



The List of Material Events Required Under Rule 15c2-12 Expands to 16

By Emily S. Brock

GFOA has created several best practices informing GFOA members of their continuing disclosure responsibilities as a byproduct of SEC Rule 15c2-12.

Continued advocacy and descriptive guidance for continuing disclosure of financial information as a contract of publicly issued debt are hallmarks of several GFOA best practices, including *Understanding Your Continuing Disclosure Responsibilities* and *Using the Comprehensive Annual Financial Report to Meet SEC Requirements for Periodic Disclosure* (available at gfoa.org). The best practices were established to inform GFOA members of their continuing disclosure responsibilities as a byproduct of Securities and Exchange Commission (SEC) Rule 15c2-12.

On March 1, 2017, the SEC proposed amending Exchange Act Rule 15c2-12 to include additional event notices under continuing disclosure undertakings. Throughout the notice and comment period of the amendment process, GFOA (along with many other market participants¹) expressed serious concerns about the broad scope and potential unintended consequences of the proposed amendments. In August 2018, the SEC approved a narrower version of the amendments than what was originally proposed. This article will explain the dramatic change to the rule and provide critical considerations for an issuer to consider before the February 27, 2019, deadline for implementation.

WHAT IS 15C2-12?

SEC Rule 15c2-12 prohibits an under-

writer from purchasing or selling municipal securities unless an issuer has committed to annually providing financial information and operating data specified in a written continuing disclosure agreement (CDA). The rule also requires underwriters to obtain and review a final official statement that discloses whenever the issuer has failed to file information required by the CDA during the previous five years.

While SEC Rule 15c2-12 does not directly require issuers of municipal securities to adhere to certain disclosure requirements, it does require underwriters to reasonably determine that the issuer has agreed to disclose annual financial and operating information, as well as material event notices. Issuers must make these disclosures *within 10 business days of the event's occurrence* on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access (EMMA) website. Reasonable determinations are made through the CDA, which is signed by the issuer.

Importantly, SEC Rule 15c2-12 only applies to underwriters because the SEC is prohibited from directly regulating issuers under the 1975 Tower Amendment to the Securities Exchange Act of 1934 (the Exchange Act). However, through recent enforcement actions, the SEC has demonstrated that making false statements in official statements about continuing disclosure obligation compliance will be

interpreted as securities law violations under Section 17(a) of the Securities Act of 1933 and/or Section 10(b) of the Exchange Act. In this way, it applies to issuers.

MATERIAL EVENTS CURRENT IN RULE 15C2-12

Rule 15c2-12 requires dealers acting as underwriters in offerings to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide event notices to the MSRB, in an electronic format and in a timely manner of not more than ten business days, when any of the following events with respect to the securities being offered occurs:²

1. Principal and interest payment delinquencies with respect to the securities being offered.
2. Non-payment related defaults, if material.
3. Unscheduled draws on debt service reserves reflecting financial difficulties.
4. Unscheduled draws on credit enhancements reflecting financial difficulties.
5. Substitution of credit or liquidity providers, or their failure to perform.
6. Adverse tax opinions, Internal Revenue Service issuance of proposed or final determinations of taxability, notices of proposed issue, or other material notices or determinations with respect to the tax status of the security, or other material events affecting the status of the security.
7. Material modifications to rights of security holders.
8. Material bond calls, and tender offers.
9. Defeasances.

10. Release, substitution, or sale of property securing repayment of the securities, if material.

11. Rating changes.

12. Bankruptcy, insolvency, receivership, or similar event of the obligated person.

13. Consummation of a merger, consolidation, or acquisition; acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business; the entry into a definitive agreement to undertake such an action; or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.

14. Appointment of a successor or additional trustee or the change of name of a trustee, if material.

In August 2018, the SEC adopted amendments to Rule 15c2-12 to include two additional material event notices, bringing the count to 16.

TWO ADDITIONAL MATERIAL EVENT NOTICES

Under the approved amendments, the commission proposed to add two additional event notices. A dealer acting as an underwriter in an offering must reasonably determine that an issuer or an obligated person has undertaken, in a written agreement or contract for the benefit of holders of municipal securities, to provide them to the MSRB. Specifically, the proposed

amendments would have affected the list of events for which notice is to be provided to include: 1) 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; and 2) 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.

