

**Legal Update –
Current Developments
in Securities Law
Impacting Health Care
Tax-Exempt Financing**

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Overview of Today's Presentation

- A. Continuing disclosure requirements for municipal securities (SEC Rule 15c2-12)
 - 1. Public offerings
 - 2. Private/direct placements

- B. Amendments to SEC Rule 15c2-12
 - 1. Description of the amendments
 - 2. How/when this will impact you

- C. Best practices

Public Offerings vs Private Offerings

▶ Public Offerings

- ▶ Bonds sold in underwritten public offerings
- ▶ Held by individual and/or institutional investors
- ▶ Purchased in public markets after a formal offering involving the delivery of an Official Statement

▶ Private Offerings

- ▶ Privately or directly placed bonds
- ▶ Sold to one or a small number of bank investors
- ▶ Bank investors hold the bonds like a traditional bank loan, but provide the funds at a tax-exempt rate

Increase in Popularity of Private Placements

- A. Directly (privately) placed bonds have become more common over the last few years
 - 1. Amount of directly placed bonds have nearly tripled since 2010
 - a. \$66.5 billion at year end 2010
 - b. \$190.5 billion by the end of Q1 2018

Benefits of Private Placement Structure

- A. No need for disclosure document
 - 1. Direct placements are not currently subject to Rule 15c2-12
- B. Potential ease of execution/quicker from start to closing
- C. Ability to modify terms, covenant status dealing directly with Bondholders
- D. Rating of bank irrelevant
- E. Potential unique terms
- F. Less costly
- G. Less likely to require a Debt Service Reserve Fund
- H. Credit rating typically not required

Drawbacks of Private Placement Structure

- A. Less availability of long-term fixed interest rate (shorter maturities)
- B. Bank covenants generally more restrictive/intrusive than in public market
- C. Put risk (at option of Bank Bondholder)
- D. Bank requirements for yield protection, gross-up provisions
- E. Consent rights of Bank (view as a “partner”)
- F. Requirement for ancillary business
- G. Bank involvement in major construction projects

SEC, MSRB and Municipal Disclosure

A. Two primary forms of regulation of Obligated Persons:

1. Indirectly by SEC/MSRB regulation of broker-dealers, banks, and financial advisors
2. Directly through anti-fraud provisions of the Securities Act of 1933 (the “1933 Act”) and the Securities Exchange Act of 1934 (the “1934 Act”)

SEC RULE 15c2-12

- A. Rule 15c2-12 – governs primary offering disclosure and continuing disclosure, including submission of annual financial information and material event notices
 - 1. Primary offering of municipal securities of \$1 million or more
 - 2. Directly governs underwriters and indirectly governs issuers/borrowers

SEC RULE 15c2-12 *(continued)*

A. SEC Rule 15c2-12 – General

1. The underwriter must obtain and review an Official Statement (OS) "deemed final" by an issuer/borrower prior to bidding for, purchasing, offering or selling municipal securities.
2. The underwriter must review the Preliminary Official Statement (POS) in a professional manner.
3. Permitted omissions from the "deemed final" OS
4. Receipt of Final OS

SEC RULE 15c2-12 (Continuing Disclosure)

- A. Continuing Disclosure Commitment – Underwriter must reasonably determine that the issuer or an obligated person has undertaken in writing to provide certain required information on an ongoing basis for the benefit of the bondholders (Continuing Disclosure Certificate/Agreement, "CDA")
 1. Annual financial information
 2. Notice of Material Event
 3. Rule also requires disclosure of a failure of any person to provide annual financial information as required by the CDA as a material event and in any OS for the next five years

SEC RULE 15c2-12 (Continuing Disclosure) *(continued)*

A. Continuing Disclosure Commitment

1. Information in addition to that specified in the CDA may need to be disclosed to the secondary market to complete disclosure and satisfy antifraud provisions
2. Final OS must disclose specifics of the CDA
3. Submission and Dissemination of Information
 - a. MSRB named as the sole Nationally Recognized Municipal Securities Information Repository (NRMSIR)
 - b. Submission of annual financial information and notices must be made in electronic format through the MSRB's web-based system known as EMMA (<https://emma.msrb.org>)
 - c. EMMA is designed to ensure that any disclosure to a bondholder is available to the market

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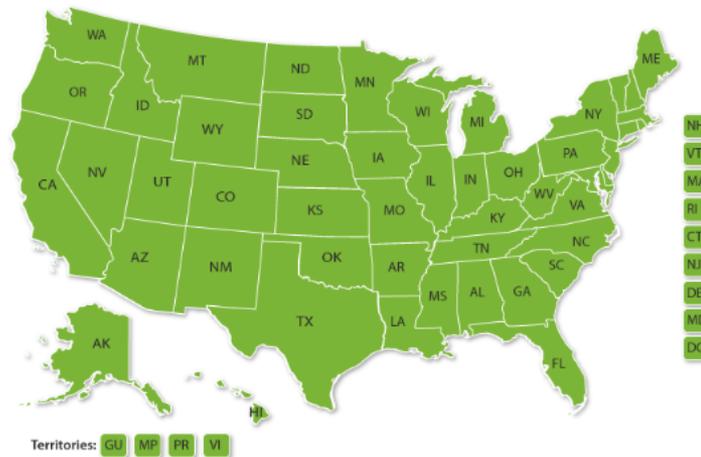
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The official source for municipal securities data and documents

Provided by the Municipal Securities Rulemaking Board.

