An Update: Crafting Disclosure Policies

National Association
of Bond Lawyers

January 2021

NOTICE

The following is provided to further legal education and research and is not intended to provide legal advice or counsel as to any particular situation. The National Association of Bond Lawyers takes no responsibility for the completeness or accuracy of this material. You are encouraged to conduct independent research of original sources of authority. If you discover any errors or omissions, please direct those and any other comments to the President of NABL.

National Association
of Bond Lawyers

National Association of Bond Lawyers
601 Thirteenth Street, NW, Suite 800 South, Washington, D.C. 20005-3875
Phone (202) 503-3300

The National Association of Bond Lawyers (NABL) is releasing Section 5.3 to Appendix B of Crafting Disclosure Policies, a paper released by NABL in 2015. The purpose of Section 5.3 is to provide NABL members with tools to advise issuers and obligated persons of municipal securities in developing written disclosure policies and procedures in response to the 2019 amendments that added two new listed events to Rule 15c2-12 (the Rule). Section 5.3 is intended to be read in connection with Appendix B of Crafting Disclosure Policies.

SCHEDULE 5.3 TO APPENDIX B

The purpose of this Schedule 5.3 to Appendix B is to provide NABL members with tools to advise issuers and obligated persons of municipal securities in developing amendments and additions to existing written disclosure policies and procedures in response to the 2019 amendments to Rule 15c2-12 (the "Rule"). This schedule should be read in conjunction with Appendix B of Crafting Disclosure Policies. Certain terms not otherwise defined in this schedule or in the Glossary attached to Appendix B are defined in the Glossary to Schedule 5.3.

1. Two New Events

   a. The Rule was amended to add the following two events to Disclosure Agreements executed on or after February 27, 2019[1]:

      (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.

      "Financial obligation" means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) a guarantee of either (i) or (ii) but excludes municipal securities as to which a final official statement has been provided to the MSRB consistent with the Rule.

   b. Disclosure Agreements entered into on or after February 27, 2019 must include the two new events. Disclosure Agreements entered into prior to February 27, 2019 are not affected by the Rule Amendments.

2. Identifying Responsible Parties/Working Group

   a. The Disclosure Officers shall determine if the group of officers and employees of the [Entity] responsible for identifying events should be expanded to include additional parties most likely to possess knowledge of the incurrence of, and terms of, Financial Obligations.

   b. The Disclosure Officers, with the assistance of Disclosure Counsel, should educate the appropriate employees of the [Entity] as to the requirement to disclose Financial Obligations under the Rule.

   c. The Disclosure Officers may seek to coordinate with those responsible for accounting matters, as they may be reviewing bank loans and other debt for the purposes of the

[1] See SEC Rel. No. 34-83885 (August 20, 2018), 83 Fed. Reg. 44700 (August 31, 2018). 3

footnote disclosure required for debt instruments under GASB 88. Note however that the definition of "financial obligation" does not track the definition of debt for purposes of GASB 88, and the adopting release makes clear that the Rule Amendments do not track the GASB pronouncement.

3. Identify, assemble and inventory Financial Obligations

a. Definition of Financial Obligations.

The Disclosure Officers will need to identify which of the [Entity's] various obligations and instruments fall within the definition of Financial Obligations. Establishing an inventory of the [Entity's] current Financial Obligations and contracts pursuant to which the Financial Obligations are issued or incurred may assist the Disclosure Officers in identifying the future incurrence of Financial Obligations.

For example, the Government Finance Officers Association suggests reviewing the [Entity's] audited financial statements for a list of Financial Obligations currently outstanding.[2] Although this list may not be exhaustive of the Financial Obligations that fall under the Rule, it is a good starting point. (See Annex attached hereto for a more detailed discussion of leases.)

Review all agreements associated with the Financial Obligation to identify covenants, events of default, remedies, priority rights, or other similar terms to determine whether they are material.

Additionally, consider creating a spreadsheet or building a database of existing Financial Obligations and agreements related thereto. This database will assist in compliance with Event 16 if any changes occur which reflect financial difficulties. [3]

b. Specific Examples.

