National Federation of Municipal Analysts

Recommended Term Sheet and Legal Provisions for Hospital Debt Transactions

The National Federation of Municipal Analysts (NFMA) is an organization of nearly 1,000 members, primarily research analysts, who evaluate credit and other risks of municipal securities. These individuals represent, among others, mutual funds, insurance companies, broker/dealers, bond insurers and rating agencies.

Members of the NFMA determined that as a result of the breadth and diversity of the municipal market, there is a lack of standardization in hospital bond legal documents, which leads to much confusion and potential risk to bondholders. In addition, particularly in the "high grade" market, some key transaction participants may not have extensive experience in workouts and bankruptcies. As a result, we have found that in a default, the bond documents may not work in accordance with the original intent of those who structured or purchased the bonds.

The NFMA thought it would be a useful resource for all concerned to assemble model provisions that incorporate the lessons learned by its members in following many deals through the default, workout and bankruptcy cycle. The following Recommended Term Sheet and Legal Provisions for Hospital Debt Transactions ("RTS") represent an initial attempt to address these issues.

Educational Tool. The RTS is intended to serve as an educational tool. It will serve as a resource to explain the purpose of certain financing provisions and how they operate and inter-relate. Since the "devil is in the details", the RTS goes into some detail. We were asked by many members if we could shorten the paper by focusing on the most important items, or at provide an appendix of key items. After careful consideration, we decided that a "short list" was unworkable. Simply put, the collective experience of the 17 professionals who worked on this project (which in turn represents the experience of the NFMA membership) has taught us that there are many ways that poor document provisions have affected bondholder recovery. Given the prevalence of weak document provisions in the market, the only alternative was to cover the waterfront.

Documentation Resource. The RTS is also a resource for documentation. The NFMA recognizes that not all provisions contained in the RTS will be applicable to all financings. The tax-exempt debt market comprises a broad spectrum of credits and certain terms and conditions used in a financing for a BB credit will be inappropriate for a AA credit. Further, many provisions are negotiable. Hence, the particular covenants and protections to use in a given situation will depend on the circumstances. So for example, bondholders may prefer to get a mortgage but, depending on the market for the credit at issue, they may not be able to get one. But, to serve the educational function, the RTS discusses the reasons for getting a mortgage and the issues to consider in making sure a mortgage is effective.

The NFMA intends to process the RTS in a manner similar to its disclosure efforts. The initial draft RTS was widely circulated and an industry comment period was used to seek input from interested parties. It is our intent to be inclusive of the opinion of other market participants while maintaining the integrity of our effort to develop standard language and legal provisions. In this spirit, the NFMA welcomes the input of all market participants to make this document as useful a resource as possible. We

encourage all interested parties to submit comments at any time to lgood@nfma.org so that they may be considered in the development of future versions of the RTS.

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PART I. COLLATERAL

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A. ***Introductory Note:*** Not surprisingly, bondholders prefer more collateral, and obligors prefer less. How much, and what type, is often a function of what the market demands in relation to the credit rating of the obligor. What follows is a discussion of collateral that is mandatory and collateral that is discretionary, as well as a discussion of collateral-related issues based on hard-earned, acquired wisdom from various troubled credits.

B. ***Mandatory Collateral:*** The Bonds shall be secured by all funds held by the Trustee from time to time, including amounts held in the Construction Fund, the Debt Service Funds, and the Debt Service Reserve Funds.[1] To assure that the Bonds indeed are secured by funds held by the Trustee, granting language substantially equivalent to the following, properly perfected under local law (and modified to reflect local law and Obligated Group financings if required), should be used:

> To secure the performance and observance of all such covenants and agreements, the Obligor does hereby sell, assign, transfer, set over, pledge and grant a security interest to the Trustee in all of its right, title, and interest in and to all funds and accounts herein or hereafter established with the Trustee, including all moneys and investments therein and investment income thereon, [and all of its right, title and interest in and to the Gross Revenues (as herein defined)]; all such security to be held by the Trustee in trust for the equal and ratable benefit and security of all Bondholders issued hereunder, without preference, priority, or distinction (except as

[1] In all but the most highly rated issues, this list should also include Gross Revenues at a minimum and many of the "discretionary" elements of collateral discussed below. For obligors of lesser credit quality, the collateral package should be greater, in the same way that the covenants should be tighter, reporting stricter, and restrictions on operations more prevalent.

otherwise specifically set forth herein) of any one Bond over another Bond.[2]

C. ***Discretionary Collateral:*** Additionally, the Bonds shall be secured by:

(a) A lien on Gross Revenues, defined as follows:

"Gross Revenues" means all receipts, revenues, income (including investment income) and other money received or receivable by or on behalf of the Company derived from all sources including, without limitation, the operation or ownership of the Facility, and including, without limitation, proceeds of any license, lease or sublease permitted under the Loan Agreement or the Mortgage, disposition of assets or borrowings, fees paid or payable by or on behalf of users of the Facility, and any insurance proceeds and condemnation awards, and all rights to receive the same whether in the form of accounts, accounts receivable, health care insurance receivables, general intangibles, contract rights, chattel paper, instruments, investment property or other rights and the proceeds thereof and all deposit accounts, general intangibles, investment property, financial assets and the proceeds thereof; whether now existing or hereafter coming into existence and whether now owned or held or hereafter acquired by the Company; provided, however, that there shall be excluded from Gross Revenues gifts, grants, bequests, donations and contributions made to the Company, designated at the time of making thereof by the donor or maker as being for certain specified purposes inconsistent with the application thereof to the payment of amounts due under the Loan Agreement or the Mortgage or not subject to pledge, and any income derived therefrom to the extent required by such designation or restriction;[3]

(b) A continuing security interest in cash and depositary accounts, which may be perfected by means of a control agreement, depending on state law; and

(c) A mortgage or deed of trust (as appropriate) and security agreement on the principal operating assets (which may include personal property such as equipment), containing terms and having the attributes described below.

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[2] This provision grants a security interest to the trustee. Note however that under applicable bankruptcy law, any legal or equitable interest, no matter how remote, is sufficient to make the monies property of the bankrupt's estate (in one leading case, the possibility that oil might be found on the hospital campus, thereby enabling the otherwise defunct debtor to repay its bonds, was held sufficient in the presence of a reversion of the debt service reserve fund to make it property of the bankrupt's estate.) Note also that a senior lien in favor of the Trustee's fees and expenses will be provided in the sections concerning the Trustee's administration of the financing.

[3] Prior to the 2001 Amendments to Article 9 of the Uniform Commercial Code, this definition would probably have been sufficient in and of itself. Now, it is critically important also to obtain a lien on cash and depositary accounts next mentioned, to assure that the security interest in "proceeds" of Gross Revenues is not lost. Also, this definition should be reviewed for conformity with state statutory requirements for the particular issuer. Some issuers have specific formulations of this kind of collateral that should be carefully reviewed to make sure accounts receivable and other similar collateral is included. See discussion in D.1, below.

Documentation to effectuate the foregoing shall be executed and delivered at closing, even if the control agreements, Debt Service Reserve Funds or the mortgage or deed of trust are springing.[4]

It is expected that opinions will be delivered at closing with regard to due authorization, validity, and binding nature of the transaction, as well as perfection and priority of all liens and security interests, although in the latter instance reliance may be had on searches, title reports, and title insurance.

In credit circumstances below investment grade, the security interest might be broadened to cover essentially all assets of the debtor, whether now owned or hereafter acquired, including, without limitation, all now owned and hereafter acquired personal property, goods, inventory, equipment, furniture, fixtures, investment property, instruments, promissory notes, chattel paper, electronic chattel paper, tangible chattel paper, documents, letter-of-credit rights, accounts, accounts receivable, health-care insurance receivables, as-extracted collateral, rights under insurance, deposit accounts, commercial tort claims, general intangibles, payment intangibles, and software, and the products and proceeds of all of the foregoing.

Careful consideration should be given before including the following items:

(a) springing control agreements, debt service reserve funds or mortgages or deeds of trust;[5]

(b) use of GICs[6] or forward float contracts[7] on trustee held funds; and

(c) elimination of title reports, environmental due diligence, and surveys.

D. **Issues Relating to Collateral:**

1. **Gross Revenues:** Often, the term "gross revenues" or "gross receipts" or "revenues" is used in hospital financing, for two reasons. First, it has its origins in true municipal finance where capturing a revenue stream associated with an asset is simpler than in a

[4] As discussed below, the NFMA generally views "springing" collateral as significantly limited. Springing is never as automatic as it sounds. A springing mortgage, for example, without further detail, leaves the parties to negotiate and document the arrangement, with its attendant costs and complications, at a time where the parties may have difficulty cooperating. For this reason, it is desirable to negotiate the mortgage (and attendant costs, such as title, survey, and environmental reports) as part of the financing and arrange for the execution of the mortgage and placement into escrow. Further, the adverse circumstances that tend to trigger the springing requirement are the same circumstances that may cause the obligor to try to evade the springing requirement. Timing of the requirement may help. For example, with a springing DSR, if the hurdle is set far enough in advance of significant fiscal deterioration the hospital still has a lot to lose by not complying. When set early enough, the resultant drain on cash is a powerful motivator to cure the problem.

[5] See discussion at note 4.

[6] See discussion at D. 3 below.

[7] Forward float agreements are a hidden, or perhaps not so hidden, source of leverage on a transaction. Typically, they provide relatively little upfront benefit and can impose substantial termination fees. Ideally, they should be prohibited without bondholder consent.

normal commercial transaction. Secondly, it has been thought by some to avoid implicating the anti-assignment provision of the Federal healthcare reimbursement statutes by focusing on the receipt of the funds rather than the entitlement to receipt, as with the commercial term "accounts". Unhappily, however, the lack of familiarity of commercial lawyers with the term has resulted in the failure to recognize that under generally accepted accounting principles, "gross revenues" captures the entire top end of the income statement and is far broader in scope than merely "accounts". Thus, regardless of what particular formulation of the definition is used, the transaction should be secured by a pledge of and security interest in "gross revenues", defined under generally accepted accounting principles to include both revenue and income, but also mentioning in the definition the balance sheet terms with which commercial lawyers are familiar, such as "accounts", "accounts receivable", "contract rights", "general intangibles", and the like, as well as proceeds and products of the foregoing. To avoid frustrating any charitable purpose, often "gross revenues" is defined to exclude donor restricted gifts and bequests.

There are many issues related to taking a security interest in accounts receivable. These are explored in detail in Exhibit A.

2. **Cash and Depositary Accounts:** Since collateral perfection issues often depend on state law, this category is mentioned out of an abundance of caution. Properly described and documented, a lien on gross revenues should encompass a hospital's cash and funds in depositary accounts as proceeds of gross revenues. However, to avoid any confusion, and to address issues raised by recent amendments to Article 9 of the Uniform Commercial Code, the scrivener of the bond documents should provide for the trustee's lien to extend both to cash and also to all of the obligor's depositary accounts so the lien is absolute, then require the necessary steps to assure perfection. Typically, this effort will mandate execution and delivery of control agreements that govern hospital's depositary accounts, together with a covenant pledging to maintain no accounts not covered by the control agreements. With these in place, the unhappily named "lockbox" is not necessary, although in fairness the control agreements operate the same way. A necessary corollary of this effort will be the requirement of a waiver by the depositary bank of any right of offset, thereby avoiding the unpleasant discovery (made only worse when it's the commercial arm of a bank recently acquired by the bond trustee) that the hospital's purportedly unsecured working capital lender now has a banker's lien on the hospital's cash senior in right to the bondholders to secure repayment of what was to be unsecured debt. Also required will be hospital counsel's opinion on perfection and priority, although in the latter instance it may be predicated on searches.

3. **Debt Service Reserve Funds GICS:** Debt service reserve funds which are held in the form of a guaranteed investment contract ("GIC") or surety bond, are not favored, even if from a GIC provider or surety holding a rating of at least the highest or second highest categories. If included, the indenture should provide for substitution of a GIC by a surety bond of like credit strength. The indenture should also provide that the GIC or surety bond must be replaced if the provider or surety is downgraded below one of the two highest categories, and a default should result from the failure to replace within thirty days of downgrade. Participants to the transaction must delineate carefully the rights of the GIC provider in relation to the Trustee exercising remedies. If a single draw destroys the GIC in an interest rate environment which is favorable to bondholders, disputes may well develop among bondholders, some of whom will

want the interest paid to them and others of whom will want to keep the GIC in place at an above market rate.

4. **Mortgage/Deed of Trust:** While the grant of a mortgage (or deed of trust, depending on jurisdiction) is considered an essential element of a non-rated transaction, it is also often an emotional decision for the hospital. This reaction ignores the historical fact that until the advent of DRGs in the early 1980s, virtually all of hospital finance involved both mortgages and lockboxes. Since the debacle of AHERF, the mortgage has reappeared (likely for good) since the lien on after-acquired accounts is cut off at filing of a bankruptcy. The mortgage is important since, given the prevalence of bankruptcy filings, it materially augments the bondholders' control and ability to block a discount sale as well as assuring that the bondholders' recoveries are not diluted by extraneous creditors. So, for example, where the pre-petition receivables are worth $10 million, the hospital sells for $20 million, and the bond debt is $30 million, the presence of the mortgage will double the secured portion of the claim (and therefore the recovery) whereas absent the mortgage, the second $10 million of proceeds would be shared with all creditors pro rata. In some circumstances, the presence of a mortgage may permit legal action denied to the holder of simple gross revenues as in those jurisdictions, for example, where a mortgage authorizing a receiver is a legal prerequisite to appointment of a receiver. In addition, no negative pledge, no matter how recorded, will stop a mechanics lien from jumping ahead of bondholders in terms of priority once the hospital's cash position has deteriorated, but a mortgage will in all but a few states.

Bankers moved away from mortgages in the early 1980s due to the relative cost to perfect as well as the belief that no one would foreclose on a hospital. On the first point, not only must the mortgage be recorded, often at considerable expense, but surveys, title insurance, environmental reports, title reports, lien searches, and the like are the inevitable resulting burden on the deal. The hospital will ask that one or more of these be skipped, or the exceptions which are uncovered be ignored. It is not a good idea, and the examples are legion where bondholders have lost recoveries due to some uncured defect. An environmental Phase I report may be important as many indenture trustees may decline to accept a mortgage without such a report, and no indenture trustee will foreclose a mortgage absent clean environmental reports.

As for the belief that no one will foreclose, the advent of significant proprietary hospital operators and an entrepreneurial spirit have made this belief incorrect, and not-for-profit hospitals are regularly sold to third parties. Further, the strategic value of the mortgage outlined above does not depend on willingness to foreclose but rather on the operation of the bankruptcy rules. The mortgage should contain the customary lender covenants normal with financing within the state, such as authority for the appointment of a receiver, and encompass the principal operating assets.

The mortgage should cover the principal operating facilities, including the ancillary services needed to operate a hospital, such as a lien on the water, power, HVAC, fire systems, parking lots, and access easements, so that a foreclosing mortgagee will have a functionally operating asset rather than a landlocked building of limited utility. The emphasis on a collateral package that can function independently is crucial given that hospital finance in the municipal market is underwritten on an enterprise basis (i.e. based on cash flow) rather than on loan to value of real estate. Receiving only discrete pieces of property, and/or allowing carve-outs or

releases from the mortgage, increases the risk of ending up with a dysfunctional collateral package, as well as dilution of the credit by the carved out properties being separately financed.

5. **Opinions:** Because mortgages and deeds of trust are quintessentially matters of local law, it is necessary to oversee perfection, a job variously assigned to hospital counsel, underwriters' counsel, or sometimes bond counsel. Given recent experience with perfection problems, it is desirable that a clearly responsible party is designated and enforceable causes of action be created for deficiencies. One way to do this is by requiring the perfection opinion to state that the security interest has actually been perfected, as opposed to saying that it will be perfected upon the taking of some further action. Making clear the responsibility will avoid the embarrassment of a defect, a suit against the party making the error, and the asserted defense of the Good Samaritan (it wasn't my job, so don't hold me liable for doing it poorly).

E. ***Model Comprehensive Description of Collateral*:**

Attached as Exhibit B is a model description of the property to be pledged to secure repayment of the bonds, for use as a granting clause or as collateral description in a Uniform Commercial Code financing statement.

PART II. DEFAULT AND REMEDIES

Contents

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A. ***Introductory note:*** The primary purposes of the Default and Remedies provisions are to define the conditions, omissions, and acts which result in defaults under the relevant documents, and to outline the remedial actions which the indenture trustee may take to realize on the collateral securing the bonds. This section also provides that the holders of a stated percentage of the bonds may direct remedial action, an important provision in the revenue bond context where often only a few institutions own the bonds. Lastly, this section provides guidance as to how funds obtained as a result of remedial action are to be distributed.

For convenience, the provisions in this part have been drafted so that they may be directly incorporated into the bond documents (i.e., the provisions include reference to "this Indenture").

B. ***Default by the Obligor*.**

(a) **Events of Default; Default:** "Event of Default" in this Indenture means any one of the events set forth below, and "default" means any Event of Default without regard to any lapse of time or notice.[8]

(i) **Failure to Pay Interest or Principal:** Failure to pay when due and payable any installment of interest or principal on the indebtedness evidenced hereby, including without limitation the

[8] The distinction between an "Event of Default" and a "default" in this context amounts to whether or not the default triggers the right to take remedial action. A "default" is an unmatured "Event of Default."

Obligor's payment obligations under Sections [CROSS-REFERENCE SPECIFIC PAYMENT SECTIONS] hereof, or in the payment of any other sum which is payable under this Indenture, as and when the same shall become due and payable;[9] or

(ii) **Default in Payment under Loan Agreement [Lease]:** Failure to pay when due and payable any installment of interest or principal required to be paid under [CROSS-REFERENCE PAYMENT PROVISIONS UNDER LOAN AGREEMENT OR LEASE]; or

(iii) **Breach of Warranty or False Representation:** If any warranty, representation, certification, financial statement or other information made or furnished to induce the Authority to issue the Bonds or to loan the proceeds thereof to the Obligor or made or furnished, at any time, in or pursuant to the terms of any loan or disclosure document entered into or approved by the Obligor, in connection with such issuance of Bonds and loan of the proceeds thereof, shall have been false or misleading in any material respect when made;[10] or

(iv) **Insolvency Proceedings:** The Obligor shall have applied for or consented to the appointment of a receiver, trustee or liquidator of all or a substantial part of its assets; admitted in writing the inability to pay its debts as they mature; made a general assignment for the benefit of creditors; been the subject of an order for relief under the federal Bankruptcy Code, or been adjudicated a bankrupt, or filed a petition or an answer seeking reorganization, liquidation or an arrangement with creditors or taken advantage of any insolvency law, or submitted an answer admitting the material allegations of a petition in bankruptcy, reorganization, liquidation or insolvency proceeding; or an order, judgment or decree shall have been entered, without the application, approval or consent of the Obligor, by any court of competent jurisdiction approving a petition seeking reorganization of the Obligor or appointing a receiver, trustee or liquidator of a substantial part of its assets and

[9] This subparagraph references a default in payment on the bonds themselves, meaning the indenture trustee does not have sufficient funds in the relevant trust account to make what is usually a bi-annual interest or an annual sinking fund or principal payment. Note that a payment default under the Indenture will be preceded by a payment default under the related loan agreement or lease. Because most loan agreements on hospital transactions provide for monthly payment of principal and interest, and indentures typically provide for bi-annual payment of interest and annual payment of principal, by the time there is a payment default on the bonds themselves there should already be an Event of Default under the indenture as a result of the cross-default to the loan agreement or lease in the next sub-section.

[10] This backward looking covenant default does not contain a grace period, as such a default would have arisen immediately upon issuance of the bonds.

such order, judgment or decree shall continue unstayed and in effect for any period of sixty (60) consecutive days; or filed a voluntary petition in bankruptcy or failed to remove an involuntary petition in bankruptcy filed against it within sixty (60) days of the filing thereof;[11] or

(v) **Cross Defaults With Material Agreements:** A default by the Obligor (after the lapse of any applicable grace period) in (A) the payment of any other obligation it may now or hereafter have for the repayment of any Indebtedness in excess of [_____],[12] or (B) the performance of any other agreement, term or condition contained in any agreement under which any Indebtedness in excess of [_____] is created if the effect of such default is to cause, or permit the holder or holders of such Indebtedness or such obligation (or a trustee on behalf of such holder or holders) to cause such obligation to become due prior to its stated maturity (as used in this paragraph Indebtedness in excess of [_____] shall not include accounts payable and other similar items arising in the normal course of business);[13] or

(vi) **Lapse of License:** The failure to maintain in full force and effect all material licenses for the Facility for a period of sixty (60) days after notice of such failure has been received by the Obligor; or

(vii) **Material Adverse Judgments:** If a final judgment for an amount in excess of [$_____] shall be outstanding for any period of ten (10) days or more from the date of its entry and such judgment shall not have been discharged in full or stayed pending appeal; or

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[11] This fairly standard insolvency default provision is of limited value if the obligor files a bankruptcy petition, as remedial actions are stayed by the filing of the petition. However, it is sometimes useful to have certain of the default triggers listed in this section. For example, if a receiver is appointed for all or a substantial portion of the obligor's property, the indenture trustee may accelerate the bonds, thereby triggering calculation of default interest. In some jurisdictions, it is necessary to accelerate prior to a bankruptcy in order to claim default interest.

