BNA, INC.

SECURITIES REGULATION & LAW

REPORT

Reproduced with permission from Securities Regulation & Law Report, 41 SRLR 33, 08/17/2009. Copyright © 2009 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

BOND MARKETS

Tighter Regulation Proposed for Muni Dealers to Increase Issuer Disclosure

BY PAUL S. MACO

Federal regulators have launched a series of proposed rule amendments and interpretations affecting the brokers, dealers and municipal securities dealers who offer, buy, and sell, municipal bonds for their customers (''municipal dealers''). The Securities and Exchange Commission (''SEC'') has tapped its limited regulatory authority over municipal securities to propose expanding existing broker-dealer regulations under Exchange Act Rule 15c2-12 in an effort to improve issuer transparency in the increasingly popular municipal bond market.[1] Simultaneously the Municipal Securities Rulemaking Board (''MSRB''), the self-regulatory organization created by Congress to regulate municipal dealers, has filed with the SEC a proposed expansion of information filing requirements under MSRB Rule G-32 relating to the continuing disclosure agreements required under Rule 15c2-12 for incorporation into EMMA, the MSRB's Electronic Municipal Market Access system. One day earlier, the MSRB also filed with the SEC an interpretation of existing regulations on ''disclosure and other sales practice obligations of brokers, dealers and municipal securities dealers to individual and other retail investors in municipal securities,'' under MSRB Rules G-17, G-18, G-19, and G-30 (the ''Interpretation''), by its nature effective upon filing.[2] These actions closely follow a June 30, 2009 Financial Industry Regulatory Authority (FINRA) news release announcing ''Sweeping Action to Protect Muni

Paul Maco is a partner in the Complex Commercial Litigation Group in the Washington D.C. office of Vinson & Elkins LLP and, from 1995 to 2000, was the Director of the SEC's Office of Municipal Securities. Shawn Cloonan, an associate in the Corporate and Public Finance Section in the Houston, Texas office of V&E, assisted in preparing this article. This article is intended for educational and informational purposes only and does not constitute legal advice or services. If legal advice is required, the services of a competent professional should be sought. These materials represent the views of and summaries by the author. They do not necessarily reflect the opinions or views of Vinson & Elkins LLP or of any of its other attorneys or clients. They are not guaranteed to be correct, complete, or current, and they are not intended to imply or establish standards of care applicable to any attorney in any particular circumstance.

[1] Proposed Amendments to Municipal Securities Disclosure, 17 CFR Parts 240 and 241, Release No. 34-60332 (Jul. 17, 2009) (the ''2009 Proposed Amendments'').

[2] MSRB Notice 2009-42 (Jul. 14, 2009), posted for comment by the SEC on July 21, 2009 at: www.sec.gov/rules/sro/msrb/2009/34-60359.pdf and text available at: www.msrb.org/msrb1/whatsnew/2009-42.asp.

Bond Investors''[3] through an Investor Alert, Regulatory Notice, and launch of industry sweeps. The actions also coincide with the July 1, 2009 commencement of operations of continuing disclosure services by EMMA.[4] Together with the prospect of increased information for investors, these combined actions foretell increasing regulatory pressure on brokers, dealers, and municipal securities dealers (''municipal dealers'') to both prompt the production of and utilize increased disclosure made by issuers and obligated persons[5] in the $2.7 trillion municipal securities market.

The Limited Regulation of Municipal Securities Disclosure and Rule 15c2-12

At first glance, those not familiar with the regulatory quirks of the municipal securities market might consider increased pressure on financial intermediaries to improve disclosure of bond issuers as somewhat misdirected. The most effective means of improving issuer disclosure would seem to be to compel production of such information from the state and local governments that issue municipal bonds and the conduit entities that borrow through them, as occurs with issuers registered with the Commission. On closer look, the 2009 Proposed Amendments may be an effort to make the best of the tools available to the SEC. Under law existing since the 1930's, most municipal securities are exempt from the registration and reporting provisions of federal securities law, although subject to its antifraud provisions.[6] This state of affairs was underscored by Congress in the provision known colloquially as the Tower Amendment[7] added to the Securities Act Amendments of 1975 (the ''1975 Amendments'').[8] The 1975 Amendments, among other features, created the MSRB and firmly established the SEC's authority over municipal dealers.