In determining what falls within the definition of Financial Obligation, the Adopting Release states that the purpose of the amendments is to afford investors and other market participants access to timely disclosure of important information related to an issuer's or obligated person's material Financial Obligations that could impact its overall creditworthiness or an existing security holder's rights.

i. Debt or Debt-Like or Debt Related. According to the Adopting Release, the definition of Financial Obligation focuses on debt, debt-like or debt related obligations of issuers and obligated persons. This includes any short-term or long-term obligation which represents a borrowing of money to be repaid at a later date. The Adopting Release states that the definition may exclude ordinary financial and operating liabilities incurred in the normal course of business, if they are not debt-like or debt related. Debt obligations may include, in addition to bonds, notes and

[2] https://www.gfoa.org/new-amendments-sec-rule-15c2-12-new-event-notices-related-material-financial-obligations-and-events
[3] https://www.bondbuyer.com/opinion/what-you-need-to-know-now-about-the-new-rule-15c2-12-events

securities, obligations under direct purchase agreements, loans and credit agreements, lines of credit, private placement agreements, commercial paper transactions, reimbursement agreements and leases that operate as vehicles for borrowed money. Disclosure Officers should review such contracts and agreements to determine if they constitute a Financial Obligation. An Event Notice should be prepared and filed if the terms of the debt, debt-like or debt related obligation materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.

ii. Leases that Operate as Vehicles to Borrow Money. The Adopting Release provides that not all leases are Financial Obligations under the Rule. Only those leases that operate as a vehicle to borrow money are Financial Obligations under the Rule. [4] Upon the incurrence of such leases, an Event Notice should be prepared and filed. SEC guidance has stated that, in determining which leases qualify for reporting, the issuer or obligated person should ask whether the lease represents a borrowing, or whether the issuer or obligated person is obligated to repay borrowed money under the lease. The analysis focuses on the economic substance of the transaction and not on any particular state law or accounting treatment of the lease.

(a) In public presentations OMS staff has provided the following examples:

A lease between a police department for a fleet of police cruisers from a car dealership, pursuant to which the police department makes fixed monthly payments for the right to possess and use the vehicles, with or without the right to purchase at the end of the lease, would not be a lease that operates as a vehicle to borrow money.

A lease financing corporation purchases the vehicles from the dealership with money borrowed by the police department and then leases the vehicles to the police department, with the payments under the lease going towards repaying the borrowed money and title for the vehicles passing to the police department at the end of the lease, would be a lease that operates as a vehicle to borrow money.[5]

[4] The final Rule deleted a specific requirement contained in the proposed amendments issued in 2017 to disclose all leases entered into by an issuer or obligated person. The Commission stated that the burden of assessing the materiality of leases that do not operate as vehicles to borrow money, and disclosing such leases within ten business days, would not justify the benefit of such disclosures.

[5] See SEC Rule 15c2-12 Amendments NABL Member Questions and Practical Considerations (July 2019) (the "NABL Member Questions and Practical Considerations"). The NABL Securities Law and Disclosure Committee ("Committee") submitted questions about the amendments collected from NABL members to the staff of the SEC's Office of Municipal Securities (the "Staff"). Although the Staff has not provided formal written guidance in response to the questions submitted by the Committee, the Staff has addressed several of these questions in various settings, including the SEC Rule 15c2-12 Webinar hosted by the MSRB on February 27, 2019 (the "MSRB Webinar"), NABL U: The Institute held March 7-8, 2019, and the NABL-U Now webinar on the amendments held May 30, 2019 (the "NABL Webinar"). The [NABL Member Questions and Practical Considerations] paper summarizes questions submitted by the Committee to the Staff and attempts to provide practical considerations for NABL members as they work with their clients to develop strategies to comply with the amended Rule. See NABL Member Questions and Practical Considerations at 1-2. The NABL Member Questions and Practical Considerations paper is available on NABL's website at www.nabl.org/research/documents/securities-law-materials; a transcript of

(b) An Event Notice should be prepared and filed if the terms of a lease for which an Event Notice filing has been made materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.

(c) Disclosure Officers should consider whether to revise the [Entity's] authorization procedures to ensure that the Disclosure Officers are promptly notified regarding the incurrence of any leases that operate as vehicles to borrow money.

