

## GFOA ALERT – Deadline Extended for SEC MCDC Initiative

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*The information contained in this document is intended to educate members about the SEC MCDC Initiative and should not be construed as legal advice.*

**The SEC recently announced that the deadline for issuers to self-report under the MCDC Initiative is extended until December 1, 2014.** The deadline for underwriters remains September 9, 2014. GFOA previously issued an [MCDC Alert](#), which explains the MCDC Initiative, provides guidance to issuers and highlights key considerations for issuers in deciding whether to self-report any failure to make required continuing disclosure or material event filings.

Underwriters are now completing their internal review of transactions over the last five years on which they were the lead underwriter or bonds that they purchased via competitive sale. GFOA is encouraging issuers to reach out to their underwriters on these deals to discuss the related findings that underwriters plan to submit to the SEC on September 9. Issuers should expect errors in the underwriter's findings due to the deficiencies in the data and systems that are being used to conduct these investigations. Common mistakes include continuing disclosure filings made during the period prior to the establishment of the Electronic Municipal Market Access (EMMA) platform, (before July 1, 2009). The data available prior to EMMA from the Nationally Recognized Municipal Securities Information Repository (NRMSIR) system is either not available or seriously flawed. Adding to the confusion is Bloomberg data, which routinely shows the posted date rather than the filing date on its system. Also, filings that were made on EMMA may not contain all relevant CUSIP numbers or the filing may be made under tabs or headings that do not reflect the entire content of the information filed. These examples are explained in more detail in Appendix A of this document. Issuers should be prepared to scrutinize the findings from underwriters and provide documentation to correct errors.

Issuers should also be prepared to evaluate the "materiality" of any misstatement or omission regarding its continuing disclosure compliance. Not all failures to file continuing disclosure or material event notices constitute a "material" misstatement or omission under the federal securities laws. For example, failure to file a bond insurer downgrade may not be considered "material" because this fact was widely reported and common knowledge by investors. While the SEC has not provided any guidance on circumstances it does not consider to be "material", the National Association of Bond Lawyers (NABL) recently published a paper ([Considerations for Analysis by Issuers of Materiality and Self Reporting](#)) to assist issuers and their counsel with evaluating "materiality". Issuers and underwriters may have a difference of opinion regarding "materiality" because the underwriter is incentivized from a risk management perspective to report any failure to file, regardless of whether such failure is "material". Issuers should consult with counsel in evaluating the "materiality" of any failure to comply with its continuing disclosure undertaking.

With the deadline extended to December 1, 2014, issuers now have the opportunity to review the findings that participating underwriters submit to SEC. GFOA is urging members to exercise caution and familiarize themselves with the details and legal consequences of participating in the initiative before consenting to do so, and to thoroughly evaluate their options with the assistance of counsel.

## APPENDIX A

### Common Issues Arising From Performing Due Diligence Related to the MCDC Initiative

- **Lack of evidence of filings from the pre-EMMA period (pre-July 1, 2009)**

The greatest problem for issuers that complied with their continuing disclosure obligations and made filings during the pre-EMMA period is the deeply flawed presentation of information that is currently available through the remaining NRMSIR system. In many cases, timely and accurate filings made by issuers were not correctly recorded by the NRMSIR. Current searches for such filings by CUSIP often do not retrieve documents that were properly filed. In addition, dates of filings currently reflected in the records of the most accessible NRMSIR, Bloomberg, are dates that such filings were uploaded onto Bloomberg's on-line system rather than the dates that the respective documents were filed by issuers. In certain cases, this is made clear by a cover page within the document identifying the date on which the document was filed with the NRMSIR. Consequently, the information currently available from the pre-EMMA period is not reliable for determining whether or not filings were properly made.

- **Filings that were made on EMMA but were not linked to relevant CUSIP numbers**

Neither SEC Rule 15c2-12 nor most continuing disclosure undertakings require that issuers file using specific CUSIP numbers. Furthermore, MSRB guidance has not been clear or comprehensive about how filings should be made on the EMMA system. As long as an issuer made filings, it should not be held against them that documents were not filed against specific CUSIP numbers. Issuers should be aware that underwriters may submit findings to the SEC under the MCDC Initiative out of concern that the issue that is not linked to a CUSIP in a filing.

- **Filings that were made by issuers but were not filed under optimal tabs or headings**

Neither 15c2-12 nor most continuing disclosure undertakings require that issuers file documents in a specific manner on EMMA (or, previously, with the NRMSIR). Consequently, as an example, many issuers filed official statements as a means of providing their financial statements and annual operating information. In many cases, such official statements were filed under the official statement tab, rather than the financial statement or annual operating information tab, on EMMA. The SEC should acknowledge that, as long as it filed information on EMMA, an issuer did not violate its continuing disclosure undertakings. Issuers should be aware that the SEC has not made such an acknowledgement, and that underwriters may submit findings to the SEC under MCDC because issuer information is not located where they expected to find it.