

Disclosure and Accounting Practices in the Municipal Securities Market

Introduction

Many critically important aspects of American life, from airports to sewers and schools to hospitals, depend on the municipal securities market for financing. All bonds, notes and other debt securities issued by states and local governments and their respective agencies and instrumentalities are “municipal securities.” They are issued by such government entities to pay for a variety of public projects, cash flow and other governmental needs and, by acting as a conduit on behalf of private organizations who wish to obtain tax-exempt interest rates, to fund non-governmental private projects.¹ Maintaining the health of this key component of our capital markets is important to every resident of the United States not least to the millions of individuals who invest in municipal bonds. To this end, staff of the Divisions of Corporation Finance, Enforcement and Market Regulation and of the Office of Chief Accountant of the Securities and Exchange Commission would like to bring to your attention some of our ongoing concerns about investor access to full and accurate information regarding municipal issuers and their securities.

A number of Commission enforcement actions have highlighted continued disclosure weaknesses, raised concerns about governmental accounting, and suggested the need for improvements to disclosure practices. These enforcement actions involved allegations that in disclosure documents used in offerings or other information provided to investors:

- the City of San Diego, California failed to disclose the gravity of its enormous pension and retiree health liabilities or that those liabilities had placed the City in serious financial jeopardy;²
- the City of Miami, Florida failed to disclose an unprecedented cash flow shortage which it had eased, in part, by spending the proceeds of bonds issued for other purposes for operating costs;³
- Maricopa County, Arizona failed to disclose a material decline in its financial condition and operating cash flow, the substantial deficit in its general fund, and increased deficit in another fund;⁴
- the City of Syracuse, New York falsely claimed a surplus for its general and debt service funds, materially overstated its ending fund balances in those funds, and misled investors by describing certain financial information as audited;⁵

¹ The Internal Revenue Code delineates the purposes for which tax-exempt municipal bonds may be issued for the benefit of organizations other than states and local governments, i.e., conduit borrowers.

² *In the Matter of the City of San Diego*, SEC Release No. 34-54745 (November 14, 2006).

³ Opinion of the Commission *In the Matter of the City of Miami, Florida*, SEC Release No. 34-47552 (March 21, 2003).

⁴ *In re Maricopa County*, SEC Release No. 33-7354, 34- 37779 (October 3, 1996).

⁵ *In re City of Syracuse, New York, Warren D. Simpson, and Edward D. Polgreen*, SEC Release No. 34-39149 (September 30, 1997).

- Orange County, California made misleading statements and failed to disclose material information about the County's high risk investment pool and financial condition that brought into question the County's ability to repay its securities – facts about which members of its Board of Supervisors were aware, but failed to take appropriate steps to assure were disclosed;⁶
- A lawyer serving as bond counsel was responsible for misrepresentations and omissions in an official statement and in his legal opinions, which failed to provide investors with full information concerning the substantial risk that the IRS would find a municipal securities issue to be taxable;⁷ and
- A group of 15 broker-dealer firms engaged in a variety of violative practices in the auction rate securities market and in certain other practices that were not adequately disclosed to investors in auction rate securities, some of which had the effect of favoring certain customers over others, and some of which had the effect of favoring the issuer of the securities over customers, or vice versa.⁸

The Commission has taken many other enforcement actions involving municipal securities.⁹ According to press accounts, these may not be the only instances in which important information was not disclosed to investors in municipal securities.¹⁰

Section 15B(b) of the Exchange Act established a self regulatory organization, the Municipal Securities Rulemaking Board (MSRB), to set rules for brokers, dealers and municipal securities dealers who engage in municipal securities transactions, subject to

⁶ *Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors*, SEC Release No. 34-36761 (January 24, 1996).

⁷ *Weiss v. SEC*, 468 F.3d 849 (D.C.C. 2006) (upholding the Commission's decision *In the Matter of Ira Weiss*, SEC Release No.34- 52875 (December 2, 2005)).