(d) See Annex to this Schedule 5.3 for a more detailed discussion of leases under the Rule Amendments.

iii. Guarantees. A Financial Obligation includes any guarantee of either a debt obligation or a derivative instrument entered into in connection with a debt obligation, if material. The application of the Rule may be triggered in the event either the issuer or obligated person provides the guarantee or in the event the issuer or obligated person is the beneficiary of a guarantee of its debt or derivative instrument by a third party, if material. For those obligated persons and issuers who provide guarantees, a Disclosure Officer should be identified under the Disclosure Policy to evaluate (a) the materiality of any such guarantees that are provided, and (b) if determined to be material and not already so disclosed, to identify the material terms of the guarantee. An Event Notice should be prepared and filed if the terms of the guarantee materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.[6]

For state issuers that offer a guaranty program to enhance the credit of another entity's obligations and who are subject to Event 15, the Disclosure Officers should evaluate if the guarantee program could affect any of its security holders and if material to such security holders. If a determination is made that such guaranty program does affect the guarantor's security holders and is material, the Policy should identify one or more Disclosure Officers to assess if proper disclosure has been made of the material terms of the guarantee program in the guarantor's existing Official Statements or if additional disclosure is warranted.

iv. Draw-Down Bonds/Draws on Lines of Credit. According to the Adopting Release, Financial Obligations are incurred under draw-down bonds and lines of credit at the time such obligations are legally enforceable and not the date of each draw or advance.[7] Disclosure Officers identified under the Disclosure Policy to report the

---

the MSRB Transcript is available on the MSRB's website at http://www.msrb.org/EducationCenter/Issuers/Disclosing/Requirements/15c2-12-Transcript.aspx; a recording of the NABL webinar is available in NABL U Now's On-Demand Learning Library at https://www.nabl.org/Learn/NABL-U/NABL-U-Now-On-Demand/Living-with-the-15c2-12-Amendments. See also Adopting Release at 44710-12.

[6] Adopting Release at 44715. The exclusion from the definition of Financial Obligation covers only "municipal securities" as to which a final official statement has been provided to the MSRB consistent with the Rule and does not extend to instruments or obligations (contingent or otherwise) related to such municipal securities.

[7] Footnote 89 of the Adopting Release states that this treatment is consistent with similar concepts in Exchange Act Form 8-K.

incurrence of draw-down bonds and lines of credit should identify and report the material terms of such obligations, including the maximum amount available to be drawn down or advanced and the period of time over which such amounts may be drawn down or advanced, at the time the initial bond or line of credit agreement is executed, delivered and becomes enforceable, even if no funds are initially advanced or drawn down. An Event Notice should be prepared and filed if the terms of the draw-down bonds/draws on the lines of credit materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.

v. Commercial Paper.[8] Financial Obligations represented by commercial paper are similarly incurred when the terms of the obligation are legally enforceable against the issuer of the commercial paper. Accordingly, the issuer through its designated Disclosure Officers should provide notice of the issuance of commercial paper and its material terms when the credit agreement or other issuing agreement is executed and becomes enforceable, and not with each ramp up or issuance of additional notes. An Event Notice should be prepared and filed if the terms of the commercial paper program materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.

vi. Forward Delivery Bond Purchase Contract/Derivatives. Financial Obligations may include any swap, security-based swap, futures contract, forward contract, option or similar instrument (or combination) to which an issuer or obligated person is a counterparty, if entered into in connection with or pledged as security for the payment of an existing or planned debt obligation. The Adopting Release indicates that a debt obligation is "planned" at the time the issuer or obligated person will incur the related yet-to-be-issued debt obligation at a future date. Factors to be considered as to whether a debt obligation is "planned" might include, but are not limited to, the following:

(a) whether documents evidencing the relevant derivative instrument assumes future debt obligation;

(b) if the legislative body of the issuer or obligated person has taken any action to authorize the future debt obligation; and

(c) if the issuer or obligated person has hired any professionals to assist the issuer or obligated person on matters related to the future debt obligation.

Whether a debt obligation is planned is based on objective facts and circumstances prevailing at the time of the incurrence of the derivative instrument. The Disclosure Policy should identify the Disclosure Officers responsible for reviewing

[8] Commercial paper financings may be municipal securities for which "a final official statement has been provided to the MSRB consistent with the Rule." See below discussion under "Scope of Exclusion – 'Consistent with the Rule.'"

documentation relating to derivative obligations to make a determination if the derivative is entered in connection with a planned debt obligation.

