National Council of Higher Education Loan Programs, Inc.
NCHELP

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VIA E-MAIL

February 16, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number S7-45-10

Dear Ms. Murphy:

This comment letter is submitted in response to the Release proposing rules to implement Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 975") relating to the registration of municipal advisors, published in the Federal Register on January 6, 2011 (Securities Exchange Act Release No. 63576; File No. S7-45-10) (the "Proposing Release" and "Proposed Rules"). The National Council of Higher Education Loan Programs ("NCHELP") is a trade association representing a nationwide network of organizations involved in student financial aid, including both State entities and nonprofit corporations that act as lenders and guaranty agencies pursuant to the Federal Family Education Loan Program ("FFELP") that is administered by the federal Department of Education ("DOE")pursuant to Title IV of the Higher Education Act ("Title IV").

NCHELP's voting members include State agencies, authorities and similar public entities that issue municipal securities to finance their origination or secondary market purchase of FFELP loans, as well as nonprofit corporations, formed for such purposes at the request of their respective States, that issue similar securities. As a preliminary matter, we would ask that the Securities and Exchange Commission (the "SEC") confirm whether the intent of the Proposed Rules is to include any such nonprofit corporations within the scope of the statutory term "municipal entity".

All FFELP loans are guaranteed by a guaranty agency, which in turn is reinsured by the DOE. Under Title IV, guaranty agencies must be either State agencies or non-profit organizations. In the case where an individual student (or parent) borrower defaults on a FFELP loan, or dies, becomes disabled or meets certain other criteria, the guaranty agency pays the lender or holder a certain amount (generally between 97 and 100% of the amount outstanding) and is assigned the loan. Guaranty agencies are subject to comprehensive DOE regulation under Title IV with respect to their administration of guarantee funds and of defaulted loans and have been deemed to be fiduciaries of the federal government with respect to such assets. Although many guaranty agencies also act as lenders, or are related to State lenders, they also guarantee FFELP loans owned by other lenders, including banks and certain for profit corporations as well as other State and nonprofit corporate lenders. While their payments to the lender are generally pledged to a trust securing the lender's financing obligations, guaranty agencies do not directly support the payment of such financing obligations. The guaranty of the individual pledged assets exists independent of any municipal obligation. Although we believe that such guaranty agencies should not be deemed to be "obligated persons" as a result of such operation (see Response to Question 9 in

September 19, 1995 Letter from Catherine McGuire to National Association of Bond Lawyers; a copy of which is attached for convenient reference), we ask that the SEC confirm that they will not.

Municipal advisors to those of our members who are deemed to be "municipal entities" or "obligated persons" would be subject to the Proposed Rule when it to becomes effective. We specifically take issue with the interpretation in the Proposed Rule under which a municipal entity's non-elective board members could be deemed to be "municipal advisors".

We recognize that the Proposed Rules are grounded in Section 975. The definition of "municipal advisor" in the Proposed Rules incorporates the definition in Section 975 and elaborates on some of the statutory exclusions (e.g. brokers, dealers, investment advisors, attorneys, and engineers). While the Proposed Rules do not elaborate on the statutory exclusions for municipal entities and employees of municipal entities, the Proposing Release offers an interpretation which would cover in the exclusion only elected members of the governing body of a municipal entity and appointed members who are *ex officio* members by virtue of holding elective office, but not other members (except for those who were also employees). Appointed and nonelected *ex officio* members would thus be deemed to be municipal advisors if they meet the other requirement of the statutory definition (providing advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities, including advice with respect to structure, timing, and terms). The Proposed Rule specifically asks for comments on the proposed distinction. For the reasons spelled out below, we believe that **no** members of a municipal entity's governing board should be deemed to be municipal advisors by reason of such service.

