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The New 15c2-12 Event Requirements – A Practical Approach to Issuer Compliance: Gilmore Bell

Following an August 2018 rule change by the Securities and Exchange Commission, municipal issuers, conduit borrowers and other "obligated persons" will be required to file an event notice with EMMA for the incurrence of certain material "financial obligations" and for certain defaults, accelerations and other events related to financial obligations. The rule applies only to continuing disclosure undertakings for new bond issues that close on or after February 27, 2019, and does not change existing continuing disclosure undertakings.

This post will discuss compliance methods for municipal issuers, borrowers and other "obligated persons" (referred to in this post as "issuers"). For more details about the rule changes, see Impact of Rule 15c2-12 Amendments.

Why will compliance be different than it is now for the existing list of "material" events?

The existing list of 14 events requiring an event notice filing is primarily comprised of two groups: (1) events that reflect financial challenges or other extremely rare events (such as payment defaults, insolvency, or credit substitutions) and (2) events that are relatively frequent, but are likely to involve outside advisors and professionals such as a financial advisor, bond counsel or a trustee (e.g., rating changes or bond calls). New Event 16 falls within group (1) and likely (2) above because it relates to certain events under the terms of a financial obligation that reflect financial difficulties.

By contrast, new Event 15, which generally requires notice for the incurrence of a material financial obligation, material agreement or amendment to covenants, or certain guarantees, is not likely to fall within the two groups above. Accordingly, the practical responsibility for identifying circumstances that might require a notice will largely rest with the issuer's internal staff. Once those circumstances are identified by the issuer's staff, then the issuer's financial advisor, disclosure counsel or bond counsel should be available to assist with determining whether an instrument or agreement is a "financial obligation" or "material" and preparing the requisite filings.

What can my organization do to comply with the new Event 15?

We understand that every issuer is different. Some issuers have large finance teams managing multiple credits and complex enterprise systems, other issuers have only one or two staff members and may only infrequently issue bonds, and many fall somewhere in the middle.

It will be important for each issuer to consider how to best promote compliance with the new event notice requirements within the context of its particular circumstances. Because an event notice will be required to be filed within 10 business days after the incurrence of a new material financial obligation or a material amendment to an existing financial obligation, many of the recommendations below are intended to identify those financial obligations before they are signed by the issuer.

Issuers should consider the following steps:

- **Understand the requirements.** Ask your bond counsel, financial advisor and underwriter about the changes when bonds are issued and a new continuing disclosure undertaking is signed. Make sure that you understand what types of new or existing leases, bank loans, agreements or other obligations your organization needs to monitor to promote compliance. It may be that you only need to monitor limited materials or information.
- **Identify the right people.** Most (if not all) of the agreements that would require an event notice filing under the new financial obligation rules are likely to cross the desk of at least one of the following:
  — Finance Director/CFO/Treasurer
  – Internal Attorney/General Counsel
  – Clerk or Corporate Secretary
- **Internal training.** It's important that the above-listed individuals within your organization are educated on what might constitute a material "financial obligation" so that a decision can be made either internally or in consultation with external advisors whether an event notice needs to be filed. The more individuals who are trained on identifying financial obligations, the greater likelihood of compliance with the new requirements.
- **Governing body approvals.** For most governmental issuers and nonprofit borrowers, agreements likely to trigger an EMMA filing requirement will be presented to a governing body or board for approval prior to execution. Review the processes already in place for agenda items that could be updated to include consideration of the new events.
- **Pick a point person.** Identify one person within your organization to receive the initial "call" from an individual who identifies a potential financial obligation. For most organizations, the point person will naturally be the staff member who manages bond financings and continuing disclosure, typically the finance director, chief financial officer or treasurer. This central individual will, in consultation with counsel and other advisors, decide whether an event notice will be filed. Centralizing this process will promote consistency across the organization in the application of legal analyses and centralize compliance information for future official statement disclosures about continuing disclosure compliance.
- **Next steps.** If the appropriate group of internal professionals is identified and trained on the new requirements and considers the new requirements as part of their regular review of contracts and other arrangements, compliance with the new requirements should be relatively straightforward. Those individuals will identify potential material "financial obligations," report them to the point person, and the point person will reach out as needed to counsel or other advisors to conduct the proper analysis and file any necessary event notices.
- **What about record-keeping?** It's good practice to keep a record of your processes and conclusions, particularly if an issuer determines a financial obligation is not material or that an agreement is not a "financial obligation." However, it is our view that the most important activity is conducting an analysis in furtherance of compliance efforts and not necessarily keeping a record of every single conclusion or analysis. Issuers and their counsel and advisors should be skeptical of committing to prepare or preparing a list of "financial obligations" for an underwriter's records.

What else might be changing?

We expect that there will be additional due diligence by underwriters and disclosure counsel in connection with new financings, whether in the form of questionnaires or discussions. We think this can be done practically and reasonably without unnecessary busywork for the issuer's staff.

Note for competitive sale issuers

Issuers that regularly utilize a competitive process or public sale for their bond issues should be aware that prospective underwriters may inquire about compliance with these new requirements (once effective for your organization). There is typically a short timeline between the posting of the

notice of sale/POS and the date of the sale, sometimes as short as one week. Accordingly, issuers should work with their finance team in advance of posting the notice of sale in order to demonstrate or describe compliance to potential bidders quickly and efficiently. We cannot be sure prospective bidders would decline to bid if the issuer does not have compliance evidence available prior to the date of the public sale, but until established practice is developed in the public sale market, it is a good idea to discuss with your finance team early in the financing process.

by Colleen R. Duncan | Feb 26, 2019

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