

**STATEMENT
OF THE
NATIONAL ASSOCIATION OF BOND LAWYERS
TO
UNITED STATES SECURITIES AND EXCHANGE COMMISSION
REGARDING
MUNICIPAL SECURITIES DISCLOSURE OBLIGATIONS**

This statement is submitted to the United States Securities and Exchange Commission (the “SEC” or the “Commission”) on behalf of the National Association of Bond Lawyers (“NABL”) relating to Securities Act Release No. 33-7049 (the “1994 Interpretive Release”), which addresses municipal securities disclosure obligations. The Commission noted in the 1994 Interpretive Release that:

The Commission intends to continue to monitor developments in municipal securities disclosure practices. Comment is requested regarding the disclosure items discussed in this release, and in particular, items warranting event disclosure. Comment is also requested regarding additional action that should be taken with respect to disclosure in the municipal securities market by the Commission, the MSRB, or Congress.

NABL has previously shared with the SEC suggestions with respect to issues on which Commission clarification would benefit the municipal securities market and its participants through statements delivered on May 14, 2010 (the “2010 NABL Statement”) and September 2, 2011 (the “2011 NABL Statement”). We now offer additional thoughts, including both high-level observations and specific suggestions with respect to certain topics where such clarification and guidance would prove most helpful to the municipal market. Guidance on these matters would assist municipal issuers, borrowers and other obligated persons (referred to herein together as “issuers”), and underwriters in complying with their respective obligations under the federal securities laws.

This statement was prepared by an *ad hoc* subcommittee of the NABL Securities Law and Disclosure Committee comprised of those individuals listed on Exhibit I and was approved by the NABL Board of Directors.

General Observations

Before providing specific recommendations, we wish to share a few general observations about disclosure and the municipal market.

- Market Changes Since 1994: Since the initial promulgation of the 1994 Interpretive Release, significant changes in the regulatory structure and market practices, as well as transformative technological innovation, have compounded the need for a comprehensive review, update and recompilation of SEC positions on the topic of municipal securities disclosure. The advent of new technologies, such as the internet, social media and the Municipal Securities Rulemaking Board's ("MSRB") Electronic Municipal Market Access ("EMMA") system have greatly expanded and changed the ways in which issuers and their representatives interact with the public, and the sources from which investors obtain financial information with respect to issuers. The ubiquity of information, speed of dissemination, and various methods of communicating information have created uncertainties in the interpretation and application of the 1994 Interpretive Release and interpretive guidance regarding SEC Rule 15c2-12¹ ("Rule 15c2-12" or the "Rule") generally.

In addition to technological innovation, legislation and other actions by certain self-regulatory organizations ("SROs") have reshaped the regulatory landscape governing the municipal market. The *Dodd-Frank Wall Street Reform and Consumer Protection Act*, passed in 2010, created the SEC's Office of Municipal Securities ("OMS"), formalized municipal advisors as regulated entities under SEC and SRO purview, and statutorily expanded the mission of the MSRB, most notably to include the protection of municipal entities. Additionally, as a result of the SEC's Municipalities Continuing Disclosure Cooperation Initiative ("MCDC Initiative" or "MCDC"), market participants expend significant time and resources on drafting disclosure documents that will pass the strict scrutiny of the SEC Division of Enforcement ("Division") as to issuers' and underwriters' disclosure and diligence obligations with respect to past continuing disclosure compliance. Furthermore, amendments to SEC rules have created new disclosure obligations in the form of additional event notices for offerings subject to Rule 15c2-12² and created additional ambiguities for market participants.

In tandem, these and other market changes have led to concurrent evolutions in the types of antifraud risks faced by municipal market participants, particularly issuers, municipal advisors and underwriters and expansion of the "legal grey area" that already existed under previous guidance. While the SEC has issued various forms of guidance (including through enforcement) to address some of these market changes, areas of uncertainty continue to persist as market practices and technological innovation have continued to evolve, which uncertainty has the potential to cause parties to focus on perceived "technical compliance"

¹ 17 C.F.R. § 240.15c2-12.