[12] The parties should establish a threshold level of debt a default on which would result in a default under the indenture. This threshold level will be different in each transaction, depending on the size of the transaction, the nature and extent of the obligor's business activities, and the risks inherent in the transaction.

[13] This default provides an early warning trigger where the obligor defaults on another material financing. For example, the obligor may have a permitted line of credit secured by accounts receivable. A default under such a line of credit would signal significant problems with the obligor's finances.

(viii) **Insurance and Taxes:** Failure to maintain insurance on the Mortgaged Property or to pay all applicable real estate taxes on the Mortgaged Property; or

(ix) **Termination of Provider and Reimbursement Agreements:** If any participation, provider or reimbursement agreement in effect for the benefit of the Obligor in connection with the operation of the Facility relating to any right of payment or other claim arising out of or in connection with the Obligor's participation in Medicare or Medicaid [or any other third party payor program contributing a material portion of the Facility's revenues] shall be terminated prior to the expiration of the term thereof or shall not be renewed or extended upon the expiration of the stated term thereof;[14] or

(x) **Medicaid Program Violations:** If a final unappealable determination is made by the applicable governmental authority that the Obligor shall have failed to comply with applicable Medicaid regulations in the operation of the Project, as a result of which failure the Obligor is declared ineligible to receive reimbursements under the Medicaid program; or

(xi) **Financial Covenant Defaults:** A violation by the Obligor of Sections [CROSS-REFERENCE FINANCIAL COVENANT REQUIREMENTS] hereof, provided that a failure to comply with the [NAME SPECIFIC COVENANTS] shall not constitute an Event of Default unless (a) the Debt Service Coverage Ratio falls to less than [_____][15] for any reporting period with respect to which compliance with the Rate Covenant is tested pursuant to Section _____ commencing with the fiscal quarter ending

[14] As many hospitals rely to a great extent on federal, state and private reimbursement programs for revenue, this default, and the following default addressing Medicaid program violations, are important components of any hospital financing. The termination of eligibility for these programs could have a material effect on the obligor's revenues. This provision is written such that termination of Medicare, Medicaid or any reimbursement program contributing a material portion of the Facility's revenues results in an immediate event of default. Depending on the credit quality of the hospital, it may be appropriate to provide some leeway with regard to termination of private reimbursement programs, or even Medicaid, to allow the Obligor the ability to terminate such a reimbursement agreement in connection with its efforts to negotiate a more favorable agreement for the hospital.

[15] Hospital bond documents typically provide for two sets of rate and liquidity covenants. The first, more stringent set of covenants, is used as an early warning device for bondholders. If the obligor fails to satisfy these covenants, the obligor is usually required to retain a consultant to provide guidance as to how to improve financial performance in order to satisfy the covenants. Generally, if the obligor retains the consultant as required, and follows the consultant's advice, there is no default. This section provides a second, hard covenant default if the obligor fails to satisfy more lenient liquidity and rate covenants. If the obligor fails to satisfy these hard covenant provisions, then there is an immediate default, without regard to whether the obligor has retained a consultant. NFMA strongly recommends that the hard rate covenant default be at least 1.0 to 1. The determination of an appropriate ratio for the hard rate covenant default and an appropriate liquidity level depends on the risks inherent in the transaction.

_____ or (b) the Obligor's Days Cash On Hand falls below [_____] Days Cash On Hand for any reporting period with respect to which compliance with the Liquidity Covenant is tested pursuant to Section _____ commencing with the fiscal quarter ending _____; or

(xii) **Transfer of Assets:** Any sale, assignment, lease, mortgage or any other transfer of any material portion of the Mortgaged Property or the Gross Revenues by the Obligor, other than as permitted by this Indenture, whether voluntarily or by operation of law, including, without limitation, through foreclosure;[16] or

(xiii) **Abandonment:** Other than as permitted by this Indenture, an abandonment by the Obligor of any portion of the Facility or failure by the Obligor to continuously operate any portion of the Facility necessary for the operation of the Facility as currently licensed; or

(xiv) **Use of Debt Service Reserve Fund:** Application of funds in the Debt Service Reserve Fund by the Trustee to pay amounts due on the Bonds or under any other Financing Document;[17] or

(xv) **Other Covenant Defaults:** The Obligor fails to observe or perform any other covenant, agreement or obligation on the part of the Obligor contained in this Indenture (other than a covenant, agreement or obligation a default in the performance of which or the breach of which is already referenced in this Subsection (x), above), provided however that if such failure is reasonably capable of being cured by Obligor, and Obligor diligently and continuously pursues such a cure, no Event of Default shall be deemed to have occurred until such failure shall have continued for a period of sixty (60) days after written notice, by registered or certified mail, to the Obligor specifying the failure and requiring that it be remedied, which notice may be given by the Trustee in its discretion and shall be given by the Trustee at the written request of a Majority of Owners; provided, that the Trustee may agree in

[16] Other than transfers of minor assets, or transfers of substantial assets with required consent, all as provided typically in the loan agreement or lease, the obligor's sale or transfer of property could have a material adverse effect on its ability to repay the bonds.

[17] This default, often not included, is important to maintaining the overall strength of the default section. If the indenture trustee does not have sufficient funds in the relevant accounts to make a regularly scheduled payment of interest or principal, the indenture typically provides that it may look to a debt service reserve fund to make up the shortfall. Under some indentures, this draw does not result in a default because the payment is made on the bonds, albeit not from funds paid in by the obligor. NFMA believes it is better to provide that a draw on the debt service reserve fund results in a default, as this aligns with the early warning feature of having the debt service reserve fund in the first place.

writing to a longer period prior to the expiration of the first sixty (60) day period; provided further, that if the Obligor shall proceed to take curative action which, if begun and prosecuted with due diligence, cannot be completed within the first period of sixty (60) days, then upon written notice thereof to the Trustee such period shall be increased without such written extension until such curative action has been completed (as to which efforts the Trustee shall be advised from time to time) or until sixty (60) days after such curative action can be diligently completed.[18]

(b) **Notice to Trustee of Default:** The Trustee shall not be required to take notice, and shall not be deemed to have notice, of any Default or Event of Default hereunder, except Events of Default under Subsections _____(a)(i) or (xiv) above, unless the Trustee shall be specifically notified in writing of the Default or Event of Default by the Obligor, by the Bondholders holding at least ten percent (10%) in aggregate principal amount of the Outstanding Bonds, or by the Authority. In the absence of such notice to the Trustee, the Trustee may assume conclusively that there is no Default or Event of Default except as provided in the previous sentence.[19]

(c) **Waiver:** Subject to Section ___ [SECTION PRESERVING RIGHTS AS TO PRINCIPAL AND INTEREST], the Trustee may waive any default and its consequences, including any acceleration, upon written approval of a Majority of Owners.[20]

C. ***Remedies for Events of Default***. If an Event of Default occurs and is continuing:

(a) Acceleration. Subject to the provisions of Section ___ below, [CROSS-REFERENCE SECTION REGARDING SOLICITATION OF MAJORITY BONDHOLDER] the Trustee may and if directed by a Majority of Owners,[21] shall by written notice to the Obligor and the Authority declare immediately due and payable the principal amount of

[18] This default includes a typical grace period to allow the obligor to attempt to correct covenant defaults that may be corrected by obligor effort. Sixty (60) days is within the norm of hospital transactions.

[19] Because of the limited information delivered to the indenture trustee under most indentures, the indenture trustee is deemed to have knowledge only of payment defaults. However, there is a provision for a particular percentage of bondholders to inform the indenture trustee officially of other defaults, at which point the indenture trustee is deemed to have knowledge of such defaults.

[20] This provision allows waiver of an event of default only upon the written approval of a certain percentage of bondowners. The simple majority requirement, provided here, is common. For better rated credits, the parties may consider giving the trustee a discretionary right to waive defaults. In light of the provisions of the "Trustee" section of this term sheet, the indenture trustee may request indemnity for waiving a default if such a waiver may subject it to liability of any kind.

[21] On a widely-held deal, a lower percentage to declare acceleration may be appropriate.

the Outstanding Bonds or the payments to be made by the Obligor therefor under the Loan Agreement, or both, and accrued interest on the foregoing, whereupon the same shall become immediately due and payable without any further action or notice.[22]

(b) Entry. The Trustee may at any time enter the Mortgaged Property, may take complete and peaceful possession of the Mortgaged Property, in whole or in part, with or without process of law, and may dispossess the Obligor therefrom, and the Obligor covenants that in any such event it will peacefully and quietly yield up and surrender the Mortgaged Property. The Trustee may operate and manage the property either directly or through its agents, receivers or other similar officials; exercise all of the powers and privileges and remedies of the Obligor with respect thereto, either in the name of the Obligor or otherwise; receive all rents, profits, revenues and other income of the Mortgaged Property; and make such repairs or alterations in or to the Mortgaged Property as it may deem necessary to place and maintain the same in good order and condition. Before making such entry, the Trustee shall give at least two (2) days' notice to the Obligor, except that, in case entry on lesser notice or without notice is necessary to preserve such property from damage, destruction, deterioration or unauthorized removal, as reasonably determined by the Trustee, the Trustee may make such entry on lesser notice or give the notice promptly after rather than before the entry. Entry under this Subsection shall not operate to release the Obligor from any sums to be paid or other obligations under this Indenture. Any such entry shall not cause the Trustee to become so called mortgagee in possession unless the Trustee declares itself so to be. [THIS SECTION MAY REQUIRE REVISION CONSISTENT WITH LOCAL LAW][23]

(c) Foreclosure.

(i) The Trustee may foreclose the Mortgage, and upon commencement of a foreclosure action in addition to all other rights and remedies available to the Trustee, shall be entitled to the appointment of a receiver of the rents, issues and profits of the

[22] The primary remedial act in response to an Event of Default, acceleration of the bonds or of the underlying payment obligations under the loan agreement, is a precursor to various activities the indenture trustee may undertake to realize on the collateral securing the bonds. This proposed provision cross-references a provision which may provide that the indenture trustee must seek bondholder input prior to acceleration. NFMA does not recommend such a bondholder approval provision in most cases, as it may prevent the indenture trustee from accelerating where time is of the essence, such as where it is clear the obligor is about to file a bankruptcy petition.

[23] The remedy of entering and taking control of the collateral, in this case a hospital, is rarely used. This is particularly the case where the indenture trustee could be subject to significant liability, as it would be here. However, in some states, entering and taking control of the mortgaged property is a prerequisite to the appointment of a receiver. As this remedy is subject to state law, this section requires revision to ensure that it complies with the indenture trustee's rights and duties under relevant local law.

Mortgaged Property as a matter of right and without notice, with power to collect the rents, issues and profits of the Mortgaged Property, due and becoming due during the pendency of such foreclosure suit, such rents, issues and profits being hereby expressly assigned and pledged as additional security for the payment of the Outstanding Bonds without regard to the value of the Mortgaged Property or the solvency of any person or persons liable for the payment of the Outstanding Bonds, and regardless of whether the Trustee has an adequate remedy at law. The Obligor for itself and any subsequent owner of the Mortgaged Property hereby waives any and all defenses to the application for a receiver, as above provided, and hereby specifically consents to such appointment without notice, except any notice required by law, but nothing herein contained is to be construed to deprive the Trustee of any other right, remedy or privilege the Trustee may have under the law to have a receiver appointed. [THIS SECTION MAY REQUIRE REVISION CONSISTENT WITH LOCAL LAW][24]

(ii) In case of foreclosure of this Mortgage in any court of law or equity whether or not any order or decree shall have been entered therein, and to the extent permitted by law, a reasonable sum shall be allowed for stenographers' fees and for all moneys expended for documentary evidence and the cost of a complete abstract of title and title report for the purpose of such foreclosure, such sums to be secured by the lien of the mortgage granted hereunder, and, to the extent permitted by law, there shall be included in any judgment or decree foreclosing the mortgage granted hereunder and paid out of said rents, issues and profits from the Mortgaged Property and the proceeds of any sale made in pursuance of any such judgment or decree: (A) all costs and expenses of such suit or suits, appraisals, advertising, sale and conveyance, including stenographers' fees, outlays for documentary evidence and the cost of said abstract, examination of title and title report; (B) reasonable fees and disbursements of legal counsel to the Trustee, to the fullest extent permitted by law; (C) all moneys advanced by the Trustee, if any, for any purposes authorized in this Indenture, with interest as herein provided; (D) all the accrued interest remaining unpaid on the Outstanding Bonds; and (E) all the principal and premium, if any, of the Outstanding Bonds. The surplus of the proceeds, if any, shall be paid to the Obligor promptly after request by the

[24] This remedial provision is particularly useful as there has been an increase in the use of state and federal receivership for healthcare facilities, including hospitals. Subject to applicable state law, this provision allows the indenture trustee to commence foreclosure and request the appointment of a receiver, and the obligor has consented to the appointment of the receiver. While not always sufficient, itself, to obtain the appointment of a receiver, the obligor's written consent upon default is useful evidence before the court.

Obligor, or as the court may direct. [THIS SECTION MAY REQUIRE REVISION CONSISTENT WITH LOCAL LAW][25]

(iii) In case of any foreclosure sale of the Mortgaged Property, the same may be sold in one or more parcels and at one time or from time to time.[26]

(d) Rights as a Secured Party. The Trustee may exercise all of the rights and remedies of a secured party under the UCC with respect to that portion of the Mortgaged Property pledged hereunder which is or may be treated as collateral under the UCC. The Trustee may deal with such property as collateral under the UCC or as provided herein or in part the one and in part the other. Notice of any public sale of such collateral under the UCC shall be given in the same manner as is provided in Subsection _____ (c) [CROSS-REFERENCE SUBSECTION ABOVE]. Notice sent by registered or certified mail, postage prepaid, or delivered during business hours, to the Obligor at least seven (7) days before an event under UCC Section 9 504(3) or any successor provision of law shall constitute reasonable notification of such event. To the extent permitted by law, the Trustee may treat all or any portion or portions of the Mortgaged Property as personal property and may remove the same for the purposes of exercising its rights and remedies hereunder. Before any such removal of Mortgaged Property which has not been sold pursuant to a power of sale, the Trustee shall give at least ten (10) days' notice to the Obligor, except that, in case removal on lesser notice or without notice is necessary to preserve such property from damage, destruction, deterioration or unauthorized removal, as reasonably determined by the Trustee, the Trustee may remove such property on lesser notice or give the notice promptly after rather than before the removal.[27]

(e) Rights as to Gross Revenues. The Trustee may exercise all of the rights and remedies of a secured party, under the UCC or otherwise, with respect to the lien on Gross Revenues created by Subsection ____ [CROSS-REFERENCE GRANT OF LIEN ON GROSS REVENUES.] Without limiting the generality of the foregoing, to the extent permitted by law, the Trustee may realize upon such lien by any one or more of the following actions: (i) enter the Mortgaged Property and take possession of copies of the financial books and records of the Obligor relating to the Gross Revenues and of all checks or other orders for payment of money and cash

[25] This typical "costs" section requires editing consistent with the requirements of state law.

[26] If the collateral can be subdivided in such a way as to increase its overall value at foreclosure, the indenture trustee may hold more than one foreclosure sale.

[27] This section allows the indenture trustee to accomplish foreclosure on the personal property along with the real property.

in the possession of the Obligor representing Gross Revenues or proceeds thereof; (ii) notify account debtors obligated on any Gross Revenues to make payment directly to the order of the Trustee; (iii) collect, compromise, settle, compound or extend Gross Revenues which are in the form of accounts receivable or contract rights from the Obligor's account debtors by suit or other means and give a full acquittance therefor and receipt therefor in the name of the Obligor, whether or not the full amount of any such account receivable or contract right owing shall be paid to the Trustee; (iv) require the Obligor to deposit all cash, money and checks or other orders for the payment of money which represent Gross Revenues within five (5) Business Days after receipt of written notice of such requirement, and thereafter as received, into a fund or account to be established for such purpose by the Trustee, provided, however, that the requirement to make such deposits shall cease, and the balance of such fund or account shall be paid to the Obligor, when all Events of Default have been cured; (v) forbid the Obligor to extend, compromise, compound or settle any accounts receivable or contract rights which represent Gross Revenues, or release, wholly or partly, any person liable for the payment thereof (except upon receipt of the full amount due) or allow any credit or discount thereon; (vi) endorse in the name of the Obligor any checks or other orders for the payment of money representing Gross Revenues or the proceeds thereof; and (vii) exercise any rights resulting from such default under agreements with third parties, including, without limitation, so called "control agreements". Without limiting the generality of the foregoing, any of the foregoing may be accomplished by a receiver for the Mortgaged Property, duly appointed by a court of competent jurisdiction.[28]

(f) The Trustee in its discretion may, and upon the written request of a Majority of Owners shall, in its own name:

(i) by mandamus, or other suit, action or proceeding at law or in equity, enforce all rights of the Bondholders under the Bonds and all rights of the Bondholders, at law or in equity relating to the purchase or ownership of the Bonds, including but not limited to the right to require the Authority to charge and collect moneys adequate to carry out the terms of the Indenture and to require the Authority to carry out any other agreements with, or for the benefit of, the Bondholders and to perform such agreements or their duties under the Act;

(ii) bring suit upon the Bonds;

[28] As with the remedy allowing the indenture trustee to enter the mortgaged property, above, this remedy is little used, except in connection with the appointment of a receiver.

(iii) by action or suit in equity require the Authority to account as if it were the trustee of an express trust for the Bondholders;

(iv) by action or suit in equity enjoin any acts or things which may be unlawful or in violation of the rights of the Bondholders; and

(v) exercise all of the rights and remedies provided in Mortgage and the other Security Documents.

(g) Retain or Replace Manager. The Trustee may, and upon the written direction of a Majority of Owners, shall direct the Obligor to retain an Independent management company (including replacement of an existing management company) acceptable to the directing Bondholders and under terms and pursuant to a management agreement acceptable to the directing Bondholders , and the Obligor shall be obligated to comply with such direction.[29]

(h) Obligor Retention of Consultant. [CROSS-REFERENCE COVENANTS PROVISIONS REGARDING RETENTION OF CONSULTANT UPON FINANCIAL COVENANT DEFAULT.]

(i) Exercise of Remedies Without Acceleration. The Trustee may exercise the remedies set forth in Subsections ___(b) through ___(h) hereof whether or not the Trustee has accelerated the Bonds pursuant to Subsection ___(a) hereof.

(j) Survival of Indenture. Notwithstanding anything herein to the contrary, this Indenture and all of its terms shall survive foreclosure of or other realization on the Mortgaged Property and the Trustee and the Issuer shall retain each and every right, power and duty hereunder. [UNDER CERTAIN CIRCUMSTANCES, THIS SUB-SECTION IS NECESSARY TO RETAIN THE RIGHT TO SUE FOR A DEFICIENCY.]

D. ***Court Proceedings.***

(a) The Trustee may enforce the obligations of the Obligor under this Indenture, the Loan Agreement or any other Security Document by legal proceedings for the specific performance of any covenant, obligation or agreement contained in any of the foregoing, whether or not any breach has become an Event of Default, or for the enforcement of any other appropriate legal or equitable remedy, and may recover damages caused by any breach by the Obligor of the provisions of this Indenture, the Loan Agreement or any Security Document including (to the extent this Indenture or any other Security Document may lawfully provide) court

[29] It has become more common for the indenture trustee to have the ability to cause the obligor to terminate its current third-party manager under certain circumstances.

costs, reasonable attorneys' fees and other costs and expenses incurred in enforcing the obligations of the Obligor hereunder, under the Loan Agreement or under any other Security Document. The Authority may likewise enforce obligations to it hereunder which it has not assigned to the Trustee, including court costs, reasonable attorney's fees and other costs and expenses of enforcement. Without limiting to the Bondholders' individual right to sue under Section __, the Trustee may also bring any action one or more Bondholders may possess against the Obligor or third parties by virtue of their purchase or ownership of the Bonds, on behalf of and for the benefit of such Bondholders.

