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IF CASH IS KING, FLEXIBILITY IS THE CROWN PRINCE

Once upon a time, in an economy long, long ago, borrowers typically maintained all their debt, operating accounts, deposit accounts and other banking needs with a single financial institution. Whenever they needed a loan, a letter of credit or any other banking service, they would simply call their banker, go out to lunch and sign some documents. The world was simpler then and all was well.

Fast forward to 2009 and anyone can tell you that this fairy tale is over. In today's credit market where capital markets, underwriting standards and credit considerations change rapidly, flexibility is more important than ever. Cash may still be king, but flexibility is the crown prince.

So how is a 501(c)(3) borrower to maintain flexibility in its tax-exempt bond financings? By drafting bond documents with ultimate flexibility, negotiating flexible terms which heretofore were afterthoughts, diversifying its debt portfolio and banking relationships and, most importantly, remaining ever vigilant.

Master Trust Indentures Are No Longer Only for Large, Multi-Campus Systems

In the recent past, most professionals would have agreed that implementing a master trust indenture (an "MTI") structure for a single-campus healthcare provider was not necessary. Implementing an MTI structure was merely one more example of lawyers "over-papering" a deal. Now, however, the flexibility an MTI offers is absolutely essential. An MTI allows a borrower to grant rights and interests in certain collateral to a master trustee for the benefit of all its respective lenders. For example, an MTI allows the borrower to grant a parity lien in favor of its working capital lender as well as long term debt holders. An MTI can accommodate any type of security interest, including a real estate mortgage, as required by lenders. The MTI provides the baseline for all borrowing and governs the relationship and rights among a borrower's various lenders.

Moreover, an MTI provides terms and conditions under which a borrower may take on additional debt with a to-be-determined lender. While individual loan documents may contain terms and conditions more onerous and perhaps more restrictive than those broadly applicable via the MTI, the flexibility of the MTI limits the likelihood of a borrower being held hostage by a single lender. In today's markets, where lenders come and go, this flexibility is critical.

Draft Bond Documents for the Future

For many years, variable rate bond transactions have included provisions for multiple modes ranging from daily or weekly interest rate modes to longer modes (such as annual, 5-year or fixed forever). In contrast, bonds issued and initially placed with banks often contained only a single interest rate mode – the one that applied to the initial bank purchase. Now, it is advisable to include any and all modes that might ever come to pass, including perhaps a mode that is so flexible as to accommodate anything the market might dream up in the future, in every transaction. By including more rate options at the outset, it may be possible to avoid the costs of a reissuance or refunding of the bonds later. Other ways to increase flexibility in bond documents would be to include provisions for the substitution of the letter of credit, changing the remarketing agent and purchase of the bonds by the borrower in lieu of redemption. One simply cannot be certain what market conditions might be like in 3, 5 or 10 years and therefore one must

make every attempt to draft documents today which will accommodate the financial products of the future.

Diversification of Your Debt Portfolio and Banking Relationships

A well-diversified investment portfolio has been a staple of sound investing advice for decades. No right-minded finance committee or board of directors would ever recommend holding one's entire investment portfolio in a single investment. Yet, organizations have for years maintained all of their debt and all of their banking services with a single financial institution. In today's market, that financial institution may not be capable of providing all the services needed and, in fact, may not even be around next quarter. As a practical matter, strong banks are currently requiring borrowers to move certain services, such as treasury or investment management to that bank, as part of the bargain for providing a letter of credit or other credit facilities. Even in these situations, one should maintain flexibility in at least some of the organization's banking services. When combined with an MTI structure (see above), diversification of one's debt portfolio and banking relationships provides some protection in an ever-changing banking environment.

The Bottom Line

If the recent behavior of the credit markets has taught us anything it is that we cannot predict the future. Borrowers must act and plan now in order to preserve their flexibility to meet future financing needs and to accommodate future financing products not yet invented.

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