May 15, 2017

VIA ELECTRONIC MAIL

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: <u>File No. S7-01-17; Proposed Amendments to Municipal Securities Disclosure</u>

Dear Secretary Fields:

The Large Public Power Council (the "LPPC") appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "Commission") on the proposed amendments (the "Proposed Amendments") to Rule 15c2-12 (the "Rule") under the Securities Exchange Act of 1934 (the "Act") set forth in Release No. 34-80130 (File No. S7-01-17) (the "Release"). Founded in 1987, LPPC is a national organization comprising 26 of the nation's largest public power systems. LPPC members are locally owned and controlled not-for-profit electric utilities committed to the people and communities they serve. LPPC advocates for policies that allow public power systems to build infrastructure, invest in communities and provide reliable service at affordable rates. From New York to California and from Washington State to Florida, LPPC members provide reliable, low-cost electric service to over 30 million people. Our member utilities represent a cross section of the nation's utility industry, and own and operate 30,000 circuit miles of high voltage transmission lines and over 71,000 MW of generation with a significant amount of renewables, fossil, hydro, efficiency, and demand side management. LPPC's members are significant issuers of municipal bonds, with over $68 billion currently outstanding and expectations to issue more than $15 billion over the next five years.

While LPPC generally supports the concepts behind the Proposed Amendments, including improving the timely availability and quality of important information about municipal bond issuers and their financial obligations, LPPC believes that the Proposed Amendments should be narrowly tailored to require municipal issuers only to provide notice of the incurrence of bank loans, private placements or direct purchases of debt obligations, and derivatives instruments that are executed in connection with, and hedge, debt obligations of an issuer. The Proposed Amendments arose in response to widespread commentary and a desire in the municipal market for timely and better dissemination of information about bank loans, direct purchases, and other non-public placements of debt securities. As drafted, however, the Proposed Amendments go far beyond what was expected and require the reporting of a wide variety of "financial obligations" within 10 days of the incurrence of such obligations, if material, or any agreement to certain covenants or terms in a financial obligation, if material. The Commission should be aware of the considerable amount of time and costs associated with adopting the changes to the Rule as proposed. These changes would be burdensome and ultimately increase costs for LPPC members that would lead to increased costs for our members' utility customers and investors.

Definition of "Financial Obligation"

LPPC believes that the scope of the term "financial obligation" in the Proposed Amendments is too broad and would greatly increase the burden and cost of financial monitoring and reporting of information for all municipal issuers who access the public debt markets. Municipal issuers already disclose much of the information required by the Proposed Amendments in their annual disclosure filings and their annual financial statements. LPPC believes that the Proposed Amendments should be narrowly tailored to require municipal issuers only to provide notice of the incurrence of bank loans, private placements or direct purchases of debt obligations and derivatives instruments that are executed in connection with, and hedge, debt obligations of an issuer. The expansive list of "financial obligations" would require information to be reported to investors that would be superfluous and costly for issuers to adopt.

Under the current definition of financial obligation, an issuer would be required to report the incurrence of any derivative obligation. The Proposed Amendments define the term "derivative instrument" as any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument to which an issuer or obligated person is a counterparty. LPPC is concerned that the scope of the term of derivative obligation is much too broad. Certain municipal issuers, and particularly public power issuers, enter into "derivative" transactions in the ordinary course of their business for conventional business-related purposes, such as to manage fuel price or power price volatility or to reduce other risks. Municipal issuers who enter into derivative transactions regularly have adopted risk management policies that limit the amount of money at risk or limit the type and terms of hedging that are permitted. To require reporting of the execution of each hedging agreement not only would be burdensome given the number of agreements that are entered into but disclosure of the material terms could put the issuer at a competitive disadvantage. LPPC believes that the Commission should create an exemption in the definition of "financial obligation" for derivative instruments, as well as for the other types of agreements included in the definition of "financial obligations," that are entered into by a municipal issuer in the ordinary course of its business.

