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May 15, 2017

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

RE: Proposed Amendments to Exchange Act Rule 15c2-12 (Release No. 34-80130; File No. S7-01-17)

Dear Mr. Fields:

The National Association of Bond Lawyers (NABL) respectfully submits the attached comments to the U.S. Securities and Exchange Commission regarding the proposed amendments to Exchange Act Rule 15c2-12, Release No. 34-80130, File No. S7-01-17, which were published in the Federal Register on March 15, 2017. The comments, which have been approved by NABL's Board of Directors, were prepared by a working group of NABL's Securities Law and Disclosure Committee, composed of the individuals listed in Exhibit 1.

I have also attached comments previously submitted to the Securities and Exchange Commission and to the Office of Management and Budget concerning the burdens of the proposed amendments under the Paperwork Reduction Act.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. We respectfully provide this submission in furtherance of that mission.

If NABL can provide further assistance, please do not hesitate to contact Bill Daly in our Washington, D.C. office at ([redacted].

Thank you for your consideration of these comments.

Sincerely,

Clifford M. Gerber

Enclosure

NATIONAL ASSOCIATION OF BOND LAWYERS

COMMENTS TO PROPOSED RULE 15c2-12 AMENDMENTS

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I. *Introduction*

a. NABL and Committee Role

The National Association of Bond Lawyers ("*NABL*") respectfully provides the following comments to the U.S. Securities and Exchange Commission (the "*Commission*"). These comments address the amendments (the "*Proposed Amendments*") to Exchange Act Rule 15c2-12[1] (the "*Rule*") of the Commission proposed by Securities Exchange Act Release No. 34-80130, File No. S7-01-17, adopted March 1, 2017, and published in the Federal Register on March 15, 2017 (the "*Proposing Release*").

NABL exists to promote the integrity of the public finance market by advancing the understanding of and compliance with the law affecting public finance. NABL is a nonprofit corporation organized for the purposes of educating its members and others in the law relating to state and local bonds and other obligations, providing a forum for the exchange of ideas as to law and practice, providing advice and comment at the federal, state and local levels with respect to legislation, regulations, rulings and other actions, or proposals therefor, affecting state and local obligations, and providing advice and comment with regard to state and local obligations in proceedings before courts and administrative bodies through briefs and memoranda as a friend of the court or agency. NABL has more than 2,700 members, almost all of whom regularly represent governmental issuers and other obligated persons (collectively, "*issuers*"), underwriters, and other market participants in the issuance of state and local securities and in the preparation, review, and filing of continuing disclosures by issuers.

The NABL Securities Law and Disclosure Committee's Working Group [2] responsible for preparation of this comment letter consists of approximately 25 attorneys from firms of all sizes across the country. The Working Group members have substantial and varied bond, disclosure and underwriter's counsel experience and represent a wide range of issuers, as well as underwriters. Participants also serve as issuer's counsel and purchaser's counsel in numerous financings.

These comments are based on our collective experience representing participants in the public finance market.

b. NABL PRA Comments

On April 11, 2017, NABL submitted its *Comments Regarding Collection of Information Burden of Proposed Amendments to SEC Rule 15c2-12* (the "*NABL PRA Comments*") to the Commission and the U.S Office of Management and Budget ("*OMB*"). The NABL PRA Comments specifically addressed the "collection of information burdens," as defined in the Paperwork Reduction Act of 1995, as amended (the "*PRA*"), that can be expected to result from the Proposed Amendments. The NABL

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[1] 17 C.F.R. 240.15c2-12.

[2] See Exhibit 1.

PRA Comments respectfully urged the Director of OMB to disapprove the collection of information burdens contained in the Proposed Amendments unless the Commission (i) revises the Proposed Amendments to draw clear lines that eliminate any obligation to provide or collect information that is not sufficiently important to investors to warrant burdens that can reasonably be expected to result, and (ii) makes careful, well-informed, and rigorous cost estimates in evaluating the complete resulting benefits and burdens in light of current market practice. We reiterate our concern regarding the collection of information burdens expressed in the NABL PRA Comments. While not mentioned in the NABL PRA Comments, we also note that the Proposing Release has not quantified any benefit that can be expected to result from the Proposed Amendments. Accordingly, if the Commission determines to take any action on the subject of the Proposed Amendments, we respectfully request that it first make a rigorous quantitative estimate of all the resulting benefits and costs in light of current market practice, and then modify the Proposed Amendments as required to provide clear lines for when notices must be provided and to avoid burdens that outweigh the resulting benefits.

c. Executive Summary

i. *Comments on the Substance of the Proposed Amendments*

a. *The Proposed Amendments Are Overly Broad*

The Proposed Amendments are overly broad, primarily because the term "financial obligations" is overly broad. The Proposed Amendments go far beyond requiring disclosure regarding bank loans and private placements. The Proposed Amendments encompass a wide range of other "financial obligations," including many obligations that are not "debt" (i.e., the borrowing of funds), such as routine leases, contingent obligations, and obligations resulting from adverse judicial or administrative proceedings. The examples of investor risk discussed in the Proposing Release—senior bank liens and acceleration provisions—are either prohibited by outstanding bond contracts, in which case they would trigger a notice under the existing Rule, or are permitted by outstanding bond contracts, in which case the risk of such action should be priced into the value of outstanding bonds even before the event. In addition, the Proposing Release does not make the case for including financial obligations beyond bank loans and private placements.

b. *The Materiality Qualification Does Not Effectively Limit the Breadth of the Proposed Amendments*

Contrary to the Commission's belief, the Proposed Amendments do not provide a balanced approach merely by incorporating the concept of materiality to define reportable events. Rather than specifically defining events that by their nature would likely be material to investors (comparable to the existing listed events under the Rule), the Proposed Amendments' use of the phrase "financial obligations" will ensnare thousands of contracts for many issuers, and then rely on the use of a materiality qualifier to sort these contracts for investor importance. The "materiality" qualifier is not clear, requiring application of a time-consuming and uncertain facts and circumstances analysis to each such obligation and event, which will result in burdensome disclosure procedures. The Commission's approach to analyzing materiality in the settlement agreements from the recent Municipalities Continuing Disclosure Cooperation (*"MCDC")* initiative has affected and will continue to affect market practices with respect to the assessment of materiality in the context of the Rule.

c. *The Disclosure Deadline is Too Short*

Given the steps required to identify, evaluate, and give notice of a material financial obligation or related event, a filing deadline of 10 business days after the event is too short. The Proposing Release does not adequately address why the Proposed Amendments would require notice of material financial obligations, rather than the more consistent, comparable and reliable information included in audited annual reports.

d. *The Commission Has Not Reliably Estimated Burdens and Benefits*

The Proposing Release merely speculates about qualitative benefits that may be expected to accrue to investors and others as a result of the Proposed Amendments. The Proposing Release does not include a quantitative estimate of benefit. Absent a quantitative estimate of benefit, it is impossible to conclude that the expected benefits will outweigh the understated burdens estimated by the Commission, let alone the reasonably expected burdens.

ii. Comments on the Rationale for the Proposed Amendments

The Proposing Release does not demonstrate that the Proposed Amendments, which utilize the broad term "financial obligation" as their focal point, are needed to prevent fraud, which is the jurisdictional predicate for the Rule. Congress has specifically exempted issuers of municipal securities from the periodic and current reporting requirements that apply to reporting companies. Nonetheless, the Proposed Amendments require issuers to make ongoing disclosures that are modeled on and akin to (but in some respects actually exceed) the disclosures required of public companies under Commission Form 8-K. Unlike reporting companies, however, neither issuers of municipal securities nor most non-reporting company obligated persons have outstanding equity securities. The value of state and local securities is affected primarily by changes in prevailing interest rates, secondarily by long-term economic and demographic trends, and less commonly by significant financial events affecting the issuer. That is not to say that a significant financial obligation or other event affecting the issuer could not be material to investors. Governmental issuers operate, however, with heightened transparency (as compared to corporations). Under state "sunshine laws" decisions are made at public meetings, with public notice, and documented with public records. Technology, including the internet, has made information, particularly public information, vastly more accessible to all investors than when the Rule was originally adopted. Public media, information service companies and other tools to access this readily-available public information would appear to be adequate to provide public disclosure of these events in the ordinary course. An ongoing reporting requirement to require EMMA notice of these events is not necessary to prevent fraud. Consequently, we question whether the Proposed Amendments are legally authorized, especially given Congress' express exemption of municipal securities issuers from periodic and current reporting requirements.

iii. *Comments on the Potential Unintended Consequences of the Overly Broad Proposed Amendments*

If the Proposed Amendments are adopted in their current form and scope, many, if not most, issuers (in part in an effort to contain legal review cost) will give notice of many non-material financial obligations and file lengthy, inconsistently redacted documents, rather than summaries, resulting in a deluge of unrefined information that would be of marginal value to investors and could increase the cost to underwriters and brokers (and therefore investors) in effecting municipal securities transactions. For that reason, the Proposed Amendments may be adverse to investors.

If the Proposed Amendments are adopted in their current form and scope, they will substantially burden issuers, particularly small issuers, who may be incentivized to avoid the capital markets, thus thwarting the Commission's stated interest in equalizing the costs between the capital and bank loan markets. Any resulting increase in the cost of issuing debt would likely reduce investment in public infrastructure, which is sorely needed.

iv. *Recommendations*

a. *Defer the Proposed Amendments Pending Further Advances from Voluntary Initiatives*

The Commission should postpone or provisionally withdraw the Proposed Amendments for a two-year period to allow for (A) voluntary disclosure of bank loans and direct placements (and negotiated disclosure requirements) to continue to develop, especially in light of growing voluntary disclosure since the Municipal Securities Rulemaking Board (the "*MSRB*") enhanced EMMA to facilitate such disclosure,[3] (B) continued growth of information service companies and other internet or technology tools that provide investors with public information regarding issuers and events that could affect the value of municipal securities, and (C) an opportunity for quantitative analysis of the benefits to investors. If, after a two-year evaluation period, the Commission concludes that its concerns are not being adequately addressed through voluntary disclosure efforts, then it could re-propose a modified version of the Proposed Amendments, narrowed as described below.

[3] Specifically, before adopting regulations like the Proposed Amendments, the Commission should (i) provide further opportunity for voluntary disclosures to take hold and (ii) study pricing data for the securities that were linked to notices filed to date. If the notices did not affect price, or if the Commission does not know whether they did, then the purported investor benefit of the Proposed Amendments does not warrant its cost.

b. *Encourage Undertakings to Include Voluntary Commitments to Disclose Bank Loans and Direct Placements*

If the Commission determines to amend the Rule to address disclosure of bank loans and private placements, we suggest an approach that would permit primary offering participants to negotiate the undertaking, rather than imposing a one-size-fits-all requirement on all issuers, regardless of market needs, benefits, and costs.

The Commission could encourage voluntary commitments by requiring that an underwriter receive a continuing disclosure agreement ("*CDA*") that includes an affirmative statement as to whether the issuer is undertaking to provide information regarding bank loans and private placements, and, if so, a description of the parameters of the disclosure, including the form and timeframe. Because the form of the CDA is typically attached to the official statement (or a summary of the undertaking is included in the official statement), investors would be informed of any issuer undertaking.

Such an approach would allow for the development of market-based, sector-by-sector, credit-relevant disclosure commitments by the types of issuers where it is most important, and would avoid the cost of a reporting regime for issuers where the benefits are outweighed by the costs.

c. *Exempt Issuers and Obligated Persons with Less Than $16,500,000 of Municipal Securities Outstanding*

If the Proposed Amendments are adopted in their current form and scope, they should not apply to issuers with less than $16,500,000 [4] in outstanding municipal securities, because smaller issuers will be less able to accommodate the substantial burdens of the Proposed Amendments, and the purported investor benefit will be more substantially outweighed by these burdens.

d. *Further Defer the Effective Date*

NABL recommends that any approach be implemented on a timeframe that puts issuers in a position to comply readily with the amendments. If the Proposed Amendments are adopted, the Commission should approve a much later effective date to afford issuers time to consider whether to continue to offer municipal securities in lieu of bank loans and private placements and, if so, to draft, review, obtain authorization of, and implement procedures (including training) to centralize information regarding financial obligations, to evaluate their materiality, and to provide required notices.

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[4] We suggest a minimum threshold of $16,500,000 because the Consumer Price Index has increased by 65percent since the month in which the 1994 Amendments were first proposed, so $16,500,000 should exempt today an equivalent number of issuers as the Commission did in proposing the 1994 Amendments to arrive at an appropriate balance of cost and benefit.

e. *Condition Action on Reliable Estimates of Benefits and Burdens*

Unless the Commission is able to obtain or produce a reliable, quantitative estimate of the benefits and the burdens reasonably expected to result from the Proposed Amendments, it should not adopt them.

II. Summary of the Proposed Amendments

The Proposed Amendments would require that, in offering municipal securities in primary offerings, participating underwriters must confirm that the issuer (or an obligated person) has entered into a CDA by which it has agreed to provide timely notice of any of the following events (in addition to the 14 events currently included in the Rule):

> "(15) Incurrence of a financial obligation of the obligated person, if material, or 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
>
> "(16) 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."

For these purposes, a "financial obligation" would be defined as a "(i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding," other than municipal securities for which a final official statement has been provided to the MSRB. The Proposed Amendments do not define "material." The Proposing Release makes clear that the term "financial obligation" is to be broadly interpreted, indicating for example that it captures both short-term and long-term debt obligations within the phrase "debt obligations," and both capital leases and operating leases as "leases." The Proposing Release states that the term "derivative instrument" includes any swap, security-based swap, futures contract, forward contract, option, or similar instrument entered into by the issuer, which could include short-term fuel hedges as well as interest rate swaps.