² *Amendments to Municipal Securities Disclosure*, Exchange Act (Release No. 34-83885). Aug. 20, 2018, [available at https://www.sec.gov/files/rules/final/2018/34-83885.pdf](https://www.sec.gov/files/rules/final/2018/34-83885.pdf)

instead of a reasoned focus on clear and direct disclosure of material information to investors.

- SEC Statements on Municipal Disclosure Since 1994: The market has benefitted from several statements and reports delivered by the SEC and SEC staff in response to perceived disclosure deficiencies, market disruptions and developments, including, but not limited to, Securities Exchange Act Release No. 59062, 73 Fed. Reg. 76,104 (Dec. 15, 2008) (the “2008 Adopting Release”); Securities Exchange Act Release No. 34-62184A (May 27, 2010), 75 FR 33,100 (the “2010 Adopting Release”); Securities and Exchange Commission, Report on the Municipal Securities Market (July 31, 2012) (the “2012 Report”); Securities Exchange Act Release No. 69516, “Report of Investigation in the Matter of the City of Harrisburg, Pennsylvania Concerning the Potential Liability of Public Officials with Regard to Disclosure Obligations in the Secondary Market” (May 6, 2013) (the “Harrisburg Report”); Application of Antifraud Provisions to Public Statements of Issuers and Obligated Persons of Municipal Securities in the Secondary Market: Staff Legal Bulletin No. 21 (OMS) (the “OMS SLB”); and the statement made by then-Chairman Jay Clayton and then-Director of OMS, Rebecca Olsen, The Importance of Disclosure for our Municipal Markets, (May 4, 2020) (the “COVID Statement”). We believe as more fully discussed herein, that the topics covered in this Statement, the 2010 NABL Statement, and the 2011 NABL Statement have not previously been addressed by the Commission as a whole, and the market would benefit from additional guidance from the Commission.
- The Corporate vs. Municipal Securities Markets: Although the corporate securities market offers certain potential analogous protections for disclosure, the municipal market differs from the corporate securities market in several significant ways that should be considered when examining any policy objective for the municipal securities market. Full and fair disclosure in a municipal bond offering is no exception. Most importantly, the “Tower Amendment” prohibits both the SEC and the MSRB from directly or indirectly requiring issuers of municipal securities to file documents with the SEC and the MSRB prior to a sale. In addition, the Tower Amendment restricts the MSRB, but not the SEC, from requiring any issuer of municipal securities directly or indirectly, through a broker dealer, municipal advisor or otherwise, to furnish to the MSRB or to a purchaser any information with respect to such issuer. Municipal offerings are, nonetheless, subject to the antifraud provisions of federal securities laws, as well as bound by federally-mandated yet private contractual continuing disclosure undertakings or agreements (each, a “CDA” and collectively, “CDAs”) that are required for certain municipal securities under Rule 15c2-12. This statutory design remains a legal cornerstone and defining characteristic of the municipal market, which also ensures a degree of independence in how state and local governments establish their fiscal and budgetary priorities.
- Public Nature of Municipal Issuer Information: In addition to this important statutory distinction, the nature of information publicly available in the municipal market categorically differs from the corporate market, as municipal entities are subject to state sunshine, open records and public meeting laws. Information in the municipal market is not “made public,” as it is by corporate registrants, but rather it is effectively “born” public. Municipal issuers have far less control in determining which information and data are made

publicly available than their counterparts in the corporate market. In many, if not most, states, there must be a legally prescribed reason for a municipal issuer to keep information private. Corporate issuers, on the other hand, may restrict the release of information unless there is a legally prescribed requirement to release such information. Municipal issuers must follow an inherently public process when setting fiscal and budgetary priorities, yet the municipal market lacks clear safe harbors for the dissemination of such information. Additionally, the governing bodies of many municipal issuers are elected or appointed by elected officials, which presents the unique and challenging circumstance of “political speech.” As such, guidance with respect to municipal disclosure should consider the process by which a municipal entity’s information becomes public and whether such disclosure was by means of a deliberate action to address information to the investing public (*e.g.* information submitted to EMMA or posted on an investor relations page) versus information that exists in the public domain as a result of the entity’s public nature or provided under circumstances that make the information unofficial and, potentially, unreliable.

