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Navigating the Disclosure Labyrinth in Municipal Finance: A Practical Approach

One of the primary purposes of the Securities and Exchange Commission (the “SEC”) is to ensure that the investing public obtains accurate, timely and comprehensive information with respect to publicly-traded securities. The SEC regulates the release of such information through the antifraud provisions of the federal securities laws, particularly Section 17(a) of the Securities Act of 1933 and SEC Rule 10b-5 (established under Section 10(b) of the Securities Exchange Act of 1934) (“Rule 10b-5”). Like public companies, governmental issuers of municipal bonds must comply with these antifraud provisions when making public statements that are reasonably expected to reach investors and the trading market. In recent years, the SEC has undertaken unprecedented enforcement activity relative to such disclosures, both in terms of the number of actions and the enforcement tools at its disposal. Significantly, recent SEC enforcement actions have involved not only governmental issuers, but also their individual officials.

As a result, issuers are taking a fresh look at their disclosure practices relative to their public finance transactions, paying particular attention to the individuals tasked with: (i) assuring that the issuer’s disclosure documents for a particular bond issue comply with federal securities law requirements and (ii) assisting the issuer with its post-issuance disclosure obligations. Often, the issuer’s bond counsel and financial advisor take the lead in overseeing these matters. Alternatively, in situations involving unique or complicated disclosure questions, separate disclosure counsel may be engaged to advise the issuer on its disclosure obligations.

The involvement of legal counsel notwithstanding, the issuer is ultimately responsible for complying with its disclosure obligations under the federal securities laws. This blog is intended to help issuers in navigating these considerations, focusing on: (i) the preparation of the issuer’s offering circular, commonly known as the official statement (the “Official Statement”), in connection with the public sale of its municipal bonds; (ii) the issuer’s ongoing disclosure requirements once the bonds are issued, including the effect of the issuer’s other financial obligations on these requirements; (iii) the impact of the issuer’s other public statements in relation to the antifraud provisions; (iv) guidelines for preparing effective disclosure policies and procedures to facilitate these requirements; and (v) a brief word on environmental, social and governance (“ESG”) matters as they relate to the issuer’s disclosure obligations.

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