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Key Firms Still Absent From Settlements as NABL Surveys MCDC Aspects.

WASHINGTON – At least two major Wall Street firms have not settled with the Securities and Exchange Commission under its Municipalities Continuing Disclosure Cooperation initiative, noted some lawyers who were involved with a National Association of Bond Lawyers survey on the impact of MCDC.

Carol McCoog, a partner at Hawkins, Delafield & Wood in Portland and the chair of NABL's securities law and disclosure committee, said the absence of large underwriting firms like Barclays Capital and Wells Fargo & Co. from the settlements likely means the SEC has more settlements coming.

"Maybe the SEC is just taking a little longer going through what I would anticipate would be more filings," McCoog said.

Another lawyer familiar with the enforcement process said it is not surprising that the firms have yet to be included.

The two large firms were among the top ten senior managing underwriters in the market in each of 2012 and 2013, the two years before the SEC announced the MCDC initiative. They held about 10% of the market share in each year and were also among the top ten underwriters for negotiated issues, which far outpaced the number of competitive issues that showed up in the first two rounds of MCDC settlements.

One perhaps surprising piece of information from the NABL survey was that 43% of the attorneys who responded said none of the underwriters they represented or advised self-reported under the initiative.

The survey, which included responses from 220 lawyers, was completed in January after the filing deadlines for underwriters and issuers. But it was not publicly disclosed until MCDC discussions at NABL's Bond Attorney's Workshop conference in Chicago last month and not made publicly available until Thursday.

The MCDC encouraged underwriters and issuers to voluntarily report to the SEC any time in the previous five years that they sold or underwrote bonds with offering documents that contained materially false or misleading statements or omissions. The deadline for underwriters to submit under the initiative was Sept. 10 of last year and the deadline for issuers was Dec. 1.

According to the survey, 91% of the respondents said they discussed establishing new disclosure policies and procedures with issuer clients because of MCDC. That response seems to provide evidence to back up the SEC's claims that the MCDC initiative has had a beneficial impact on continuing disclosure in the muni market. NABL added to that discussion by releasing a paper on Aug. 20 to help provide lawyers and their clients with considerations to take into account when crafting strong disclosure policies and procedures.

More issuers than underwriters seemed to self-report MCDC violations, according to the survey. Seventy-three percent of the lawyers that responded said all, most or some of their issuer and borrower clients self-reported, while only 58% said all, most or some of their underwriter clients self-reported. Lawyers said issuer clients sought approval from their governing bodies before reporting, with 44% saying the issuers did so without exception and 31% saying that they did so generally.

Some of the most surprising responses were related to questions regarding materiality. Roughly 93% of the lawyers that responded said their underwriter and issuer clients self-reported some or many misrepresentations about compliance with continuing disclosure obligations that were not material. According to case law, information is material if an investor would want to know it before buying or selling securities.

Further, 75% of respondents said their issuer or borrower clients analyzed the materiality of lapses before self-reporting and 45% said their clients felt they had to self-report lapses if underwriters had reported them, regardless of materiality.

Only 20% of lawyers who responded said they spent more than 50 hours representing or advising underwriters under the MCDC initiative and 59% said they spent less than 10 hours. In contrast, 57% of the lawyers spent more than 50 hours representing or advising issuers and borrowers on MCDC and only 5% spent less than 10 hours.

Most issuers and obligated persons declined to disclose their participation in MCDC in official statements for transactions that were taking place at that time or on EMMA. About 84% of the lawyers said clients did not include the information in an OS and 94% said clients never filed an EMMA notice on their MCDC participation.

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