The Proposed Amendments would affect all issuers and obligated persons entering into CDAs regardless of size or type of municipal security, affecting states, cities, counties, fire districts, public power providers, public and nonprofit hospitals and healthcare systems, public and private universities and colleges, school districts, affordable housing providers, water and sewer districts, public seaports and airports, and a host of other state, local, and nonprofit entities. In the Commission's *2012 Report on the Municipal Securities Market*, the Commission said there were "close to 44,000 issuers."[5] Most, if not all, of these entities enter into leases and other financial

[5] U.S. Securities and Exchange Commission, *Report on the Municipal Securities Market*, at 1 (July 31, 2012), available at https://www.sec.gov/news/studies/2012/munireport073112.pdf.

obligations, as defined in the Proposed Amendments, in the ordinary course of providing important services to the public.

The Proposed Amendments also would affect underwriters as well as brokers effecting transactions in the secondary market. Under Commission interpretations of the duties of underwriters, underwriters would be obligated to review issuers' disclosure of failures to comply with the proposed new CDA paragraphs, which could require a review of every financial obligation and every amendment and waiver of a financial obligation that might be material. Under MSRB rules, brokers would be required to disclose to customers any information in resulting event filings that is material.

III. Comments on the Substance of the Proposed Amendments

a. The Requirement to Disclose the "incurrence of a financial obligation of the obligated person, if material" Is Overly Broad

Our primary substantive concern with the Proposed Amendments is that the scope of the term "financial obligation" is overly broad. The Proposed Amendments are not specific to a type of issuer, and would apply equally to governmental issuers of general obligation bonds, governmental issuers of revenue bonds, and reporting and non-reporting conduit borrowers, even though these entities present very different profiles in terms of transparency, credit stability, and readiness to comply with the additional disclosure requirement. In the case of obligated persons that are reporting companies, the Proposed Amendments would impose a burden that is unnecessary, given their duties under Form 8-K. The new disclosure requirement is not specific to particular bonds, but rather represents an ongoing obligation to disclose the "incurrence" of financial obligations of the issuer, if material. As discussed below, unlike a debt transaction that is "incurred" when the transaction closes, it is not always immediately discernible when certain types of other obligations swept up in the breadth of the proposed definition are incurred. Absent an appropriate qualifier, the Proposed Amendments would describe an overly broad and vague category of potentially disclosable events. For reasons explained below, the materiality qualifier is not effective as a practical limitation.

i. <u>*The Case for Requiring Disclosure of Bank Loans and Private Placements*</u>

The Proposed Amendments purport to be in response to the increasing use of bank loans and private placements by issuers and conduit borrowers,[6] and to complaints that investors are not receiving timely information concerning all such bank loans and private placements. As a member of the Bank Loan Disclosure Task Force,[7] NABL joined in a consensus encouraging careful consideration of voluntary disclosure about

[6] Proposing Release, notes 160-176.

[7] Municipal Market Bank Loan Disclosure Task Force, "*Considerations Regarding Voluntary Secondary Market Disclosure About Bank Loans*" (May 1, 2013), available at https://www.nabl.org/portals/0/documents/Bank_Loan_Voluntary_Disclosure_Considerations_May_2013.pdf

bank loans, noting growth in the use of bank loans and recognizing that the MSRB and others have expressed interest in receiving timely information regarding the incurrence of bank loan obligations. As discussed below, we are encouraged by the trending number of issuers that are reporting bank loans and private placements.[8]

Voluntary disclosure of bank loans and private placements will likely continue to expand as issuers become aware of and begin to use the new EMMA features (added in September 2016) introduced to facilitate these filings. Members of our Working Group worked to replicate the MSRB's search of voluntary bank loan disclosures on EMMA cited in the Proposing Release.[9] We found that the volume of filings has increased markedly since the MSRB introduced the new tab to facilitate these filings.[10] At this rate of increase, even if the Proposed Amendments are not adopted, voluntary disclosures may soon reach the Commission's expected number of annual filings under the Proposed Amendments (2,200).[11]

The Proposing Release understates the efficacy of voluntary reporting. It also overstates the potential harm (stated very broadly as any potential impacts to an issuer's liquidity or overall creditworthiness) to investors in not receiving information regarding additional debt except through annual financial filings and official statement disclosure.[12] The Proposing Release notes a concern that issuers may enter into additional debt that includes terms that negatively affect investors in outstanding state and local securities, such as an acceleration remedy. However, because the bank lender or purchaser of a direct placement would have already determined that the issuer is sufficiently creditworthy in order to be willing to extend credit to it, the possibility of any use of the acceleration provision would normally be sufficiently remote so as not to warrant an immediate notice to investors. The Proposing Release does not provide any specific examples or other evidence that issuers are granting such rights in bank loans or private placements to the detriment of investors in outstanding state and local securities, let alone granting such rights with any frequency or in violation of existing state and local bond documents. The Proposing Release also asserts that issuers are jumping the payment priority or granting senior positions in security pledged to investors in outstanding state and local securities. In general, covenants in the documents authorizing state and local bonds should prohibit granting superior interests in the trust estate (except in compliance with conditions in the authorizing documents). In that case, any such action would be a

[8] The collective experience of the members of this NABL Working Group is that issuers are voluntarily making numerous EMMA filings regarding bank loans and private placements, and the scope of those disclosures is wide-ranging depending upon the facts and circumstances of each bank loan or private placement.

[9] Proposing Release, note 82.

[10] Reviewing filings under the subcategory "Bank Loan/Alternative Financings Filings" yielded the following results: 79 disclosures in 2015, 364 disclosures in 2016 and 338 disclosures in 2017 (through April 14, 2017).

[11] Proposing Release, note 138.

[12] The Proposing Release provides anecdotal examples of investor harm by noting certain municipal bankruptcies and payment defaults, but the 2010 Amendments already require notice of bankruptcies and payment defaults with respect to bonds being offered.

non-payment default, so would require notice to be given under CDAs entered into in accordance with the existing Rule, if material.[13] If a priming lien is not prohibited by outstanding bond contracts, then with deference to experts on the pricing of state and local bonds, we suggest that the possibility of such a lien would be priced into the value of the outstanding municipal securities even before the priming lien is granted.

Investors in state and local securities agree to additional parity or senior debt as specified in the applicable authorizing documents, within parameters depending on the type of securities being issued. General obligation bond investors usually have no promise of priority or of protection against additional debt. Revenue bond investors preapprove debt within the specific parameters of an additional bonds test. These parameters typically take into account balloon maturity debt and term-out provisions. Accordingly, and with deference to experts on the pricing of state and local bonds, we suggest that the possibility and the potentially material terms of additional debt may be reflected in the price of municipal securities that permit such events. Accordingly, an issuer's later, actual exercise of the right may not affect the value of an outstanding security.[14] Consequently, investors are unlikely to be harmed by deferring news of a particular financial obligation to the issuer's next annual financial information filing or official statement.[15] Of course, if outstanding securities do not permit such an event, then it may be reportable under CDAs entered into in accordance with the existing Rule as a "non-payment default, if material."

ii. *The Absence of a Case for Requiring Disclosure of Other "Financial Obligations"*

The inclusion of leases, monetary obligations resulting from judicial, administrative or administrative proceedings, derivatives, and guarantees within the definition of "financial obligation" is particularly problematic.

With respect to leases, neither the Proposing Release nor the Proposed Amendments distinguish between leases where the issuer is the lessor and leases where the issuer is the lessee. The Proposed Amendments could implicate student housing leases, park concessions, office leases, copier, equipment, and other routine capital leases, and many other operating leases that are part of the ordinary course of the business of issuers, whether as lessor or lessee. The Proposing Release makes clear that the Commission intends to include operating as well as capital leases.[16]

[13] See Rule 15c2-12(a)(5)(C)(7).

[14] In addition, new bank or privately placed debt often replaces existing debt, rather than adding to it.

[15] Because investors do not receive an event notice when an issuer files a final official statement for a new series of parity bonds, it is unclear why investors should receive an event notice when an issuer incurs other types of financial obligations.

[16] Proposing Release, at 38.

The Proposing Release simply does not make the case for requiring reporting of "financial obligations" beyond bank loans and private placements. Although there has been an increase in the use of bank loans and private placements since the beginning of 2009, there has been no such comparable reported increase in the use of other financial obligations. In fact, the use of derivatives in the public finance market has decreased.[17]

The Proposing Release cites few proponents in support of a reporting requirement for more than bank loans and private placements.[18] In its Comments Letter dated January 20, 2015, in response to a PRA request for comment on the Rule, the MSRB urged a wholesale rewrite of the Rule and specifically referenced Item 2.03 of Form 8-K as a guide for the types of items that should be disclosed under a revisited Rule.[19] In prior MSRB releases and letters (including its 2012 notice and a later 2015 notice, 2015-03), however, the MSRB called only for disclosure of bank loans and similar items and not any of the other items found in Item 2.03 of Form 8-K. Four other MSRB documents are cited, none of which suggested expanding the types of financial instruments being disclosed beyond bank loans.

The Proposing Release includes no evidence to support the inclusion of leases–-whether capital or operating—and guarantees in the definition of financial obligation.

The Proposing Release offers only anecdotal evidence in support of including derivatives within the broad definition of financial obligation. The Proposing Release states that the Commission intends that the term capture any swap, security-based swap, futures contract, forward contract, option, or similar instrument, and only provides anecdotal support—citing swap termination payments made by the City of Chicago[20]—that weakens on closer review. In fact, the City of Chicago provided primary disclosure that it may enter into swaps and that it had entered into swaps, and disclosure regarding the terms of the swaps, well in advance of the swap termination payments.[21] Following the adoption of Governmental Accounting Standards Board ("*GASB")* Statement No. 53, for example, the City disclosed its outstanding derivative instruments, including the risk of termination and any associated payment to be made because of such termination.[22]

[17] Proposing Release, note 105 (conceding that certain of these "may not currently be used by many issuers and obligated persons").

[18] Proposing Release, note 76.

[19] MSRB Comments Letter (January 20, 2015).

[20] Proposing Release, note 116.

[21] The official statements for the City's 2002, 2003 and 2007 bonds each stated that moneys in the bond fund could be used to pay "any obligation of the City to any Swap Provider under any Qualified Swap Agreement." See, e.g., $202,500,000 City of Chicago General Obligation Variable Rate Demand Bonds, Project and Refunding Series 2003B, dated August 6, 2003, available at http://www.onlinemunis.com/Statement/upload/city.of.chicago.go.final.pdf

[22] The City disclosed outstanding derivatives pursuant to GASB Statement No. 53, Accounting and Financial Reporting for Derivative Instruments (June 2008), in all of its financial statements since 2009. See, e.g., City of Chicago Comprehensive Annual Financial Report for the year ended December 31, 2009, Note 1(d)(ix) Long-term obligation,

The Proposing Release also offers only anecdotal evidence in support of including "monetary obligations resulting from judicial, administrative or arbitration proceedings" within a broad definition of financial obligations. Again, this anecdotal evidence weakens on further review.[23] As in the case of the City of Chicago swap termination payments, the City of Hillview provided information in its annual financial statement and its bankruptcy was reviewed by ratings agencies and was covered by the local and national media, including coverage prior to the payment and bankruptcy dates, respectively.[24]

Although the use of these other types of financial obligations has not increased since the beginning of 2009, GASB accounting pronouncements have resulted in additional information regarding swaps, financial guarantees and contingent liabilities being included in annual financial statements.[25] Issuers provide information regarding monetary obligations resulting from judicial, administrative or arbitration proceedings through the reporting of contingent liabilities in annual financial statements.[26] Disclosure

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10(b)(iv) Enterprise Fund Revenue Bonds and Notes, and 10(d) Derivatives. See also City of Chicago, Finance Department, Accounting and Financial Reporting, CAFR, available at https://www.cityofchicago.org/city/en/depts/fin/supp_info/comprehensive_annualfinancialstatements.html and on EMMA. The City's outstanding swaps also were disclosed in Appendix B – Financial and Other Information and Appendix C – Basic Financial Statements in connection with the remarketing of the 2002 bonds in 2012. The 2003 bonds were remarketed in 2014, and that remarketing circular contained significant disclosure regarding the City's outstanding swaps, although one of the City's rating agencies specifically stated in its rating report for the City in 2015 that "the additional debt needed to finance the swap termination payments is <u>not</u> material relative to the level of the City's outstanding direct and overlapping general obligation debt." See also Yvette Shields, Chicago's Market Foray Triggers Bleak Disclosures, *The Bond Buyer* (May 12, 2015) (emphasis added).

[23] For example, the Proposing Release notes a City of Hillview judgment leading to bankruptcy, implying that investors lacked notice in the years prior to notice of the bankruptcy. The City of Hillview filed for bankruptcy on August 20, 2015. In its audited financial statements for the fiscal year ended June 30, 2014, posted to EMMA on March 16, 2015, however, the City noted that it recently had a judgment against it of $11,435,259.49, and noted "This amount exceeds the City's capacity to pay. This condition raises substantial doubt about its ability to continue as a going concern." The City of Hillview failed to make annual filings on EMMA from the date of issuance of the bonds until March 16, 2015. It is not clear if prior annual filings, if made when required, would have provided information regarding potential or ongoing litigation.

[24] See, e.g., Hillview, Ky., GOs Junked, Bankruptcy Considered: S&P, *The Bond Buyer* (Feb. 27, 2015) (noting that Standard & Poor's lowered its rating on Hillview in light of "a potential $11.4 million damage assessment that could land the city in bankruptcy court" and noting the "junk rating for the city's 2010 GO refunding bonds reflects S&P's view of the city's fiscal 2014 audit in which the city's auditor expressed doubts regarding Hillview's ability to continue as a going concern"); Exclusive: Chicago nears fiscal free fall with latest downgrade, *Reuters* (Feb, 27, 2015).

[25] For example, GASB issued Statement No. 53 in June 2008 to address the recognition, measurement and disclosure of information regarding derivative instruments for state and local governments. GASB Statement No. 53's key provision is for derivative instruments to be reported at fair value in order for users of financial statement to more "fully understand a government's resources available to provide services." GASB Statement No. 53 applies to financial statements for periods beginning after June 15, 2009, and provides for disclosure of the state and local government's derivative instrument activity and the information necessary to assess such government's objectives for derivative instruments, their significant terms and the risks associated with such derivative instruments.

