

## The SEC Adopts Rule 15c2-12 Amendments Regarding Material Financial Obligations: Some Initial Q&A

### Recent Rule 15c2-12 Amendments

The Securities and Exchange Commission (the SEC) on August 20, 2018, announced that it has adopted amendments (the 2018 Amendments) to Rule 15c2-12 of the Securities Exchange Act of 1934. The 2018 Amendments add two new categories of listed events<sup>1</sup> that require continuing disclosure material event notice filings by issuers or obligated persons (e.g., a conduit nonprofit hospital or university borrower in a 501(c) financing, a water company in an exempt facility financing, a special-purpose entity in project finance, or a township guaranteeing municipal authority revenue bonds). The SEC characterizes the 2018 Amendments as focusing on an issuer or obligated person's material financial obligations that could impact the liquidity or overall creditworthiness of the issuer or obligated person, or impact an existing security holder's rights.

### When will the 2018 Amendments become effective?

The compliance date for the 2018 Amendments is 180 days after they are published in the Federal Register. In any case, the 2018 Amendments would not apply to bonds issued before the end of the 2018 calendar year.

### What are the new events?

The two new events (the Financial Obligation Events) added to the list included in Rule 15c2-12 include the:

- 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; and
- 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.

### What is the timing requirement for filing a material event notice with EMMA of a Financial Obligation Event?

The timing requirement remains the same as for existing listed events under Rule 15c2-12. A continuing disclosure material event notice must be filed with EMMA within 10 business days of the occurrence of the listed event.

### Has the SEC prescribed a form of notice? Can transaction documents be filed?

The SEC has not prescribed any form of notice and emphasized that the material terms of the obligation will need to be described. It indicated that depending on the facts and circumstances, the filing of transaction documents may be consistent with meeting the requirements of Rule 15c2-12. In such a case, confidential information (e.g., account numbers, contact information) would not need to be disclosed.

### Did the SEC address draw-down loans?

Yes. The SEC indicated that a financial obligation generally should be considered to be incurred when it is enforceable, noting that this is consistent with similar concepts in corporate Exchange



Mark H. Vacha

Member

mvacha@cozen.com  
Phone: (215) 665-6975  
Fax: (215) 665-2013



Suzanne S. Mayes

Co-Chair,  
Business Law  
Department <br> Chair,  
Public & Project  
Finance

smayes@cozen.com  
Phone: (215) 665-6922  
Fax: (215) 701-2107

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Act Form 8-K (which provides the event reporting framework for reporting companies). Therefore, in the context of a draw-down loan, it indicated that, generally, notice should be provided at the time there is a legally enforceable contract, instead of each time a draw is made.

### **Does a “financial obligation” mean more than bank loans and directly placed bonds?**

Yes. However, the term financial obligation is not as broad as any material obligation to pay money. The SEC indicated that due to concerns about the breadth and vagueness of the amendments as initially proposed, it attempted to limit the scope of the term financial obligation in the final version of the 2018 Amendments. Under the 2018 Amendments, the term financial obligation means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). Among other things, this definition is notable in that certain entities (such as utilities) that may use derivatives as part of their daily business (e.g., forward gas supply contracts) might not have to be concerned about such products being caught within the definition of financial obligation. To further illustrate the point that there may be some interesting items excluded and included, pension obligation bonds appear to be clearly captured under the definition while pension and OPEB obligations arising from a new collective bargaining agreement appear not to be captured.

### **Is a filing required in connection with every material debt issuance?**

No. The term financial obligation expressly provides that it does not include municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule 15c2-12.

### **What did the SEC offer about how to address questions of materiality?**

Consistent with the SEC’s general approach to Rule 15c2-12 (such as with respect to leaving to underwriters and other parties discretion to determine the content and scope of disclosed financial information and operating data), the SEC indicated that a need for flexibility applies to assessments of financial obligations. The SEC believes that a facts and circumstances analysis is important and stated that it does not believe it would be appropriate to provide a mechanical test for determining the materiality of a financial obligation.

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<sup>1</sup> Rule 15c2-12 of the Securities Exchange Act requires issuers and obligated persons in primary offerings of municipal securities to agree to provide to the Municipal Securities Rulemaking Board (MSRB)(currently through the EMMA system) timely notice of certain events. (There are 14 categories of listed events in effect prior to the effectiveness of the 2018 Amendments.)