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“The Role of the County Attorney in Bond Closings and
Continuing Disclosure”

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Topics in this Presentation

- What is the role of the County Attorney in bond closings?
- What is continuing disclosure and how does it affect us?

Role of County Attorney in Bond Closings

- Actually, your role is the same as that of Bond Counsel: to deliver your opinion – also known as the local counsel opinion.
- Important to know the substance of your opinion at the beginning of the transaction.
- Review points of your opinion with Bond Counsel to insure that you have no questions and each point is clear in your mind.
- “Nail it on the wall” – especially in revenue bond transactions.

What does it mean to give a local counsel opinion?

- Role of Bond Counsel is to exercise objectivity and the legal expertise necessary to opine as to the validity of the obligation and the exemption from income taxes as to the interest on the obligation.
- Role of Local Counsel is to provide an objective opinion with respect to certain actions undertaken by and affecting the County (the Issuer).
- Scope of opinion varies depending on the transaction.
- General obligation bond opinion is usually limited (validity of authorizing document and no-litigation).
- Other types of transactions may require more thorough opinions (Revenue bonds, Installment Purchase, Conduit, etc.).

Breaking down a model revenue bond opinion.

- State your review of certain core items:
 - Authorizing legislation
 - Resolutions/Ordinances
 - Certain proceedings regarding the sale of the debt
 - Important contracts related to the system
 - Contract of Purchase (BPA), Disclosure Agreement (CDA), Official Statement or Escrow Agreements (when required)
 - Other necessary closing documents

Breaking down a model revenue bond opinion.

- First Opinion:
 - Issuer is validly organized and existing public body with powers to adopt Resolutions/Ordinances, execute, deliver and perform those things required under the BPA and the CDA, and operate its system.
- Second/Third/Fourth Opinions:
 - Resolutions/ordinances were duly adopted and are enforceable;
 - BPA was authorized, executed and delivered and is enforceable (carve out indemnity); and
 - CDA is valid, binding and enforceable.

Breaking down a model revenue bond opinion.

- Fifth Opinion:
 - That the Resolutions/Ordinances, BPA and CDA do not conflict with or constitute a breach of the Constitution, or any other document or decree to which the Issuer is bound.

- Sixth Opinion:
 - All necessary authorizations, approvals, licenses, consents and orders have been obtained.

- Seventh Opinion:
 - No laws exist that affect the power of the Issuer to: (1) collect and apply its revenues to the payment of the obligation; (2) own and operate its system; or (3) charge and collect fees associated with operations.

Breaking down a model revenue bond opinion.

- Eighth Opinion:
 - There is no litigation pending or threatened which: (a) questions the existence of the Issuer or the status of its officers; (b) seeks to enjoin the issuance of the debt; (c) contests the validity of the debt, Resolutions/Ordinances, CDA or BPA; (d) contests the collection of pledged revenues; and (e) may result in material adverse change in finances.

- Ninth Opinion:
 - Nothing has come to our attention that would lead us to believe that the information in the Official Statement or the offering document is untrue or misleading.

Preparation of Official Statement – Primary Market Disclosure

- Responsibility of Disclosure Counsel who often is also Bond Counsel
- Closely review section of Official Statement (OS) describing opinions
- Closely review section of OS describing pending litigation of Issuer
- As Issuer's Counsel, you must read it cover to cover to be sure it does not state any misleading or incorrect statements or omit to state a material fact
- Pay particular attention to the CDA which will be included as an appendix to the OS and assist Bond Counsel to insure that its covenants are understood and implemented

What is Continuing Disclosure?

- “Continuing disclosure consists of important information about a municipal bond and its issuer that arises after the initial issuance of the bond. This information generally reflects the financial or operating condition of the issuer as it changes over time, as well as specific events occurring after issuance that can have an impact on the ability of issuer to make payments on the bond, the value of the bond if it is traded prior to its maturity, the timing of repayment of principal, and other key features of the bond.”¹
- Enforced through the U.S. Securities and Exchange Commission (SEC) regulation of Broker-Dealers; Required in primary market offer as an aid to secondary market.
- Advent of the Electronic Municipal Markets Access (EMMA) system; centralized online source for municipal disclosures.

¹ Source: www.emma.msrb.org

What are your client's continuing disclosure responsibilities?

