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TREASURER OF OHIO

# FIN 240: Continuing Disclosure from an Underwriter's Perspective

# Katie Kleinfelder

- Katie Kleinfelder  
Director  
RBC Capital Markets  
(513) 826-0547  
[katie.kleinfelder@rbccm.com](mailto:katie.kleinfelder@rbccm.com)

# General Post-Issuance Requirements



# Municipal Issuer Disclosure – A Brief History

- Securities Act of 1933 – passed with the objective of providing investors full disclosure of material facts about securities offered and sold
- Securities Exchange Act of 1934 - created the Securities and Exchange Commission (SEC)
  - While municipal securities are exempt from the registration and reporting requirements of the Securities Acts, issuers are subject to liability under the anti-fraud provisions of the Securities Acts (principally Rule 10b-5 of the Securities Exchange Act of 1934)
- In spite of rule 10b-5, full disclosure was not frequently practiced by municipal issuers prior to the 1960s
- The 1960s through 1980s saw dramatic changes in the municipal market including revenue bonds, housing bonds, advance refundings, variable rate bonds, and other provisions dramatically increasing the complexity of municipal securities
- Public sentiment for increased disclosure reached new heights in 1975 with the default of New York City and in 1983 with the default of Washington Public Power Supply System
- In 1988 the SEC began several initiatives designed to improve quality, timing, and dissemination of disclosure in the municipal securities market in response to a widely held belief that there were problems in the timeliness of and access to Official Statements
- On January 1, 1990, Rule 15c2-12 went into effect which required greater access to Official Statements for primary offerings
  - While the quality of disclosure for primary offerings significantly improved with the passage of Rule 15c2-12, there was a continuing concern with the adequacy of disclosure in the secondary market

Source: <https://www.sec.gov/spotlight/municipalsecurities/statements072911/borg.pdf>

# Municipal Issuer Disclosure – Continuing Disclosure Requirements

- ◉ To address continuing disclosure for municipal issuers in the secondary market the SEC amended Rule 15c2-12 on November 10, 1994
- ◉ Under the amended rule, broker-dealers are barred from buying municipal securities unless the issuer has agreed, in writing, to provide **ongoing disclosure**
  - This provision is the basis for a required Continuing Disclosure Agreement (CDA)
- ◉ This CDA requires municipal bond issuers to prepare and disseminate “Annual Financial Information” and notices of material events
  - Annual Financial Information: Usually an Annual Information Statement & Audited Financials
  - Material Event Notices: Various events (14 currently contained in the Rule) must be disclosed not in excess of ten business day after the occurrence of the event

# SEC Rule 15(c)2-12 - General

- **Rule 15(c)2-12: governs primary offering disclosure and continuing disclosure, including submission of annual financial information and material event notices**
  - Primary offering of municipal securities in principal amount of \$1 million or more, subject to exceptions
  - Directly governs underwriters and indirectly governs issuers and obligated persons



# SEC Rule 15c2-12

## SUMMARY:

The Securities and Exchange Commission ("SEC" or "Commission") is adopting amendments to Rule 15c2-12 under the Securities Exchange Act of 1934 ("Exchange Act") to **deter fraud and manipulation in the municipal securities market** by prohibiting the underwriting and subsequent recommendation of securities for which adequate information is not available. The amendments prohibit a broker, dealer, or municipal securities dealer ("Participating Underwriter") from purchasing or selling municipal securities **unless the Participating Underwriter has reasonably determined** that an issuer of municipal securities or an obligated person has undertaken in a written agreement or contract for the benefit of holders of such securities to provide certain annual financial information and event notices to various information repositories; and **prohibit a broker, dealer, or municipal securities dealer from recommending the purchase or sale of a municipal security unless it has procedures in place that provide reasonable assurance that it will receive promptly any event notices with respect to that security. (emphasis added)**

- 15c2-12 requires dealers to “obtain and review” the official statement, and also to have “reasonably determined” that the issuer or obligated party has entered into a continuing disclosure undertaking
- According to the SEC, for issuers that have persistently failed to comply with an undertaking, it is unlikely the dealer could form a reasonable basis to rely on the representations by the issuer that they will comply going forward.

