Bond Case Briefs

Municipal Finance Law Since 1971

Will President Trump's Regulation Cuts Reduce Ongoing Disclosure for Bond-Financed Projects?

HIGHLIGHTS:

- President Donald Trump's recent executive order entitled "Core Principles for Regulating the United States Financial System" directed the Treasury Secretary to consult with financial regulators, including the U.S. Securities and Exchange Commission (SEC), as to whether or not existing regulations "promote the core principles" outlined in the order, including, among others, the directive to "make regulation efficient, effective, and appropriately tailored."
- Participants in the municipal bond industry are hoping that the push for more "efficient" and "appropriate" regulations might lessen the regulatory burden under the Dodd-Frank Wall Street Reform and Consumer Protection Act of issuing municipal bonds.
- A significant part of the cost of issuance involves the elaborate disclosure that must be provided to investors, often on a quarterly basis and often for as long as a single bond of a particular issuance remains outstanding.

President Donald Trump on Feb. 3, 2017, signed an executive order entitled "Core Principles for Regulating the United States Financial System," which directed the Treasury Secretary to consult with financial regulators, including the U.S. Securities and Exchange Commission (SEC), as to whether or not existing regulations "promote the core principles" outlined in the order. Those principles include, among others, the directive to "make regulation efficient, effective, and appropriately tailored."

One of the targets of this order is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted in 2010 in the wake of the 2008 recession. Among its many impacts, Dodd-Frank resulted in more abundant and elaborate disclosure regulations imposed by the Municipal Securities Rulemaking Board (MSRB) and the SEC on municipalities and their conduit borrowers – i.e., developers and nonprofit charitable organizations. Participants in the municipal bond industry are hoping that President Trump's push for more "efficient" and "appropriate" regulations might lessen the regulatory burden, and therefore the cost, of issuing municipal bonds. A significant part of the cost of issuance involves the elaborate disclosure that must be provided to investors, often on a quarterly basis and often for as long as a single bond of a particular issuance remains outstanding.

A Brief History of Continuing Disclosure for Muni Bonds

Municipal securities generally are exempt from the regulatory and reporting requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934. In the late 1980s, following significant turmoil in the municipal bond industry that included the default of $2.45 billion in tax-exempt revenue bonds issued by the Washington Public Power Supply System, the SEC adopted Rule 15c2-12 under the 1934 Act.

Rule 15c2-12 generally obligates bond underwriters to obtain from an issuer, and to review and distribute to investors, a preliminary official statement (POS) describing the securities being offered.

The issuer must deem the POS final as of its date, except for certain information that may be added upon the consummation of the bond sale, such as the aggregate principal amount and interest rates. The underwriter is also obligated to provide a complete, final official statement to all investors within seven business days following the bond closing.

Since its Jan. 1, 1990, effective date, Rule 15c2-12 has been amended several times. For instance, in 1994, in response to growing concerns among investors about the adequacy of secondary market disclosure, the SEC amended Rule 15c2-12 to prohibit underwriters from purchasing municipal securities unless the issuer signed a written agreement to provide ongoing disclosure, including financial information and notices of material events. This obligation extends to “obligated persons” (i.e., persons or entities responsible for paying any of the underlying revenues securing the bonds). For obligated persons, however, the obligation generally may be terminated when the entity’s financial responsibility falls below a certain threshold. For instance, in California, developer-landowners who borrow proceeds from an issuance of Mello-Roos bonds – i.e., bonds secured by special taxes levied within a community facilities district – generally may terminate their continuing disclosure obligation once their special tax obligation falls below 20 percent of the total tax levy for a given fiscal year.

How Did Dodd-Frank Impact Continuing Disclosure?

Dodd-Frank imposed additional fiduciary duties on municipal securities issuers and underwriters, and it extended the regulatory umbrella to cover financial advisors. It also augmented the regulatory authority of the MSRB and the SEC. Several new municipal securities regulations and enforcement initiatives were implemented as a result of Dodd-Frank, including the Municipalities Continuing Disclosure Cooperation Initiative (MCDC Initiative).

The MCDC Initiative, implemented in 2014, represented the SEC’s first step in a plan to tighten its regulatory reigns on municipal securities in compliance with Dodd-Frank. The MCDC Initiative provided issuers and underwriters the opportunity to self-report any instances of material omissions or misstatements in prior offering documents. In return for this self-reporting, the SEC agreed to mitigate penalties for such disclosure violations. Under the MCDC Initiative, the SEC charged 71 issuers for selling municipal securities with deficient disclosure relating to compliance with ongoing disclosure requirements under Rule 15c2-12. The SEC settled those actions without requiring admissions of guilt but requiring that the parties agree to cease future violations as well as establish policies and procedures that will ensure such violations do not occur in the future.

What Will a Dodd-Frank Overhaul Mean to Continuing Disclosure?

At this point, it is impossible to predict how President Trump’s efforts to streamline financial regulation will impact continuing disclosure obligations for municipal securities. Now that issuers, developers and nonprofits have instituted procedures for disseminating information to the bond market, and investors have become accustomed to receiving such information, an effort to reduce that data flow may potentially be met with resistance. Moreover, disclosure of salient information to the marketplace is equally as appropriate for municipal issuers as it is for corporate issuers. Nevertheless, it remains to be seen if President Trump, who seems to favor a more laissez-faire approach to regulating private businesses, will establish an environment in which private companies – the so-called “obligated persons” – might be relieved of some of their current continuing disclosure burden.

by Robert Haight Jr., Douglas Praw | Holland & Knight LLP

2/14/2017