

UPDATE

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Part VII: “Remedial Efforts and Undertakings as a Source of Best Practices” (with conclusion)

“Securities Disclosure: What Lessons Can We Learn from the Securities and Exchange Commission’s Proceedings versus the City of San Diego, California?”

BY MARK H. VACHA, ESQ.

This final installment is Part VII in a seven-part series about the Securities and Exchange Commission’s (the “Commission”) proceedings versus the City of San Diego, California (the “City”) as set forth in the November 14, 2006 Release No. 8751 (the “Release”). The Release relates to the settlement between the Commission and the City pursuant to which the City consented to the entry of a cease-and-desist order relating to the City’s offer and sale of over \$260 million in municipal bonds in 2002 and 2003. For more factual background on these proceedings and an overview, please see Part I of this series which is available on the Dilworth Paxson LLP website at www.dilworthlaw.com. This article addresses potential insights from the Release regarding best practices for the process of preparing disclosure. Although the Release dealt with a general purpose governmental issuer, the points made by the Commission can also be instructive for the board of a conduit borrower in a transaction such as a tax-exempt qualified 501(c)(3) bond financing (e.g. the board of directors or trustees of a university or a hospital).

Remedial Efforts and Undertakings as a Source of Best Practices

The Release noted that the City had implemented several remedial measures since 2005 with a view to detecting and preventing securities violations. Some of these measures appeared to be in reaction to the specific situations facing the City such as the termination and replacement of certain officials and professional consultants. Other measures might be considered by other issuers since they are more proactive in nature. Amongst this latter category at least five practices adopted by the City should be noted.

- First, the City hired a full-time municipal securities attorney who is responsible for coordinating the City’s public disclosure and who has conducted continuing education for the City’s deputy attorneys on the City’s disclosure requirements.

- Second, the City hired individuals not affiliated with the City to act as the City’s Audit Committee.
- Third, the City created a Disclosure Practices Working Group, comprised of senior City officials from across City government which reviews all of the City’s documents distributed in connection with the City’s disclosure obligations relating to securities issued by the City or its related entities.
- Fourth, the Mayor and City Attorney must personally certify to the City Council the accuracy of the City’s official statements.
- Fifth, the City Auditor must annually evaluate the City’s internal financial controls and report the results to City Council.

Conclusion

Although the Release specifically stated that the finding made therein were made pursuant to the City’s offer of settlement and are not binding on any other person in any proceeding, the Release provides insight into a number of factors that the Commission may consider relevant for purposes of disclosure in municipal securities offerings generally and specifically regarding disclosure of pension and other post-employment benefit funding obligations.

One lesson to be learned from the Release is the necessity for issuer officials to read and understand (with a critical eye) the content of the official statement which the Commission has stated is the issuer’s document. Reliance on the professionals on the finance team is not a defense to inadequate disclosure.

On a more proactive note, the Release also provides a glimpse of specific remedial and preventive measures undertaken by the City which may provide guidance for issuers striving to enhance their procedures for preparing disclosures in connection with their municipal security issuances.



Mr. Vacha is a member of Dilworth Paxson’s Corporate Department and its Public Finance and Securities Groups. He has advised issuers, and national and regional investment banking firms in municipal capital markets transactions. He has handled securitization/ structured finance, initial public debt offerings, tax credit financings, bond pools, and tax district financings as well as traditional municipal bond transactions in the general governmental and 501(c)(3) contexts.

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