

PUBLIC FINANCE ADVISORY

SEC and MSRB Representatives Provide Commentary Regarding Continuing Disclosure in Light of COVID-19



On March 19, 2020, the Municipal Securities Rulemaking Board (MSRB) and the Securities and Exchange Commission's (SEC) Office of Municipal Securities hosted a webinar titled "Understanding How Continuing Disclosures Appear on the EMMA® Website." Portions of the webinar addressed questions regarding the continuing disclosure obligations of issuers, underwriters, and obligated persons in light of the current COVID-19 crisis. Below, we have summarized certain COVID-19-related comments made during the webinar. Responses were identified as the views of the speakers themselves and not of the MSRB or SEC. A recording of the webinar can be accessed [here](#).

Given the current COVID-19 pandemic, what are the consequences of issuers missing continuing disclosure filing deadlines?

The COVID-19 pandemic does not change any of the current consequences of missing a filing deadline. Pursuant to [Rule 15c2-12](#), issuers or obligated persons (for simplicity, referred to as issuers) that miss a filing deadline should make the relevant filing(s) as promptly as possible, and for annual filings, issuers must also file a notice of their failure to make the filing through the MSRB's [Electronic Municipal Markets Access](#) (EMMA) webpage. There may also be additional contractual requirements pursuant to the issuer's continuing disclosure undertakings. Further, if the failure to file is material, the issuer would need to disclose this failure in subsequent offering documents for any new issues within five years.



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If an issuer misses several filings as a result of COVID-19, could an underwriter consider these circumstances when making its reasonableness determination regarding the issuer's ability to comply with continuing disclosure obligations at the outset of a subsequent offering?

Yes. If an issuer misses filings because of COVID-19, an underwriter could reasonably determine that the circumstances do not bear on the issuer's ability to timely make filings in the future, but this is a case-by-case basis and must be evaluated in the context of the totality of the facts and circumstances surrounding the failure.

Does every issuer need to make a COVID-19 filing?

No. Pursuant to Rule 15c2-12, the mere fact that the COVID-19 pandemic has occurred, or even the fact that an issuer is generally impacted by COVID-19, does not trigger any of the enumerated events in Rule 15c2-12 that would require disclosure. If, however, COVID-19 causes one of the enumerated events to occur, such as a default or a draw on a reserve fund reflecting financial difficulties, then the issuer would need to make an event filing for that reason.

Which event category in EMMA should issuers use for material event disclosures related to COVID-19?

As noted above, if an event related to COVID-19 implicates one of the 16 enumerated event disclosures in Rule 15c2-12, then it would be appropriate to use the relevant event notice category. If an issuer is making a voluntary disclosure (i.e., a disclosure that is not among the 16 enumerated events), the issuer should attempt to use one or more of the voluntary categories. The MSRB has published a document available online titled "[Selecting Financial/Operating Disclosure Categories](#)" that provides guidance regarding which category to select. Further, issuers may use the "pretext" field to describe the nature of the disclosure and in doing so may explicitly note that COVID-19 is relevant.

If a government agency must shut down due to COVID-19, does this constitute a material event?

Initially, the issuer should rely on its continuing disclosure undertaking to understand its filing obligations. If the continuing disclosure undertaking uses a standard form that follows Rule 15c2-12, an office closure itself should not trigger any notice requirement, although again a case-by-case analysis will be warranted. The office closure (or the consequences thereof) would need to trigger one of the 16 events outlined in Rule 15c2-12 in order to constitute a material event requiring disclosure.

If an issuer is unable to make a filing because of COVID-19, is the SEC considering providing regulatory relief?

Because Rule 15c2-12 applies only to broker-dealers, filings made by issuers are done pursuant to their contractual continuing disclosure undertakings; therefore, issuers are not within the SEC's jurisdiction. As such, the SEC's exemptive authority would not apply directly to issuers. Notwithstanding the present crisis, issuers should regard missed filings just as they would have done before the crisis and therefore seek to make timely filings, and if not possible, to make the relevant filing(s) as promptly as possible. If an issuer subsequently enters the market following a late filing due to COVID-19 circumstances, the underwriter should: (i) make a materiality determination regarding the issuer's failure to make any past filings; and (ii) disclose such failure in the offering document if the failure to file is deemed material.

Is it appropriate to note in an issuer's offering document that the circumstances of a late filing were related to COVID-19?

Although Rule 15c2-12 is generally indifferent toward the reasons for a late or missed filing, the circumstances surrounding late filings related to COVID-19 could be relevant to issuers, underwriters and the investing public as they evaluate the likeliness of future compliance by the issuer. Issuers may elect to disclose to the public that a filing could not be made timely because of COVID-19. Issuers may use EMMA's "pretext" feature to explicitly note COVID-19 when making a filing.

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