National Association
of Bond Lawyers

Viewpoints on Issuer Participation in MCDC
October 17, 2014

Since the September 10, 2014 filing deadline for underwriters relating to the Securities and Exchange Commission's Municipal Continuing Disclosure Cooperation Initiative ("MCDC"), the National Association of Bond Lawyers has been participating in conversations with lawyers and other professionals concerning the position of issuers and obligated persons ("issuers") under the initiative. The points summarized below represent a summary of views broadly held among many practitioners on procedural aspects of an issuer's decision whether or not to self-report under MCDC. Many of these issues were discussed on the recent NABL October 15, 2014 teleconference. A recording of that teleconference and of two earlier NABL teleconferences on MCDC are available on the NABL website. This summary is offered for consideration by NABL members in advising clients in advance of the December 1, 2014 MCDC self-reporting deadline for issuers. Of course, each lawyer must decide how to advise clients and, ultimately, it is the client's decision whether and how to participate in MCDC.

1. MCDC was designed to solicit self-reports regarding potentially material misstatements in bond offering documents regarding prior compliance with continuing disclosure undertakings. Issuers who believe that they have not made a material misstatement, but whose transactions have been reported by underwriters, should consider whether or not to participate in MCDC. Such issuers might decide not to participate, notwithstanding an underwriter's reporting. However, see items 3 and 8 below.

2. The filing of an MCDC self-report by an issuer will not in and of itself be treated by the staff of the Securities and Exchange Commission ("SEC") as an offer of settlement or an admission of liability. Issuers participating in MCDC can anticipate that they will have an opportunity to explain to the SEC staff any extenuating circumstances regarding the self-report including, for example, why they believe a particular misstatement in an official statement should not be considered material. However, because MCDC is meant to afford an expedited process for settlement and not a forum for protracted debate over materiality issues, SEC staff discussions with issuers participating in MCDC are unlikely to be as extended or formal as they would be in connection with a typical SEC enforcement proceeding.

3. SEC staff is expected to contact issuers to discuss the potential violations they have reported under MCDC before making a final determination about eligibility for the settlement terms. If, after discussion, SEC staff decides there has been a violation, they will seek an offer of settlement from the issuer, as contemplated by MCDC. Because, as noted above, MCDC establishes an expedited process for settlement, issuers that participate in MCDC are unlikely to have the opportunity normally afforded in a typical enforcement proceeding through the Wells process to make their case directly to the Commission if they fail to persuade the SEC staff.

4. To pursue an enforcement action under Section 17(a)(2) of the Securities Act of 1933, SEC staff will have to reach a conclusion in each case that there was a material misstatement resulting from negligent (or more culpable) conduct by an issuer.

5. If SEC staff decides not to proceed with an enforcement action in connection with an issuer's MCDC self-report, the issuer can expect to be informed by SEC staff of that decision. That may not occur for some time because SEC staff likely will focus first on cases with respect to which they consider an enforcement action justified.

6. Under the terms of MCDC, issuers can use Box 5 to provide an explanation of "the circumstances that may have led to…potentially inaccurate statements." However, issuers may also choose to include in Box 5 details about noncompliance incidences and factors supporting a finding of non-materiality. If an issuer provides no information in Box 5, SEC staff is likely to contact the issuer for information.

7. If an issuer determines not to participate in MCDC but submits a separate writing to SEC staff regarding a potential violation, the issuer cannot be assured that it will get the benefit of MCDC settlement terms should the SEC determine to pursue an enforcement action. The SEC may seek settlement terms beyond those outlined under the initiative if it pursues an enforcement action outside of MCDC.

8. If an issuer determines not to participate in MCDC, any SEC investigation regarding a potential violation would occur in a typical (and more costly) SEC enforcement proceeding, and that proceeding would be resolved based on an evaluation by the SEC of the pertinent facts and circumstances. In previous enforcement proceedings, remedial actions taken by a municipal issuer have been cited favorably in SEC enforcement orders. The adoption or enhancement of continuing disclosure policies and procedures by an issuer and the correction of all deficient continuing disclosure filings may be factors SEC staff would consider in deciding what action to take. An issuer that determines not to participate in MCDC because it has determined no securities law violation has occurred should consider documenting the analysis supporting its determination.

9. There is a five-year statute of limitations for the SEC seeking financial penalties. An MCDC filing is not an agreement to toll the statute of limitations. The statute of limitations continues to run after such filing, absent execution of a tolling agreement by the issuer. It is unclear whether the statute of limitations for SEC enforcement actions applies to injunctive or equitable remedies, such as a cease and desist order.

10. The process to be followed in MCDC is akin to the process set out in the SEC Enforcement Manual for other circumstances in which the SEC becomes aware of a possible violation of securities law through self-reporting. The Manual can be accessed on the SEC website at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.