National Association of Bond Lawyers

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March 7, 2022

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board (MSRB)
1300 I Street, Suite 1000
Washington, D.C. 20005

RE: COMMENTS OF THE NATIONAL ASSOCIATION OF BOND LAWYERS REGARDING MSRB REQUEST FOR INFORMATION 2021-17

Dear Mr. Smith:

The following comments are submitted to the Municipal Securities Rulemaking Board (the "MSRB") on behalf of the National Association of Bond Lawyers ("NABL") relating to MSRB Request for Information 2021-17 (the "Request") requesting information on environmental, social and governance ("ESG") practices in the municipal securities market, published December 8, 2021. The comments were prepared by an ad hoc subcommittee of the NABL Securities Law and Disclosure Committee comprised of those individuals listed on Exhibit I and were approved by the NABL Board of Directors. NABL appreciates the opportunity to respond to the request for public input by the MSRB.

At the outset, we note the unprecedented nature of this Request by the MSRB. Although the MSRB has been granted a general charge to "protect investors, municipal entities, obligated persons and the public interest" under Section 15B of the Securities Exchange Act of 1934, as amended (the "1934 Act"), the 1934 Act grants the MSRB authority to regulate only broker-dealers of municipal securities and municipal advisors. The MSRB has no authority to directly regulate issuers of municipal securities, and Section 15B(d) expressly limits the MSRB's ability to require information of municipal issuers. We understand that the Request is intended to solicit information from municipal market participants on a voluntary basis but asking questions directly of issuers as the MSRB does in the Request – and the implication that the MSRB has jurisdiction to issue rules based on the responses to those questions – is inconsistent with the limited charge granted to the MSRB in the 1934 Act.

The Request asks questions directed at trends and the advisability of standardization in the municipal securities market in relation to: (1) the disclosure of information regarding ESG-related risk factors and ESG-related practices ("ESG-Related Disclosures") and (2) the labeling and marketing of municipal securities with ESG designations ("ESG-Labeled Bonds"). We appreciate the framing of these issues as two discrete concepts and encourage the MSRB and the municipal market at large to continue to evaluate ESG-Related Disclosures and ESG-Labeled Bonds separately. We will address each of these concepts in turn.

ESG-Related Disclosures and Materiality

As we noted in our recent comment letter to the Securities and Exchange Commission ("SEC") regarding climate change disclosure,[1] municipal issuers are subject to the antifraud provisions of the federal securities laws, which (1) require disclosure of material information about securities to allow investors to make informed decisions, and (2) prohibit misrepresentation or other fraudulent conduct in connection with the purchase and sale of securities. Under the principles-based approach of the antifraud provisions, municipal issuers are already required to disclose information relating to the material risks applicable to municipal offerings. As demonstrated by numerous municipal offering documents published in the past several years, many municipal market participants have already determined that ESG-Related Disclosures are material to their securities and have included such disclosure in their primary offering documents. NABL and other public finance industry organizations continue to work with their respective members on best practices for ESG-Related Disclosures and such efforts are expected to continue.[2]

The Request asks municipal market participants whether ESG-Related Disclosures should be a distinct category of required disclosures and/or whether such disclosures should be standardized. Although significant attention is currently being paid to ESG concerns, ESG-Related Disclosures in municipal securities do not warrant a separate category of disclosure, should not be given greater importance than other disclosures. In addition, the need for and adequacy of such disclosures should continue to be evaluated under the well-established concept of materiality, rather than some special set of considerations relating to ESG. Each offering of municipal securities necessitates a careful analysis of all factors affecting the offering, including ESG factors, and disclosure of the same. This principles-based approach has allowed the municipal market to quickly adapt to a wide-range of emergent and nascent threats, such as the increased threat of cyber-attacks, the social and financial impact of the COVID-19 pandemic, or the varied ways by which climate change impacts a particular issuer. The current antifraud regime allows federal securities law to flexibly and fairly take into account the tremendous variety of municipal issuers, transaction structures, uses of proceeds, and repayment sources.

[1] National Association of Bond Lawyers to SEC Chair Gary Gensler regarding Climate Change Disclosures (Sept. 9, 2021), *available at* https://www.sec.gov/comments/climate-disclosure/cll12-9218139-250189.pdf.

[2] For instance, see Government Finance Officers Association materials on ESG available at https://www.gfoa.org/esg.

