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GFOA Releases More MCDC Guidance.

SEC Extends MCDC Deadline for Issuers, Tiers Penalty Caps for Underwriters

WASHINGTON - The Government Finance Officers Association has issued a new alert on the Municipalities Continuing Disclosure Cooperation initiative, offering guidance to issuers on how to make use of the extra time they were granted to participate in the program and explaining problems state and local governments face in performing due diligence.

The Securities and Exchange Commission initiative allows both issuers and underwriters to get favorable settlement terms if they voluntarily report, for any bonds issued in the last five years, any time they misled investors about their compliance with their continuing disclosure obligations. The initiative originally set a deadline around midnight Sept. 9 for both issuers and underwriters to participate, but the SEC late last month extended that deadline to Dec. 1 for issuers.

The latest GFOA alert, dated Aug. 19, makes issuers aware of their extra time, urges them to review information from underwriters they've worked with, and warns them to be prepared for the MCDC submissions to contain flaws.

"Issuers should expect errors in the underwriter's findings due to the deficiencies in the data and systems that are being used to conduct these investigations," the alert counsels. "The data available prior to EMMA from the Nationally Recognized Municipal Securities Information Repository system is either not available or seriously flawed. Adding to the confusion is Bloomberg data, which routinely shows the posted date rather than the filing date on its system. Also, filings that were made on EMMA may not contain all relevant CUSIP numbers or the filing may be made under tabs or headings that do not reflect the entire content of the information filed."

GFOA also told its members to be prepared to analyze the materiality of any misstatements or omissions regarding their continuing disclosure compliance, citing a recent National Association of Bond Lawyers paper on MCDC materiality. That paper provided issuers and their attorneys with a framework for conducting an analysis of whether past offering documents included "material misstatements" that they might want to consider reporting under the MCDC.

"Not all failures to file continuing disclosures or material event notices constitute a 'material' misstatement or omission under the federal securities laws," the GFOA alert advises. "For example, failure to file a bond insurer downgrade may not be considered 'material' because this fact was widely reported and common knowledge by investors."

Market participants assume most underwriters will participate in the MCDC and therefore expose the issuers they've worked with to SEC scrutiny. The extra three months given issuers gives them more time to decide if they want to make materiality decisions and dispute underwriters' findings, the GFOA alert states.

GFOA is continuing to urge issuers to use caution when deciding whether or not to participate in the initiative. Although the terms of the MCDC stipulate that the commission's enforcement division will

recommend no civil penalties for issuers, they also make clear that individual public officials could still be charged if appropriate. Securities lawyers have also warned that SEC investigators performing a probe in connection with an MCDC submission could find other violations not covered by the initiative and would be free to act on those.

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