

CATALYST™

Pennsylvania Chamber of Business and Industry

Business EXPERTise

Recognized and respected issue experts from PA Chamber member companies answer businesses' most frequently asked questions about HR, Tax, Communications and Environmental concerns, compliance and best practices.

Finance/Tax

What are the best practices for municipal securities issuers to help ensure they comply with continuing disclosure obligations?

For many years, issuers of municipal securities (bonds, notes or other obligations sold to the public) focused only on primary offering disclosure with respect to such securities. Many issuers, however, did not take as much care with ongoing obligations to the marketplace with respect to continuing disclosure. In recent years, the Securities and Exchange Commission has paid close attention to enforcement of continuing disclosure obligations on the part of issuers of municipal securities. Below is a brief description of steps issuers of municipal securities can take to ensure that such issuers do not inadvertently violate their continuing disclosure obligations with respect to their outstanding municipal securities.

Continuing Disclosure Undertakings

Issuers of municipal securities are familiar with the continuing disclosure agreements

that are entered into as part of any public issuance of such securities. Pursuant to Rule 15c2-12, the SEC requires that underwriters of municipal securities refrain from engaging in the distribution of municipal securities unless the issuers of such securities promise to provide to the Municipal Securities Rulemaking Board's Electronic Municipal Market Access System (EMMA) certain financial information and audited financial statements by a certain date every year. These agreements also call for the provision of certain information concerning "material events" as described in Rule 15c2-12.

Before entering into a continuing disclosure agreement, it is important for issuers to keep a few things in mind:

1. With respect to annual filings, be sure that the agreement specifies the date for which such filings are due. "X" number of days ought to be used only if the issuer anticipates changing its fiscal year.
2. Pick a reporting date that you are sure will allow for enough time to complete your audit or other annual financial information that is required by the continuing disclosure



Andrew Maher
Cohen & Grigsby, P.C.

agreement. Be conservative and add 30 days beyond what has been typical in the past.

3. SEC Guidance says that continuing disclosure agreements should require that if the audit is not completed by the reporting date, the issuer or obligor should file unaudited financial statements by the reporting date, and supplement them with the audited statements when they are available.
4. Discuss fully with the underwriters which information is important for future investors to know in order to trade the bonds. Remember that municipal securities trade on a secondary market and certain investors may

continued

wish to have current information over and above what is required by Rule 15c2-12.

5. Frequent issuers or obligors can incorporate their updated financial information by referencing a recent official statement. For less frequent issuers, it is important to keep the information updated in a manner that is not unduly burdensome for disclosure purposes.
6. In the continuing disclosure agreement, try to be flexible in describing the information required to be produced, so that if certain data is no longer collected, some other similar data can be substituted. But, also be mindful of the need to have adequate guidance on what to report.

Continuing Disclosure Policies and Procedures

While it has not been required by the SEC, it is certainly in an issuer's best interest to have in place written continuing disclosure policies and procedures. Such written procedures will

enable issuers to assign disclosure-related tasks to specific personnel, make issuers less dependent on employees with "institutional memory" and, in the event of non-compliance with its continuing disclosure obligations, to be able to show the SEC that the issuer has acted in good faith.

Specifically, such policies and procedures should include provisions covering the following items:

1. Creation of a template for annual compliance as well as a list of events to be reported.
2. Establish internal deadlines and ticklers to ensure compliance.
3. Provision for the periodic (at least annually) training of personnel concerning continuing disclosure responsibilities.
4. Such policies and procedures should name at least one person who should be made responsible for compliance.

5. Use EMMA for free automated reminders of approaching deadlines — annual, quarterly and other.

Additionally, policies and procedures should include language concerning voluntary disclosures. There may be events that materially impact an issuer or its securities (positively or negatively) and, while not strictly necessary to disclose, still should be considered for disclosure on EMMA. For example, recent changes to certain accounting rules with respect to calculating pension obligations and other post-employment benefits for government employees may adversely impact an issuer's financial statements. Continuing disclosure policies and procedures should include provisions for posting such information on EMMA, even on a voluntary basis. ■

■ **Andrew C. Maher** is a director in Cohen & Grigsby's Public Finance Group.