SEC Continuing Disclosure 15c2-12 Amendments

Special Report September 2018

On Friday, August 31, the Securities and Exchange Commission (SEC) posted amendments for Rule 15c2-12 of the Securities Exchange Act to the Federal Registrar. These amendments address the continuing disclosure of two new events that issuers, or other obligated individuals, must file with the Municipal Securities Rulemaking Board (MSRB) in a timely matter. The SEC believes the additions will improve the transparency of an issuer's financial situation by providing investors greater insight on their liquidity, creditworthiness and the rights of a security holder. Compliance with these amendments will begin on February 27, 2019.

To be compliant with the new amendments to Rule 15c2-12, Continuing Disclosure Agreements (CDAs) executed on or after the compliance date must include the two new events in addition to existing continuing disclosure undertakings.

The two events now requiring continued disclosure are as follows:

1. *"Incurrence of a financial obligation of the issuer or obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material." (Event 15)*

2. *"Default, event of acceleration, termination event, modification of terms or other similar events under the terms of the financial obligation of the issuer or obligated person, any of which reflect financial difficulties." (Event 16)*

With respect to what constitutes "material," the SEC has declined to provide further clarity. However, the SEC did comment that, in determining materiality, issuers should use the same analysis regularly made when preparing disclosure documents, stating that issuers should "consider whether financial obligations or terms of such financial obligations would affect security holders" and "would be important to a reasonable investor when making an investment decision."

PFM cannot endorse or provide legal advice. However, we strongly encourage our clients to seek guidance from their bond and/or disclosure counsel to better understand the effect these amendments might have on post-issuance procedures and also to determine materiality. Before the first offering including a CDA executed on or after February 27, 2019, to comply with Event 16 above upon sale, industry experts have suggested that preparations include meeting with their respective bond and/or disclosure counsel to:[1]

- Identify all existing financial obligations.

  "Financial obligations" do NOT include ordinary obligations included in the normal course of business or municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule 15c2-12, but do include the following:

1 The source for the following recommendations is Paul S. Maco, Edward Fierro, Britt Cass Steckman, "This time is different: What you need to know now about the new Rule 15c2-12 events," Bond Buyer, August, 28, 2018. Accessed September 6, 2018. https://www.bondbuyer.com/opinion/what-you-need-to-know-now-about-the-new-rule-15c2-12-events

1. Debt obligations
2. Derivative instruments
3. Guarantees of debt obligations and derivative instruments
4. Leases to the extent that leases operate as a vehicle to borrow money

- Review financial obligations with bond and/or disclosure counsel to determine if material.
- Review agreements associated with each financial obligation and identify any covenants, remedies, events of default, priority rights, etc., with bond and/or disclosure counsel to determine if material.
- Create a chart or spreadsheet itemizing each existing material financial obligation, together with any agreements to covenants, remedies, events of default, priority of rights, etc., determined to affect security holders.
- Maintain records evidencing a review of each financial obligation.

Experts also suggest that after the first offering including a CDA executed on or after February 27, 2019, to comply with Event 15 above, clients should meet with their respective bond and/or disclosure counsel to:

- Assess each new financial obligation prior to or upon incurrence to determine what is material and requires filing of a notice
- Assess whether any agreements associated with each financial obligation affect security holders and are material and require filing of a notice
- Prepare and file such notices on EMMA, reflecting either or both instances specified above including a description of the material terms of the financial obligation within 10 business days of incurrence
- Add to the chart or spreadsheet any new material financial obligation or material agreements to covenants, events of default, remedies, priority rights, etc., that affect security holders
- Periodically review the chart or spreadsheet and analyze for the occurrence of a default, event of acceleration, termination event, modification of terms, or similar events, and upon occurrence, determine whether such events reflect financial difficulties
- To the extent events reflect financial difficulties, file notice of event on EMMA within 10 business days of occurrence.

Questions for Discussion with Counsel

1. What format or documents (specifically) need to be included in the disclosure?
2. If all of our debt is with the same bank (one investor), is there a requirement to provide disclosure?
3. If we do not have a public rating, and no intention of issuing public bonds, does this apply?
4. Staff is already overworked, and I am not sure this is something we can get to in the next year. What penalty (if any) would there be if we just ignored this altogether?
5. What level of debt is included in the requirement? Clearly not a copier lease, but what is the threshold?
6. Do I post pre-existing loan documents, or just new documents?

Other Resources

Federal Registrar – Amendments to Municipal Securities Disclosure