First, we have found no support in the Congressional history for the proposed distinction between a "municipal entity" and its board while acting in such capacity. While the individuals who make up such a board may be advisors to other entities, as board members they are collectively the governing body of the entity itself and not its advisors. They, and through them, the entity they govern are the recipients of advice from the class of advisors that Section 975 was clearly meant to address. This is true regardless of how actively engaged an individual member may be in a board's consideration of the issuance or administration of municipal securities or other financial affairs. We believe that members of the governing body are covered by the exclusion for the municipal entity itself, as the actions of the governing board reflect the entity's decision-making. Second, we have also found no support for the proposed further distinction between elected and non-elected members. The Commission's justification for the distinction is based on the proposition that elected members are accountable to the municipal entity for their actions. This implies that non-elected are not accountable for their actions. We dispute this conclusion, as all members of a governing board have a fiduciary duty to the municipal entity.

It is also important to recognize a likely consequence of application of the Proposed Rules to our members' governing boards, which is that existing board members will be discouraged from continued participation and that individuals who may be qualified to replace them will be discouraged from doing so because of the burden of registration and the related exposure to federal securities law liability. A fundamental function of governing boards of municipal entities is to make determinations with respect to municipal financial products and the issuance of municipal securities, including structure, timing and terms. If the Proposed Rules were applied to board members as described in the Proposing Release, we would expect many existing board members to resign, or at a minimum to abstain from board deliberations on such topics. In either case, the municipal entity would lose valuable input, input which should be encouraged, not discouraged. This would be particularly problematic for our members, both because of the complex federal regulatory background within which a FFELP lender or guaranty agency must be administered and because the expiration in 2010 of federal authorization for new FFELP loan origination has resulted in a diminishing pool of individuals who are knowledgeable about these requirements.

In summary, for the reasons set forth above, we ask that the Final Rule clarify that no member of the governing board of a municipal entity should be deemed to be a municipal advisor by reason of his or her service on the board, and that the Commission clarify a guaranty agency is not an "obligated person".

Please do contact our General Counsel, Shelly Repp, at 202-721-1195 or shelly_repp@nchelp.org, if you have any questions.

Sincerely,

Brett E. Lief
President

SEC RELEASES "NABL II" IN RESPONSE TO SECURITIES LAW AND DISCLOSURE COMMITTEE'S QUERIES

Editor's Note: The following interpretive letter was received on the eve of the 1995 Bond Attorneys' Workshop.

September 19, 1995

John S. Overdorff, Chair
Securities Law and Disclosure Committee
National Association of Bond Lawyers
2000 Pennsylvania Avenue, N.W.
Suite 9000
Washington, D.C. 20006

Re: Rule 15c2-12.

Dear Mr. Overdorff:

The Securities Law and Disclosure Committee of the National Association of Bond Lawyers ("NABL"), in its letter of September 19,

1995, requested staff interpretive guidance regarding the recent amendments to Securities Exchange Act of 1934 ("Exchange Act") Rule 15c2-12, as adopted in Exchange Act Release No. 34961 (Nov. 10, 1994) ("Adopting Release"). The staff provided earlier guidance to NABL in a June 23, 1995 letter ("NABL Letter") [printed at page 62 in the August 1 *Quarterly Newsletter*]. For ease of reference, the questions in the attached letter have been restated with the responses.

Question 1.

> In response to Question 1 of the NABL Letter, the staff referred by way of illustration to Exchange Act Rule 13d-3 for a definition of the term "beneficial owner." We interpret the reference to Exchange Act Rule 13d-3 as providing one basis of analysis for the term "holders" but not prohibiting use of other sources for a definition. May an undertaking be negotiated to specifically define "holders" in a manner that would include persons who have or share investment power but exclude persons deemed to be beneficial owners merely by reason of having rights to acquire securities within 60 days?

Response:

The reference in the NABL Letter to the definition of beneficial owners in Exchange Act Rule 13d-3 was a reference to "analogous provisions of the federal securities laws . . . [that] may be helpful." It was not stated to be nor should it be construed as a sole or exclusive reference. Therefore, an undertaking may specifically define "holders" in a manner that would include persons who have or share investment power but exclude persons who have rights to acquire securities in the future.

