

**Bond Dealers of America
Government Finance Officers Association
National Association of Bond Lawyers
National Association of State Auditors, Comptrollers and Treasurers
Securities Industry and Financial Markets Association**

August 9, 2016

Jessica Kane, Director
Office of Municipal Securities
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC

Dear Ms. Kane,

As representatives of the organizations identified below, we appreciate the opportunity to frequently share our views with you on matters important to the fair and efficient functioning of the municipal securities markets. We write today on the matter of flexibility in amending issuer continuing disclosure agreements (“CDAs”).

In the Adopting Release for the 1994 Amendments to Rule 15c2-12, the Securities and Exchange Commission (“SEC”) promoted flexibility in drafting CDAs required by the amended Rule while adhering to a basic framework, in line with the official statement for the particular offering.¹ As a result, there is no uniform CDA used by all over the last twenty years. The SEC’s Division of Enforcement’s Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, now well into its second year, drew attention to this issue. Through review of multiple CDAs entered into over a period extending back almost two decades, many issuers and underwriters have discovered ambiguities and inconsistencies in their CDAs that often resulted in overlapping, inconsistent, and outdated information in the disclosures required. In some cases, a CDA may require information that may be no longer relevant, available or able to be produced without significant burden or cost. Under current guidance, however, there is no simple way to amend and fix such CDAs. We ask you to address this issue by elaborating on the SEC’s outstanding guidance on CDA amendments.

The following example illustrates one of the many problems presented, that of a preference by investors for new, rather than prior metrics in water system offerings.

¹ 59 F. R. 59590, 59599 (Nov. 17, 1994).

Municipality A owns and operates a water utility and has municipal securities outstanding that were issued in 2005 for which it entered into a CDA. In connection with the 2005 bond issue, the Municipality A engaged a consulting engineer and a rate consultant to assist it in assessing the financial feasibility of the bond issue. The consulting engineer prepared an engineering report and the rate consultant prepared a rate study. Significant sections of both reports were included in the city's official statement, including tables of rate comparisons, operating capacity, and usage data, among other things. The CDA identified the specific tables in the official statement that are required to be updated on an annual basis. For 10 years the city provided an annual report that included updates to the tables that were in the CDA. However, some of the information was difficult to produce without expense to the city because the rate consultant's software was proprietary. In 2015 Municipality A embarked on a new bond issue for capital improvements to the water system. This time, it engages disclosure counsel, who works with the city's staff to completely revamp the city's disclosure document. No longer looking to and copying tables from the various consultant reports, the city's 2015 disclosure document includes internally prepared financial information and operating data for the water system compiled from reliable and accessible sources. The resulting disclosure document provides all the relevant information considered material for a water utility revenue bond transaction in 2015. However, unless the Municipality A amends its 2005 CDA, it will remain contractually obligated to produce the old tables until the 2005 bonds are paid or redeemed, as well as annual updates on the system information contained in the new offering document.

Facilitating a municipal issuer's ability to amend existing CDAs to be consistent with newer primary offering documents reflecting current information preferred by investors would benefit both issuers and investors as well as market efficiency. Issuers would be able to meet contemporary investor expectations without continuing to produce superfluous, costly and less relevant information, and would more efficiently meet their contractual obligations. Consequently, the market would accrue the benefit of updated and improved disclosure formats.

The ability to amend an existing continuing disclosure undertaking, however, is governed by the terms of the particular contract.

Under current guidance, for example, Municipality A's ability to amend its existing CDA must satisfy three requirements set out by the SEC staff in the "NABL 1" letter²:

1. The amendment may only be made in connection with a change in circumstances that arises from a change in legal requirements, change in law, or change in the identity, nature, or status of the obligated person, or type of business conducted;
2. The undertaking, as amended, would have complied with the requirements of the rule at the time of the primary offering, after taking into account any

² Available at www.sec.gov/info/municipal/nabl-1-interpretive-letter-1995-06-23.pdf.

amendments or interpretations of the rule, as well as any change in circumstances; and

3. The amendment does not materially impair the interests of holders, as determined either by parties unaffiliated with the issuer or obligated person (such as the trustee or bond counsel), or by approving vote of bondholders pursuant to the terms of the governing instrument at the time of the amendment.

The SEC staff anticipated at the time that undertakings would include a general description of the type of financial information and operating data that will be provided, rather than references to specific tables and other information. “These descriptions need not state more than a general category of financial information and operating data,” according to the NABL 1 letter. As we now know, many, if not most, continuing disclosure undertakings include specific references to the information to be provided.

We note that in 2004, SEC staff issued a letter that effectively interpreted outstanding CDAs when stating with respect to DisclosureUSA “an Issuer that chooses to satisfy an existing undertaking (that does not reference DisclosureUSA) by the method described in clause (i) is acting in a manner consistent with the intent of the Rule.”³ We suggest a similar approach may be employed in facilitating amendments to outstanding CDAs in order to remove ambiguities and inconsistencies and provide continuing disclosure consistent with the disclosure required in a contemporary offering.

It would facilitate the amendment process if the SEC staff would provide additional guidance that approves an amendment process designed to update the disclosure requirements set forth in older continuing disclosure undertakings so long as adequate notice is provided to bondholders and the new requirements would be sufficient if the applicable bonds were being issued today (i.e. allowing the disclosure requirements to evolve as market requirements change). In that regard, it would be helpful if the SEC staff would, for purposes of interpreting the language included in the NABL 1 letter, agree that the following actions are consistent with and satisfy the requirements specified in NABL 1:

1. a change in disclosure practices is a “change in circumstances that arises from a change in legal requirements” for purposes of the first prong of the test⁴;

³ Letter of Martha Mahan Haines, Chief, Office of Municipal Securities, Assistant Director, Division of Market Regulation, to Mr. W. David Holland, Chairman, Texas MAC and Mr. John M. McNally, Hawkins, Delafield & Wood LLP, re www.DisclosureUSA.org – Texas MAC’s Central Post Office, September 7, 2004.

⁴ Changes in practice reflect changes in what is regarded as material and therefore what is required to be disclosed. See, Commissioner Kara Stein, “Disclosure in the Digital Age” (May 6, 2016) (“What investors want changes. Materiality evolves. It changes as society changes, and it also changes with the availability of new and better data. To achieve effective disclosure, we must understand what is important to today’s investors.”).

2. the information required to be provided in the amended continuing disclosure undertaking is consistent with the disclosure that would be included in a primary market offering document if the bonds were being issued today; and
3. an amendment as described in 2 above does not materially impair the interests of holders and notice via EMMA filing is an appropriate means of notifying holders of such an amendment.

Although the SEC staff interpretation would be limited to application of Rule 15c2-12, such an interpretation would likely be sufficient to enable counsel to render an opinion that the amendment document complies with the contractual requirements. It would also aid underwriters in discharging their diligence responsibility with respect to municipal issuers who have amended their continuing disclosure undertakings.

We request that the SEC staff provide guidance in this regard. We believe guidance on this matter would improve the quality and timeliness of information available to investors, as well as provide clarity to issuers and underwriters seeking to comply with their respective obligations of the federal securities laws. We welcome the opportunity to discuss this request with you.

Very truly yours,

Michael Nicholas
Chief Executive Officer
Bond Dealers of America

Emily Swenson Brock
Director, Federal Liaison Center
Government Finance Officers Association

Kenneth R. Artin
President
National Association of Bond Lawyers

Cornelia Chebinou
Washington Director
National Association of State Auditors, Comptrollers and Treasurers

Michael Decker
Managing Director
Securities Industry and Financial Markets Association