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SEC Expands Continuing Disclosure Requirements: Includes Tax Exempt Bonds of Healthcare Issuers

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On July 15, 2009, the Securities and Exchange Commission (“SEC”) voted to propose a set of rule revisions to expand the types of debt and events that are subject to continuing disclosure. The SEC’s goal is to address the disparity between the level of information available to investors in municipal securities versus information available to investors in corporate securities - thus continuing the drift of tax-exempt municipal bond disclosure towards that of public companies.

Rule 15c2-12 of the Securities Exchange Act of 1934 (“Rule”) is the source of the requirement to provide ongoing disclosure. These proposed amendments expand the Rule’s coverage with respect to municipal bonds and generally reflect the SEC’s desire to create greater transparency in the municipal securities market.

The proposed amendments do the following:

Expand Disclosure of Certain Categories of Events

The proposed amendments would increase the number of events that require disclosure. If deemed material by the issuers, mergers, consolidations, acquisitions, the sale of all or substantially all of the assets of the obligated person, a name change and the appointment of a successor or additional trustee, must be disclosed. Tender offers, bankruptcy and insolvency must be disclosed whenever they occur. For example, a hospital issuer’s acquisition of a significant integrated physician group or perhaps even an acquisition of a comprehensive IT/EHR system might require disclosure, if deemed material.

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Existing disclosure requirements related to material events include: (1) defaults unrelated to payment; (2) modifications to rights of security holders; (3) bond calls; and (4) release, substitution or sale of property securing repayment of the securities.

Eliminate Materiality Threshold

The proposed amendments would also require that certain events be disclosed when they occur regardless of whether the issuer deems them material. These events include: (1) failure to pay principal and interest; (2) unscheduled payments from debt service reserves, reflecting financial difficulties; (3) unscheduled payments by parties backing the bonds, reflecting financial difficulties; (4) a change in the identity of parties backing the bonds or their failure to perform; (5) defeasances; and (6) rating changes. For example, if a letter of credit bank is substituted under a liquidity facility, or if a series of bonds is defeased, disclosure must be made.

Expand the Rule to Cover VRDOs

The proposed amendments would expand the Rule to apply to variable rate demand obligations or VRDOs, which are presently exempt from the Rule if certain requirements are satisfied and accounted for approximately 38% of the trading volume for municipal securities in 2008.

Disclosure of Tax Risk

The SEC also proposes that issuers disclose a broader range of events that may adversely affect the tax exempt status of a series of bonds. Specifically, issuers have to disclose the issuance by the Internal Revenue Service (“IRS”) of proposed or final determinations of taxability, including disclosure of the receipt of IRS “Form 5701,” which is a preliminary IRS form that outlines issues that would need to be resolved with respect to the bonds.

Create 10-Day Filing Deadline

Finally, the proposed amendments include a proposal to establish a more specific filing standard for notices of all events listed in the Rule of no more than 10 business days after the occurrence of the event. These include each of the events discussed here.

From a practical standpoint, the elimination of the materiality determination coupled with a new filing deadline may be the most critical changes. Individuals in treasury and legal departments with disclosure responsibilities will need to be sensitive to these expanded reporting requirements.

The proposed amendments were published in the Federal Register on July 24, 2009 and the public comment period ends on September 8, 2009. The SEC is proposing an effective date no earlier than three months after any

final adoption of the proposed amendments, so these rule changes are likely to become effective in early 2010.

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