Beginning in 1989 with the first iteration of Exchange Act Rule 15c2-12, the SEC has used its authority over municipal dealers to create a framework for municipal market issuer disclosure, initially by requiring municipal dealers participating in an offering to obtain an Official Statement (the term given to a prospectus in the municipal market) ''deemed final'' by the issuer prior to a bid, purchase, offer or sale of the municipal securities[9] and then contracting with the issuer to receive sufficient copies of the final official statement for dissemination to investors.[10] In 1994, the SEC returned to the device of using an issuer contractual requirement to produce what it lacked authority to require directly, when amending Rule 15c2-12 to prohibit a municipal dealer from underwriting an offering of municipal securities unless the municipal dealer ''reasonably determined'' that the issuer or an obligated person had contracted to provide annual financial information, disclosure of eleven events, if material, and notice of a failure to produce the contractually required annual information, to information repositories identified by the SEC.[11] The definition of ''final official statement'' as used in the Rule was amended to add both a description of the contract to provide continuing disclosure and of any instances over the previous five years in which each person required to produce annual information under a previous contract failed to do so. Since Rule 15c2-12 is a broker-dealer rule, the remedy against an issuer or obligated person for failure to abide by its contractual commitments is not SEC enforcement or disciplinary action, but typically a mandamus proceeding by and at the expense of bondholders to enforce the contract in state court. Rule section 15c2-12(c), added by the amendments, prohibits a municipal dealer from recommending the purchase or sale of a municipal security unless it ''has procedures in place that provide reasonable assurance that it will receive prompt notice'' of any of the eleven events or a failure to file disclosed pursuant to the required contract.[12]

In the fifteen years since the SEC put in place a disclosure framework for the municipal market, the market size has more than doubled, profound advances in information technology have reshaped securities markets, and, most recently, global financial markets including the municipal market experienced extraordinary turmoil.

Proposed Amendments to Rule 15c2-12

At an open meeting on July 15, 2009, the SEC voted unanimously to propose ''amendments to enhance and expand the applicability of rule 15c2-12.''[13] The proposed amendments consist of three distinct categories of change.

Removal of Exemption for Variable Rate Demand Securities

The existing Rule provides an exemption for securities sold in denominations of $100,000 or more and which, at the option of the holder thereof, may be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more

---

[3] FINRA Takes Sweeping Action to Protect Muni Bond Investors; Regulator Issues Investor Alert, Regulatory Notice, Launches Industry Sweeps (June 30, 2009) (the ''News Release''), available at: www.finra.org/Newsroom/NewsReleases/2009/P119064.

[4] Prior to July 1, 2009, the SEC had designated by letter four Nationally Recognized Municipal Securities Information Repositories, or ''NRMSIRs'' as locations to which the continuing disclosure produced pursuant to Securities Exchange Act Rule 15c2-12 (''Rule 15c2-12,'' or the ''Rule'') was to be disseminated for market access. Greater detail of the operation of Rule 15c2-12 is provided below. Effective July 1, 2009, the SEC withdrew its letters designating NRMSIRs and amendments to Rule 15c2-12 to effect replacing the NRMSIRs with EMMA as the designated recipient of disclosure under the Rule.

[5] The term ''obligated person'' is defined in Rule 15c2-12 to mean ''any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).''

[6] Securities Act of 1933 (''Securities Act'') § 17(a), Securities Exchange Act of 1934 (''Exchange Act'') § 10(b) and Exchange Act Rule 10b-5.

[7] Exchange Act § 15B(d)(2).

[8] Pub. L. No. 94-29, 89 Stat. 97

[9] Rule 15c2-12(b)(1).

[10] Rule 15c2-12(b)(3).

[11] Rule 15c2-12(b)(5); 17 CFR Part 240, Release No. 34-34961 (Nov. 10, 1994) (''1994 Release'').

[12] 1994 Release.

[13] Speech by SEC Chairman: Opening Statement Before the Commission Open Meeting (Jul. 15, 2009), available at: www.sec.gov/news/speech/2009/spch071509mls.htm.

 COPYRIGHT © 2009 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0037-0665

at least as frequently as every nine months.[14] The 2009 Proposed Amendments would remove the exemption and require municipal dealers to ensure the same disclosure is contractually required for demand securities as for non-demand securities. The SEC believes this change is necessary to increase the availability of information in the secondary market as an ever greater market portion, estimated by the SEC to be 38 percent, consist of variable rate demand securities (''VRDOs'').