Source: <https://www.sec.gov/rules/final/adpt6.txt>

# SEC Rule 15(c)2-12 – Primary Offering

OFFICIAL STATEMENT DATED \_\_\_\_\_

**New Issue** Rating: S&P:  
(State Credit Enhancement)  
Underlying Rating: S&P:  
See "Ratings" and "State Credit Enhancement" herein

*In the opinion of Peck, Shaffer & Williams, a division of Dunsmuir & Shohl LLP, Bond Counsel, under existing law: (i) interest on the Refunding Bonds will be excludable from gross income of the holders thereof for purposes of federal income taxation, (ii) interest on the Refunding Bonds will not be a specific item of tax preference for purposes of the federal alternative minimum tax imposed on individuals and corporations, and (iii) the Refunding Bonds, the transfer thereof and the income therefrom, including any profit made on the sale thereof, are exempt from taxation, including personal income taxation, by the State of Ohio and its political subdivisions, and will be excluded from the net income base used in calculating the Ohio corporate franchise tax, all subject to the qualifications described herein under the heading "TAX STATUS."*

*The Refunding Bonds are designated as "qualified tax-exempt obligations" with respect to investments by certain financial institutions under Section 265 of the Code.*

**OFFICIAL STATEMENT OF THE  
SCHOOL DISTRICT**  
Counties of \_\_\_\_\_  
Relating to the original issuance of  
**\$3,380,000**  
**School Improvement Refunding Bonds, Series 2015**  
**(General Obligation)**  
**(Unlimited Taxes)**

**Dated: Date of Issuance** \_\_\_\_\_ **Due: December 1 as stated below**

The School Improvement Refunding Bonds, Series 2015 (the "Refunding Bonds") are issuable as current interest bonds dated the date of their issuance. Interest on the Refunding Bonds will be payable semi-annually on June 1 and December 1 of each year, initially payable June 1, 2015. The Refunding Bonds are issuable as fully registered bonds, under a book entry system and will be registered initially in the name of The Depository Trust Company ("DTC") or its nominee, CIEE & Co. There will be no distribution of Bonds to the ultimate purchasers of book entry interests in the Refunding Bonds. The Refunding Bonds will not be transferable or exchangeable except for transfer to another nominee of DTC or as otherwise described herein. For further information regarding the book entry system and transfer of book entry interests by such ultimate purchasers, see "The Refunding Bonds - Book Entry System" herein. Principal of the Refunding Bonds will be payable at the office of \_\_\_\_\_, Ohio, as paying agent, transfer agent and registrar (the "Registrar"). Interest on the Refunding Bonds is payable by draft, check or wire transfer to be sent by the Registrar to the record date registered owner as shown in the registration records maintained by the Registrar. Notwithstanding the foregoing, so long as DTC, its nominee or another depository is the holder of any Bond, principal and interest payments, as applicable, will be payable to DTC or such depository in immediately available funds, or equivalent next day funds, or as otherwise provided in the applicable agreement with such depository. The record dates for June 1 and December 1 interest payment dates shall be the fifteenth day preceding each interest payment date, respectively (the "Record Dates"). The Refunding Bonds are issuable in denominations of \$5,000 or any integral multiple thereof. The Refunding Bonds mature on December 1 of each year, as shown below:

SERIAL BONDS									
Year	Principal Amount	Interest Rate	Per Annum	Reoffering Price	Year	Principal Amount	Interest Rate	Per Annum	Reoffering Price
2027	\$330,000	3.250%		104.553%	2032	\$385,000	4.000%		107.233%
2028	335,000	3.500		105.783	2033	400,000	4.000		107.007
2029	350,000	3.500		105.104	2034	415,000	4.000		106.706
2030	360,000	3.500		104.506	2035	430,000	4.000		106.407
2031	375,000	4.000		107.610					

The Refunding Bonds are subject to redemption as set forth herein.

The Refunding Bonds are issued for the purpose of refunding outstanding bonds issued to refund bond anticipation notes originally issued for the purpose of paying the local share of school construction under the State of Ohio Classroom Facilities Assistance Program (including construction of a new PK-12 school building), other improvements to school facilities, equipment, furnishings, and all necessary appurtenances thereto.

The Underwriter, has satisfied the requirements of The Depository Trust Company ("DTC") for the Refunding Bonds to be eligible for DTC services.