An Event Notice should be prepared and filed if the terms of the forward delivery bond purchase contract/derivative materially change or change due to financial difficulties, or if another of the events outlined in (15) or (16) occurs.

vii. Variable Rate Demand Bonds. If a "final official statement," as defined in the Rule, is prepared and filed with the MSRB "consistent with the Rule," variable rate demand bonds (VRDBs) will qualify for the municipal securities exclusion from "Financial Obligation." SEC staff has stated in public conferences that "consistent with the Rule" means not only that an official statement has been posted with EMMA but that the issuer or obligated person has entered into a Disclosure Agreement that complies with the requirements of the Rule. If the VRDB offering is grandfathered under the 2010 Amendments to the Rule and therefore exempt from the continuing disclosure requirements of the Rule, the obligated person must nonetheless enter into a Disclosure Agreement to qualify the VRDBs for the municipal securities exemption by delivering an official statement to the MSRB consistent with the Rule. Otherwise, upon the incurrence of the VRDBs, the Disclosure Officer will need to prepare an Event Notice describing the material terms of the VRDB obligation and will need to prepare an Event Notice if another of the events outlined in (15) or (16) occurs.[9]

c. Scope of Exclusion – "Consistent with the Rule". A Financial Obligation does not include municipal securities for which "a final official statement has been provided to the MSRB consistent with the Rule." An issuer or obligated person may have an outstanding or future bond offering which is partially or wholly exempted from the Rule, but for which the issuer or obligated person voluntarily filed an official statement with the MSRB. As noted above, SEC staff has stated in public conferences that "consistent with the Rule" means not only that an official statement has been posted with EMMA but that the issuer or obligated person has entered into a Disclosure Agreement that complies with the requirements of the Rule. The Disclosure Policy may provide that the Disclosure Officers determine at the time the issuer or obligated person offers securities if this exemption applies by determining not only if the Official Statement is filed, but if a Disclosure Agreement has been entered into which is consistent with the Rule.

4. Determination of "Materiality"

a. Materiality Standard.

A materiality standard requires an issuer or obligated person to assess its disclosure obligation in the context of the specific facts and circumstances. Not every incurrence of a Financial Obligation is material. Materiality determinations should be based on whether the information would be important to the total mix of information made

[9] See NABL Member Questions and Practical Considerations at 5.

available to the reasonable investor.[10] SEC guidance has stated that the determination by an issuer or obligated person of whether to submit an Event Notice under Event 15 requires the same analysis that is regularly made by such parties when preparing offering documents. An issuer or obligated person will need to consider whether a Financial Obligation or the terms of a Financial Obligation, if they affect security holders, would be important to a reasonable investor when making an investment decision. The SEC has acknowledged that, in the course of providing disclosures to the market about their Financial Obligations, some issuers and obligated persons may have differing opinions with respect to whether a piece of information would be considered important to a reasonable investor when making an investment decision. [11]

b. Factors to Consider When Assessing Materiality.

A materiality analysis should not be limited to simply the par amount or the source of security pledged for repayment of a Financial Obligation. An issuer or obligated person may consider a number of factors when assessing the materiality of a particular Financial Obligation. Materiality is determined upon the incurrence of each distinct Financial Obligation, taking into account all relevant facts and circumstances. Factors to consider include, but are not limited to:

i. Source of security pledged for repayment of the Financial Obligation;

ii. Rights associated with the pledge (i.e. senior or subordinate);

iii. Par amount or notional amount (in the case of a derivative instrument or guarantee of a derivative instrument) of the Financial Obligation; and

iv. Terms that an issuer or obligated person agreed to at the time of incurrence that affect security holders (such as covenants, events of default, remedies, priority rights, or similar terms).

c. Determination of Whether a Series of Financial Obligations is to be Viewed Collectively or Separately Under Materiality Analysis.

Relevant factors that could indicate that a series of Financial Obligations incurred close in time is related include the following: (i) share an authorizing document, (ii) have the same purpose, or (iii) have the same source of security.[12]

---

[10] See Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976) ([M]ateriality is determined by reference to whether there is a "substantial likelihood its disclosure would have been considered significant by a reasonable investor")).

[11] Footnote Adopting Release at 44705-6.