[26] Other evidence presented in support of the Proposed Amendments cites issuers that have failed to timely file annual financial statements. It is not clear how adding an additional disclosure requirement will address noncompliance with an existing disclosure requirement. Using the Proposed Amendments to address noncompliance will burden all issuers— including the vast majority that timely file—to address noncompliance by particular issuers.

of a contingent liability in annual financial statements will likely precede event disclosure of an actual monetary obligation.[27] Likewise derivatives[28] and financial guarantees[29] are already reviewed for disclosure in financial statements, including in accordance with recent GASB pronouncements. Financial statement disclosure of financial obligations consistent with accounting standards will likely provide more meaningful information for investors than the notices required under the Proposed Amendments. The Proposing Release suggests that relying on annual financial statements disclosure may result in information that is "limited"[30] or "may not include certain details."[31] Accounting standards, however, play an important role in providing "consistent, comparable, relevant and reliable information that is useful for investors."[32]

b. The Additional Disclosure Items Under the Proposed Amendments are Overly Broad

The Proposed Amendments also would require disclosure of "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"[33] and

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[27] Note that issuers routinely manage litigation risk through insurance coverage, indemnification arrangements, and litigation reserves. The Proposed Amendments also are not clear regarding the timing of a notice of a monetary obligation resulting from judicial, administrative, or arbitration proceedings. For example, in the case of monetary obligations resulting from judicial or administrative proceedings, when is the obligation "incurred" if the liability is a penalty that relates back to the event that triggered the litigation or enforcement action? Was it incurred when the violation occurred? Is it incurred when the administrative body makes a finding or a trial court enters a judgment? Or is it incurred only when the judgment is final and non-appealable? In many of these examples, pending and contingent liabilities are dealt with on an annual basis, in the notes to financial statements developed in accordance with generally accepted accounting principles. That information should be provided annually in advance of a contingent liability actually becoming a monetary obligation, will be accompanied by a judgment about the likelihood of it becoming a current liability and the likely magnitude of that liability, and will be more meaningful to the public finance market than information provided after the fact.

[28] See e.g., GASB Statement No. 53, Accounting and Financial Reporting for Derivative Instruments (June 2008); GASB Statement No. 49, Accounting and Financial Reporting for Pollution Remediation Obligations (November 2006).

[29] GASB Statement No. 70, Accounting and Financial Reporting For Nonexchange Financial Guarantees (April 2013).

[30] Proposing Release, at 78.

[31] Proposing Release, at 85.

[32] See, e.g., Commission Concept Release: International Accounting Standards, Nos. 3-7801, 34-42430 (Feb. 18, 2000) ("U.S. accounting standards provide a framework for reporting that seeks to deliver transparent, consistent, comparable, relevant and reliable financial information…. High quality accounting standards consist of a comprehensive set of neutral principles that require consistent, comparable, relevant and reliable information that is useful for investors, lenders and creditors, and others who make capital allocation decisions. High quality accounting standards are essential to the efficient functioning of a market economy because decisions about the allocation of capital rely heavily on credible and understandable financial information."); see also *U.S. Imperative: High-Quality, Globally Accepted Accounting Standards*, Remarks of Commission Chair Mary Jo White (Jan. 5, 2017).

[33] The meaning of the phrase "any of which affect security holders, if material" is unclear. Is the reference to "security" intended to be a reference to the security that is the subject of the CDA? Can an event be material but not affect security holders?

disclosure of a "default,[34] 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." These additional disclosure requirements raise all of the concerns noted above regarding the over breadth of the term "financial obligation."[35] Moreover, by requiring notice of a modification of terms, this additional requirement will require issuers to implement procedures to require centralized reporting not only of every financial obligation in every department that might be material, but also of every modification of any such financial obligation that might be material or reflect financial difficulties. As noted above, the requirement is not specific to a type of issuer and would apply equally to governmental issuers of general obligation bonds, governmental issuers of revenue bonds and reporting and non-reporting conduit borrowers, even though these entities present very different risk profiles.

c. *The Materiality Qualification Does Not Limit Effectively the Breadth of the Proposed Amendments*

The Proposed Amendments attempt to narrow the otherwise overly broad term "financial obligations" and related events through use of a materiality qualification. The Proposing Release states a belief that the materiality standard in the Proposed Amendments strikes the appropriate balance:

> The Commission preliminarily believes that including a materiality determination would strike an appropriate balance. As proposed, the materiality determination applies to the incurrence of a financial obligation and each of the agreed upon terms listed (i.e., covenants, events of default, remedies, priority rights, or other similar terms).[36]

We disagree that the use of "material" as a qualifier is adequate to strike an appropriate balance, for several reasons.

First, the materiality qualifier serves an inappropriately central role in the Proposed Amendments. Rather than adding narrowly defined events that by their nature

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[34] Any reference should be to an "event of default" rather than "default" to recognize that issuers have opportunities to cure. Note that a default does not necessarily, and may rarely, give rise to a remedy of acceleration. Cf., Proposing Release, text at note 115. General obligation debt usually cannot be accelerated (a government with taxing powers cannot accelerate its tax collections).

[35] The additional requirements also may not be necessary: although the Proposing Release notes the potential harm that could arise from more restrictive covenants in bank loans or private placements (i.e., by triggering an earlier remedy for the bank lender as compared to the bond investor), a more restrictive covenant also benefits bond investors by requiring issuers to operate in compliance with higher debt service coverage ratios or other more stringent operating requirements, unless waived by the bank after concluding that doing so would not risk repayment of the bank loan (and, therefore, the issuer's outstanding municipal securities). If the covenants, defaults, priority rights, remedies, etc., negatively affect bond owner rights, consider whether the granting of such rights may constitute a "modification to rights of security holders," which is already a reportable event, if material. See 15c2-12(a)(5)(C)(7).

[36] Proposing Release, discussion following note 90.

would be likely to be material to investors, the Proposed Amendments include "financial obligations," which are so broadly defined as to encompass many thousands of issuer contracts, and then rely on the use of a materiality qualifier to sort these contracts for investor relevance. For that reason and the reasons stated below, the Proposed Amendments will result in CDA undertakings that do not provide sufficient clarity for issuers, underwriters, or investors.[37]

Although the lead-in to the event disclosures required under the Rule includes the phrase "with respect to the securities being offered in the Offering," the intended meaning of the materiality qualifier is not clear. The Proposed Amendments would require notice of the "[i]ncurrence of a financial obligation of the obligated person, *if material*."[38] Is the reporting requirement triggered when an issuer incurs any financial obligation that a reasonable investor would deem important to the issuer's current financial condition? Or only to reasonable investors in bonds that are the beneficiaries of the CDA in question? Or in parity bonds? Or in any outstanding security of the issuer? For example, if an issuer has outstanding general obligation bonds and airport revenue bonds, and it enters into a nonrecourse financial obligation of the airport system that is important to reasonable investors in its airport revenue bonds, but not important to reasonable investors in its general obligation bonds, must it link its event filing to its airport revenue bonds only or to all bonds? In the case of contingent obligations or derivative instruments, is the obligation "material" when executed even if there is no expectation of payment? Or is it material when the potential exposure reaches a particular threshold, or when the conditions that could trigger a draw on the guarantee or a termination event actually occur?

Moreover, the use of the materiality qualifier will result in burdensome disclosure procedures that will cast a wide net for information to be sorted for potential disclosure, rather than focusing on specific information of most interest to investors. Under the Proposed Amendments, issuers would be challenged to accomplish all of the following within any 10-business-day period: identify all debt obligations, leases, guarantees, derivatives, and judicial, administrative, or arbitration awards as well as all changes to covenants, events of default, remedies, priority rights, or other similar terms of any such financial obligation; review all such financial obligations and changes; draw a conclusion as to whether the obligation has been "incurred" and a determination as to materiality (or, as applicable, whether the item reflects financial difficulties); and prepare and file the necessary notice. The procedures would need to set out a mechanism by which every such financial obligation and change is sorted for materiality, by a person trained to understand and apply the materiality standard and to recognize the context in which the determination is to be made. Moreover, the content of the filing—the information to be disclosed—may need to be compiled, redacted or even negotiated with counterparties within that timeframe.

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[37] The Proposed Amendments may not permit issuers and investors to agree in advance that, for example, all office copier leases are not material and should be excluded.

[38] Emphasis added.

Finally, and most importantly in practice, the materiality qualifier will do little to narrow the term "financial obligation," even when applied by trained personnel. The lessons of the MCDC initiative will affect the implementation of the Proposed Amendments, if they are adopted as proposed. The settlements and accompanying underwriter cease-and-desist orders have directly resulted in over reporting of continuing disclosure deficiencies. The list of deficiencies presented in the 72 settlements with municipal securities dealers and 71 issuer settlements include numerous individual failures that are not material in and of themselves. Post-MCDC disclosure practice has increasingly consisted of official statement disclosure of CDA compliance deficiencies, even foot faults, without regard to actual materiality. Even if an issuer does undertake a materiality analysis, the underwriter for the issuer's next publicly offered transaction is likely to revisit that analysis. Compliance departments of investment banks and many underwriter's counsel have been unwilling to engage in materiality evaluation of prior events and continuing disclosure deficiencies and can be expected to be unwilling to engage in materiality evaluation of financial obligations and disclosures of compliance with the new requirements. Consequently, they will require disclosure of noncompliance, unless the issuer gave notice of even non-material financial obligations and related events, and issuers will file many more event notices than necessary in order to avoid such disclosures.

This reaction to the MCDC initiative will continue to directly affect the market's implementation of Rule-related disclosures for many years and will affect implementation of the Proposed Amendments, if adopted. Thus, the use of a materiality qualifier to limit such a broad category of events is not only an inappropriate use of the qualifier, but its utility has been dramatically undercut by the Commission's approach to the analysis of materiality in the context of the Rule.

d. The Absence of a Case for Requiring Disclosure Within 10 Business Days[39]

Material financial obligations are disclosed in an issuer's annual financial statements. In recent years, annual financial statements have provided additional transparency as a result of new accounting pronouncements addressing derivatives, financial guarantees and other matters.[40] The Proposed Amendments would require disclosure of financial obligations within a tight timeline—10 business days—rather than allowing financial obligations to be addressed in annual financial statements. No effort is made to explain why 10 business days is the appropriate timeline for the proposed reporting events. The Proposing Release does not explain why incurring a financial obligation—particularly those types of obligations that are not "incurred" at a formal

[39] This section responds to the Commission's request for comment on the "frequency of such event and the utility of this information."

[40] See, e.g., GASB Statement No. 49, Accounting and Financial Reporting for Pollution Remediation Obligations (November 2006), GASB Statement No. 53, Accounting and Financial Reporting for Derivative Instruments (June 2008), GASB Statement No. 68, Accounting and Financial Reporting for Pensions—An Amendment of GASB Statement No. 27 (June, 2012), GASB Statement No. 70, Accounting and Financial Reporting For Nonexchange Financial Guarantees (April 2013).

closing—is more like the occurrence of other listed events under the existing Rule, requiring reporting within 10 business days, than other financial information that is disclosed in annual financial reports.

As we noted in our 2009 comments, the timing of the notice should reflect the nature of the event.[41] The timing of the notice also should take into account the time required to prepare the notice, which depends on the complexity of the disclosure item. A notice that the issuer has incurred a bank loan or private placement, for example, may appropriately be filed as part of the issuer's next annual report or within a reasonable period after the closing. The more quickly an issuer must give notice of a financial obligation or change in its terms, the more likely it will be to file the entire contract, rather than a more investor-friendly summary.[42] Other types of obligations—particularly derivatives and monetary obligations resulting from administrative or judicial proceedings and modifications of financial obligations—may not easily lend themselves to such strict timelines. As noted above, it may not be clear when these obligations are incurred.

e. The Absence of Quantitative Estimates of Benefits and Reasonable Estimates of Burdens

In the Proposing Release, the Commission speculates regarding qualitative benefits that might be expected to accrue to investors and others as a result of the Proposed Amendments, but it does not make any quantitative estimate of benefit and, in fact, admits its inability to do so. Absent a quantitative estimate of benefit, it is impossible to conclude that the expected benefits will outweigh even the understated burdens estimated by the Commission, let alone the reasonably expected burden. If and when the Commission does attempt to estimate the quantitative benefits of the Proposed Amendments, it should take into account that the primary market for direct placements might well subside. As explained in the NABL PRA Comments, the Commission grossly underestimated the burdens that it recognized, and it failed to recognize, discuss, and estimate the burdens that would be imposed on brokers executing secondary market trades. Unless the Commission is able to obtain or produce a reliable, quantitative estimate of both the benefits and the burdens reasonably expected from the Proposed Amendments, it should not adopt them.

[41] See NABL Letter re: File No. S7-15-09, *NABL Comments on SEC Release No. 34-60332* (Sept. 23, 2009). "In its 1994 release promulgating amendments to the Rule, the Commission stated, '[t]he amendments do not establish a specific time frame as "timely," because of the wide variety of events and issuer circumstances. In general, this determination must take into consideration the time needed to discover the occurrence of the event, assess its materiality, and prepare and disseminate the notice.' Exchange Act Release No. 34-34961 (November 10, 1994)."

[42] The issuer may need to negotiate the summary language with the bank lender, or negotiate the scope of redactions, a process that issuers will be challenged to accomplish within a 10-business-day period.

IV. Comments on the Rationale for the Proposed Amendments

The Proposed Amendments represent a further step away from the Commission's rationale for the Rule, which relied on its authority to adopt regulations to prevent fraud in connection with the offer, purchase or sale of securities.[43] As described in the Proposing Release, the Rule was "designed to prevent fraud in the municipal securities market by enhancing the timely access of official statements to underwriters, investors, and other interested persons."[44]

Building on the original rationale and premise of the Rule,[45] the 1994 amendments to the Rule (the *"1994 Amendments"*)[46] were designed to provide investors in the secondary market with access to certain information to update the disclosure provided by the issuer in the primary offering.[47] Thus, the information required to be provided annually was the "financial information and operating data" included by the issuer in the official statement for the primary offering.

