

Client Alert

Current Issues Relevant to Our Clients

June 25, 2015

SEC Settles with 36 Underwriting Firms under its MCDC Initiative

On June 18, 2015, the Securities and Exchange Commission (SEC) issued cease-and-desist orders to 36 underwriting firms in response to voluntary self-reporting of potential misrepresentations in municipal bond offering documents regarding compliance by issuers¹ with prior disclosure obligations under the SEC's Municipalities Continuing Disclosure Cooperation (MCDC) initiative. The MCDC initiative offered underwriters and issuers the opportunity to self-report potential violations during the past five years in exchange for more lenient settlements than would otherwise be available for violations which were not self-reported. Our Client Alert on the MCDC initiative can be found [here](#).

In the orders, the SEC noted its consideration of the underwriting firms' cooperation in self reporting the violations. The underwriting firms neither admitted nor denied the alleged violations in the settlements.

In this first round of settlements, the SEC alleged that between 2010 and 2014, each of the underwriting firms failed to conduct adequate due diligence regarding an issuer's statements or omissions in municipal official statements relating to the issuer's compliance with its prior continuing disclosure obligations under Rule 15c2-12.

Each order included examples of instances in which an issuer failed, in the judgment of the SEC, to comply in all material respects with prior continuing disclosure undertakings and where the official statement did not disclose such failure. In the majority of the examples, the official statement stated that the issuer was in compliance with past continuing disclosure undertakings, when instead the issuer was alleged to have failed to make certain filings or to have made such filings after the applicable deadlines without a notice detailing the failure.

Below is a summary of the failures highlighted in the orders:

- The majority of the failures involved issuers that did not file either annual audited or required annual financial information, and did not file a "failure to file" notice.
- The next most often-cited failures were of issuers that filed required information over 100 days late and did not file a "failure to file" notice detailing the delay.
- The SEC cited some instances in which filings were late by a range of 45-99 days, and the issuer did not file a "failure to file" notice. Some orders cited filings that were late by a fewer number of days, the shortest cited period being 14 days, but these situations included other filings by the same issuer that were late for much longer periods.
- The SEC also cited failures relating to incomplete filings or missing information.
- Some orders noted situations in which the official statement did not include any statement regarding compliance with existing continuing disclosure undertakings (when there was a failure to comply).
- There was one instance of a 2011 filing with a Nationally Recognized Municipal Securities Information Repository (NRMSIR) and not with the Municipal Securities Rulemaking Board through its Electronic Municipal Market Access System (EMMA).

The public finance community was hoping for guidance from the SEC in these orders in determining which failures to comply with continuing disclosure undertakings are considered "material" failures under Rule 15c2-12. However, most of the violations cited in this first round of settlements were not of the type that would assist in a nuanced analysis of such "material" failures. We do not know if other failures in continuing disclosure would be considered material, or if late filings made sooner than the

¹ "issuer" also refers to an "obligated person" under the MCDC initiative.

shortest periods noted above would constitute material failures. Also, the orders focused on annual filing requirements, with no mention of failure to file notices of material/reportable events. Until the SEC releases additional orders under the MCDC initiative, issuers will likely take the approach of disclosing all failures with respect to continuing disclosure, without attempting to determine what the SEC would consider a “material” failure.

Under the settlements, the firms were assessed civil penalties, the amount which was based on the number and size of the offerings identified, with caps based on the size of the firm, and were also required to take remedial actions. The underwriters must also cooperate with any subsequent SEC investigations, including any investigation of “the roles of other parties”.

Additional underwriting firms are expected to enter into similar cease-and-desist orders in the future. The SEC has not yet provided any settlement information under the MCDC initiative for issuers and obligated persons.

For More Information

To discuss any of the topics covered in this Client Alert, please contact a member of our Public Finance Group or visit us online at chapman.com.

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