(b) The Trustee is hereby authorized and directed, on behalf of the Bondholders, to file a proof or proofs of claim in any bankruptcy, receivership or other insolvency proceedings involving the Obligor.[30]

E. ***Trustee May Perform Obligations.*** If the Obligor fails to observe or perform any covenant, condition, agreement or provision contained in this Indenture or under any Security Document with respect to the Mortgaged Property (including, without limitation, the insurance, maintenance or repair of the Mortgaged Property and the payment of taxes or other governmental charges thereon), whether or not there is an Event of Default hereunder, the Trustee may perform such covenant, condition, agreement or provision in its own name or in the Obligor's name, and is hereby irrevocably appointed the Obligor's attorney in fact for such purpose. The Trustee shall give at least seven (7) days' notice to the Obligor before taking action under this Section, except that in the case of emergency as reasonably determined by the Trustee, the Trustee may act on lesser notice or give the notice promptly after rather than before taking the action. The reasonable cost of any such action by the Trustee shall be paid or reimbursed by the Obligor pursuant to Subsection ____. The Obligor shall have no cause of action against the Trustee or any Bondholders for exercising or failing to exercise any remedial right granted hereunder.[31]

F. ***Remedies Cumulative.*** The rights and remedies under this Indenture shall be cumulative and shall not exclude any other rights and remedies allowed by law, provided there is no duplication of recovery. The failure to insist upon a strict performance of any of the obligations of the Obligor or of the Authority or to exercise any remedy for any violation thereof shall not be taken as a waiver for the future of the right to insist upon strict performance or of the right to exercise any remedy for the violation.

G. ***Bondholders May Direct Proceedings; Retention of Counsel; Selection of Consultants.*** A Majority of Owners shall have the right to direct the method and place of

[30] In any bankruptcy, receivership, or insolvency, the indenture trustee files proofs of claim for claims represented by the bonds, and individual bondholders do not file such proofs of claim. The only claims to be filed by bondholders are those personal to the bondholders and not arising under the bonds themselves. For example, if a bondholder has a claim based in fraud or tort against the obligor, the bondholder would file an independent proof of claim addressing those claims.

[31] This provision allows the indenture trustee to protect its lien on the collateral by paying taxes, making repairs, or obtaining insurance coverage for the project, among other things.

conducting all remedial proceedings by the Trustee under this Indenture; provided, that such direction shall not be in conflict with any rule of law or with this Indenture. Without limiting the foregoing, any such remedial proceeding may include forbearance or non-action on the part of the Trustee, the acceptance by the Trustee, as mortgagee under the Mortgage, of a deed in lieu of foreclosure, "bidding - in" the debt represented by the Bonds at any foreclosure or bankruptcy or receivership sale, the sale of all or a part of the Mortgaged Property free and clear of the lien of the Indenture and the Mortgage for an amount less than amounts due with respect to the Bonds and the waiver of claims or the granting of a covenant not to sue. In addition, any such remedial proceeding may include directing the Trustee to employ counsel to represent the Trustee, or to represent both the Trustee and the directing Bondholders, in any claim or remedial action; provided that if the directing Bondholders direct the Trustee to retain counsel for both the Trustee and the directing Bondholders, and the Trustee determines that there is a conflict of interest between the Trustee and such directing Bondholders, and the Trustee and the directing Bondholders are not willing to waive such conflict or such counsel is unwilling to serve notwithstanding any such waiver, then the Trustee shall be entitled to retain separate counsel (reasonably acceptable to the directing Bondholders).[32]

H. ***Trustee Solicitation of Majority Bondholder Prior to Providing Approval or Accelerating Obligations.*** If any group of three (3) or fewer Bondholders or beneficial owners of Bonds which are separate entities (i) collectively own more than fifty percent (50%) of the aggregate principal amount of all Outstanding Bonds, and (ii) have notified the Trustee in writing of its or their desire to be deemed a "Majority Bondholder", then (a) in each and every instance under the terms of this Indenture where the Trustee is required to provide or withhold its approval of any action of the Obligor or regarding the Project including, without limitation, the retention of a Consultant and the approval of a Manager, and (b) prior to any acceleration of all or part of the obligations hereunder, before giving or withholding its approval or accelerating any obligations hereunder the Trustee shall provide seven (7) days written notice to the Majority Bondholder of the requested approval or acceleration. If the Trustee does not receive a written response from the Majority Bondholder within seven (7) days of the Trustee's written notice to the Majority Bondholder, the Trustee may give or withhold its approval, as requested, or accelerate the obligations, consistent with its duties under this Indenture. If the Trustee receives a written response from the Majority Bondholder within the prescribed period, the Trustee shall give or withhold its approval or accelerate or not accelerate the obligations hereunder consistent with the direction of the Majority Bondholder. The Trustee shall not be entitled to indemnity for, and shall not be liable to the Majority Bondholder or to any other Bondholder for, accelerating or not accelerating the obligations hereunder consistent with the direction of the Majority Bondholder under this Section. Written notice to the Majority Bondholder under this Section shall be provided by electronic mail, where available, or by telecopy, where available, or otherwise by overnight delivery. The notices required under this paragraph may be waived for

[32] This provision is particularly important as it provides a percentage of bondholders the power to direct the trustee's actions after default. Such directions generally require indemnification of the indenture trustee against any possible liability as provided below in the "Trustee" section. The simple majority threshold, provided here, is typical in hospital transactions.

any specified period of time by the written direction of Majority of Owners pursuant to Section ___ [CROSS-REFERENCE BONDHOLDER DIRECTION PROVISION].[33]

I. ***Restrictions Upon Action by Individual Bondholders.***

Except as provided in [CROSS-REFERENCE BONDHOLDER DIRECTION PROVISION] hereof, no Bondholder shall have any right to institute any suit, action or proceeding in equity or at law on any Bond or for the execution of any trust hereunder or for any other remedy hereunder unless such Bondholder previously has (a) given to the Trustee written notice of an Event of Default on account of which such suit, action or proceeding is to be instituted, (b) together with Bondholders holding not less than 25% in aggregate principal amount of the Bonds then Outstanding made written request of the Trustee to exercise such powers or right of action after such right has accrued, (c) afforded the Trustee a reasonable opportunity either to proceed to exercise the powers hereinabove granted or to institute such action, suit or proceeding in its or their name, and (d) offered to the Trustee reasonable security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee has refused or neglected to comply with such request within thirty (30) days. Such notification, request and offer of indemnity are hereby conditions precedent to the execution of the powers and trusts of this Indenture or to any other remedy hereunder. Notwithstanding the foregoing provisions of this paragraph and without complying therewith, but subject to the provisions of the next succeeding sentence, Bondholders holding not less than 25% in aggregate principal amount of the Bonds then Outstanding may institute any such suit, action or proceeding in their own names for the benefit of all Bondholders. It is understood and intended that no one or more Bondholders hereby secured have any right in any manner whatever by this Indenture or to enforce any right hereunder except in the manner herein provided, that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the benefit of all Bondholders, and that any individual right of action or other right given to one or more of such Bondholders by law is restricted by this Indenture to the rights and remedies herein provided; provided, however, that subject to Section __ [CROSS REFERENCE TO ANY SUPERMAJORITY RESTRUCTURING PROVISION][34] nothing in this Article __ shall affect or impair the right of any Bondholder to enforce the payment of principal of, premium and interest on its Bonds at the time and place said Bond expressed.

J. ***Annulment of Acceleration.*** After the principal of the Bonds has been declared to be due and payable, Bondholders holding greater than 50% in aggregate principal amount of all Bonds Outstanding, by written notice to the Authority and Trustee, may annul such declaration and its consequences, and such annulment shall be binding upon the Trustee and upon all owners of Bonds issued hereunder. No such annulment shall extend to or affect any subsequent default or impair any right or remedy consequent thereon.

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[33] The parties should determine, under the circumstances, the appropriate number for assembling a "Majority Bondholder." For example, in a deal where six institutions hold much of the issue, three may be too low a number. Further, application of this provision, particularly in the context of determining whether to accelerate the bonds, may not be advisable in every instance. For example, in some jurisdictions, acceleration of the debt pre-bankruptcy may be required to include interest at a default rate or an acceleration premium as part of a bankruptcy claim. NFMA recommends that the parties consult with counsel prior to including this provision in the indenture.

[34] See Part IX - Amendments, and in particular footnote 92 and accompanying text.

K. ***Discontinuance of Proceedings by Trustee.*** If any proceeding commenced by the Trustee on account of any Event of Default is discontinued or is determined adversely to the Trustee, the Authority, the Trustee and the Bondholders shall be restored to their former positions and rights hereunder as though no such proceedings had been commenced.

L. ***Trustee May Enforce Rights Without Possession of Bonds.*** All rights under this Indenture and the Bonds may be enforced by the Trustee without the possession of any Bonds or the production thereof at the trial or other proceedings relative thereto, and any proceeding instituted by the Trustee shall be brought in its name for the ratable benefit of the Bondholders.[35]

M. ***Application of Moneys after Default.***[36] (a) Following an Event of Default pursuant to Section ____ hereof, any moneys received by the Trustee under this Article ___, and all moneys then or thereafter on deposit in the funds held by the Trustee (excluding the Rebate Fund), shall be applied in the following order:

(a) To the payment of the reasonable costs of the Authority, the Trustee, and a Majority of Owners, including reasonable counsel fees and expenses and any disbursements of the Authority, Trustee, and a Majority of Owners, to the payment of the Trustee's reasonable compensation, and to the payment of any expense reimbursement obligations and indemnification obligations owed by the Obligor to the Authority.

(b) To make any payments necessary to implement the rights and remedies available to the Trustee under this Indenture, the Agreement and the other Bond Documents.

(c) If a Majority of Owners so direct, to the payment of the reasonable costs and expenses of the operation, maintenance, repair and improvement of the Project;

(d) (i) Unless the principal of all Bonds shall have become or shall have been declared due and payable, first, to the payment to the persons entitled thereby of all installments of interest then due on the Bonds (including default interest), in such direct order of the maturity of the installments of such interest and, if the amounts available shall not be sufficient to pay in full any particular installment, then to the payment ratably, according to the amounts due on such installment, to the persons entitled thereto, without discrimination or privilege, second, to the payment to the persons entitled thereto of the unpaid principal and redemption price, if any, on any of the Bonds, which shall have become due (other than Bonds which have matured or otherwise become payable prior to such Event of Default

[35] As the representative of the bondholders, the indenture trustee acts on their behalf whether it owns any bonds or not.

[36] This fairly typical application provision instructs the indenture trustee to apply funds on hand after default and remedial action.

and moneys for the payment of which are held in the Bond Fund or otherwise held by the Trustee), with interest on such principal from the respective dates upon which the same became due and, if the amount available shall not be sufficient to pay in full the amount of principal and redemption price, if any, due on any particular date, then to the payment ratably, according to the amount of principal due on such date, to the persons entitled thereto, without any discrimination or privilege;

(ii) If the principal of all Bonds shall have become or shall have been declared due and payable, to the payment of principal, redemption price (including any applicable Acceleration Premium) and interest then owing on the Bonds (including default interest) and, in case such money shall be insufficient to pay the same in full, then to the payment of principal, redemption price (including any applicable Acceleration Premium) and interest then owing on the Bonds (including default interest) ratably, without preference or priority of one over another or of any installment of interest over any other installment of interest.

(e) The surplus, if any, shall be paid to the Obligor or the person lawfully entitled to receive the same as a court of competent jurisdiction may direct.

Whenever money is to be applied by the Trustee pursuant to the provisions of this Section, such money shall be applied by the Trustee at such times and from time to time, as the Trustee in its sole discretion shall determine, having due regard for the amount of such money available for such application and the likelihood of additional money becoming available for such application in the future; the setting aside of such money, in trust for the proper purpose, shall constitute proper application by the Trustee, and the Trustee shall incur no liability whatsoever to the Issuer, to any Bondholder or to any other Person for any delay in applying any such money so long as the Trustee acts with reasonable diligence, having due regard for the circumstances, and ultimately applies the same in accordance with such provisions of this Indenture as may be applicable at the time of application by the Trustee. Whenever the Trustee shall exercise such discretion in applying such money, it shall fix the date (which shall be an Interest Payment Date unless the Trustee shall deem another date more suitable) upon which such application is to be made and upon such date interest on the amounts of principal to be paid on such date shall cease to accrue.

PART III. THE TRUSTEE AND PAYING AGENT

Contents

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A. ***Introductory note:*** The primary purposes of the Trustee and Paying Agent provisions are to define the rights and duties of the indenture trustee. In general, the indenture trustee acts as a fiduciary for the bondholders. However, the indenture spells out specific duties of the indenture trustee, and limits the actions the indenture trustee may be required to take if such actions may result in the indenture trustee undertaking personal liability. This section also sets forth the priority of payment of the indenture trustee's fees and expenses.

For convenience, the provisions in this part have been drafted so that they may be directly incorporated into the bond documents (i.e., the provisions include reference to "this Indenture").

B. ***Corporate Organization, Authorization and Capacity.*** The Trustee represents and warrants that it is a corporation duly organized and validly existing under the laws of the State of _____, having the powers of a trust company within the State of _____ [NAME STATE OF PROJECT], that it has qualified to do business in any state where it is necessary or desirable to do so to undertake the duties hereunder, including the capacity to exercise the powers and duties of the Trustee hereunder, and that by proper corporate action it has duly authorized the execution and delivery of this Indenture.[37]

C. ***Rights and Duties of the Trustee***

1. **Moneys to be Held in Trust.** All moneys received by the Trustee under this Indenture shall be held by the Trustee in trust and applied subject to the provisions of this Indenture.

2. **Accounts.** The Trustee shall keep proper accounts of its transactions hereunder (separate from its other accounts), which shall be open to inspection by the Authority, the Obligor and the Bondholders and their representatives duly authorized in writing.

[37] In many cases, state law requires that the indenture trustee be qualified in one way or another to undertake the trust. Consequently, this provision addresses some of the more common qualification requirements.

3. **Bond Register; Beneficial Owners; Percentage.**

(a) The Paying Agent shall keep a register of Bonds (the "Bond Register") in which shall be maintained the names and addresses of all owners thereof, the numbers and amounts of the Bonds, and other information appropriate to the discharge of its duties hereunder. The Paying Agent shall make the Bond Register available to the Obligor and the Authority for its inspection during normal business hours. In addition, the Paying Agent shall, upon request of any Bondholder owning at least ten percent (10%) in aggregate principal amount of Bonds Outstanding and at the expense of the Obligor, provide to the requesting Bondholder a list of the names and addresses of all registered Bondholders.[38]

(b) The Paying Agent shall also maintain a register of the beneficial owners of Bonds. The register of beneficial owners of Bonds shall include all parties who have provided to the Paying Agent written certification of beneficial ownership of Bonds (including a mailing address) accompanied by evidence thereof reasonably satisfactory to the Paying Agent.[39] Upon the transfer of a Bond, the new registered Bondholder shall become the beneficial owner until another beneficial owner is designated. A copy of any notice sent hereunder to Bondholders shall also be sent to beneficial owners and any consent, request, direction, approval, objection or other instrument or action required or permitted by this Indenture to be executed or taken by any Bondholder (other than the transfer of a Bond) shall be fully effective if executed or taken by the beneficial owner thereof provided that, in the event of conflicting instruments executed by the registered Bondholder and the beneficial owner, the action of the registered Bondholder shall govern.[40]

(c) For purposes of determining whether a Bondholder holds a certain percentage in aggregate principal amount of Bonds Outstanding for the purposes of this Indenture, ownership by Bondholders which are affiliates

[38] Note that in most cases the sole registered holder of the bonds will be "Cede & Co." as nominee for The Depository Trust Company.

[39] This provision is relatively new to revenue bond indentures. The goal of this provision is to provide a method for beneficial owners of bonds, otherwise not known to the indenture trustee under the DTC system, to identify themselves as such. It is left up to the indenture trustee to determine what proof is necessary to prove beneficial ownership. For example, some indenture trustees will accept a letter from the beneficial owner's DTC participant representing that it holds a position in the name of the beneficial owner. The resulting streamlining of the bondholder consent and approval process has proven beneficial to bondholders and obligors.

[40] This fairly progressive provision allows the indenture trustee to recognize directions from beneficial owners rather than registered owners, as is technically required under most indentures. In practice, beneficial owners are the primary players in any default and thus indenture trustees routinely deal directly with beneficial owners. However, numerous indenture trustees require specific written direction from the registered owner, which is often difficult and time-consuming to obtain through the DTC system. This provision attempts to short-circuit the process and eliminate potential delays.

shall be aggregated. A Bondholder is an affiliate of another if the first controls the second, is controlled by the second or is under common control with the second, or if both Bondholders share a common investment advisor (or affiliated investment advisors). The Trustee shall be entitled to rely upon a certificate of any Bondholder with respect to such matters. For the purposes of this Subsection, Bondholder shall be deemed to include beneficial owners of the Bonds listed in the register thereof maintained under clause (ii) hereof.[41]

(d) Performance of the Authority's Obligations. If the Authority shall fail to observe or perform any covenant or obligation contained in this Indenture, the Trustee may to whatever extent it deems appropriate for the protection of the Bondholders or itself, perform any such obligation in the name of the Authority and on its behalf.

(e) Notices of Default. The Trustee shall not be required to monitor the financial condition of the Obligor or the physical condition of the Mortgaged Property and, unless otherwise expressly provided, shall not have any responsibility with respect to reports, notices, certificates or other documents filed with it hereunder, except to make them available for inspection by Bondholders. Except for (i) a default under Subsections _____[LIST PAYMENT DEFAULT SECTIONS] hereof or (ii) the failure of the Obligor to provide proof of insurance as required hereunder or file financial statements or reports required to be filed with the Trustee pursuant to Subsections [LIST RELEVANT SECTIONS] hereof or (iii) any other event of which the responsible trust officer has "actual knowledge" and which event, with the giving of notice or lapse of time or both, would constitute an Event of Default under this Indenture, the Trustee shall not be required to take notice of any other breach or default by the Obligor or the Authority except when given written notice thereof by the owners of not less than ten percent (10%) in aggregate principal amount of the Outstanding Bonds. As used above, the term "responsible trust officer" means the trust officer of the Trustee assigned to supervise this Indenture and "actual knowledge" means the actual fact or state of knowing, without any duty to make any investigation with regard thereto. The Trustee shall notify the Bondholders within five (5) Business Days of an Event of Default described in clauses (i), (ii) and (iii) above.[42]

(f) Indemnity. Except as otherwise specifically provided herein, the Trustee shall not be required to take any remedial action provided for in this

[41] This provision allows mutual funds under common management to be considered a single beneficial owner for purposes of the indenture.

[42] As stated above, it is common to provide that the indenture trustee has notice only of payment defaults and defaults of which it has actual knowledge.