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Dated Date: 02/24/2015
 Underwriting Spread Amount: Disclosed in Official Statement
 Closing Date: 02/24/2015
 Time of Formal Award: 02/11/2015 02:03 PM
 Time of First Execution: 02/11/2015 04:15 PM

View issuer homepage:
 ■ RICHMOND IND HOSP AUTH REV

Final Scale | Official Statement | **Continuing Disclosure** | Trade Activity

View continuing disclosure or advance refunding document, which provides important information about the security after initial issuance.

FINANCIAL INFORMATION & DOCUMENTS Collapse ▲

Most Recent 2018 3rd Quarter Financials for the quarter ended 09/30/2018 posted 10/26/2018 (44 KB) [details](#)

Annual Financial Information and Operating Data

2017 Annual Financial Information & Operating Data for the year ended 12/31/2017 posted 05/04/2018 (18 KB) [details](#)
 2016 Annual Financial Information & Operating Data for the year ended 12/31/2016 posted 05/16/2017 (61 KB) [details](#)
 2015 Annual Financial Information & Operating Data for the year ended 12/31/2015 posted 05/18/2016 (20 KB) [details](#)
 2014 Annual Financial Information & Operating Data for the year ended 12/31/2014 posted 05/15/2015 (32 KB) [details](#)

Audited Financial Statements or CAFR

2017 Audited Financial Statements for the year ended 12/31/2017 posted 05/04/2018 (335 KB) [details](#)
 2016 Audited Financial Statements for the year ended 12/31/2016 posted 05/16/2017 (170 KB) [details](#)
 2015 Audited Financial Statements for the year ended 12/31/2015 posted 05/18/2016 (170 KB) [details](#)
 2014 Audited Financial Statements for the year ended 12/31/2014 posted 05/11/2015 (170 KB) [details](#)

Other Financial / Operating Data

Incorporate OS by Reference as of 02/24/2015 posted 02/24/2015 (1.1 MB) [details](#)

Quarterly / Monthly Financial Information

2018 3rd Quarter Financials for the quarter ended 09/30/2018 posted 10/26/2018 (44 KB) [details](#)
 2018 2nd Quarter Financials for the quarter ended 06/30/2018 posted 08/02/2018 (43 KB) [details](#)
 2018 1st Quarter Financials for the quarter ended 03/31/2018 posted 05/04/2018 (41 KB) [details](#)
 2017 4th Quarter Financials for the quarter ended 12/31/2017 posted 02/12/2018 (45 KB) [details](#)
 2017 3rd Quarter Financials for the quarter ended 09/30/2017 posted 11/03/2017 (44 KB) [details](#)
 2017 2nd Quarter Financials for the quarter ended 06/30/2017 posted 08/08/2017 (43 KB) [details](#)
 2017 1st Quarter Financials for the quarter ended 03/31/2017 posted 05/05/2017 (41 KB) [details](#)
 2016 4th Quarter Financials for the quarter ended 12/31/2016 posted 02/14/2017 (45 KB) [details](#)
 2016 3rd Quarter Financials for the quarter ended 09/30/2016 posted 11/04/2016 (151 KB) [details](#)
 2016 2nd Quarter Financials for the quarter ended 06/30/2016 posted 08/11/2016 (29 KB) [details](#)
 2016 1st Quarter Financials for the quarter ended 03/31/2016 posted 05/09/2016 (40 KB) [details](#)
 2015 4th Quarter Financials for the quarter ended 12/31/2015 posted 02/11/2016 (88 KB) [details](#)
 2015 3rd Quarter Financials for the quarter ended 09/30/2015 posted 11/09/2015 (89 KB) [details](#)

Links to Former NRMSIRs

Until 2009, the organizations listed below served as Nationally Recognized Municipal Securities Information Repositories (NRMSIRs) and may have primary market and continuing disclosure documents produced before July 1, 2009, when the EMMA website became the official repository for municipal market disclosures.

- Bloomberg L.P.
- DPC Data
- ICE Data Services (formerly Interactive Data Pricing and Reference Data)
- Standard & Poor's

Voluntary Disclosure of Direct Placements

- A. Currently, SEC Rule 15c2-12 does not require disclosure of the terms of private placements...
 - 1. Under a private placement, there is no need to enter into a Continuing Disclosure Agreement...
 - 2. HOWEVER, new SEC Rule 15c2-12 amendments require bank placement disclosure in connection with public transactions
 - a. Must disclose private placements in connection with CDAs executed in public transactions
 - b. Effective on and after February 27, 2019 (unless a CDA requires this disclosure sooner)

What Type of Information Needs to be Disclosed Pursuant to SEC RULE 15c2-12(b)(5)(i)?