[12] "An example of the type of facts and circumstances that could indicate that a series of related transactions were incurred separately for legitimate business purposes would be if the series of Financial Obligations satisfy the requirements set forth in the U.S. Department of Treasury regulations and guidance governing what constitutes a single issue of municipal securities under the Internal Revenue Code." The SEC cautions issuers and obligated persons against entering into a series of transaction with a purpose of evading potential disclosure obligations established by Events 15 and 16. Adopting Release at 44707.

5. Definition of "Incurrence" and "Agreement" for Event 15

a. Incurrence.

A Financial Obligation generally is incurred when it is enforceable against an issuer or obligated person, whether or not subject to conditions, under which the direct Financial Obligation will arise or be created or issued.[13] Also see 4.c. above for factors to be examined to determine if Financial Obligations are related.

i. Drawdown bond – notice should be filed at the time the terms of the obligation are legally enforceable against the issuer or obligated person instead of each time a draw is made.[14]

ii. Derivative instrument – notice should be filed when derivative instrument is legally enforceable.[15]

iii. Line of credit/commercial paper program - incurred when the terms of the obligation are legally enforceable against the issuer, instead of when each draw on the line of credit is made or when each tranche of commercial paper is issued.[16]

iv. Bond obligation incurred on the closing date, not at the time the bond purchase agreement is executed (assuming a standard closing period rather than a forward delivery).[17]

b. Agreement.

An agreement or an amendment to an agreement is incurred or entered into when it is enforceable against an issuer or obligated person. If a Financial Obligation includes terms that will change automatically upon certain trigger events (i.e. (a) liens may

[13] Adopting Release at 44708.

[14] Adopting Release at 44708.

[15] For example, a forward-starting interest rate swap generally would mean any swap used in the municipal debt market that is anticipated to be cash settled at the time of incurrence of a debt obligation, swap anticipated to be part of a synthetic fixed rate debt obligation, or similar product. If the incurrence of such a swap is material, a forward-starting interest rate swap would be disclosed within 10 business days of its incurrence because, the issuer's or obligated person's contingent obligation to make payments and post collateral would begin at the point of incurrence of the swap, not if or when the planned debt obligation is incurred because the terms of the swap would be set at the time that the swap is incurred. As a result, the issuer or obligated person would, at that time, assume market risk (i.e., interest rate fluctuations) and counterparty risk (i.e., counterparty liquidity) Adopting Release at 44713.

[16] Issuers or obligated persons should provide notice of a line of credit or commercial paper program and its authorized amount when the credit agreement is entered into or omnibus commercial paper note is established with DTC, not upon each draw or ramp up. Commercial paper programs entered into before the Compliance Date were incurred prior to the Compliance Date, so the issuance of a new tranche under that program would not be an incurrence that would require disclosure under Event 15 and no notice need be given of draws or ramp ups under a line of credit or commercial paper program established before an undertaking complying with the new amendments is entered into, even if they occur while the undertaking is in force and no prior notice of the line or program had been filed with the MSRB. See NABL Member Questions and Practical Considerations at 8-9.

[17] A forward delivery bond purchase contract that provides for a binding commitment to issue bonds on a particular future day beyond normal settlement conventions, may, however, be a derivative instrument and, therefore, a Financial Obligation incurred at the time of execution. See NABL Member Questions and Practical Considerations at 10.

spring automatically based upon the occurrence of an events, (b) interest rate may reset because it is based on an index, or (c) issuer elects or exercises an option included in the Financial Obligation when incurred), those terms should be described in the notice of incurrence, if material, filed for such Financial Obligation, but subsequent trigger events would not appear to be an "agreement" to terms requiring notice under Event 15.[18]

6. Modifications of Existing Agreements

   a. Issuers and obligors should be aware of Financial Obligations entered into before and after execution of a new Disclosure Agreement, monitor the same for modifications, and determine materiality or reflection of financial difficulties (either Event 15 or 16).

   b. A modification of terms occurs when the modified terms become enforceable against the issuer or obligor.

   c. A modification of terms is significant in nature, but may take a number of forms, including written or verbal waivers (e.g. waiver of interest rate changes).

   d. Differentiate between Event 15 and Event 16 modifications

      i. While Event 16 requires reporting only if a modification reflects financial difficulties of the issuer or obligor,[19] Event 15 requires reporting if a modification affects securities holders and is material even if it does not reflect financial difficulties. This obligation would extend to material amendments of Financial Obligations incurred before the undertaking was entered into.[20]

      ii. Event 16 encompasses modification of agreements which reflect financial difficulties without need for materiality analysis. Automatic modifications that occur upon a trigger event (e.g. event of default) and reflect financial difficulties could be modifications of which Event 16 requires notice.[21]

7. Definition of "Affect Security Holders"

   The Disclosure Officers shall determine whether the event affects the holders of the securities applicable to a particular Disclosure Agreement. When determining whether the

[18] See NABL Member Questions and Practical Considerations at 7.

