UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

March 11, 1991

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Re: Remarketing of Certain Fixed Rate Industrial Development Bonds and Adjustable Rate Industrial Development Bonds

Dear Ms. Thompson:

In your letter of May 16, 1990, you inquired about the application of Rule 15c2-12 ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act") to the remarketing of certain fixed-rate industrial development bonds (the "Fixed Rate Bonds") and the remarketing of certain adjustable rate industrial development bonds (the "Multi-Mode Bonds"). In particular, you requested guidance as to whether either of the proposed remarketings is a "primary offering" of municipal securities as defined in the Rule.

We understand the facts to be as follows:

The Fixed Rate Bonds were issued in 1983 as fixed rate securities in $5,000 denominations by a political subdivision (the "County") for the financing of certain pollution control facilities for a corporate user (the "Company"). The Fixed Rate Bonds were sold to more than 100 purchasers. Payment of the Fixed Rate Bonds is to be made from, and is secured by, a pledge of revenues to be derived from a financing agreement between the County and the Company. The Fixed Rate Bonds originally were priced and marketed on the credit of the Company's parent corporation (the "Guarantor"), which has unconditionally guaranteed the payment of the principal and interest on the Fixed Rate Bonds.

The Fixed Rate Bonds have an initial term of seven years. After the expiration of the initial term, and under the terms of the indenture between the County and the trustee, the Fixed Rate Bonds may, at the option of the bondholders, be redeemed by the County on June 1st of every year up to and including June 1, 2000.[1] Redemptions would be at par plus interest accrued to such June 1st redemption date. To prevent the redemption of the Fixed Rate

[1] The Fixed Rate Bonds mature on June 1, 2001.

Bonds, the Company has the right, prior to the redemption date, to purchase the Fixed Rate Bonds from the bond holders who have decided to exercise the redemption option. Once purchased by the Company, the Fixed Rate Bonds remain outstanding under the indenture and may be held, resold, delivered to the Trustee for cancellation, or otherwise disposed of by the Company. The right of the bondholders to demand such redemption or purchase is referred to as the "Put Right."

The Company anticipated a significant bondholder exercise of the Put Rights with respect to the most recent June 1, 1990 redemption date and intended to prevent such redemptions by exercising its option to purchase all the Fixed Rate Bonds with respect to which the Put Right has been exercised. Following the purchase, the Company, through the services of a remarketing agent to be appointed, will remarket the Fixed Rate Bonds ("Fixed Rate Remarketing"). The remarketing will be done without an adjustment to the interest rate.

In a separate matter, the Company intends to exercise its right to convert the Multi-Mode Bonds to fixed-rate securities and thereafter remarket them. The Multi-Mode Bonds were issued in 1985 in $5,000 denominations by a County government for the financing of certain pollution control facilities for the Company. They mature in the year 2015. Payment of the Multi-Mode Bonds, like the Fixed Rate Bonds discussed above, is to be made from, and is secured by, a pledge of revenues to be derived from a financing agreement between the County and the Company. The Guarantor has unconditionally guaranteed the repayment of the principal and interest on the Multi-Mode Bonds in the same manner as described above.

On each Interest Payment Date, occurring every six-months, the rate on the Multi-Mode Bonds is adjusted to enable the remarketing agent to remarket the Multi-Mode Bonds at par. In addition, the Company has the right on each Interest Payment Date to convert the Multi-Mode Bonds from bonds bearing interest at a floating rate to bonds with a fixed rate (the "Conversion Date"). The bondholders have the option to tender the Multi-Mode Bonds on any Interest Payment Date prior to the Conversion Date. However, the bondholders are required to tender the Multi-Mode Bonds to the designated remarketing agent if the Company exercises its right to convert the Multi-Mode Bonds to fixed-rate securities. The Company intends to purchase the tendered Multi-Mode Bonds and direct the remarketing agent to remarket the converted bonds ("Multi-Mode Remarketing"). Once converted, all Put Rights currently in the Multi-Mode Bonds will be eliminated.

You indicate that both the Fixed Rate and Multi-Mode Bonds (collectively, the "Bonds") are clearly municipal securities as

that term is defined in Section 3(a)(29) of the Exchange Act.[2] The Company also acknowledges that the Bonds would, if sold today for the first time, fall within the class of municipal securities that Rule 15c2-12 addresses and would not be exempt under subsection (c) of the Rule. Nevertheless, it is your view that neither of the remarketings should be subject to the provisions of Rule 15c2-12.