Question 2.

> Paragraph (b)(5)(i)(C) of the Rule requires a Participating Underwriter to reasonably determine that an Issuer or Obligated Person has undertaken to supply notice of each of 11 specified events, if material. Current practice has varied with some Participating Underwriters accepting undertakings that list less than all of the events specified in the Rule in situations where certain of the events are not relevant in

the primary offering (for example, the bonds have no reserve fund or there is not credit enhancement) while other participating underwriters require all 11 events to be listed in the Undertaking under all circumstances. May the written undertaking eliminate references to those of the 11 specified events that may not be applicable to the bonds in question? If all 11 events should be listed, may the undertaking indicate that certain events may not be applicable?

Response:

Undertakings pursuant to Rule 15c2-12(b)(5)(i)(C) may not eliminate references to any of the eleven events, regardless of whether any particular event is believed to be applicable to the securities being offered. In addition, undertakings with respect to material events should list all events in the same language as is contained in the rule, without any qualifying words or phrases, except as the staff has indicated otherwise with respect to mandatory redemptions of bonds. See response to NABL Letter at Question 8. As a general mater, the staff is concerned that by either excluding certain events, or by adding qualifications to the list of events in Rule 15c2-12(b)(5)(i)(C), issuers and obligated persons will be making materiality determinations about certain events prior to the issuance of securities. Materiality determinations need to be made at the time an event occurs.

An official statement describing the undertaking may indicate that certain of the eleven events may not be applicable.

Question 3.

After the primary offering of bonds, credit enhancement may be added to the bonds. The issuer typically does not apply for, nor participate in, obtaining such credit enhancement and the credit enhancement is not described in the final official statement related to the bonds. In these circumstances, is an issuer required to provide material event notice with respect to credit enhancement that is obtained by a holder of municipal securities in the secondary market?

Response:

No. An issuer is not required to provide material event notices with respect to credit enhancement when the credit enhancement is added after the primary offering of the bonds, the issuer does not apply for or participate in obtaining such credit enhancement and such credit enhancement is not described in the final official statement relating to the bonds.

Question 4.

In paragraph (g) of the Rule, is the phrase "offering of municipal securities commencing prior to January 1, 1996," which is contained in the second sentence, intended to state a different test than the "contractually committed" test which is contained in the first sentence of paragraph (g)?

Response:

The test is the same. As with the application of Rule 15c2-12(b)(5), the commencement of an Offering, as the term is used with reference to the exemption in Rule 15c2-12(d)(2), is the time that the Participating Underwriter makes a contractual commitment to purchase securities. Therefore, Rule 15c2-12(d)(2)(ii) and (d)(2)(iii) shall not apply to an Offering of municipal securities if there is a contractual commitment by a Participating Underwriter to act as an underwriter in an Offering of municipal securities prior to January 1, 1996.

Question 5.

Is it a correct reading of paragraph (g) that it provides transitional relief for bonds eligible for the small issuer exception from both the material events and annual reporting requirements for any bond issue commencing prior to January 1, 1996 for the life of the issue?

Response:

Yes.

Question 6.

Paragraph (f) of the Rule provides that in determining "authorized denominations of $100,000 or more," the purchase price is used for municipal securities with an original issue discount of 10% or more rather than the principal amount of the securities. For purposes of determining the aggregate principal amount under paragraph (a) of the Rule (the $1,000,000 threshold) or under paragraph (d)(2) of the Rule (the $10,000,000 threshold), would the same 10% threshold rule apply to securities issued with original issue discount or for securities sold at a premium?

Response:

No. The thresholds for the rule generally in rule 15c2-12(a) and the small issuer exemption in Rule 15c2-12(d)(2) are calculated based on the aggregate principal amount of securities for which an issuer or obligated person ultimately is liable. Only for purposes of determining authorized denominations of $100,000 or more under Rule 15c2-12(d)(1), where securities are sold with an original issue discount of 10% or more, is the use of the purchase price appropriate.

Question 7.

