MSRB Announces Market Advisory on Selective Disclosure

The Municipal Securities Rulemaking Board ("MSRB") recently issued a market advisory to increase awareness among market participants, including issuers and obligated persons[1], of the importance of disclosing material information fairly, equitably and in the public domain. The MSRB market advisory is available here.

Selective Disclosure Overview

Selective disclosure occurs when certain classes of investors are given access to information but other investors are not. The select investors that are privy to this nonpublic information often include analysts for investment banking firms, investment advisers or institutional investors, who are given access to material information that others do not have.

MSRB Executive Director Lynette Kelly stated that "[w]hen selective disclosure occurs – often inadvertently – certain investors can be disadvantaged. The MSRB is a resource for issuers and their financial professionals seeking to implement practices to ensure that all investors and stakeholders have equal access to the same material information from the issuer in a timely manner."

As described in the market advisory, question-and-answer sessions during investor conference calls and invitation-only meetings with analysts are common scenarios in which selective disclosure could arise. Kelly further notes that "[t]hese types of events are not inherently problematic. However, issuers should make it a practice to consider whether material nonpublic information was shared in these circumstances and take steps to make that information public promptly after the event."

In addition, according to past statements by SEC officials, issuers should be mindful of instances in which they are "speaking to the market," when they are required to include all previously undisclosed occurrences that would be material to investors. Issuers who opt to use EMMA to remedy inadvertent selective disclosure when there is no current bond offering should consider whether any other material event has occurred which should also be included in the voluntary filing.

Anti-Fraud Liability

While the registration and reporting requirements of federal securities law do not apply to municipal securities, the anti-fraud provisions of federal securities law do apply. As such, issuers may face liability for selective disclosure if such disclosure violates the general anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. Notably, to the extent that selective disclosure is of material nonpublic information and that information was known to the issuer at the time of, but was not included in, an offering document or other required disclosure, the market advisory provides that "the relevant documents likely would suffer from a material omission or misstatement."

Federal Regulation FD (for "fair disclosure") prohibits selective disclosure by public companies, although issuers of municipal bonds are not subject to similar regulations. Regulation FD requires that if the selective disclosure was intentional, the issuer must make the public disclosure simultaneously, and if the selective disclosure was unintentional, the issuer must make the public disclosure promptly. Such disclosure may be made by public SEC filing or "another method or combination of methods that is reasonably designated to effect broad, non-exclusionary distribution of the information to the public."

The market advisory further notes that while compliance with Regulation FD is not required by issuers of municipal bonds, issuers may want to adopt disclosure policies to address instances of selective disclosure should they occur. According to the market advisory, such disclosure could be accomplished by posting the relevant information on EMMA.

1 The use of the term "issuer" in this Alert shall also include "obligated persons."

Conclusion

The MSRB encourages issuers and their financial professionals to implement practices to ensure that all investors and stakeholders have equal access to the same information in a timely manner. An issuer can disseminate any such information to EMMA by posting a voluntary continuing disclosure and associating such disclosure with all of the issuer's bonds.

For More Information

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