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GFOA Offers New Guidance on SEC Self-Reporting Program.

WASHINGTON — The Government Finance Officers Association has issued an alert for issuer officials urging them to approach the Securities and Exchange Commission's continuing disclosure self-reporting program cautiously, and advising the group's members that attempts to lobby the SEC for changes to the initiative have been largely unsuccessful.

The GFOA alert released Monday came barely two months before the SEC's Municipalities Continuing Disclosure Cooperation initiative is set to expire Sept. 10. The program allows issuers and underwriters to get lenient settlement terms if they voluntarily self-report their failures to ensure bond offering documents were not false or misleading about their compliance with their continuing disclosure obligations. Issuers would not face civil financial penalties if they participate, but individuals would not enjoy any immunity. Issuers need to take the MCDC "seriously, but exercise caution," the alert states.

"The legal consequences of participating in the MCDC initiative are significant and should be thoroughly evaluated with the assistance of counsel," it advises.

The alert also explains that issuers need not worry about the MCDC if they have not issued bonds in the past five years, the time period covered by the initiative. For issuers who have offered debt in that time period and who are unsure if their official statements might have been inaccurate, the GFOA recommends a review of those offerings with transaction participants in addition to scrutinizing internal files and EMMA filings. If an OS admits to past noncompliance, it is probably not problematic, the GFOA alert states.

"If the information in the official statement describes any instances of prior non-compliance (including instances that may be immaterial), the issuer can probably conclude that it has not misstated compliance and no further investigation is necessary," it explains.

If an issuer official does discover potentially problematic official statements, it should consult counsel about the materiality of the lapse and about the potential advantages and disadvantages of participating in the MCDC, GFOA's alert concludes. Issuers in that situation should also adopt or enhance policies and procedures to prevent future lapses in addition to correcting noncompliance as quickly as possible.

The MCDC has been controversial since it was announced earlier this year, and GFOA debt committee chairman Ben Watkins has publicly expressed strong distaste for the SEC's approach. GFOA is among several industry groups, including the Bond Dealers of America, National Association of Bond Lawyers, and Securities Industry and Financial Markets Association, who have pushed the SEC to make changes to the MCDC.

Many market participants want the deadline extended to December or beyond. GFOA is also seeking clarification on what the SEC would consider to be material for the sake of the MCDC, a term courts have ruled means information a "reasonable investor" would want to know.

SEC officials have indicated that they are unlikely to alter the MCDC, although they have expressed some sympathy for the struggles that both issuers and underwriters have reported experiencing while attempting to find documents on deals that happened before the EMMA system became the muni market's sole transparency database in 2009.

"The initial feedback from the SEC indicated an unwillingness to streamline the MCDC Initiative to improve the efficiency and effectiveness and reduce the uncertainties and burdens being imposed on issuers," the GFOA alert states. "GFOA will continue to press for common-sense changes to modify the MCDC Initiative and focus on constructive ways to improve continuing disclosure compliance."

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