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of Bond Lawyers

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September 21, 2015

VIA EMAIL

Chair and Commissioners
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

RE: Municipalities Continuing Disclosure Cooperation Initiative

Dear Chair White and Commissioners Aguilar, Gallagher, Piwowar and Stein:

In March 2014, the Division of Enforcement (the "Division") of the Securities and Exchange Commission (the "Commission") announced the Municipalities Continuing Disclosure Cooperation Initiative (the "MCDC Initiative"), a self-reporting program intended to address what the Division perceived to be potentially widespread violations of the federal securities laws resulting from misrepresentations in municipal bond offering documents about prior compliance with continuing disclosure obligations.

The National Association of Bond Lawyers ("NABL") respectfully submits the enclosed analysis of, and recommendations relating to, the MCDC Initiative. This submission is based upon the collective observations of our members and has been approved by the NABL Board of Directors.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,700 members and is headquartered in Washington, DC.

If you have any questions concerning the comments, contact William Daly, Director of Governmental Affairs, at (202) 503-3302 or bdaly@nabl.org.

Sincerely,

Kenneth R. Artin

cc: LeeAnn Gaunt, Chief, Municipal Securities and Public Pensions Unit
Jessica Kane, Director, Office of Municipal Securities

ANALYSIS OF AND RECOMMENDATIONS RELATING TO THE

MUNICIPALITIES CONTINUING DISCLOSURE COOPERATION INITIATIVE

Brief Summary of the MCDC Initiative

In March 2014, the Division of Enforcement (the "Division") of the Securities and Exchange Commission (the "Commission") announced the Municipalities Continuing Disclosure Cooperation Initiative (the "MCDC Initiative"), a self-reporting program intended to address what the Division believed were potentially widespread violations of the federal securities laws resulting from misrepresentations in municipal bond offering documents about prior compliance with continuing disclosure obligations.

Pursuant to the MCDC Initiative, the Division agreed to recommend standardized settlement terms to issuers and obligated persons involved in the offer or sale of municipal securities (collectively, "issuers") as well as underwriters of such offerings if they self-reported to the Division possible violations involving materially inaccurate statements relating to prior compliance with the continuing disclosure obligations specified in Rule 15c2-12 under the Securities Exchange Act of 1934 (the "Exchange Act").

The standardized settlement terms that the Division proposed would address these past violations primarily by attempting to prevent similar violations in the future. For example, with respect to settlements with underwriters, the underwriter must undertake to:

- retain an independent consultant, not unacceptable to the Commission staff, to conduct a compliance review and, within 180 days of the institution of the proceedings, provide recommendations to the underwriter regarding the underwriter's municipal underwriting due diligence process and procedures;
- within 90 days of the independent consultant's recommendations, take reasonable steps to enact such recommendations; provided that the underwriter may seek approval from the Commission staff to not adopt recommendations that the underwriter can demonstrate to be unduly burdensome;
- cooperate with any subsequent investigation by the Division regarding the false statement(s), including the roles of individuals and/or other parties involved; and
- provide the Commission staff with a compliance certification regarding the applicable undertakings by the underwriter on the one-year anniversary of the date of the institution of the proceedings.

Under the proposed standardized settlement terms with respect to issuers, the issuer must undertake to:

- establish appropriate policies and procedures and training regarding continuing disclosure obligations within 180 days of the proceedings;
- comply with existing continuing disclosure undertakings, including updating past delinquent filings within 180 days of the institution of the proceedings;

- cooperate with any subsequent investigation by the Division regarding the false statement(s), including the roles of individuals and/or other parties involved;

- disclose in a clear and conspicuous fashion the settlement terms in any final official statement for an offering by the issuer within five years of the date of institution of the proceedings; and

- provide the Commission staff with a compliance certification regarding the applicable undertakings by the issuer on the one-year anniversary of the date of institution of the proceedings.

The minimal civil penalties for entities that self-report (none for issuers and a $500,000 maximum for underwriters) underscore that the MCDC Initiative was primarily focused on preventing future violations instead of primarily punishing issuers and underwriters for prior conduct.

Results of the MCDC Initiative

Initially, issuers and underwriters were required to self-report by September 10, 2014; however, on July 31, 2014, the Commission announced that the Division had extended the deadline for issuers to self-report until December 1, 2014.

On June 18, 2015, the Commission approved settlements with 36 underwriters who had self-reported under the MCDC Initiative. In a related order,[1] the Commission made the following statement about the results of the MCDC Initiative:

> The MCDC Initiative resulted in a large number of underwriters and other participants self-reporting potential non-scienter based violations of the federal securities laws and has generated much-needed attention within the municipal underwriter community about continuing disclosure compliance, the disclosure process, and due diligence.

Since the announcement of the MCDC Initiative in March 2014, and certainly since the self-reporting deadline for underwriters in September 2014, NABL believes that all (or virtually all) municipal underwriters have given additional focus to their due diligence process and procedures regarding disclosure in primary offerings of issuers' compliance with prior continuing disclosure undertakings. From this point forward it should be rare for an official statement to contain a misstatement regarding the issuer's compliance with its prior continuing disclosure undertakings. To the extent that the primary purpose of the MCDC Initiative was deterrence (i.e., to prevent future misstatements or omissions in official statements about compliance with prior continuing disclosure undertakings), NABL believes that this purpose has been accomplished.