⁸ *In the Matter of Bear, Stearns & Co. Inc.; Citigroup Global Markets, Inc.; Goldman, Sachs & Co.; J.P. Morgan Securities, Inc.; Lehman Brothers Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Morgan Stanley & Co. Incorporated and Morgan Stanley DW Inc.; RBC Dain Rauscher Inc.; Banc of America Securities LLC; A.G. Edwards & Sons, Inc.; Morgan Keegan & Company, Inc.; Piper Jaffray & Co.; SunTrust Capital Markets Inc.; and Wachovia Capital Markets, LLC*, SEC Release No. 34-53888. (May 31, 2006).

⁹ Other enforcement actions involving the municipal securities market include *In the Matter of the Dauphin County General Authority*, SEC Release No.33-8415 (April 26, 2004); *Mount Sinai Medical Center of Florida, Inc., M. Brooks Turkel and Harvey W. Smith*, Sec Release No. 34-51797 (June 7, 2005); *In the Matter of Neshannock Township School District*, SEC Release No. 34-49600 (April 22, 2004); *SEC v. Manoucher Sarbaz, et al*, Civ. Action No. CV 03-881 CJC (C.D. Cal.), **Litigation Release No. 18898** (September 24, 2004); *SEC v. Robert Kasirer, et al.*, Civ. Action No. 04-CV-04340 (N.D. Ill.), **Litigation Release No. 19131** (March 11, 2005); *SEC v. David Fitzgerald and Pacific Genesis Group, Inc.*, **Litigation Release No. 17432** (March 22, 2002). A compendium of such actions is available on the SEC's web site. <http://www.sec.gov/info/municipal.shtml>

¹⁰ See, e.g., John Connor, "IRS Muni Cop Criticizes Muni Market Attitudes, Practices," *Dow Jones Newswires*, November 30, 2006; William Selway, Martin Z. Braun and David Dietz, "Broken Promises," *Bloomberg Markets*, November 1, 2006; Joe Mysak, "San Diego Isn't the Only City with Pension Troubles," *Bloomberg News*, November 17, 2006.

Commission oversight.¹¹ However, because the MSRB's authority is limited only to brokers, dealers and municipal securities dealers, its rules cannot address the problems exposed by SEC enforcement actions which involve issuer disclosure or the activities of other market participants.¹²

The Commission's statutory authority to regulate issuers and many other participants in the municipal securities market is also closely circumscribed. Municipal securities are exempt securities under both the Securities Act and the Exchange Act and, therefore, are not subject to the Securities Act registration requirements or the Exchange Act periodic disclosure obligations applicable to public companies.¹³ Although the Commission is authorized to take enforcement actions against any person or entity, including issuers of municipal securities, who violate the antifraud provisions of the federal securities laws, its statutory authority is limited with regard to securities offerings and other actions of many municipal market participants, including issuers, issuer officials, conduit borrowers,¹⁴ independent municipal financial advisors, and bond lawyers. The Exchange Act does, however, give the Commission regulatory authority over brokers and dealers who underwrite issuances or otherwise engage in municipal securities transactions.¹⁵ However, the Commission's authority over issuers of municipal securities is specifically limited by Section 15B(d) of the Exchange Act (commonly called the Tower Amendment).¹⁶

The Commission has used its existing limited authority to address concerns about disclosure in the municipal securities market through enforcement actions, adopting a regulation applicable to brokers and dealers, and issuing interpretative releases. In an effort to improve the transparency of the municipal securities market, the Commission adopted Rule 15c2-12, which, among other things, established a system for the dissemination of certain important information – final official statements, annual reports

¹¹ The MSRB does not enforce the rules it sets. Instead, the NASD, the Commission and, in some cases, other appropriate regulatory agencies, enforce the MSRB's rules. Commission enforcement actions taken against brokers and dealers in municipal securities often include alleged violations of the MSRB's rules.