Indenture or under applicable law (other than the giving of notice) unless it receives reasonable indemnity in an amount and in a form satisfactory to the Trustee in its sole discretion, for any expense (including reasonable counsel fees and expenses) or liability to be incurred therein. Each indemnity shall be only for those actions taken or not taken at the indemnifying Bondholder's written direction. In the case in which more than one Bondholder is providing indemnity, such indemnity shall be several and not joint as to each Bondholder, and the indemnity obligation of each directing Bondholder shall not exceed such Bondholder's pro rata share of the aggregate amount of outstanding Bonds held by the directing Bondholders. The Trustee shall not require an indemnity bond or other security for indemnity if the Bondholders providing such reasonable indemnity as is required hereunder have an aggregate net worth or net asset value in excess of $100 million. If provided indemnity by the Bondholders as provided in this Section, Trustee shall retain nationally recognized counsel or other nationally recognized advisors designated by the indemnifying Bondholders (it being agreed that the Trustee may retain and be reimbursed from the trust estate for the costs of Trustee's independent counsel to negotiate the indemnity on behalf of Trustee and to analyze whether the direction of the Bondholders is being given in accordance with the Agreement but no other fees unless specifically provided herein or otherwise agreed by the indemnifying Bondholders).[43]

(g) Environmental Liability. Notwithstanding anything to the contrary contained in this Indenture, in the event the Trustee is entitled to commence an action to foreclose under this Indenture or otherwise exercise its remedies to acquire control or possession of the Facility, the Trustee shall not be required to commence any action or exercise any such remedy if the Trustee has reasonably determined that the Trustee may incur liability under any environmental law as the result of the presence at, or release on or from the Facility of any Hazardous Materials unless the Trustee has received security or indemnity from a person, in an amount and in a form satisfactory to the Trustee in its sole discretion, protecting the Trustee from all expenses (including reasonable counsel fees and expenses) and liability. In the case in which more than one Bondholder is providing indemnity, such indemnity shall be several and not joint as to

[43] The typical revenue bond indenture includes a provision to the effect that the indenture trustee need take no action that would subject it to liability of any kind. This provision is customary because while the indenture trustee acts as a fiduciary for the bondholders, it has no stake in the investment and should not be placing its assets at risk. However, the common indemnity provision leaves open several issues specifically addressed in this draft provision. For example, this draft provides: (i) that the indemnifying bondholders share liability according to their relative interest in the bonds, but without each indemnitor guarantying the obligations of any other indemnitor, (ii) that 100% of the indemnification liability, if any, is born by the directing bondholders even if they are not all of the holders of the bonds, and (iii) that if the directing bondholders have net worth of a minimum amount the indenture trustee cannot require a bond. As drafted, this provision would allow the majority of United States mutual funds to provide a written indemnity without a supporting bond.

each Bondholder, and the indemnity obligation of each directing Bondholder shall not exceed such Bondholder's pro rata share of the aggregate amount of outstanding Bonds held by the directing Bondholders. The Trustee shall not require an indemnity bond or other security for indemnity if the Bondholders providing such reasonable indemnity as is required hereunder have an aggregate net worth or net asset value in excess of $100 million.[44]

(h) Upon receipt of written notice, direction or instruction as provided herein, and after making such investigation, if any, as it deems appropriate to verify the occurrence of any event of which it is notified, the Trustee shall promptly pursue the remedy provided by this Indenture or any of such remedies (not contrary to any such direction) as it deems appropriate for the protection of the Bondholders (or as directed by the Bondholders pursuant to this Indenture), and in its actions under this Indenture, the Trustee shall act for the protection of the Bondholders with the same promptness and prudence as would be expected of a prudent person in the conduct of such person's own affairs.[45]

(i) Reports by the Trustee.[46]

(i) Within ten (10) days after the end of any month, the Trustee shall furnish to any Bondholder upon written request, without charge to the Bondholder, a report on the status of each of the funds and accounts established under this Indenture that are held by the Trustee, showing at least the balance in such fund or account as of the first day of the preceding month, the deposits to (including interest on investments) and the disbursements from each such fund or account during such preceding month, and the balance in each such fund or account on the last day of the preceding month.

(ii) Within 30 days after the end of each Fiscal Year of the Obligor, the Trustee shall furnish to any Bondholder upon written request, without charge to the Bondholder, an annual report for such Fiscal Year on the status of each of the funds and accounts within funds established under the Agreement that are held by the Trustee, showing at least the balance in each such fund or account as of the first day of such Fiscal Year, the deposits to (including interests

[44] This provision is parallel to the bondholder indemnity provision, above.

[45] This provision allows the indenture trustee to take action as necessary to fulfill its fiduciary duty, unless specifically directed to do otherwise (and subject to other applicable law).

[46] These provisions address concerns of various institutional bondholders in connection with the availability of information regarding trust fund balances or any other information in the possession of the indenture trustee. NFMA notes that such information may include material, non-public information and recommends that the parties discuss this provision with counsel prior to including it in the indenture.

and investments) and the disbursements from each such fund or account during such Fiscal Year, and the balance in each such fund or account on the last day of such Fiscal Year.

(iii) Upon the request of any Bondholder, the Trustee will provide such Bondholder information about the Authority, the Obligor or the Trustee within the Trustee's possession or reasonably obtainable.

(j) Notices by the Trustee.[47] The Trustee shall give notice to the Obligor, the Authority, and each Bondholder of:

(i) the failure of the Obligor to make a payment required of it under Subsection _____ [CROSS-REFERENCE PAYMENT SECTION];

(ii) any withdrawal from the Debt Service Reserve Fund or decline in value of investments in such Fund resulting in the amount therein being less than the Debt Service Reserve Fund Requirement;

(iii) any withdrawal from the Replacement Reserve Fund pursuant to Subsection _____;

(iv) the failure of the Obligor to file financial statements or reports required to be filed with the Trustee pursuant to Subsections _____;

(v) any other event of which the responsible trust officer (as defined in Subsection _____) has actual knowledge (as defined in Subsection _____) and which event, with the giving of notice or the lapse of time, or both, would constitute an Event of Default under this Indenture; and

(vi) any material event under paragraph (b)(5)(i)(C) of Rule 15c2-12 promulgated under the Securities Exchange Act of 1934, as amended.

(k) Provision of Information to Third Parties. Upon written request, the Trustee may provide to third parties, including without limitation prospective purchasers of Bonds, bond insurers, and bond pricing services, any information included under Subsection (j) of this Section, including, without limitation, information regarding any material event under

[47] This section may be supplanted by a separate disclosure agreement.

paragraph (b)(5)(i)(C) of Rule 15c2-12 promulgated under the Securities Exchange Act of 1934, as amended.[48]

(l) Responsibility. The Trustee shall be entitled to the advice of counsel (who may be counsel for one or more Bondholders) and shall not be liable for any action taken in good faith in reliance on such advice. The Trustee may rely conclusively on any notice, certificate or other document furnished to it under this Indenture and reasonably believed by it to be genuine. The Trustee shall not be liable for any action taken or omitted to be taken by it in good faith and reasonably believed by it to be within the discretion or power conferred upon it, or taken by it pursuant to any direction or instruction by which it is governed under this Indenture or omitted to be taken by it by reason of the lack of direction or instruction required for such action, or be responsible for the consequences of any error of judgment reasonably made by it, provided, however, that the Trustee shall not be relieved from liability for its own negligence or its own willful misconduct. When any payment or consent or other action by the Trustee is called for by this Indenture, the Trustee may defer such action pending receipt of such evidence, if any, as it may reasonably require in support thereof. A permissive right or power to act shall not be construed as a requirement to act. The Trustee shall in no event be liable for the application or misapplication of funds, or for other acts or defaults, by any person, firm or corporation except by its own directors, officers, agents and employees. No recourse shall be had by the Obligor, the Authority, any Bondholder or any holder of Alternative Indebtedness for any claim based on this Indenture, the Bonds, any Alternative Indebtedness or any agreement securing the same against any director, officer, agent or employee of the Trustee unless such claim is based upon the bad faith, fraud or deceit of such person. Without limiting the foregoing, the Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture, and no implied agreements or obligations shall be read into this Indenture against the Trustee. In case an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in its exercise, as a prudent person would exercise or use under circumstances in the conduct of his or her own affairs.

(m) Ownership of Bonds. The Trustee may be or become the owner of or trade in Bonds with the same rights as if it were not the Trustee.

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[48] This provision addresses certain concerns raised by institutional bondholders regarding the availability of information to entities other than current bondholders. In addition, NFMA recommends that elsewhere in the bond documents the obligor be required to adopt, and agree to be governed by, the indenture so that provisions such as this may be binding on the obligor.

(n) Surety Bond. The Trustee shall not be required to furnish any bond or surety.

(o) Continuation Statements. It shall be the duty of the Trustee to file or cause to be filed such continuation statements as may be required by the UCC with respect to any security interest granted to the Trustee hereunder for the benefit of the Bondholders.[49] The Obligor shall pay or reimburse the Trustee for all reasonable costs incurred by the Trustee in the preparation and filing of any such continuation statements.

(p) Financial Obligations. Nothing contained in this Indenture shall in any way obligate the Trustee to pay any debt or meet any financial obligations to any person in relation to the Mortgaged Property except from moneys received under the provisions of this Indenture as provided herein or from the exercise of the Trustee's rights hereunder other than the moneys received for its own purposes.

(q) Trustee Not Required to Pay Interest. The Trustee shall not be under any liability for interest on any money received hereunder except such as may be agreed upon with the Authority or the Obligor.

(r) Reports Delivered to the Trustee. The Trustee shall be under no obligation to analyze, review or make any credit decisions with respect to any financial statements or reports received by it hereunder but shall hold such financial statements and reports solely for the benefit of, and review by, Bondholders and such other parties to whom Trustee may provide such information pursuant to this Indenture.[50]

(s) No Responsibility for Disclosure Documents. Except for information concerning the Trustee, the Trustee shall have no duty or responsibility to examine or review and shall have no liability for the contents of any document submitted or delivered to any Bondholder in the nature of a preliminary or final placement memorandum, official statement, offering circular, or other disclosure document.[51]

(t) No Responsibility for Operation or Maintenance of Facilities. All costs of operating and maintaining the Facility shall be paid by the Obligor and

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[49] This is a controversial provision. Some indenture trustees avoid undertaking this duty, and insist that the documents require the obligor to make such filings and specifically relieve the indenture trustee of filing continuation statements. NFMA believes that the indenture trustee is in the best position to ensure that continuation statements are timely filed and recommends that the draft provision be incorporated wherever possible.

[50] Consistent with the indenture trustee's position as a non-stakeholder in the transaction, the indenture trustee is not required to analyze information it receives. This is particularly true of financial information. The indenture trustee's only duty is to make such information available to bondholders as provided in the indenture.

[51] This section has the same purpose as the immediately preceding section.

neither the Authority nor the Trustee shall have any obligation or liability with respect to the operation or maintenance of the Facility.

D. ***Fees and Expenses of the Trustee.*** Except to the extent the Trustee has been paid or reimbursed from the Expense Fund or the Construction Fund, the Obligor shall pay to the Trustee reasonable fees for its services and pay or reimburse the Trustee for its reasonable actual expenses and disbursements, including attorneys' fees and expenses, hereunder. The Obligor shall indemnify and save the Trustee harmless against any expenses and liabilities which it may incur in the exercise of its duties hereunder and which are not due to its negligence or bad faith. Any fees, expenses, reimbursements or other charges which the Trustee may be entitled to receive from the Obligor hereunder, if not paid when due, shall bear interest at the "prime rate" (or, if none, the nearest equivalent) of the bank or trust company at the time serving as Trustee hereunder, and shall be secured by the lien on the Trust Estate under this Indenture. Whenever the Trustee incurs expenses or renders services after the occurrence of and during an Event of Default described in Section ____ hereof, the expenses and compensation for services are intended to constitute expenses of administration under any bankruptcy or similar law.[52] The Trustee may deduct its reasonable fee therefor from any payment it is requested to make hereunder by wire transfer.

E. ***Resignation or Removal of the Trustee.*** The Trustee may resign on not less than thirty (30) days' notice given in writing to the Authority, the Bondholders and the Obligor, but such resignation shall not take effect until a successor has been appointed and has accepted such appointment. The Trustee will promptly certify to the Authority that it has mailed such notice to all Bondholders and such certificate will be conclusive evidence that such notice was given in the manner required hereby. The Trustee may be removed by written notice to the Trustee, the Authority and the Obligor from Bondholders holding a majority in principal amount of the Outstanding Bonds.[53] Immediately upon the resignation or removal of the Trustee, and upon appointment of a successor Trustee hereunder, the predecessor Trustee shall deliver all trust assets, including without limitation the balance of the trust accounts (subject only to payment of amounts owing and unpaid to the predecessor Trustee under the terms of this Indenture), fully executed copies of this Indenture and all related documents, relevant trust account records, and all correspondence relating to this trust.

F. ***Successor Trustee.*** Any corporation or association which succeeds to the corporate trust business of the Trustee as a whole or substantially as a whole, whether by sale, merger, consolidation or otherwise, shall thereby become vested with all the property, rights and powers of the Trustee under this Indenture, without any further act or conveyance.

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[52] While the proposed provision includes a statement that the fees and expenses of the indenture trustee, incurred after the obligor's bankruptcy filing, are administrative expense claims, nothing in the indenture or applicable law would require a Bankruptcy Court to rule consistent with this statement.

[53] This provision allows the holders of a stated percentage of bonds to remove the indenture trustee. This may be useful where the indenture trustee proves intractable and the bondholders believe a successor indenture trustee will act more expeditiously. The same percentage of bondholders is authorized to appointed the successor.

In case the Trustee resigns or is removed or becomes incapable of acting, or becomes bankrupt or insolvent, or if a receiver, liquidator or conservator of the Trustee or of its property is appointed, or if a public officer takes charge or control of the Trustee, or of its property or affairs, a successor shall be appointed by Bondholders holding a majority in principal amount of outstanding Bonds or, if none, by the Obligor with the consent of the Authority. The successor Trustee shall notify the Bondholders of the appointment in writing within twenty (20) days from the appointment. If no appointment of a successor is made within forty five (45) days after the giving of written notice in accordance with Section ___ or after the occurrence of any other event requiring or authorizing such appointment, the outgoing Trustee or any Bondholder may apply to any court of competent jurisdiction for the appointment of such a successor, and such court may thereupon, after such notice, if any, as such court may deem proper, appoint such successor. Any successor Trustee appointed under this Section shall be a trust company or a bank having the powers of a trust company, authorized to do business in the State of _____, having a capital and surplus of not less than $100,000,000. Any such successor Trustee shall notify the Authority and the Obligor of its acceptance of the appointment and, upon giving such notice, shall become Trustee, vested with all the property, rights and powers of the Trustee hereunder, without any further act or conveyance. Such successor Trustee shall execute, deliver, record and file such instruments as are required to confirm or perfect its succession hereunder and any predecessor Trustee shall from time to time execute, deliver, record and file such instruments as the incumbent Trustee may reasonably require to confirm or perfect any succession hereunder.

G. ***Trustee Requirement to Act.*** In any instance hereunder in which the Trustee's consent is required, the Trustee agrees to either give or deny such consent within thirty (30) days of receipt of written request therefor by the Obligor by certified mail, return receipt requested. Any such consent which is not given or denied within such thirty-day period shall be deemed given.[54]

[54] This provision is a double-edged sword. On the one hand, it requires the indenture trustee to act within a specified time, thereby reducing the potential for delay. On the other hand, the stated period may be too long under some circumstances and may impose delay where time is of the essence.

PART IV. REPORTING REQUIREMENTS; ACCESS TO PROJECT

Contents

A. Introductory Note
B. Reporting
C. Access to Project, Obligor

A. ***Introductory note:*** The issue of financial reporting and secondary market disclosure has always been a sensitive one in the marketplace. As a general matter, bondholders want more disclosure than is currently being provided. Without rehashing the current debate, and the NFMA's stated positions on the subject (which are available at www.nfma.org), it is important to note that many bondholders are fiduciaries with the legal obligation to price their holdings daily. This puts the issue of disclosure on the front burner for bond investors.

B. ***Reporting:***

(a) In general, reference is made to the Recommended Best Practices in Disclosure for Hospital Debt Transactions and the Draft White Paper on Disclosure for SWAP Transactions, published by the National Association of Municipal Analysts and available at www.nfma.org, for a description of quarterly, annual and event-related disclosure.

(b) In addition, the Obligor shall provide the following information:

(i) No later than 30 days prior to the end of each fiscal year a copy of the Obligor's annual budget for the next fiscal year, as approved by the Obligor, as well as any amendments thereto delivered from time to time.[55]

(ii) No later than the applicable Report Date a calculation of the Debt Service Coverage Ratio, Days Cash on Hand and compliance with the Trade Payables Covenant (as defined below).

(c) The Issuer and the Obligor (and any other significant obligors) shall also undertake in a continuing disclosure agreement to provide ongoing disclosure as and when required by law so as to permit brokers or dealers to recommend, underwrite or deal in the Bonds in compliance with law, including Rule 15c2-12. The Continuing Disclosure Agreement shall

[55] NFMA understands that some obligors do not routinely provide budget guidance to investors but rather operating targets. For lower grade credits, particularly for projects where revenues flow through the Indenture, a month-by-month budget (perhaps on a modified, cash basis) will be necessary to establish operating revenue requirements.

require disclosure of the following additional events, in addition to those set forth in Rule 15c2-12:[56]

(i) the occurrence of any Event of Default and the expiration of any applicable cure period under, or any amendment to, any Bond Document

(ii) any change in the composition of the Obligor (including any admissions to or withdrawals from an Obligated Group)

(iii) any change in the manager or a material change in a management contract for the project, if applicable

(iv) the incurrence of any additional indebtedness (including the incurrence or expansion of any line of credit) other than accounts payable incurred in the ordinary course of business, with a description of the terms thereof

(v) The incurrence of any material liens (including the creation or expansion of any lien not securing or on a priority to the lien securing, bonds)

(vi) any sale of accounts receivable

(vii) any release of collateral for the Bonds

(viii) the institution of any litigation that, if determined adversely to the Obligor, would have a material adverse effect on the Obligor or the project, which has a substantial possibility of being determined adversely, and any material development in any such litigation

(ix) any Determination of Taxability

(x) the execution of any Hedging Contract or any "float agreement" or other sale of investment rights on Indenture held funds, including a description of the material terms thereof

[56] NFMA's recommendations regarding additional information to be provided under the Continuing Disclosure Agreement should not be taken to mean that currently mandated disclosure requirements are being satisfied. Indeed, a recent NFMA survey revealed that compliance with 15c2-12 secondary market disclosure requirements as reflected by NRMSIR searches was spotty. In addition, current market practice is to have the failure to comply with the Continuing Disclosure Agreement constitute an event where the sole remedy is specific performance, rendering the continuing disclosure covenant a toothless tiger. Failure to comply should constitute a regular performance default that with notice and opportunity to cure becomes an Event of Default. If specific performance is the sole remedy, the Obligor should be held liable for the costs of bringing such action. Finally, it is common for Continuing Disclosure Agreements to permit the lessening of disclosure requirements to the extent consistent with changes in law; the NFMA believes that the provisions of the Continuing Disclosure Agreement should remain in effect even if the law becomes less restrictive.

(xi) any audit of the tax-exempt status of the Bonds or of the Obligor that is either focused specifically on the Bonds or the sector or category of Bonds (i.e. other than a "random audit")

(xii) the institution of any regulatory or administrative review, audit, inquiry or proceeding that, if determined adversely to the Obligor, would have a material adverse effect on the Obligor or the project, which has a substantial possibility of being determined adversely, and any material development in any such matter.

(d) A copy of all information set forth above will also be posted for general availability on the website of the Obligor or the dissemination agent and shall be furnished to each Nationally Recognized Municipal Securities Information Repository established under Rule 15c2-12.[57] Should also be sent to Central Post Office and Pricing Services.[58]

(e) The Bond Trustee shall provide to each Bondholder or its designee upon written request a statement of activity and fund balances on a monthly basis for all funds and accounts.

C. ***Access to Project, Obligor:*** The Trustee and any Bondholder by their respective duly authorized representatives, at reasonable times and upon reasonable notice, may (i) discuss the financial affairs of the Obligor with a designee of senior management[59] and of any independent third-party manager (if applicable), and any Consultant retained by the Obligor to analyze its operations or financial affairs as a result of a failure to meet any financial covenants or as a result of any Event of Default, and (ii) at their own expense (unless an Event of Default under any Bond Document shall have occurred and be continuing, in which case at the Obligor's expense) examine and inspect the Facility, the books and records of the Obligor and any collateral for the Bonds.[60]

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[57] If the information is not made publicly available through the website, certain additional parties may need to be specified as information recipients, including any bondholder, any prospective purchaser of Bonds and any pricing service used by any holder to establish a price for Bonds held by such holder.

[58] The inclusion of pricing services is an important one. For those holders, such as mutual funds, that are required to price their holdings daily and compile a daily net asset value, it is their practice to rely on pricing services to report an independent market price.

[59] There has been some suggestion by market participants that discussions between analysts and obligors raise insider trading concerns. NFMA believes that such concerns, while valid to some extent, are generally misplaced. The SEC excluded municipal issuers and obligors on municipal securities from Reg FD. Further, the municipal market differs in fundamental ways that reduce the ability and motivation of corporate insiders from sharing information with favored analysts. For example the insiders do not hold equity or options that can increase in value by currying favor with key analysts that follow the issuer's securities.

[60] It is understood that there may be some limitations on access to materials such as patient records due to confidentiality requirements.

PART V. TAX ISSUES, DEFEASANCE, DEFAULT INTEREST RATE, COERCED TENDERS

Contents

A. Tax Covenant
B. Tax Call
C. Not Liquidated Damages
D. Determination of Taxability
E. Tax Gross Up
F. Defeasance
G. Interest Rate Upon Default
H. Coerced Tenders

A. ***Tax Covenant[61]:*** The Obligor covenants that it will not take any action, or fail to take any action, if any such action or failure to take action would adversely affect the exclusion from gross income of the interest on any Bonds under Section 103 of the Code. Without limiting the generality of the foregoing, the Issuer will not knowingly, and the Company will not, directly or indirectly use or permit the use (including the making of any investment) of any proceeds of the Bonds or any other funds of the Authority or the Company, or take or omit to take any action, that would cause the Bonds to be "arbitrage bonds" within the meaning of Section 148(a) of the Code or "private activity bonds" that are not "qualified bonds" within the meaning of Section 141(e) of the Code. To that end, the Authority will comply with the requirements and procedures set forth in the tax certificate executed in connection with the issuance of the Bonds and will do and perform all acts and things necessary in order to assure that interest on such Bonds will be excluded from gross income for Federal income tax purposes, under the Code. All of the representations and covenants contained in such tax certificate shall be incorporated into the Loan Agreement by reference. The Company will comply with all requirements of Section 148 of the Code to the extent applicable to the Bonds.

