

# SPEER FINANCIAL, INC.

## CLIENT UPDATE- SEC'S MCDC INITIATIVE AUGUST 2014

### Introduction

On March 10, 2014, the Division of Enforcement (the "Division") of the U.S. Securities and Exchange Commission ("SEC") announced its Municipalities Continuing Disclosure Cooperation Initiative ("MCDC Initiative"). According to the SEC, the initiative is meant to "address potentially widespread violations of federal securities law by municipal issuers and underwriters of municipal securities in connection with certain representations about continuing disclosures in bond offering documents."

The MCDC Initiative allows municipal issuers and underwriters to self-report instances of **material** misstatements and omissions in bond offering documents regarding the issuer's compliance with prior continuing disclosure undertakings ("CDU"). By self-reporting, the Division will recommend favorable settlement terms to issuers and underwriters. The MCDC Initiative covers transactions dating back to September of 2009.

### Background on Rule 15c2-12

Rule 15c2-12 under the Securities Exchange Act of 1934 (the "Exchange Act") generally prohibits any underwriter from purchasing or selling municipal securities unless the issuer has committed to providing continuing disclosure regarding the security and the issuer. Rule 15c2-12 also generally requires that any final official statement or offering document prepared in connection with a primary offering of municipal securities contain a description of any instance in the previous five years in which the issuer has failed to comply, in all material respects, with any previous CDU.

The SEC has said in Release No. 34-34961 that underwriters are not prohibited from underwriting a muni offering if the issuer has not complied with its prior CDUs. However, if a failure to comply with such previous undertakings has not been remedied as of the start of the offering, or if the issuer has a history of persistent and material breaches, it is doubtful whether an underwriter could form a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations.

### Deadlines

Underwriters must report to the SEC by 12:00 a.m. on September 10, 2014. Municipal issuers have until 5:00 p.m. on December 1, 2014 to report.

### Settlement Terms

The SEC has established a standardized set of settlement terms for municipal issuers which can be found on the SEC's website (see Additional Resources on the following page). For issuers that qualify for the MCDC Initiative, the Division will recommend that the SEC accept a settlement in which there is no payment of any civil penalty by the issuer.

Underwriters will have to pay a civil penalty for each transaction, which is capped at a total amount based on the underwriter's annual revenues. The fee cap may result in underwriters reporting all instances of failed filings, whether material or not, in order to limit all future liability.

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### Information to be Reviewed

For all transactions completed since September of 2009, issuers must carefully review the language regarding prior CDU compliance in each of its official statements for accuracy. Because each official statement requires disclosure regarding missed or late filings for the previous five years, issuers may have to check continuing disclosure filing records for as far back as 2004. The issuer's review should cover any required filings of audited financial statements, annual financial information as well as material event notices (such as rating changes).

Prior to July of 2009, CDU filings were made using the Nationally Recognized Municipal Securities Information Repositories (NRMSIRs). Obtaining information from the NRMSIRs is generally difficult and often times not available. For this reason, the SEC has stated that if violations related to these filings are identified by the Division after the expiration of the MCDC Initiative, the SEC will consider "reasonable, good faith, and documented efforts" in deciding whether to recommend enforcement action and in determining relief if enforcement action is recommended.

All filings made since July of 2009 would have been made on the MSRB's Electronic Municipal Market Access (EMMA) platform. These filings can be verified by visiting [www.emma.msrb.org](http://www.emma.msrb.org).

### GFOA Best Practices

The Government Financing Officers Association (GFOA) has issued an alert regarding this topic. The alert gives guidance on how to self-examine, discusses the idea of materiality and the potential consequences of participation. A link to the alert can be found below.

### Next Steps

Should the issuer identify any instances of inaccuracy or misstatement in its previous official statements regarding prior CDU compliance, the next step will be to consult with its legal counsel in order to determine if the inaccuracy is material and if self-reporting under the MCDC Initiative would be beneficial. Underwriters may be contacting issuers regarding their plans to report as their deadline quickly approaches.

### Additional Resources

For more information regarding the MCDC Initiative, please see the references below:

The Securities and Exchange Commission: <http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml>

GFOA Alert: The SEC MCDC Initiative and Issuers: <http://www.gfoa.org/gfoa-alert-sec-mcdc-initiative-and-issuers>

GFOA Alert: The SEC Enforcement Division Provides Extension to Governments under MCDC Initiative: <http://www.gfoa.org/sec-enforcement-division-provides-extension-governments-under-mcdc-initiative-0>

National Association of Bond Lawyer position paper: [http://www.nabl.org/uploads/cms/documents/MCDC\\_Initiative\\_-\\_Considerations\\_for\\_Analysis\\_by\\_Issuers\\_of\\_Materiality\\_and\\_Self-Reporting\\_8-5-14.pdf](http://www.nabl.org/uploads/cms/documents/MCDC_Initiative_-_Considerations_for_Analysis_by_Issuers_of_Materiality_and_Self-Reporting_8-5-14.pdf)

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