¹² Both the Commission's and MSRB's authority is limited by Section 15B(d) of the Exchange Act which provides as follows: "(1) Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly *or indirectly through a purchaser or prospective purchaser of securities from the issuer* [i.e., an underwriter of an offering of municipal securities], to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities. (2) The Board is not authorized under this title to require any issuer of municipal securities, directly *or indirectly through a municipal securities broker or municipal securities dealer or otherwise*, to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer..." [emphasis added]

¹³ Securities Act section 3(a)(2); Exchange Act section 3(a)(12)(A).

¹⁴ The Commission does, of course, have statutory authority, in addition to antifraud authority, over securities offerings involving conduit borrowers, whether a public reporting company or a private entity, where the exemption from the registration requirements of the federal securities laws is unavailable to the conduit borrower due to the type of securities offering involved.

¹⁵ In particular, section 15(c)(2)(D) of the Exchange Act grants authority to the Commission, "by rules and regulations, to define, and prescribe means reasonably designed to prevent," fraudulent, deceptive, or manipulative acts and practices and fictitious quotations by brokers and dealers.

¹⁶ *Supra*, at note 12.

containing certain financial and other information prepared by municipal issuers, and notices of certain material events affecting municipal issuers and their securities - through requirements placed not on issuers, but on broker-dealers.¹⁷ The Commission has also issued an interpretative release expressing the Commission's views with respect to disclosures under the federal securities laws in the municipal market and the disclosure obligations of municipal securities issuers and others.¹⁸

Various industry organizations and groups of organizations have attempted to accomplish improvements through voluntary efforts. While some of these initiatives have done much good, the nature of the municipal market – with more than 50,000 issuers – makes universal improvement on a voluntary basis virtually impossible.

Although staff is reviewing Rule 15c2-12, in order that it might recommend possible improvements, the Commission is near to the statutory limits of its present authority to address the needs of investors in municipal securities for information upon which investment decisions may be made. To provide investors in municipal securities with access to full, accurate, and timely information like that enjoyed by investors in many other U.S. capital markets, the Commission requires expanded authority over the municipal securities market.

The Municipal Securities Market

The size of the municipal securities market is striking. There are over \$2.4 trillion of municipal securities outstanding. More than \$430 billion of new bonds and notes were issued last year. Despite its reputation as a “buy and hold” market, trading volume is also substantial, with over \$6 trillion of long and short term municipal securities traded in 2006. The municipal securities market is diverse and fragmented. There are more than 50,000 state and local issuers of municipal securities, and 2 million separate bonds outstanding.

Individual investors participate heavily in this market: households own 36% (\$860.6 billion) of municipal securities directly¹⁹ and it is believed that they hold up to 33% indirectly through money market funds, mutual funds, and closed end funds.²⁰ The

¹⁷ This information is not filed with the Commission. It is made available to the public by certain private information vendors, known as nationally recognized municipal securities information repositories (NRMSIRs) and state information depositories (SIDs) (collectively, Document Repositories), who charge investors fees to obtain this information. Although some documents known as material event notices are also available from the MSRB, this service (CDINet) has only been lightly used. At the request of the MSRB, the Commission has proposed amending Rule 15c2-12 to allow the MSRB to discontinue using CDINet as a recipient of material event notices. The Board based its request on the limited use of CDINet, concern that notices filed with CDINet were not reaching the broader market, the availability to issuers of alternative electronic document delivery services for NRMSIR and SID filings, and the estimated \$500,000 to \$1 million outlay necessary to keep CDINet operational as reasons for requesting the rule amendment. See, SEC Release No. 34-54863 (December 4, 2006).

¹⁸ *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others*, SEC Release No. 34-33741 (May 17, 1994).

¹⁹ *Holder of Municipal Debt 1997-2006*, The Bond Buyer and Source Media Inc.

²⁰ Federal Reserve Board, Flow of Funds Accounts, Flows and Outstandings, Fourth Quarter 2006.

median size trade in fixed income municipal securities is only \$25,000; more than 56% of all customer trades are for \$25,000 or less and 86.7% are for \$100,000 or less.²¹ As our nation's infrastructure needs continue to escalate and retiring baby-boomers seek safe, tax-free investments, the size of, and level of individual investor involvement in, the municipal securities market is expected to continue to grow.