[19] "A modification of terms would be reported under a continuing disclosure agreement only if the modification 'reflect[s] financial difficulties of the issuer or obligated person.'" Adopting Release at 44716.

[20] "The Staff clarified that, under paragraph (15), an issuer must undertake to give timely notice of a post-incurrence modification of a Financial Obligation covenant, etc., if the modification affects securities holders and is material, even absent financial difficulties. The Staff clarified that this obligation would extend to material amendments of Financial Obligations incurred before the undertaking was entered into." See NABL Member Questions and Practical Considerations at 7, citing MSRB Transcript at 2.

[21] "According to the Staff, automatic modifications that reflect financial difficulties should be analyzed for possible disclosure under paragraph (16). The Staff explained that the amendments were adopted in part because private lenders are believed to be privy to information that public securities holders learn only later, if at all, and are intended to level access to important information." See NABL Member Questions and Practical Considerations at 7-8, citing NABL Webinar.

event affects the applicable holders, the Disclosure Officers shall evaluate the event and the particular structure, security, rights of existing holders, principal amount at issue, covenants, events of default, and remedies, among other things.

8. Define "Financial Difficulties"

This Disclosure Officers shall determine whether the default or other event identified in (16) reflects (or was caused by) financial difficulties. [22] The Disclosure Officers must determine whether the event would be relevant to a current assessment of financial condition of the issuer or obligated person. Specifically, does the event affect the liquidity or overall creditworthiness of the issuer or obligated person? When making this determination, the Disclosure Officers need not determine whether the Financial Obligation at issue is material.

9. Preparation of Event Notice

Once it has been determined that an event under (15) or (16) has occurred, the Disclosure Officers shall (i) prepare an Event Notice giving notice of the event and (ii) forward the draft Event Notice to the Chief Financial Officer and the Chief Legal Officer for their review or other appropriate party. On EMMA, an Event Notice under Event 15 is called Event Notice - Financial Obligation – Incurrence or Agreement. An Event Filing under Event 16 is called Event Notice - Financial Obligation – Event Reflecting Financial Difficulties.

a. Material Terms.

For filings under Events 15 and 16 the Event Notice must include all material terms of the Financial Obligation. Accordingly, Disclosure Officers will need to have a copy of the legal documents relevant to the Financial Obligation. The relevant information will likely include the name of the agreement that creates the Financial Obligation and a brief statement of the purpose of the obligation (e.g., revolving line of credit to finance ongoing capital improvements), the date of incurrence (including the original date of incurrence and any effective amendment dates), the principal amount, maturity and amortization, interest rate, if fixed, or method of computation, if variable, default rates and other terms as may be appropriate.[23] The Chief Legal Officer and/or Disclosure Counsel should be consulted to confirm that the material terms are accurately stated.

b. Document Summary or Complete Document?

In connection with the incurrence of a Financial Obligation or agreement related to a Financial Obligation (Event 15), the Disclosure Officers should consider whether the Event Notice should include the entire legal document creating the Financial Obligation

[22] "The Commission believes that the term is not vague, as the concept of 'reflecting financial difficulties' has been used in paragraphs (b)(5)(i)(C)(3) and (4) since the 1994 amendments to Rule 15c2-12, and, as such, market participants should be familiar with the concept as it relates to the operation of Rule 15c2-12." See Adopting Release at 44716.
[23] Adopting Release at 44708.

or a summary of the material terms of the document.[24] The Disclosure Officers may find that a summary of the material terms of the Financial Obligation is more helpful to investors and undertake the preparation of a document summary, which should be done with the assistance of Members of the Disclosure Working Group and subject to review by the Chief Legal Officer and/or Disclosure Counsel before filing to confirm that the material terms are accurately summarized.[25] Alternatively, the Disclosure Officers may instead determine to file the entire legal document, rather than attempting to summarize the material terms.

c. Redactions.

