# Bond Case Briefs

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## Lawyers Concerned About Burdens From SEC Disclosure Amendments.

WASHINGTON – The SEC's proposed changes to its Rule 15c212 will create many new disclosure obligations that will be costly and burdensome for issuers, especially those that are smaller, said bond lawyers meeting here on Thursday.

The lawyers made their comments during the National Association of Bond Lawyers' Tax and Securities Law Institute here and discussed the recent amendments that would add two new events to the list of material events that issuers must report under 15c212.

The amendments are designed to achieve a goal most municipal participants have supported – helping rating agencies, analysts and others obtain information about bank loans, private placements and other alternatives to publicly offered tax-exempt bonds that issuers and borrowers are increasingly using that fall outside the current 15c212 disclosure requirements.

The first new material event notice category would require an issuer or borrower to file a notice if they incur a financial obligation that is material or a financial obligation has an agreement to covenants, events of default, remedies, priority rights or similar terms "any of which affect securities holders, if material."

Financial obligations are defined as "a debt obligation, lease, guarantee, derivative instrument or a monetary obligation resulting from a judicial, administrative or arbitration proceeding."

The second new material event category would require a notice to be filed for certain actions or events related to the financial obligation that "reflect financial difficulties" such as a default, event of acceleration, termination event, or modification of terms.

Underwriters would have to reasonably determine that an issuer or borrower has agreed to provide notice of such events in its continuing disclosure agreement (CDA). The proposed amendments, if adopted would apply to CDAs entered into in connection with primary offerings occurring on or after the compliance date for the amendments.

Timothy Stratton, a lawyer with Gust Rosenfeld in Phoenix, said the proposal may not sit well with the "thousands and thousands" of local government issuers who might use the alternatives to avoid disclosure obligations like those in the proposal.

"This kind of pulls the rug out from underneath some of that," Stratton said about the proposal.

He added there is going to be "a real learning curve" for a lot of issuers that will not be immediately thinking about the financial obligations because they aren't bonds.

"I think we've sufficiently gotten our issuers to disclose issues for bonds … but the transportation department and school district are not really going to be thinking about this when they sign the school bus lease," he said. "That's where I'm really concerned. It's a laudable goal to say, 'Yes, we're

going to put all this information out there for the bondholders,' but I think we have to on the flip side say, 'What's the practical effect and impact on the issuers.'"

"We're going to have to do a great deal of education out in the field with our clients, with our various state associations and others," Stratton said.

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Stratton said one of the concerns is that terms are supposed to be disclosed based on materiality.

The SEC has consistently declined to define materiality, but the Supreme Court has said a fact is material if there is a substantial likelihood that a reasonable investor would consider it important.

"I think that gives me and a lot of my fellow practitioners here a great deal of anxiety as we are advising clients moving forward," Stratton said. "There are just so many terms and conditions in a number of these bank loans and that's just talking about bank loans, not even thinking about swaps and derivatives transactions."

Andrew Kintzinger, counsel with Hunton & Williams here, said that it seems to him that the proposal ends up "talking about extreme materiality or hyper-materiality" where issuers now feel they need to disclose a lot to avoid possible enforcement actions from regulators.

Kintzinger said the SEC's cost estimates for the proposal "are way off" and that "either issuers are going to pay a lot of money summarizing aspects of financial obligations or broker-dealers are going to spend a lot of time on EMMA reading full credit agreements."

Rebecca Olsen, deputy director of the SEC's Office of Municipal Securities, made clear the SEC's use of the materiality standard is not suggesting that issuers need to submit a release every time they enter into a contract. She offered clarifications on lawyers' questions throughout the discussion and consistently encouraged those present to share the comments and concerns they were voicing with the commission during the 60-day comment period.

"There will certainly be costs to doing this but there will be benefits to the market" such as "putting investors in a position to protect themselves by making informed investment decisions," Olsen said.

**The Bond Buyer**

By Jack Casey

March 9, 2017