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September 8, 2009

Elizabeth M. Murphy
Secretary
United States Securities
and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-15-09
Comments of Kutak Rock LLP
on Release No. 34-60332

Dear Commissioners:

We are writing to provide our comments on the amendments to Rule 15c2-12 proposed by Release No. 34-60332.

Kutak Rock LLP is a national law firm with a longstanding and substantial public finance practice. We represent numerous municipal issuers as bond counsel or in connection with the preparation of their disclosure documents. Our practice also includes the representation of municipal securities brokers and dealers, trustees, credit enhancers and investors in municipal securities and we frequently advise on federal income tax issues affecting municipal securities.

We strongly support the Commission's recent efforts to simplify and expedite the availability of material information to investors and to make disclosure practices in the municipal securities market more uniform. However, in our view, the movement toward a more uniform and standardized approach, while desirable as a general matter, carries with it the risk that in specific situations the resulting regulatory standards will be overbroad, causing issuers to be subject to mandatory filings for events that are not actually material to investors, or that they will penalize small issuers who are not staffed adequately to monitor and immediately respond to all of the developments that might be considered material under the proposed amendments.

We therefore have the following comments and suggestions:

1. **It is impractical to require the filing of material event notices within 10 business days of occurrence of material events; filings should be required within 10 business days after the issuer (or other obligated person) has actual knowledge of their occurrence.** We believe the most difficult practical problem with the proposed

Rule changes is the requirement, proposed to be included in Rule 15c2-12(5)(i)(C), that material event filings be made by issuers (or other obligated persons) within 10 business days of the occurrence of material events.

Particularly in the case of smaller municipal issuers, who make up a significant component of the municipal market, it is highly likely that some of the listed events in the Rule would occur without the knowledge of the issuer. Examples of these include changes in name or corporate status of a trustee or rating changes due to insurer downgrades. We understand that the rating agencies do not typically notify individual issuers and other obligated persons of changes in insured ratings affecting their bonds. For an issuer or other obligated person to be aware of such a change, it would need to be monitoring its ratings on a daily basis – something very few issuers and other obligated persons, small or large, are staffed to do. Moreover, we understand that rating agencies charge for access to their ratings releases. Similarly, bank trustees may not affirmatively notify issuers and other obligated persons of name and status changes.

We suggest that the proposed amendment should be revised to provide that filings would be required within 10 business days after the issuer (or other obligated person) receives actual notice of the event. Such a requirement would still provide for prompt reporting of events arising in the issuer's or obligated person's own operations. This would accomplish the objective of greater transparency and access to information about municipal securities generally, without setting up a standard which is subject to inadvertent and unintentional violation by the majority of issuers and obligated persons.

2. The definition of a "primary offering" of a variable rate demand obligation should be clarified. The proposed amendments would substantially broaden the application of the Rule to variable rate demand obligations ("VRDO's"). As the Commission is aware, VRDO's are typically targeted to money market funds. The amounts of securities held are large, and the entities holding them generally have large staffs who are well equipped to follow the obligated parties (mostly banks or public corporations) and already have information readily available. In short, there is little evidence that the participants in the secondary market for VRDO's suffer from a shortage of information. Proposed new paragraph 15c2-12(d)(5) would indirectly cause all "primary offerings" of VRDO's after the effective date of the amendments to be subject to the requirement of a continuing disclosure agreement. It is not always entirely clear, however, in the context of transactions involving VRDO's, where the line should be drawn between primary offerings and secondary market trading activity. We respectfully request that the Commission provide a standard by which to distinguish remarketings that are "primary offerings" requiring continuing disclosure agreements from those that are not "primary offerings." This could be accomplished without having to write a completely new definition of "primary offering." Instead, we suggest as a workable test that, in addition to new issues, "primary offerings" are: (1) remarketings of VRDO's

which constitute "reissuances" for federal tax purposes and (2) remarketings of VRDO's involving a change in liquidity or credit enhancement following a mandatory tender. Both circumstances may be determined objectively by reference to existing rules or ascertainable facts. It would not be necessary that the definition apply for any purposes other than determining whether the amended Rule would apply to outstanding VRDO's.

3. **The definition of a "principal and interest payment delinquency" should be clarified to take account of contractual grace periods and similar operational considerations.** Under paragraph 15c2-12(b)(5)(i) as proposed, principal and interest payment delinquencies would need to be reported without regard to materiality. In light of common document provisions and the typical administrative practices of trustees and other parties, we believe that the Commission should clarify what is meant by principal and interest payment "delinquencies." For example, if the bond documents provide a grace period for the payment of interest or principal before there is any event of payment default, does "delinquency" mean not paid on the stated payment date or not paid within the grace period? If the issuer pays the trustee on time but the trustee fails to make timely payment, is that a delinquency? What if the trustee fails to send out a redemption notice on time, resulting in a redemption occurring on a later date than scheduled? What if, as often happens, the trustee makes a payment to security owners before it confirms receipt of funds, and the issuer actually only pays the next day? What if a late payment is due to operational or wire transfer issues? Does principal and interest delinquency include failure to pay the tender price upon an optional tender? Does it matter that the failure to pay the tender price is not an event of default on the bonds? In each case, we would suggest that the materiality of the event can and should be tested by reference to whether (1) it adversely affects the timely receipt of payment by security owners (giving effect to any contracted for grace period), as opposed to receipt by intermediaries handling funds, or (2) it reflects on the issuer's own credit or indicates a material weakness or flaw in the structure of the issue or a credit deficiency of the participants other than the issuer. We believe that minor operational variances which do not result in an actual failure to make timely payment to security owners should generally not per se require material event disclosure.

