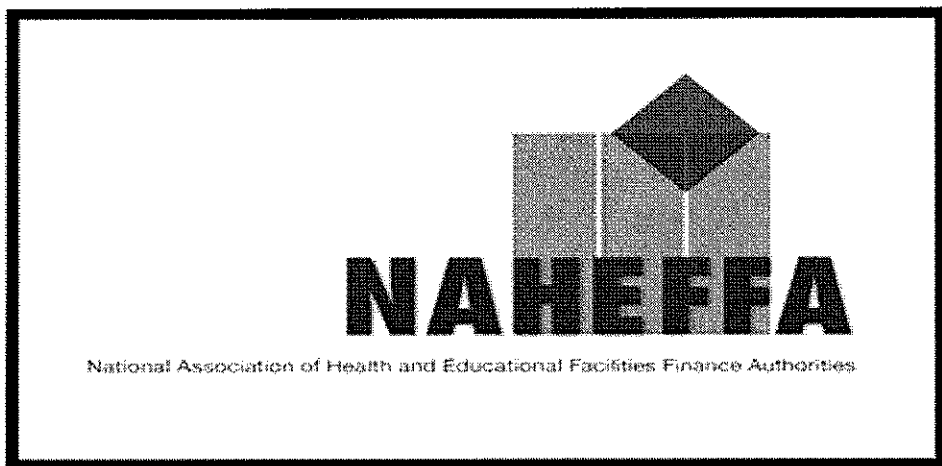


Comments of the National Association of Health and Educational Facilities Finance Authorities Regarding the Proposed Amendment to Municipal Securities Disclosure (74 Federal Register 36832, July 24, 2009; SEC Release No. 34-60332; File No. S7-15-09)

September 4, 2009

The National Association of Health and Educational Facilities Finance Authorities ("NAHEFFA") appreciates the opportunity to comment on the SEC's proposed amendments to Rule 15c2-12 under the Exchange Act of 1934 (the "Rule") relating to municipal securities disclosure.

NAHEFFA represents over 40 state and other authorities which issue tax exempt bonds on behalf of 501(c)(3) organizations, particularly in the areas of education and health care. While NAHEFFA's focus is on assisting not-for-profit health care and higher education institutions, some members also issue governmental, student loan, economic development and other bonds. Our comments will focus on the impact of the proposed amendments on 501(c)(3) financings.

The SEC proposal would amend certain requirements regarding the information that a broker, dealer, or municipal securities dealer acting as an underwriter in a primary offering of municipal securities must reasonably determine that an issuer of municipal securities or an obligated person, in a written agreement or contract for the benefit of the holders of the issuer's municipal securities, has undertaken to provide to the Municipal Securities Rulemaking Board (MSRB). Additionally, the proposal would modify the exemption under the Rule for certain demand securities.

The proposed amendments of most concern to NAHEFFA require a broker, dealer or municipal securities dealer to reasonably determine that the issuer or obligated person (as in our conduit financing transactions) has agreed to provide notice of specified events in a timely manner *not in excess of ten business days after the event's occurrence*. This comment will focus on the difficulties the proposed ten-day maximum time poses for 501(c)(3) organizations in the context of the existing events for which such notice is required as well as in the context of other proposed amendments to the Rule that would expand the list of events that trigger such notice requirements.

In general, this time period is too short, requires virtually perfect and immediate knowledge and institutional recognition of the need for a filing and unreasonably requires enhanced, expensive and infeasible monitoring. NAHEFFA believes a 30-day deadline, measured from the date the issuer or obligated person knew or should have known of the occurrence, for the filing of the applicable notice is appropriate, and that the imposition of any such deadline should be combined with clarification of the Commission's interpretive guidance on the consequences of noncompliance, as discussed below. A more reasonable timing requirement is particularly important where "materiality" considerations are minimized and where occurrences must be reported which are external to the borrowing institution and not necessarily of a nature that would immediately come to the notice of an institution. There also must be time for processing of the new information and preparing it for submission.

Many of the proposed reporting changes seem unobjectionable in isolation. The problem is that when combined with the Commission's interpretive guidance (the "Rule Interpretation") a situation is created where minor "foot faults" by the issuer or obligated person may make it appear that such person is a scofflaw and deprive such person of future market access when, in fact, the "violations" may singly and in combination be fairly trivial.

Particularly for smaller issuers or obligors, the ability to report the occurrence of any of the potential events in the Rule's proposed expanded list of events requiring a notice within ten days of their occurrence may not be feasible. As a practical matter, it is probable that some, particularly smaller, issuers or obligors will miss such a short deadline and not report such events until, for instance, 12 or 15 days following their occurrence. Yet the Rule Interpretation indicates that the requirement that municipal underwriters, prior to underwriting a municipal bond issue, reasonably determine that the issuer or obligated person has undertaken to provide continuing disclosure documents to the MSRB requires not only the underwriter's determination that the issuer or obligated person has executed a contractual undertaking that complies with the Rule, but some sort of evaluation by the underwriter that it is reasonable to expect that the issuer or obligated person will actually comply in the future with its contractual obligation. Furthermore, the Rule Interpretation asserts that "it is doubtful that an underwriter could meet this reasonable basis standard without inquiring as to the filing history of an issuer or obligated person," and 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." SEC Release No. 34-60332 at 59. In other words, the Rule Interpretation suggests that a record of several relatively minor transgressions in meeting event notice deadlines could result in a financial "death sentence" for institutions by preventing or dissuading the underwriting of such institution's capital financings.