Timing of Event Notices

The existing Rule does not establish a specific time frame for event notification, instead notice is to be provided in a ''timely manner.'' The SEC proposes adding clarifying language to define the maximum time frame as ''not in excess of ten business days'' after the occurrence of the event. As proposed, the time frame would begin upon the occurrence of the event and not upon knowledge by the issuer of the occurrence.

Modifications to Disclosure Events

The 2009 Proposed Amendments would add four new categories of disclosure events to the existing eleven requiring notification: tender offers, bankruptcy, merger events, and change in trustee or trustee name.[15] Currently, all notice events under the Rule are qualified by the phrase ''if material.'' The 2009 Proposed Amendments would remove this qualifier from seven of the existing eleven events and two of the four additions (tender offers and bankruptcy) would be added without it. Notice would be sent regardless of materiality for (i) principal and interest payment delinquencies, (ii) unscheduled draws on debt service reserves, (iii) unscheduled draws on credit enhancements, (iv) tax events, (v) substitution of credit or liquidity providers, or their failure to perform, (vi) defeasances, (vii) rating changes, (viii) tender offers, and (ix) bankruptcy. Notice of the remaining events would continue to be required only if such events were determined to be material.

The proposal also expands the tax related events triggering notice. The amendment would specifically require notice of adverse tax opinions, the issuance of proposed or final determinations of taxability, Notices of Proposed Issue or other material notices or determinations with respect to or affecting the tax-exempt status of securities, or other events affecting the tax-exempt status of the security.[16]

SEC Interpretive Guidance With Respect to Obligations of Participating Underwriters

The 2009 Proposed Amendments also include a brief section in which the SEC first reviews its prior interpretations regarding municipal underwriter's responsibilities, then states it ''has determined to further expound upon'' them. As discussed above, an issuer's or obligated person's breach of a continuing disclosure agreement is not a violation of securities law, but a matter of state contract law, with a mandamus proceeding as a typical remedy. The question of course under this broker-dealer rule is what is a municipal dealer to do in such circumstances? What follows is the heart of the SEC guidance:

> The Commission believes that, if the underwriter finds that the issuer or obligated person has on multiple occasions during the previous five years, failed to provide on a timely basis continuing disclosure documents, including event notices and failure to file notices, as required in continuing disclosure agreements for prior offerings it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would provide such information under a continuing disclosure agreement in connection with a subsequent offering. In the Commission's view, it is doubtful that an underwriter could meet the reasonable belief standard without the underwriter affirmatively inquiring as to that filing history. The underwriter's reasonable belief would be based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking. If the underwriter finds that the issuer or obligated person has failed to provide such information, the underwriter should take that failure into account in forming its reasonable belief in the accuracy and completeness of representations made by the issuer or obligated person.[17]

In the interpretation above, the SEC expands the specificity of its 2004 statement that ''it is doubtful whether a Participating Underwriter could form a reasonable basis'' in light of ''a history of persistent and material breaches'' in previous undertakings to provide continuing disclosure. The restated guidance now makes specific reference to ''event notices and failure to file notices'' as well as failures ''to provide on a timely basis'' occurring ''on multiple occasions'' mak-

[14] Rule 15c2-12(d)(1)(iii).

[15] Under the 2009 Proposed Amendments, the list of events requiring disclosure would be as follows:

1. Principal and interest payment delinquencies;
2. Non-payment related defaults, if material;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax-exempt status of the securities, or other events affecting the tax-exempt status of the security;
7. Modifications to rights of security holders, if material;
8. Bond calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the securities, if material;
11. Rating changes;
12. Bankruptcy, insolvency, receivership or similar proceeding of the obligated person;
13. The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and
14. Appointment of a successor or additional trustee or the change in name of the trustee, if material.

Also included is a requirement to file a notice of failure to file annual financial information on or before the date specified in the continuing disclosure agreement. One new notice requirement, tender offers, is proposed to be added to an existing event, bond calls if material, with the result that the addition of four new categories of event notices to the existing eleven tallies fourteen event notice categories under the rule amended as proposed.

[16] See item #6 in n. 15.

[17] 2009 Proposed Amendments, Part III.

ing it ''very difficult for the underwriter to make a reasonable determination that information would be provided under a continuing disclosure document in connection with a subsequent offering.