In other words, the 1994 Amendments specifically referenced and adhered to the "footprint" of the primary offering; annual continuing disclosure was required to update the information in the final Official Statement. As described in the 1994 Adopting Release,

> "As is currently the practice, under the amendments, the participants in an underwriting would continue to determine which persons are material to an understanding of the Offering. Information concerning those persons would be included in the final official statement. Financial information and operating data that is material to an offering at the outset generally remains material throughout the life of the securities. Under the amendments, that information would be provided on an annual basis. Put simply, the amendments reflect the belief that purchasers in the secondary market need the <u>same</u> level financial information and operating data in making investment decisions as purchasers in the underwritten offering."[48]

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[43] See Exchange Act Release No. 34-26985 (June 28, 1989), 54 FR 28799 (July 10, 1989) (the "*1989 Adopting Release*"), adopting the final Rule and noting that the Rule was "promulgated under the Commission's authority in Section 15(c) of the Exchange Act as a means reasonably designed to prevent fraud."

[44] Proposing Release, at 15.

[45] The original Rule, among other matters, required underwriters participating in primary offerings of municipal securities of $1,000,000 or more to obtain, review, and distribute to investors copies of the issuer's near final official statement. See 1989 Adopting Release.

[46] Exchange Act Release No. 34-34961 (Nov. 10, 1994), 59 FR 59590 (Nov. 17, 1994) (the "*1994 Adopting Release*").

[47] The 1994 Adopting Release, discussion at note 18.

[48] The 1994 Adopting Release discussion at notes 16-18 (emphasis added).

Similarly, the original 11 events for which notices were required to be filed with the repositories were events relating directly to the municipal securities sold in the primary offering.[49]

The Commission specifically considered and rejected adding a general "other material events" category to the list of event notices at the time it adopted the 1994 Amendments.

> Some commenters believed that the list of eleven events should be expanded to include a provision that would cover any other event that might reasonably be expected to have a material adverse effect on the holders of the bonds. . . . The list of eleven events has been retained in the amendments [without including a general catchall for other material events][footnotes omitted].[50]

In 2010 (the "*2010 Amendments*"),[51] the Commission added additional events to the list covered by the Rule. Arguably the 2010 Amendments went beyond the footprint approach of the 1994 Amendments, but the additional events were specific and salient events directly related to the specific securities subject to the CDA (tender offers and changes in trustee), or at least specific and salient events so fundamental to the issuer as likely relevant to the specific securities subject to the CDA (bankruptcies and mergers). Importantly, they are events that occur rarely to issuers of municipal securities and obligated persons.

The Commission now proposes adding a version of an "other material events" category, which relates to "financial obligations." Under the Proposed Amendments, unless the materiality qualifier is replaced with one that is more effective, the "financial obligations" to be reported may have no more relevance to the specific securities subject to the CDA—or even the issuer—as any number of other events that occur from time to time and affect issuers. Accordingly, the Proposed Amendments require continuing disclosure beyond the footprint of the primary offering. The stated rationale for this departure from the original Rule as amended in 1994 is very broad: the Proposing Release suggests that the Proposed Amendments would "potentially provide important

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[49] The original 11 events for which notice filings were required by the 1994 Amendments were, if material with respect to the securities being offered: (1) principal and interest payment delinquencies; (2) non-payment related defaults; (3) unscheduled draws on debt service reserves reflecting financial difficulties; (4) unscheduled draws on credit enhancements reflecting financial difficulties; (5) substitution of credit or liquidity providers, or their failure to perform; (6) adverse tax opinions or events affecting the tax-exempt status of the security; (7) modifications to rights of security holders; (8) bond calls; (9) defeasances; (10) release, substitution, or sale of property securing repayment of the securities; and (11) rating changes. These events also are all matters (with the exception of rating changes) that would almost immediately be known to the issuer and its finance department (or equivalent).

[50] The 1994 Adopting Release discussion at notes 118, 119.

[51] See Exchange Act Release No. 34-62184A (May 26, 2010), 75 FR 33100 (June 10, 2010).

information regarding the current financial condition of the issuer."[52] Based on this rationale, the Commission could require constant updates on any matter that could potentially affect the financial condition of an issuer. In this manner the Proposed Amendments represent a much broader ongoing issuer reporting requirement, rather than a requirement to provide notice of specific and salient events to update the financial information and operating data included in primary offering documents.[53] Thus, it appears that the Commission is seeking, *sub silentio*, to change the original framework articulated in the 1994 Adopting Release.

The Proposed Amendments are modeled on and akin to the disclosures required of public companies under Commission Form 8-K, but without the statutory authority to require issuer reporting or the extensive guidance provided by the Commission for public companies. Congress has expressly exempted municipal securities from periodic and current reporting under the Securities Exchange Act of 1934 (the "Exchange Act").[54] NABL believes that the Form 8-K approach reflected by the Proposed Amendments is inappropriate for state and local issuers.[55] Form 8-K requires disclosure of material new debt, leases, and derivative transactions due to the potential impact of such transactions on stock prices. Unlike public companies, however, governmental issuers of state and local securities have no outstanding equity securities, nor do most obligated persons (such as nonprofit healthcare providers and private universities) that are not reporting companies. We defer to comments of experts in state and local bond pricing, but suggest that, in contrast to equities, the value of debt securities is affected primarily by changes in prevailing interest rates, secondarily by long-term economic and demographic trends, and to a lesser extent by significant financial events affecting the issuer. Governmental issuers generally have stable credit, backed either by taxing authority or by the revenue of a utility or other enterprise that provides essential services to a community without the risk of competition. Economic trends that affect tax and utility revenues develop over the long term. Accordingly, state and local debt prices may be affected primarily by interest rates and long-term economic and demographic trends, not by the incurrence of a particular financial obligation by the issuer. That is not to say that a significant financial obligation or other event affecting the issuer could not be material to investors, but investors have ready access to public information regarding governmental issuers. As noted above, anecdotal examples listed in the Proposing Release were all reported in local and national media. Governmental issuers operate with heightened transparency (as compared to corporations). Under state "sunshine laws" decisions are made at public meetings, with public notice, and documented with public records. Investors have ready

52 See, e.g. Proposing Release, at 30, 34, 40, 44, 46.

53 Under the Administrative Procedures Act a significant change to a prior regulation should be acknowledged. *See, e.g., FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 514-515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.").

54 See Section 3(a)(12) and (29) of the Exchange Act.

55 See the 1989 Adopting Release.

access to these public records, including budgets, meeting minutes, judgments, and financial reports of state and local issuers. The more significant a financial obligation or related event, the more likely it is to require formal action at a public meeting, and the more likely it is to be reported in the local and national press. Technology, including the internet, has made information, particularly public information, vastly more accessible to all investors than when the Rule was originally adopted. Moreover, events reported by public media increasingly are brought to the attention of institutional investors and retail brokers (and relayed to retail investors) by information service companies, including companies employing artificial intelligence technology.[56] It is likely that investors would learn of significant, time-sensitive financial obligations, defaults, and similar events through these services or through other technology (such as Google alerts), and that they would do so before an issuer would be obligated to file notice under the Proposed Amendments.

Accordingly, the Proposed Amendments, which utilize the broad term "financial obligation" as their focal point, would not appear to be necessary to prevent fraud. The Proposing Release does not provide even a single example of securities fraud arising from a lack of public disclosure of any of the events specified in the Proposed Amendments. Public media, information service companies and other tools to access readily-available public information would appear to be adequate to provide public disclosure of these events in the ordinary course. Accordingly, we question whether the Proposed Amendments are legally authorized by the Commission's antifraud authority, given the weak case that they serve that function and Congress' express exemption of issuers of state and local securities from periodic and current reporting requirements.

Not only is the use of a Form 8-K approach inappropriate for issuers of state and local securities, the Proposed Amendments are more ambiguous than the Form 8-K requirements, and broader in some respects. Item 2.03 of Form 8-K specifically sets out relevant definitions of Long-Term Debt Obligation, Capital Lease Obligation, and Operating Lease Obligation[57] referencing Financial Accounting Standards Board definitions. The Proposed Amendments have no relation to accounting standards, and do not take into account the GASB pronouncements relevant to derivatives, guarantees, contingent liabilities and other financial obligations.[58] Item 2.03 of Form 8-K does not

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[56] J. Curie, Commentary Artificial intelligence is radically changing muni risk assessments, *The Bond Buyer* (Mar. 20, 2017).

[57] Note particularly that an Operating Lease Obligation is required to be disclosed only if it is disclosable pursuant to accounting standards. See 17 CFR 229.303(a)(5)(ii)(C)) - (Item 303).

[58] In addition, GASB has published its Exposure Draft proposing disclosure of lease obligations applicable to years beginning after December 31, 2018. As set forth in the Exposure Draft all leases (capital or operating) will represent a balance sheet liability, with a corresponding asset. Operating leases will be disclosed in groups and not individually. See GASB Exposure Draft, Proposed Statement of the Governmental Accounting Standards Board: Leases (Jan. 25, 2016), noting that the proposed statement is intended to:

> "increase the usefulness of governments' financial statements by requiring reporting of certain lease liabilities that currently are not reported. It would enhance comparability of financial statements among governments by requiring lessees and lessors to report leases under a single model. This proposed Statement also would enhance the decision usefulness of the information provided to

require disclosure of an event of default (unless it triggers an off-balance-sheet liability), but only an event of acceleration.[59] Item 2.03 only requires disclosure of short-term debt if it is outside the ordinary course of business, and Form 8-K does not require disclosure of litigation (which is addressed through Form 10-Q and Form 10-K).[60] The Proposed Amendments are unjustified in proposing to impose on issuers of municipal securities, which have stable credit and no equity securities, current reporting requirements that are in some respects greater than those imposed on reporting companies.

V. Comments on the Potential Unintended Consequences of the Proposed Amendments[61]

If adopted as proposed, issuers can be expected to respond to the Proposed Amendments by reporting non-material financial obligations, for fear of being second guessed by underwriters, their counsel or Commission staff. Furthermore, issuers will be discouraged from summarizing the financial obligations, which could be expensive, time-consuming, and risk a hindsight conclusion by underwriters or the Commission that the summary did not include all "material" terms. Filings may, therefore, predictably consist of uncurated lengthy documents, with only the redactions required by the bank or private placement lender (which could result in wide variations in information redacted).[62] Accordingly, the Proposed Amendments would likely result in a deluge of unrefined information, even indiscriminate bulk filings, that would at best be of marginal practical value to investors. As described above, financial statement disclosure of financial obligations consistent with accounting standards—and, therefore comparable, relevant and reliable—will likely provide more meaningful information for investors than the unrefined filings encouraged by the Proposed Amendments.

> financial statement users by requiring notes to the financial statements related to the timing, significance, and purpose of a government's leasing arrangements."

The Proposed Amendments may, therefore, be rendered inconsistent with GASB lease accounting. Similarly, as discussed in Donald J. Weidner, *New FASB Rules on Accounting for Leases: A Sarbanes-Oxley Promise Delivered,* 72 The Bus. Law. 367 (2017), in 2016, the Financial Accounting Standards Board, which establishes financial accounting and reporting standards for many public and private companies and nonprofit organizations that make use of municipal bonds, issued new rules that require that most leases be capitalized and recorded on the lessee's balance sheet as reflecting both an asset and a corresponding liability; these new rules are effective beginning in 2019.

[59] Note that acceleration is not a typical remedy for many state and local obligations. Cf.. Proposing Release, at note 115.

[60] Rather than relying solely on a materiality qualifier, a definition of litigation to be described is provided in Item 103 of Regulation S-K. See 17 CFR 229.103 - (Item 103) Legal proceedings.

[61] This section responds to the Commission's request for comment on the "nature of any impact on small entities," on "any potential effects on competition, investment or innovation" and on "any potential increase in costs or prices for consumers or individual industries."

[62] It may be time-consuming for issuers to receive lender approval on any summary, or even on the redactions to complete documents, and for issuers otherwise to address confidentiality provisions. This is particularly of concern in regard to derivative contracts that could contain confidential pricing information, which could delay otherwise timely filings by issuers. In some cases (for example, cases involving private conduit borrowers), these contracts may prohibit the disclosure of such information, effectively causing a default under those documents if an issuer were to proceed with disclosure absent consent by the third party.

The overly broad approach of the Proposed Amendments appears to lose sight of the kinds of listed event filings that would be useful to investors, and would instead have the effect of shifting the burden to the investor to engage in a meticulous, ongoing process of "separating the wheat from the chaff." This in turn will impose a burden on brokers (who must obtain and supply readily accessible material information to investors) in effecting secondary market transactions, which will likely (i) disadvantage smaller brokers who cannot spread the monitoring and document reviewing function over as many trades, (ii) make brokers unwilling to participate in smaller trades, disadvantaging small investors and small issuers and making their holdings less liquid, and (iii) increase commissions on secondary market trades to cover resulting broker expense. If issuers file "everything," it also will be difficult for market participants to review the filings for compliance. In fact, because the Proposed Amendments may increase the cost of secondary market transactions without producing usable information for investors except in rare circumstances, the Proposed Amendments may be adverse to investors.

The Proposed Amendments in their current form and scope would particularly burden small issuers as well as larger issuers that undertake many leases and other financial obligations in the course of their operations. Operating leases, purchase money acquisitions, copier, equipment, and other routine capital leases and other financial obligations often are handled by divisions of the issuer other than the finance department and may not even be systematically catalogued. Issuers may determine that the administrative burden of monitoring, and reporting on, financial obligations is too great and opt out of the public finance market. If so, the Proposed Amendments will favor one segment of the market (investors) and another (direct lenders) to the direct disadvantage of others (issuers and underwriters). It also would increase the amount of new financial obligations that investors in outstanding municipal securities may need to monitor without the benefit of CDAs entered into in compliance with the Proposed Amendments. Any resulting migration to the bank loan market may allow banks to charge higher fees and demand more onerous terms in what could become a less competitive environment. By providing an incentive for issuers to move from the public finance market to the bank loan market, the Proposed Amendments may overburden the bank loan market.[63] Any resulting increase in the cost of issuing debt would likely reduce investments in public infrastructure, which are sorely needed.

