New SEC Rules for Counties Issuing Bonds

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On December 1, 2010, new amendments to Rule 15c2-12 ("Rule") will take effect, as approved by the Securities and Exchange Commission ("SEC") earlier this year. The new amendments to the Rule contain additional requirements that must be met by local governments, including counties, in providing "continuing disclosure" for bonds which are issued on or after December 1, 2010.

Generally speaking, whenever a county issues bonds, it must provide a "continuing disclosure undertaking" -- a promise to periodically provide the financial markets with certain financial and operating information. This reporting is done electronically, to an Internet-based electronic filing system called the Electronic Municipal Market Access system, or "EMMA".

There are three basic types of required ongoing disclosure:

- annual filings of financial and operating information,
- notices of failure to make required filings, and
- disclosure of specified events.

The amended Rule will now require that counties report to the financial markets, through EMMA, on the occurrence of any of an expanded list of events, regardless of whether the event is "material". For example, the following events must be reported, among others: (i) any failure to pay debt service on bonds on time; (ii) an unscheduled withdrawal from debt service reserve fund securing the bonds, reflecting possible county financial difficulties; (iii) receipt of an adverse tax opinion (or similar notices) concerning the county's outstanding bonds; and (iv) if the county's bonds have been rated, a change in the rating for those bonds.

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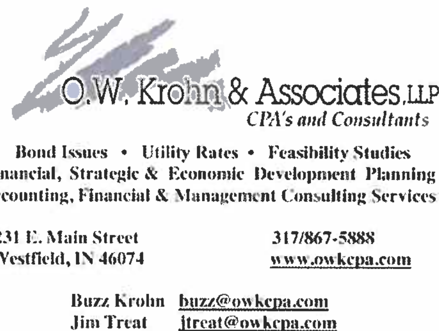

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The county is also required to report certain other events, if such events would be a considered "material". These include: (i) a default under the documents securing the bonds other than a problem with payment of debt service; (ii) a change in the existing rights of bond holders; (iii) redemption (paying off) of the bonds; (iv) a change in the type of property securing the bonds (such as mortgage bonds) or selling the property securing the bonds; and (v) a change in the trustee for the bonds.

More significantly, however, the amended Rule will require reports to be made in a timely manner within 10 business days after the occurrence of an event. This will require counties to monitor such events more closely, and to monitor their reporting obligations more closely, too.

One word of caution may be particularly important to counties and other infrequent issuers. In its release accompanying the Rule amendments, the SEC reaffirmed that bond underwriters have certain duties to their bondholder customers including the duty to be able to recommend the bonds to purchasers before agreeing to sell them. The SEC questioned whether underwriters would be able to satisfy this duty if an issuer had a pattern of not meeting its disclosure obligations in a timely fashion. SEC enforcement actions on this point might well have a "chilling effect" on the ability of some counties to sell their bonds.

Counties with bond issues in process should discuss their obligations under the amended Rule with their bond counsel, financial advisor, and local counsel in the near future to prepare for these reporting requirement changes. These changes do not, however, affect existing bond issues absent a new offering. •

Ice Miller LLP serves as general counsel to the Association of Indiana Counties. If you have any questions concerning the procedures that apply to a particular borrowing, please feel free to call Lisa Lee at (317) 236-2268.