Securities and Exchange Commission's

Municipalities Continuing Disclosure Cooperation Initiative –

What Do Tennessee Local Governments Need to do?

BASS BERRY SIMS

Background

Under federal law, underwriters are not allowed to underwrite the bonds of a local government unless the local government has committed to provide certain ongoing financial information while the bonds are outstanding. The purpose of this rule is to permit investors to get updated financial information regarding local governments so that the investor community can make better decisions in connection with buying and selling municipal bonds after they have been issued. The commitment by the local government entity to provide ongoing financial information is known as its continuing disclosure obligation. When local governments in Tennessee issue bonds through an underwriter (ie. with an official statement), the local government will enter into a continuing disclosure certificate or agreement under which the local government agrees to provide the required ongoing financial information. When an underwriter underwrites bonds for a local government after it has entered into a continuing disclosure obligation, the underwriter is supposed to determine whether the local government has met its continuing disclosure obligations in the past, and any material non-compliance with the local government's continuing disclosure obligations should be disclosed in the official statement relating to the bonds being sold. Some local governments have not carefully complied with their continuing disclosure obligations, and their failure to disclose that non-compliance is the subject of the initiative described herein. The following questions and answers are intended to give you an overview regarding the purpose and the terms of this initiative.

What is the Municipalities Continuing Disclosure Cooperation Initiative (MCDC)?

The MCDC is an initiative of the Securities and Exchange Commission (“SEC”). The SEC is giving issuers of municipal securities until September 10, 2014 to voluntarily report materially inaccurate statements made during the past five years in official statements regarding prior continuing disclosure compliance. Reports submitted prior to September 10, 2014 are eligible for the MCDC settlement process described below. The SEC has warned that issuers will likely receive more severe penalties for materially inaccurate statements that are not reported during this period and which are later discovered by the SEC.

Why has the SEC launched the MCDC?

The SEC has grown increasingly concerned with (1) the failure of local governments to comply with their continuing disclosure obligations and (2) misrepresentations made in official statements about the local government’s continuing disclosure compliance. In July 2013, the SEC sanctioned a municipal issuer in connection with an official statement that stated that the issuer had fully complied with its continuing disclosure obligations in the previous five years, when in fact the issuer had failed to comply with its continuing disclosure obligations during that period. The SEC hopes that the MCDC will cause local governments to clean up their past continuing disclosure lapses and establish improved compliance practices going forward.

What should local governments do?

- Identify each official statement for bonds or notes sold since September 10, 2009.
- Detail the local government's compliance with its continuing disclosure obligations (annual reports and material event notices) during the five years preceding the official statement.
- Determine whether the official statement accurately describes any continuing disclosure lapses in the five year period preceding the official statement (the SEC has stated that the omission of a description of past lapses is equivalent to a misrepresentation about those lapses).
- Determine whether any inaccurate or omitted descriptions are "material" (you should consider seeking legal advice with questions regarding materiality).
- Consider whether to report any material inaccuracies to the SEC by September 10, 2014 under the terms of the MCDC.

Reminder: Under the MCDC, continuing disclosure lapses are not – on their own – a problem. It is only the subsequent failure to accurately describe those lapses in an official statement, if material, that should be evaluated for reporting.

How does the MCDC reporting and settlement process work?

Local governments wishing to report violations must complete and file with the SEC a questionnaire, which can be found at:
http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828#.UyEBIPldXQg.

The MCDC provides the following settlement terms for local governments:

- The local government will consent to a cease and desist proceeding, and the local government will not have to admit liability with respect to any SEC findings.
- The local government will cooperate with further investigations by the SEC staff, including those regarding the roles of individuals and other parties involved.
- The local government must establish appropriate continuing disclosure policies, procedures and training, update its past delinquent continuing disclosure filings, and clearly disclose the settlement terms in any future official statement for five years.
- No monetary penalties will be imposed.

What is the incentive for a local government to self-report?

The SEC has made clear that it will seek more severe sanctions for violations which could have been self-reported by September 10, 2014 and were not. Those more severe sanctions include monetary penalties, the required admission of liability and the pursuit of enforcement actions and penalties against individuals who may be culpable.

How does the MCDC apply to underwriters and what are the implications for local governments?

The MCDC initiative is also available to underwriters of bonds and notes. Like local governments, underwriters are offered more favorable settlement terms for self-reporting violations prior to September 10, 2014.

It is clear that the SEC will be focused on violations reported under the MCDC by an underwriter and not the local government, and vice versa. The SEC recognizes that the MCDC creates tension between issuers and underwriters. Local governments should consider (1) communicating with the underwriter of any public bond issue for which there is some question regarding the accuracy of the description regarding continuing disclosure compliance, to determine whether the underwriter intends to report the issue, and (2) informing the underwriter of any bond issue being reported by the local government under the MCDC.

Going Forward

Whether or not a local government identifies an issue to report to the SEC, the MCDC initiative is certainly a reminder of the importance of a local government (1) having appropriate continuing disclosure procedures in place and (2) reviewing and ensuring the accuracy of all of its bond official statements and continuing disclosure filings.

Additional Information

A copy of the SEC release related to the MCDC may be found here:
http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828#.UyEBIPldXQg.

You may contact any of the public finance attorneys at Bass, Berry & Sims PLC if you have questions.

G. Mark Mamantov
Member
(865) 521-0365
mmamantov@bassberry.com

George H. Masterson
Member
(615) 742-6263
gmasterson@bassberry.com

Russell A. Miller
Member
(615) 742-7778
rmiller@bassberry.com

Karen S. Neal
Member
(615) 742-6274
kneal@bassberry.com

Jeffrey A. Oldham
Member
(615) 742-6234
joldham@bassberry.com

Lillian M. Blackshear
Associate
(615) 742-7902
lblackshear@bassberry.com

James Polk Moneyhun, Jr.
Associate
(865) 521-0368
jmoneyhun@bassberry.com