Specific Recommendations

With these general points in mind, we offer several specific recommendations, in addition to those in the 2010 NABL Statement and the 2011 NABL Statement, where additional authoritative guidance from the SEC would eliminate (or at least reduce) uncertainty and would aid municipal market participants in understanding their obligations to the market and ensure investors have the information needed to make an informed investment decision, while at the same time acknowledging the distinct differences between corporate and municipal issuers. Further, the Commission can encourage and expedite the ongoing efforts by market participants to improve disclosure practices and assist market participants in meeting their obligations under the antifraud provisions by publishing a comprehensive update to the 1994 Interpretive Release.

1. **Narrowly defined safe harbor when conducting reasonable due diligence and making good-faith disclosure determinations regarding prior compliance with a continuing disclosure obligation**

On March 10, 2014, the SEC issued a press release announcing the Commission's MCDC Initiative,³ under which the Division offered to "recommend favorable settlement terms" to issuers involved in the offer or sale of municipal securities (as well as underwriters of such offerings if they self-report to the Division possible violations involving materially inaccurate statements relating to prior compliance with the continuing disclosure obligations specified in Rule 15c2-12. In the following years, the SEC announced charges against numerous municipal entity issuers, obligated persons and underwriters as a result of the MCDC Initiative.⁴ Specifically, these firms and issuers were alleged to have violated the antifraud provisions of the federal securities laws by selling municipal bonds using offering documents that contained "materially" false statements or omissions about the bond issuers' compliance with their prior continuing disclosure obligations. As further discussed below, the litany of compliance failures the SEC described in the MCDC Initiative settlement statements included several examples of what most reasonable and informed persons would not consider "material non-compliance." Given the severity of the penalties imposed on firms and issuers, the MCDC Initiative drastically increased market awareness of the continuing disclosure compliance of issuers and other obligated parties and fundamentally altered basic primary offering practices. Most significantly, on any given transaction, the working group now devotes a significant portion of its time conducting and *documenting* diligence on prior continuing disclosure compliance. As identified in some of the examples below, much of this effort offers little in terms of material information to a reasonable investor, but nevertheless is deemed necessary to avoid future MCDC Initiative-like liability. In this way, the costs and inefficiencies associated with such diligence and disclosure efforts are rarely justified by the (at best) marginal disclosure benefits to investors.

With the MCDC Initiative now more than a decade behind us, we would encourage the Commission to clarify how the 1994 Interpretive Release's disclosure standards interact with Rule 15c2-12's requirement that the final official statement for a municipal entity issuer include a statement of "any instances in the previous five years in which each person . . . failed to comply, in all material respects, with any previous undertakings." Specifically, it would be helpful for the Commission to dispel the perception in the market, arising from the MCDC Initiative, that any instance of noncompliance with a prior CDA, however minor, must be disclosed in an official statement. Two distinct questions are at issue: first, whether the issuer or other obligated person has "failed to comply, in all material respects," with a previous CDA, such that Rule 15c2-12 requires disclosure of that failure; and second, whether the official statement's description of the issuer's prior compliance is materially accurate and complete. We would encourage the Commission to confirm that immaterial instances of noncompliance do not trigger the Rule 15c2-12 disclosure requirement, and that both issuers and underwriters may rely on a materiality analysis in addressing each question. To that end, we would encourage the Commission to reaffirm that the

³ [SEC.gov | SEC Launches Enforcement Cooperation Initiative for Municipal Issuers and Underwriters](http://www.sec.gov/news/pressrelease/2014-125.html).