Proposed Amendments to MSRB Rule G-32

On the same day the SEC approved the proposal of the 2009 Proposed Amendments, the MSRB published notice that it had filed with the SEC two proposed amendments to MSRB Rule G-32, Disclosures in Connection with a Primary Offering.[18] As described by the MSRB, ''the first proposal would require brokers, dealers and municipal securities dealers acting as underwriters, placement agents or remarketing agents for primary offerings of municipal securities (''underwriters'') to provide to EMMA information about whether the issuer or other obligated person has undertaken to provide continuing disclosures, the identity of any obligated person other than the issuer, and the timing by which such issuers or obligated persons have agreed to provide annual financial and operating data.''[19] This proposal, if adopted, would be mandatory. The second proposal would not be a new or expanded municipal dealer rule requirement but a modification to the EMMA system that ''would permit issuers, on a voluntary basis, to submit to EMMA preliminary official statements and other related pre-sale documents, official statements and advance refunding documents (''primary market documents''), as well as information relating to the preparation and submission of audited financial statements and/or annual financial information and hyperlinks to other disclosure information available from the issuer's website.''[20]

The MSRB Interpretive Guidance

At the same time as the SEC and MSRB proposed these expansions of existing municipal dealer requirements, the MSRB issued a notice providing ''Interpretive Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities'' (the ''Interpretation''). As described by the MSRB, the Interpretation ''updates guidance to dealers on (i) their obligations to disclose material information about issuers, their securities and credit/liquidity support for such securities in connection with the fulfillment of their disclosure obligations under MSRB Rule G-17, (ii) their obligations to use such material information in fulfilling their suitability obligations under MSRB Rule G-19, and (iii) their fair pricing obligations under MSRB Rules G-18 and G-30.''[21] The MSRB points out that now both primary and continuing disclosure for municipal issues is available to the public through EMMA, together with transaction price information and comprehensive interest rate information on auction rate securities and VRDOs. EMMA is characterized as ''an established industry source'' of information, joining the NRMSIRs which preceded its function under Rule 15c2-12, and other data available from the MSRB and from vendors, that under an MSRB 2002 interpretive guidance are to be used by municipal dealers in meeting their obligations under MSRB rules.[22] As explained in the Interpretation, the MSRB does not consider this availability to reduce municipal dealer obligations to customers. Several statements in the Interpretation are noteworthy.

The Interpretation describes MSRB Rule G-17 as ''the core of the MSRB's investor protection rules'' and ''requires a dealer effecting a municipal securities transaction to disclose to its customer all material information about the transaction known by the dealer, as well as material information about the security that is reasonably accessible to the market,'' including information available from established industry sources. The disclosure is to be provided to the investor ''at the time of trade.'' As in the 2002 notice, the Interpretation states the ''disclosure duty applies to any municipal securities transaction, regardless of whether the dealer is acting

---

[18] MSRB Notice 2009-44 (July 15, 2009), MSRB Files Proposals to Provide for Additional Primary Market and Continuing Disclosure Information to be Made Available Through the MSRB's Electronic Municipal Market Access System (''EMMA''). Available at: www.msrb.org/msrb1/whatsnew/2009-44.asp. The SEC has separately posted the proposals for comment under SR-MSRB-2009-09, available at: www.sec.gov/rules/sro/msrb/2009/34-60314.pdf, and SR-MSRB-2009-10, available at: www.sec.gov/rules/sro/msrb/2009/34-60315.pdf

[19] Id. Specifically, the amendments would require filing on Form G-32:

- whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Exchange Act Rule 15c2-12;
- the name of any obligated person, other than the issuer of the municipal securities, that has or will undertake, or is otherwise expected to provide, continuing disclosure pursuant to the continuing disclosure undertaking;
- the date or dates identified in the continuing disclosure undertaking, pursuant to Exchange Act Rule 15c2-12(b)(5)(ii)(C) or otherwise, by which annual financial information is expected to be submitted each year by the issuer and/or any obligated persons to the EMMA system; and
- contact information for a representative of the issuer and/or any obligated persons for purposes of establishing continuing disclosure submission accounts for such issuer and/or obligated persons in connection with their submissions to the EMMA system.

