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NABL Provides Issuers Disclosure Guidance in Wake of SEC Cases.

WASHINGTON — The National Association of Bond Lawyers released a paper Thursday giving its members tools to help issuer clients develop written disclosure policies and procedures in response to recent Securities and Exchange Commission cases against issuers.

The paper, titled "Crafting Disclosure Policies," explores the functions and benefits of voluntary written disclosure policies as well as the considerations that should go into drafting such policies. The procedures can help clients avoid actions under federal securities laws, which prohibit issuers from making false or misleading statements or omissions that are material and connected to the purchase or sale of securities, NABL said. Generally, information is material if investors would want to know it before engaging in securities transactions.

Daniel Deaton, a partner with Nixon Peabody who was involved in drafting the paper along with an eight-person committee, said the idea was to emphasize that creating disclosure policies and procedures should be its own process for counsel and issuers that takes into account a careful analysis of the issuer. He added the process should not be "one-size-fits-all" and should incorporate the "excellent" internal processes issuers already tend to have.

"One of the big concerns the paper identifies is that [the procedures are] not imposing new bureaucracies on an issuer but rather that members are looking at the issuer for what it is within its own natural organic operation," Deaton said.

Lawyers and their clients should also keep the disclosure plan from "becoming just a checklist," NABL said, while determining the issuers' existing processes and then finding out what enhancements need to be made for better disclosure.

"A disclosure policy that is merely a checklist can result in a myopic process that does not encourage issuer staff and officials to see and convey the big picture," the paper said. "A disclosure policy ideally should strike a balance between being systematic" and pragmatic, "ensuring that the systematic aspects of the process do not become the purpose of the disclosure process itself."

The paper begins with a background section on disclosure policies that explains how issuers can "reduce the chances of making a material misstatement or omission in disclosure to investors" and also establish "a defense of reasonable care against actions for misstatements and omissions that nevertheless occur."

It then lays out the "four core components" of good disclosure policies: a description of the types of disclosures to investors that are covered by the policy; a clear statement of the process by which each type of disclosure to investors will be undertaken, drafted, reviewed, and approved, as well as how compliance with the process will be documented; the process for adequate supervision and reasonable disbursement of responsibilities; and the steps for training of officials and employees.

NABL recommends lawyers and issuer clients consider which documents they have that could be

considered material statements and create an inclusive policy. Examples of documents issuers might consider include primary offering documents, continuing disclosure filings, audited financial statements, information contained on issuer websites, and other statements like press releases, interviews and speeches.

A comprehensive policy should also be structured to include applicable levels of review, whether that be from an internal working group tasked with reviewing the documents for accuracy, or reviews from senior officials, outside consultants or governing bodies. Additionally, any continuing disclosure review should start early enough to give enough time for careful consideration and all public statements should be "properly vetted" before being released.

Issuers should also document their compliance and consider the kind of training they want to pursue "to ensure that their personnel sufficiently understand the disclosure policy and the issuer's obligations under the federal securities laws," according to the paper.

The paper ends with three appendices that discuss relevant SEC enforcement actions against issuers, give annotated examples of disclosure policies and procedures, as well as a table of references.

In its appendix on SEC actions, the paper notes the commission has mentioned some form of disclosure policies in almost every recent order against issuers in the municipal securities market. It describes the specific emphasis put on clearly identifying individual responsibilities in disclosing information, the process for disclosing that information, and the necessary supervision that came out of the 2006 case against San Diego. It also calls for comprehensive disclosure policies like those that came from more recent cases like those against New Jersey, South Miami and Kansas.

The paper concludes by stating that lawyers and issuers can address the SEC concerns: by combatting the "silo" effect that comes when only one department of a much larger organization is tasked with disclosure activities; by removing discrepancies in training; and by weeding political considerations out of disclosure decisions.

"The SEC's comments regarding the importance of written disclosure policies are not isolated or ad hoc remarks, but rather appear to represent one of its major emphases in the municipal securities market," the paper said. "These comments are indicative of the SEC's position that issuers should adopt written disclosure policies to avoid the securities law violations alleged in these orders."

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