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SEC Announces Muni Conference, as Regulators Face Backlash.

CHICAGO – A Securities and Exchange Commission official announced the commission will host a muni disclosure conference at its headquarters on Dec. 6 during a bond lawyers' meeting here where regulatory officials got some backlash on recent rules and advisories.

Rebecca Olsen, director of the SEC's Office of Municipal Securities, announced the commission conference during a Thursday panel at the National Association of Bond Lawyers' Bond Attorneys' Workshop.

The conference will be a one-day affair and will feature opening remarks from SEC Chairman Jay Clayton, Olsen said. The conference stems from a recommendation in the SEC's 2012 Report on the Municipal Securities Market that the SEC hold such an event.

Olsen noted that the SEC has not provided formal written interpretive guidance on both primary and continuing disclosure since a 1994 interpretive release which explored those obligations with respect to the antifraud provisions in the federal securities laws. She said the commission hopes the conference will provide it with market perspectives to inform its decisions, including on whether to issue new guidance.

"We're very much focused on disclosure," Olsen said.

The panel, titled "Hot Topics in Securities Law," was held twice Thursday with the same participants. Besides Olsen's announcement, the discussion also included the SEC's recent amendments to its Rule 15c2-12, the Municipal Securities Rulemaking Board's controversial 2017 market advisory on selective disclosure, and an overview of the SEC's recent enforcement efforts.

The commission's amendments to 15c2-12, effective Feb. 27 of next year after their August approval, adds two new events to the list issuers must agree to disclose through the MSRB's EMMA system. One of those new events is the incurrence by the issuer of a new material financial obligation, as well as details about that obligation. The other new requirement is that issuers file an event notice for certain actions or events related to their financial obligations that "reflect financial difficulties" such as a default, event of acceleration, termination event, or modification of terms.

Though the new requirements are narrower than those originally proposed, they still have met with some backlash from the market. Panelist Ernesto Lanza, senior counsel at Clark Hill in Washington, said that he believes there are many issuers who have not been fully advised of what their new responsibilities will be.

Specifically, Lanza said, issuers need to be prepared to report any indications of "financial difficulty" related to their debts and obligations as soon as the rule is effective.

Rebecca Lawrence, chief counsel for public finance and fixed income sales and trading at broker-dealer Piper Jaffray (PJC), said underwriters and issuers are already butting heads over what is material and therefore needs to be disclosed.

Courts have said that materiality means information a reasonable investor would consider important in making an investment decision.

Underwriters generally want a lot of issuer disclosure due to the legacy SEC's Municipalities Continuing Disclosure Cooperation initiative, which in 2016 resulted in 72 underwriters being fined by the SEC.

But issuers are already saying they don't feel they should have to disclose certain obligations and covenants, Lawrence said.

"I doubt there's going to be a lot of agreement on these concepts," Lawrence said.

Olsen and Mark Zehner, deputy chief at the SEC enforcement division's public finance abuse unit, pushed back against criticism of the amendments and complaints about a lack of guidance on the concept of materiality.

"These amendments very strategically focused on an information gap," Olsen said.
Zehner suggested recording or otherwise documenting the materiality discussion so that enforcement officials who might investigate would be able to see a good faith effort to comply.

MSRB Chief Regulatory Officer Lanny Schwartz responded to criticism of the MSRB's 2017 advisory warning against the "selective disclosure" by issuers of information to only a few potential investors. The "market advisory" triggered criticism because the topic is outside the scope of the MSRB's regulatory authority.

"We have heard that criticism and we are very mindful of that criticism," Schwartz said.

Schwartz, who joined the MSRB four months ago, said the MSRB will make an even greater effort to be clear that such market commentaries do not have regulatory implications. They are meant as educational, Schwartz explained, and the MSRB is confident in its legal right to make such commentary when it sees fit.

Dave Sanchez, a senior counsel at Norton rose Fulbright in San Francisco who moderated the panel, told Schwartz that nobody has a problem with education but that market participants are unsure what to make of "extraneous statements." Zehner said that enforcement lawyers would not be guided by such commentary and that he had not read the selective disclosure advisory until recently.

The NABL conference concluded Friday. The group will convene again March 19-20, 2019, at its Tax & Securities Law Institute conference in San Diego.

By Kyle Glazier

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