

COHFA's Nonprofit Healthcare Forum

Primary and Secondary Disclosure – Best Practices and Procedures for Borrowers

William C. Rhodes, Esq.
Ballard Spahr LLP
(215) 864-8534
rhodes@ballardspahr.com

SEC Rule 15c2-12

- Rule began as a requirement to deliver a “deemed final” Preliminary Official Statement and a “complete” Final Official Statement
- Amended in 1994 to require municipal securities dealers to ensure that issuers and obligated parties to undertake in writing to provide certain information to the market concerning annual operating and financial information and notices of certain material events.
- Amended in 2010 to add more material events and clarify others

Exemptions from the Rule

- Issues under \$1.0 million
- Private placements
 - Minimum denominations of \$100,000
 - 35 or fewer sophisticated purchasers
- Certain “puttable” bonds
 - This exemption was terminated for issues after 1 Dec 2010

Past Practices

- Widespread non-compliance by obligated parties
- Frequent statements in primary offerings about past compliance ignored ‘foot faults’
- Liberal perception of materiality of non-compliance
 - Largely based on lack of effect on pricing in secondary market

MCDC – A Game Changer

- Municipalities Continuing Disclosure “Cooperation” Initiative.
 - Launched by the SEC to allow dealers and obligated parties to self-report instances of failure to disclose past non-compliance in recent primary offerings
 - Intentionally created incredible tension between dealers (who reported obligated parties) and obligated parties (who may or may not wanted to self-report).
 - Cease and Desist orders did not include financial penalties or findings of guilt

MCDC Self-Reporting

- Nearly universal reporting by municipal dealers
 - Nearly all entered into Cease and Desist orders
- More than 70 enforcement actions were then brought against obligated parties of all kinds and from all regions.
 - Awaiting enforcement actions against non-reporters (Beaumont)
- Certain facts were enumerated in the C&D orders
 - Filings that were 14 days late were considered by the SEC to be material

Post-MCDC

- New appreciation of what kind of non-compliance may be material
 - Approaching strict liability standard
- Avoid risk of converting a contract (CDA) default into securities law liability exposure
- Changing attitudes about affirmative statements on past compliance in primary offerings
 - Limit such statements to BPAs

Best Practices Post-MCDC

- Curative filings for annual operating and financial information non-compliance only
- Avoid Affirmative statements of past compliance
 - Only instances of non-compliance need to be disclosed
- 3rd party service providers (DAC/Lumesis)
 - Timely new filings and past non-compliance research
- Specific annual filing date deadlines
- Careful diligence of *content* of secondary market O&F data filings

Best Practices Post-MCDC

- Health Care Mergers and Acquisitions
 - Due diligence on acquired entity's past non-compliance
- Engagement of Disclosure Counsel
 - Not Bond and Disclosure Counsel
 - Rather, Borrower and Disclosure Counsel

Continuing Disclosure Undertakings

- Amendments to CDAs
 - Very rare
 - Due only to change in law or change in circumstances
- Borrower's or Disclosure Counsel should prepare CDAs
 - Try to specify rights to amend
- Use a date certain for O&F information filing deadline
 - Avoid “within XXX days from “fiscal year end”

Proposed Amendments to Rule 15c2-12

- March 2017 SEC Release
- Adding two new material events
 - Incurrence of new **financial obligations** (bank facilities, leases, etc.), **if material**, will trigger disclosure of covenants, events of defaults, remedies, priority rights and similar terms which could affect bondholder rights.
 - **Defaults, judgments**, accelerations, terminations and modifications which reflect financial difficulties

SIFMA Recommendations for Changes

- Require date certain reporting deadlines
- Requests guidance on responsibilities of municipal advisors, especially in competitive deals
- Eliminate material event # 11 (rating changes)
 - Rating agencies now report changes directly to MSRB

Disclosure Policies and Procedures

- Do you have disclosure policies and procedures in place?
- What should your policies cover?
 - Primary disclosure review and approval
 - Secondary market compliance
 - Training of responsible officials (primary and secondary)
 - Avoidance of selective disclosure (recent MSRB reminder)

Cutting Edge Disclosure Topics

- Cyber security
- Climate change
- Change in tax law
- Change in health care law

Questions

- Any Questions?