Despite the size and importance of this market, it lacks many of the systemic protections customary in many other sectors of the U.S. capital markets. Investors in municipal securities are, in certain respects, afforded second-class treatment under current law. Different treatment of this market may have been justified when the securities laws were enacted over 70 years ago and the municipal market was relatively small and dominated by institutional investors. For the most part, different treatment is no longer appropriate. Furthermore, this market has shifted from being a predominantly intrastate market – in which investors might learn about issuers by reading the local paper – to being a national market. Investors in municipal securities, municipal analysts, investment advisors, and the broker-dealers who effect transactions in this market would benefit significantly from access to current, high quality disclosure comparable to that which is available to them in other markets.

Availability of Information

The federal securities laws are premised on full and fair disclosure - the ability of investors to make informed investment decisions based on accurate and full information. However, disclosure in the municipal securities market is substantially less comprehensive and less readily available, particularly to individual investors, than disclosure by public reporting companies.

The federal securities laws and Commission regulations establish a detailed registration and periodic disclosure system that requires public companies to electronically file Securities Act registration statements and Exchange Act periodic reports with the Commission through the Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR), which makes them publicly available to all persons for free and provides them to a variety of information vendors for further dissemination. No filings are made through EDGAR with respect to municipal securities because, as exempt securities, none are required.

Although Exchange Act Rule 15c2-12 has greatly increased the quantity of information available to municipal securities investors, both industry participants and Commission staff have identified significant weaknesses in this system due to the Commission's inability to impose requirements directly on municipal issuers.²² For

²¹ However, transactions of \$100,000 or less account for only 16.6% of the trading volume for fixed rate municipal securities. *Report on Transactions in Municipal Securities*, Office of Economic Analysis and Office of Municipal Securities, U.S. Securities and Exchange Commission, July 1, 2004. (Covered trades from November 1, 1999 – October 31, 2000.)

²² "NFMA Survey Shows Gripes On Disclosure Muni Analysts Cite 15c2-12 Shortfalls" *The Bond Buyer*, December 7, 2001; "Dysfunctional Disclosure Sources: SEC Survey Finds System Not Working," *The Bond Buyer*, February 22, 2002; "SEC, NFMA: Many Issuers Fail To Meet Disclosure Obligations," *The*

example, due in part to the Tower Amendment to the Exchange Act,²³ which was adopted more than 30 years ago when the municipal market was much smaller, the Commission cannot directly or indirectly require issuers to file preliminary official statements with it or the Board so that they may be made freely and easily available prior to the issuance of municipal securities. As a result, prospective investors in primary offerings cannot quickly and easily access this information at the time it is most needed – prior to an investment decision.²⁴

Moreover, municipal issuers frequently fail to provide information to all of the Document Repositories or provide information that is so stale as to be of limited usefulness. As a result, prospective investors and other market participants do not have a free or comprehensive source to turn to for information on municipal securities. It is important that the same information be available from each Document Repository and for it to be available simultaneously in order to provide a level playing field. However, the Commission does not have the authority directly to require issuers to make available the information they have undertaken to provide. Industry efforts have been unable to fully address these issues. Organizations representing issuers of municipal securities have repeatedly expressed a desire for a filing location similar to EDGAR.²⁵

Accounting Standards

The lack of uniformly applied generally accepted accounting standards in the municipal market raises significant issues for investors and the market. Federal securities law authorizes the Commission to set standards of accounting and financial reporting for companies with publicly-traded securities. The Commission historically has looked to private-sector standard-setting bodies to develop accounting principles and standards for public companies. Pursuant to its authority under Section 108 of the Sarbanes-Oxley

Bond Buyer, June 18, 2002; “Officials: Good Ratings, Investor Interest Depend on Disclosure,” *The Bond Buyer*, June 17, 2003; “Taylor, McCarthy to Discuss Muni Bond Regulation Over the Internet” *The Bond Buyer*, March 30, 2004.

