SQUIRE PATTON BOGGS

SEC Approves Amendments to Rule 15c2-12

New events relating to financial obligations and defaults required to be reported.

Our partner and current NABL president, Alexandra (Sandy) MacLennan, gives her insight on the latest changes to disclosure agreement requirements that were released on August 20.

On August 20, 2018, the Securities and Exchange Commission (SEC) announced approval of amendments to Rule 15c2-12 (the Rule) that will increase to 17 the number of events that must be included in continuing disclosure agreements as required to be disclosed within 10 business days of occurrence. The SEC, acting without a public meeting on August 15, 2018, adopted the amendments largely as proposed in 2017, but with a slightly narrower scope. A copy of the SEC Release No. 34-83885 is available at: https://www.sec.gov/rules/final/2018/34-83885.pdf

The Rule, as amended, will require notice to be provided to the Municipal Securities Rulemaking Board within 10 business days of the occurrence of the following additional events:

- Incurrence of a financial obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material
- Default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties

The Rule amendment defines "financial obligation" to mean 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). The term "financial obligation" does not include municipal securities as to which a final official statement has been provided to the MSRB under the Rule. This definition is narrower than the 2017 proposal, which would have also specifically included leases and monetary obligations resulting from a judicial, administrative or arbitration proceeding. While reference to leases has been excluded from the definition, leases that operate as a means to borrow money would be included in the term "debt obligation." The reference to derivatives is also narrower than the 2017 proposal, which would have included all derivatives to which the issuer is a counterparty, regardless of any connection to debt obligations of the issuer.

Compliance with the new event disclosure requirements will involve an assessment of the materiality of any particular "financial obligation." Many comments to the SEC requested guidance from the SEC on this issue, and the SEC included a lengthy discussion of the comments; however, no specific guidelines were provided other than a review of the materiality concepts applied in preparing disclosure for a securities offering. Several comment letters expressed specific concern over the influence of the published settlement agreements in the SEC's Municipalities Continuing Disclosure Compliance Initiative has had on the approach to determining materiality. In response, the SEC stated that it:

> *"...believes that the type of analysis undertaken in connection with the MCDC Initiative is distinct from the analysis required to determine whether a piece of information is material and must be publicly disclosed to investors in offering materials. In the materiality inquiry that issuers, obligated persons, and dealers must regularly undertake when preparing disclosure documents in connection with an Offering, they must assess whether a piece of information at the time of issuance is of a character that there is a substantial likelihood that, under all the circumstances, 'the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.' Compliance with these requirements will be evaluated using the same standard."*

The SEC went on to state that although it acknowledges that with respect to any particular event, issuers and obligated persons may come to different conclusions as to the materiality of that event, the SEC "does not believe it necessary to provide additional guidance at this time."

The effective date of the amendments, referred to as the "compliance date" in the notice, will be 180 days after the publication of the amendment in the Federal Register.

If you have questions or concerns about the new amendments to the Rule, please contact one of our Public & Infrastructure Finance Lawyers.

Contact

Alexandra MacLennan
Partner, Tampa
T +1 813 202 1353
E sandy.maclennan@squirepb.com