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Why Market Groups Want SEC Disclosure Guidance.

WASHINGTON - Five municipal market groups are asking the Securities and Exchange Commission for guidance that would help create a streamlined process for issuers to amend their continuing disclosure agreements without running afoul of Rule 15c2-12 on disclosure.

The groups, which include the Government Finance Officers Association, Bond Dealers of America, and the Securities Industry and Financial Markets Association, made their request in a letter to Jessica Kane, director of the SEC's office of municipal securities. The National Association of Bond Lawyers and the National Association of State Auditors, Comptrollers and Treasurers also signed the letter.

An SEC spokesman declined to comment on the letter.

The groups said their request stems from discoveries that issuers and underwriters made while reviewing continuing disclosure agreements (CDAs) as part of the SEC's Municipalities Continuing Disclosure Cooperation initiative. The issuers and underwriters found that many of the issuers' agreements had ambiguities and inconsistencies that often resulted in overlapping, varying, and outdated information in the required disclosures.

The groups attributed these problems to the SEC's allowing issuers, in its 1994 amendments to Rule 15c2-12, to be flexible in drafting CDAs. As a result of this flexibility, there has not been a uniform CDA that everyone has used over the last 20 years and disclosure obligations have differed depending on the specifics of the issuance, according to the groups.

"In some cases, a CDA may require information that may be no longer relevant, available or able to be produced without significant burden or cost," the groups wrote. "Under current guidance ... there is no simple way to amend and fix such CDAs."

For example, an issuer that has been active in the market for a number of years may have one previous CDA for a water utility issuance that said it will continue to provide investors with specific tables from rate reports on the water utility. That issuer might then embark on a new bond issue for capital improvements to the water system ten years later and include internally prepared financial information and operating data for the water system that excludes rate tables because they are less applicable and harder to obtain. Unless the issuer can amend its ten-year-old CDA, it will be contractually obligated to bondholders to produce the old tables until the bonds are paid or redeemed while still providing the annual updates to the information promised in the most recent CDA.

"We think that if the amendments that an issuer wants to make to an outstanding [CDA] are in keeping with that issuer's current practice and are consistent with what an issuer would commit to if they were issuing the bonds today and they don't have any material adverse effect on outstanding bondholders, that should be a reasonable set of guidelines for making amendments to outstanding continuing disclosure agreements," said Michael Decker, managing director and co-head of munis with SIFMA.

Jessica Giroux, general counsel and managing director for Bond Dealers of America, said the organizations sent the letter with the hope of getting “some commonsense changes ... based upon what the practitioners in the field see as something that might streamline the system and not burden any one individual player.”

The SEC’s current requirements for amending CDAs include that the amendments only be made in connection with a change in circumstances that arises from a modification in: legal requirements; law; or the identity, nature, or status of the obligated person, or type of business conducted. The amended disclosure undertaking also must have complied with the requirements of 15c2-12 at the time of the primary offering after taking into account any amendments or interpretations of the rule as well as any change in circumstances. Finally, the amended CDA must also not impair the interests of bondholders.

The groups are asking the SEC to provide interpretive language that classifies a change in issuer disclosure practices as fitting into the “change in circumstances that arises from a change in legal requirements” guidance. They also are asking the SEC to agree that it would fit with current guidance to have the information required in the amended CDA be consistent with the disclosure that would be included in a primary market offering document if the bonds were issued today.

Additionally, they want the commission to sign off on the idea that a CDA change is acceptable if both the amendment to the CDA does not materially impair the interests of the bondholder and the notice through the Municipal Securities Rulemaking Board’s EMMA system is an appropriate way to notify bondholders of the changes.

The letter is the product a subset of the many municipal market organizations that began discussing ways to improve disclosure after the SEC began its MCDC initiative. MCDC was first announced in March 2014 and allows underwriters and issuers to receive lenient settlement terms if they self-report any instances during the past five years that issuers falsely claimed in official statements that they were in compliance with their self-imposed continuing disclosure agreements. The initiative has already led to settlements totaling \$18 million with 72 underwriters representing 96% of the market by underwriting volume. The SEC has been contacting issuers that self-disclosed violations, but it is unclear when issuer settlements will be released.

Some groups see the collaboration as a way to preempt any SEC action to further regulate disclosure in the market.

Several representatives of the organizations that signed the letter said the larger group of organizations will continue to share ideas on improving disclosure, but could not point to any specific initiatives or future letter they have planned.

The Bond Buyer

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