Depending upon the facts and circumstances of a specific exemptive letter or no action letter, are classes of transactions exempted under paragraph (e) of the Rule required to be counted towards the $10,000,000 threshold in paragraph (d)(2) of the Rule? For example, are the "whole agreements" exempted in the First Continental Financial Corporation letter (June 1, 1990) required to be counted?

Response:

As a general matter, no-action and exemptive requests should specify those sections of Rule 15c2-12 for which relief is requested. Unless relief specifically is granted for exclusion of certain transactions or classes of transactions from the threshold calculation for the Rule 15c2-12(d)(2) exemption, these transactions or classes of transactions must be included in that calculation.

Securities exempt pursuant to the exemption in First Continental Financial Corporation (June 1, 1990)[1/] need not be counted toward the $10,000,000 threshold amount.

Question 8.

The definitions of "final official statement" and "annual financial information" state

1/ In June of 1990, the Commission granted an exemption to First Continental Financial Corporation and certain brokers, dealers, and municipal securities dealers participating in offerings of governmental lease-purchase and installment sales agreements. See First Continental Financial Corporation (June 1, 1990).

financial information may be included by reference to documents previously provided to each NRMSIR and to a SID, if any, or to the Commission. The next sentence then reads: "If the document is a final official statement, it must be available from the [MSRB]." May the last sentence be interpreted to mean that a final official statement or annual financial information may include by reference information set forth in another official statement that is filed with the MSRB, but has not been filed with the Commission or each NRMSIR and the SID, if any?

Response:

Yes. To be considered publicly available, a final official statement must be available from the MSRB. It need not be available from each NRMSIR and the appropriate SID, if any. See Adopting Release at n. 47.

Question 9.

Certain municipal obligations may be secured by a pledge of assets that are insured or guaranteed by public third parties where no contractual or other arrangement directly commits such third parties to support payment of all, or of any part, of the municipal obligations. Depending upon the performance of the pledged assets, receipts in respect of such guarantee may be a material source of payment of the municipal obligations and, accordingly, information with respect to such insurance or guarantee may be included in the final official statement. However, such insurance or guarantee of the payments of pledged asset obligors exists independently of the existence of any municipal obligation. An example of these types of guaranteed or insured assets would be loans insured or guaranteed by State or local housing agencies or programs. Will the existence of such insurance or guarantee of the assets, by itself, cause the provider of such security to be deemed an "Obligated Person" within the meaning of the Rule?

Response:

Rule 15c2-12 requires a covenant to provide ongoing information with respect to any person who is committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities (other than

providers of municipal bond insurance, letters of credit, or other liquidity facilities), for which financial information or operating data is included in the final official statement.

Entities that insure or guarantee performance of assets that have been pledged to secure the repayment of the municipal obligation may fall within the definition of "obligated person," and ongoing information may be required on such parties, unless such insurance or guarantee has been obtained prior to and not in contemplation of any offering of municipal securities, the insurance or guarantee relates only to the individual pledged assets, and the insurance or guarantee exists independent of the existence of a municipal obligation. The ultimate determination as to whether an insurer or guarantor is an obligated person depends on the relationship to the financing itself -- a factual analysis.

A determination of whether a guarantor or insurer would fall within the exclusion for providers of bond insurance, letters of credit or liquidity facilities will depend on the particular facts and circumstances. Your attention is directed to response to Question 22 in the NABL Letter. The staff is willing to consider the application of the definition and the rule to such persons based on specific facts and circumstances.

Question 10.

In response to Question 8 in the NABL Letter, Commission staff stated that a "notice of the occurrence of a mandatory, scheduled redemption not otherwise contingent upon the occurrence of an event, is not required under the Rule if the terms under which the redemption is to occur are set forth in detail in the final official statement." Please confirm that mandatory redemptions of bonds as a result of required sinking fund payments as set forth in the final official statement do not require notices under the Rule. We recognize that notices pursuant to the transaction documents or pursuant to Exchange Act Release No. 23856 may be required. Will the fact that the sinking fund redemption schedule set forth in the final official statement may be reduced by other redemptions or bond purchases change the result?