You note that Rule 15c2-12 applies only to "primary offerings" of municipal securities. Subparagraph (e)(7) of Rule 15c2-12 defines a "primary offering" as:

> an offering of municipal securities directly or indirectly by or on behalf of an issuer of such securities, including any remarketing of municipal securities (i) that is accompanied by a change in the authorized denominations of such securities from $100,000 or more to less than $100,000, or (ii) that is accompanied by a change in the period during which such securities may be tendered to an issuer of such securities or its designated agent for redemption or purchase from a period of nine months or less to a period of more than nine months.

Among other things, you argue that, unless a remarketing of municipal securities falls within the examples provided in (i) or (ii) of subparagraph (e)(7), it is not a "primary offering" and, therefore, is not subject to the requirements of the Rule.

You contend that the remarketing of the Fixed Rate Bonds, as described above, does not fall within the parameters used to described a "primary offering." Specifically, you note that the Fixed Rate Bonds were issued in $5,000 denominations and the remarketing does not involve any change thereto. Accordingly, the denominations are not changed to an amount below $100,000 as provided in part (i) of subparagraph (e)(7). Similarly, you maintain that the remarketing of the Fixed Rate Bonds does not include any change in the effective maturity of the Fixed Rate Bonds that would result in a primary offering as described in part (ii) of subparagraph (e)(7). In this regard, you state Fixed Rate Remarketing would not affect the right of the bondholders annually to put the Fixed Rate Bonds to the Company, which is more frequent than the nine months provision found in subparagraph (e)(7).

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2 We rely upon, but do not address, the validity of your representation that the Bonds are municipal securities as defined in Section 3(a)(29) of the Exchange Act.

You further believe that the Multi-Mode Remarketing also appears to fall outside the parameters of a "primary offering" as set forth in part (ii) of subparagraph (e)(7). You contend that the Multi-Mode Bonds can be put back to the remarketing agent twice per year (at six month intervals) up until the Conversion Date. Therefore, the Put Rights on the Multi-Mode Bonds will be changed from every six months - more frequent than the nine month provision of subparagraph (e)(7)(ii) - to no Put Rights at all. You further believe that the elimination of Put Rights is not addressed by the subparagraph. In your view, part (ii) of subparagraph (e)(7) describes a situation in which redemption rights are maintained, but a longer period is created between redemption periods. You argue that the elimination of the Put Rights altogether does not result in the frequency of the Put Rights being changed from every six months to greater than nine months (the Multi-Mode Bonds may be "put" back only at maturity in 2015).

Response:

Based upon your representations, we are unable to conclude that the Multi-Mode Remarketing would not be considered a primary offering for purposes of Rule 15c2-12. We also are unable to conclude that the Fixed Rate Remarketings would not be considered primary offerings for purposes of the Rule.[3]

Rule 15c2-12 applies to underwriters participating in primary offerings with aggregate principal amounts of $1 million or more, unless an exemption is available. Although the definition of primary offering in subparagraph (e)(7) specifically includes remarketings in which the denominations or maturities change from greater than $100,000 to less than $100,000, as well as remarketings in which the effective maturities are changed from less than nine months to greater than nine months, these examples are illustrative, and do not define the universe of remarketings that are subject to the Rule. For purposes of the Rule, a "primary offering" is distinguished from a typical secondary market transaction by the fact that it is "directly or indirectly by or on behalf of an issuer of such securities."[4]

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[3] The initial Fixed Rate Remarketing occurred on June 1, 1990, and specifically is not addressed by this response.

[4] We have reviewed the sample remarketing agreement that you have provided. Although not the exclusive factor in determining whether a particular remarketing would be considered "directly or indirectly by or on behalf an issuer," we note that in this case the agreement states clearly that in the event of the remarketing agent's *(continued...)*

At the time of each remarketing that is directly or indirectly on behalf of the issuer, the underwriter or remarketing agent must examine whether the Rule is applicable. In most cases, the maturities and denominations will remain within the range that permits the underwriter to rely upon the exemption for securities with effective short-term maturities found in paragraphs (c)(2) and (c)(3). However, if, for example, bonds with a minimum denomination of $100,000 and a maturity of one year initially are offered by an underwriter in accordance with the requirements of paragraph (b) of the Rule, that underwriter, or another underwriter, could not continually remarket the securities each year, directly or indirectly on behalf of an issuer, without complying with the Rule's requirements at the time of each subsequent remarketing, unless it could rely on the limited placement exemption in paragraph (c)(1).