When including the entire agreement as part of an event filing, confidential information that is not material and would likely result in competitive harm if disclosed can be redacted from the documents. Information that is typically redacted includes personally identifiable information such as account numbers, signatures, and individual contact information. Disclosure Officers should consult with the Chief Legal Officer and/or Disclosure Counsel to confirm the information to be redacted.[26]

10. Review and Approval of Event Notice

See Section 5.3.3 in Appendix B.

11. MSRB's Guidance regarding Rule 15c2-12 Amendments

The MSRB's guide Ten Things to Know: New SEC Rule 15c2-12 Requirements provides information on submitting event disclosures on EMMA.

12. Documentation of Procedures

[24] In cases where the entire legal agreement creating the Financial Obligation is of nominal length, the Disclosure Officers may elect to include the entire agreement as an attachment to its Event Notice. Providing the complete agreement ensures that all terms of the Financial Obligation are disclosed within the filing deadline and minimizes the additional time and costs associated with preparing a summary of the material terms of the Financial Obligation. However, the Disclosure Officers may determine that principles of effective disclosure (such as plain English, ordering disclosure by importance, and not obscuring material items with immaterial items) may not be advanced by filing an entire agreement. Commission staff have also generally expressed a preference for prepared summaries of material terms rather than filing entire agreements. See the NABL Workshop, Hot Topics in Securities Law, September 2019. The written materials can be found at https://www.nabl.org/Portals/0/Workshop%202019%20Program%20Book%20FINAL%2008%2027.pdf. See also *Considerations Regarding Voluntary Secondary Market Disclosure about Bank Loans* (May 1, 2013), which can be found at https://www.sifma.org/resources/submissions/considerations-regarding-voluntary-secondary-market-disclosure-about-bank-loans.

[25] Indeed, since the filing of an Event Notice will generally precede footnote disclosure in an issuer's financial statements, it will be worthwhile to consider in the Event Notice a description which will be suitable for the footnote disclosure. Many may have a concern about the responsibility Disclosure Counsel or others may be seen to have assumed in deciding which terms of a Financial Obligation are material. Well-crafted disclosure practices which set out a process by which the Disclosure Working Group makes a decision about the material terms offer a sounder basis than a process by which no decision about materiality is made.

[26] In making redactions, issuers may find it useful to consult the recently revised Items 601(a)(5) and (a)(6) of Regulation S-K and related SEC staff guidance.

See Section 5.3.5 in Appendix B.

13. Reference to Adopting Release

Disclosure Policies should reference the Adopting Release for interpretative guidance relating to terms of Events 15 and 16.

14. Training and Periodic Review of Financial Obligations

See Section 6 in Appendix B.

a. Training.

Each member of a Disclosure Working Group, the Disclosure Officers, the Chief Executive Officer, the Chief Financial Officer, the Chief Accounting Officer, the Chief Legal Officer, the Public Information Officer, and each officer or employee designated as a source of data or an Event Notice pursuant to this Disclosure Policy shall undergo training related to the Rule amendment.

b. How are New Financial Obligations Identified?

The Disclosure Policy shall be reviewed annually by the Disclosure Working Group and such annual review shall identify any new Financial Obligations.

15. Voluntary Notices

The [Entity] may continue to upload voluntary notices on EMMA. The MSRB's guide Ten Things to Know: New SEC Rule 15c2-12 Requirements states that voluntary disclosure may be categorized using the new event disclosure types whether that information is required or is voluntarily submitted. The [Entity's] Disclosure Policy may want to address if any voluntary notice is desired where a commercial paper program, line of credit or draw-down bond was in existence prior to the time a continuing disclosure agreement complying with the amendments to the Rule was entered into, if no disclosure exists as to such commercial paper program, line of credit or draw-down bond, and if the terms are considered material. If the [Entity] files a voluntary submission, it may consider whether to include the word "voluntary" in the description of the disclosure. Alternatively, the [Entity] could file a voluntary submission under the "other" categories.

GLOSSARY

For purposes of this Schedule 5.3:

1.1 "***Adopting Release***" means SEC Rel. No. 34-83885 (August 20, 2018), 83 Fed. Reg. 44700 (August 31, 2018).

1.2 "***Financial Obligation***" means a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) a guarantee of either (i) or (ii) but excludes municipal securities as to which a final official statement has been provided to the MSRB consistent with the Rule.