Such an exemption already exists for public reporting companies. Public companies are required under the Act to file a Form 8-K to report, on a current basis, the occurrence of certain significant events. These events include the entering into of any "material definitive agreement" not made in the ordinary course of business of the company.[1] Agreements made in the ordinary course of business are those that "ordinarily accompan[y] the kind of business conducted by the registrant and its subsidiaries."[2] An ordinary course of business determination for a derivative instrument entered into by a municipal issuer would simply require comparing the nature of a particular derivative contract with the nature of the municipal issuer's business as is currently done for public companies. Using this analysis, a municipal utility would be exempt from the requirement to report that it entered into a fuel hedge, but a school district that enters into a fuel hedge would be required to make a notice filing. LPPC believes that the ordinary course of business exemption would be appropriately applied to any lease, contract or agreement included in the definition of financial obligation.

While LPPC supports the requirement to file a notice for the entering into of a derivative instrument for the purpose of hedging interest rate exposure in connection with an issuer's outstanding debt obligations, LPPC would like the Commission to consider clarifying the timing and manner of providing such notice. In the event that a derivative is being entered into concurrently with a public issuance and sale of bonds, the Proposed Amendments should be revised to make it clear that no separate event notice would need to be filed with the MSRB if the material terms of such derivative are included and set forth in the final official statement that is filed with the MSRB. In addition, if an issuer is entering into a derivative such as a rate lock for a series of new bonds or refunding bonds to be issued on a future date, disclosure of such derivative instrument within ten business days of the execution of the agreement could signal to the market that an issuance of debt obligations is expected. LPPC believes that the requirement to file the notice of the incurrence of such derivative transaction should be delayed and required to be made when the notice filing for the issuance of the debt obligation is made.

LPPC is also concerned about the requirement to report any monetary obligation, if material, resulting from a judicial, administrative, or arbitration proceeding as well as from a settlement order or consent decree within 10 business days of the imposition of such monetary obligation. Public power issuers are heavily regulated and may be involved in addressing or responding to a number of proceedings, investigations, or other matters that may result in the imposition of a fine or penalty when finally resolved and our members often manage litigation and other similar risks through insurance coverage, funding reserves, and other arrangements. LPPC believes that the disclosure of monetary obligations resulting from a judicial, administrative or arbitration proceedings is already adequately provided to an investor in the notes to an issuer's annual financial statements that describe an issuer's pending and contingent liabilities and should be excluded from the Proposed Amendments. However, if the Commission remains concerned about having information that could affect the current financial condition of an issuer made available to investors on a more timely basis, LPPC requests that any requirement under Rule 15c2-12 to provide information about a material monetary obligation resulting from judicial, administrative or arbitration proceeding would (1) only arise at the time that such judicial,

[1] Item 1.01 of Form 8-K.

[2] Item 601(b)(10)(ii) of Form 8-K.

administrative or arbitration is final and non-appealable and (2) only arise if such monetary obligation is in excess of any insurance coverage, funding reserves, and other financial arrangements that are available for its payment.

Additional Disclosure Items to Report; Material Terms

The Proposed Amendments also require disclosure of any "agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material," and disclosure of a default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties. Again, the required determination of materiality and the lack of a definition of "financial difficulties" would create uncertainty and impose significant costs and burdens on LPPC members and other government issuers. LPPC is also concerned that disclosure of an issuer's agreement to any of the items included in the list in the Proposed Amendments could adversely impact an issuer's ability to effectively negotiate and enter into future agreements. The disclosure of such terms would be available to all municipal market participants as well as investors and any counterparty to a contract could use that to strengthen their negotiating position. The Commission needs to clarify and limit the types of covenants, events of default, remedies, priority rights, and other terms it requires to be reported or to extend the time for reporting such information to prevent loss of competitive advantage for large and small municipal issuers.

Timing

The Proposed Amendments would require issuers to report the incurrence and material terms of financial obligations within a very tight timeline—10 business days—rather than allowing financial obligations to be addressed in annual financial statements. LPPC understands that the Commission is concerned that under current 15c2-12 reporting requirements the incurrence of bank loans or the issuance of bonds in a private placement may not be reported until an issuer files its annual financial and operating data which may not be until one year later. However, the Release provides no explanation as to why the "within 10 business days" is the appropriate timing for such information.

