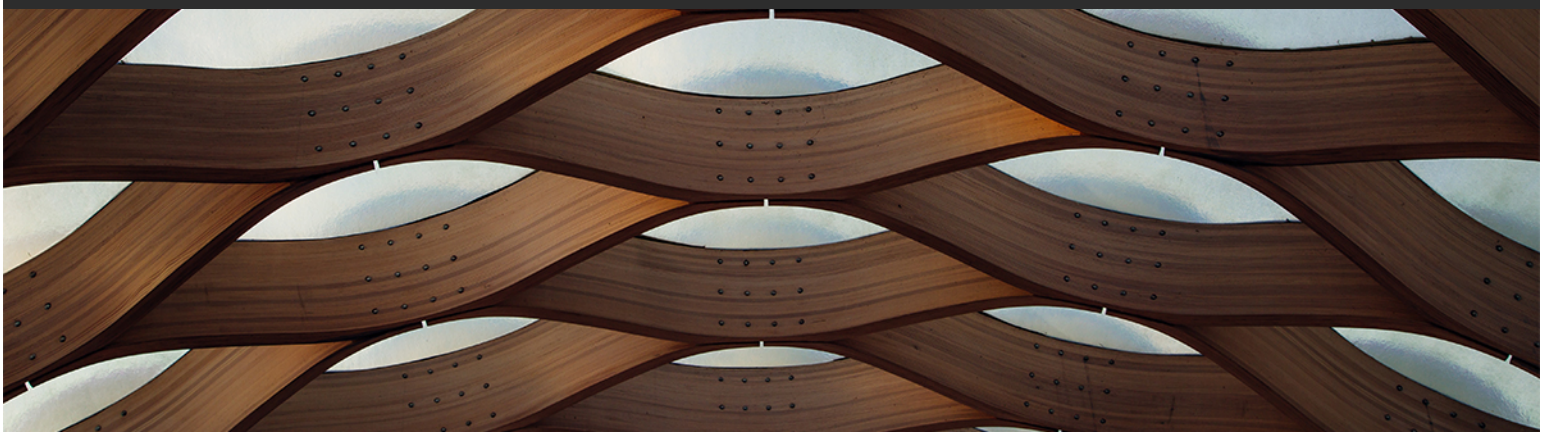
GT GreenbergTraurig

# Alert | Public Finance



August 2018

# SEC Adopts Amendments to Rule 15c2-12

## Background

Rule 15c2-12 of the Securities Exchange Act of 1934 (Rule 15c2-12) was adopted by the Securities and Exchange Commission (SEC) in 1989 to establish standards for the procurement and dissemination of disclosure documents by underwriters as a means of enhancing the accuracy and timeliness of disclosure to municipal securities investors. Previous amendments to Rule 15c2-12 incorporated provisions: (1) prohibiting underwriters from purchasing or selling municipal securities in connection with a primary offering unless the issuer and/or an obligated person had committed to providing continuing disclosure (1994); (2) establishing a single centralized disclosure repository for the electronic collection and availability of information regarding municipal securities (2008); and (3) making significant changes to the material event notice requirements and making the continuing disclosure requirements of Rule 15c2-12 applicable to variable rate demand obligations (2010).

In March 2017, the SEC published for comment proposed amendments to Rule 15c2-12, which focused on material financial obligations that could impact an issuer's liquidity, overall creditworthiness, or an existing security holder's rights. A wide range of commenters sent comment letters to the SEC in response to the proposed amendments and encouraged the SEC to consider narrowing the scope of the proposed amendments to avoid overburdening market participants.

On August 20, 2018, the SEC announced that it adopted amendments to Rule 15c2-12 (the 2018 Amendments) in substantially the form as proposed with some revisions, including the deletion of the

broader language which would have included all leases and any "monetary obligation resulting from a judicial, administrative, or arbitration proceeding."

The following is an overview of the 2018 Amendments and relevant guidance from the SEC relating to the 2018 Amendments.

## 2018 Amendments

*Event Notices*

The 2018 Amendments revise the list of event notices required under paragraph (b)(5)(i)(C) of Rule 15c2-12 to include:

> (15) 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
>
> (16) 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.

*Definition of Financial Obligation*

The term "financial obligation" is referenced in both of the new events added to the list of event notices under the 2018 Amendments. The 2018 Amendments revise the list of definitions under paragraph (f) of Rule 15c2-12 to include the following definition:

> The term "financial obligation" means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the MSRB consistent with this rule.

The definition of "financial obligation" does not include ordinary financial and operating liabilities incurred in the normal course of an issuer's or obligated person's business, only an issuer's or obligated person's debt, debt-like, or debt-related obligations. It is significant to note that "financial obligation" as defined under the 2018 Amendments includes direct placements and bank loans, but the definition is expansive enough to capture other types of financial transactions, such as capital leases, interest rate swaps, guarantees, and other funding vehicles as described below.

## Guidance Relating to Terms Referenced Under Paragraph (b)(5)(i)(C)(15)

The following is an overview of the relevant terms referenced under paragraph (b)(5)(i)(C)(15) of Rule 15c2-12, which was added to the list of event notices under the 2018 Amendments.

*Debt Obligation*

The term "debt obligation," which is included in the definition of "financial obligation," includes leases "that operate as vehicles to borrow money." In addition, the term "debt obligation" includes short-term and long-term debt obligations of an issuer or obligated person under the terms of an indenture, loan agreement, lease, or similar contract.