Obligated Persons, in a written agreement or contract for the benefit of holders of such securities, must provide:

- A. Annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement . . .
- B. If not submitted as part of the annual financial information, then when and if available, audited financial statements for each obligated person covered by paragraph (b)(5)(i)(A) of this section;

SEC Rule 15c2-12(b)(5)(i)(C)

- C. In a timely manner not in excess of ten business days after the occurrence of the event, notice of any of the following events with respect to the securities being offered in the Offering:
1. Principal and interest payment delinquencies;
 2. Non-payment related defaults, if material;
 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;

SEC Rule 15c2-12(b)(5)(i)(C) *(continued)*

6. 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;
7. Modifications to rights of security holders, if material;
8. Bond calls, if material, and tender offers;
9. Defeasances;
10. Release, substitution, or sale of property securing repayment of the securities, if material;
11. Rating changes;

SEC Rule 15c2-12(b)(5)(i)(C) *(continued)*

12. Bankruptcy, insolvency, receivership or similar event of the obligated person;
13. 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;
14. Appointment of a successor or additional trustee or the change of name of a trustee, if material; and

Amendments (New Additions) to Rule 15c2-12(b)(5)(i)(C)

- Paragraph 15

- Incurrence of a financial obligation of the issuer or obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material

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- Paragraph 16

- Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, any of which reflect financial difficulties

Amendments (New Additions) to Rule 15c2-12(b)(5)(i)(C) (continued)

A. “Financial Obligation”

1. This term is key to the new paragraphs 15 and 16
 - a. The term financial obligation means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) guarantee of (i) or (ii). The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.

Reasons for SEC Rule 15c2-12 Amendments

- A. SEC wanted to “enhance transparency in the municipal securities market”

- B. The amendments “focus on material financial obligations that could impact an issuer’s liquidity, overall creditworthiness, or an existing security holder’s rights”



What do the Amendments to SEC Rule 15c2-12 Really Mean?

- A. Existing continuing disclosure undertakings are (likely) unaffected
 - 1. Amendments apply only to "primary offerings" that close on or after February 27, 2019
- B. The definition of "financial obligation" includes only debt, debt-like and debt-related obligations, not ordinary liabilities
- C. Event notices must be filed upon the occurrence of any of the events that reflect financial difficulties . . .
 - 1. . . . regardless of whether the related financial obligation was incurred before the effective date of the amendments

What do the Amendments to Rule 15c2-12 Really Mean? (continued)

- D. Broker-dealers will not need to perform diligence on an obligated person's past compliance with the events added by the amendments unless the obligated person has a CDA that includes the added events or language or otherwise "sweeps in" the amendments

- E. Leases are not included in the definition of financial obligation, except when they are debt or debt-like
 1. Any lease that operates as a vehicle to borrow money, such as an equipment financing lease, is included in the definition

What do the Amendments to Rule 15c2-12 Really Mean? (continued)

F. Notice of the incurrance of a “material financial obligation” should include a description of the “material” terms of the financial obligation

1. The SEC provided little guidance on its interpretation of materiality; the following examples of material terms were provided:
 - a. Date of incurrance, principal amount, maturity and amortization, interest rate (if fixed) or method of computation (if variable) plus any default rates, and other terms, depending on the circumstances
2. The determination is ultimately left to the obligated person

G. Derivative instruments of the type described in the definition of financial obligation must always be disclosed on EMMA

Best Practices for Obligated Persons

- A. Four core components of good disclosure policies (per NABL 2015 publication “Crafting Disclosure Policies”)
 - 1. Description of types of disclosures to investors that are covered by the policy
 - a. A comprehensive disclosure policy will include procedures addressing all potentially material statements that are “reasonably expected to reach investors and the trading markets”
 - 2. Clear statement of process by which (and by whom) each type of disclosure will be undertaken, drafted, reviewed, and approved and how compliance with the process will be documented
 - a. Procedures should be reviewed and revised or developed to address each type of disclosure to be covered

Best Practices for Obligated Persons *(continued)*

3. Inclusion of adequate supervision and reasonable disbursement of responsibilities
 - a. Documenting compliance is particularly important if the SEC or another party conducts an investigation or otherwise scrutinizes an obligated person's disclosures or disclosure policies
4. Provision for training of officials and employees regarding federal securities laws, the adopted disclosure policy, and specific training for certain roles and responsibilities in the disclosure process
 - a. Scope, frequency, and other aspects of training will vary with the size and complexity of the obligated person and the frequency of disclosures, etc.
 - b. No one-size-fits-all approach

Best Practices for Obligated Persons *(continued)*

- B. Avoid becoming just a checklist – focus on the big picture (more “forest,” less “trees”)
- C. Convey any important internal considerations to outside counsel so that existing practices and disclosure policy are in sync
- D. Review language of your existing CDA(s) to ensure that amendments are not “swept in”
 1. Consider involving counsel/bond counsel in this review

Questions?



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