CDA generally requires:

- Annual Disclosure of Financial and Operating Information
- Material Event Notices

Recent amendments to Rule 15c2-12 affect future bond issues and reflect the general sense that the SEC and the Municipal Securities Rulemaking Board are very interested in a perceived lack of appropriate disclosure.

So, compliance has become and continues to be a hot topic in our field.

DeKalb's Descent Startles Market

S&P Drops Credit By Five Notches

BY SHELLY SIGO

BRADENTON, Fla. — Some municipal bond market observers say last week's stunning five-notch downgrade of Georgia's third-largest county highlights the importance of disclosure — or what Standard & Poor's sees as insufficient disclosure in the case of DeKalb County.

The downgrade to BBB from AA-minus, and withdrawal of the county's ratings, drew swift reaction from market observers and forced bondholders unable to hold the debt at the lower rating to shed their investments.

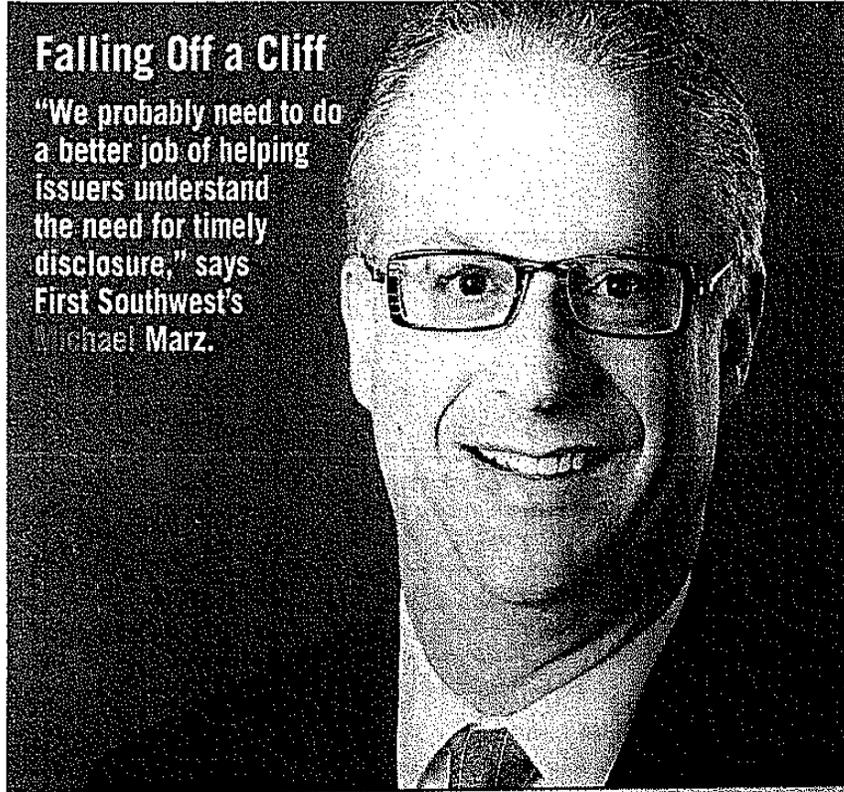
Standard & Poor's had given the county a gilt-edged AAA rating as recently as January.

Some experts said the situation should send a message to issuers about the importance of disclosure, and the potential higher cost of credit.

But they also rejected the idea that DeKalb's downgrade supports predictions of wide-

Falling Off a Cliff

"We probably need to do a better job of helping issuers understand the need for timely disclosure," says First Southwest's Michael Marz.



spread defaults by municipalities.

DeKalb has not defaulted on its debt and Standard & Poor's analysts said its action, while unusual, was indicative of a county with a rapidly deteriorating financial condition and inconsistent reporting on which to base a rating analysis.

"It was clearly the absence of information that contributed to that," Michael Marz, a vice chairman at First Southwest Co. and chairman of the Bond Dealers of America, said at the National Municipal Bond Summit in Miami Beach last week.

Marz said there is an expense

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Why Disclosure – both primary and continuing – is so important

Issuer Liability

- SEC Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, as amended, provides that it is unlawful for any person, directly or indirectly:
 1. to employ any device, scheme, or artifice to defraud,
 2. to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Issuer Liability

- What are we talking about?

Whether there is substantial likelihood that the inclusion or omission of a fact would significantly alter the “total mix” of information about a security in the view of the reasonable investor.

Issuer Liability

- When is this relevant?
 - Primary Market Disclosure – official statements, transaction documents.
 - Secondary Market Disclosure – continuing disclosure, and other statements “calculated to reach the market.”

