

CDFA // BNY MELLON DEVELOPMENT FINANCE WEBCAST SERIES

The MCDC Initiative: An Interactive Discussion with Issuers and Underwriters

The Broadcast will Begin at 1:00pm EDT

- ▶ Submit your questions in advance using the GoToWebinar control panel
- ▶ View previous webcast recordings online at www.cdfa.net

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



Hello! Welcome to the webcast.



Katie Kramer

Vice President
Council of Development Finance Agencies
Columbus, OH

Are you a CDFA Member?

Members receive exclusive access to thousands of resources in the CDFA Online Resource Database.

Create your unique login today at www.cdfa.net

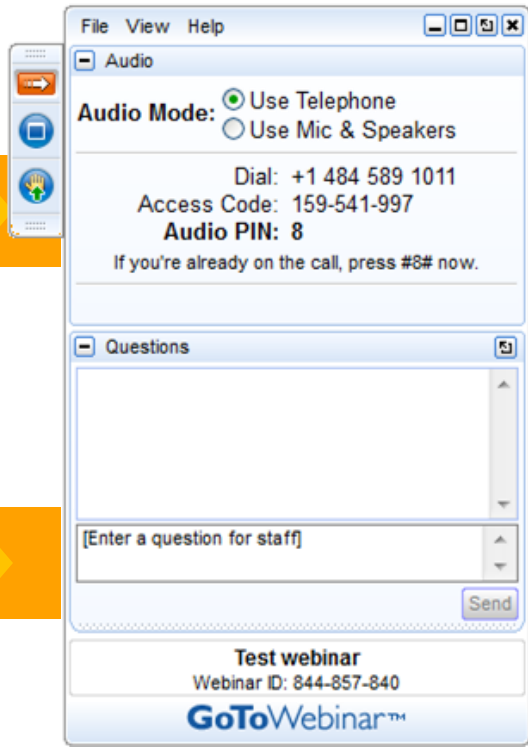
CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



BNY MELLON

Listen through the telephone for best audio quality.

Submit your questions to the panelists here.



This webcast is designed to provide accurate and authoritative information in regard to the subject matter covered. It is available with the understanding that CDFA and the panelists are not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

CDFA // BNY MELLON DEVELOPMENT FINANCE WEBCAST SERIES



Fundamentals of Economic Development Finance Course



August 11, 2014
Washington DC

Intro Revolving Loan Fund Course



August 12-13, 2014
Washington DC

Intro Brownfields Finance Course



August 14-15, 2014
Washington DC

CDFA Training Institute

13 courses in development finance designed for all skill levels. Learn more and register today at www.cdfa.net

Panelists

Rena Nakashima, *Moderator*

Vice President
BNY Mellon

Joshua P. Meyer

Partner
Kutak Rock

Martin Walke

Vice President of Economic Development
Louisiana Public Facilities Authority

Robert Swanger

Managing Director
Stern Brothers & Co.

Rich Frampton

Vice President
Illinois Finance Authority

John Wooten

Director
Head of Municipal Placements
Wells Fargo Securities

CDFA // BNY MELLON DEVELOPMENT FINANCE WEBCAST SERIES



BNY MELLON



Rena Nakashima

Vice President
BNY Mellon
Los Angeles, CA

What are you reading?

Your development finance toolbox isn't complete without a set of CDFA reference guides. Members save 15% on every purchase.

Order today at www.cdfa.net.

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



BNY MELLON



Joshua P. Meyer

Partner
Kutak Rock LLP
Omaha, NE

Join CDFA Today

Members receive discounts to all CDFA events, including training courses and the National Summit. Join at www.cdfa.net, and start saving today.

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



CDFA // BNY Mellon Development Finance Webcast Series

**The MCDC Initiative: An Interactive Discussion
with Issuers and Underwriters**

July 15, 2014

Josh P. Meyer
402-231-8919
Joshua.Meyer@KutakRock.com

**KUTAK
ROCK_{LLP}**

WHAT IS MCDC?