The Commission has made no estimate of the value of the reporting regime, which could well disadvantage investors if the value of the reported information is outweighed by the added administrative cost of investing. The Commission should not adopt the Proposed Amendments unless it first makes a rigorous estimate of both burdens and benefits and concludes that the latter exceed the former. This exercise is particularly important given the Trump Administration's focus on eliminating costly and unnecessary regulation.

[63] The bank loan and private placement market may not be able to absorb the volume of debt issued by states, large municipalities, large public enterprises (water, public power, etc.).

VI. Recommendations

a. Achieving Useful Disclosure Goals Through Voluntary Disclosure

NABL recommends a more incremental and measured approach that focuses directly on bank loans and private placements and recognizes recent voluntary disclosure efforts being undertaken by issuers. Issuers are disclosing bank loans and private placements with increasing frequency as described above. As demonstrated by negotiated quarterly reporting requirements for more credit-sensitive sectors, investors have demonstrated the ability to require disclosure where it is important. In fact, investors already are requiring bank loan reporting in certain sectors (e.g., health care). In addition, some purchasers in the direct placement market are requiring that those direct placement transactions be described in an EMMA filing. It is reasonable to believe that these market practices will continue to expand and develop where appropriate.[64]

The Proposed Amendments should be postponed or provisionally withdrawn for a two-year period to allow for voluntary disclosure efforts to be further developed and expanded, particularly in light of the fact that the MSRB just recently added a continuing disclosure filing tab on EMMA to facilitate such filings in just September 2016. This approach would allow the market to continue to develop best disclosure practices without unduly burdening issuers with indirect regulations or investors with having to sort through a deluge of data, most of which would be of marginal value (i.e., the "over reporting" problem). A two-year evaluation period would provide an opportunity for quantitative analysis of the benefits to investors. It would allow for the development of market-based, sector-by-sector, credit-relevant disclosure by the types of issuers where it is most important, and it would avoid the cost of a reporting regime for issuers where the benefits are outweighed by the costs. If after a two-year evaluation period the Commission concludes that the concerns that gave rise to the Proposed Amendments have not been adequately addressed, the Commission could re-release a modified version of the Proposed Amendments to address its remaining concerns.

b. Permitting Continuing Disclosure Agreements to Specify the Financial Obligations to be Disclosed

Any approach to regulating disclosure of financial obligations should be significantly narrowed to balance appropriately the benefits to investors and the burdens and costs to issuers.

The Commission could encourage voluntary commitments by requiring that an underwriter receive a CDA that includes an affirmative statement as to whether the issuer

[64] For example, it is possible that an EMMA filing requirement could be negotiated by underwriters into the additional bonds tests in both direct placements and in public offerings, now that there is a clearer reporting category on EMMA.

is undertaking to provide information regarding bank loans and private placements, and, if so, a description of the parameters of the disclosure including the form and timeframe.

Such an approach would remove the uncertainty of the proposed definition of "financial obligations." In addition, because the form of the CDA is typically attached to the official statement (or a summary of the CDA is included in the official statement) investors would be informed whether the issuer had undertaken to provide bank loan and private placement disclosure and would be informed as to the scope and timing of that disclosure.

Allowing the participants in the transaction to tailor the thresholds for disclosure to the particular characteristics of that transaction would (i) increase the efficiency and usefulness of those disclosures, (ii) allow issuers to propose a scope that is tailored to their credit and that aligns with their internal reporting structure and procedures, (iii) be more likely to result in meaningful disclosure than a one-size-fits-all approach, and (iv) inform investors as to the types and timing of information that will be provided on a continuing disclosure basis. Investors would then be able to meaningfully evaluate, prior to making any investment decision, whether the level of disclosure that a particular issuer has agreed to provide is sufficient for their needs, and pricing of the state or local security could reflect the level of issuer transparency (or lack thereof).

This approach would avoid encouraging an avalanche of non-material filings. Issuers and other market participants could more easily confirm compliance in a reasonable time frame.

c. Exempting Issuers and Obligated Persons with Less Than $16,500,000 of Municipal Securities Outstanding

The 1994 Amendments included a limited, but important, exemption for municipal issuers and obligated persons (defined above collectively as "issuers") with less than $10,000,000 principal amount of securities outstanding.[65] The threshold of $10,000,000 was retained in the final 1994 Amendments notwithstanding comments that it was too high or too low. The Commission was influenced in establishing this exemption by statistics provided by one commenter that in 1993, 71% of the approximately 52,000 municipal issuers had under $10,000,000 in outstanding municipal securities. The 1994 Amendments included a limited exemption for these smaller issuers from the financial information and operating data that was required to be updated annually and further exempted them from filing that information with the national repositories. The smaller issuers were nonetheless subject to the requirement to make event notice filings for the initial 11 events in the Rule.[66] The benefit of the small issuer exemption was largely removed by the 2010 amendments to the Rule.

[65] See 1994 Adopting Release discussion at notes 181 – 187.

[66] See the 1994 Amendments.

If the Proposed Amendments are adopted in their current form and scope, the new disclosure events relating to financial obligations should not apply to issuers with less than $16,500,000 (or another meaningful threshold) in outstanding municipal securities. (We suggest a minimum threshold of $16,500,000 because the Consumer Price Index has increased by 65 percent since the month in which the 1994 Amendments were first proposed, so $16,500,000 should exempt today an equivalent number of issuers as the Commission did in proposing the 1994 Amendments to arrive at an appropriate balance of cost and benefit.)[67] As discussed above, the burdens of reporting on the incurrence of or any changes to financial obligations will be substantial and will place a particular burden on smaller issuers, which are much less likely to have the resources to respond to additional disclosure requirements. The burden on smaller issuers will be directly affected by the costs associated with identifying financial obligations and making a materiality assessment (especially in light of the context of the MCDC initiative) when the smaller issuer is not otherwise in the market. This is not to say that financial information regarding small issuers is less important than financial information regarding larger issuers, but it is a recognition that small issuers may not have resources to manage effectively a broad ongoing reporting requirement. Just as the 1994 Amendments imposed a lesser disclosure burden on small issuers, and just as the Commission has scaled disclosure requirements for smaller reporting companies,[68] the Commission should minimize the significant adverse effects on smaller issuers from a broad ongoing disclosure requirement. The Commission could consider requiring less burdensome scaled disclosure, allowing more time for disclosures or exempting smaller issuers altogether.

d. Timing of Adoption and Transition[69]

NABL respectfully submits that, if the Proposed Amendments are adopted as proposed, the three-month transition period set forth in the Proposed Amendments is much too short to position governmental entities to be in full compliance. Issuers would need to consider whether to continue to issue bonds in the capital markets or rely on bank loans going forward. Issuers who proceed to issue bonds would need procedures to centralize information regarding leases and other financial obligations. Issuers would need sufficient time to draft, review and implement procedures, including board authorization where required. These procedures may require changes in organizational structure and position responsibilities to centralize information, may require hiring additional personnel, and would require additional training. In addition to extending the

[67] An even higher threshold of $75,000,000 or $50 million in annual revenues would correspond more closely to the threshold above which reporting companies are no longer entitled to reduced disclosure requirements. See, e.g., 17 CFR 240.12b-2, defining smaller reporting company.

[68] "If your company qualifies as a 'smaller reporting company' or an 'emerging growth company,' it will be eligible to follow scaled disclosure requirements" [for annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K with the SEC on an ongoing basis]. https://www.sec.gov/info/smallbus/qasbsec.htm

[69] This section responds to the question regarding compliance date and transition issues.

transition period, NABL recommends that any reporting obligation for an issuer start with its first fiscal year beginning after a set date, to coincide with issuer accounting timeframes.

e. Condition Action on Reliable Estimates of Benefit and Burde.

Unless the Commission is able to obtain or produce a reliable, quantitative estimate of the benefits and the burdens reasonably expected to result from the Proposed Amendments, it should not adopt them. See the NABL PRA Comments.

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April 11, 2017

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RE: Proposed Amendments to Exchange Act Rule 15c2-12,
Comments on the Collection of Information Requirements
File No. S7-01-17
Release No. 34-80130

Dear Ms. Ahmed and Mr. Fields:

Thank you for the opportunity to comment on the collection of information burdens of recently proposed amendments to Exchange Act Rule 15c2-12. The National Association of Bond Lawyers (NABL) is concerned that the Commission's estimates of the burdens of complying with the collection of information requirements of the proposed amendments grossly understate the actual burdens that would be imposed by the amendments. The attached comments explain our concerns and include the results of a survey that NABL conducted of its members. Based in part on the survey, we believe that the actual burdens are more than 100 times those estimated by the Commission, suggesting that the Office of Management and Budget should file comments with the Commission and disapprove the collection of information contained in the proposed amendments pending a revised, reasonable estimate of burden and cost/benefit analysis.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. NABL has more than 2,700 members, almost all of whom regularly represent issuers and other obligated persons, underwriters, and other market participants in the issuance of municipal securities and the preparation, review, and filing of continuing disclosures. Accordingly, NABL members, including those who participated in the preparation of these comments and the NABL survey, are knowledgeable about the collection of information burdens that can reasonably be expected to result if the amendments are adopted as proposed.

These comments concern only the collection of information burdens that would result from the proposed amendments. These comments express no view as to whether the proposed amendments should or should not be adopted or revised.. NABL intends to submit additional comments to the Securities and Exchange Commission concerning those matters, which may include cost/benefit and other recommendations.

These comments were prepared by an ad hoc task force, composed of those NABL members listed in Exhibit B. These comments were approved by the NABL Board of Directors.

Thank you for your consideration.

Sincerely,

Clifford M. Gerber

Enclosure

cc: Securities and Exchange Commission, Public Reference Room

COMMENTS REGARDING COLLECTION OF INFORMATION BURDEN OF PROPOSED AMENDMENTS TO SEC RULE 15c2-12

The National Association of Bond Lawyers ("*NABL*") respectfully provides the following comments to the U.S. Office of Management and Budget ("*OMB*") and the U.S. Securities and Exchange Commission (the "*Commission*"). These Comments concern "*collection of information burdens*," as defined in the Paperwork Reduction Act of 1995, as amended (the "*PRA*"), that can be expected to result from amendments (the "*Proposed Amendments*") to Rule 15c2-12 (the "*Rule*") of the Commission, if adopted as proposed by Securities Exchange Act Release No. 34-80130, File No. S7-01-17, adopted March 1, 2017, and published in the Federal Register on March 15, 2017 (the "*Proposing Release*"). To permit adoption of the Proposed Amendments, the Commission submitted to OMB (for approval) proposed revisions to the Commission's current collection of information titled "Municipal Securities Disclosure," which are summarized in the Proposing Release.

A. Executive Summary of Comments

As explained in more detail below, NABL respectfully submits that:

1. **Collections of Information:** The Proposed Amendments are "collections of information" within the meaning of the PRA because:

a. ***Issuers:*** the Proposed Amendments effectively require issuers of and other persons obligated on municipal securities ("*obligated persons*" and, collectively with issuers, "*issuers*") to contract to file notices of additional events with the Municipal Securities Rulemaking Board ("*MSRB*"), as recognized in the Proposing Release,

b. ***Underwriters:*** the Proposed Amendments require underwriters to obtain and review official statements that describe the contract and breaches of prior contracts, also as recognized in the Proposing Release, and

c. ***Brokers:*** the Proposed Amendments, together with other rules of the Commission and the MSRB, require that brokers obtain and review the filings in connection with each secondary market transaction in affected municipal securities, which is not acknowledged in the Proposing Release or taken into account in estimating resulting burden.

2. **Gross Underestimation of Burden:** The Commission has grossly underestimated the burdens imposed by the Proposed Amendments' collection of information requirements.

a. ***Reliance on Inapposite, Faulty Prior Estimates*:** The Commission estimated the time required by issuers to prepare and file notices of the new events (2 hours per event), as well as the time required for underwriters to compare issuer certifications of events to filed notices of the events (12 minutes per offering). The Commission, however, simply used prior time estimates for that purpose, even though (a) the new events impose qualitatively different compliance obligations, (b) the Commission was previously informed by knowledgeable industry participants that its prior estimates had greatly underestimated the compliance burdens of the existing Rule, and (c) as discussed in 3. below, as a result of subsequent Commission actions, its prior estimates are no longer indicative.

b. ***Inconsistency with Commission Enforcement Positions:*** In estimating underwriter compliance burdens, the Commission assumed that underwriters would employ procedures that are far less time-consuming than those the Commission previously stated are required to be followed to comply with the antifraud provisions of the federal securities laws.

c. ***Overlooked Compliance Burdens:*** The Commission failed to estimate the time required (a) by issuers to identify and evaluate events for materiality, (b) by underwriters to review financial obligation documents to assess materiality, and (c) by brokers to obtain and review event filings when they conduct secondary market transactions.

d. ***Off by Over Two Orders of Magnitude:*** Based on responses to a questionnaire completed by more than 70 NABL members, NABL estimates the actual annual burdens of the proposed collection of information requirements (in hours) to be as follows, more than 100 times (i.e., more than two orders of magnitude) greater than the Commission's estimates:

	NABL Estimate	**Commission Estimate**	**Factor**
Issuers	1,150,702	4,000	287x
Underwriters	334,948	2,500	134x
Brokers	14,224,229	N/A	N/A
Total	15,709,879	6,500	2,417x

3. **Changed Circumstances:** Even if the Commission's prior compliance estimates had been reasonable when made, they are no longer reliable for estimating compliance burdens that would result from the Proposed Amendments, because:

a. ***Different Events:*** the two new reportable events are different from the existing reportable events for which the prior estimates had been made and will take substantially more work to ascertain, review, and disclose, and

b. ***Impact of Subsequent Commission Action:*** the Commission's actions since it made prior time estimates, including more than 140 settlements under its Municipalities Continuing Disclosure Cooperation (MCDC) initiative, have dramatically increased the collection of information burdens of the existing Rule by (i) making it more difficult to determine whether an event is "material" in the eyes of the Commission and (ii) causing underwriters to construe the term broadly to avoid any possible breach of cease-and-desist orders imposed under the MCDC initiative.