²³ Securities Exchange Act of 1934, Section 15B(d)(1) and (2), 15 U.S.C. section 78o-4.

²⁴ Rule 15c2-12(b)(2) requires that “from the time [an underwriter] has reached an understanding with an issuer of municipal securities that it will become [an underwriter] in [an offering covered by the rule] until a final official statement is available, [the underwriter] shall send no later than the next business day, by first-class mail or other equally prompt means, to any potential customer, on request, a single copy of the most recent preliminary official statement, if any.” Rule 15c2-12(b)(2) does not cover all offerings (competitively bid offerings and offerings of under \$1 million are not covered by the rule and certain other types of offerings are exempt from this portion of the rule) and its effectiveness may be limited because investors may not be aware that a preliminary official statement can be obtained from the underwriter upon request and because the document may not reach a prospective investor before an investment decision must be made.

²⁵ For example, in the 1988 Proposing Release for Rule 15c2-12 the Commission solicited comment on the creation of a central repository for municipal disclosure documents. Of the more than 60 comment letters the Commission received, 45 commentators expressed a view on the concept of a central repository. Forty commentators supported some form of a central repository. The primary reason given for supporting the creation of one or more central repositories was the need to have a readily accessible central source of information on municipal bonds. SEC Release No. 34-26985 (June 28, 1989): Adoption of Rule 15c2-12.

Act,²⁶ the Commission has designated the Financial Accounting Standards Board (FASB) as a private sector standard-setter. Section 108 of the Sarbanes-Oxley Act establishes criteria that must be met in order for the work product of an accounting standard-setting body to be recognized by the Commission as “generally accepted.” Section 108 requires that the Commission determine whether the standard-setting body has the capacity to assist the Commission in fulfilling the requirements of the securities laws. At a minimum, the standard-setting body must be capable of improving the accuracy and effectiveness of financial reporting and the protection of investors. The Commission must exercise initial and continuing oversight over the standard-setting body to determine whether these criteria have been met. The FASB’s accounting principles are recognized as “generally accepted” for purposes of the federal securities laws for public companies – but not states or local governments.²⁷ Section 108 of the Sarbanes-Oxley Act is focused on the accounting standards under the Commission’s authority with regard to public company issuers.

The Governmental Accounting Standards Board (GASB)²⁸ establishes generally accepted accounting principles (GAAP) that are used by many states and local governments of widely varying size and complexity.²⁹ GASB is a not-for-profit organization that operates under the oversight of the Financial Accounting Foundation (FAF).³⁰ GASB is funded by voluntary payments and contributions from states and local governments and the financial community, and through sales of its publications. This funding mechanism is inadequate to ensure an ongoing program of high-quality governmental accounting standards and has raised questions from some parties about GASB’s ability to remain independent of its donors.³¹

Although statutes in many states require compliance with GASB standards, elsewhere municipal issuer use of GASB standards is largely voluntary, coming about as a result of its use by auditors rendering GAAP opinions on the fairness of presentations of the financial condition of governmental entities. An estimated 20,000 issuers of municipal securities use a variety of accounting methods that do not conform to GASB

²⁶ Pub.L. 107-204, 116 Stat. 745 (2002).

²⁷ April 25, 2003, Commission policy statement recognizing the FASB as satisfying the criteria in Section 19(b) of the Securities Act, as added by Section 108 of the Sarbanes-Oxley Act of 2002.

²⁸ The GASB was organized in 1984 as an operating entity of the Financial Accounting Foundation (FAF) to establish standards of financial accounting and reporting for state and local governmental entities. Its standards guide the preparation of external financial reports of those entities. The FAF’s trustees are responsible for selecting the members of the GASB and its Advisory Council, funding their activities and exercising general oversight-with the exception of the GASB’s resolution of technical issues.

