BARNES & THORNBURG LLP

The MCDC Orders: Everything Is Material

June 19, 2015 | | SEC, The GEE Blog

Anne N. DePrez
Of Counsel
(Retired)

Pursuant to Rule 15c2-12 under the 1934 Act, official statements for municipal securities offerings are to contain a description of any time in the prior five years when the issuer failed to comply, "in all material respects," with prior contractual commitments to provide continuing financial and operational disclosures. The SEC's Division of Enforcement has taken the position that a failure to disclose such instances of material non-compliance in an official statement violates the federal securities laws. In March 2014, the Division announced the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative pursuant to which issuers and underwriters could obtain favorable settlement terms if they self-reported to the Division of Enforcement any instances in which there had been a materially inaccurate statement in a final official statement about continuing disclosure compliance. Any such settlement would include the institution of a cease and desist proceeding for violations of section 17(a)(2) of the 1933 Act, a requirement that appropriate policies and procedures be established to avoid similar violations in the future and, in the case of underwriters, a civil penalty of no more than $500,000. At the time, the Division gave little to no guidance about what it considered material in the context of continuing disclosure obligations. Was the filing of a single annual financial statement two months late a failure to comply in all material respects with continuing disclosure obligations? And was that two-month delay a material fact that needed to be disclosed in order to make other statements in the official statement not misleading? While little guidance regarding such issues was available before the Sept. 10, 2014, and Dec. 1, 2014, MCDC deadlines for self-reporting by underwriters and issuers respectively, plenty of guidance became available on June 18, 2015, with the release of orders instituting cease and desist proceedings against 36 underwriters pursuant to the MCDC program. That guidance makes clear that the Division will take the position that even the most minor delay in complying with continuing disclosure obligations is material. Among the instances of failures to disclose the Division considered to be material, were: a 2011 offering in which an issuer failed to disclose that it filed two annual financial reports between five and ten months late; 2013 securities offering in which an issuer failed to disclose that it filed two audited financial statements between 71 and 95 days late; a 2012 offering in which an issuer failed to disclose that it filed a financial report and operating data 45 days late; and a 2012 offering in which an obligor failed to disclose that it filed four quarterly reports between 36 and 99 days late. It will be interesting to see if the Division actually pursues some of the issuers and underwriters who did not participate in the MCDC Initiative. If it does, it will be interesting to see how the Division fares in trying to convince courts that two-, three- or four-month delays constitute material facts, as materiality has been defined by the Supreme Court:

RELATED PRACTICE AREAS

Anti-Corruption Compliance and Defense
Financial and Regulatory Litigation
Government Litigation
Monitorships
Securities and Capital Markets
White Collar and Investigations

RELATED TOPICS

municipal securities offerings
Municipalities Continuing Disclosure Cooperation

> a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder [or] . . . a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).