[61] A covenant by the Obligor to maintain the tax exemption is the fundamental provision that allocates the risk of taxability between the Obligor and the bondholders. In the event that the Obligor violates that covenant, the Bondholders should have an action for damages against the Obligor.

B. ***Tax Call:***[62] The Bonds shall be subject to mandatory redemption prior to maturity, as a whole, at a redemption price equal to [INSERT FIXED REDEMPTION PRICE/the principal amount thereof plus the Valuation Premium, plus accrued interest to the redemption date][63] upon the occurrence of a Determination of Taxability (defined below), on a Business Day not later than 120 days after the occurrence of the Determination of Taxability; provided, however, that a Majority of Owners may waive or postpone the redemption required pursuant to this paragraph; and provided further that if the Determination of Taxability is due to a Change in Use, the Redemption Price shall equal Defeasance Value.[64]

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[62] The tax call may be helpful in the event that bonds become subject to a Determination of Taxability (as defined below). In such case, the bondholders may wish to exercise one or more of several options, depending on the situation. First, bondholders may wish to have the bonds retired quickly, so they cease bearing now-taxable (or potentially taxable) interest, by forcing the obligor to refinance the bonds. Second, bondholders may wish to keep the bonds outstanding, so that remedial steps may be taken, because the bonds though taxable (or potentially taxable) still retain value, or for other reasons. The bondholders will also want to make sure the Obligor and the issuer are taking all possible steps to resolve the matter with the IRS. To facilitate the exercise of these options, bondholders may wish to include a tax call.

However, in the case of a change in use, which is a common cause of potential taxability for a non-profit hospital, IRS regulations provide for defeasance of the affected bonds. Any tax call should either except change in use or provide for an appropriate premium in such instances. See note 63 below.

[63] It has become common in the market to assign a fixed number to the redemption price for bonds redeemed pursuant to the tax call. Typical fixed premiums range from 3% to 8% and higher. In evaluating whether a given fixed premium is appropriate or adequate, one needs to consider several factors. First, do the documents expressly provide for a gross up of the interest rate? Because taxability generally is retroactive to the issue date, up to three years of past interest payments may become subject to tax. If the documents do not include a tax gross up, then the premium will need to compensate for up to three years of tax liability on past interest payments.

Second, there is the potential loss of coupon resulting from early prepayment of the bonds (or windfall to the Obligor if it can avoid having to defease the bonds). These damages, can be defined through a Valuation Premium, equal to the positive difference (if any) between pricing of the bonds and par, determined as of the date immediately preceding the taxability event.

Third, the parties may wish to distinguish between acts that are caused by action or inaction of the Obligor or the Issuer.

A special situation results from a change in use, which results in taxability unless certain remedial actions, such as defeasance of the allocable bonds, are taken. In order to avoid having the Obligor achieve a windfall by avoiding the cost of defeasing the debt, if a tax call is used, the redemption price should be defined in such cases as "Defeasance Value", which essentially is the value of the Bonds as defeased, tax exempt bonds. The applicable definitions are included in Exhibit B.

Therefore, in setting a fixed numerical premium, one needs to consider what elements of damages are being recovered through the premium. Because a specified numerical premium may not capture these elements of economic harm resulting from taxability, consider making it clear in the documents that the premium is not intended to constitute liquidated damages for the breach of the tax covenant.

[64] The mandatory tax "call" really is more properly a tax "put". The ability of a Majority of Owners to waive the mandatory call or to defer the date upon which the redemption is to occur is in keeping with this understanding and is designed to give the bondholders the flexibility to deal with the taxability event and the bonds appropriately under the circumstances. The ability of bondholders to waive or postpone the call is particularly important where the definition of "Determination of Taxability" imposes an early trigger for taxability.

C. **Not liquidated damages:** The redemption price of bonds pursuant to the tax call is not intended to constitute liquidated damages for any claim that the bondholders or the trustee may have against any party resulting from the Determination of Taxability.

D. **Determination of Taxability:** "Determination of Taxability" as to the Bonds means a determination that the interest income on any of the Bonds does not qualify for the exclusion from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended (the "Code"), (in the case of a private activity bond other than a qualified 501(c)(3) bond, for a reason other than that a registered owner is or a former registered owner was a substantial user or a related person within the meaning of Section 147 of the Code), which determination shall be deemed to have been made upon the occurrence of the first to occur of any of the following:[65]

(a) the date on which any change in law or regulation becomes effective or on which the Internal Revenue Service issues any public or private ruling, technical advice memorandum or any other written communication (including any preliminary or proposed adverse determination letter) or on which there shall occur a ruling or decision of a court of competent jurisdiction with or to the effect that the interest income on any of the Bonds does not qualify for such exclusion; provided that if the effect of any of the foregoing is not clear because it does not expressly reference the Bonds or the exclusion of interest thereon with particularity, such effect may be established by an opinion of nationally recognized bond counsel (reasonably satisfactory to a Majority of Owners), which opinion need not address the merits of the underlying position taken in such ruling, technical advice memorandum, written communication, ruling or decision; or

(b) the date on which the Obligor shall receive notice from the Trustee in writing that (i) the Trustee has been notified by the Internal Revenue Service or (ii) the Trustee has been advised by the Issuer, the Obligated Group, or any Bondholder or former Bondholder that the Internal Revenue Service has issued a "30 day letter", a notice of deficiency or similar notice which asserts that the interest on any of the Bonds does not qualify for such exclusion.

E. **Tax Gross Up:** There shall also be paid to each registered Bondholder since the Taxable Interest Payment Date an amount equal to the aggregate of future value as of redemption date (valued using the Taxable Rate) of the positive difference on each Taxable Interest Payment Date occurring prior to the redemption date between (A) interest that should have been paid to

[65] The event that triggers the tax call needs to occur early enough so that bondholders may act before the lengthy IRS appeals process is played out. The taxability issue may be quite clear before the appeals process has ended. Also, the pressure of the tax call can incentivize the Obligor and the Issuer to resolve the issue with the IRS through a closing agreement. However, it is important that a Majority of Owners be able to waive or defer the effectiveness of the mandatory call, as described above.

such Bondholders on the Bonds at the Taxable Rate, and (B) the actual interest that was paid to such Bondholders on the applicable Taxable Interest Payment Date.

F. ***Defeasance:*** Defeasance of all or a portion of the bonds may occur only if there is provided a verification report of a firm of certified public accountants as to escrow sufficiency, a legal opinion as to compliance with the defeasance requirements of the Trust Indenture and enforceability of the escrow agreement, an opinion of Bond Counsel with respect to the tax-exempt status of the defeased bonds. The defeasance securities should consist of non-callable and non-prepayable obligations, the timely payment of principal and interest on which are direct obligations of, or unconditionally guaranteed by, the United States of America.[66] If the defeasance is to be effective 90 days or more in advance of the payment of the Bonds to be defeased, there shall also be obtained at the Company's expense, as a condition of such defeasance, a rating from Standard & Poor's or Moody's of AAA or #Aaa, respectively. Furthermore, in the event of a defeasance, the following language is to be used in the escrow agreement. "The Issuer and the Obligated Group hereby covenant not to exercise any optional or extraordinary redemption provisions under the Trust Indenture other than any optional redemption specified in the redemption instructions delivered to the Trustee herewith. The Tax Call and the scheduled mandatory sinking fund redemptions will survive the defeasance and continue in full force and effect with respect to the Bonds."

G. **Interest Rate Upon Default:** The interest rate upon the occurrence and during the continuation of an Event of Default shall equal ____%.[67]

H. **Coerced Tenders.** The market has increasingly seen attempts to induce bondholders to tender their bonds at a nominal premium under threat of redemption at par. These transactions often violate the applicable bond document provisions. The issue is treated at length in Appendix __.

[66] Ideally, Defeasance Securities will consist of United States Treasury State and Local Government Securities (SLGS). This will moot any concerns over "yield-burning." If the escrow also permits obligations guaranteed by the US Government, then the escrow should prohibit substitution of direct obligations of the United States of America with obligations that are not direct obligations of the United States of America without the prior written consent of a Majority of Owners secured by such escrow and affected by such change.

[67] The events of default that trigger a "default rate" of interest can be limited to just payment defaults on the bonds, or expanded to include other material defaults such as use of the debt service reserve without immediate replenishment, default on underlying principal and interest installments on the underlying loan, etc.

PART VI. CERTAIN PROVISIONS RELATIVE TO OBLIGATED GROUP FINANCINGS

Contents

A. Introductory Note
B. Additions to and Withdrawals from Obligated Group

A. ***Introductory Note:*** Financings where the credit is an obligated group present certain challenges for credit analysts. In general, there is a need to create a covenant structure that allows the obligated group to take advantage of the flexibility that the structure was designed to create. However, it also important to make sure that the basis of the credit remains intact as the obligated group members and their relative value to the credit may change over time.

B. ***Additions to and Withdrawals from Obligated Group:***

(a) [SPECIFY "FLAGSHIP ENTITY" OR ENTITIES][68] (each a "Required Member") shall not withdraw from the Obligated Group without the prior written consent of a Majority of Owners. In addition, no member of the Obligated Group (i) generating at least [x]% of its revenues or its excess of revenues over expenses, or (ii) owning at least [x%] of either its [cash or marketable investments][69] or its net worth (a "Material Member") may withdraw from the Obligated Group without the prior written consent of a Majority of Owners.

(b) Any member other than a Required Member or a Material Member may withdraw from the Obligated Group, and any entity may join the Obligated Group, upon satisfying the following conditions:

(i) upon furnishing the following to the trustee and to each Bondholder:

(A) An auditor's certificate showing that, based on the audited financial statements for each of the two most recent fiscal years, (i) had the addition or withdrawal occurred at the beginning of such period the Obligated Group would have satisfied the Debt Service Coverage Ratio for each such fiscal year and (ii) the Obligated Group would, upon such

[68] The intent here is to specify the one or two main entities of an Obligated Group hospital system that are the essential components of the credit.

[69] This number should correlate to the numerator of the Days Cash on Hand calculation.

admission or withdrawal, meet the test for incurrence of additional Indebtedness set forth under paragraph (b) (i) under the heading "Additional Debt".[70]

(B) An auditor's certificate showing that, following the addition or withdrawal, the Obligated Group has at least __ Days Cash on Hand.[71]

(C) An auditor's certificate showing that following the addition or withdrawal, the Obligated Group has a Capitalization Ratio not exceeding [x%], determined by dividing the aggregate principal amount of all Outstanding Long Term Indebtedness of the Members of the Obligated Group by the sum of (A) the aggregate principal amount of all Outstanding Long Term Indebtedness of the Members of the Obligated Group plus (B) the aggregate Unrestricted Net Assets of the Members of the Obligated Group.

(D) In the case of admission, (1) a Related Supplemental Indenture, executed by the new Member in which such party agrees to become a Member and to be jointly and severally liable with the other Members for the performance of all covenants contained in the MTI and in the Master Notes and (2) an opinion of counsel as to execution, validity and enforceability of the Related Supplemental Indenture [and the Mortgage][72] and that the trustee is secured by a valid lien on the Gross Revenues of such Member that is on a parity with the lien on Gross Revenues in favor of such Member's other bonded indebtedness and that such lien is perfected to the extent such lien can be perfected by the filing of financing statements under the Uniform Commercial Code [and (3) an amendment to the Mortgage subjecting the Facilities of such Member to the mortgage lien thereunder securing all

[70] In various provisions of this term sheet, the required financial statements are those of the most recent fiscal year as opposed to the most recently available financial statements. The latter formulation has in the past permitted material transactions to occur based on stale information, and in some egregious cases when more recent financial statements may have been held back to suppress negative financial information they would have revealed. The recommended formulation requires fresh information for certain material transactions, at the expense of limiting the window for such transactions, until the audited financial statements for the immediately preceding year have been produced.

[71] See the Liquidity Covenant below.

[72] For a discussion on the strategic and other significance of a mortgage, see Part I, D.4 above. NFMA believes that springing mortgages are of dubious value. Generally, when the bondholders most need that mortgage to spring, there are likely to be significant practical and legal hurdles to getting it sprung.

Indenture Indebtedness, together with a lender's title insurance policy insuring the first lien status of the lien of the Mortgage on such Facilities, subject to Permitted Encumbrances],

(E) An opinion or opinions of counsel to the effect that the withdrawal or addition will not affect the tax exempt status of any Member or the tax exempt status of any outstanding bonds,

(F) The written consent of all Members to such admission or withdrawal

(G) An Obligated Group Representative certificate which demonstrates that, immediately prior to and after the cessation of such status, the Obligated Group was not and will not be in default under the MTI or any Bond Document

(ii) Immediately prior to and after the cessation of such status, the Obligated Group was not and will not be in default under the MTI or any Bond Document

PART VII. FINANCIAL COVENANTS – DEBT SERVICE COVERAGE RATIO, LIQUIDITY COVENANT AND TRADE PAYABLES COVENANT

Contents

A. Introductory Note
B. Debt Service Coverage Ratio Covenant
C. Liquidity Covenant
D. Trade Payables Covenant

A. ***Introductory Note:*** The following financial covenants provide an "early-warning" system in advance of an actual default on Bonds. Issues such as who approves the consultant, what the scope of the consultant's review is defined to be and what is the obligor's obligation to follow recommendations are of paramount importance to having an effective remedy for breach of financial covenants. In addition, clear definitions are desirable so that ratios can be calculated with certainty.

B. ***Debt Service Coverage Ratio Covenant:*** The Obligated Group shall maintain for each Fiscal Year[73] a Debt Service Coverage Ratio of at least [___]. On or before the Report Date for each Fiscal Year, the Obligated Group shall furnish a calculation by the Auditor of the Debt Service Coverage Ratio for such Fiscal Year. If such ratio, as calculated at the end of any Fiscal Year, is below [___], the Obligated Group shall employ within thirty (30) days after the applicable Report Date, at the Obligated Group's expense, a Consultant to submit a written report and recommendations with respect to the rents, fees, rates and other charges relating to the Facility and with respect to improvements or changes in the operations and management of or the services rendered by the Obligated Group so as to permit the Obligated Group to comply with the Debt Service Coverage Ratio, which report shall state the extent to which prior recommendations (if any) of the Consultant may not have been complied with by the Obligated Group. A copy of such report shall be submitted to the Trustee and each Bondholder as soon as practicable but in no event later than seventy-five (75) days after the applicable Report Date. Within seven (7) months after the submission of its initial report, the Consultant shall submit to the Trustee and each Bondholder a follow-up report indicating whether or not the recommendations contained in its initial report are being complied with. The Obligated Group shall revise or cause to be revised such rents, fees and other charges in conformity with any recommendation of the Consultant and otherwise follow the recommendations of the Consultant to the extent permitted by law. If the Obligated Group continuously complies with the recommendations of the Consultant, this Section shall be deemed to have been complied with even if the Debt Service Coverage Ratio for such Fiscal Year was below [___], provided,

[73] The debt service coverage ratio test may need to be tailored to the particular credit situation. For example, a less creditworthy obligor might be subjected to quarterly or semi-annual testing of the ratio. Also, it may be useful to provide that the Consultant need not be retained more than once in any specified period (such as 24 months) to avoid multiple consultant engagements in a short period of time.

however, the failure to maintain a Debt Service Coverage Ratio for any Fiscal Year of at least 1.00 shall constitute an Event of Default.[74]

C. ***Liquidity Covenant:***

(a) The Obligated Group agrees to maintain Days Cash On Hand, (the "Liquidity Covenant") as of each Ratio Evaluation Date equal to the following:

Ratio Evaluation Date	Required Days Cash on Hand

(b) On the Report Date following each Ratio Evaluation Date, the Obligated Group shall submit to the Trustee and each Bondholder a report evidencing its compliance or non-compliance with the Liquidity Covenant for the applicable period. The report due following each _____ may be prepared by the Obligated Group but the report following the end of the Fiscal Year shall be prepared by the Auditor.

(c) If as of any Ratio Evaluation Date the Obligated Group shall fail to comply with the applicable Liquidity Covenant, then the Obligated Group shall employ within thirty (30) days after the applicable date, at the Obligated Group's expense, a Consultant to submit a written report and recommendations with respect to the rents, fees, rates and other charges relating to the Facility and with respect to improvements or changes in the operations and management of or the services rendered by the Obligated Group so as to permit the Obligated Group to comply with the Liquidity Covenant, which report shall state the extent to which prior recommendations (if any) of the Consultant may not have been complied with by the Obligated Group. A copy of such report shall be submitted to the Trustee and each Bondholder as soon as practicable but in no event later than seventy-five (75) days after the applicable Report Date. Within seven (7) months after the submission of its initial report, the Consultant shall submit to the Trustee and each Bondholder a follow-up report indicating whether or not the recommendations contained in its initial report are being complied with. The Obligated Group shall revise or cause to be revised such rents, fees and other charges in conformity with any recommendation of the Consultant and otherwise follow the

[74] The 1.00 Debt Service Coverage Ratio floor is a useful tool to test for the business that is dying on the vine but still able to meet its debt service obligations by relying on its reserves funded during better days or by stringing out payments on its accounts payable. Without this "real time" test of how the business is doing, bondholders may not be able to exercise remedies until the business is in desperate straits.

recommendations of the Consultant to the extent permitted by law.[75] If the Obligated Group continuously complies with the recommendations of the Consultant, failure to comply with the Liquidity Covenant as of such Ratio Evaluation Date will not constitute an Event of Default hereunder. Notwithstanding the foregoing, the failure to maintain at least [_____ (__)] Days Cash on Hand as of any Ratio Evaluation Date shall constitute an Event of Default hereunder.

D. ***Trade Payables Covenant:***

(a) The Obligated Group agrees to maintain its trade payables so that on each Ratio Evaluation Date 90% of such trade payables are no more than [60] days from date of invoice and the remaining 10% are no more than [90] days from date of invoice (the "Trade Payables Covenant").[76]

(b) On or before the Report Date following each Ratio Evaluation Date the Obligated Group shall submit to the Trustee and to each Bondholder a report evidencing its compliance or non-compliance with the Trade Payables Covenant as of the Ratio Evaluation Date. The report due following each _____ may be prepared by the Obligated Group, but the report due following the end of the Fiscal Year shall be prepared by the Auditor.

(c) If the Obligated Group shall fail to achieve the Trade Payables Covenant as of any Ratio Evaluation Date, then the Obligated Group shall employ within thirty (30) days after the Ratio Evaluation Date, at the Obligated Group's expense, a Consultant to submit a written report and recommendations with respect to the rents, fees, rates and other charges relating to the Facility and with respect to improvements or changes in the operations and management of or the services rendered by the Obligated Group so as to permit the Obligated Group to comply with the Trade Payables Covenant, which report shall state the extent to which prior recommendations (if any) of the Consultant may not have been complied with by the Obligated Group. A copy of such report shall be submitted to the Trustee and each Bondholder as soon as practicable but in no event later than seventy-five (75) days after the applicable Ratio Evaluation Date. Within seven (7) months after the submission of its initial report, the Consultant shall submit to the Trustee and each Bondholder a follow-up report indicating whether or not the recommendations contained in its initial report are being complied with. The Obligated Group shall revise or cause to be revised such rents, fees and other charges in conformity with

[75] Transaction participants should recognize that improvements in revenues and expenses will not reflect themselves as quickly in liquidity levels as they will in the debt service coverage ratio.

[76] Although this trade payables covenant is more typically associated with high yield financings, it is a necessary companion to a meaningful liquidity covenant. Cash on hand can be enhanced by stretching payables.

any recommendation of the Consultant and otherwise follow the recommendations of the Consultant to the extent permitted by law. The failure to comply with the Trade Payables Covenant as of any Ratio Evaluation Date shall constitute an Event of Default.

