CONTINUING DISCLOSURE – TIME FOR ISSUERS TO "JUST DO IT"

Continuing disclosure or secondary market disclosure came to municipal issuers in 1995 with the SEC's adoption of amendments to its Rule 15c2-12. Though the Tower Amendment prohibits the SEC from directly requiring municipal issuers to file post municipal securities issuance information, Rule 15c2-12 prohibits an underwriter from underwriting a new issue of municipal securities unless the issuer of such securities has entered into a written contract to provide annual financial information and material event disclosures relating to the issuer and such securities to EMMA (www.emma.msrb.org), the information repository of the MSRB.

Since 1990, many issuers have entered into such contracts but have not consistently complied with the annual filings. Why? Because there were no compelling incentives or penalties for non-compliance. Continuing disclosure contracts specifically state that non-compliance will not result in a default of the related securities. The SEC in its Release No. 34-34961 states that an underwriter is not prohibited from underwriting a new municipal securities issue of an issuer even though such issuer has previously failed to comply with previous undertakings to provide secondary market disclosure. However, Release 34-34961 states that the issuer must be brought into compliance with all previous undertakings before the underwriter could underwrite a new issue of municipal securities.

Municipal industry participants, especially underwriters and investors, are finally beginning to add some real consequences for issuers who do not comply with their continuing disclosure obligations.

Prior non-compliance with continuing disclosure obligations by an issuer must be described in such issuer's primary offering document for a new issue of municipal securities, typically an official statement (OS). The OS disclosure should describe if an issuer's prior continuing disclosure filings were made late (and if so, how late) or not at all. Moreover, the OS disclosure typically addresses whether the issuer is taking steps to assure that future continuing disclosures will be made on time.

Investors, especially those that may not hold their investment in municipal securities to maturity, are checking on the EMMA website for past compliance of an issuer in order to form an expectation that such an issuer will honor its secondary market disclosure obligations in the future. Such secondary market disclosure can greatly enhance the likelihood that securities traded in the secondary market are priced fairly. In certain cases, non-compliance with prior continuing disclosure obligations by an issuer can result in an increase in the interest rates investors are willing to accept for such an issuer's new issue of municipal securities.

In addition, underwriters need to have a reasonable basis to believe that the issuer will comply in the future with its continuing disclosure obligations on a new municipal securities issue before it can underwrite the securities. Underwriters are checking on EMMA to verify that all prior secondary market disclosures were timely made by an issuer. Release 34-34961 states that if an issuer has a history of persistent and material non-compliance with its previous continuing disclosure undertakings, it is doubtful that an underwriter can form a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. Without this reasonable basis, the SEC may be able to initiate an action against an underwriter of such an issuer's new issue of municipal securities.

Speer Financial, Inc. provides continuing disclosure agent services to its clients. For issuers that prepare their own continuing disclosure, Speer Financial provides a step-by-step tutorial on how to file continuing disclosure documents with EMMA on its website (www.speerfinancial.com).