BEST PRACTICE

Understanding Your Continuing Disclosure Responsibilities (2010)

Background. Any government or governmental entity issuing bonds has an obligation to meet specific continuing disclosure standards in compliance with Securities and Exchange Commission (SEC) Rule 15c2-12. This rule, which is under the *Securities Exchange Act of 1934,* sets forth certain obligations of (i) underwriters to receive, review and disseminate official statements prepared by issuers of most primary offerings of municipal securities, (ii) underwriters to obtain continuing disclosure agreements from issuers, and other obligated persons to provide material event disclosures and annual financial information on a continuing basis, and (iii) broker-dealers to have access to such continuing disclosure in order to make recommendations of municipal securities in the secondary market.[1]

When bonds are issued, the issuer enters into a continuing disclosure agreement/certificate/undertaking (CDA) for the benefit of the underwriter to meet the SEC's requirements, promising to provide certain annual financial information and material event notices to the public. In accordance with changes made in 2009 to Rule 15c2-12, those filings must be made electronically at the Electronic Municipal Market Access (EMMA) portal (www.emma.msrb.org).

Nothing prohibits issuers from providing periodic voluntary financial information to investors in addition to fulfilling the SEC Rule 15c2-12 responsibilities undertaken in their CDA through EMMA. It is important to note that issuers must disseminate any financial information to the market as a whole and cannot give any one investor certain information that is not readily available to all investors.

In addition to making EMMA filings, a government may choose to post its annual financial information and other financial reports and information on its web site.

Recommendation. The Government Finance Officers Association (GFOA) recommends that finance officers responsible for their government's debt management program adopt a thorough continuing disclosure policy and adhere to the following disclosure practices that are practical for their entity. Governments are encouraged to incorporate robust disclosure practices in order to enhance their credibility in the marketplace, foster liquidity for the securities and demonstrate a solid disclosure track record that will be viewed favorably by investors, credit rating agencies and the public.

Issuers should consider the following elements in order to create a strong continuing disclosure policy:

1. They should have a clear understanding of their responsibilities as defined in the bond's continuing disclosure agreement/certificate/undertaking. This includes being aware of the material events that must be disclosed. Prior to execution, CDAs should be discussed with the transaction's bond counsel, underwriter and financial advisor to ensure a full understanding of issuer obligations.

[1] MSRB Glossary of Terms, www.msrb.org

2. Governments should develop continuing disclosure procedures that:
    a. identify the information that is obligated to be submitted in an annual filing;
    b. disclose the dates on which filings are to be made;
    c. list the material events as stated by the SEC and your CDA; and
    d. identify the person who is designated to be responsible for making the filings.
3. For many governments, a Comprehensive Annual Financial Report (CAFR) may fulfill annual financial information obligations. The information provided in a CAFR does not have to be replicated when filing with EMMA. If within a CDA a government has agreed to furnish information that is outside the scope of its CAFR, that information may be included as a supplement to the CAFR when filing with EMMA.
4. As recommended in the GFOA's Certificate of Achievement for Excellence in Financial Reporting program, a government should complete its audited annual financial information within 180 days of the end of its fiscal year. Upon its completion, the CAFR should immediately be submitted to EMMA.
5. Although the SEC has approved a new voluntary field within EMMA for governments to indicate if they make their filing of annual financial information within 120 or 150 days of the end of the year, such a notation can only be made if the government includes such a commitment within its continuing disclosure agreement. The GFOA does not support the inclusion of such a commitment within a government's continuing disclosure agreement, as such timelines will be very difficult to meet, and if a government fails to adhere to such a timeframe, they would be in violation of their continuing disclosure agreement.
6. Material event notices should be filed according to SEC Rule 15c2-12
    a. For bonds issued after December 1, 2010, the SEC requires issuers to file material event notices within 10 business days of the event.
    b. For bonds issued before December 1, 2010, the rule states that governments should file event notices in a "timely manner." Governments are encouraged to adopt a policy to submit material event notices, within 10 business days.
7. Governments, in consultation with internal and external counsel, may wish to submit other financial information to EMMA (and post it on their web sites) that goes beyond what is specified in the CDA. This information includes annual budgets, financial plans, financial materials sent to governing bodies for council or board meetings, monthly financial summaries, investment information, and economic and revenue forecasts. Additionally, governments are encourged to place this interim financial information on their web sites, and through a new feautre within EMMA that allows governments to post a link to their web site so that investors and the public can directly access the information.
8. Issuers may want to provide additional information to investors about agreements entered into in connection with debt issuance. These disclosures should provide information that will enable investors to make judgements about the volatility and risk exposure of certain kinds of agreements that may embed risks that should be disclosed and quantified. Areas of such risk exposure include:
    a. Letters of credit issued in connection with variable rate debt issuance;
    b. Interest rate swaps entered into in connection with debt issuance;
    c. Investment agreements for bond proceeds, including reserve funds, particularly where such investments may be pledged or anticipated bond security; and
    d. Insurance sureties used to fund reserve fund requirements.

References.

- *Making Good Disclosure*, Government Finance Officers Association, 2002.
- GFOA Best Practice, *Using a Web Site for Disclosure*, 2010.
- GFOA Best Practice, *Maintaining an Investor Relations Program*, 2010.
- GFOA Best Practice, *Using the Comprehensive Annual Financial Report to Meet SEC Requirements for Periodic Disclosure*, 2006.
- *Disclosure Roles of Counsel*, John McNally, Project Coordinator, ABA/National Association of Bond Lawyers, 2009.
- SEC Rule 15c2-12, http://www.sec.gov/rules/final/adpt6.txt.
- Electronic Municipal Market Access (EMMA), http://www.emma.msrb.org.

Approved by the GFOA's Executive Board, October 15, 2010.