The MCDC Initiative has also caused a substantial number of issuers to focus on compliance with their continuing disclosure undertakings. This also should help eliminate misstatements in official statements regarding compliance with prior undertakings and should increase the level of compliance by some issuers with their continuing disclosure undertakings between offerings. As discussed below, however, the MCDC Initiative did not directly address the larger issue, which is how to assure that issuers (particularly those that are smaller and/or less

[1] Release No. 33-9848 (June 18, 2015).

frequent issuers) understand and are able to comply with their continuing disclosure undertakings.

How the MCDC Initiative Might Affect Future Initiatives

The MCDC Initiative was the first industry-wide enforcement initiative undertaken by the Division with respect to the municipal market. If the Division were to consider any such initiative in the future, NABL would urge the Commission to consider the following:

- If any future enforcement initiative is directed at issuers, substantial consideration should be given to the question of how to make the issuer community aware of the initiative. According to the SEC's 2012 Report on the Municipal Securities Market, there are close to 44,000 state and local issuers.[2] But there is no single channel for communicating with all of these issuers simultaneously. As our members have observed, in the case of the MCDC Initiative, many issuers were simply not aware of the initiative, particularly issuers who did not publicly offer bonds within the initiative's time frame.

- Although individual enforcement actions are not subject to a cost/benefit analysis, enforcement initiatives directed at a broad cross-section of issuers and/or underwriters in the municipal bond market should be subject to a rigorous cost/benefit analysis. As discussed above, NABL believes that the MCDC Initiative has accomplished the purpose of eliminating future misstatements; however, the MCDC Initiative could have accomplished that purpose at a substantially lower cost to the issuer community and with a wider breadth (e.g., by limiting the number of prior offerings that were required to be reviewed and/or limiting the review required with respect to each prior offering).

Improving Compliance with Continuing Disclosure Undertakings

Because the MCDC Initiative was an enforcement initiative, it was necessarily limited to potential violations of the federal securities laws, i.e., misstatements in official statements about compliance with prior continuing disclosure undertakings. The MCDC Initiative, however, did not directly address the larger issue, which is how to assure that issuers (particularly those that are smaller and/or less frequent issuers) understand and are able to comply with their continuing disclosure undertakings.

Rule 15c2-12 requires underwriters to obtain a continuing disclosure undertaking by issuers, but compliance with the undertaking assumes that issuers will understand and internalize these requirements and then carry them out without the assistance of the working group that worked on the primary offering (e.g., underwriters, financial advisors, bond counsel).

Why are issuers left with the responsibility for complying with their continuing disclosure undertakings without the assistance of the working group? The answers have much to do with the scope of engagement for third-party working group professionals and cost. The engagement of professionals for the offering generally ends with the initial issuance and delivery of the securities. Moreover, most issuers do not budget for the ongoing cost of retaining professionals to handle post-issuance compliance matters, such as continuing disclosure (except, in some cases,

[2] Report on the Municipal Securities Market (July 31, 2012) at 1.

dissemination agents, who generally do not appear to engage in any substantive review of continuing disclosure filings).

Our members' observations indicate that issuers are willing and intend to comply with their continuing disclosure undertakings. Intentional noncompliance, to the extent it happens at all, is extremely rare. Noncompliance results from a failure to understand or internalize the requirements or a change in personnel between offerings.

NABL stands ready to work with the Commission's Office of Municipal Securities, the Municipal Securities Rulemaking Board and other industry groups to consider how to increase overall compliance with continuing disclosure undertakings in a manner that is cost-effective but does not create market disruption.

To make the current system work better, the industry must consider how to better educate issuer officials and staff during the course of an offering, how to provide issuers with tools for compliance and how to develop systems for reminding issuers about their responsibilities between offerings.[3] Possible steps include:

- Encouraging issuers to utilize the capability of the MSRB's EMMA system to send reminders about deadlines for filings. The working group in a bond offering could assist the issuer in signing up for these reminders as the offering is closing.

- More careful analysis by the working group as to the operating data to be included in the official statement, focusing on the issuer's ability to readily update such data during the life of the bond issue.

- Encouraging issuers to consult with their auditors to determine whether all or some of the operating data included in the official statement that is required to be updated annually can be included in footnotes or information supplementary to the annual audited financial statements.

- To the extent that operating data included in the official statement that is required to be updated annually will not be included in footnotes or information supplementary to the annual audited financial statements or if operating data will be updated more frequently than annually (e.g., quarterly), providing issuers with a template for updating operating data contained in the official statement. The template could be drafted by the working group as the offering is closing, provided to the issuer and included as part of the transcript.

- Easing the means by which existing continuing disclosure undertakings may be amended in order to allow issuers to streamline their annual disclosure filings and remove data requirements that are overly burdensome or antiquated.

- Industry groups could consider including compliance with continuing disclosure obligations among the criteria used to rate or award issuers.

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[3] NABL recently released a paper to provide counsel with the tools to assist issuers in developing policies and procedures to enhance the issuers' abilities to meet their disclosure obligations, including continuing disclosure obligations. See National Association of Bond Lawyers, *Crafting Disclosure Policies* (August 20, 2015), available at https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?PortalId=0&TabId=176&EntryId=1008.

- Guidance from the Commission that, if a rating agency provides its ratings directly to EMMA, an issuer would not need to separately file a material event notice upon a rating change from such rating agency.