²⁹ The stated mission of the GASB is to establish and improve standards of state and local governmental accounting and financial reporting that will result in useful information for users of financial reports and guide and educate the public, including issuers, auditors, and users of those financial reports. Governments and the ethical requirements of the American Institute of Certified Public Accountants (AICPA) recognize the GASB as the official source of generally accepted accounting principles (GAAP) for state and local governments. See AICPA Ethics Rule 202.01 and Appendix A to that rule; ET § 202.

³⁰ The FAF has responsibility for the oversight, administration, and finances of both the GASB and the FASB.

³¹ “GASB Faces Reporting Criticism, Concern Grows About Independence,” by Steve Burkholder, *Accounting Policy & Practice*, Bureau of National Affairs, March 9, 2007; “Standards Deviation.” by Arthur Levitt, Jr., *Wall Street Journal*, March 9, 2007.

standards. Sometimes use of these non-GASB methods are dictated by state law.³² On occasion, governments that are otherwise compliant with GASB may choose not to apply specific rules with which they disagree or which would make their financial condition appear weaker.³³ This makes their financial statements hard to understand and difficult to compare.

Furthermore, some issuers include audited annual financial statements in disclosure documents without obtaining the consent of the auditor, sometimes without disclosing that such consent has not been obtained.³⁴ The Commission has not been explicitly authorized to regulate accounting and financial reporting standards for municipal issuers. As a result, the Commission has no direct influence over the GASB and the standards it sets, nor can the Commission designate GASB standards as “generally accepted.” Further, the Commission has no express authority to require municipal issuers to follow GASB standards.

There are differences between the purposes of financial reports of governmental entities and those of private-sector business enterprises.³⁵ Nevertheless, there are important areas in accounting and disclosure standards in which divergence is no longer warranted. Users of financial reports of governmental entities are entitled to material information about arrangements and transactions—for example, those related to pension benefits, other post employment benefits, and derivatives—just as investors and other users of financial reports of business enterprises are entitled to that information. Such users are also entitled to adequate financial statement presentation, disclosure, and discussion.

³² Many local governments in New Jersey, for example, must use a statutory accounting method instead of the GASB’s accounting standards.

³³ For example, the Texas legislature recently enacted a law, and the Connecticut General Assembly recently approved a bill, which was subsequently vetoed by the Governor, to pull issuers out from under GASB standards and place them under systems of generally accepted accounting rules developed and administered by those states. This is tantamount to allowing each public company to set accounting standards for itself and its subsidiaries. The Texas law requires the State, and permits local governments in Texas, not to use new GASB Statement 45, which requires governmental entities that provide health care, life insurance, and other post-employment benefits to retirees to report the estimated accrued cost of the benefits. *See*, “Texans want to strike new rule on projecting retiree health care” *New York Times*, March 12, 2007. *See also*, “Texas’ new \$50 billion question - New rule requires state to total the real cost of public retiree health care” *American-Statesman*, February 11, 2007, “Paying for Promises - After the shock of the big numbers, states and localities are finding ways to deal with the costs of their retirees’ health care,” *Governing*, February, 2007, and “Texas Blinks in GASB Showdown: Bill Would Allow Option to Follow Rule 45” *The Bond Buyer*, April 20, 2007. Connecticut’s bill would have allowed the state comptroller to establish accounting standards for the State’s budgetary purposes rather than follow GASB standards. *See*, “Connecticut Takes Up Fight Over Accounting Rules” *The New York Times*, June 2, 2007 and “Connecticut Weighs Bill Giving Comptroller Power over GAAP” *The Bond Buyer*, June 6, 2007.

³⁴ *See* “Recommended Practice: Auditor Association with Financial Statements Included in Offering Statements or Posted on Websites (2005 and 2006) (CAAFR & DEBT)” Government Finance Officers Association, February 24, 2006.

³⁵ Examples of those differences from GASB’s point of view are discussed in a GASB White Paper entitled “Why Governmental Accounting and Financial Reporting Is—And Should Be—Different,” available on the GASB’s website at www.gasb.org.