Issuer Liability

- What Disclosure is Calculated to Reach the Market?
 - It seems fairly intuitive that Official Statements and EMMA filings pursuant to CDAs are calculated to reach the market and need to be accurate.
 - However, “[m]unicipal issuers have an obligation to make sure that information that is released to the public that is reasonably expected to reach investors and trading markets, even if not specifically published for that purpose, does not violate the antifraud provisions.” SEC Release 69515, May 6, 2013.

Issuer Liability

- The SEC has taken the position that in the absence of EMMA filings, “investors may be more likely to rely upon statements from public officials.”
- In this case, public officials’ statements become “the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market.”
- Full and complete public disclosure on EMMA reduces the likelihood that public statements will alter the total mix of information.

- Moreover, the SEC has increasingly focused on individuals:
 - “Although cities and municipal issuers are distinct legal entities, in fact they act through individuals . . . And they meet their primary and continuing disclosure obligations under state and federal law through the conduct of public officials. So when we find material misstatements or omissions by public officials in connection with municipal securities, we can, should, and will take action to hold the appropriate public officials accountable.” – SEC Commissioner Daniel Gallagher on May 10, 2013.

Issuer Liability

- There has been a spurt of SEC activity in 2013; many of the actions by the SEC focus on individuals and nontraditional forms of disclosure:
 - Nontraditional Media
 - Harrisburg, PA – Public Statements
 - South Miami, FL – Unrelated Documents
 - Personal Financial Liability
 - San Diego, CA – Understatement of Pension Liability
 - Victorville, CA – Inflation of Property Values
 - Miami, FL – Pattern of Misbehavior

Issuer Liability – Harrisburg, PA

- Harrisburg failed to file its audit or other continuing disclosure in connection with its disclosure agreements. This created an information vacuum during a time the City was experiencing financial distress.
- In the absence of such documents, the SEC found that budgets and even State of the City addresses amounted to disclosure under the securities laws.
- Problematically, these documents and speeches omitted the City's failure to pay certain bond issues and misstated the City's credit rating.

Issuer Liability – Harrisburg, PA

- The SEC report, filed May 6, 2013, establishes that documents unrelated to a bond issue, but reasonably expected to reach investors can result in fraud liability.
- “Public officials should be mindful that their public statements, whether written or oral, may affect the total mix of information available to investors, and should understand that these public statements, if they are materially misleading or omit material information, can lead to potential liability under the antifraud provisions of the federal securities laws.” SEC Release 69516, May 6, 2013.

Issuer Liability – South Miami, FL

- South Miami falsely certified that it was complying with loan agreements to ensure two sets of pool bonds issued by a conduit issuer in 2002 and 2006 would be tax-exempt.
- The City represented that the proceeds were being used for proper purposes when in reality it loaned the bond proceeds and leased the project to a private developer in return for parking revenues, jeopardizing the tax-exempt status.
- The documents at issue were certifications to the conduit issuer, not statements designed to reach investors.

Issuer Liability – San Diego, CA

- The SEC alleged that the San Diego City Manager, Auditor & Comptroller, Deputy Finance City Manager, and the City Treasurer fraudulently failed to inform municipal investors about the severe under-funding of its pension obligations.
- “Municipal officials have a personal obligation to ensure that investors are provided with complete and accurate information about the issuer’s financial condition.” – SEC Regional Director Rosalind Tyson
- The City officials consented to the entry of a consent order that permanently enjoined them from future violations of the Securities Act with three having to pay a penalty of \$25,000 and the fourth paying a fine of \$5,000.

Issuer Liability – Victorville, CA

- Victorville issued Airport Tax Increment Financing (TIF) Bonds.
- City inflated the valuation of hangers (\$65m v. \$27.7m) in the issuance of TIF bonds to allow for a larger issue size.
- City was put on notice by assessor that values were suspect.
- SEC is seeking financial penalties against the City, the former director of economic development, the airport authority, and the underwriters.
- The SEC is also seeking an injunction to prohibit [further violations of the Securities Act].

Issuer Liability – Miami, FL

- It is alleged, that Miami, acting through its budget director, made several inter-fund transfers of restricted monies as a means of masking a general fund deficit and securing better bond ratings.
- This mirrored conduct in 2003 that was the subject of an existing cease and desist order.
- The SEC is suing the City and its former budget director for monetary damages.



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