4. **The term "rating change" needs to be specifically defined**. If, as proposed, rating changes must be disclosed to the secondary market under Rule 15c2-12(b)(5)(i) regardless of materiality, there should be more clarity regarding the meaning of a "rating change." For example, does this term include only published ratings on the securities? Many credit enhanced bonds now carry only the underlying rating of the issuer as it is higher than that of the credit enhancer. Must changes in the credit enhancer's ratings still be reported? Similarly, questions arise in the cases of investment agreement providers investing bond proceeds or a reserve fund under an investment agreement. Does the placing of a bond issue on "credit watch" or its removal count as a "rating change"? What about ratings the issuer may have which are not attached to the

bonds, e.g. where the bonds are long term but the issuer also has a short term rating? We suggest that the Rule should be limited to changes, of which the issuer or other obligated person has actual knowledge, in the highest published rating of the security, which may be the underlying rating or may be the credit-enhanced rating, and that, as a general matter, the term "rating change" should exclude changes in outlook, as well as changes in the credit ratings of parties other than the issuer or obligated person itself, unless the issuer or obligated person has received specific notice of the change in such other party's rating.

5. The term "tender offer" should be defined for purposes of Rule 15c2-12. We question whether, in the context of the municipal bond market, the term "tender offer" used in proposed amended paragraph 15c2-12(b)(5)(i)(8) has the same kind of generally recognized meaning as in private sector transactions. Does the term include any purchase by the issuer of its securities, other than pursuant to a put option? Would it include solicitations by persons other than the issuer wishing to purchase outstanding securities? Should mandatory tenders pursuant to VRDO documents be treated like bond calls as the proposed amendments seem to do? When would the ten business days start to run for disclosure of a tender offer? More generally, we question whether a subparagraph of the Rule is the appropriate place to regulate a complex category of transactions such as tender offers.

In response to the Commission's question posed in the Release, we are not aware of any material exchange transactions in the recent past. We would not object to a more detailed definition of tender offers which also defines "exchange."

6. Disclosure of mergers, etc., should be subject to a materiality standard. The proposed amendments add a new subparagraph 15c2-12(b)(5)(i)(C)(13) for "mergers, consolidations or acquisitions" involving obligated persons. When merger terminology is applied without a materiality qualification to governmental entities, certain common transactions which would not generally be material may be covered by the filing requirement. An example would be the addition of territory to a municipality by annexation or the absorption of a neighboring governmental subdivision or other service provider such as a fire protection district or library district incident to an annexation. Ordinarily, such an event would have little effect on the municipality's credit yet the amended Rule would seem to require a filing. It would be advisable in our view to apply a materiality standard in these cases to avoid a large volume of filings for immaterial events of this kind.

7. The treatment of tax events may have many unintended consequences which would adversely affect the municipal securities market. We are concerned that the treatment of tax events under the proposed amendments will have an adverse effect on the tax-exempt market. Specifically, the deletion of the provision that only "material"

adverse tax opinions or events need be disclosed has the potential result of flooding the tax-exempt market with material event notices that would dramatically increase short-term interest rates for issuers and obligated persons as well as fixed rates in the secondary market.

The IRS audit/examination process is an adversarial one in which the IRS asserts numerous issues in an attempt to gain an advantage prior to the negotiation of a closing or settlement agreement with the issuer. In many cases, and a majority of the cases involving random audits by the IRS, the issuer is successful in rebutting any arguments of the IRS or providing the IRS with additional information that satisfies the IRS that the subject bonds continue to be worthy of tax-exempt status. In those cases where the issuer is unsuccessful in satisfying the concerns of the IRS, the issuer typically enters into a closing or settlement agreement, where the issuer agrees to pay a certain amount to the IRS in exchange for which the IRS will state that the subject violation will not cause the bonds to be taxable. This process, from receipt of an initial audit/examination letter by the issuer until final resolution through an IRS no-change letter or the execution of a closing or settlement agreement, can be lengthy and involve multiple exchanges of correspondence.

By requiring disclosure by issuers and other obligated persons such as conduit borrowers of any "other events affecting the tax-exempt status of the security," whether or not such event is material, the proposed amendments would require issuers to file material event notices throughout the audit/examination process causing the bonds to be viewed unfavorably in the market. In such a situation, variable rate bonds would potentially bear interest at taxable rates for several months, even years, before there is a resolution, significantly raising the borrowing costs of tax-exempt borrowers such as states, municipalities and Section 501(c)(3) entities.