The GASB has made progress in recent years in improving financial reporting standards, but the GASB needs greater support to better serve users of financial reports of governmental entities. Greater support for the GASB could be provided in several ways, including legislation allowing the Commission to mandate compliance with GASB standards, granting the Commission clear authority, similar to that in Section 108 of the Sarbanes-Oxley Act, to designate GASB standards as “generally accepted” for municipal issuers (provided that the Commission could make the necessary findings), with the attendant authority to oversee the GASB, and providing funding to strengthen the GASB’s independence.

Disclosure Policies and Procedures; Transaction Professionals

The staff is concerned that, regardless of size, issuers of municipal securities may lack policies or procedures adequate to ensure accurate and full disclosure in their offering documents and are not legally required to certify the accuracy of their disclosures.³⁶ Furthermore, the Commission lacks the authority directly to require issuers to establish disclosure policies and procedures or to provide certifications. Unlike in the corporate context, in which there are requirements for disclosure controls, evidence obtained in many enforcement actions suggests that issuer officials who vote to approve the use of disclosure documents often assume the accuracy of disclosure documents and approve them with little or no review. Furthermore, the staff has observed that issuer representatives often have limited involvement in the preparation of disclosure documents.

In contrast to corporate securities offerings in which the issuer and its counsel prepare a company’s disclosure documents and filings, with input from the underwriter and its counsel, the offering documents for negotiated offerings³⁷ of municipal securities are typically prepared by the underwriter and underwriter’s counsel, who do not have an intimate knowledge of the issuer’s affairs. In fact, issuers often are not represented by counsel with respect to the preparation of disclosure documents.³⁸ The issuer’s counsel, bond counsel, and other professionals who work on an offering are often hired on a transaction-by-transaction basis and therefore may lack the depth of factual knowledge derived from an ongoing relationship with an issuer. Often issuer’s counsel is only occasionally engaged in municipal securities offerings and is heavily dependent on others

³⁶ Often, bond purchase contracts require issuers to provide a certification to the underwriter regarding the accuracy of portions of official statements. However, these certifications often are directed to the underwriter alone and, because they are only required by contract, not law, the level of importance ascribed to them by issuer officials may be less than if they were required by federal law or regulation.

³⁷ In 2006, according to Thomson Financial, more than 80% of municipal bonds were sold in negotiated sales. About 18 percent were sold at auction, which are also called competitive sales. The remainder were privately placed. Joe Mysak, “Don’t Bury Bond Auction Sales, They Aren’t Dead Yet,” Bloomberg News, March 9, 2007.

³⁸ Bond counsel generally limit their engagement to matters related to the validity and tax-exemption of an offering and to the accuracy of the summaries of documents which they have prepared that are included in offering documents. “The Functions and Professional Responsibilities of Bond Counsel” National Association of Bond Lawyers Committee on Professional Responsibility, 1995 (2nd Ed), pp 2-4.

about disclosure matters. Bond counsel often limit their practices exclusively to municipal securities and may lack the depth of knowledge of the federal securities laws obtained from representing clients in registration, periodic reporting, and other matters before the Commission. Furthermore, underwriters of municipal securities often disclaim responsibility for statements made in offering documents, which would not be permitted in a corporate bond offering.³⁹

Eleven years ago, the Commission issued an Exchange Act Section 21(a) Report of Investigation regarding the conduct of the Board of Supervisors of Orange County⁴⁰ in which it alerted municipal issuers and other participants to their responsibilities with respect to disclosure and recommended steps issuer officials should take in connection with disclosure documents:

The Supervisors ... had a duty to take steps appropriate under the circumstances to assure accurate disclosure was made to investors regarding ... material information. The Supervisors, however, failed to take appropriate steps. For example, while the Supervisors believed that they could rely on the County's officials, employees or other agents with respect to these offerings, they never questioned these officials, employees or other agents regarding the disclosure of this information; nor did they become familiar with the disclosure regarding the County's financial condition. Had they taken such or similar steps, it should have been apparent to each Supervisor, in light of his or her knowledge, that the disclosure regarding the County's financial condition may have been materially false or misleading.⁴¹

Despite the Commission's explicit statements, information obtained in enforcement actions suggest that this problem remains. For example, *In the Matter of the City of Miami*, the Commission found that "Miami's officials ignored the City's disclosure responsibilities. [The City Manager] admitted that he was not familiar with Miami's disclosure requirements and dismissed the importance of the bond offering documents.

