

## Bond Issues and Protecting Your County

By: *Kristi Harshbarger*

ISAC Legal Counsel



In my previous position as a private practice attorney, a large part of my practice was dedicated to assisting private businesses in issuing stock to capitalize their projects – which meant preparing a lot of disclosure documents and assisting clients with securities regulation compliance. So I was interested to discover from attending several presentations and reading a few articles on the topic, that many of the issues I had stressed to private business clients when issuing stock also apply to governmental entities when issuing bonds. I am in no way an expert on bond issue regulations and this article is not legal advice. But I do want to share some of things I’ve learned that counties should keep in mind when conducting a bond issue in hopes this may remind you or help you discover matters that you should be discussing with your bond issuance team.

### Pre-Issuance Considerations

Prior to issuing bonds, the county (typically with the assistance of a financial advisor), prepares an official statement, which contains various required disclosures to provide context regarding the county and the particulars of the bond issue. The Frank-Dodd Act has created new requirements related to many financial advisors, if they fall within the definition of a municipal advisor. Guaranteed investment contract brokers, placement agents, swap advisors and third-party marketers may also be considered municipal advisors. Registered broker-dealers and bond counsel are not considered municipal advisors. Counties should confirm – or have their professionals demonstrate – that persons which may be considered municipal advisors are registered with the Municipal Service Rulemaking Board and the Securities and Exchange Commission (the “SEC”). If they are not registered, find out why, as there are several exceptions to the registration requirements.

Another area that can trip up issuers is making sure all disclosures comply with SEC rules. The general standard can be found in SEC Rule 10b-5 and requires that all disclosures in the official statement not “make any untrue statement of a 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.” In addition, certain SEC rules may require a county to update some disclosures, and such an update requirement may require regular periodic interval updates or may be triggered as a result of the occurrence of a particular type of event.

How can you make sure all your disclosures meet the accuracy standards of the SEC rules? In a presentation I attended at the 2011 annual International Municipal Lawyers Association (the “IMLA”) conference, Robert Doty (of AGFS in Sacramento)

suggested a governmental entity establish a disclosure group and charge the group with developing and implementing disclosure policies and procedures. By formalizing this process, the county will have confidence that disclosures are being drafted and reviewed consistently with each bond issue. Make sure that disclosures are read (preferably by multiple county employees or officials) that have the requisite knowledge on the facts related to the county and bond issue. Most importantly, make sure the professionals working with the county on the bond issue are notified of facts surrounding the bond issue. Have policies in place to delineate the process for notifying your bond issuance team when circumstances change. Remember, your professionals cannot assist you in properly disclosing a fact if they are not aware of its existence.

### Post-Issuance Considerations

The Internal Revenue Service (the “IRS”) has recommended that governmental entities handle their responsibilities to comply with IRS regulations throughout the time bonds remain outstanding by establishing post-issuance compliance procedures. Moreover, the IRS has begun to send out post-issuance questionnaires to issuers, which require specific disclosure on whether or not the governmental entity has these types of written procedures. According to the written materials provided by Mara S. Georges and Maribel Mata Benedict (both from Ketten Muchin Rosenman LLLP in Chicago) from their 2011 IMLA conference presentation, this questionnaire asks about procedures in the following areas:

- Debt management;
- Assuring compliance with federal tax requirements related to advance refunding;
- Arbitrage yield restriction and rebate;
- Determining issue price;
- Record retention; and
- Post-issuance compliance and educational resources.

A recent article from Ahlers & Cooney PC in Des Moines describes written guidance from the IRS that such post-issuance compliance procedures make provisions for:

Continues on page 24.

## affiliate news

### ISAA “Outstanding Member” awarded to Randy Ripperger

Randy Ripperger, Polk County Chief Deputy Assessor was nominated and selected to receive the “Outstanding Member” Award at the Iowa State Association of Assessor’s Annual Conference and School of Instruction held in Des Moines October 2-5, 2011. The recipient of this award is selected based on leadership qualities, professionalism and contributions to the Association.

Randy received his B.S. degree in Economics from Central College in Pella. He then started his assessment career in 1980 when he was hired as a residential appraiser for Polk County, and currently holds the title of Polk County Chief Deputy Assessor. Randy is a member of the International Association of Assessing Officers (IAAO), Iowa State Association of Assessors (ISAA), and has earned the designations of Certified Assessment Evaluator (CAE) from the International Association of Assessing Officers, and Iowa Certified Assessor (ICA) from the Institute of Iowa Certified Assessors (IICA). In addition Randy has been certified as a General Real Property Appraiser.

Randy has served the ISAA, IAAO and IICA in several capacities over the years, currently serving on the Executive Board of the IAAO, and the Legislative Committee of the ISAA. Randy’s dedication to promoting education is well displayed by his commitments to the organizations he belongs to. While a member of IICA, he has served on the Board of Directors, then as Vice-President, and President. As an active IAAO member, he has served as Chair of the Professional Designation Subcommittee, professional designations advisor, proctor, grader and grading Chairman. He also is an IAAO Senior Instructor and has presented on several occasions at the IAAO Conference.



Randy was also recently recognized by IAAO at their annual conference in Phoenix in September by being awarded the Verne W. Pottorff, CAE Professional Designee of the Year Award. This award is presented to the IAAO Professional Designee who has most effectively promoted the interests and mission of the IAAO Professional Designation Program.

Randy resides in Winterset. Special surprise guests attending the award presentation in Des Moines on October 4<sup>th</sup> included his wife Deb, daughters Shelby, Kelsey & Bailey, as well as friends and co-workers.

## legal briefs

Continued on page 5.

- Due diligence review at regular intervals;
- Identifying the official or employee responsible for review;
- Training of the responsible official/employee;
- Retention of adequate records to substantiate compliance (e.g., records related to expenditure of proceeds);
- Procedures reasonably expected to timely identify non compliance; and

- Procedures ensuring that the issuer will take steps to timely correct noncompliance.

The article from Ahlers & Cooney includes an example of a post-issuance compliance policy. Please contact Ahlers & Cooney or myself if you’d like to review this. Of course, the example won’t fit all situations, but might give you an idea of where to start if your county does not currently have a policy of this type. While this type of policy is not yet required by the IRS, it does serve to demonstrate your county understands its obligations and intends to comply with IRS regulations.