- ❑ MCDC: “Municipalities Continuing Disclosure Cooperation Initiative”
- ❑ Announced by the SEC on March 10, 2014; runs through September 10, 2014.
- ❑ Ostensibly designed to afford favorable treatment terms to municipal issuers and obligated parties, as well as underwriters, who may have violated federal securities laws by misstating or omitting to state in certain official statements any instances in the previous five years in which an issuer failed to materially comply with its continuing disclosure undertakings under SEC Rule 15c2-12 (the “Rule”).

WHY WAS MCDC CREATED?

- SEC has long been convinced that:
 - ▶ issuers and obligated parties are not timely and adequately complying with their obligations under the Rule; and
 - ▶ underwriters are failing to determine whether issuers have complied with such continuing disclosure obligations before underwriting new bond issues for such issuers.

- SEC cannot force an issuer to comply with its undertakings under the Rule, BUT it can bring an action against an issuer for committing fraud, e.g., making a materially false statement in an official statement.

WHY WAS MCDC CREATED? (cont.)

- Rule 15c2-12 requires that any final official statement prepared in connection with a primary offering of municipal securities contain a description of any instances in the previous five years in which the issuer failed to comply, “in all material respects,” with any previous undertakings in a written contract or agreement under the Rule.
- Recent SEC enforcement actions cite a lack of disclosure policies and procedures.
- Cease and Desist Order against West Clark Community Schools:
 - ▶ SEC rules that issuer’s misstatements regarding compliance with previous undertakings under the Rule was a material misstatement that violated 10b-5 .
 - ▶ Note initial SEC investigation did not focus on Rule 15c2-12

WHO IS SUBJECT TO MCDC?

- Issuers, underwriters and conduit borrowers who have released official statements from September 10, 2009 through September 9, 2014 can self-report under the MCDC Initiative.
- Individuals associate with issuers, underwriters and conduit borrowers (e.g., public officials or employees, individual investment bankers, officers of conduit borrowers) cannot self report and cannot obtain protection under the MCDC Initiative.

WHAT FRAUD IS ADDRESSED UNDER MCDC?

- The Initiative applies only to statements in an official statement regarding compliance by an issuer or a conduit borrower with its previous undertakings under the Rule.
- Specifically, the Initiative addresses instances in which an issuer or a conduit borrower misstates in an official statement, or omits to state, whether the issuer or conduit borrower failed to comply, “in all material respects,” with any previous undertakings under the Rule during in the previous five years.
- The Initiative does NOT apply to any other misstatements or omissions in an official statement unrelated to compliance with the Rule.

WHAT FRAUD IS ADDRESSED UNDER MCDC? (cont.)

□ Applicable Timeframe in Question:

- ▶ The Initiative applies to material misstatements and omissions in official statements dated September 10, 2009 through September 9, 2014.
- ▶ Any statement regarding compliance in an official statement posted during this 5-year period is subject to 5-year look-back.
- ▶ For example, for an official statement dated January 1, 2010 with a statement to the effect that “During the previous five years, the issuer has been in compliance, in all material respects, with its previous undertakings under the Rule,” the SEC would look back during the previous five years to determine whether the issuer, in fact, materially complied with its undertakings.

SELF-REPORTING.

- Self-reporting must be done on the SEC's form, which includes a statement that the self-reporting entity intends to consent to the applicable Settlement Terms imposed by the SEC under the MCDC Initiative, e.g., a cease and desist order.
- Do officials of the issuer/conduit borrower have authority to self-report and enter into a cease and desist order? May need approval of the governing body.
- Questionnaires must be filed no later than 11:59 p.m. (EDT) on September 9, 2014.

SETTLEMENT TERMS.

□ Cease and Desist Order

▶ For Issuers/Conduit Borrowers:

- ▶ establish disclosure policies, procedures and training;
- ▶ get into compliance with existing continuing disclosure undertakings;
- ▶ cooperate with any subsequent investigation by the SEC;
- ▶ disclose in a clear and conspicuous fashion the settlement terms in any official statement for an offering by the issuer within the next five years; and
- ▶ provide the SEC with a compliance certificate regarding the foregoing on the one-year anniversary of the date of the institution of the proceedings.

▶ Similar requirements for Underwriters:

SETTLEMENT TERMS (cont.).

