

Public Finance Alert: Securities and Exchange Commission Releases Proposed Changes to Rule 15c2-12 Disclosure Requirements

7/22/2009

On Friday, July 17, 2009, the Securities and Exchange Commission (the SEC) published proposed changes to Exchange Act Rule 15c2-12 (the Rule) relating to continuing disclosure requirements for municipal securities. The Rule requires that underwriters in a primary offering of municipal securities reasonably determine that an issuer of municipal securities or an obligated person has undertaken, in a written agreement or contract for the benefit of bondholders, to provide certain continuing disclosure information to the Municipal Securities Rulemaking Board (MSRB). The proposed Rule modification will:

- eliminate certain exemptions for variable rate demand obligations;
- expand the types of events issuers or obligated persons must undertake to disclose on a continuing basis;
- remove the qualification that certain events need be disclosed only if material; and
- require event notices to be filed no later than 10 business days after the applicable event occurs.

In addition, the SEC has provided interpretive guidance to assist underwriters in meeting their obligations under the federal antifraud laws.

These are proposed changes that are subject to public comment.

Variable Rate Demand Obligation Exemption Removed

Citing increased trading volume and the lack of market disclosure during the current financial crisis, the proposed amendment removes the variable rate demand obligation (VRDO) exemption from the Rule's continuing disclosure requirements. The proposed rule would apply to both any initial offering of VRDOs, and remarketings that are primary offerings² of VRDOs, occurring on or after the effective date of any final amendment (even if initially issued prior to the effective date).

Expanded Disclosure of Certain Events

The existing Rule mandates that issuers or obligated persons undertake to disclose certain events “if material.” The proposed rule would remove the materiality limitation for the following events:

- Principal and interest payment delinquencies with respect to the securities being offered
- Unscheduled draws on debt service reserves reflecting financial difficulties
- Unscheduled draws on credit enhancements reflecting financial difficulties
- Substitution of credit or liquidity providers, or their failure to perform
- Defeasances
- Rating changes

Disclosure of Tax Events

Currently the Rule only requires that issuers or obligated persons agree to file notice for adverse tax opinions or events affecting the securities’ tax-exempt status, if material. The SEC proposes to modify this provision to include the issuance by the Internal Revenue Service (IRS) of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB), or other material notices or determinations with respect to the tax-exempt status of the securities, or other events affecting the tax-exempt status of the security.

Additional Events To Be Disclosed

In addition, the proposed rule would add four additional events for ongoing “event disclosure” (without regard to materiality, unless noted):

- Tender offers
- Bankruptcy, insolvency, receivership or similar proceeding of the obligated person
- Consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, or the entry into a definitive agreement to undertake such actions, if material
- Appointment of a successor or additional trustee or the change of the name of a trustee, if material

Establishment of Filing Date Deadline

Under the proposed rule change, an issuer or obligated person must agree to file event notices to the MSRB “in a timely manner, not in excess of 10 business days after the occurrence of the applicable event.” Currently the Rule only requires filing “on a timely basis.”

Additional Interpretive Guidance

The SEC provided additional interpretive guidance regarding municipal underwriters' responsibilities under federal antifraud securities laws. Under the Rule, an underwriter is required to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract for the benefit of the bondholders, to provide continuing disclosure documents to the MSRB. The SEC states that:

- It is doubtful that an underwriter could meet this reasonable basis standard without affirmatively inquiring as to the filing history of any issuer or obligated person.
- If the underwriter finds that the issuer or obligated person has, on multiple occasions during the previous five years, failed to provide continuing disclosure documents on a timely basis as required by a previous continuing disclosure agreement, it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would provide such information for subsequent offerings.

The proposals will be subject to a 45-day public comment period after they are published in the *Federal Register*.

Endnotes

¹ Full text and discussion of the SEC's proposed rule and interpretive guidance can be found on the SEC's website at <http://www.sec.gov/rules/proposed/2009/34-60332.pdf>

² A "primary offering" means an offering of municipal securities, directly or indirectly, by or on behalf of an issuer of such securities, including any remarketing of municipal securities (i) that is accompanied by a change in authorized denomination of such securities from \$100,000 or more to less than \$100,000, or (ii) that is accompanied by a change in the period during which such securities may be tendered to an issuer of such securities or its designated agent for redemption or purchase from a period of nine months or less to a period of more than nine months.
17 CFR 240.15c2-12(f)(7)

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Richard H. Moche
(617) 348-1696
RMoche@mintz.com

Jonathan A. Ballan
(212) 692-6772
JABallan@mintz.com

Meghan B. Burke
(617) 348-1663
MBBurke@mintz.com

Charles E. Carey
(212) 692-6266
CECarey@mintz.com

Ann-Ellen Hornidge
(617) 348-1657
AHornidge@mintz.com

Linda B. Port
(617) 348-1718
LPort@mintz.com

John R. Regier
(617) 348-1720
JRRegier@mintz.com

Charles A. Samuels
(202) 434-7311
CASamuels@mintz.com

Gregory A. Sandomirsky
(617) 348-1730
GASandomirsky@mintz.com

P. Miyoko Sato
(617) 348-1896
PMSato@mintz.com

Maxwell D. Solet
(617) 348-1739
MDSolet@mintz.com

Jeremy A. Spector
(212) 692-6283
JASpector@mintz.com

Leonard Weiser-Varon
(617) 348-1758
LWeiser-Varon@mintz.com

Colleen A. Murphy

(617) 348-1836

[CMurphy@mintz.com](mailto:CAMurphy@mintz.com)

Robert Owen Senzer

(212) 692-6738

ROSenzer@mintz.com

Gregory Bilton

(617) 348-4450

GBilton@mintz.com

Elissa Flynn-Poppey

(617) 348-1868

EFlynn-Poppey@mintz.com

Colin McNiece

(617) 348-1788

CMcNiece@mintz.com

Poonam Patidar

(617) 348-3038

PPatidar@mintz.com