[20] Id. Specifically, the information would include:

- an issuer's or obligated person's undertaking to prepare audited financial statements pursuant to generally accepted accounting principles (''GAAP'') as established by the Governmental Accounting Standards Board (''GASB''), as described below (the ''GASB-GAAP undertaking'');
- an issuer's or obligated person's undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year, as described below (the ''annual filing undertaking'');
- Certificate of Achievement for Excellence in Financial Reporting awarded by the Government Finance Officers Association (''GFOA'') in connection with the preparation of a Comprehensive Annual Financial Report (''CAFR'') of an issuer (''GFOA-CAFR Certificate''); and
- uniform resource locator (URL) of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information.

[21] MSRB Notice 2009-42. The Notice also applies previous guidance on bond insurance rating downgrades and widescale auction failures for municipal auction rate securities (''ARS'') to municipal securities transactions in general and specifically to transactions with individual and other retail investors in variable rate demand obligations (''VRDOs'').

[22] Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts (March 20, 2002), available at: www.msrb.org/msrb1/rules/notg17.htm. See also: Interpretive Notice Filed Regarding Rule G-17, on Disclosure of Material Facts, discussing comments received on proposal, available at: www.msrb.org/msrb1/archive/g17_not0102.htm

 COPYRIGHT © 2009 BY THE BUREAU OF NATIONAL AFFAIRS, INC. SRLR ISSN 0037-0665

as a so-called ''order-taker'' (as when the trade is ''unsolicited''), whether the transaction is recommended, or whether the transaction is a primary or secondary market trade.''

In addition to information available from established information sources, the MSRB repeats its 2002 interpretation that a municipal dealer's disclosure duty extends to ''material information they know about the securities even if such information is not then available from established industry sources.'' In 2009, the MSRB expands its 2002 statement to address procedures: ''it is essential that dealers establish procedures reasonably designed to ensure that information known to the dealer is communicated internally or otherwise made available to relevant personnel in a manner reasonably designed to ensure compliance with this disclosure obligation.''

The Interpretation advises that the suitability determination under MSRB Rule G-19 ''requires a meaningful analysis'' and that such determinations ''are required regardless of the apparent safety of a particular security or issuer or the apparent wealth or sophistication of a particular investor.'' Pointing to the systems and procedures requirement of Rule 15c2-12(c), the Interpretation states municipal dealers ''would be expected to have reviewed any applicable continuing disclosures made available through EMMA or other established industry sources and to have taken such disclosures into account in undertaking its suitability determination.''

The Interpretation also ties EMMA and established industry sources to municipal dealer obligations in pricing transactions, noting first that MSRB Rule G-30 requires ''the aggregate transaction price to the customer must be fair and reasonable, taking into consideration all relevant factors'' and then stating that in determining fair and reasonable, ''among other things, dealers would be expected to have reviewed any applicable continuing disclosures made available through EMMA or other established industry sources and to have taken such disclosures into account.''

Finally, the Interpretation cautions that ''an issuer's use of a retail order period based on a perception that the retail order period will improve pricing of the new issue for the issuer does not create a safe harbor for dealers to engage in pricing that violates the fair pricing obligation under Rule G-30'' and advises that ''large differences between institutional and individual prices that exceed the price/yield variance that normally applies to transactions of different sizes in the primary market provide evidence that the duty of fair pricing to individual clients may not have been met.''

The FINRA Regulatory Notice and Industry Sweeps

FINRA currently has three sweeps underway focused on municipal bond transactions, according to a June 30, 2009 news release.[23] The news release describes the first as ''a broad sweep'' looking at industry sales and supervisory practices for sales of municipal bonds to retail investors. The related Targeted Examination Request, dated June 2009, states that for ''purposes of this request, the term 'retail municipal transaction' means a transaction of less than 100 municipal bonds (i.e., less than $100,000 in par value) effected with a customer, including institutional customers'' and requests itemized information for the period from January 1, 2009 through March 31, 2009. The request includes a ''firm's written supervisory procedures, memoranda and other documents explaining firm controls in place with regard to. . .(a) Firm processes for the identification and disclosure of material facts to customers as defined in MSRB Rule G-17 and related interpretations; (b) Firm procedures for disclosures when selling municipal bonds to retail customers during 'new issue disclosure periods' as defined in MSRB Rule G-32; and (c) Firm processes for the identification of issuer material events, as defined in SEC Rule 15c2-12, and the use of this information.''[24] In addition, request is made for the firm's supervisory procedures explaining ''firm controls in place with regard to its responsibilities as a Participating Underwriter under SEC Rule 15c2-12(b)'' as well as a ''detailed written description regarding the process for determining pricing for municipal securities when purchasing from or selling to retail customers.''[25] A second ''more targeted sweep'' examines ''potential conflicts, disclosure practices and marketing by firms underwriting municipal securities involving swaps and derivatives for small municipalities.''[26] The third ''narrowly targeted sweep'' seeks information from firms that engaged in retail sales of municipal Gas Bonds underwritten and guaranteed by Lehman Brothers.[27]