4. **Ambiguous Collection Standards**: Especially in light of the positions taken by the Commission in the MCDC initiative, because the Proposed Amendments rely on the term "material" to ascertain whether a collection of information is required, the Proposed Amendments do not employ "plain, coherent, and *unambiguous* terminology" and will not be "understandable to those who are to respond," as the Commission is to have certified to OMB under the PRA.

5. **Recommended Comments:** In compliance with the Executive Order, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017, the Director of OMB should file comments with the Commission to the effect that (a) the Proposed Amendments impose ambiguous and overly burdensome collection of information requirements, and (b) the

Commission's estimates of the burden of these requirements are not adequate and should be reassessed in light of current market practice.

6. **Conditional Disapproval:** NABL respectfully urges the Director of OMB to disapprove the collection of information requirements contained in the Proposed Amendments unless the Commission (a) revises the Proposed Amendments to draw clear lines that eliminate any obligation to provide or collect information that is not sufficiently important to investors to warrant burdens that can reasonably be expected to result and (b) makes careful, well-informed, and rigorous cost estimates in evaluating the complete resulting benefits and burdens in light of current market practice.

B. Proposed Amendments

The Proposed Amendments would require that, in offering municipal securities in primary offerings, participating underwriters must confirm that the issuer (or an obligated person) has entered into a continuing disclosure agreement (CDA) by which it has agreed to provide timely notice of any of the following events (in addition to the 14 events currently included in the Rule) to the MSRB:

> "(15) Incurrence of a financial obligation of the obligated person, if material, or 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
>
> "(16) 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."

In addition, participating underwriters must obtain, review, and distribute an official statement that describes the CDA and any instance in the previous five years in which the issuer has failed to comply, in all material respects, with any CDA.

For these purposes, "*financial obligation*" would be defined as a (i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding," other than municipal securities for which a final official statement has been provided to the MSRB. The Proposed Amendments do not define "material."

The Proposing Release makes clear that "financial obligation" is to be broadly interpreted, indicating for example that it captures both short-term and long-term debt obligations within the phrase "debt obligations" and captures both capital leases and operating leases as "leases." The Proposing Release states that the term "derivative instrument" includes any swap, security-based swap, futures contract, forward contract, option, or similar instrument entered into by the issuer, which could include short-term fuel hedges as well as interest rate derivatives.

The Proposed Amendments would affect all issuers and obligated persons entering into CDAs regardless of size or type, affecting states, cities, counties, fire districts, public power providers, public and nonprofit hospitals and healthcare systems, public and private universities and colleges, school districts, affordable housing providers, water and sewer districts, public seaports and airports, and a host of other state, local, and nonprofit entities. In the Commission's

2012 *Report on the Municipal Securities Market,* the Commission said there were "close to 44,000 issuers." Collectively these entities enter into a staggering number of leases and other financial obligations, as defined in the Proposed Amendments, in the ordinary course of providing important services to the public.

The Commission adopted its initial continuing disclosure amendments to the Rule in 1995, subsequently expanded them, and (through interpretations of the amendments and antifraud provisions) has imposed additional duties on underwriters in complying with them. It has done so in an effort to improve market practices by effectively imposing EDGAR-like filing requirements on municipal securities issuers (by requiring underwriters to ensure that issuers enter into and comply with CDAs), even though the Commission does not have statutory authority to regulate issuers directly.

C. Commission-Estimated Burden of Proposed Amendments

In the Proposing Release, the Commission estimates that, of the estimated 20,000 issuers that file event notices annually, only 2,000 will be required to file notices under the amendments, and that it will take issuers on average two hours per filing to comply for a total of 4,000 hours. The Commission does not estimate compliance times (especially for the thousands of issuers who may not file in a given year) to develop and implement procedures to centralize information regarding all financial obligations, to monitor for potential filing requirements, or to make materiality decisions to determine whether filings are required. If all of the estimated burden were allocated to these pre-filing activities, which could be undertaken by 35,000[1] or more issuers, then the estimated 4,000-hour burden equates to only a few minutes per year per issuer before taking into account any time required to prepare and file a notice. The Commission also concluded that issuers generally would not incur external costs in complying with amended CDAs, suggesting that they would not rely on outside counsel or municipal advisors in reaching materiality decisions or drafting summaries of financial obligations, amendments, or other new events. Particularly because of the ambiguities in the Proposed Amendments, NABL submits that filers would, in fact, seek outside legal assistance in complying with the new requirements as proposed.

In the Proposing Release, the Commission estimates that it will take each of an estimated 250 underwriters on average 30 minutes to give notice of the amendments to affected personnel and an additional 10 hours per year to comply with the amendments. Since the Commission has assumed 12,000 issues per year in estimating collection of information burdens, the Commission has estimated that the amendments will result in an average additional underwriter burden of approximately 12 minutes per issue. To reach this conclusion, the Commission described the underwriters' review procedures as follows, starkly departing from its prior descriptions of their duties (made when not estimating compliance burdens, as described below under "Commission Interpretation of Underwriter and Broker Requirements"):

> "Determining whether an issuer or obligated person has filed continuing disclosure documents will usually include an examination of the filings made over a five-year period on the MSRB's EMMA system. An underwriter may also ask questions of an issuer, and, where, appropriate, obtain certifications from an issuer, obligated person, or other appropriate party about facts such as the

[1] Based on annual audited financial statements or CAFRs filed with EMMA in 2016. MSRB 2016 Fact Book. See "Reasonable Estimates of Burden" below.

> occurrence of specific events listed in paragraph (b)(5)(i)(C) of the Rule and the timely filing of annual filings and any required event notices or failure to file notices."

Release No. 34-80130 (March 1, 2017) at notes 130-31. The Commission ignored the additional diligence tasks that it previously stated are required. (These are described under "Commission Interpretation of Underwriter and Broker Requirements" below.) The Commission also ignored the time required to adopt modified procedures. It also included no estimated additional burden for brokers in the secondary market.

For the reasons stated below, NABL believes that the Commission grossly underestimated the burdens of complying with the collection of information requirements that would be imposed by the Proposed Amendments, especially those burdens arising as a result of the uncertainty that has resulted from the Commission's interpretation of "material" in settlements under the MCDC initiative.

D. Commission Readings of "Material" and Resulting Ambiguity

If the Proposed Amendments are adopted as proposed, (a) issuers will need to determine whether financial obligations they incur, or amendments to or waivers or breaches of those obligations, are "material" (after they enter into a CDA that satisfies the Rule, as amended), and (b) underwriters will need to make the same determination in order to determine whether each subsequent offering document omits a description of any material breach of such a CDA in the prior five years. Particularly since the MCDC initiative, Commission interpretations of "material" are too vague, ambiguous, and unpredictable to enable issuers and underwriters to clearly determine when notice of an event must be filed or when a failure to file must be disclosed. The Commission used the term "material" to identify reportable events under the existing Rule, but it was adopted before the Commission's positions in the MCDC initiative. The fact that underwriters accounting for 96% of the municipal market were subjected to administrative actions for violating the existing Rule requirement (to obtain official statements that describe "material" breaches) is evidence that the term "material" is ambiguous, not that the term is understandable (as stated in the Proposing Release).

1. Ambiguity of "Material." "Material," as used in the Rule, has the meaning ascribed to such term in the Securities Exchange Act of 1934, as amended. Exchange Act Rule 0-1(b). Under the antifraud provisions of that act and the Securities Act of 1933, as interpreted by the U.S. Supreme Court, "information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding" how to vote or make an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988). An omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*

Commission staff has stated that materiality determinations cannot be reduced to a numerical formula and that evaluations of materiality require both quantitative and qualitative considerations. Staff Accounting Bulletin No. 99, Release No. SAB 99 (Aug. 12, 1999), 64 FR 45150 (Aug. 19, 1999). Consequently, neither issuers nor underwriters may safely conclude that a financial obligation is not material because, for example, it comprises less than 5% of the issuer's total indebtedness.

The Commission has consistently declined to give advance advice as to whether a fact is material. Instead, market participants must review voluminous, often inconsistent court decisions and administrative orders in an attempt to give clarity to the term. The Commission's own Investor Advisory Committee spoke to the expense of making judgments about materiality when it criticized a Financial Accounting Standards Board (FASB) proposal to modify the materiality standard in generally accepted accounting principles to more closely resemble the meaning given to "material" in the antifraud provisions of federal securities laws:

> "[T]he 'Conceptual Framework' Proposal does not adequately discuss the impact of the change on the disclosure process, *including the increased costs that will likely result*. In particular, the Proposal does not sufficiently take into account that, by "clarifying" the legal nature of the definition, counsel will likely have an increased role in the process. *Whatever the current role, issuers wanting greater comfort on the proper application of the "legal concept of materiality" will presumably have an increased incentive to seek the views or opinions of counsel.* Particularly if this type of review becomes common, the additional costs may be significant. Beyond costs, the risk exists that, by replacing the current, differentiated professional accounting standard with a *case-law driven legal standard*, close questions of judgment will ultimately devolve to lawyers rather than accountants."

Letter of SEC Investor Advisory Committee to Technical Director, FASB, dated February 14, 2017 (emphasis added).

2. Commission Applications of Materiality. While the Commission has declined to give advance advice about whether a fact is material, it regularly makes *ex post facto* judgments about materiality in administrative and civil enforcement actions.

In various orders implementing settled administrative actions under the Commission's MCDC initiative, the Commission has taken extreme positions on materiality that seem to exclude only very minor or "foot-fault" instances of noncompliance, alleging that the following undisclosed failures to make filings with the MSRB under CDAs, among others, were "material":

- In a 2013 primary offering, an undisclosed failure to timely file an annual report in 2007 was described as a material omission, even though the issuer did disclose that it failed to file timely reports in 2008, 2009, and 2010, thus informing investors that the issuer's CDA could not be relied on. *In the Matter of City of Andover, Kansas*, Securities Act of 1933 Release No. 10139, August 24, 2016.

- A city's failure to describe late filings of audited financial statements in two years was material, even though they were contained in official statements filed with EMMA, because the city failed to link the official statements on the EMMA continuing disclosure page for previously issued securities. *In the Matter of the City of Cedar Rapids, Iowa*, Securities Act of 1933 Release No. 10141, August 24, 2016.

- An undisclosed failure to file annual financial and operating data until 36 days after the filing deadline was described as a material breach, without regard to the fact that investors regularly purchase securities with filing deadlines that are more than 36 days later than the deadline in question, at comparable yields for issues with comparable credits. *In the Matter of Borough of Roselle Park in the County of Union, New Jersey*, Securities Act of 1933, Release No. 10134, August 24, 2016.

In addition, Commission staff has said that, in bringing administrative actions under the MCDC initiative, it disregarded whether information that was not timely filed with EMMA was nevertheless accessible to investors on the issuer's website or under state law equivalents of the federal Freedom of Information Act, thus elevating investor inconvenience in accessing information to the level of "material."

These orders inform issuers and underwriters of the yardstick the Commission is likely to apply, *ex post facto*, in judging their compliance with CDA and requirements to disclose material breaches. In view of these orders, to avoid the expense, risks, and reputational damage that a Commission enforcement action could entail, issuers and underwriters will construe "material" expansively, contributing to a much higher compliance burden than estimated by the Commission, which relied on pre-MCDC estimates in estimating the burden of the Proposed Amendments.

3. Underwriter Cease-and-Desist Orders. In settling administrative actions under the MCDC initiative, the Commission issued orders against 72 underwriters, who collectively had a 96% market share for municipal securities underwritings, to cease and desist from violating Section 17(a)(2) of the Securities Act of 1933. A violation of these cease-and-desist orders allows the Commission to bring an action in federal district court to impose civil penalties of up to the greater of either $500,000 or the pecuniary gain that resulted from the violation. 17 U.S.C. 77t(d). Further, a violation of these orders could be considered an independent violation of Section 17(a)(2) and expose underwriters to a fine of up to $10,000 under 15 U.S.C. § 77x, and to separate cease-and-desist proceedings with fines of up to $725,000 under 15 U.S.C. § 77h-1(g)(2)(C). In addition, any further violation while a cease-and-desist order is in place could result in a permanent bar from participating in the securities markets. Consequently, the orders, coupled with past Commission precedent, have caused underwriters to dramatically change their practices and make very conservative readings of "material" (i.e., to include more instances of noncompliance) when reviewing for undisclosed breaches of an issuer's prior CDAs. They would almost certainly apply the same practices in evaluating an issuer's compliance with the proposed new requirement to give event notices. Consequently, underwriters are likely to spend substantially more time than the Commission estimates in reviewing issuer records to determine the existence of financial obligations, amendments, and breaches and evaluating whether they may be material.

4. Consequence of Ambiguity. The same word, "material," is used in the Rule to describe both when a breach of a prior filing undertaking must be disclosed and also which events require notice filings. Since the Commission has read "material" expansively (reaching many more failures to file than market participants believe to be warranted), issuers and underwriters (and their counsel) reasonably fear that it will apply the same expansive reading to determine, *ex post facto*, whether financial obligations and related events are material. Consequently, given the ambiguity of the term, the Proposed Amendments are likely to lead issuers to implement procedures to centralize information regarding even routine financial obligations, and to file notice of the incurrence of almost every financial obligation, resulting in many additional notices of events that are not material. In addition, issuers can be expected to file complete copies of often voluminous financial obligation documents rather than attempt to prepare a summary of "material" terms, since (a) an inadequate summary of a financial obligation or amendment could expose an issuer to liability under the antifraud provisions of the securities laws, (b) a complete copy may be redacted in less time (and therefore with less expense) than it may be summarized accurately and fairly, and (c) issuers will be required to file notices within a short time frame – 10 business days.

Consequently, if the Proposed Amendments are adopted, we can expect that EMMA will be flooded with numerous filings of long documents, through which underwriters and brokers will need to wade to comply with Commission descriptions of their duties. Given the ambiguity of the term "material," the Proposed Amendments are also likely to lead underwriters to devote significantly more time looking for undisclosed failures to file notices of events that are not, in fact, material. We can expect that issuers and underwriters will take this cautious, inclusive approach unless the Proposed Amendments are revised to use, when describing the events for which issuers must commit to file notices, "plain, coherent, and unambiguous terminology" so as to be "understandable to those who are to respond."

