
Adopting Release re: Rule 15c2-12 of The Securities and Exchange Act of 1934

On May 27, 2010, the Securities and Exchange Commission (SEC) issued a release (Adopting Release)¹ confirming its adoption of certain amendments to Rule 15c2-12 of the Securities and Exchange Act of 1934 (Rule). The amendments finalize substantially all of the revisions to the Rule initially recommended in the proposing release issued July 24, 2009 (Proposing Release)², with a few modifications. The amendments, which become effective on December 1, 2010, will:

- > Extend the continuing disclosure requirements of paragraph (b)(5) of the Rule to apply to offerings (and remarketings) of demand securities;
- > Impose a ten-day deadline for obligated persons (defined below) to report the occurrence of events (Reportable Events) described in paragraph (b)(5)(i)(C) of the Rule;
- > Eliminate the materiality threshold that currently limits obligated persons' obligation to disclose certain Reportable Events;
- > Narrow the circumstances in which a potentially adverse tax determination by the Internal Revenue Service constitutes a Reportable Event; and
- > Expand the set of Reportable Events by four items.

A more detailed summary of the Rule in its current form and the finalized amendments to the Rule are provided below.

I. Brief Summary of Current Rule

Generally, there are two sets of disclosure requirements under the Rule. The first set pertains to the primary disclosure obligations related to the initial sale of, and offering statements and purchase agreements for, offerings of municipal securities. The second set, which is the focus of the amendments, involves the secondary disclosure obligations

¹ Amendment to Municipal Securities Disclosure, Exchange Act Release No. 34-62184 (May 27, 2010).

² See, Proposed Amendment to Municipal Securities Disclosure, Exchange Act Release No. 34-60332 (July 17, 2009), 74 Fed. Reg. 36832 (July 24, 2009).

of obligated persons that continue while the municipal securities are outstanding. These continuing disclosure requirements are set forth in paragraph (b)(5) of the Rule (Continuing Disclosure Requirements), and currently, apply to offerings of municipal securities, with certain exceptions, including, importantly, most issues of variable rate demand bonds.

Under the Continuing Disclosure Requirements, a participating underwriter, prior to selling or purchasing a municipal security, must confirm that each person who directly or indirectly is committed to support the payment obligations of the issue (an "obligated person"), has entered into an agreement to provide certain financial and other disclosures in accordance with paragraph (b)(5)(i) of the Rule. This disclosure information, to be provided to the Municipal Securities Rulemaking Board (MSRB) (through its Electronic Municipal Market Access System or EMMA), includes: (1) annual financial information of the obligated person with respect to the issue, generally including audited financial statements and other financial or operating data similar to the primary offering material (Financial Reports), (2) in a timely manner, notice of any failure to provide Financial Reports; and (3) in a timely manner, notice of the occurrence of a Reportable Event (Event Notice), if such Reportable Event is material. Currently, the Rule identifies the following events as Reportable Events:

1. Principal and interest payment delinquencies;
2. Non-payment related defaults;
3. Unscheduled draws on debt service reserves reflecting financial difficulties;
4. Unscheduled draws on credit enhancements reflecting financial difficulties;
5. Substitution of credit or liquidity providers, or their failure to perform;
6. Adverse tax opinions or events affecting the tax-exempt status of the security;
7. Modifications to rights of security holders;
8. Bond calls;
9. Defeasances;
10. Release, substitution or sale of property securing repayment of the securities; and
11. Rating changes.

The Continuing Disclosure Requirements, in addition to requiring the above, also prohibit any broker, dealer or municipal securities dealer from recommending the sale or purchase of a municipal security unless such broker, dealer, or municipal securities dealer has procedures in place to receive an Event Notice or a notice of a failure to provide Financial Reports.

The additional requirements of the Rule, including the procedures for submitting notices to the MSRB and certain exemptions to the Rule, will remain the same upon the implementation of the amendments, and thus, are not summarized in full here. The focus of

the amendments to the Continuing Disclosure Requirements--- the elimination of the demand securities exemption and certain revisions of the Reportable Events--- are summarized below.