As part of the municipal bond initiative, FINRA issued a June 30, 2009 Regulatory Notice[28] reminding securities firms of their obligations to disclose material information to customers, suitability of recommendations, and supervision of municipal securities activities. The FINRA Regulatory Notice, issued approximately two weeks before the Interpretation, urges municipal dealers to ''reassess the adequacy of their current policies and procedures'' for complying with MSRB rules, with ''particular attention to those relating to'' disclosure, suitability of recommendations, and supervision of municipal securities activities. Similar to the Interpretation, the Regulatory Notice states: ''the MSRB has interpreted Rule G-17 to require a dealer, in connection with any transaction in municipal securities, to disclose to its customer, at or prior to the sale, all material facts about the transaction known by the dealer, as well as material facts about the security that are reasonably accessible to the market.'' FINRA advises: ''If a firm discovers through its Rule 15c2-12 procedures or otherwise that an issuer has failed to make filings required under its continuing disclosure agreements, the firm

[23] News Release, *supra* n. 3.

[24] FINRA Targeted Examination Request Re: Retail Municipal Securities Transaction (June 2009), available at: www.finra.org/Industry/Regulation/Guidance/TaretedExaminationLetters/P118892.

[25] Id.

[26] FINRA Targeted Examination Request Re: Municipal Underwritings and Municipal Derivative Investments (May 2009), available at: www.finra.org/Industry/Regulation/Guidance/TargetedExaminationLetters/P119050

[27] FINRA Targeted Examination Request Re: Retail Sale of ''Gas Bonds'' (June 2009) available at: www.finra.org/Industry/Regulation/Guidance/TargetedExaminationLetters/P119051.

[28] Regulatory Notice 09-35 (June 2009), available at: www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p119067.pdf

must take this information into consideration in meeting its obligations under Rule G- 17 and in assessing the suitability of the issuer's bonds under Rule G-19.'' Finally, the Regulatory Notice states that, beginning July 1, 2009, a firm's supervisory procedures ''should include requiring and training associated persons to access all relevant information from EMMA and other established industry sources before selling or recommending a municipal security, whether in connection with an initial offering or in the secondary market.''

As part of its focus on the municipal bond market, along with the actions above, FINRA also issued the Investor Alert — *Municipal Bonds — Staying on the Safe Side of the Street in Rough Times*, linked to a ''Muni Bond Check List,'' providing investors with a step-by-step guide for avoiding common pitfalls in municipal bond investing.[29]

Observations

In Congressional testimony immediately prior to the July 15 open meeting, SEC Chairman Mary L. Schapiro characterized the 2009 Proposed Amendments as ''a first step'' and if adopted, ''municipal securities investors should receive more complete and timely information about important events that affect their investments as well as more information about variable rate demand obligations previously exempt from these broker-dealer rules.'' As to what the next steps may be, Chairman Schapiro testified: ''We look forward to working with Congress to more effectively protect investors in the important municipal securities market by developing methods to more fundamentally address municipal securities disclosure.''

Since 1994, Rule 15c2-12 has confronted municipal dealers with a compliance conundrum - how to determine a failure to file annual financial information when an issuer failing to file is also unlikely to file, timely or at all, the required notice of a failure to file? By now emphasizing material events, the SEC's interpretation ups the ante - how can an underwriter determine if an issuer or obligated person failed to file an event notice without having independent knowledge of the event? What compliance procedures can adequately address this conundrum?

The 2009 Proposed Amendments should be reviewed not on a stand-alone basis, but together with the MSRB Notices and FINRA Regulatory Notice discussed above for a full appreciation of the combined scope and potential effect of all the regulatory actions. Municipal Dealers will be directly affected by the amendments, if adopted. Issuers of municipal securities and obligated persons, will be affected through the continuing disclosure agreements to which they are a party.

[29] News Release *supra* n. 3.

COPYRIGHT © 2009 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

ISSN 0037-0665