PART VIII. NEGATIVE COVENANTS; MISCELLANEOUS COVENANTS

Contents

A. Introductory Note
B. Mergers/Change In Control
C. Additional Debt
D. Computation of Debt Service on Certain Instruments
E. Permitted Encumbrances
F. Disposition of Assets
G. Cross Covenant
H. Covenant to Maintain Rating
I. Covenant to Bound by the Bond Documents

A. ***Introductory Note:*** Covenants against certain actions by the obligor (or obligated group) are necessary to avoid deterioration of the credit through overleveraging, changing the underlying assets, changing the underlying business or other adverse developments. In addition, the failure to comply with certain negative covenants, such as a covenant against liens, can serve as an early warning signal of developing problems.

B. ***Mergers/Change In Control:*** Subject to the provisions concerning admission and withdrawal of Obligated Group Members, each Obligated Group Member shall maintain its existence as a non profit corporation qualified to do business in _____, and it will not merge or consolidate with any other corporation, partnership, joint venture, business trust or other entity or sell or convey all or substantially all of its assets to any person (other than with or to another Obligated Group Member) or suffer any Change in Control unless there is delivered to the Trustee (i) an Officer's Certificate certifying that the Debt Service Coverage Ratio for the most recent Fiscal Year, taking into account such merger, consolidation, sale or conveyance, as if it had occurred at the beginning of such Fiscal Year, would have been not less than [___] and the Liquidity Covenant would have been satisfied as of the end of such Fiscal Year; provided that such certificate shall be based upon the audited financial statements of the Obligated Group for the most recent Fiscal Year and (ii) a written confirmation from each rating agency maintaining a rating on the bonds solicited by the Obligated Group that such rating shall not be reduced or placed on "credit watch" or similar status on account of such action.

"Change in Control" with respect to any Obligated Group Member means any change in the corporate member (or other equivalent governing Person or Persons) of such Obligated Group Member or any memorandum of understanding, affiliation agreement or other contract or arrangement that affects the composition or means of selection of an Obligated Group Member's Board of Trustees or of the governing body of any Affiliate controlling an Obligated Group Member or which reserves or subjects to review or approval by any other entity the exercise of the powers and authority directly or indirectly vested in the Board of Trustees of an Obligated Group Member on the date of original issuance of the Obligations. Notwithstanding the foregoing, the dissolution or withdrawal of a sole member or shareholder of an entity, where

such entity has no other affiliates and the sole member or shareholder has no assets or income or is consolidated into the entity, shall not constitute a change in control.

C. ***Additional Debt:***[77] The Obligated Group agrees that no Obligated Group Member will incur any Additional Indebtedness other than Additional Indebtedness consisting of one or more of the following, which the Obligated Group Agent may, from time to time, designate or redesignate to any applicable classification permitted hereby. The intent is that, subject to the last paragraph, Additional Indebtedness may be incurred if permitted under any one of the following categories:

(a) Long-Term Indebtedness if (A) the total principal amount of Long Term Indebtedness to be incurred at such time, when added to the aggregate principal amount of all other Long Term Indebtedness theretofore issued pursuant to this clause (a) and then Outstanding, will not exceed ten percent (10%) of the Total Operating Revenues of the Obligated Group based on the audited financial statements for the Historic Test Period and (B) the Obligated Group is in compliance with the Debt Service Coverage Ratio hereof based on the audited financial statements for the Historic Test Period. Any Long Term Indebtedness or portion thereof incurred under the terms of the Agreement described in this clause (a) which is Outstanding at any time shall be deemed to have been incurred under another provision under this heading if at any time subsequent to the incurrence thereof there shall be filed with the Trustee an Officer's Certificate to the effect that such Outstanding Indebtedness or portion thereof would satisfy such other provision, specifying such other provision, and thereupon the amount deemed to have been incurred and to be Outstanding under the Agreement shall be deemed to have been reduced by such amount and to have been incurred under such other provision.

(b) Long Term Indebtedness, if:

(i) prior to incurrence of the Long Term Indebtedness, there is delivered to the Trustee an Officer's Certificate certifying that based on the audited financial statements for the Historic Test Period, the Debt Service Coverage Ratio, taking into account the current aggregate Outstanding principal amount of all Long Term Indebtedness, and the proposed additional Long Term Indebtedness, as if it had been incurred at the beginning of such period, is not less than [___]; or

[77] The tests for additional debt must be read in conjunction with the tests for additional liens. As noted in connection with additional short-term debt below, the combination of additional debt and liens can in effect substantially undermine all of the bondholders' collateral. All of the additional debt tests can be tightened to address less credit-worthy obligors.

(ii) prior to incurrence of the Long Term Indebtedness, there is delivered to the Trustee (1) an Officer's Certificate certifying that based on the audited financial statements the Debt Service Coverage Ratio for the Historic Test Period, not taking the proposed additional Long Term Indebtedness into account, is not less than [ ], and (2) a Consultant's report (A) certifying that the projected Long Term Indebtedness Service Coverage Ratio for each of the next two full Fiscal Years following the incurrence of such Long Term Indebtedness or, in the case of the incurrence of such Long Term Indebtedness for capital improvements, following the completion of the facilities being financed (such applicable two-year period, the "Projected Test Period"), taking the proposed additional Long Term Indebtedness into account, is not less than [ ], and (B) indicating that sufficient revenues and cash flow would be generated to meet the projected operating expenses (including debt service on the proposed Indebtedness) of the Obligated Group during the Projected Test Period. Notwithstanding the foregoing, if the Officer's Certificate certifies that the projected Long-Term Indebtedness Service Coverage Ratio exceeds [1.50], an Officer's Certificate may be substituted for the Consultant's report described in (2) above.

(c) Completion Indebtedness in an aggregate amount for a Project that does not exceed ten percent (10%) of the original principal amount of the Long-Term Indebtedness originally issued for such Project, provided that there is delivered to the Trustee (i) an Officer's Certificate (A) specifying the estimated cost of completing the construction or equipping of such Project and (B) stating the reason for incurring the Completion Indebtedness, and (ii) a certificate of an independent architect stating that the proceeds of such Completion Indebtedness and other available moneys will be sufficient to finance the cost of completion of such Project, and including a schedule demonstrating the foregoing.

(d) Long Term Indebtedness incurred for the purpose of refunding or refinancing, including advance refunding or cross over refunding, any Outstanding Long Term Indebtedness; provided that the Obligated Group Agent shall deliver the following to the Trustee:

(i) An Officer's Certificate to the effect that the Maximum Annual Debt Service for each of the years that the refunded Indebtedness would have been Outstanding will not be increased;[78] and

[78] The refunding debt test can be made more rigorous by limiting extensions of the maturity of the refunding debt or also by requiring there to be debt service savings in each fiscal year.

(ii) An Opinion of Counsel stating that the incurrence of the Indebtedness has been duly authorized and that the applicable requirements for its issuance have been satisfied, and an Opinion of Counsel stating that, upon the incurrence of such proposed Indebtedness and application of the proceeds thereof, the Outstanding Indebtedness to be refunded thereby will no longer be Outstanding.

(e) Short-Term Indebtedness, provided that immediately after the incurrence of such Indebtedness the aggregate Outstanding principal amount of all such Short Term Indebtedness does not exceed [x percent] of the aggregate of Total Operating Revenues for the most recent Fiscal Year;[79] and provided further that for a period of at least thirty (30) consecutive days in each Fiscal Year the Outstanding principal amount of all such Indebtedness shall not exceed [x percent] of the aggregate of Total Operating Revenues of the Obligated Group for the previous Fiscal Year.[80] Short Term Indebtedness may also be incurred if such Short Term Indebtedness could be incurred under subparagraph (a) above assuming it were Long Term Indebtedness.

(f) Non-Recourse Indebtedness or Subordinated Indebtedness in an amount at the time of occurrence which would not cause the aggregate of such Indebtedness to exceed ___ percent of operating revenues of the Obligated Group for the Historic Test Period; provided that there is filed with the Trustee an Officer's Certificate projecting that the Debt Service Coverage Ratio shall be complied with for the then current and the next following Fiscal Year, taking into consideration projected revenues and the proposed Indebtedness.

(g) Indebtedness in the form of installment purchase contracts, capitalized leases, purchase money mortgages, loans, sale agreements or other typical similar purchase money borrowing instruments; provided that no such indebtedness may be incurred if it would cause the aggregate Annual Debt Service on all Indebtedness permitted under this clause in any Fiscal Year to exceed [two percent (2%)] of Total Operating Revenues for the Historic Test Period,[81] provided further that such Indebtedness may exceed [two

[79] This provision must be read together with the permitted lien section as well as in the context of the overall collateral position. If the security for the bonds is only accounts receivable, permitting short term debt in any significant amount and allowing it to be secured by a senior lien in accounts receivable effectively gives up all of the bondholders' security to the short term debt provider.

[80] It is more typical in lower rated or non-rated credits to require short term debt outstanding to be paid down to zero on an annual basis (the so-called "clean-up"). One can also consider an exclusion from the clean-up requirement if there is filed with the Trustee an Officer's Certificate to the effect that such Short-Term Indebtedness, because of Government Restrictions, must or reasonably should remain outstanding in excess of the clean-up requirement.

[81] While it may be tempting to disregard indebtedness in this category, even non-recourse indebtedness (or the operations financed through non-recourse indebtedness) can give rise to claims against the Obligated Group and

percent (2%)] of Total Operating Revenues for the most recent completed fiscal year if it could have been incurred under the Agreement assuming such Indebtedness were Long-Term Indebtedness.

(h) Any Indebtedness represented by a letter of credit reimbursement agreement or other similar reimbursement agreement entered into by an Obligated Group Member and an institution providing a Credit Facility with respect to any other Indebtedness incurred in accordance with any other provision hereof.

Notwithstanding the foregoing, the Obligated Group shall not incur any Additional Indebtedness, if (i) there is an Event of Default under any of the Financing Documents or (ii) in the case of Indebtedness described in clauses (a), (b), (c), (f) or (g) above, the Capitalization Ratio following such issuance would exceed [x%], determined by dividing the aggregate principal amount of all Outstanding Long Term Indebtedness of the Members of the Obligated Group by the sum of (A) the aggregate principal amount of all Outstanding Long Term Indebtedness of the Members of the Obligated Group plus (B) the aggregate Unrestricted Net Assets of the Members of the Obligated Group.

D. ***Computation of Debt Service on Certain Instruments:***[82]

(a) Debt Service on Balloon Indebtedness. For purposes of the computation of the Long Term Indebtedness Service Requirement, Annual Debt Service or Maximum Annual Debt Service, whether historic or projected, the following provisions shall apply to Balloon Indebtedness:

(i) the principal of such Balloon Indebtedness is amortized from the date of calculation thereof over a term equal to the lesser of twenty (20) years or the actual term of such Indebtedness at an assumed interest rate based on the last-published "30-year Revenue Bond Index" published by The Bond Buyer immediately preceding the date of calculation of such Indebtedness; or

(ii) the principal of such Balloon Indebtedness is amortized during the term to the maturity thereof by deposits made to a sinking fund with a sinking fund schedule established by resolution of the Governing Body of the applicable Obligated Group Member adopted at or subsequent to the time of incurrence of such Balloon Indebtedness, as certified in a certificate of the chief financial officer of the applicable Obligated Group Member, provided, that

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divert management resources substantially. As to subordinated indebtedness, the documents will typically not provide adequate subordination (including remedies standstill) that would prevent such subordinate indebtedness from exerting pressure on the Obligated Group in adverse financial circumstances.

[82] In general these provisions can be tightened for less-creditworthy obligors. For example, it is typical for high-yield or non-rated transactions to include all guaranteed debt service without the percentage reductions discussed below.

at the time of such calculation, all deposits required to have been made prior to such date shall have been made; or

(iii) with respect to Balloon Indebtedness for which there exists a Credit Facility, the principal of such Balloon Indebtedness is due and payable in the amounts and at the times specified in the Credit Facility;

provided, however, that if the Balloon Indebtedness is of the type described in subsection (ii) of the definition of Balloon Indebtedness, it shall be assumed that such Balloon Indebtedness matures on the first date on which it may first be tendered for purchase or redemption at the option of the Bondholder thereof unless the Trustee has received a certified copy of a Credit Facility under which funds are available for the payment of such Balloon Indebtedness, in which case the Obligated Group may elect anyone of the options set forth in (i), (ii) or (iii) above (without regard to the date on which such Balloon Indebtedness may first be tendered for purchase or redemption at the option of the owner thereof) unless any amount has been drawn down under any such Credit Facility, in which case any required computation shall be made (with respect to the amounts so drawn, until so repaid) in the manner described in subparagraph (iii) above.

(b) Debt Service on Guaranties. Debt Service Requirements of the Obligated Group shall be computed by reference to payments required to be made by a Member under the Guaranty, based on a percentage of the Debt Service Requirements on Guaranteed Indebtedness, as follows:

(i) if the beneficiary's debt service coverage ratio is equal to or less than 1.10 then 100 percent of the beneficiary's debt service requirements shall become the Obligated Group's Debt Service Requirements; or

(A) if the beneficiary's debt service coverage ratio is greater than 1.10 but less than or equal to 1.40, then 50 percent of the beneficiary's debt service requirements shall become the Obligated Group's Debt Service Requirements; or

(B) if the beneficiary's debt service coverage ratio is greater than or equal to 1.40, then 20 percent of the beneficiary's debt service requirements shall become the Obligated Group's Debt Service Requirements; or

(C) if, within 36 months prior to the date of the computation, a Member of the Obligated Group shall have been required to make a payment thereon, then 100 percent of the

beneficiary's debt service requirements shall become the Obligated Group's Debt Service Requirements;

(ii) If the Guaranty is required to be drawn upon only following a draw on a guaranty or guaranties of one or more Persons who are not Members of the Obligated Group, then none of the beneficiary's debt service requirements shall become the Obligated Group's Debt Service Requirements, unless within 36 months prior to the date of the computation, a Member of the Obligated Group shall have been required to make a payment thereon, in which case the provisions of subclause (i) (i) (c) shall apply.

(c) Debt Service on Variable Rate Indebtedness. For purposes of the computation of the projected (but not historic) Long Term Indebtedness Service Requirement, Annual Debt Service or Maximum Annual Debt Service, Variable Rate Indebtedness (including any such indebtedness that may constitute Balloon Indebtedness) shall, at the election of the Obligated Group Agent, be deemed Indebtedness which bears interest at a rate equal to the greater of (i) 120% of that derived from the Bond Buyer 25 Revenue Bond Index, (ii) at a rate equal to 120% of the average interest rate outstanding on such debt for the most recent 24 month period, provided, however, that if the debt has not been outstanding for 24 months, then the interest rate shall be the average rate for the most recent 12 months (iii) or the interest rate in effect on the date of calculation, as determined by an Officer's Certificate.

(d) Effect of Hedging Contract. For purposes of the computation of the Long-Term Indebtedness Service Requirement, Annual Debt Service or Maximum Annual Debt Service, Indebtedness with respect to which the Obligated Group has entered into a Hedging Contract with a Qualified Provider to fix the interest thereon or to convert fixed interest to variable interest shall, for the period of the effectiveness of such Hedging Agreement, be deemed Indebtedness which bears interest at the net amount payable by the Obligated Group taking into account such Hedging Contract and such Indebtedness.[83]

E. ***Permitted Encumbrances:***[84] The Obligated Group agrees that no Obligated Group Member will create or suffer to be created or exist any Lien upon[85] [Property now owned

[83] This rule has the effect of integrating a Hedging Agreement with the underlying indebtedness for purposes of the Debt Service Coverage Ratio. If this rule is used, then the corresponding non-operating revenue or expenses should be excluded in calculating Net Income Available for Debt Service.

[84] The Permitted Encumbrances section is used to, among other things, permit certain additional financing activity by the Obligated Group, and therefore must be read carefully in conjunction with the additional debt provisions. The provisions will also depend on whether a mortgage has been granted. Generally, consideration should be given to the potential cumulative impact of the various permitted lien categories. Any additional lien should take the form of permission to grant a lien in the collateral, not to release the bondholder's lien on collateral.

or hereafter acquired by the Obligated Group] [or its Gross Revenues and Restricted Property] of any Obligated Group Member other than Permitted Encumbrances. Permitted Encumbrances shall consist of the following:

(a) Liens arising by reason of good faith deposits with any Obligated Group Member in connection with leases of real estate, bids or contracts (other than contracts for the payment of money), deposits by an Obligated Group Member to secure public or statutory obligations, or to secure, or in lieu of, surety, stay or appeal bonds, and deposits as security for the payment of taxes or assessments or other similar charges, and all in the ordinary course of business;

(b) Any lien arising by reason of deposits with, or the giving of any form of security to, any governmental agency or any body created or approved by law or governmental regulation for any purpose at any time as required by law or governmental regulation as a condition to the transaction of any business or the exercise of any privilege or license, or to enable any Obligated Group Member to maintain self insurance or to participate in any funds established to cover any insurance risks permitted pursuant to the Indenture or in connection with workmen's compensation, unemployment insurance, pension or old age benefit or other social security obligations;

(c) Any lien for the satisfaction and discharge of which a sum of money or a surety bond is on deposit with a fiduciary or trustee and pledged to and sufficient to satisfy such lien or resulting from the entry of a judgment which is the subject of perfected appeal proceedings or as to which the time within which an appeal therefrom may be perfected has not yet expired (but only so long as no Person in favor of whom such judgment was rendered has taken any action to enforce the lien resulting from such judgment);

(d) (i) Rights reserved to or vested in any municipality or public authority by the terms of any right, power, franchise, grant, license, permit or provision of law, affecting any Property, to (1) terminate such right, power, franchise, grant, license or permit, provided that the exercise of such right would not materially alter the use of such Property or materially and adversely affect the value thereof, or (2) purchase, condemn, appropriate or recapture, or designate a purchaser of, such Property; (ii) any liens on any Property for taxes, assessments, levies, fees, water and sewer rents, and other governmental and similar charges and any liens of mechanics, materialmen, laborers, suppliers or vendors for work or services performed or materials furnished in connection with such

[85] A threshold decision must be made as to whether the permitted lien section will cover all property of the Obligated Group or only some revenue producing core property. Note that the property that produces the revenues can change over time so it may be advisable to apply the lien restrictions to all property.

Property, which are not due and payable or which are not delinquent or the amount or validity of which are being contested and execution thereon is stayed or the existence of which will not individually or in the aggregate subject the Property to material loss or forfeiture; (iii) easements, rights of way, servitudes, restrictions and other minor defects, encumbrances, and irregularities in the title to any Property which do not individually or in the aggregate materially impair the use of such Property or materially and adversely affect the value thereof; (iv) rights reserved to or vested in any municipality or public authority to control or regulate any Property or to use such Property in any manner, which rights do not individually or in the aggregate materially impair the use of such Property or materially and adversely affect the value thereof; and (v) to the extent that it affects title to any Property, [or the Mortgages] the Lien created under the Master Indenture, the rights of Related Bond Trustees and Related Issuers created under Related Bond Indentures and Related Loan Agreements, respectively;

(e) Any Lien on Property described in Schedule __ hereto which is existing on the date of authentication and delivery of the Bonds, including renewals thereof, provided that no such Lien may be extended or modified to apply to any Property of any Obligated Group Member not subject to such Lien on such date, unless such Lien as so extended or modified otherwise qualifies as a Permitted Encumbrance hereunder and no such lien may be pledged to secure any additional Indebtedness;

(f) leases which relate to property which is of the type that is customarily the subject of leases, including, without limitation, office space for physicians and educational institutions, food service facilities, parking facilities, gift, flower, barber or beauty shops and radiology, pathology or other hospital-based specialty services, pharmacy and similar departments, other leases existing as of the date hereof, office space in real property constituting Collateral subject to members of the medical staff or office space in real property constituting Collateral which is not directly used by a Member of the Obligated Group in the ordinary course of business or to further its exempt functions, and any renewals and extensions thereof; and

(g) liens on Property received by Members of the Obligated Group through gifts, grants or bequests, such liens being due to restrictions imposed by the donor, grantor or testator on such gifts, grants or bequests of property or the income therefrom or such liens having been in existence at the time of such gift, grant or bequest; and;

(h) Any Lien on Property of a person that becomes an Obligated Group Member pursuant to a consolidation, merger, sale or conveyance in accordance with Section ___ hereof or pursuant to an addition to the Obligated Group in accordance with Section ___ hereof and that is not incurred in contemplation of such consolidation, merger, sale or

conveyance or such addition to the Obligated Group; provided that no such Lien may be extended or modified to apply to any Property of any Obligated Group Member not subject to such Lien on such date, unless such Lien if so extended or modified otherwise qualifies as a Permitted Encumbrance hereunder, and no additional Indebtedness may thereafter be incurred that is secured by such Lien;

(i) Any Lien on Property (other than cash and marketable investments) which Lien secures Long Term Indebtedness incurred in compliance with the provisions under "Additional Debt", if, after giving effect to the Lien, the Value of the Property which is encumbered in accordance with this clause will not exceed [___ percent (__%)][86] of the Value of the Property, Plant and Equipment as of the end of the Historic Test Period;[87]

(j) Any parity Lien on all or a portion of Gross Revenues [or the Mortgaged Property] to secure an Obligation issued under the MTI.