On August 15, 2018, the SEC adopted these amendments to Rule 15c2-12 of the Securities Exchange Act to include two additional material event notices, bringing the count to 16. The SEC noted that the scope of material “financial obligations” that must be addressed within CDAs and material event filings include debt obligations, derivative instruments related to existing or planned debt obligations, or guarantees of either.³ The following is a brief overview of the amendments:

- Debt obligations include material bank loans.
- Debt obligations” also include material leases “that operate as a vehicle to borrow money.”
- Material derivative instruments include derivatives that are designed to hedge against the risks of a debt obligation, but not derivatives designed to mitigate investment risks.

It is worth noting that unlike the proposed amendments, the final amendments to the rule do not include disclosure of obligations from judicial, administrative, and arbitration pro-

ceedings or operating leases. GFOA strongly opposed having these items included in the amendments.

The compliance date for the new amendments to the rule is February 27, 2019; language must be included in CDAs for municipal bonds issued on and after that date. Material events occurring after this date must be filed on EMMA.

GFOA RESOURCES

GFOA's best practices have long provided guidance on how to meet disclosure commitments. Upon reviewing and assessing market disclosure along with Rule 15c2-12 material events expanded list, GFOA issued a member alert as part of a series of alerts on municipal disclosure that reminds issuers of the importance of making timely filings of financial information in accordance with each issuer's continuing disclosure agreement.

Disclosure alerts have continued to highlight essential practices emphasized throughout GFOA's best practices on continuing disclosure:

1. Understand and discuss your organization's policies and procedures on disclosure.
2. Know who is filing what, when, and where.
3. Be aware of what is posted on EMMA.
4. Be aware of what your organization has promised to do in the continuing disclosure agreement.
5. Recognize that each official statement must state whether the issuer failed to materially comply with previous commitments within the last five years.

Many GFOA best practices either focus on or contribute to members'

understanding about continuing disclosure documents, like the following:

- **Understanding Your Continuing Disclosure Responsibilities.** This best practice offers issuers guidance on important components to include in their continuing disclosure policies and emphasizes the need for governments to adopt procedures to ensure that continuing disclosure responsibilities are met.
- **Using Technology for Disclosure.** As the use of technology for communication with the municipal market has increased, GFOA developed this best practice to provide recommendations to issuers about how to use issuer websites and the EMMA platform in order to share required and voluntary financial information with investors.
- **Primary Market Disclosure.** GFOA recommends that issuers establish clear policies and procedures for compiling information before issuing debt. Issuers should carefully consider information that may be material to investors when compiling primary market information.
- **Post-Issuance Policies and Procedures.** GFOA recommends that issuers of bonds or other debt obligations should develop and adopt formal, written post-issuance compliance policies and procedures to assist in meeting compliance requirements and in preventing, identifying, and correcting possible violations that might occur during the term that bonds are outstanding.
- **Small Government/New Issuer-Debt Issuance Checklist: Considerations When Issuing Bonds.** This best practice walks new and infrequent issuers through key

considerations for issuing debt and provides links to other useful and related GFOA debt management resources.

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CONCLUSIONS

During this heightened state of attentiveness regarding issuers' continuing disclosure responsibilities, GFOA is acutely aware that issuers need information. In addition to the member alerts, the GFOA Debt Committee continues to update best practices to enhance members' familiarity with and knowledge of continuing disclosure responsibilities. GFOA's Federal Liaison Center is committed to providing the issuer community with quick, quality information reported from the SEC as we approach February 27, 2019. *Information contained in disclosure alerts and best practices is developed to educate members about Rule 15c2-12; it should not be construed as legal advice. GFOA urges issuers to seek legal counsel to discuss specific material events and other continuing disclosure obligations.* |

Notes

1. Comments received by the SEC are available at sec.gov/comments/s7-01-17/s70117.htm.
2. Rule text is available at sec.gov/rules/final/2018/34-83885.pdf.
3. "SEC Adopts Rule Amendments to Improve Municipal Securities Disclosure," SEC press release 2018-158, available at sec.gov/news/press-release/2018-158.

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