Bond Case Briefs

Municipal Finance Law Since 1971

Lawyers Recommend Disclosure Strategies in Wake of MCDC.

WASHINGTON — The Securities and Exchange Commission's disclosure violation self-reporting program has highlighted that issuers and underwriters should take steps to strengthen their disclosure and due diligence procedures to protect themselves from SEC enforcement action, bond lawyers said Thursday.

Attorneys from Orrick, Herrington & Sutcliffe described the state of continuing disclosure in the aftermath of the SEC's Municipalities Continuing Disclosure Cooperation initiative during a webinar the firm presented in conjunction with The Bond Buyer.

The MCDC, announced last March, allowed both issuers and underwriters to 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 SEC offered lenient settlement terms in exchange for the voluntary reporting.

Though the deadline was in September for underwriters and December for issuers, the SEC is still in the process of combing through the many submissions it has acknowledged receiving from deal participants. Elaine Greenberg, a partner in Orrick's Washington office, said that while it is likely many settlements will result from the MCDC, it may be some time before the SEC gets around to them all.

"The process is likely to take a good part of the rest of the year," she said.

The MCDC was based on the SEC's Rule 15c2-12, which requires dealers to review issuers' official statements in primary offerings and reasonably determine that the issuers have contracted in writing to disclose annual financial and operating information, as well as material event notices.

The Municipal Securities Rulemaking Board is among groups who called for the rule to be revisited and possibly overhauled after the SEC requested comment on the burdens the rule poses. Eileen Heitzler, a partner in Orrick's New York office, said the MCDC has resulted in a lot of discussion of disclosure requirements.

"There has been more discussion of what is or isn't material," Heitzler said.

Heitzler said the in-depth materiality analyses issuers and underwriters conducted could potentially be carried forward to help determine which, if any, instances of past compliance failure should be included in future official statements. But she cautioned that the SEC has still not ruled on the materiality of the disclosure failures reported under MCDC.

Robert Feyer, a partner in the firm's San Francisco office, offered some specific steps issuers could take to help with their compliance. Continuing disclosure agreements contained in offering documents should set specific dates for filing audited financial statements, rather than adhering to a common practice of promising to file a certain number of days after the end of the fiscal year, Feyer said.

“That makes compliance crystal clear,” he said.

Feyer added that issuers should choose a date by which they can confidently complete their audits, and file unaudited information if the audited data is not available by the date in the continuing disclosure agreement.

Alison Radecki, another partner in the New York office, said it is important for both issuers and underwriters to emphasize written policies and procedures related to their compliance obligations, and to have training on the requirements at least annually.

The SEC has only publicized one settlement under the MCDC, a July 2014 action against Kings Canyon Joint Unified School District. That settlement was vague, annoying many bond lawyers. But the SEC has said future MCDC settlements would be more revealing of the commission’s views on what should or should be disclosed as material.

THE BOND BUYER

BY KYLE GLAZIER

FEB 5, 2015 2:57pm ET