(k) Any [parity] lien on up to __% of Accounts Receivable securing or deemed to secure any Short-Term Indebtedness incurred pursuant to the provisions under "Additional Debt".[88]

(l) Any lien on Property securing Indebtedness incurred pursuant to clause (f) and clause (g) under "Additional Debt".

(m) Rights of set-off or banker's lien with respect to funds on deposit with a financial institution in the ordinary course of business (but excluding any right of set off held by a lender).

(n) liens on property arising from the rights of third party payers for recoupment of amounts paid to the Members of the Obligated Group for patient care, and liens on moneys deposited by patients or others with Members of the Obligated Group as security for or as prepayment of the cost of patient care;

(o) rights of the United States of America under 42 U.S.C. §291 as a result of what are commonly known as Hill-Burton grants and similar rights under other federal or state statutes.

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[86] The percentage of property that is pledgable under this "lien basket" provision is negotiable.

[87] This provision, as well as certain others, such as clause (h), allows a mortgage to be granted or to exist on property, even though the bonds may not be secured by a mortgage. Consider whether this kind of provision is appropriate where the bonds are not secured by a mortgage. See footnote 90, which suggests inclusion of a provision that requires that a parity mortgage be granted to bondholders if any creditor is granted a mortgage.

[88] The level of accounts receivable that may be pledged is negotiable. See footnotes 79 and 80 and accompanying text regarding the incurrence of Short Term Indebtedness.

F. ***Disposition of Assets:***

1. **Property other than Cash, Cash Equivalents and Marketable Securities:** The Obligated Group Members may in any Fiscal Year sell, lease or otherwise dispose of Property (other than cash, cash equivalents, or marketable securities) the Value of which in the aggregate does not exceed in any Fiscal Year 5% (and in the aggregate does not exceed 10% in any consecutive three year period) of the Value of all Property, Plant and Equipment of the Obligated Group, as shown on the most recent audited financial statements of the Obligated Group for each such year. Other than as provided in the preceding sentence, the Obligated Group shall not make any transfers, sales or leases of Property except for the following (other than cash, cash equivalents, or marketable securities, the disposition of which shall be governed by Section (2):

(a) to any person if, in the judgment of the Obligated Group Agent, such Property has, or within the next succeeding twenty four (24) calendar months is reasonably expected to, become inadequate, obsolete, worn out, unsuitable, unprofitable, undesirable or unnecessary and the sale, lease, removal or other disposition thereof will not impair the structural soundness, efficiency or economic value of the remaining Property; or

(b) to another Obligated Group Member; or

(c) in the ordinary course of business (provided that events shall not be considered "ordinary course" solely by reason that the Obligated Group shall have engaged in them on a recurring basis); or

(d) if the Obligated Group receives fair market value therefor and the proceeds of such disposition are applied to the purchase of additional capital assets or applied to the defeasance, discharge, redemption or retirement of Indebtedness; or

(e) to a person which is not an Obligated Group Member provided that prior to such disposition, there shall be delivered to the Trustee (i) an Officer's Certificate shall demonstrate that the Debt Service Coverage Ratio for the Historic Test Period prior to the sale, lease or other disposition was equal to at least ____; (ii) an Officer's Certificate shall demonstrate that the Debt Service Coverage Ratio, after giving effect to the transaction, (A) will not be less than [1.30], and shall be at least [80]% of what it was prior to the transaction; and (iii) an Officer's Certificate stating that the Obligated Group or successor, as applicable, immediately following the transfer or disposition, will be in compliance with the Liquidity Covenant and the Trade Payables Covenant, and (iv) an Officer's Certificate stating; or

(f) to any person if the transferred Property consists of Accounts Receivable and the Obligated Group receives fair market value therefor, and provided further that the aggregate principal amount of Accounts Receivable

transferred in any Fiscal Year shall not exceed 5% of the Total Operating Revenues of the Obligated Group for the Historic Test Period.[89]

2. **Cash, Cash Equivalents and Marketable Securities:** The Obligated Group will not sell, lease, donate, exchange or dispose of any non operating assets (including cash, cash equivalents and marketable securities) with or without consideration (in other than the ordinary course of business, which shall mean for this purpose the purchase for fair market value of goods and services in the normal course of the operation of its business) without, at least ten (10) Business Days prior to such action, delivering to the Trustee (a) an Officer's Certificate stating that the Obligated Group or successor, as applicable, immediately following the transfer or disposition, will be in compliance with the Liquidity Covenant [Alternatively: Have at least _____ Days Cash on Hand] and that the amount transferred does not exceed ___% of the cash and marketable investments used in calculating Days Cash on Hand, and (b) an Officer's Certificate stating that the Obligated Group or successor, as applicable, immediately following the transfer or disposition, would be able to issue at least one dollar of additional Long Term Indebtedness pursuant to paragraph (b)(i) under the heading "Additional Debt."

3. Notwithstanding the foregoing, no transfers, sales or leases pursuant to this Section (1) or (2) shall be permitted in any period during which a Event of Default has occurred and is continuing without the prior written consent of a Majority of Owners.

G. ***Cross Covenant*:** Any covenants contained in any agreement related to any other indebtedness for borrowed money of the Obligated Group shall be incorporated (together with any related definitions) by reference in the Master Indenture as though specifically set forth therein and such covenants will be deemed to continue in effect under the Master Indenture for so long as such other agreement remains in effect among the parties thereto, in the form so incorporated, whether or not such covenants are modified, amended or waived by the parties thereto.[90]

H. ***Covenant to Maintain Rating***: If the Bonds have been assigned a rating by a rating agency at the request of the Obligated Group then the Obligated Group covenants to continue to cause the bonds to be publicly rated by at least one nationally recognized rating agency (which need not be the same such rating agency throughout the term of the Bonds), including without limitation the payment of required fees and furnishing required disclosure.[91]

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[89] Sales of accounts receivable would typically be even more tightly restricted for less creditworthy obligors.

[90] This provision, while not typical in the market, is important to giving bondholders the same protections as may be afforded to the Obligor's other creditors. NFMA expects that it will become more applicable to obligors of lesser credit quality. A similar concept would be, in a financing that is not secured by a mortgage, to require the obligor to grant a mortgage in favor of bondholders if any creditor receives a mortgage in the obligor's property.

[91] The NFMA believes that if Bonds are sold with the benefit of a rating then obligors should maintain a rating for the life of an issue. The covenant has been phrased flexibly to avoid unduly disrupting the obligor-rating agency dynamic.

I. ***Covenant to be Bound by the Bond Documents.*** The Obligor agrees that it shall faithfully and timely perform all of its obligations under each Bond Document and agrees to be bound by the provisions of the Bond Documents.

PART IX. AMENDMENTS

A. Bondholder Consent to Amendments

A. ***Bondholder Consent to Amendments:*** The Obligated Group may amend the Bond Documents to provide for additional collateral without Bondholder consent. All other amendments to the Bond Documents and the Master Indenture shall require the consent of Bondholders holding more than 50% in aggregate principal amount of the Bonds or the master notes, as the case may be. The consent of each affected Bondholder shall only be required for the following amendments: (1) to extend the maturity of any Bond; (2) to reduce the principal amount or interest rate of any Bond; (3) to change any redemption provisions for any Bond; (4) to create a preference or priority of any Bond or Bonds over any other Bond or Bonds other than as set forth in the Indenture; (5) any change to any Bond Document that would adversely affect the tax-exemption of any Bond or Bonds; or (6) to reduce the percentage of the Bonds required to consent to any amendment.[92] In addition, the following shall be disregarded in determining whether the required level of consents shall have been achieved: (i) the vote of any bondholder exercised or deemed exercised as a condition of purchase of or simultaneous with the issuance of any Bond, (ii) the vote of any Bonds held by any underwriter during the Underwriting Period (as defined in Rule 15c2-12) or by any agent of the Obligor; and (iii) any Bond not Outstanding[93] as defined in the Indenture.

[92] It may be useful to include a provision permitting the provisions in clauses (1)-(6) to be modified, upon the occurrence of an Event of Default, by a **"super-majority"** vote of bondholders, such as 75%, so long as all Bondholders are treated equally and ratably by such change. This provision is of particular utility where there may be some retail component of the bonds that cannot be effectively contacted in a workout. Similarly, one may wish to include a provision that permits a redemption period to be extended with the consent of a majority, or a supermajority.

[93] The definition of "Outstanding" under the bond documents should exclude bonds held by any Obligated Group member or any affiliate.

Exhibit A

Collateral Concerns – Hospital Bonds Secured By Accounts Receivable

Many hospital bond investors have been disappointed in the outcome of hospital bankruptcies where the bonds were secured by either a so-called revenue pledge (generally defined to include accounts receivable) or by a specific pledge of the hospital's accounts receivable. The three major issues that account for disappointing returns to investors on hospital bond issues secured in this fashion are: (i) the relationship between the value of the collateral and the amount of debt outstanding; (ii) excessively generous "Permitted Liens" that can materially reduce the value of bondholders' collateral after issuance of the bonds; and (iii) issues relating to the failure to properly grant a security interest in accounts receivable and the failure to properly perfect and continue perfection of that security interest under the Uniform Commercial Code ("UCC"). This Appendix addresses each of these concerns, and focuses on problems with the granting and perfection of security interests under the UCC.

A. Collateral Valuation versus Amount of Debt

A typical "revenue pledge" in connection with a hospital bond includes a specific grant of a security interest in the hospital's "accounts" and "accounts receivable" as defined under the UCC in the relevant state. Assuming a hospital bond is secured solely by such a security interest in accounts and accounts receivable, in a bankruptcy of the hospital the ultimate recovery to bondholders depends on the value of this collateral relative to the total amount of debt secured by such collateral. For example, if the hospital files a bankruptcy petition with $100 million in annual revenue, $50 million in debt outstanding, and $25 million in accounts receivable and other pledged accounts, the investor can expect something less than a 50% recovery after collection costs ($25 million in collateral less collection costs divided by the $50 million in debt outstanding).

Contrary to the belief of many hospital bond analysts, a revenue pledge does not guarantee full coverage of the debt, even if the amount of annual revenue is greater than the amount of debt outstanding. Instead, the investor should look to the value of the tangible and intangible collateral granted to secure the bond, often to a large extent the hospital's accounts receivable, to determine bondholder recovery.

B. Permitted Liens

Investors should carefully review provisions in bond documents (typically contained in the loan agreement, mortgage, or deed of trust) allowing the borrower to grant liens on its assets to parties other than the indenture trustee. Expansive permitted liens provisions may allow the borrower to encumber assets otherwise available to pay creditors, including bondholders, in the hospital's bankruptcy. In extreme cases, bond documents may provide that certain permitted liens have priority over the liens granted to secure the bonds. A provision in a bond transaction allowing the hospital to have separate accounts receivable financing, generally up to a stated cap, should

be carefully weighed in the credit analysis, as the involvement of a competing, senior secured creditor may have a material impact on the bondholders' rights in a future hospital bankruptcy.

C. Inadequate Grant of and Perfection of Security Interests

The improper drafting of security interest granting provisions, and the failure to perfect or continue perfection of security interests, are very often the cause of substantial bondholder losses. Of the matters addressed in this Appendix, these issues are the least well understood. To paraphrase one lawyer in the industry – "There are a thousand ways to screw up perfection of pledged collateral but only one way to do it right."

Under the UCC, there are two steps to create and maintain a valid, perfected security interest in most personal property, including accounts receivable: (i) the bond documents must contain an explicit grant of the security interest by the borrower to the secured party (issuer and/or indenture trustee), and (ii) there must be timely continued UCC financing statements on file in the proper places to perfect the security interests granted in the bond documents.

Mistakes often occur at three points in this process. First, there are numerous instances where the original grant of the security interest by the borrower in the bond documents does not adequately describe the collateral as required under the UCC. Under the UCC, it is permissible to describe collateral by using terms specifically defined in the UCC. For example, these include the term "account" which is defined to include "health-care-insurance receivables," both of which are relevant in the hospital context. In general, the grant should include all relevant collateral terms contained in the UCC, as well as a description of the types of rights to payment and other collateral the hospital may have. Unfortunately, granting provisions are often deficient by leaving out certain potentially applicable defined terms or, worse, by defining the security interest in terms of the hospital's "receipts" – funds actually received by the hospital – but leaving out the hospital's many forms of rights to payment. In addition, it is not acceptable to use "super-generic" collateral descriptions, such as "all assets" or "all personal property," in a security agreement.

Second, with certain exceptions, security interests in most collateral must be perfected by filing a financing statement with the central filing office in the state of incorporation of the borrower. In a later bankruptcy of the hospital borrower, failure to perfect a security interest is tantamount to not having the security interest in the first place. The financing statement must include the name of the debtor (borrower), the name of the secured party, and a description of the collateral. It is generally permissible to use the same collateral description used in the security agreement. However, it is also permissible in some instances to use broad terms such as "all assets" or "all personal property." In spite of the obvious ease of simply copying the security interest granting language from the security agreement into the financing statement (making sure to include any internally defined terms), there are often errors in the description of collateral in financing statements that prove fatal to perfection of the underlying security interests. It is necessary to file the financing statement(s) in the proper place. In most states, after 2001 revisions to the UCC, there is only one place for filing – the state of incorporation of the borrower. However, prior to 2001, it was often necessary to file in more than one state and, sometimes, in more than

one place in each state. The parties often failed to file in the correct location(s), resulting in unperfected liens.

Third, the filed financing statements just be periodically continued, and failure to continue the financing statements results in loss of priority of the lien to later filed liens. In many states, under revisions enacted in 2001, if a financing statement provides that it is filed in connection with a "public finance transaction" it is valid for 30 years rather than the standard 5 years. However, certain states did not enact this change (e.g., Florida). In addition, financing statements filed prior to 2001, or that do not contain the "public finance transaction" reference, must be continued every 5 years or they lose their priority. This process is complicated by certain transition rules regarding financing statements filed prior to 2001, but that need to be continued after 2001. It is often necessary to obtain advice of counsel to continue such financing statements.

Assistance from the borrower is not necessary to file continuation statements. Nevertheless, many bond documents contain provisions stating that the borrower is to file continuation statements. It cannot be more strongly stated – the borrower is the last party who should have such a duty. The NFMA believes that all revenue bond documents should require that the indenture trustee be responsible for the filing of continuation statements, because the indenture trustee is the only party (other than the issuer) with an ongoing involvement in the transaction who has a fiduciary duty to the bondholders. Nevertheless, it is advisable for bondholders to have their own counsel review perfection concerns where default is imminent.

Finally, changes in the transaction, including most particularly changes in the official name of the borrower. It is necessary to file financing statement amendments for certain changes, and failure to file such amendments can be fatal to the perfection or priority of the security interest.

A significant number of financing statement in connection with hospital revenue bond transactions have security interest perfection issues. An institutional investor recently performed a review of the UCC perfection status of its hospital bond holdings. Of these, 68% were found to have significant perfection issues of the following types:

- Security not properly granted in bond documents
- Security granted in documents but the financing statement did not match the security that was granted
- Security that was granted did not include accounts receivable or the collateral that the bondholders expected
- Financing statements were never prepared or filed
- Financing statements were prepared correctly but not filed in the correct location(s)
- Financing statements were not timely continued
- Borrower changed its name or other changes occurred but no amendment was made to the filed financing statements

D. Bondholder Protections

Current practice in the revenue bond market provides little assurance that bondholders' collateral position will be protected. There are significant problems with standard bond documents and financing statement filing practices throughout the industry. Many bond counsel who have little experience in the default context do not understand the shortcomings of their standard documents. Only counsel (and bondholders) who have had to litigate in bankruptcy court over security interest defects are truly aware of these perfection deficiencies.

This Model Term Sheet attempts to correct some of these shortcomings by focusing attention on the problems, providing definitional and other documentary fixes, and building best practices in the area.

Elsewhere in the commentary on this Model Term Sheet, the NFMA suggests that bondholders obtain a perfection opinion. There are two benefits to this recommendation: (i) it is expected that the law firm giving the perfection opinion will perform adequate due diligence related to all of the definitional and initial filing issues so as to be able to provide the opinion, and (ii) the law firm's liability policy will be on the line to backstop this opinion.

It may also be possible to obtain an insurance policy on the validity and priority of security interests granted in the bond documents. This type of policy is relatively new and, as far as we know, is only offered by one firm.

The fixes mentioned above only address the issues at a particular point in time. In order to fully address the preservation of security interests it is necessary for all parties in the market to obtain a complete understanding of the issues discussed above. A large percentage of the security interest perfection problems arise from failure to file continuation statements and failure to file amendments in connection with borrower name changes. Knowledge of perfection issues and vigilance in identifying potential perfection lapses are the only protection a secured party can expect in the municipal bond market.

Summary

In order to obtain and maintain a valid, perfected security interest in hospital accounts receivable, (a) the security interest must be reflected in a security agreement authenticated by the borrower that includes a proper definition of the collateral, (b) with some exceptions the security interest must be perfected by the filing of one or more financing statements filed in the correct location(s) and containing an adequate description of the collateral, and (c) the financing statement(s) must be timely continued and amended as circumstances merit. At a minimum, bondholders should obtain assurance at closing that the collateral purportedly pledged to secure the bonds as described in the original offering documents has been properly granted in the underlying bond documents and perfected under the UCC. Going forward, a system needs to be implemented to assure that such security interests are maintained throughout the life of the bonds. The costs of that system should be a borrower expense.

EXHIBIT B

If possible, NFMA recommends the following broad description of collateral appear on the face of the financing statement:

All assets of the debtor, whether now owned or hereafter acquired, including, without limitation, all now owned and hereafter acquired personal property, goods, inventory, equipment, furniture, fixtures, investment property, instruments, promissory notes, chattel paper, electronic chattel paper, tangible chattel paper, documents, letter-of-credit rights, accounts, accounts receivable, health-care-insurance receivables, as-extracted collateral, rights under insurance, deposit accounts, commercial tort claims, general intangibles, payment intangibles, and software, and the products and proceeds of all of the foregoing, including, without limitation, the collateral described on Exhibit A attached hereto.[94]

This is a Public-Finance transaction and this financing statement shall remain effective for a period of thirty (30) years from the date of filing.

EXHIBIT A
to
FINANCING STATEMENT

DESCRIPTION OF COLLATERAL

DEBTOR: _____
_____
_____

SECURED PARTY: _____
_____
_____

[94] This "all assets" collateral description is authorized under the revised Article 9. The list of collateral in this paragraph includes every defined term for types of collateral contained in revised Article 9 that would apply in hospital finance. NFMA recommends that this text appear on the face of the financing statement itself as this reduces the possibility that a mis-filed exhibit or attachment could threaten the perfection of the indenture trustee's lien (a possibility already significantly reduced by electronic filing in most states). Because revised Article 9 provides that financing statements for "public-finance transactions" remain effective for thirty (30) years rather than the standard five (5) years, the relevant box should be checked on the financing statement, and NFMA also recommends this text be inserted in the collateral box on the front of the standard financing statement. Please note that some states have enacted non-standard versions of revised Article 9, so NFMA recommends consultation with counsel prior to closing to determine whether the proposed language is appropriate in a given jurisdiction. In particular, certain states (e.g., Florida) did not enact the thirty (30) year provision for public-finance filings.

All of the Debtor's right, title and interest in any and all personal property, goods, inventory, equipment, furniture, fixtures, investment property, instruments, promissory notes, chattel paper, electronic chattel paper, tangible chattel paper, documents, letter-of-credit rights, accounts, accounts receivable, health-care-insurance receivables, as-extracted collateral, rights under insurance, deposit accounts, commercial tort claims, general intangibles, payment intangibles, software, and Gross Revenues, now owned or hereafter acquired by the Debtor, and the products and proceeds thereof, as more particularly described as follows (collectively, the "Property"):

[INSERT TEXT FROM SECURITY AGREEMENT OR MORTGAGE EDITED AS APPROPRIATE FOR FINANCING STATEMENT][95]

[95] The collateral description in the Exhibit A to the financing statement should mirror the collateral description in the security agreement and/or mortgage, but be edited as appropriate for inclusion with the financing statement. The description should include complete definitions for all capitalized terms defined in the Indenture, loan agreement, mortgage or security agreement that appear in the collateral description. References to other sections of the granting document should be revised so that the Exhibit A is a self-contained description of the collateral such that the reader may readily identify all of the collateral without reference to any other document.

