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Issuers Head to the MCDC Wire.

WASHINGTON — Many issuers mulling whether to self-report disclosure violations under a Securities and Exchange Commission initiative will probably weigh their decisions right down to the deadline, and will not see any further guidance from the SEC, a muni law expert told market participants Tuesday.

John McNally, a partner at Hawkins Delafield & Wood in Washington, made the prediction at The Bond Buyer's Transportation Finance/P3 Conference here.

Issuers are wrestling with whether to self-report under the Municipalities Continuing Disclosure Cooperation initiative. MCDC 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 deadline for underwriters to self-report incidences of noncompliance was in September, and the SEC has said many firms participated. The deadline for issuers is Dec. 1.

"I'm expecting this will go right to the wire," McNally said, adding that he continues to get many calls from issuer clients seeking guidance on their reporting considerations. McNally was the principal author of a National Association of Bond Lawyers paper released earlier this year that laid out an analytical framework issuers and their lawyers could use as an aid in deciding whether or not to self-report.

Bond lawyers, issuers, and underwriters have all repeatedly called for the SEC to offer some sort of guidance on what the commission might consider a "material" misstatement under the MCDC. The Supreme Court has held that information is material if knowing it would influence the decision of a reasonable investor to buy or sell a bond. But the SEC has declined to say anything on that front.

"The SEC will never give guidance on what is material for an antifraud purpose." McNally told the group. He and others have publicly said that the SEC could offer MCDC guidance without speaking about materiality for fraud purposes. They have also suggested that the SEC release an MCDC settlement with an underwriter and use that as an opportunity to provide some guidance McNally told conference attendees that he does not expect either of those things by the deadline.

"We're not going to hear from them on materiality," he said. "We're not going to see an enforcement action between now and Dec. 1."

McNally also discussed the municipal advisor rule with Michael Decker, a managing director and co-head of municipal securities at the Securities Industry and Financial Markets Association, as well as Lawrence Sandor, deputy general counsel at the Municipal Securities Rulemaking Board.

Decker told issuers in attendance to expect underwriters to take great care to avoid being roped in as MAs, which owe a fiduciary duty to the state and local governments to which they offer advice. He warned underwriters will probably ask them to sign many documents they have not seen in the

past. Underwriters, which are exempted from being MAs if issuers have their own independent registered MAs advising them, have been asking issuers to sign affirmations that they have IRMAs and that the underwriters can therefore provide advice freely without worrying about becoming MAs.

“What you will see under the rule going forward is bankers asking you to execute documents that you haven’t had to execute before,” Decker said.

Sandor said that the MSRB, which is working on several rules to compliment the year-old SEC MA registration rule, has made an effort to provide long comment periods and plenty of educational outreach about the new regulatory regime.

The conference began Nov. 16 and concluded Tuesday.

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