JAFFRAY
INDIVIDUAL BANKER

➤ **Role—**

❖ **Underwriter of Bond Anticipation Notes Issued by Greater Wenatchee, Washington, Regional Events Center Public Facilities District**

❖ **Prior Underwriter Could Not Sell Bonds**

NOTE: Many Underwriters Consider This To Be a Key Action Regarding Due Diligence

PIPER JAFFRAY
INDIVIDUAL BANKER

➤ **Allegations—**

- ❖ **Failure to Conduct Adequate Due Diligence in Highly Time-Pressured Circumstances**
- ❖ **“No Due Diligence” on Project Manager with Limited Experience**
- ❖ **“Only cursory inquiry into projections” prepared by manager**
- ❖ **“No contact” with project manager regarding projections**
- ❖ **Not aware project manager’s projection assumptions were changed at mayor’s urging to produce more favorable results**
- ❖ **Failure to seek independent consultant’s report questioning projections, although aware of report’s existence**
- ❖ **OS misrepresented that “no financial advisor, accounting or other firm had examined projections”**

PIPER JAFFRAY
INDIVIDUAL BANKER

➤ **Allegations—**

- ❖ **Failure to Conduct Adequate Investigation into City’s Legal Capacity to Loan Funds to Pay Interest under Backstop Agreement (Explanatory Paragraph in Prior OS Deleted)**
- ❖ **Firm’s Due Diligence Policies and Procedures “Provided Limited Guidance to Its Bankers”**
- ❖ **Firm “Did Not Require a Written [Due Diligence] Plan or Supervisory Review”**
- ❖ **Individual Banker “Did Not Ask for or Review All Documents” on a Firm List, “Including Independent Consultant’s Report”**

PIPER JAFFRAY INDIVIDUAL BANKER

- **Piper Jaffray Remedies—**
 - ❖ **Cease and Desist Order**

 - ❖ **Censure**

 - ❖ **Civil Penalty—\$300,000**

 - ❖ **Compliance with Undertakings
to Retain Independent Consultant
and Implement Recommendations**

 - ❖ **SEC Considered Remedial Efforts to Underwrite
New Issue for District at Reduced Discount,
Settlement Payment to District, Revise Due
Diligence Procedures and Due Diligence
Checklists, Train Staff**

PIPER JAFFRAY **INDIVIDUAL BANKER**

- **Banker Remedies—**
 - ❖ **Cease and Desist Order**
 - ❖ **Censure**
 - ❖ **Civil Penalty—\$25,000**
 - ❖ **Compliance with Undertakings to Refrain for 12 Months from Contacting Customers and Making Due Diligence Decisions for any Broker-Dealer**

OTHER UNDERWRITER ACTIONS

- **Edward D. Jones LP and Head of Syndicate Desk—Allegations—Bond Pricing at Other Than Initial Offering Price as Syndicate Member in Offerings (Firm—Agreed to Pay More Than \$20 Million in Disgorgement and Penalties; Head of Syndicate Desk—Paid \$15,000 and Barred from Industry for Two Years)**
- **13 Firms—Allegations—Sales of Puerto Rico Bonds at Less Than Minimum Denominations (Cease and Desist Orders; Censure; Civil Penalties)**
- **City Securities and Executive Vice President/Supervisor of the Firm's Public Finance & Municipal Bond Department—Allegations—Failure to Disclose Issuer's Noncompliance with Prior Continuing Disclosure Undertakings; Excessive Gift Giving (Firm—Undertakings to Review, Audit and Revise Policies and Procedures; Retention of Independent Consultant; Staff Training; Cease and Desist Order; Censure; Disgorgement—\$238,000; Prejudgment Interest—41,446; Civil Penalty—\$300,000; Officer—Cease and Desist Order; Bar from Industry with Right to Re-Apply after One Year; Permanent Bar from Serving in Supervisory Capacity in Industry)**

**NON-MCDC MUNICIPAL AND
FINANCIAL ADVISOR
ACTIONS
SINCE EARLY 2013**

MUNICIPAL AND FINANCIAL ADVISORS

- **Central States Capital Markets, Managing Director/Chief Executive Officer and Two Vice Presidents—Allegations—**
Advisor's Officers Worked with Underwriting Firm Without Disclosure to Issuers in Offerings on Which The Officers Also Served as Municipal Advisors
(First Time SEC Enforced Municipal Advisor's Statutory Fiduciary Duty; Also Cited MSRB Rules G-23 and G-17)
(Firm—Disgorgement and Prejudgment Interest—\$289,827.80; Civil Penalty—\$85,000; Officers—Cease and Desist Order; Civil Penalties of \$25,000 and \$20,000 and Bars from Industry for One and Two Years)
- **School Business Consulting, Inc. and President—Allegations—**
Unregistered Municipal Advisor Assisted School Districts in Interviewing Candidates and Retaining Keygent LLC (see next slide) to Provide Advice in Offerings Without Disclosure of Contractual Relationship with Keygent; Also Provided Confidential Information to Keygent About the Process and Competitor Proposals (Firm—Cease and Desist Order; Censure; Civil Penalty—\$30,000; President—Cease and Desist Order; Civil Penalty—\$20,000; Bar from Industry)