II. Summary of Amendments

A. *Elimination of the Exemption of Demand Securities*

In its current form, the Continuing Disclosure Requirements do not apply to the offerings of certain demand securities, including most variable rate demand obligations.³ The amendments will eliminate this broad exemption except as to demand securities outstanding as of the date the SEC amendments are effective. This decision to “grandfather in” currently outstanding demand securities arose in response to comments to the Proposing Release. Commentators to the Proposing Release objected to the potential costs that would be incurred by the obligated persons for currently outstanding demand securities on account of the sudden imposition of Continuing Disclosure Requirements. In response to this concern, the SEC, according to the Adopting Release, agreed to extend the exemption for issues of demand securities that have remained outstanding in the form of demand securities and that are outstanding as of November 30, 2010. This limited grandfather provision will apply to such demand securities as long as they remain in authorized denominations of \$100,000.

B. *Ten-Business Day Reporting Deadline*

In its current form, the Rule requires that an Event Notice be submitted in “a timely manner.” The adopted amendments would replace this with a more specific timeframe and require submission of Event Notices “in a timely manner not in excess of ten business days after the occurrence of the [Reportable Event].” According to the Proposing Release, the ten-day deadline should be viewed as an outside limit and not as a safe harbor for delays in the submission of Event Notices. The timeliness of each submission will depend on the facts and circumstances of the underlying Reportable Event.

The Adopting Release re-affirms this approach and further hints at the SEC’s decreasing tolerance for delayed Event Notices. This decreasing tolerance is evident in the SEC’s discussion of certain comments to the Proposing Release. In one instance, the SEC specifically denied the request of a commentator who suggested that the SEC calculate the 10-day deadline based on the day on which the obligated person has actual knowledge of a Reportable Event. The SEC found this unnecessary, as it expected the occurrence of all Reportable Events, regardless of the type of the Reportable Event or the resources of the obligated person, to be reported expeditiously to persons responsible for submitting Event Notices on behalf of the obligated person. This expectation that Reportable Events be known to the obligated person almost contemporaneously with occurrence of the Reportable Event, and related discussions in the Adopting Release, suggest that the timing of Event Notice submissions may be subject to increased scrutiny. So, obligated persons may be well-advised to carefully consider their procedures for tracking and responding to Reportable Events so as to avoid unnecessary delays in submissions of Event Notices.

³ See, paragraph (d)(iii) of the Rule.

C. *Materiality Determinations Regarding Event Notices*

The Rule, in its current form, stipulates that any continuing disclosure agreement require an obligated person with respect to an issue determine that a Reportable Event is material prior to issuing an Event Notice. The final amendments will eliminate this materiality determination for the following Reportable Events: (1) principal and interest payment delinquencies; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.

D. *Adverse Tax-Related Reportable Event*

Under the Rule, the occurrence of “adverse tax opinions or events affecting the tax-exempt status of the security,” if material, constitutes a Reportable Event. More specifically delineating the scope of a tax-related Reportable Event, the amendments provide that each of the following will constitute a tax-related Reportable Event: (1) the receipt of adverse tax opinions, (2) the issuance by the Internal Revenue Service (IRS) of proposed or final determinations of taxability, (3) the issuance of a Notice of Proposed Issue (IRS Form 5701-TEB) or (4) the occurrence or receipt (as applicable) of other material notices or determinations with respect to the tax-exempt status of securities or other material events affecting the tax-exempt status of the security.

The SEC found a more specific description of the tax-related Reportable Event to be necessary so that potentially benign inquiries by the IRS, such as a notice of a random examination, do not necessarily raise the alarm of investors. Even so, the SEC included in its amendments the “catch-all” provision described in (4) to ensure that any material tax event is disclosed in the paragraph above seemingly to ensure that any material tax event is disclosed.

E. *Additional Reportable Events*

The amendments add four additional Reportable Events as follows: (1) tender offers for municipal securities; (2) bankruptcy, insolvency, receivership or similar proceeding of the obligated person; (3) the 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 an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and (4) the appointment of a successor or additional trustee, or the change of name of a trustee, if material.

The SEC found these four events to be significant enough to warrant disclosure to investors. Notably, the Reportable Events that involve changes to a trustee or a change in control transaction are subject to a materiality determination.

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