THIS COVER PAGE CONTAINS CERTAIN INFORMATION FOR QUICK REFERENCE ONLY. IT IS NOT A SUMMARY OF THIS ISSUE. INVESTORS MUST READ THE ENTIRE OFFICIAL STATEMENT TO OBTAIN INFORMATION ESSENTIAL TO THE MAKING OF AN INFORMED INVESTMENT DECISION.

The Refunding Bonds are offered when, as and if issued and accepted by the Underwriter, subject to the approving legal opinion of Peck, Shaffer & Williams, a division of Dunsmuir & Shohl LLP, Columbus, Ohio, Bond Counsel, and certain other conditions. It is expected that the Refunding Bonds in definitive form will be available for delivery to the Underwriter in Cincinnati, Ohio on or about \_\_\_\_\_.



# SEC Rule 15(c)2-12 – Primary Offering

- ◉ Offering Document/Official Statement
  - Issuers generally work with professionals (underwriters, municipal advisors, bond counsel) to determine necessity of an offering document/Official Statement
    - Exceptions to offering document requirement:
      - Selling less than \$1 million; or
      - Selling in \$100,000 denominations to 35 or less accredited investors
  - If Issuer uses an offering document, Rule 15(c)2-12 will apply to the Issuer and the Underwriter
  - **Underwriter can only market the securities if reasonably believes Issuer will provide continuing disclosure**

# Broker-Dealer (Underwriter) Responsibilities – Due Diligence

- ◉ Dealers (Underwriters) are responsible for due diligence regarding compliance by Issuers
- ◉ Has the Issuer filed an annual report pursuant to Rule 15c2-12 for each of the last five (5) years? (If so, please provide evidence of such filings.)
- ◉ Has the Issuer filed any material event notices in any of the last five (5) years? (If so, please provide evidence of such filings and describe the circumstances surrounding the filing(s).)

# SEC Rule 15(c)2-12 – Continuing Disclosure – Issuers

- Issuer subject to Rule 15(c)2-12 must enter into a continuing disclosure undertaking
  - Continuing Disclosure Agreement
- Continuing Disclosure Agreements
  - Annual Filing date(s)
  - Sets forth what needs to be filed:
    - Audited financials\* - Best practice is to file material event notice at this time if audited financials are not available OR file unaudited financials with this data OR disclose on the cover of AIS filing that audited financials are not available. In all instances disclose that audited financials will be filed as soon as they are available.
    - Selected annual financial/operating data from the Official Statement (largest taxpayers, tax collection rates, assessed valuation, etc.)
    - Material Event Notices (rating change, late payment, etc.)

\*if audit not available by filing date, is to be filed “when and if available”

# Continuing Disclosure

- ◉ **Not all Continuing Disclosure Agreements are the same**
  - After current issuance of a security, if have outstanding debt:
    - \$10,000,000 or more → Audited financials plus financial/operating data
    - Less than \$10,000,000 → only financial information that is “customarily prepared” (often audited financials)
- ◉ **Each debt issuance has its own Continuing Disclosure Agreement**
  - Example: 3 outstanding bond issues (each subject to 15(c)2-12)  
3 Continuing Disclosure Agreements
  - Ideally all 3 Continuing Disclosure Agreements have the same required filing date and are substantially the same in all material respects

# Continuing Disclosure – Underwriters Due Diligence

- ◉ Typically diligence requires an independent review of EMMA to ensure the issuer is in substantial compliance
  - Underwriters may require third party (e.g. DAC) reports using CPA to verify what securities were outstanding in the last five years for the Issuer (all credits of the Issuer) and to review completeness of the filing with the continuing disclosure undertakings
  - Problems exist including, but not limited to:  
Mislabelling data posted, unconnected CUSIPs for various credits (GO Bonds vs. Revenue Bonds, COPs etc for the same Issuer), missing data or missing years

# Continuing Disclosure – Offering Document

- ◉ Offering Document/Official Statement
  - Must summarize the requirements of the Continuing Disclosure Agreement
  - Issuer must disclose if they have **failed** to comply with prior continuing disclosure obligations any time within the past **5 years**
  - While not required many issuers include a statement in the offering document stating their compliance with continuing disclosure

