Commentary What issuers may have missed in the SEC's new disclosure requirements

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Among the many articles and webinars being produced to explain to issuers and obligors how the new amendments to SEC Rule 15c2-12 (the "Rule") will work, we are concerned that at least one aspect has been under-reported or even misstated. It has been commonly reported that the amendments added two new reporting obligations to the current list of 14 events under the Rule. Careful reading of the amendments, however, reveals that there are really three types of events which may have to be reported.

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The new event (15) actually comprises two separate elements. The first, and the one most commonly discussed, is the "incurrence" of a material "financial obligation" (a term defined in the amended Rule). This is clearly a forward-looking obligation that comes into play only if an issuer or obligor enters into, say, a direct bank loan after such issuer has sold public bonds and signed a new continuing disclosure agreement ("CDA") under the Rule on or after February 27, 2019 (the effective date of the amendments).

However, event (15) has a second clause, which is a separate type of event that has to be reported. This is an "agreement to covenants, events of default, remedies, priority rights or other similar terms of a financial obligation [of the issuer or obligor] any of which may affect security holders [of the bonds to which the CDA relates], if material." This second clause reads as if it might overlap event (16), which requires a report on a "default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of [the issuer or obligor] any of which reflect financial difficulties." Despite the similarity, the event (15) clause 2 requirement is different from event (16). Event (15), clause 2, applies to any change or amendment to terms made to a financial obligation, even if not based on financial difficulties of the issuer or obligor, if it is determined to be material to other debt-holders. For instance, the covenants of a private placement or loan agreement may be changed because of improvements to the financial condition of the issuer or obligor, or if the parties wish to restructure the loan for other reasons. Such changes could be equally material to other debt-holders as any changes based on financial difficulties, and thus may require an event filing under event (15) clause 2.

What is common between event (15) clause 2, and event (16), is that both will apply retroactively to financial obligations which were in existence prior to the signing of the first CDA on or after February 27, 2019, as well as to any financial obligation which has been reported under event (15) clause 1. We have seen descriptions of the new Rule amendments which have either largely or completely ignored event (15) clause 2, or referred to event (15) as being prospective only. This is incorrect.

We have confirmed the analysis above with SEC staff in informal conversations. Moreover, the Municipal Securities Rulemaking Board, in modifying its EMMA system to receive filings under the amended Rule on and after February 27, 2019, is creating a cover sheet for such filings which describes the filing under event (15) as "Financial Obligation – Incurrence or Agreement." There is a separate box to check for a filing under event (16) which reads "Financial Obligation – Event Reflecting Financial Difficulties."

Issuers and obligors establishing new policies and procedures to implement the Rule amendments on and after February 27, 2019, and advisers and counsel working with them, should take care to correctly incorporate the requirements of event (15), clause 2. We expect that in practice, there will be more reports made under event (15) clause 2 than under event (16).

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