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Ballard Spahr: SEC Muni Enforcement Chief Offers Her Views on MCDC.

The Securities and Exchange Commission's (SEC's) year-old Municipalities Continuing Disclosure Cooperation Initiative (MCDC Initiative or MCDC) has encouraged municipal securities issuers, borrowers, and underwriters to self-report possible securities law violations related to inaccurate representations in offering documents concerning an issuer's prior compliance with its continuing disclosure obligations. At the National Association of Bond Lawyers' Tax & Securities Law Institute (TSLI) last week, members of the SEC enforcement staff appeared on a panel to provide additional MCDC details, including that underwriter MCDC cease-and-desist orders will be announced in the "coming months" and that issuers will not be named in these enforcement actions.

LeeAnn G. Gaunt, chief of the SEC's Municipal Securities and Public Pensions Unit, told the TSLI audience that there was broad market participation in the MCDC Initiative. The SEC, however, does not plan to announce the precise number of MCDC self-reports it received or the percentage that result in a cease-and-desist order. The SEC will announce its MCDC orders against underwriters before it announces any MCDC settlements with issuers or obligated persons. Ms. Gaunt declined to assure underwriters that the SEC will waive certain statutory disqualifications that could be triggered by MCDC settlements, but indicated such waivers eventually should be obtainable.

In July 2014, [the SEC announced its first MCDC cease-and-desist order](#) against Kings Canyon Joint Unified School District of California (District). The order was noted by securities lawyers for its lack of detail about the underlying facts and legal analysis supporting the SEC's conclusion of a securities law violation. In response, Ms. Gaunt stated at TSLI that, in each underwriter order, there will be a few detailed examples of the types of continuing disclosure failures upon which the order is based. Ms. Gaunt believes that these examples will provide the municipal market with a representative and diverse set of facts that can illustrate circumstances that may prompt an SEC enforcement action. The examples will not identify a municipal securities issuer or borrower or the name of the issue.

One of the MCDC settlement terms requires underwriters to retain an independent consultant to conduct a compliance review and provide recommendations to the underwriter on its due diligence process and procedures. Ms. Gaunt indicated that the SEC will not alter its "independence" standard for purposes of MCDC. This means underwriters will have to retain a consultant who has not worked with the underwriter for a two-year period before or after the MCDC settlement.

Upon receipt of a settlement offer, the SEC is setting a tight deadline of two weeks to respond and negotiate the terms. The SEC plans to follow up with all MCDC self-reporters, including entities that will not face a cease-and-desist order. Ms. Gaunt stated that an MCDC enforcement action against an underwriter for a particular transaction will not automatically result in a related action against the issuer or other obligated person involved in the transaction.

The SEC is likely to follow up soon with issuers and other obligated persons who self-reported and/or who were reported by an underwriter. If you receive a call from the SEC, remember:

- **Extensive discussions may not serve your interests.** You should politely listen, ask the SEC staff member for his or her contact information, and let the staff member know that your counsel will call him or her back.
- **Contact your counsel.** The issuer or obligated person should contact its MCDC counsel as soon as possible. Keep in mind that the internal notes and e-mails of issuer and obligated person officers and employees are discoverable. By contrast, communications with your lawyer are protected by attorney-client privilege.
- **Retain records.** Do not destroy any potentially relevant documents.

Please refer to our [webinar recording](#) for more information on what to expect following MCDC self-reporting or a decision not to report, how the SEC may determine the materiality of any reported misstatement, and the process of SEC investigations.

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