E. Commission Interpretation of Underwriter and Broker Requirements

To estimate the collection of information burden that would be imposed on underwriters and brokers by the Proposed Amendments, it is first necessary to understand the legal duties of underwriters and brokers, as imposed or interpreted by the Commission and the MSRB, and how those duties inform the steps that underwriters and brokers would take to comply with the new collection of information requirements.

1. Review of Official Statement. As noted above, underwriters participating in an offering of municipal securities must obtain, review, and distribute an official statement that describes each material breach of an issuer CDA that occurred in the prior five years. Securities Exchange Act Rule 15c2-12(b). To do this with regard to the Proposed Amendments in accordance with Commission interpretations, as explained in more detail below, underwriters would have to ascertain all of the financial obligations (or modifications of obligations specified in proposed paragraph (15)) of an issuer entered into in the prior five years, determine if any of those obligations or modifications were material and, if so, if were they reported to EMMA within 10 business days. Underwriters would have to undertake a similar exercise for the events, such as default, acceleration, modification of terms, or "other similar events," described in proposed paragraph (16) for the same period.

The Commission has stated that underwriters "must exercise reasonable care to evaluate the accuracy of statements in issuer disclosure documents." Release No. 34-26100 (September 22, 1988) at note 77. More specifically, in its 2009 release proposing the amendments to the Rule, the Commission stated that underwriters must investigate the issuer's prior compliance with its CDAs (to assure that prior material breaches are described in the official statement), and that *they may not merely rely on certifications by the issuer*:

> "As articulated in a prior interpretation, the Commission believes that it is doubtful that an underwriter could form a reasonable basis for relying on the accuracy or completeness of the issuer's or obligated person's ongoing disclosure representations, if such issuer or obligated person has a history of persistent and material breaches or if it has not remedied such past failures by the time the offering commences. The Commission believes that, if the underwriter finds that the issuer or obligated person has on multiple occasions during the previous five years, failed to provide on a timely basis continuing disclosure documents, including event notices and failure to file notices, as required in continuing disclosure agreements for prior offerings, it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would provide such information under a continuing disclosure agreement in connection with a subsequent offering. In the Commission's view, it is doubtful that an underwriter could meet the reasonable belief standard without the underwriter affirmatively inquiring as to that filing history. The

> underwriter's reasonable belief would be *based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking*. If the underwriter finds that the issuer or obligated person has failed to provide such information, the underwriter should take that failure into account in forming its reasonable belief in the accuracy and completeness of representations made by the issuer or obligated person."

Release No. 34-60332 (July 17, 2009) (footnotes omitted, emphasis added).

In adopting the then proposed amendments, the Commission reiterated that an underwriter must check the accuracy and completeness of an official statement and that "[t]he underwriter's reasonable belief should be based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking." Release No. 34-62184A (May 26, 2010) at note 351. The Commission stated that, when an underwriter cannot independently determine whether an event has occurred, it may rely on certifications of the issuer to that effect. The Commission cautioned:

> "However, as discussed above, the underwriter *may not rely solely upon the representations of an issuer or obligated person concerning the materiality of such events* or that it has, in fact, provided annual filings or event notices to the parties identified in its continuing disclosure agreements (i.e., NRMSIRs, MSRB, and State Information Depositories). Instead, an underwriter should *obtain evidence reasonably sufficient to determine whether and when such annual filings and event notices were, in fact, provided*. The underwriter therefore must *rely upon its own judgment, not solely on the representation of the issuer or obligated person, as to the materiality of any failure by the issuer or obligated person to comply with a prior undertaking*."

Release No. 34-62184A (May 26, 2010) at notes 360-62 (footnotes omitted, emphasis added).

2. Requirements for Secondary Market Transactions. No broker, dealer, or municipal securities dealer may sell a municipal security to a customer, or purchase a municipal security from a customer, including in a secondary market transaction, without disclosing to the customer all material information known about the transaction, as well as material information about the security that is "reasonably accessible to the market," i.e., "available publicly through established industry sources." MSRB Rule G-47. Consequently, if the Proposed Amendments are adopted, brokers will be required to obtain and review new event notices filed by the issuer of a municipal security before engaging in a secondary market transaction in the security. This requirement imposes an additional collection of information burden that would result from the Proposed Amendments. The Commission failed to acknowledge or estimate this burden.

3. Requirements for Policies and Procedures. Brokers, dealers, and municipal securities dealers must implement processes and procedures to ensure that material information regarding municipal securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer. MSRB Rule G-47 (Supplementary Material .04). In addition, it is unlawful for any broker, dealer, or municipal securities dealer to recommend the purchase or sale of a municipal security unless it has implemented procedures that provide reasonable assurance that it will receive prompt notice of any event disclosed to the MSRB pursuant to a CDA. Securities Exchange Act Rule 15c2-12(c). "To comply with the rule's requirement, . . . dealers should make certain that . . . systems receive, directly or indirectly, material event notices for issues the dealer recommends. In addition, dealers should develop procedures to ensure that notices of such events will be available to the staff responsible for making recommendations." Exchange Act Release No. 34-34961 (November 10, 1994) (following note 142). The "burden" of a collection of information requirement includes resources required "for reviewing instructions; acquiring, installing, and utilizing technology and systems; [and] adjusting the existing ways to comply with any previously applicable instructions and requirements." The Commission failed to acknowledge or estimate the resources required for underwriters to change their policies and procedures, as opposed to merely providing notice of the changes to affected employees.

F. Additional Burdens of the Proposed Amendments

If the Proposed Amendments are adopted, they will impose annual collection of information burdens on all issuers with outstanding, possibly material financial obligations, not merely on issuers that incur, amend, or default under a financial obligation in the year. Given existing precedent, the great majority of issuers will have outstanding financial obligations that the Commission could deem material, unless the meaning of "material" as used in the Proposed Amendments is clarified and limited to avoid that result or a different standard for reporting is applied. Accordingly, unless the meaning of "materiality" is clarified and limited, (a) issuers would be burdened by time-consuming collection and reporting requirements, (b) underwriters would be obliged to employ time-consuming additional due diligence procedures in most primary offerings of municipal securities, and (c) brokers would be required to obtain and review numerous, voluminous filed documents before effecting transactions in an issuer's securities.

1. Issuers. If the Proposed Amendments are adopted as proposed, then issuers must (a) in their next offering of municipal securities that is not exempt from the Rule, execute a CDA that obligates them to give notice of any event described in the Proposed Amendments and (b) thereafter comply with that CDA.

To comply with any such CDA, issuers will need to establish procedures to identify and alert a responsible official of each such event. These procedures likely should (a) identify the departments or officials who may first become aware of the event, (b) establish guidelines or a process for determining when an event may be material, (c) implement reporting requirements to bring such events to the attention of the official charged with giving notices under the CDA, (d) establish a system of periodic inquiries of those described in (a) to determine whether they may have failed to recognize or report an event, and (e) add these procedures to periodic disclosure training of issuer officials and staff. They should also be designed to enable all of these steps to be taken within 10 business days after an event has occurred. Particularly since the proposed definition of "financial obligations" includes leases (even vehicle and other equipment leases) and financial hedges (e.g., fuel hedges), it is likely that purchasing, real estate, and facilities management staff, rather than financial or legal personnel, may be the first within an issuer to become aware of a potentially material event.

To determine whether an event discovered under the issuer's procedures could be material, issuers likely will need to both (a) review and stay abreast of Commission and judicial precedent and relevant industry guidelines, or seek professional (commonly outside) legal advice, to judge when such an event may be material and (b) evaluate the event in light of the precedent and guidelines. To do so, they may need to determine whether the financial obligation or amendment subjects the issuer to credit (including liquidity) or other risks, whether the risks differ from those presented by other securities and previously disclosed to investors, the magnitude of the risks, the financial resources that are available to the issuer to deal with the risk, and whether the resulting incremental risk would be important to a reasonable investor. Importantly, issuers would be obligated to report material events that reduce risk as well as those that increase risk. Given the imprecise definition of "material" and the expansive meaning given to the term in Commission orders and releases, issuers may have tens or hundreds or, in the case of a state or large city, thousands of financial obligations to review.

To give notice of a financial obligation or revision that they have determined may be material, issuers will need either (a) to file the entire loan, lease, master, or other agreement or indenture by which it is incurred or (b) to prepare and file a summary of the financial obligation or revision. In either case, the issuer will need to identify whether it may make public disclosure of the terms of the financial obligation consistent with confidentiality agreements with the other party to the agreement, including providing any required notices and obtaining any required consents. To file the entire obligation or revision, an issuer will need to (a) first redact identifying personal or confidential information and (b) then determine whether the unredacted language makes fair disclosure of the event. To prepare a summary of the financial obligation or revision, issuers almost certainly will engage outside counsel (as they do in summarizing the legal terms of municipal securities and supporting documents to investors in primary offerings). Since loan, lease, and master agreements and indentures are commonly detailed and lengthy, preparing a summary would be a time-consuming process. Even if an issuer were inclined to incur the expense required to prepare a summary in order to reduce the review burden imposed on investors, they may not have sufficient time to do so before the proposed 10-business-day deadline for filing. Accordingly, it is likely that issuers will choose simply to upload redacted versions of their financial obligations and revisions.

To prepare a notice of a default under a financial obligation, issuers will need to carefully describe both the event and its likely or reasonably foreseeable consequences to investors.

The Commission made no estimate of the time required for issuers to take *any* of the above steps, other than filing notice of an event, once it has been identified as having occurred and as being material. The Commission's estimate of the average time required to file (2 hours) is not sufficient to cover the other steps, especially since those steps would have to be taken by the great majority of issuers, once the Proposed Amendments have been in effect for a few years, not just by those who must file event notices.

2. Underwriters. It is unreasonable to believe that initial underwriter compliance steps could be completed in 30 minutes, as estimated by the Commission. If the Proposed Amendments are adopted, then underwriters would have to modify their policies and procedures to assure (and preserve a record of) compliance with their resulting additional duties. To do so prudently, they would have to identify their resulting duties, develop procedures for complying with them (including means for determining appropriate review levels and materiality judgments in commonly recurring circumstances), communicate the procedures to applicable personnel, and include the procedures in periodic training. The procedures would have to address both acting as an underwriter in a primary offering and effecting a secondary market transaction as a broker or dealer.

If the Proposed Amendments are adopted, then underwriters would have to undertake significant additional actions to comply with the Commission's interpretation of their duties in primary offerings of municipal securities offerings. They likely would have to (a) obtain a list of all financial obligations (bonds, notes, leases, guarantees, derivatives, and monetary obligations from judicial, administrative, or arbitration proceedings, unless an official statement for them has been filed with the MSRB) entered into by or against each issuer in the prior five years, (b) obtain a copy of the financial obligation and the loan, lease, or master agreement or indenture by which it is evidenced or under which it is issued, (c) obtain a list and copy of each amendment, waiver, release, or other modification of any such agreement or indenture entered into in such 5-year period with respect to such financial obligations or any other financial obligations outstanding during the period, (d) review each modification to determine whether it affects securities holders, (e) review each such agreement, indenture, and modification to determine whether it is material, (f) obtain a list of any event of default or similar event under any such agreement or indenture, whether or not material, that has occurred in such 5-year period, (g) compare the information received from the issuer to its own knowledge and readily accessible sources for accuracy and completeness, (h) determine, from this work, whether the issuer should have filed notice of one or more of these events with the MSRB, (i) review EMMA to determine whether event notices were filed and, if so, whether they were filed within 10 business days of the occurrence of the event, and (j) review the event notices to determine whether they accurately and completely disclosed the events. It is unreasonable to believe that these steps may be completed in approximately *12 minutes* on average, which is the Commission's estimate of per offering burden on underwriters.

3. Brokers. If the Proposed Amendments are adopted, before effecting transactions in municipal securities on the secondary market, brokers will have to review additional event filings made with respect to the securities. If the issuer has filed lease, loan, or master agreements or indentures in full (albeit redacted) text, the broker will have to review relevant provisions of the filings (which may total hundreds or thousands of pages) to determine whether they present material information that the broker must disclose to its customer. The requirement that brokers obtain and review event notices filed with the MSRB is a collection of information requirement. If the Proposed Amendments are adopted as proposed, underwriters will be obligated to make issuers enter into CDAs that undertake to provide additional documents to EMMA, which in turn will increase the collection of information burden of brokers, since they will be obligated to access and review substantially more paperwork. Nevertheless, in the Proposing Release the Commission has made no estimate of the burden imposed on brokers in secondary market transactions.

G. Prior Commission Estimates of Rule 15c2-12 Burden

In estimating collection of information burdens that would be imposed by the Proposed Amendments, the Commission has relied on estimates made by it in connection with prior amendments to the Rule. These prior estimates were roundly criticized by knowledgeable industry participants, including NABL, as described below. (Neither NABL's nor, to our knowledge, other participants' prior criticism was shared with OMB, but rather was included in comment letters sent to the Commission alone, partly because of the challenge of clearing comments quickly enough to be useful to OMB and partly out of deference to the Commission. Consequently, the prior criticisms could not have been taken into account by OMB in reacting to the Commission's prior proposed amendments to the Rule.) However, despite having been told of the gross inaccuracies of prior Commission estimates, the Commission largely relied upon and repeated them in estimating the burden that would result from the Proposed Amendments. Consequently, NABL is submitting these Comments to OMB as well as the Commission.

The 1995 amendments to the Rule, which created the initial continuing disclosure regime for municipal securities, were promulgated before the effective date of the PRA. Consequently, the proposing release did not include any estimate of the burden of compliance. (NABL is unaware of any filing that the Commission may have made with OMB under the Federal Reports Act of 1942.) The Commission did make estimates of the collection of information burdens imposed by the existing Rule when it adopted amendments to the Rule in 2009 and 2010.