*Incurrence of a Financial Obligation*

A financial obligation generally should be considered to be incurred when it is enforceable against an issuer or obligated person. The SEC believes that disclosure of a material financial obligation at such time would provide investors with important information about the current financial condition and potential liabilities of the issuer or obligated person, including potential impacts to the issuer's or obligated person's liquidity and overall creditworthiness.

*Materiality*

The reporting of an event is only required "if material." The SEC stated that compliance with the requirements of the 2018 Amendments will be evaluated using the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b-5 context, which states that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

*Derivative Instrument Entered into in Connection with, or Pledged as Security or a Source of Payment for, an Existing or Planned Debt Obligation*

As used in the 2018 Amendments, the phrase "derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation" extends the concept well beyond interest rate swaps entered into by issuers or obligated persons. Accordingly, the SEC reiterated that the definition captures any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument to which an issuer or obligated person is a counterparty in the adopted definition of "financial obligation" provided that such instruments are related to an existing or planned debt obligation. This includes, under certain circumstances, instruments that are related to an existing or planned debt obligation of a third party.

The SEC believes that a debt obligation is "planned" at the time the issuer or obligated person incurs the related derivative instrument if, based on the facts and circumstances, a reasonable person would view it likely or probable that the issuer or obligated person will incur the related yet-to-be-incurred debt obligation at a future date. Factors relevant to whether an issuer's or obligated person's debt obligation is "planned" might include, but are not limited to, whether: (a) the documents evidencing the relevant derivative instrument explicitly or implicitly assume a future debt obligation; (b) the legislative body of the issuer or obligated person has taken any preliminary (e.g., preliminary resolution) or final (e.g., authorizing resolution) action to authorize the related future debt obligation; or (c) the issuer or obligated person has hired any professionals (e.g., municipal advisor, bond counsel, rate consultant) to assist or advise the issuer or obligated person on matters related to the future debt obligation. Determinations by issuers and obligated persons of whether a derivative instrument contemplates a future debt obligation should prioritize substance over form. In addition, whether a debt obligation is "planned" is based on an objective assessment of the facts and circumstances prevailing at the time of incurrence of the derivative instrument, and is not a bright-line test.

*Guarantee*

The term "guarantee" is intended to capture any guarantee provided by an issuer or obligated person (as a guarantor) for the benefit of itself or a third party, which guarantees payment of a financial obligation.

## Guidance Relating to Terms Referenced Under Paragraph (b)(5)(i)(C)(16)

The following is a summary of the relevant terms referenced under paragraph (b)(5)(i)(C)(16) of Rule 15c2-12, which was added to the list of event notices under the 2018 Amendments.

*Default*

A default could be a monetary default, where an issuer or obligated person fails to pay principal, interest, or other funds due, or a non-payment related default, where an issuer or obligated person fails to comply with specified covenants. Typically, if a monetary default occurs, or a non-payment related default is not cured within a specified period, such default becomes an "event of default" and the trustee or counterparty to the financial obligation may exercise legally available rights and remedies for enforcement, including an event of acceleration. The SEC believes that there are events that may reflect financial difficulties even if they are not defined as "Defaults" or "Events of Defaults" under the transaction documents.

*Scope of Financial Obligations Subject to Paragraph (b)(5)(i)(C)(16)*

Issuers and obligated persons with continuing disclosure agreements entered into on or after the "Compliance Date" under the 2018 Amendments must disclose, pursuant to paragraph (b)(5)(i)(C)(15) of Rule 15c2-12, material financial obligations incurred on or after the Compliance Date. However, an event under the terms of a financial obligation pursuant to paragraph (b)(5)(i)(C)(16) of Rule 15c2-12 that occurs on or after the Compliance Date must be disclosed regardless of whether such obligation was incurred before or after the Compliance Date. The SEC believes narrowing paragraph (b)(5)(i)(C)(16) of Rule 15c2-12 to only financial obligations incurred after the Compliance Date or disclosed under paragraph (b)(5)(i)(C)(15) of Rule 15c2-12 would exclude important information regarding the current financial condition of the issuer or obligated person that could potentially adversely impact the issuer's or obligated person's liquidity and overall creditworthiness.

## Compliance Date

The "Compliance Date" for the 2018 Amendments is 180 days after publication in the Federal Register. In addition, the 2018 Amendments will impact only those continuing disclosure agreements entered into in connection with "Offerings" (as defined under Rule 15c2-12) that occur on or after the Compliance Date.

Accordingly, continuing disclosure agreements entered into prior to the Compliance Date would not be required to reflect the provisions of the 2018 Amendments. For the purposes of the 2018 Amendments, the SEC believes that an Offering generally should be considered to occur on the date the continuing disclosure agreement is executed. However, if a preliminary official statement is distributed before the Compliance Date, with an expectation that the Offering will occur on or after the Compliance Date, the preliminary official statement should generally attach a form of continuing disclosure agreement that reflects the 2018 Amendments. There are other timing issues relating to the Compliance Date that should be considered carefully and discussed with your Greenberg Traurig attorney.

## End Note

The purpose of this GT Alert is to provide a general overview of the 2018 Amendments. It is not intended to be a comprehensive and detailed analysis of the 2018 Amendments. Therefore, if you would like additional information on the 2018 Amendments, please contact your Greenberg Traurig attorney.

## Authors

This GT Alert was prepared by **Jéan E. Wilson** and **Melissa López Rogers**. Questions about this information can be directed to:


- Jéan E. Wilson | +1 407.999.2521 | wilsonj@gtlaw.com
- Melissa López Rogers | +1 678.553.4762 | rogersmel@gtlaw.com
- Or your Greenberg Traurig attorney