Enactment of the proposal in final form is setting up many charities for failure, particularly in requiring the reporting within ten days of external events that are not within the control of or the direct knowledge of educational or health care entities. There is no financially feasible infrastructure or mechanism readily available to guarantee that many such entities will find out about and be able to report within ten days of an occurrence. And, some of the events which must be reported without the materiality qualification are so minor or otherwise publicized that a charitable institution should not face a loss of market access for failing to beat the clock in filing the applicable event notice.

Compliance with a ten-day reporting requirement for rating changes will be particularly difficult and costly for many issuers and institutions. For example, rating changes are not within the issuer's or obligated person's control, and notification may not be transmitted to issuers and obligated persons in the normal course of events, particularly if the rating change results from a change in the rating of a bond insurer or other credit enhancer for a series of bonds. To ensure timely compliance with the ten-day requirement many issuers and obligated persons would need to subscribe to rating organization and/or dissemination agent notification services. These services are costly and for many small issuers and obligated persons prohibitively so.

If the exemption of variable rate demand obligations from secondary market disclosure is eliminated, the number of affected obligors/borrowers increases dramatically. Many borrowers will not be instantly aware of or track on a regular basis the rating of their letter of credit bank.

Recent experience related to bond insurer downgrades establishes that a ten-day deadline to report rating changes on bond issues is unachievable for some reporting entities. In many instances, determination of when bond insurer rating downgrades require a notice filing under the Rule involves not only awareness of the change in the bond insurer's rating but time-intensive research of affected issues to determine their underlying ratings, if applicable, and whether the bond insurer's rating change will affect each applicable bond issue's rating. Review by and guidance from outside counsel also may be required. Expecting issuers and obligated persons with limited personnel and financial resources to consistently react to these types of changes within ten days of their occurrence is unrealistic. If the Rule imposes unrealistic deadlines, the result is as likely to be an increase in the statistical noncompliance as it is to be improvement in disclosure practices.

As another example of the practical issues presented by the proposed amendments and the Rule Interpretation, the proposed Rule amendments would add "the appointment of a successor or additional trustee or the change of the name of a trustee, if material" as an event requiring disclosure. The turmoil in the banking sector has meant frequent charges in trustees. Many issuers and obligated persons are not informed of these changes within the proposed ten-day time frame, much less in sufficient time to identify the need to file a notice and prepare the relevant notice within such time period. The timing of succession and/or name change notices from bond trustees to issuers and/or obligated persons is governed by each trustee's business practices and/or the requirements of any applicable trust indenture requirements (which may or may not expressly require notice of a name change within a particular timeframe, may or may not have a timeframe that is consistent with meeting the proposed ten-day notice requirement in the Rule, and may or may not be complied with by the applicable trustee even if set forth in an applicable trust indenture.)

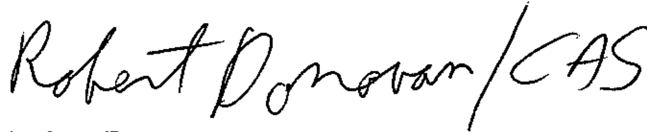
NAHEFFA supports transparency and fostering investor confidence in the tax-exempt securities market in an efficient and sustainable manner. For the reasons above, however, we believe the proposal to establish a hard deadline of ten days after the occurrence of a notice event for submitting event notices under a continuing disclosure agreement would impose onerous and, in some instances, unachievable burdens on issuers and obligated persons related to monitoring and preparing filings for these events. The complexity of the municipal market and the wide variation in the sophistication, resources and constraints on issuers and obligated persons have been recognized by the Commission in the absence of a specific deadline for the filing of annual reports required by the Rule. Those same factors counsel against imposing a short, one-size-fits all deadline for event notices for issuers and obligors that include small charities not set up for instant recognition and processing of third party and other events requiring notice under the Rule.

Thus, NAHEFFA recommends that, if a specific deadline for event notices, including external events such as rating changes and changes to the bond trustee, is to be required in continuing disclosure agreements, that deadline should be 30 days after the issuer/obligated party knew or should have known of the occurrence.

In addition, the Commission's interpretation and guidance should clarify that the underwriter's reasonable determination of prospective compliance with the Rule, to the extent it must take into account factors other than the issuer's obligor's contractual undertaking to comply, may take into account the significance, materiality and extenuating circumstances of any instances of prior technical noncompliance with event disclosure requirements by the applicable issuer or obligated person.

We would be glad to provide further information to the SEC as requested.

Respectfully Submitted,



Robert Donovan
Executive Director
Rhode Island Health and Educational Building Corporation
170 Westminster Street, 2nd Floor
Providence, Rhode Island 02903-2103
(401) 831-3770
rdonovan@rihebc.com

Chair, NAHEFFA Advocacy Committee

4701565v.