1.3 *"**Rule Amendments**"* means the amendments to the Rule adopted by the SEC pursuant to the Adopting Release.

ANNEX

DETAILED EXAMINATION OF LEASES

The following provisions offer a more detailed examination of the treatment of leases under the Rule Amendments and how such analysis may influence Disclosure Officers in the adoption of an issuer's Disclosure Policies.

In most cases, disclosure practices have and will center around those officials of an issuer or obligated person responsible for financing transactions. Where a financing transaction is initiated in the form of a capitalized lease by such officials, particularly in a public offering such as through certificates of participation, the identification of leases to be evaluated for materiality and appropriate disclosure may be straightforward. One feature of leases entered into by issuers or obligated persons is that usually they are not initiated by such officials. Indeed, it is often the case that other officials have authority to enter into leases without involving those officials responsible for financing transactions, and often without the need for the same approval process required for debt obligations. It may even be this that makes them attractive for lessors and lessees alike. For sizable issuers, it is not inconceivable that the number of leases executed may be orders of magnitude in excess of the number of financing transactions initiated by those responsible for financing transactions, and the number of officials executing leases will be orders of magnitude larger than the number of officials involved in the issuer's disclosure practices, and located in physically different locations and management hierarchies.

A threshold issue in the development of disclosure practices, then, will be establishing a process by which to identify leases that are candidates for required disclosure. There are at least two paths. The first is to segregate out leases that operate as vehicles to borrow money; the second is to segregate out by classification those leases that are not material.

The Adopting Release implicitly takes the first path by assuming that it will be immediately apparent which leases do not operate as vehicles to borrow money from those which do, which then must be assessed for materiality and appropriately disclosed. Some alternatives for this have been suggested:

- The group involved in the issuer disclosure practices could be expanded to include those with the authority to execute leases.

- Through statutory, regulatory or administrative changes, a notification requirement could be put in place such that the Disclosure Officers are promptly notified of any lease; alternatively, execution could require pre-approval of the Disclosure Officers. While this might limit the size of the group involved in disclosure practices and the volume of leases to be sifted remains large, it offers limited assurance that disclosure practices will identify leases within the required time frame.

- Through statutory or regulatory changes, a prohibition could be placed on leases being executed without approval of the disclosure group. This has most of the disadvantages of the prior suggestion, but it might allow disclosure practices to operate to identify leases within the required time frame.

- The disclosure practices could be designed to leverage off of an issuer's or obligated person's financial controls and reporting systems.

Alternatively, the disclosure practices could adopt the second path, and establish categories of leases to be fed into the process of assessing materiality. The adopting Release assumes as much by asserting that Financial Obligations do not include ordinary financial and operating liabilities incurred in the normal course of an issuer's or obligated person's business. This suggests that disclosure practices could exclude categorically all office leases and all equipment leases, or perhaps all such leases under a certain dollar amount. The adopting Release is circular on this point, however, suggesting, for example, that copier leases are not included "[u]nless they are a debt obligation under the Rule "

WORKING GROUP

Michael P. Botelho, Chair
Updike, Kelly & Spellacy, P.C.
Hartford, Connecticut
mbotelho@uks.com

Sarah C. Smith, Vice Chair
McCarter & English, LLP
Boston, Massachusetts
sasmith@mccarter.com

Brian Garzione, Securities Law and Disclosure Committee Liaison
Hawkins Delafield & Wood LLP
Washington, D.C.
Bgarzione@hawkins.com

Thomas William (T.W.) Bruno
McGuireWoods LLP
Richmond, Virginia
tbruno@mcguirewoods.com

Laura L. Bilas
Foley & Lardner LLP
Chicago, Illinois
LBilas@foley.com

Melissa Lopez Rogers
Greenberg Traurig LLP
Atlanta, Georgia
rogersmel@gtlaw.com

Ernest M. Lorimer
Soeder & Associates, LLC
Westport, Connecticut
elorimer@soeder-associates.com

Nora O'Brien
Best Best & Krieger LLP
San Diego, California
nora.obrien@bbklaw.com

Christine Reynolds
Orrick, Herrington & Sutcliffe LLP
Portland, Oregon
cereynolds@orrick.com

Ben Kitto
Ice Miller LLP
Columbus, OH
Ben.Kitto@icemiller.com