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Taxing Disclosures: Municipal Securities Issuers and COVID-19

As discussed in my earlier blog, [“SEC Focus on Municipal Securities: Disclosure and Enforcement – The Peculiar Structure of the Municipal Securities Disclosure Regime,”](#) since 1994 issuers and, in the case of conduit issuers, obligated parties are required to enter into a Continuing Disclosure Agreement (“CDA”) at the time of issuing municipal securities. Under a CDA, the issuer (or obligated person, or both) must post a Material Event Filing (“MEF”) within ten business days of occurrence, and since 2008, that posting must be made on the Electronic Municipal Market Access (“EMMA”). Failure to comply with these requirements will lead to enforcement much like that which a public company would face under the Securities Exchange Act of 1934, as amended if the public company does not meet its disclosure obligations (such as press releases, filing Current Reports on Form 8-K, etc.) The particular challenge facing municipal securities issuers in the face of the COVID-19 pandemic is how to address in a timely manner and clear away the impacts of COVID-19 on the revenues of municipal securities issuers, as well as on the costs of governmental operations. Fortunately, municipal securities issuers have been given guidance in the form of recommended best practices developed by an industry group, the Disclosure Industry Working Group (“DIWG”), the [“General Continuing Disclosure Considerations for Municipal Securities Issuers”](#) (the “CDC”), which was published in August 2020.

Taxing Disclosures

The DIWG, which includes bond lawyers, issuer officials, municipal securities analysts, and municipal advisors, was founded in July 2019 under the leadership of the Government Finance Officers Association (“GFOA”). Founded in 1906, the GFOA is a trade association with over 20,000 members, who are finance officials in federal, state, provincial, and local governments in the United States and Canada. The DIWG was formed to seek improved and more timely disclosure due to the significant increase in scrutiny by the U.S. Securities and Exchange Commission (“SEC”) of the quality and promptness of municipal disclosures. The GFOA had met with SEC Chair Jay Clayton and other commissioners in June 2019, following Chairman Clayton’s call for the SEC Office of Municipal Securities to work with the Municipal Securities Rulemaking Board to improve municipal securities disclosure. One can readily conclude that forming the DIWG was and is a defensive move to try to forestall more frequent and aggressive enforcement actions. Nonetheless, the CDC does provide helpful reminders and guidance. This first product of the DIWG, said Emily Brock, Director of the GFOA’s federal liaison center, is intended “...to improve disclosure without input from regulators.” The DIWG had significant disagreements among its members as to what to put in any group document, but that situation was fundamentally changed by the pandemic. The DIWG has stated that: “We recognize that this is our problem and rather than a regulatory mandate, we thought it would be best ... to work together and show the SEC and other parties... that we can work together and ... {offer} solutions to address ... timely disclosure.”

One particular part of the CDC stresses the need for “good investor relations,” which involves “... facilitating widespread and contemporaneous access to information” to ALL investors. This section was of critical importance to the National Federation of Municipal Analysts (“NFMA”) and had to be

in the document in order for the NFMA to support its issuance. A good part of the CDC is devoted to the need to recognize diligently the obligations inherent in a CDA, and to administer compliance with professionalism and care. This surely reflects concerns (raised by SEC comments and the formation of the DIWG itself) that too often municipal securities issuers do not devote adequate attention and/or resources to meeting those obligations, and do not adequately administer the disclosure regime applicable to them. For example, the CDC notes that the SEC has NOT relaxed the reporting requirements of issuers under their CDA's, both as to MEF's AND as to the annual filing requirement. As to the latter, the CDC emphasizes the need to know the date that the annual filing is due. The CDC also discusses at length the need for municipal securities issuers and obligated persons to consider voluntary disclosures relating to the impact of COVID-19, specifically making clear that revenue or budget projections should be official government estimates, and clearly marked as unaudited financial information. The CDC cites, in this regard, an SEC statement of May 4, 2020, which encourages municipal securities issuers and obligated persons to provide investors with forward-looking information regarding the impact of COVID-19. The SEC statement suggests that the issuer may want to add "...meaningful cautionary language...", and notes that "good faith forward-looking information will not be second-guessed by the SEC."

Finally, the CDC reminds municipal securities issuers and obligated persons that NONE of the federal tax requirements related to the tax treatment of municipal securities have been suspended in the face of the pandemic. So issuers remain obligated to make federal arbitrage rebate and yield reduction payments. Issuers are also still subject to the private use regulation and must comply with other obligations related to tax-exempt bond issuances.

Municipal Securities Issuers and COVID-19

The CDC is helpful, BUT only if municipal securities issuers and obligated persons invest adequate time and resources in carrying out the steps it recommends. Neither the quality of municipal disclosure nor the quality of mercy need be strained IF issuers and their officials and advisors act promptly, in good faith, to keep investors informed – even in the face of a pandemic.

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