□ Civil Penalties

- ▶ For Issuers/Conduit Borrowers: None

- ▶ For Underwriters:
 - ▶ \$20,000 per offering (for offerings of \$30 million or less)
 - ▶ \$60,000 per offering (for offerings of more than \$30 million)
 - ▶ Capped at \$500,000 in total civil penalties

PRISONER'S DILEMMA: UNDERWRITERS V. ISSUERS/CONDUIT BORROWERS.

- ❑ SEC intentionally structured the MCDC Initiative to pit underwriters against issuers (SEC officials have publicly referred to this tension as a “Modified Prisoner’s Dilemma”).
- ❑ SEC has induced each underwriter, once its total penalties reach \$500,000, to report every possible violation by an issuer or borrower, whether or not the violation is material or merely technical, or if it could even be well-argued that a violation has not occurred.
- ❑ SEC is encouraging underwriters to report any and all violations, regardless of materiality, and thereby provide the SEC a free master list of possible violations, without the SEC having to do any investigative work.

CONSIDERATIONS FOR ISSUERS/CONDUIT BORROWERS.

- Issuer/Borrower can skip MCDC if:
 - ▶ It has complied with its continuing disclosure undertakings, “in all material respects,” for the previous five years; or
 - ▶ It has not issued, or had issued on its behalf, any municipal securities subject to the within the previous five years; or
 - ▶ issued municipal securities within the previous five years but at the time of such issuance had no previous continuing undertakings pursuant to the Rule.
- Conduit issuers can skip MCDC if the issuer was not an obligated party under any undertaking under the Rule for a conduit borrower.

CONSIDERATIONS FOR ISSUERS/CONDUIT BORROWERS (cont.).

- If an issuer/borrower has misstated in an official statement its compliance with prior undertakings, or omitted to state its non-compliance, it should determine whether or not the non-compliance was “material”.
 - ▶ Not all non-compliance is material.
 - ▶ SEC refuses to provide ANY guidance regarding materiality.
 - ▶ May want to consult with bond counsel or other counsel as to whether such non-compliance is material.

- What should an issuer/borrower do if:
 - ▶ It determines that it has a material misstatement?
 - ▶ The Underwriter self-reports an issuer’s bond issue?

SUGGESTED MCDC REVIEW.

1. Has the Issuer/Borrower issued bonds during the past 5 years which were subject to the Rule and for which an Official Statement was prepared?
2. As of the date of any such Official Statement, was the Issuer/Borrower subject to any previous undertakings pursuant to the Rule?
3. What statements about compliance with such previous undertakings, if any, were in such Official Statement?
 - a. General statement of compliance?
 - b. Statement of non-compliance?
 - c. Silence?

SUGGESTED MCDC REVIEW (cont.).

4. Did the Issuer/Borrower comply with the requirements of each such prior undertaking? Note that “compliance” addresses the substance of the filings, the timeliness of the filings and the accuracy of the filings?
5. If any information or notices were not filed, or if such information or notices were filed but not in a timely manner or were incomplete in some manner, do these failures to file or to file timely constitute a failure to comply with the undertaking “in all material respects”?
6. Should the Issuer/Borrower self-report? Does it have authority to self-report?
7. What if the underwriter self-reports?