MUNICIPAL AND FINANCIAL ADVISORS

- **Kegent LLC and Two Managing Directors—Allegations—Received Benefit of Undisclosed Contract with and Confidential Information Provided by School Business Consulting (Firm—Cease and Desist Order; Posting Order on Website for 12 Months and Provision to Clients; Civil Penalty—\$100,000; Managing Directors—Cease and Desist Order; Censure; Provision of Order to Existing and Prospective Clients; Civil Penalties—\$30,000 and \$20,000)**
- **First Southwest Company, LLC—Allegations—Failure to Have “Writing” as Required by MSRB Rule G-23 Promptly at Outset of Financial Advisory Relationship with Issuer Setting Forth Basis of Compensation and Services (Cease and Desist Order; Censure; Disgorgement—\$120,000; Prejudgment Interest—\$22,400; Civil Penalty—\$50,000)**
- **Dougherty & Co.—Allegations—FINRA Enforcement Action Alleging That Dealer Underwrote Bond Issues While Having Continuing Financial Advisory Agreements with the Issuers (Fine—\$50,000)**

**PRACTICE TIPS—
MUNICIPAL ISSUER
PRACTICE CONSIDERATIONS**

PRACTICE TIPS

COMMON PROBLEM AREAS

- **Overly Optimistic Information Regarding Economic Development Projects—**
(*e.g.*, Wenatchee Events Center, Allen Park Movie Studio, Ramapo Baseball Stadium, Rhode Island EDC Private Online Game Company, Harvey Holiday Inn)
- **Assumptions & Other Information Supporting Projections & Expert Reports—**
(Wenatchee Events Center, Public Health Trust)

PRACTICE TIPS

COMMON PROBLEM AREAS

- **Stale Information**
(Allen Park, Public Health Trust)
- **Conflicts of Interest**
(UNO Charter School Network, Harvey)
- **Insufficient Internal Controls**
(South Miami, Public Health Trust)
- **Misleading Risk Factors**
(Rhode Island Commerce Commission)

PRACTICE TIPS

MAJOR SEC OUTCOMES (MCDC & Non-MCDC)

**Large Numbers of Issuers Adopting
Policies & Procedures
& Staff Training**

**Virtually All Underwriters (96% of Bonds)
Required to Retain Consultants Regarding
Due Diligence Practices**

Condition of MCDC Settlements

**Achieved a Re-Focused Review of Marketwide Practices
by Issuers & Underwriters**

PRACTICE TIPS

ISSUER POLICIES & PROCEDURES

Potential to Become Market Practice

**Control Persons Might Point to Adoption
as Evidence of “Good Faith”**

**BUT, Greater Risk in Enforcement,
If Not Implemented**

If Adopt, BETTER FOLLOW

PRACTICE TIPS

ISSUER POLICIES & PROCEDURES

**May Be Helpful to Control Persons
IF Implemented**

**Many Issuers Need Professionals to Assist
in Policy Development**

BUT Issuers Are Responsible for Official Statements

Officials Who Sign MUST Read and Understand

PRACTICE TIPS

ISSUER POLICIES & PROCEDURES

**SEC Often Accepts Lighter Sanctions
for Careless, Negligent Issuers
(Section 17(a)(2) & (3) of Securities Act of
1933)**

IF

**Issuers Offer to Implement Policies &
Procedures, Designate Responsible
Officials, & Train Staff**

THE FUTURE??

**NEXT STEPS
(MCDC)**

**Not Clear That There Are Any Remaining
Potential Actions Against Non-Self-Reporting Issuers & Underwriters**

-or-

**Potential Actions Against Issuer Officials
& Individual Underwriter Officers**

-or-

Potential Actions Against Professionals

THE MARKET'S FUTURE

Regulation by Enforcement
(as Well as Through Rule 15c2-12)

Tower Amendment Irrelevant

Legislative Trade-Off in the 1970s

BIG QUESTION

What Will Be the SEC's Municipal Approach in the Clayton Era?

THE END

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