*Example: Rule 15c2-12 (the "Rule"), promulgated by the Securities and Exchange Commission, requires continuing disclosure with respect to new offerings of municipal securities of \$1,000,000 or more. The District is obligated to provide such continuing disclosure with respect to one or more previously issued and currently outstanding bond or note issues. The District has been in material compliance with its continuing disclosure obligations for the past 5 years. The audited financial statements of the District are not always available by the annual filing date of October 15; therefore, historically, the District filed all required operating data by the filing date and filed the audited financial statements within forty-five days after they became available on the Ohio Auditor State's website. The District's latest required operating data disclosure was filed in October 2014 for fiscal year ending June 30, 2014. The District plans to file the FY14 Audit after it becomes available on the Ohio Auditor of State website.*

# Continuing Disclosure – Offering Document

- ⦿ This disclosure should include a detailed description of non compliance with prior continuing disclosure obligations including:
  - Failures to publish annual information filings to EMMA by the stated deadline
  - Failures to post audited financials to EMMA once they are available
  - Failures to post required information related to “material events” to EMMA within 10 days of the material event
- ⦿ It may also list in detail what steps the district has taken to ensure compliance with their continuing disclosure obligations going forward. These may include:
  - Implementing a written post issuance compliance policy
  - Signing up for EMMA continuing disclosure email reminders
  - Hiring a dissemination agent

# Continuing Disclosure – Offering Document

- ◉ For Issuers who have persistently failed to comply an objective change should be documented
  - Dissemination Agent
  - Written policy adopted
  - EMMA Reminders
- ◉ **Needs to be a reasonable basis for Underwriter to rely on that Issuer will comply going forward**

# Continuing Disclosure - EMMA

- ◉ Continuing Disclosure filings to be made on EMMA
  - Electronic Municipal Market Access System
  - <http://emma.msrb.org/>
- ◉ EMMA provides details on each publically offered security including:
  - Official Statement
  - CUSIP, maturity information, interest rate, principal amounts, initial offering price and yield
  - Continuing disclosure broken into Audited Financials, Financial/Operating Data, Event Notices
  - Trade Activity

# MSRB EMMA – Email Reminders

- The MSRB EMMA site allows users to set up email alerts in advance of required filings
- Signing up for these can provide peace of mind that required filing dates will not be missed
- For example, an email reminder alert can be scheduled for 60 days before required annual filings
- This reminder will occur annually unless canceled

The screenshot shows the EMMA Dataport Submission Portal. At the top, there is a navigation bar with the EMMA logo and 'Electronic Municipal Market Access A service of the MSRB'. On the right, it says 'EMMA Dataport | MSRB Gateway | Contact | Logout' and 'for assistance call: 703-797-6688'. Below the navigation bar is a dark blue header with 'EMMA Dataport Submission Portal' and the MSRB Gateway logo. The user is identified as 'JOHN DOE, email: fsrai@msrb.org'. A main menu contains several tabs: 'Continuing Disclosure (Rule-based & Voluntary)', 'Issuer Dashboard', 'EMMA Trade Monitor', 'Preliminary Official Statement and Pre-Sale Documents', 'Issuer Voluntary Official Statement', and 'Voluntary Financial Information: Timing, GAAP Undertaking & URL'. The 'Continuing Disclosure Submission' section has 'CREATE' and 'UPDATE' links. A red box highlights a button that says 'Schedule and manage email reminders for recurring financial disclosures' with a calendar icon. Below this is a section for 'Organize Your Issues/Securities/Groupings' and a table of 'Most Recent Submissions'.

Submission Date	Disclosure Type	Submission ID	User ID
11/25/2014	Quarterly / Monthly Financial Information	<a href="#">Q1541827</a>	JDOE2
11/25/2014	Audited Financial Statements or CAFR	<a href="#">Q1541828</a>	JDOE2
11/25/2014	Annual Financial Information and Operating Data	<a href="#">Q1541833</a>	JDOE2
11/25/2014	Initial Asset-Backed Securities Disclosure	<a href="#">Q1541835</a>	JDOE2
11/25/2014	P&I Payment Delinquency	<a href="#">Q1541834</a>	JDOE2