Response:

As noted in the NABL Letter, a notice of the occurrence of a mandatory, scheduled redemption, not otherwise contingent upon the occurrence of an event, is not required under the rule if the terms under which the redemption is to occur are set forth in detail in the final official statement, and the only open issue is which bonds will be redeemed in the case of a partial redemption. This position is conditioned on the provision of notice of the redemption to the bondholders as required under the terms of the governing instrument, and on the provision of public notice of the redemption. See Exchange Act Release No. 23856 (Dec. 3, 1986). If notice pursuant to Exchange Act Release No. 23856 is given, the rule does not require additional notice of mandatory redemptions of bonds as a result of sinking fund payments, if the sinking fund payment amounts and dates are set forth in the final official statement, even where the sinking fund redemption schedule set forth in the final official statement may be reduced by other redemptions or bond purchases.

Question 11.

An issuer of special limited obligation bonds may choose to not include its audited financial statements in the final official statement. This may be because the bonds are not payable from the issuer's general assets or because the bonds are payable from sources which did not exist at the time the audited financial statements were prepared (e.g., revenues received from a project to be constructed with proceeds of the bond issue), and accordingly the audited financial statements do not contain any relevant information. Paragraph (b)(5)(i)(B) requires that an issuer must undertake to deliver audited financial statements, when and if available, in addition to the requirement to deliver "annual financial information," which must be incorporated in an undertaking. If audited financial statements are not prepared with respect to the specific funds and accounts pledged to repayment of the bonds, is the issuer required to submit its audited general purpose financial statements, when and if available?

Response:

Yes. In a financing involving an issuer of special limited obligation bonds, if audited financial statements are not prepared with respect to the specific funds and accounts pledged to repayment of the bonds, the issuer, if an obligated person, is required to submit its audited general purpose financial statements, when and if available, regardless of whether separate information regarding such funds or accounts, or related underlying assets, are separately presented.

Question 12.

Paragraph (d)(3) of the Rule is applicable to offerings of municipal securities with a

stated maturity of 18 months or less. In a multi-modal bond issue, would paragraph (d)(3) apply to modes where such bonds, at the option of the holder thereof may be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at 18 months or less until maturity, earlier redemption, or purchase by an issuer or its designated agent?

Response:

As the Adopting Release notes, the 18 month exemption from providing annual financial information addresses situations where the securities would mature shortly after, or possibly even before, the annual financial information would be due. In a multi-modal bond issue, the final maturity of the bond issue is often far longer than 18 months, and therefore the provisions of Rule 15c2-12(b)(5) apply, unless another exemption is available.

Question 13.

If a multi-modal bond issue is not exempt from the provisions of the Rule in its initial offering and accordingly the issuer enters into a written undertaking meeting the requirements of the Rule, may the undertaking be suspended or terminated if in a future remarketing the bond issue qualifies for an exemption under the Rule? We assume that the undertaking provides that it may be suspended or terminated under such circumstances.

Response:

If a multi-modal bond issue is in a mode that allows an exemption under the rule, then the written undertaking may be terminated or suspended in accordance with the terms of the written undertaking. However, it is important to note that in this scenario an underwriter would be prohibited from re-marketing the bonds in a future mode if that mode does not qualify for an exemption and a new undertaking has not been entered into in the case of a termination, or re-activated in the case of a suspension.

* * * *

The foregoing responses address only the questions raised in your letter relating to Rule 15c2-12, as amended. The responses do not address the staff's or the Commission's position regarding the obligations of municipal market participants, and in particular, issuers, brokers, dealers, and municipal securities dealers, under the antifraud provisions of the federal securities laws. In that regard, please refer to Exchange Act Release No. 33741 (March 9, 1994) for further guidance. Should you have questions regarding the responses, please contact the Office of Chief Counsel, Division of Market Regulation, at (202) 942-0073.