1. 2009 Amendments. In 2008, the Commission proposed the first amendments to the Rule that were subject to the PRA. The amendments changed the place where and medium by which information must be contracted to be provided by issuers. In the proposing release, the Commission estimated that 200 to 250 broker-dealers "potentially could serve as Participating Underwriters in an offering of municipal securities," based on data provided by the MSRB. Release No. 34-60332 (July 17, 2009). It estimated that it would take each broker-dealer an average of approximately one hour per year to comply with the proposed amendments' collection of information requirements (i.e., checking that CDAs comply with the amended Rule) and an additional half hour initially to inform its personnel of the new requirements. The Commission also estimated that it would take each issuer approximately 15 additional minutes to submit each of an estimated 15,000 annual information fillings and 60,000 event notices to the MSRB (to accommodate the new requirements for searchable formats and identifying information), bringing the average compliance time for each submission of information to 45 minutes. Release No. 34-58255 (July 30, 2008).

2. 2010 Amendments. In 2009, the Commission proposed amendments to the Rule that extended the continuing disclosure regime to demand securities, added to and revised the list of events of which issuers must contract to provide timely notice to the MSRB, and required event filings within 10 business days after the event. In proposing the amendments, the Commission relied upon its estimate of compliance burdens included in the 2008 proposing release. Despite adding several new events to the list of those for which an issuer must undertake to provide notice (and any material breach of which undertaking must be described in the official statement the Rule requires underwriters to receive and check), the Commission estimated that no additional burden would be imposed on underwriters as a result of these amendments to the Rule's event notice requirements. With respect to issuers, the Commission estimated that requiring notice within 10 business days after an event would not increase their collection of information burden, and that eliminating materiality qualifiers from many of the events and adding four additional events would result in an average time burden of 45 minutes per notice filed (and presumably none for issuers who do not file notices).

NABL submitted a letter commenting on these proposed amendments on September 23, 2009. In its letter, NABL observed that:

> "The Commission's estimates of costs and other regulatory impacts so greatly underestimate the likely impact of the amendments that the Commission staff should recompute and resubmit its impact estimates to the Office of Management and Budget for further review, and ideally resubmit the amendments for public comment, before the Commission considers adoption of the amendments as proposed."

As an example, NABL stated:

> Consider, for example, the proposed requirement to provide notice of rating changes within ten business days after they occur. In its release adopting the 1994 Rule amendments, the Commission noted that any determination of whether an event notice has been provided in a timely manner "must take into consideration the time needed to discover the occurrence of the event." Accordingly, many issuers and obligated persons have considered notices to be timely if provided promptly after they have ascertained that the event has occurred. Consequently, many issuers and obligated persons have not instituted procedures to ascertain whether events outside of their control and knowledge have occurred. They clearly would need to do so if the Rule were to require an undertaking to file within ten business days after the occurrence of an event, whether or not the event is known to them. In fact, if the Commission were to require an event notice within ten business days after the occurrence of the specified event, it would force conscientious issuers to undertake weekly diligence to determine whether an event that might not otherwise be known to them has occurred. In order to ensure compliance with event disclosure requirements, an issuer would have to check with each rating agency for any change in rating of the insurers of its bonds on at least a weekly basis (52 times a year), which on average (given three rating agencies, internet access for the issuer and appropriate training), one would expect to take at least 30 to 60 minutes per week (or 26 to 52 hours a year), simply to monitor for the occurrence of one of the specified events. Many issuers request that their counsel or financial advisors prepare event notices for filing (and, in some cases, determine whether an event notice should be filed). If the issuer were to outsource the due diligence efforts to determine whether listed events have occurred, its costs would be substantially higher. The Commission, on the other hand, includes in its cost estimates only 45 minutes of time per notice filing and no time to ascertain whether an event has occurred.

3. 2014 PRA Notice. On November 18, 2014, the Commission published a notice soliciting comments on its estimates of the collection of information burden imposed by the Rule. The notice was issued to comply with the requirements for updating its registration of the Rule under the PRA. The Notice essentially repeated estimates from earlier Rule amendment proposals, largely ignoring criticism of its estimates received in prior comments to previously proposed amendments. In response to the 2014 notice, NABL submitted comments, dated January 17, 2015, to the Commission's Chief Information Officer. In its comments, NABL observed that "the estimates of issuer and underwriter compliance times are significantly lower than actual average compliance times." NABL explained why the burden of event filing requirements on issuers was substantially understated by the Commission:

> "To comply with these filing requirements, issuers must establish and operate verification and reporting mechanisms to ascertain whether a reportable event has occurred. Since events must be reported within 10 business days of occurrence (not discovery), Rule 15c2-12 forces issuers to search frequently for information that may not be readily known to them. Many issuers will spend a substantial amount of time to monitor for the occurrence of events that might require consideration for disclosure so that, even in years in which no event occurs, an issuer will be devoting significant time to ensure compliance with the event notice requirement. If an event occurs and is discovered, issuers then have to determine whether the event is material (if the filing requirement is conditioned on materiality) and will have to describe the event in a way that is accurate, is not misleading, and does not make the event seem more or less alarming to investors than it should. As noted above, making these determinations and crafting these descriptions involves reviews by various officers and, often, outside counsel. Consequently, in NABL's experience, an estimate that issuers spend an average of 45 minutes per reported event in complying with their event filing requirements is a substantial underestimation."

NABL also explained why the burden of event filing requirements on underwriters was substantially understated by the Commission:

> "To comply with their duties to receive an official statement with disclosure of prior noncompliance, the SEC has said (in its 2010 release adopting amendments to Rule 15c2-12) that underwriters must make a reasonable investigation into whether, over the five years preceding each offering, events occurred that might require a notice and whether required annual reports and event notices were filed in a timely manner. Consequently, to comply with Rule 15c2-12's requirement to receive a qualifying official statement, underwriters must spend substantial "due diligence" time that they would not otherwise be required if Rule 15c2-12 did not require continuing disclosure undertakings or disclosure of past noncompliance. The November 2014 notice estimates total compliance time of 300 hours for all underwriters. According to the MSRB, there were more that 12,000 new issues of municipal securities last year. Assuming that 10,000 were primary offerings subject to Rule 15c2-12, the November 2014 notice estimates that underwriters can comply in less than two minutes per issue. That estimate is clearly inadequate."

H. Reasonable Estimates of Burden

To check the Commission's estimates of the collection of information burdens that would result from the Proposed Amendments, NABL invited its members to complete and return the attached questionnaire (see Exhibit A). NABL members represent both issuers and underwriters when they establish disclosure procedures and make disclosures to investors in primary offerings and under CDAs. Accordingly, they are knowledgeable about the time that would be required to perform the obligations of issuers and underwriters under the Proposed Amendments, should they be adopted. More than 70 members responded. The mean and median averages of the compliance times that the responders estimated are set forth in the attached questionnaire.

Based in part on the NABL survey responses, as well as the experience of NABL members who participated in the preparation of these Comments, NABL estimates annual collection of information burdens (after phase-in of the Proposed Amendments but without regard to initial set-up costs) that would result from the Proposed Amendments (as well as differences from the Commission's estimates) as follows:

ESTIMATED COMPLIANCE TIMES

	NABL Estimate	Commission Estimate	Difference
Issuer annual compliance burden (in hours):			
Monitor for and elevate possibly reportable events (NABL: 34,696 issuers[2] x 25 hrs.)	867,400	N/A	N/A
Evaluate possibly reportable events (NABL: 34,696 issuers x 50% x 10 hr.)	173,480	N/A	N/A
Prepare and file notice of financial obligations (NABL: 34,696 issuers x 25% x 3 notices x 4.2 hrs.[3]) (assumes redacted versions filed)	109,292	N/A	N/A
Prepare and file notice of financial obligation default or acceleration (NABL: 100 notices x 5.3 hrs.[4])	530	N/A	N/A
Subtotal	1,150,702	4,000	287x
Underwriters' Compliance Burden (in hours):			
Perform diligence for possible undisclosed material breaches (NABL: 14,314 issues[5] x 23.4 hrs.[6])	334,948	2,500	134x
Brokers' Compliance Burdens (in hours):			
(NABL: 9,358,046[7] transactions x 76%[8] x 2 hrs.[9])	14,224,229	N/A	N/A
Total	15,709,879	6,500	2,417x

While neither responses to NABL's questionnaire nor the above estimates are the product of a statistically supported review, the great disparity between NABL's estimates and those made by the Commission do suggest, at a minimum, that the Commission's estimates be redone to comply with the PRA.

[2] Based on annual audited financial statements or CAFRs filed with EMMA in 2016. MSRB 2016 Fact Book.

[3] Mean response to Q.7 of attached NABL questionnaire. See also mean response to Q.5.

[4] Mean response to Q.8 of attached NABL questionnaire.

[5] Based on number or primary market submissions to EMMA in 2016. MSRB 2016 Fact Book.

[6] Mean response to Q.9 of attached NABL questionnaire.

[7] Based on total number of reported municipal securities trades in 2016. MSRB 2016 Fact Book.

[8] Mean response to Q.3 of attached NABL questionnaire. See also the mean response to Q.4.

[9] *See* the mean response to Q.4 of the attached NABL questionnaire, which estimates that the redacted financial obligations to be reviewed would average 39 pages in length.

I. Requested Action

The PRA was enacted, among other reasons, to "minimize the paperwork burden . . . resulting from the collection of information by or for the Federal Government" and to "strengthen the partnership between the Federal Government and State, local, and tribal governments by minimizing the burden and maximizing the utility of information created, collected, maintained, used, disseminated, and retained by or for the Federal Government." 44 U.S.C. § 3501. Municipal securities are the principal source of funds for public infrastructure in the U.S. It is widely recognized, including by the President, that substantially greater investment in U.S. public infrastructure is needed. The Proposed Amendments would substantially increase the collection of information burdens imposed on State, local, and tribal governments, which in turn would decrease their resources available to invest in infrastructure. Accordingly, especially given the purpose of the PRA, the Proposed Amendments should be subject to strict scrutiny under the PRA.

Moreover, "It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." Executive Order, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017 (the "*Executive Order*"). While, due to the Commission's statutory independence, the Executive Order may not be binding on the Commission, it should give direction to OMB in discharging its duties with respect to the Proposed Amendments under the PRA.

OMB should require the Commission to comply scrupulously with the requirements of the PRA in considering the Proposed Amendments, especially since the Proposed Amendments require the collection of information from State, local, and tribal governments and the PRA is intended to minimize the paperwork burden imposed on them by the federal government.

For these reasons and the other reasons stated above, NABL respectfully requests that the Director of OMB:

1. **Comments:** file comments on the Proposed Amendments with the Commission to the effect that (a) the Proposed Amendments impose ambiguous and overly burdensome collection of information requirements, and (b) the Commission's estimates of the burden of these requirements are not adequately supported and should be reassessed in light of current market practice; and

2. **Disapproval:** disapprove the collection of information contained in the Proposed Amendments unless the Commission (a) revises the Proposed Amendments to draw clear lines that eliminate any obligation to provide or collect information that is not sufficiently important to investors to warrant burdens that can reasonably be expected to result and (b) makes careful, well-informed, and rigorous cost estimates in evaluating the complete resulting benefits and burdens in light of current market practice.

EXHIBIT A

NATIONAL ASSOCIATION OF BOND LAWYERS

COMPLIANCE BURDENS OF PROPOSED SEC RULE 15c2-12 AMENDMENTS

N=72

Baseline Information

1. Of the municipal debt sales and derivative transactions in which you participated in the last year, what percentage were privately placed without providing an official statement to the MSRB? **29% (mean); 20% (median)**

2. Of the issuers for whom you participated in municipal securities offerings in the last year, what percentage had outstanding "financial obligations," determined *without* regard to their materiality, e.g., school bus leases, fuel hedges, etc.? **87% (mean); 100% (median)**

3. Of the issuers for whom you participated in municipal securities offerings in the last year, what percentage have outstanding "financial obligations" that you believe the SEC might determine to be material, e.g., as evidenced by its materiality conclusions in MCDC consent orders? **76% (mean); 90% (median)**

4. Of the "financial obligations" described in question 3, what is the average length of the financial obligation or the agreement under which it was issued or incurred, e.g., loan agreement, lease agreement, ISDA master agreement and schedule, etc.? **39 pages (mean); 30 pages (median)**

Issuer Compliance Burden

5. If asked to prepare a summary (accurate and complete in all material respects) of a financial obligation described in question 3, on average how many hours would be required to comply? **6.7 hrs. (mean); 4 hrs. (median)**

6. If asked to prepare a summary (accurate and complete in all material respects) of an amendment, waiver, or other modification of a financial obligation described in question 3, on average how many hours would be required to comply? **3.8 hrs. (mean); 2 hrs. (median)**

7. If asked to prepare a redacted copy of a financial obligation described in question 3 for filing with EMMA, on average how many hours would be required to comply, including by obtaining any required permission to file unredacted information from another party to the financial obligation? **4.2 hrs. (mean); 3 hrs. (median)**

8. If asked to prepare a summary (accurate and complete in all material respects) of a default, acceleration, or similar event occurring with respect to a financial obligation described in question 3, on average how many hours would be required to comply? **5.3 hrs. (mean); 3 hrs. (median)**

Underwriter Compliance Burden

9. If asked to assist an underwriter in determining whether an official statement discloses all material breaches of an issuer's CDA undertaking to give timely notice of the events described in paragraphs (15) and (16), on average for the "financial obligations " described in question 3, how many hours would be required to:

- obtain a list of all "financial obligations" of the issuer,
- obtain a copy of each such financial obligation entered into in the last 5 years and the loan, lease, or master agreement or indenture by which it is evidenced or under which it was issued,
- obtain a list and copy of each amendment, waiver, release, or other modification of any such agreement or indenture entered into in such 5-year period with respect to such financial obligations or any others that were outstanding during the 5-year period,
- review each modification to determine whether it affects securities holders,
- review each such agreement, indenture, and modification to determine whether it is material,
- obtain a list of any event of default or similar event under any such agreement or indenture, whether or not material, that has occurred in such 5-year period,
- determine whether any such event was material,
- from this work, determine whether the issuer should have filed notice of one or more of these events with the MSRB,
- review EMMA to determine whether event notices were filed and, if so, when, and
- review each event notice to determine whether it adequately disclosed the event?

23.4 hrs. (mean); 20 hrs. (median)

EXHIBIT B

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