The screenshot shows the 'EMMA Dataport – Financial Disclosure Email Reminder' form. At the top, it says 'EMMA Dataport – Financial Disclosure Email Reminder' and the MSRB Gateway logo. There is an 'EXIT' button in the top right. The form contains the following fields and options:

- Default Recipient:  [Add additional recipients](#) (include up to twenty email addresses, e.g. appropriate internal staff, financial advisor, bond counsel)
- Disclosure Type:  Annual Financial Information and Operating Data,  Audited Financial Statements or CAFR,  Asset-Backed Securities,  Other (e.g. quarterly financials, annual budget)
- Filing Due Date:
- Send email:  days before filing due date (enter number of calendar days)
- Repeat:  Yearly,  Quarterly,  Never
- Description:

At the bottom, there are 'Create Reminder' and 'Cancel' buttons.

# Compliance Strategy – Written Post Issuance Compliance Policy

- In order to ensure compliance with continuing disclosure requirements going forward districts should consider adopting a written policy covering continuing disclosure
- Written policy to monitor continuing disclosure (along with other post debt issuance compliance)
- This policy should include the following information:
  - Who is in charge?
  - A file of all Continuing Disclosure Agreements, review reporting requirements and reporting dates
  - Confirm all necessary data is filed timely
  - Annual review
  - Monitor material events
  - Periodic training
- Even if a dissemination agent is hired it is ultimately the district's obligation to confirm required filings are made on time and with complete and accurate information

# Compliance Strategy - Dissemination Agent

- A disclosure dissemination agent is hired by the District to manage the posting of required continuing disclosure
- A dissemination agent can fill the following roles:
  - Remind and assist in required filings
  - Provide disclosure templates for annual filings
  - Provide corrective action for failed filings
  - Assist with filings of voluntary or material event filings
- Dissemination agents usually cannot monitor if there has been a material event
  - District must notify dissemination agent of a material event

# Results of Non-Compliance

- ◉ SEC Charges Cease and Desist Orders
- ◉ Fines against Underwriters
- ◉ Fines against Issuers
- ◉ Prosecution of officials for securities fraud
- ◉ Barring of officials and issuer itself from securities market

# 2014 MCDC

- ⦿ **Municipalities Continuing Disclosure Cooperative: Violations include SEC Act of 1934 (The Exchange Act, Rule 15 c 2 -12), SEC Act 1933 (The Securities Act, 17 (a), 10 (b))**
  - “The Municipalities Continuing Disclosure Cooperation Initiative (the “MCDC Initiative”) is intended to address potentially widespread violations of the federal securities laws by municipal issuers and underwriters of municipal securities in connection with certain representations about continuing disclosures in bond offering documents.”
  - Additional concern was if the “underwriters for these bond offerings may also have violated the anti-fraud provisions to the extent they failed to exercise adequate due diligence in determining whether issuers have complied with such obligations, and as a result, failed to form a reasonable basis for believing the truthfulness of a key representation in the issuer’s official statement.” (Indiana school district example)
- ⦿ **Requirements: Complete the SEC Questionnaire and reviewing past 5 years of offerings and compliance with existing CDAs outstanding for the issuer**
  - **“Issuers who may have made materially inaccurate statements in a final official statement regarding their prior compliance with their continuing obligations as described in Rule 15c2-12 should consider self-reporting to the Division to take advantage of the MCDC Initiative.”**
  - Issuers (due December 1, 2014)
  - Broker dealer as underwriters (due September 10, 2014)
- ⦿ **Favorable settlement terms if issuers and underwriters self report**

# MCDC Results

- ◉ Underwriters: Retain Independent Consultants, Cease and Desist Orders, Fines levied
- ◉ Issuers: Establish policies and procedures, including training; compliance with existing CDUs, disclose settlement terms

# Private Placements – Reporting Considerations

- ◉ While private placements are exempt from continuing disclosure, the best practice is to publish private placement information to EMMA
- ◉ Information to be posted to EMMA
  - Full Issuer Name, Name of Issue, Closing Date, Maturity Date, Interest Rate (If multiple maturities provide debt schedule), Security Type (general obligation/revenue)
- ◉ The District's placement agent or bond counsel can assist with publishing this information to EMMA
- ◉ If the District maintains a credit rating from Moody's, Standard & Poor's or Fitch they require private placement information to be sent to them