In the Fixed Rate Bond Remarketing, we note that Bonds that initially were issued in 1983 in denominations of $5,000 are being repurchased by the Company. Your letter states that the Bonds are being remarketed on its behalf at the same interest rate. In our view, the remarketing would constitute a primary offering as defined in the Rule. Moreover, neither the effective maturities nor the authorized minimum denominations would entitle the remarketing agent to rely upon the exemptions contained in paragraph (c).

With respect to your arguments concerning the Multi-Mode Remarketing, as stated above, we do not believe that the language of the "primary offering" definition should be interpreted to mean that the illustrations in subparagraph (e)(7)(i) and (ii) are the exclusive circumstances in which a remarketing would be considered a primary offering. In fact, the transaction described in the Multi-Mode Remarketing specifically is contemplated by the illustration contained in subparagraph (ii) of paragraph (e)(7) of the Rule as an example of a primary offering. By removing the Put Rights on the Conversion Date, the issuer has lengthened the effective maturity from the next six months to the year 2015, a period that extends beyond the prescribed nine month maturity range. Accordingly, underwriters participating in the remarketing would be subject to the Rule.

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[4](...continued)
failure to remarket all or any portion of the bonds, "the Company shall purchase the marketed portion and shall remit the Purchase Price therefor to the Remarketing Agent." Accordingly, we would view the Remarketing Agent's efforts to be on behalf of an issuer.

The transitional provisions of the Rule contained in paragraph (f) provide a limited exemption from the requirements of paragraphs (b)(3) and (b)(4) of the Rule for an underwriter that was contractually committed to act as a remarketing agent prior to July 28, 1989 for an offering originally issued prior to July 29, 1989.[5] Nevertheless, the remarketing agent would remain subject to both the requirement in paragraph (b)(1) of the Rule that it receive and review a copy of an official statement deemed final by an issuer, as of its date, as well as the requirements of paragraph (b)(2). In the instant case, it does not appear that any underwriter has been contractually obligated to act as remarketing agent prior to the remarketings of the Fixed Rate Bonds. Accordingly, all of the requirements of paragraph (b) of Rule 15c2-12 would appear to be applicable to the transactions.[6]

Our position is based solely on the representations that you have made. Different facts or conditions may require a different result. It also should be emphasized that our response solely is limited to Rule 15c2-12, and does not address the adequacy of disclosure concerning the transactions and any separate duties that the Company or remarketing agents have under the federal securities laws to disclose material facts concerning the offering, or, in the case of the remarketing agent, to have a reasonable basis for its recommendation to investors. In this regard, your attention specifically is directed to the antifraud provisions of the federal securities laws, particularly Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division also expresses no view on any

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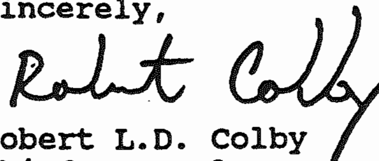
[5] As stated in the release adopting Rule 15c2-12, the reason for the exclusion was that remarketing agents may have been unable to renegotiate existing contracts that did not provide for the receipt of official statements that are required by paragraphs (b)(3) and (4). See Securities Exchange Act Release No. 26985 (June 28, 1990), 54 FR 28799.

[6] The staff has been advised that a number of offerings with effective maturities of less than nine months were conducted between the time the Rule was adopted, June 28, 1989, and its effective date, January 1, 1990, in which adequate provision may not have been made for authorized minimum denominations. If the exemptions provided in paragraph (c) of the Rule are unavailable to a remarketing agent for securities initially issued prior to January 1, 1990, solely because the securities do not meet the minimum authorized denomination requirement of $100,000, the staff would consider granting requests for exemptive relief with respect to offerings in which the remarketing agent agrees not to remarket the securities in aggregate principal amounts of less than $100,000.

additional questions that the proposed transactions may raise, including, but not limited to, the applicability of any other federal or state laws to the transactions.

Sincerely,



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