Standardization of ESG-Related Disclosures in the context of the antifraud rules would be inconsistent with the long history of federal court precedents and SEC guidance. This guidance has long directed municipal issuers to disclose the specific and material risk factors applicable to a particular offering in a tailored and meaningful way. Indeed, although Regulation S-K is not applicable to municipal securities, the 2020 amendments to Regulation S-K, Item 105, were expressly driven by a desire to shift reporting companies away from disclosure of "most significant" factors that make a particular investment speculative or risky through lengthy, generic statements of risk to a "principles-based" approach rooted in disclosure of "material" risks.[3] Such a framework already requires a municipal issuer to critically assess whether ESG matters constitute a material risk necessitating ESG-Related Disclosures, and standardization of such disclosures would not aid issuers in this endeavor.

Continuing with a principles-based approach in the municipal securities market remains consistent with the May 4, 2020, Public Statement, "The Importance of Disclosure for our Municipal Markets," which encouraged disclosure on the impact of the COVID-19 pandemic on issuers' current and expected future operations and finances. We recognize the efforts in the May 4, 2020 Public Statement to balance the unforeseeable and unpredictable nature of the COVID-19 pandemic against investors' desire for current information regarding the pandemic's impact on a particular municipal security. While the COVID-19 pandemic was unforeseeable and unpredictable, predicting impacts associated with certain ESG concerns and their future remediation and adaptation costs may involve even more uncertainty and complexity. Any guidance for ESG-Related Disclosure should be drafted with a full appreciation of the inability of existing models to accurately predict certain future events and consequent costs. Forward-looking ESG-Related Disclosure requires a myriad of assumptions, inputs, and modeling choices. If guidance is issued for the municipal market, NABL encourages guidance similar to the guidance provided in connection with the COVID-19 pandemic, including limiting civil liability and SEC enforcement for good faith forward-looking projections, including third-party data and projections, which are accompanied by meaningful cautionary language.

ESG-Labeled Bonds Are Not Ripe for Regulation

ESG disclosure in primary offering documents for ESG-Labeled Bonds largely centers around a robust discussion of the use of proceeds, focusing on the nature of the project and the problem the project is seeking to mitigate. In offering ESG-Labeled Bonds to the market, the issuer is making a conscious decision to market the bonds to a particular class of investors and generally will include additional details about the project being financed, any methodology or rationale used for attaching the ESG label, and the ESG problem the project seeks to mitigate. As part of financings involving ESG-Labeled Bonds, issuers may commit to

[3] *See* Modernization of Regulation S-K Items 101, 103, and 105, Release Nos. 33-10825; 34-89670 (Aug. 26, 2020).

comply with certain requirements in order to earn a specific bond designation and/or may agree to certain ongoing reporting obligations. Under the current antifraud rules, descriptions of the project, any ESG methodology or rationale, third-party certifications, and reporting requirements in the disclosure must be free of any material misstatements or omissions. ESG disclosure in primary offering documents for ESG-Labeled Bonds is fundamentally different than risk-driven ESG-Related Disclosure discussed above, as the "success" of an ESG project may have little bearing on the issuer's ability to repay the bonds.[4] Issuers should be able to decide whether to label or market their bonds to environmentally- or socially-driven investors, but should not be required to otherwise satisfy labeled bond requirements, barring materiality concerns.

The Request asks whether there is a need for standardization or regulation of ESG-Labeled Bonds. We remind the MRSB that the ESG-Labeled Bond market remains a relatively young market. In the past decade, the municipal market has seen a steady increase in labeled bonds, and labeled bond offerings continue to attract new classes of investors and funds. However, the standards for labeling bonds – including what attributes of the offering merit a particular label, what information should be required in the offering document, and what should be the issuer's ongoing reporting commitments – continue to evolve. Regulation or standardization is premature, may be cost-prohibitive for small issuers, and could hamper the market's ability to address emerging ESG concerns.

We appreciate the opportunity to comment on this Request. I have asked our Director of Governmental Affairs, Brian Egan, to facilitate any follow up or answer questions you may have regarding our comments. You can reach Brian via email at began@nabl.org or via phone at 202-503-3290.

Sincerely,

Ann D. Fillingham
President
National Association of Bond Lawyers

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[4] For example, a state issuer could issue a series of "green" labeled general obligation bonds to provide financing for a variety of projects focused on mitigating climate change. Whether or not the identified projects actually mitigate or have any impact on climate change will have limited influence on the state's ability to repay the debt through a general tax levied against all property under its jurisdiction.

Exhibit I

Ann D. Fillingham, NABL President

Joseph (Jodie) E. Smith, NABL President-Elect

Deanna Gregory, NABL Board Member

Brandon C. Pond
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Drew Slone
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