Under the current version of Rule 15c2-12(b)(5)(i)(C)(6), issuers are required to disclose any "adverse tax opinions or events affecting the tax-exempt status of the security," but only if such opinions or events are "material." While it is likely that a Notice of Proposed Issue issued by the IRS is material, we cannot go as far as the Commission in saying that a Notice of Proposed Issue is always material. We represent issuers that have in the past received a "preliminary determination of taxability" (the predecessor of the Notice of Proposed Issue) based on either a misreading of the facts (or in many cases a lack of certain relevant facts) or a faulty interpretation of the law that renders the preliminary determination of taxability immaterial. For the foregoing reasons, it would be unwise to dispense with the materiality requirement.

We expect that the amendments as currently proposed would result in a flood of material event notices to the tax-exempt market because of the generality and vagueness of the list of tax and other events that must be disclosed as well as the deletion of the

materiality requirement. This effect can be expected to be felt most with respect to tax questions because there are so many kinds of post-issuance tax compliance issues and so many remedial steps commonly taken in the ordinary course of administering outstanding issues. Information about most of these kinds of actions would not necessarily aid investors in protecting themselves. On the contrary, the voluminous amount of information would potentially be too much for investors to digest, and could result in a sell off of investments based on information that is only a part of a larger story. For example, a typical post-issuance consideration involves the IRS's Voluntary Compliance Agreement Program ("VCAP"). We routinely contact the IRS through VCAP on behalf of issuers that have discovered violations that potentially affect the tax exemption of their bonds, and in almost every instance in which we have used VCAP, the issuer has entered into a closing agreement with the IRS pursuant to which the IRS agrees that the subject violation does not cause the bonds to be taxable. The initiation of a VCAP, as well as the violation that is the subject of the VCAP, are both arguably events that must be disclosed under the proposed amendment, and because the VCAP process can last as long as the audit/examination process, an issuer of variable rate bonds would likely see an increase in its borrowing costs over a substantial period of time should it have to disclose that it is utilizing VCAP. Among other things, this potential result could discourage use of the VCAP program itself.

In the Release, the Commission has requested comment regarding the extent to which investors and other market participants would find it useful to be informed of the issuance of proposed and 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 securities by the IRS. In our view, investors and other market participants would find it useful to be informed of the issuance of proposed and final determinations of taxability, because at that point, there has been sufficient communication between the IRS and the issuer's representatives to determine whether there are any real issues affecting the tax-exempt status of the issuer's bonds. However, prior to such proposed and final determinations, issues are still being developed, and in many cases disposed of, so that wholesale reporting of preliminary actions would serve more to confuse and mislead rather than to inform investors and other market participants. We also feel that there is in fact a danger that a flood of material event notices concerning immaterial tax events would desensitize the market to those notices that actually contain material information about adverse tax determinations.

The Release also asks for comment on whether the continuing disclosure agreement should specify that a copy of the determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices issued by the IRS be provided to the MSRB, or whether a notice of any such determination would provide sufficient information to investors. As noted above, initial determinations of the IRS often raise numerous issues, most if not all of which will be dispensed with once the facts

are further developed and the issuer and its representatives have responded. Disclosing an initial IRS determination that contains a laundry list of possible violations would unfairly prejudice the market.

Finally, the Commission asks whether the Rule should be amended to require a Participating Underwriter to reasonably determine that the issuer or obligated person has entered into a continuing disclosure agreement to submit a notice of tax audits. Continuing disclosure agreements should not require that issuers disclose audits. Many audits are random and turn up no issues that would affect the tax exemption on the bonds. As discussed above, the majority of targeted audits are resolved with no change to the tax-exempt status of the bonds. [1]

8. A reasonable transition period should be provided for the proposed amendments. We strongly recommend that a three to six month transition period should be provided for the amendments. If the amendments are adopted as proposed, we believe that a great many issuers will need time to implement monitoring and internal reporting procedures not currently in effect. Also, the suggestion in the Release that a new disclosure agreement could be entered into to amend all of an issuer's old disclosure agreements may not be workable, especially under current conditions. The amendment provisions of many old agreements may not permit it, and the underwriters who signed or obtained the old agreements may no longer exist. Interpretive issues such as these can be expected in great number and it would be good to have time to resolve them before the effective date.

The individuals who prepared these comments were Daniel C. Lynch, Esq., in Denver (303) 292-7875, Dennis L. Holsapple, Esq., in Chicago (312) 602-4100 and Curtis L. Christensen, Esq., in Omaha (402) 346-6000. Please feel free to address followup questions to any of us.

Very truly yours,

Daniel C. Lynch

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[1] Notwithstanding the statistic provided by the IRS that states that between April 2007 and July 2008, approximately 37.5% of the cases that received a proposed determination of taxability received final determinations that the bonds were taxable; 100% of the issuers that we have represented before the IRS have either received a letter from the IRS stating that its bonds are not taxable or entered into a closing agreement with the IRS in which the IRS agrees that the issuer's bonds are not taxable.