Let me ask you this, does anybody read this [Official Statement]? I mean, only experts read this [M]ost people don't read this, nobody reads this. They go by what the raters, that is Moody's, Standard & Poor's, saying that these bonds are safe to buy.⁴²

In contrast to the corporate securities market, the Commission lacks adequate authority to fully address problems such as these in the municipal securities market.

³⁹ The Commission previously made clear its concern that such disclaimers by underwriters of municipal securities may be misleading in the *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others*, SEC Release No. 34-33741, fn. 103 (May 17, 1994).

⁴⁰ Report of Investigation in the Matter of County of Orange, California, as it Relates to the Conduct of the Members of the Board of Supervisors, SEC No. 34-36761 (January 24, 1996).

⁴¹ Report of Investigation in the Matter of County of Orange, California, as it Relates to the Conduct of the Members of the Board of Supervisors, Exchange Act Release No. 36761 (January 24, 1996).

⁴² *In the Matter of the City of Miami*, SEC Release No. 34-47552 (March 21, 2003) (Commission opinion).

Conclusion

In light of these disclosure and accounting problems observed in the municipal securities market, staff believes that Congress should consider revisions to the current disclosure and accounting requirements for municipal issuers to provide investors and other participants in the municipal securities market with information and protections comparable to those available in many other U.S. capital markets, while giving deference where appropriate to the special disclosure and accounting aspects of municipal issuers. There are a variety of steps that should be taken that would improve for investors the extent, quality, and availability of municipal issuer information. These include:

- Making available to investors municipal issuer offering documents and periodic reports that contain information similar, although not necessarily identical to, that required of issuers and offerings of corporate securities.
- Making available to investors without charge municipal issuer offering documents and periodic reports on a timely basis through an easily accessible venue, such as a system similar to EDGAR.
- Mandating municipal issuer use of “generally accepted” governmental accounting standards.
- Encouraging and supporting timely development of high-quality governmental accounting standards by, for example, providing an independent funding mechanism for the GASB and requiring or permitting Commission oversight of the GASB, as is now provided by Sections 108 and 109 of the Sarbanes-Oxley Act for the FASB.
- Applying to non-governmental conduit borrowers the registration and disclosure standards that would apply if they issued their securities directly without using municipal issuers as conduits.
- Ensuring that issuers of municipal securities establish policies and procedures for disclosure appropriate for the particular issuer.
- Clarifying the legal responsibilities of issuer officials for the disclosure documents that they authorize, the responsibilities of underwriters with respect to the offering statements they use in underwriting municipal offerings, and the securities law responsibilities of bond counsel and other participants in offerings.

The regulatory model applicable to the securities of public companies should not, however, be duplicated and applied wholesale to municipal securities. Implementation of steps such as these must be tailored to accommodate the unique character of municipal

issuers and special attributes of the municipal securities market.⁴³ For instance, the Commission should not undertake to review the disclosure documents of municipal issuers as it does those of public companies registered with the Commission, in recognition that municipal issuers are themselves governments.

⁴³ We are not suggesting that other existing exemptions from the securities laws be amended. For example, if the provisions of the exemptions are satisfied, offerings of securities by small municipal issuers in reliance on the intrastate registration exemption in Section 3(a)(11) of the Securities Act and offerings of securities by not for profit organizations in reliance on the exemption provided by Section 3(a)(4) of the Securities Act could continue. Further, the private offering exemptions under the Securities Act would remain in place for municipal issuers and conduit borrowers.