EXHIBIT C

DEFINITIONS

"Acceleration Value" means an amount equal to the sum of the present values on the date of redemption of each principal and interest payment on the Bonds during the applicable Yield Maintenance Term discounted semi-annually at a per annum discount rate equal to the Pre-Refunded Bond Yield and assuming that the full principal amount of Bonds is paid, together with accrued interest, on the last day of the Yield Maintenance Period. The Acceleration Value shall be set forth in a written notice from a Majority of Bondholders delivered to the Trustee, the Company and the Issuer and upon which the Trustee and the Issuer may conclusively rely.

"Aggregate Income Available for Debt Service" means, as to any period of time, the aggregate of Income Available for Debt Service of each Obligated Group Member for such period, determined in such manner that no portion of Income Available for Debt Service of any Obligated Group Member is included more than once.

"Annual Evaluation Date" means the last day of each Fiscal Year.

"Auditor" shall mean an independent firm of certified public accountants, that is appointed by the Obligor, is actively engaged in the business of public accounting and duly certified as a certified public accountant under the laws of the State, that has not served within the past two years as a Consultant to the Obligated Group pursuant to the provisions of the Bond Documents and is approved by the Trustee.

"Bondholder" means the registered owners of the Bonds from time to time as shown in the books kept by the Paying Agent as bond registrar and transfer agent.

"Balloon Indebtedness" means Long-Term Indebtedness (i) twenty-five percent (25%) or more of the original principal amount of which matures within a period of twelve (12) consecutive months, which portion of such principal amount is not required by the documents governing such Indebtedness to be amortized prior to the commencement of such twelve (12) month period in amounts such that, following such amortization, the principal amount maturing during such twelve (12) month period will be less than twenty-five percent (25%) of such original principal amount, or (ii) any portion of the original principal amount of which (1) may be tendered for purchase or redemption prior to maturity at the option of the holder thereof (including any such Indebtedness which is payable on demand within 365 days from the date of incurrence), or (2) is required to be tendered for purchase or redemption (other than sinking fund redemption) prior to maturity thereof.

"Bond Documents" means the Indenture, the Loan Agreement, the Mortgage, [consider additional relevant documents.]

"Completion Indebtedness" means any Indebtedness incurred by any Obligated Group Member for the purpose of financing the completion of the constructing or equipping of facilities for which Indebtedness has theretofore been incurred in accordance with the provisions of this

Indenture, to the extent necessary to provide a completed and equipped facility of the type and scope contemplated at the time of the initial funding of the facilities.

"Consultant" means an independent Person designated by the Obligated Group which is not, and no member, stockholder, director, officer or employee of which is, an officer or employee of any Obligated Group Member and which is a nationally recognized professional consultant of favorable reputation who shall not be the firm serving or proposing to serve as the Obligor's Auditor, and having the skill and experience necessary to render the particular report and which has been approved by the Trustee.

"Days Cash on Hand" means 365 times the quotient produced by dividing (i) the sum of unrestricted and unencumbered cash and cash equivalents and marketable investments[96] (excluding amounts on deposit in the accounts created with respect to payment of interest on and principal of outstanding bonds, borrowed construction funds and debt service reserve funds, and further deducting amounts owed under any line of credit)[97] by (ii) the sum, determined for the preceding Fiscal Year, of (a) operating expenses (excluding extraordinary items, infrequently occurring items or unusual items and the cumulative effect of changes in accounting principles, to the extent that such extraordinary items, infrequently occurring items or unusual items are included in operating expenses, and depreciation, amortization or other non-cash charges), and (b) payments of principal with respect to Long Term Indebtedness.

"Debt Service Coverage Ratio" means, for any period of time, the ratio of Aggregate Income Available for Debt Service to Maximum Annual Debt Service.

"Government Restrictions" means the occurrence of the following: (i) changes in applicable laws, governmental regulations, third party reimbursement methods or private or governmental insurance programs shall have occurred which prevent, have prevented or will prevent the Obligated Group from generating sufficient Aggregate Income Available for Debt Service to comply with the particular requirement of the financing document in question, (ii) the effect upon the Obligated Group of the circumstances set forth in clause (i) above shall have been confirmed by a signed Consultant's opinion or report delivered to the Authority (except in instances as to which such opinion or report is not required under this Indenture or has been waived by the Trustee at the direction of a Majority of Owners), (iii) an Officer's Certificate shall have been delivered to the Authority stating that the Obligated Group has generated the highest level of Aggregate Income Available for Debt Service which, in the opinion of such officer, could reasonably be generated given the circumstances set forth in clause (i) above, and (iv), but only at the request of the Trustee at the direction of a Majority of Owners, there shall

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[96] In general, NFMA believes that it is appropriate to include funds toward the liquidity covenant that are generally available for the payment of operating expenses or debt service, with the specific exclusions for indenture funds and borrowed moneys noted in the definition. Financial statements can be opaque regarding which funds on the balance sheet are available for these purposes. NFMA encourages obligors to provide clear financial statement disclosure regarding board designated funds and other moneys, to make clear the degree of restriction which has been imposed on their use. In no event should real estate or other illiquid investments be included in calculating Days Cash on Hand.

[97] For health care credits there should also be a deduction for any recoupment liability to any third party payor.

have been delivered to the Authority an Opinion of Counsel as to any conclusions of law supporting the opinion or report of the Consultant.

"Hedging Contract" means an interest rate swap, exchange, cap or other agreement between an Obligated Group Member and any other party for the purpose of hedging payment, interest rate, spread or similar exposure.

"Historic Test Period" as of any date means the most recent Fiscal Year then ended.

"Income Available for Debt Service" means with respect to each Obligated Group Member, as to any period of time, the excess of revenues over expenses[98] for such period, before depreciation, amortization and interest, as determined in accordance with generally accepted accounting principles consistently applied; provided, that without limiting the foregoing, no determination thereof shall take into account (i) any revenue or expense of any person which is not an Obligated Group Member, (ii) any gain or loss resulting from either the extinguishment of Indebtedness or the sale, exchange or other disposition of capital assets not in the ordinary course of business, (iii) the net proceeds of insurance (other than business interruption insurance) and condemnation awards; (iv) any extraordinary gain or loss as defined and allowed under generally accepted accounting principles; (v) the cumulative effect of changes in accounting principles; (vi) all gains and losses resulting from changes in the fair value of investments or Hedging Contracts; (vii) unrealized investment gains and losses; [and (ix) all gains and losses resulting from a Hedging Contract during any period that such Hedging Contract and the associated Indebtedness have been integrated pursuant to [REFERNCE HEDGING AGREEMENT RULE FROM INDEBTEDNESS SECTION].

"Long-Term Indebtedness Service Requirement" means, for any period of time, the aggregate of the scheduled payments to be made (other than from amounts irrevocably deposited with the Trustee or otherwise held for the benefit of a lender for purposes of such payments, including funds held in connection with an advance refunding or a cross-over refunding) in respect of principal and interest on Long-Term Indebtedness of each Obligated Group Member during such period, also taking into account (i) with respect to Balloon Indebtedness, the provisions pertaining to debt service on Balloon Indebtedness, (ii) with respect to Variable Rate Indebtedness, the provisions pertaining to debt service on Variable Rate Indebtedness, (iii) with respect to Capitalized Interest, the provisions pertaining to credit for Capitalized Interest, (iv) with respect to Indebtedness represented by a Guaranty of obligations of a person, the provisions pertaining to restrictions on Guaranties.

"Long Term Indebtedness" means all Indebtedness, other than Short Term Indebtedness, included in the following:

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[98] This definition, relevant for the calculation of debt service coverage, includes both operating and non-operating revenue. Certain members of the drafting committee argued for a more conservative definition of debt service coverage that would exclude non-operating revenue (which consists primarily of interest income). If non-operating revenue is to be excluded, consider including revenue from operating affiliates in which the obligor has an ownership interest that may technically be classified as non-operating revenue but which are derived from activities that, were they directly undertaken by the obligor, would constitute operating income.

(i) Indebtedness with respect to money borrowed for an original term, or renewable at the option of the obligor for a period from the date originally incurred, longer than one year;

(ii) Indebtedness with respect to leases which are capitalized in accordance with generally accepted accounting principles having an original term, or renewable at the option of the lessee for a period from the date originally incurred, longer than one year; and

(iii) Indebtedness with respect to installment purchase contracts having an original term in excess of one year.

"Majority Bondholder" means any group of three (3) or fewer Bondholders or beneficial owners of Bonds which are separate entities and which (i) collectively own more than fifty percent (50%) of the aggregate principal amount of all Outstanding Bonds, and (ii) notifies the Trustee in writing of its or their desire to be deemed a Majority Bondholder. The Trustee may require Bondholders or beneficial owners to provide such evidence of ownership of Bonds as the Trustee may reasonably require in making any determinations hereunder, which evidence may include, without limitation, written statements from one or more DTC Participants attesting to the beneficial ownership of the Bonds.

"Majority of Owners" means the holders or beneficial owners of, collectively, more than 50% of the aggregate principal amount of all Outstanding Bonds. The Trustee may require Bondholders or beneficial owners to provide such evidence of ownership of Bonds as the Trustee may reasonably require in making any determinations hereunder, which evidence may include, without limitation, written statements from one or more DTC Participants attesting to the beneficial ownership of the Bonds.

"Maximum Annual Debt Service" means the highest Long-Term Indebtedness Service Requirement for the then current or any future Fiscal Year.

"Non Recourse Indebtedness" means any Indebtedness secured by a Lien on Property other than Restricted Property, which Indebtedness is not a general obligation of the Obligated Group or any Obligated Group Member, and the liability for which Indebtedness is effectively limited to the Property subject to such Lien with no recourse, directly or indirectly, to any Restricted Property.

"Pre-Refunded Bond Yield" means the yield that would be borne by a pre-refunded term bond maturing on the last day of the Yield Maintenance Period, secured by an escrow of non-callable United States Government Obligations, rated in the highest rating category by S&P and Moody's, all as determined by reference to the Municipal Market Data-Line Pre-refunded Bond Yield Index as published by the Municipal Market Data Fundamental Service (or if such index is no longer published, such other comparable index as is selected by a Majority of Owners) on a day not later than fifteen days and not earlier than sixty days prior to the date fixed for redemption of the Bonds.

"Ratio Evaluation Date" means each Annual Evaluation Date and the last day of each (_____).[99]

"Report Date" means sixty (60) days following the applicable Ratio Evaluation Date except that the Report Date following the Annual Evaluation Date shall be the 120th day following the Annual Evaluation Date.

"Short Term Indebtedness" means all Indebtedness included in the following:

(i) Indebtedness with respect to money borrowed payable on demand or for an original term, or renewable at the option of the obligor for a period from the date originally incurred, of one year or less;

(ii) Indebtedness with respect to leases which are capitalized in accordance with generally accepted accounting principles having an original term, or renewable at the option of the lessee for a period from the date originally incurred, of one year or less; and

(iii) Indebtedness with respect to installment purchase contracts having an original term of one year or less (other than contracts entered into in the ordinary course of business).

"Subordinated Indebtedness" means any Indebtedness incurred or assumed by one or more Obligated Group Members, the payment of which is by its terms specifically subordinated to payments on or with respect to the Bonds and any issue of Alternative Indebtedness, or the principal of and interest on which would not be paid (whether by the terms of such Indebtedness or by agreement of the obligee) when the Bonds or Alternative Indebtedness are in default or while bankruptcy, insolvency, receivership or other similar proceedings are instituted and implemented.

"Taxable Interest Payment Date" means each Interest Payment Date occurring after (i) the date of issuance of the Bonds, or (ii) if later, the date, if any specified by the Internal Revenue Service or Bond Counsel, as applicable, as of the date from which the Bondholders are liable for federal income taxes upon interest paid on the Bonds.

"Taxable Rate" means the applicable interest rate on the Bonds divided by one (1) minus the highest marginal tax rate applicable to ordinary personal income in effect during the period for which the Taxable Rate is assessed.

"Yield Maintenance Term" shall mean the period commencing on the redemption date and ending on [PAR CALL DATE].

[99] If liquidity is tested more frequently than semi-annually, the tax code may treat moneys up to the amount of the liquidity requirement as a "negative pledge" fund and this subject to yield restriction.

Exhibit D

NATIONAL FEDERATION OF MUNICIPAL ANALYSTS

Position Paper on Coerced Tenders

The purpose of this document is to set forth the position of the National Federation of Municipal Analysts ("NFMA") regarding "Coerced Tenders". This name is given to a fairly broad range of transactions occurring with increasing frequency in which bondholders are forced to sell their bonds at a price not determined by market forces but rather at a price dictated by an investment banking firm acting in concert with both the borrower and, most distressingly, the bond trustee. A common variant of these transactions involves the borrower, through the bond trustee, simultaneously issuing an "optional" Tender Offer and an irrevocable Redemption Notice for any bonds not tendered. In all of these structures, the bondholders are notified that if they do not tender their bonds, the bonds will be redeemed at par. Naturally, many bondholders are induced, under duress, into tendering at a nominal premium. The combination of these two transactions leads to the borrower creating an optional purchase in lieu of redemption that is not authorized by the bond documents.

The goals of an Coerced Tender are to achieve the effect of interest savings (or perhaps, generally, some return, for the borrower) without going through the time and expense of a current refunding bond issue. In addition, such transactions no doubt generate substantial return for the investment banker. Preservation of the value of an existing bond insurance policy that might not be available, or might cost more, for a current refunding bond issue may also be an objective. In many cases, the return is achieved by utilizing the existing high coupon debt in some type of transaction such as a tender option bond, a total return swap or some other derivative transaction, with resulting sponsor fees or return.

The economic interests of the parties involved in these transactions are obvious. The borrower's aim is a lowering of its debt cost. For the brokerage firm, these transactions may be considerably more lucrative than a traditional current refunding bond issue. The brokerage house is able to replace a one-time placement fee with a series of renewable annual fees including remarketing, liquidity and credit enhancement fees. In addition, there are often additional fees for swaps and other related financial contracts that are included in some of these transactions.

These transactions take place on existing bonds that are currently callable. Because the economic objective requires maximizing the amount of bonds that remain outstanding under new ownership and minimizing the amount of bonds redeemed, the transactions often depend on targeting a partial redemption to bonds that are not tendered for purchase. Accordingly, one factor that generally must be present is that the call provision for a partial redemption of a given maturity must include language on the selection of bonds redeemed that allows for the Trustee's

discretion. In most or all of the cases, the exact language contains the concept that the trustee may use any selection manner that the Trustee determines to be "fair and appropriate."

The question then becomes the determination of fairness. How does the Trustee make the determination that it is fair to redeem untendered bonds rather than to do a random lottery that would result in a distribution of the available redemption money among tendered and untendered bonds? What resources are used to make this determination? What professionals are retained to provide assistance? Does the Trustee, in its role as custodian of a trust for the benefit of the bondholders, solicit those bondholders' thoughts on fairness? Who is advising the trustee that the "selection" that results from this coercive process is truly being made by the Trustee, by lot, as required under the documents, as opposed to a process designed by the borrower and its bankers? It appears that in practice the trustee does not make an independent determination of fairness but rather relies on the unofficial advice of the parties structuring the transaction.

In one recent instance, the stated fairness rationale was that the selective redemption was fair because the borrower had the right to call the bonds for redemption and that current bondholders were offered a 1% premium to tender their bonds. Therefore, the theory goes, it is fair to selectively redeem bonds by redeeming specifically those bonds not tendered rather than selecting bonds for redemption by lot or some other random method, as is customary. This misses the point that a bondholder has a right to continue holding a bond unless it is redeemed in accordance with the bond documents. Indeed, the fact that the bondholder could have tendered the bond but declined to makes it less fair, not more fair, to target for redemption the bondholder that wishes to continue owning. There is a strong argument to be made that the Trustee, as the custodian of a Trust, is not acting in the interest of the beneficiaries of that Trust, the bondholders, when they facilitate these transactions. At a minimum, bondholders should be made aware that these transactions are being contemplated and bondholder input should be solicited.

As these transactions became prevalent, some bondholders objected to them because the tender premium was not set in a fair manner since it was not the subject of a negotiation or of market forces (as is the case in primary and secondary market trading of bonds) but was instead dictated by the borrower through the coercive process of issuing a tender and an irrevocable call simultaneously. The argument against the fairness of this method is that bondholders should be free to determine what a fair price is since these are their investments. The transaction involves economic gains for various parties (borrower, investment banking firms and bond counsel firms or legal advisors) that involve using the investment that is the property of the bondholder. Absent explicit language that allows for the purchase in lieu of redemption, the fairness of the price or method for taking possession of the bondholder's investment should be determined in a manner acceptable to all parties, particularly the bondholder**.**

Unfortunately, as these transactions have evolved, the fairness of the transaction has gotten worse from a bondholder standpoint, not better. In several early transactions, the bond redemption backed by the current refunding bonds was a contingent transaction that was threatened but not irrevocably issued. Because the refunding bonds were not ready for sale and the call notice had not been issued, there are examples of the borrowers revising the tenders,

offering more of a premium and finding bondholders more willing to tender their bonds. The ability to freely negotiate price resulted in a fair price, determined by free market forces.

In order to counter the practice of negotiated tenders, the investment banking firms and legal counsel have modified the structure to link the current refunding bond redemption directly to the tender. Now, the refinancing debt is ready to be placed if needed to finance any non-tendered bonds. In addition, the banking firm and counsel instruct the borrower to issue a purportedly "irrevocable" redemption notice to redeem untendered bonds, along side a non-negotiable tender offer. The structure of this entire transaction is designed to forcibly coerce bondholders to tender since the price is slightly better than the redemption price. This mechanism depends on the fiction that a redemption notice that is cancelled if a bond is tendered is an "irrevocable" notice to redeem an unspecified amount of non-tendered bonds that are not identifiable at the time of the redemption notice, as opposed to what it really is: an impermissible contingent notice of redemption of all bonds that receive the notice.

Again, the reason for linking the tender and the call is to force bondholders to accept the tender offer at the borrower's price. Institutional holders are coerced into tendering because of their fiduciary duty to maximize shareholder value. This transaction is facilitated by the Trustee's willingness to abdicate its fiduciary duty to bondholders and to work together with the investment banker and borrower, unbeknownst to bondholders (until the "optional" Tender Notice and irrevocable Call Notice arrive in the mail), to force bondholders to tender their bonds at a pre-determined price not set by market forces. This complicity on the part of the Trustee is in direct contradiction to the trustee's fiduciary duty. In the summer of 2003, Evergreen Funds sent letters to various Trustees questioning the Trustees involvement in these transactions. The National Federation of Municipal Analysts (NFMA) has concluded that these transactions are not fair and that Bond Trustees may assume legal liability in making these directed redemptions.

This is not a redemption – which the borrower has a right to do – this is a different transaction created through the use of the existing bonds – an economic arbitrage. If the bonds are redeemed – the arbitrage opportunities go away. Traditional redemption of the bonds is a sub-optimal outcome for all the parties involved who have structured this deal – especially the brokerage firms. In order to obtain these arbitrage profits and the higher fees that accompany these deals, the parties to these transactions should not be able to coerce the bonds from the hands of investors but should be required to use regular market forces to obtain their objectives.

What steps can bondholders take to thwart these Coerced Tenders, both present and future?

- Review the language in the legal documents under the redemption provisions, specifically the section that deals with and is often entitled "Selection of Bonds for Redemption." Make sure that the Trustee is required to select bonds for redemption only by lot, meaning lottery, which is the method regarded as fair and proper throughout the investment community.
- Make your feelings about Coerced Tenders known to the brokerage houses, both on the investment banking side and to your sales coverage. Up until very recently these transactions have been occurring with relatively little bondholder awareness. Make sure the brokerage firms know that we continually evaluate their professional conduct and that

forthright, open communication and fair market dealing is the best way to establish positive professional relationships that benefit all parties.

- Inform bond trustees that you view their complicity in Coerced Tenders as a breach of their fiduciary duty to bondholders.

The NFMA is a professional association of over 900 municipal research analysts with specialized knowledge of municipal finance transactions. These individuals are drawn from a broad cross-section of institutions engaged in municipal bond transactions including broker/dealers, rating agencies, insurance companies, mutual funds, large corporations and other institutional investors. One of the main initiatives of the NFMA is to promote accurate, timely and complete disclosure of credit information pertaining to municipal bond transactions. The NFMA's advocacy efforts have ranged from global disclosure-related issues to more detailed, sector-specific work.