LPPC believes that having only 10 business days within which to file a report as set forth in the Proposed Amendments is too short and will likely discourage or even prevent issuers from summarizing and reporting only the material terms of their financial obligations. Instead, issuers will file complete copies of legal documents to avoid summarizing and making materiality determinations and to avoid the risk of a later conclusion by an underwriter or the Commission that a summary did not include all "material" terms. LPPC requests that the Commission change the timing of the filing requirement to be within 10 business days after the end of each fiscal quarter of the issuer. A quarterly reporting requirement would give issuers sufficient time to review and summarize the terms of a particular financial obligation and, if needed, to discuss any concerns about what should or should not be disclosed with counsel. Not only would this help issuers in fulfilling their disclosure obligations, it would result in more concise and meaningful information being filed, which would benefit investors and other municipal market participants.

Materiality Standard

The Proposed Amendments require the issuer to file notices of the incurrence of a financial obligation or an agreement to certain covenants or terms in a financial obligation, *if material*. The term "material" is not defined in the Release and the Commission has historically declined to provide any guidance stating that materiality determinations are not something that can be reduced to a numerical formula and that evaluations of materiality require both quantitative and qualitative considerations.[3] Without any guidance from the Commission as to materiality, there will likely be varying interpretations by issuers and by underwriters of what an issuer is required to file under the Proposed Amendments. We would expect that without additional guidance or rulemaking, the concept of materiality would be interpreted broadly and would likely result in issuers disclosing information about financial obligations that are not material, much like the post-MCDC trend where issuers disclose all instances of non-compliance with their continuing disclosure obligations without regard to actual materiality.

Therefore, LPPC would like the Commission to develop and use a threshold or a numerical test or a series of threshold or numerical tests to determine whether the incurrence of a particular financial obligation needs to be reported. For example, these tests could require reporting if the principal amount of the financial obligation as compared to total outstanding indebtedness exceeds a specified number or percentage. In addition, another factor that could be considered is if the financial obligation is issued under the same indenture or resolution as outstanding bonds. Alternatively, the Commission could continue to employ the word "material" but adopt an interpretative release or provide guidance that provides a detailed explanation of what the word "material" means in the context for each category of financial obligation. If the definition of financial obligation remains broad, the Commission should issue an interpretative release or other guidance to help issuers understand what the word "material" means in the context of each type of "financial obligation" that is included in the final rule and establish a test or series of tests to guide issuers in determining whether a financial obligation would need to be reported. Any guidance in this area should be sufficiently clear so that issuers and the underwriters (who will be spending significant time on performing due diligence with respect to an issuer's compliance with the reporting requirement of the Rule) can clearly determine what is required to be reported. If the Commission is unwilling to develop a test or provide additional guidance on application of the materiality standard, then LPPC urges the Commission to modify the Proposed Amendments to reduce the likelihood that issuers and underwriters alike will feel compelled to treat all financial obligations and all of the terms of such financial obligations as material.

Cost of Compliance

LPPC is very concerned that the SEC has significantly underestimated the amount of time and costs that will be incurred by municipal issuers to comply with the requirements of the Proposed Amendments. Large municipal issuers, such as LPPC's members, that are in the market frequently will likely have extensive disclosure and reporting requirements for staff

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[3] SEC Staff Accounting Bulletin No.99, Release SAB 99 (Aug. 12, 1999) 64 FR 4150 (Aug 19, 1999).

to manage under the Proposed Amendments while smaller issuers of municipal securities may not have staff dedicated solely to debt management and compliance issues. In either event, without rulemaking or additional guidance from the SEC as to materiality, the materiality qualifier intended to help all issuers narrow the scope of their reporting requirement will result in each financial obligation that is entered into by an issuer being analyzed for materiality on a case-by-case basis, likely with the assistance of counsel. This will require governmental issuers to engage bond counsel and/or other consultants more frequently to assist with due diligence and to review and prepare summary or redacted documents for filing on EMMA. The changes will be burdensome and costly and the increased costs ultimately will be passed along to the utility customers of LPPC's members and to investors.

We hope that the above comments will prove helpful to the Commission and its staff in their consideration of the Proposed Amendments and thank you for the opportunity to submit these comments.

Very truly yours,

Noreen Roche-Carter
Chair, Tax & Finance Task Force
Large Public Power Council