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Disclosure Considerations and Tax Reform

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The impact of tax reform is on the minds of many. While there are currently many unknowns, municipal issuers and conduit borrowers (collectively, "obligated persons") should consider whether changes in tax law could impact their disclosure obligations. The Securities and Exchange Commission ("SEC") has stated that investors consider the tax status of securities to be of great importance when making investment decisions because that status goes directly to the value of the securities. As such, it is important that obligated persons pay particular attention to proposed or future changes in tax law and consider what impact, if any, such changes may have on their disclosure obligations under the federal securities laws and existing continuing disclosure undertakings.

Discussed below are a few disclosure considerations.

- **Primary Market Disclosure:** It is important that an obligated person consider, when drafting its official statement, whether to include different or more robust disclosure about proposed or future changes in tax law. In certain scenarios more robust disclosure may be appropriate, depending on the facts and circumstances. For example, under the U.S. House of Representatives tax reform legislation, more robust disclosure may be appropriate (i) if the elimination of private activity bonds will adversely affect an obligated person's existing capital projects or plans; or (ii) if the elimination of tax-exempt advance refundings will adversely affect an obligated person's current budget or financial condition. On the other hand, there may be scenarios where different or more robust disclosure is not appropriate. For example, disclosure provided by a municipality, in connection with tax-exempt governmental bonds, may already contemplate proposed or future changes in tax law, and the tax reform legislation may not have a material impact on the municipality's financial condition.

- **Secondary Market Disclosure:** With respect to event notices, there is no requirement under Rule 15c2-12 to provide notification of general events having a widespread market impact, such as a change in tax law. That said, there is a requirement to provide an event notice for other material events affecting the tax status of the municipal securities. Accordingly, it is important that an obligated person consider whether changes in tax law affect the tax status of its outstanding municipal securities and, if so, whether the related continuing disclosure agreement requires an event notice.

- **Voluntary Disclosure:** An obligated person may choose to provide voluntary disclosure about changes in tax law. For example, if the consequences of tax reform eliminates direct subsidy payments that an obligated person receives for its outstanding tax credit bonds (including build America bonds, qualified school construction bonds, among others), the obligated person could consider whether to provide a voluntary notice describing the elimination of the subsidy and any related consequences. In such a case, an obligated person should consider the manner in which it will communicate with investors (e.g., investor call or EMMA filing) and the substance of the disclosure. The SEC has stated that disclosure that is reasonably expected to reach investors is subject to the antifraud provisions of the federal securities laws. As such, it is important that an obligated person and its outside professionals (e.g., bond counsel or disclosure counsel) carefully draft and review such disclosure.

While the SEC has repeatedly made clear that the obligation to ensure adequate disclosure rests primarily with the obligated person and its officials, it is equally important that regulated municipal market professionals pay particular attention to proposed or future changes in tax law to ensure compliance with federal securities laws and MSRB rules, including municipal advisors engaging in municipal advisory activities, underwriters participating in primary offerings, and brokers and dealers transacting in municipal securities.

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