

# UPDATE

---

Municipal securities are exempt from registration requirements, many civil liability provisions and periodic reporting under the federal securities laws. However, underwriters offering municipal securities are required, pursuant to Rule 15c2-12 of the Securities Exchange Act of 1934, as amended (“Rule 15c2-12”), to reasonably determine that the issuer or obligated person (collectively, the “Issuer”) has undertaken in a continuing disclosure agreement to provide specified information to the Municipal Securities Rulemaking Board. Specified information includes: (1) certain annual financial information filings; (2) notices of 11 specified events, if material; and (3) notices of failure by an Issuer to make required disclosure submissions.

On May 26, 2010, the Securities and Exchange Commission (the “SEC”) adopted several amendments to Rule 15c2-12 (collectively, the “Amendments”).

The compliance date for the Amendments is December 1, 2010, and all municipal securities issued after such date will be subject to the amended requirements. However, the Amendments will not affect any outstanding municipal securities, or securities issued between May 26, 2010 and November 30, 2010.

The five broad categories of amendments are as follows: (1) demand obligations (such as variable rate demand obligations) are no longer exempt from the continuing disclosure undertaking requirements; (2) notices of the specified events must be given within a new specified time; (3) the materiality standard was removed from six of the specified events; (4) notice of certain IRS actions affecting tax status of bonds was significantly amended; and (5) four additional events were added to specified events for which notice must be given.

## **Continuing Disclosure for Demand Obligations**

Historically, demand obligations have been exempt from continuing disclosure undertakings. In today’s market, demand obligations consist almost exclusively of (and are more commonly known as) variable rate demand obligations (“VRDOs”) (i.e., bonds with daily or weekly interest rate periods). However, the market for VRDOs has grown exponentially since the continuing disclosure requirements were originally adopted in 1994. As such, the SEC determined to bring demand obligations within the scope of the continuing disclosure requirements to provide necessary information to investors. Under the Amendments, all demand obligations issued after December 1, 2010, will be subject to the continuing disclosure requirements of Rule 15c2-12 described above. The Amendments provide a limited grandfather exception for VRDOs outstanding as of November 30, 2010, which will not be required to meet the continuing disclosure requirements.

## **Timeliness of Disclosure**

Currently, Issuers entering into an undertaking under Rule 15c2-12 are required to provide notice of the specified events “in a timely manner.” Under the Amendments, Issuers must provide notice of the specified events “in a timely manner not in excess of ten business days after the occurrence of the event.” Issuers should be aware that the ten-day time period begins after the occurrence of the event, not after the Issuer has knowledge of the event.

## **Removing Materiality Standard**

Under the Amendments, the SEC removed the “materiality” standard from the following specified events: (1) principal and interest payment delinquencies with respect to the securities being offered; (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.

The SEC believes that the events specified above significantly impact the pricing of bonds and warrant disclosure in every instance.

Issuers should note that the materiality standard is retained for event notices regarding: (1) non-payment related defaults; (2) modifications to rights of security holders; (3) bond calls; (4) the release, substitution, or sale of property securing repayment of the securities; and (5) certain of the new events, as described in detail below under “Additional Specified Events.”

## **Disclosure of IRS Actions Affecting Tax Status**

Currently, Issuers are required to submit notice of “adverse tax opinions or events affecting the tax-exempt status of the security.” The Amendments now provide that Issuers submit notice of “adverse tax opinions, the issuance by the Internal Revenue Service 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 status of the security, or other material events affecting the tax status of the security.” The Amendments thus broaden the relevant IRS actions for which the Issuer must give notice. The “tax-exempt status” language was modified to “tax status” in order to include IRS actions affecting Build America Bonds and other taxable municipal securities authorized by the American Recovery and Reinvestment Act of 2009.

## **Additional Specified Events**

The SEC added four new specified events for which event notices must be given. Specifically, the additional events are: (1) tender offers; (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, 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) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

Issuers should note that event notices related to mergers and acquisitions and trustee changes must only be given if deemed material by the Issuer.

## **Update Questions**

If you have questions regarding any of the items discussed in this Update, please do not hesitate to contact Roy J. Koegen ([roy@koegenedwards.com](mailto:roy@koegenedwards.com)), Mary J. Edwards ([mary@koegenedwards.com](mailto:mary@koegenedwards.com)) or Erik J. Lamb ([erik@koegenedwards.com](mailto:erik@koegenedwards.com)) or at (509) 747-4040.