Josh Meyer
Partner
Kutak Rock LLP
Omaha, NE



Bob Swanger
Managing Director
Stern Brother & Co.
St. Louis, MO



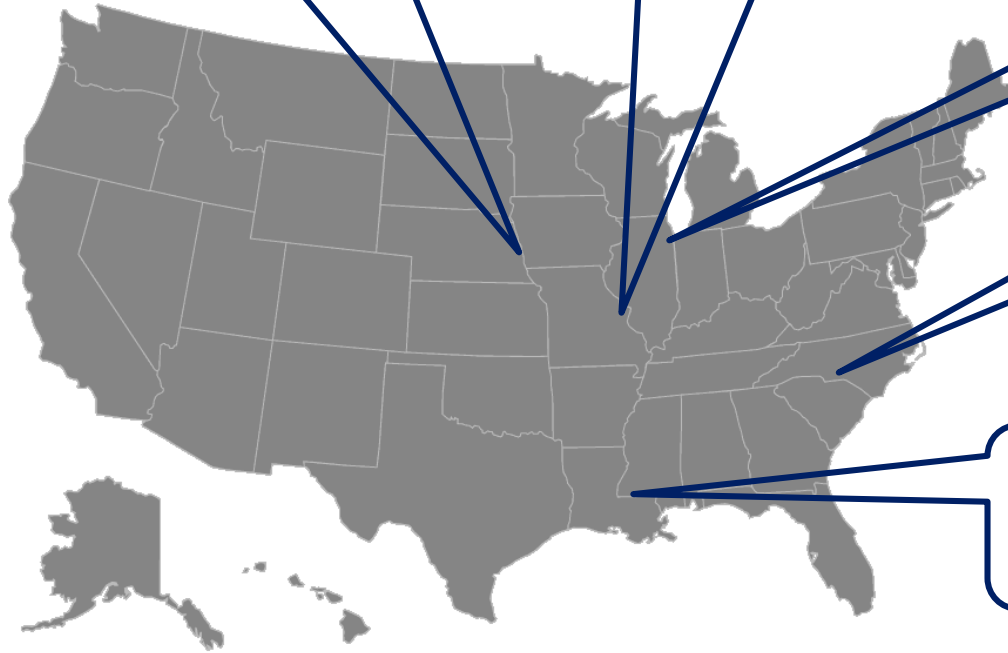
Rich Frampton
Vice President
Illinois Finance Authority
Chicago, IL



John Wooten
Director, Head of
Municipal Placements
Wells Fargo Securities



Martin Walke
Vice President of Economic Development
Louisiana Public Facilities Authority
Baton Rouge, LA



CDFA // BNY MELLON DEVELOPMENT FINANCE WEBCAST SERIES



BNY MELLON

Submit your questions to the panel now by using the GoToWebinar control panel.



The banner features a central image of a cowboy on a horse in a desert landscape. To the left, a sign reads "Welcome to OLD TOWN SCOTTSDALE". To the right, a building with a "Saba's" sign is visible. The text "National Development Finance Summit" is prominently displayed in the upper right. Logos for "Hosted By SCOTTSDALE IDA INDUSTRIAL DEVELOPMENT AUTHORITY" and "cdfa Council of Development Finance Agencies" are present. The dates "November 18-21, 2014" and location "Scottsdale, AZ" are at the bottom.

National Development Finance Summit

Hosted By
SCOTTSDALE IDA
INDUSTRIAL DEVELOPMENT AUTHORITY

cdfa
Council of
Development
Finance
Agencies

November 18-21, 2014

Scottsdale, AZ

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



BNY MELLON



Register Online at www.cdfa.net

CDFA Summer School: *Fundamentals of Economic Development Finance Course, Intro RLF Course, Intro EB-5 Course, Intro Tax Credit Finance Course, Intro Brownfields Finance Course*
August 11-15, 2014; Washington, DC

Intro P3 Finance WebCourse
September 17-18, 2014; Daily: 12-5pm EDT

Seed & Venture Finance Course
November 19, 2014; Scottsdale, AZ

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



- ▶ CDFA // BNY MELLON DEVELOPMENT FINANCE WEBCAST SERIES
Tuesday, August 19 @ 1:00 pm EDT

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



BNY MELLON



BNY MELLON

Rena Nakashima

Vice President

213-309-3413

rena.nakashima@bnymellon.com



Katie Kramer

Vice President

614-224-1316

kkramer@cdfa.net

The material contained herein is for informational purposes only. The content of this is not intended to provide authoritative financial, legal, regulatory or other professional advice. The Bank of New York Mellon Corporation and any of its subsidiaries makes no express or implied warranty regarding such material, and hereby expressly disclaims all legal liability and responsibility to persons or entities that use this report based on their reliance of the information in such report. The presentation of this material neither constitutes an offer to sell nor a solicitation of an offer to buy any securities described herein.

CDFA // BNY MELLON
DEVELOPMENT FINANCE
WEBCAST SERIES



BNY MELLON