

SEC's Office of Municipal Securities Offers Guidance Regarding COVID-19's Impact on Rule 15c2-12 Continuing Disclosure Undertaking Requirements

March 31, 2020

Every continuing disclosure undertaking entered into under Section (b)(5)(i) of Rule 15c2-12 (the "Rule") of the Securities and Exchange Commission ("SEC") requires the issuer or obligated person (as defined in the Rule) under such undertaking to report notice of certain events electronically to the Municipal Securities Rulemaking Board ("MSRB") no later than 10 business days of their occurrence. The COVID-19 pandemic and the resulting array of federal, state and local measures designed to contain its spread are not among such events.

Nevertheless, the pandemic and resulting government actions have raised a number of questions regarding compliance with ongoing disclosure requirements under the Rule. On a March 19, 2020, MSRB webinar, Ahmed Abonamah, deputy director of the SEC's Office of Municipal Securities, and David Hodapp, assistant general counsel of the MSRB, gave some insight as to some of the scenarios issuers and obligated persons may come across.

During the course of the webinar, Abonamah and Hodapp were asked to respond to the following specific questions:

- Could the SEC provide regulatory relief for issuers filing their annual financial and operating information late because personnel are required to work from home and cannot access the relevant information?
- Does an issuer have to provide an event notice that its offices are closed to the public because personnel are working from home?
- Should an issuer file a general event notice about COVID-19 on the MSRB's Electronic Municipal Market Access web site ("EMMA")?

From the reported discussion of these questions on the webinar, we can glean the following principles.

The SEC Cannot Absolve Issuers for Late Filings

- The requirements of the Rule come from the SEC's authority to impose pre-sale requirements on broker-dealers (i.e. underwriters).
- The SEC and the MSRB lack similar authority with respect to issuers (due to the Tower Amendment to the Securities Exchange Act of 1934).
- Accordingly, the SEC lacks the authority to provide relief to issuers due to any violation of their continuing disclosure undertaking (e.g. filing their annual financial information late due to COVID-19 related difficulties).
- If an issuer is unable to timely file its annual financial and operating information, it should file a notice of failure to file, along with any other information required to be provided in its undertakings, on EMMA prior to the required filing date.

The Terms of the Undertaking Control

- The continuing disclosure undertaking is a binding agreement between the issuer of (or the obligated person for) the bonds and the bondholders.

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- Consequently, issuers and obligated persons should look to the terms of their undertakings as to what financial and operating information to report and when to report it.
- Unless the implications of the COVID-19 pandemic give rise to one of the reportable events under the Rule, an issuer or obligated person is not required to report them. Hence, there is no need for a general event notice regarding COVID-19, or a notice that an issuer's offices are closed due to personnel working from home to curb the spread of COVID-19.
- However, an issuer or obligated person can voluntarily report such circumstances. A guide to reporting required events under the Rule and the categories of voluntary disclosure on the EMMA can be found on the MSRB website.

"Ratings Changes" and "Negative Watch"

Another scenario (not discussed on the webinar) that may arise is actions by rating agencies putting many categories of bonds on "negative watch" for a potential downgrade as a result of the pandemic. The SEC has previously indicated in adopting statements for amendments to the Rule that this does not constitute a "ratings change" for purposes of the Rule, and does not require filing a notice with the MSRB.

This is part of a series of our COVID-19 alerts providing clients with practical advice on measures they can take to navigate through these troubled times. If you have any questions, please contact your Miller Canfield attorney or any of the authors of this alert.

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