⁴ Press releases regarding some of these changes are available at: <http://www.sec.gov/news/pressrelease/2015-125.html>, <http://www.sec.gov/news/pressrelease/2015-220.html>, and <http://www.sec.gov/news/pressrelease/2016-18.html>.

reasonable basis standard governs disclosure of prior continuing disclosure compliance, and that underwriters may establish a reasonable basis for their belief in such disclosure without requiring disclosure of immaterial instances of noncompliance, including by articulating a safe harbor regarding routine continuing disclosure compliance scenarios, such as the following.

- *Missed CUSIP Associations on EMMA.* The process of submitting continuing disclosure filings on EMMA can be operationally complex and prone to error, particularly for repeat issuers that may have hundreds of CUSIPs outstanding at a given time. On occasion, an issuer that timely files its annual financial information or an event disclosure may inadvertently fail to associate the filing with one or more CUSIPs. It would promote certainty, market efficiency and capital formation for the Commission to issue guidance confirming that an issuer and underwriter may reasonably determine that such a failure is not a material failure to comply with a CDA, where the filing was associated with the substantial majority of the issuer's applicable CUSIPs and remains accessible on EMMA through other search methods (e.g., by issuer name) and the issuer corrects the association promptly upon discovery. The guidance should further confirm that omitting such a failure from an offering document would not, in and of itself, constitute a material misstatement or omission.
- *Failure to Reference Non-Issuer Created CUSIPs.* Similar to the prior example, it would promote certainty, market efficiency and capital formation for the Commission to issue guidance indicating that a reasonable determination can be made that a failure to associate a filing with a CUSIP that was not created at the direction of an issuer (e.g., a secondary market CUSIP) is not a material failure to comply with a CDA and omitting it from an offering document would not, in and of itself, constitute a material misstatement or omission. Issuers should not be held to account for "after-market" financial products with different CUSIP numbers from the originally issued CUSIPs.
- *Missed Bond Insurance and Underlying Ratings.* Given that (i) EMMA provides current rating information, and (ii) issuers are routinely not advised of rating changes of credit enhancement providers, it would promote certainty, market efficiency and capital formation for the Commission to issue guidance that a missed event posting for a change in a bond insurance provider's or other third-party credit enhancement provider's rating is not a material failure to comply and omitting it from an offering document would not, in and of itself, constitute a material misstatement or omission. Moreover, we would encourage the Commission to amend Rule 15c2-12 to eliminate this required event filing altogether. Credit rating agencies provide rating information directly to EMMA, where it is displayed alongside each issuer's securities. This is one of the many features of EMMA that promotes transparency and timely dissemination of information to the municipal market, and one of the many developments in municipal disclosure that did not exist when Rule 15c2-12 was adopted. Requiring issuers to separately file notice of the same rating changes is therefore duplicative and gives investors no additional information.

- *Annual, Quarterly, and Monthly Filings Late by 5 Business Days or Less.* As SEC staff has previously advised, a CDA need not set the annual filing deadline as a fixed calendar date; it may instead express the deadline as a period of time, such as a number of days or months following the end of the fiscal year. As a consequence, whether an issuer has complied with its continuing disclosure obligations can be a matter of interpretation and turn on how that period is calculated in a given year. If the last day of the period falls on a weekend, holiday, or other day the market is closed, is the deadline extended to the next business day? Is a nine-month reporting deadline the same as a 270-day reporting deadline? Does the CDA account for leap years? Does the CDA include a business day convention provision? It would promote certainty, market efficiency and capital formation for the Commission to issue guidance indicating that a reasonable determination can be made that a failure to make a filing within a reasonable window of five business days is not a material failure to comply, is not a basis on which to judge expected future compliance, and omitting it from an offering document, would not, in and of itself, constitute a material misstatement or omission.
- *Omitted Table Calculations and Other Minor Metrics.* Continuing disclosure obligations are effectively entered into for the life of the securities without a ready method for amendment (see discussion below). Over the typical 30-year maturity period, the financial and operating information produced by an issuer and relevant to investors may change, and the format in which such information is presented or calculated may evolve too. This leads to a number of questions as to how literally to interpret an issuer's ongoing disclosure obligation. For example, should it be considered material non-compliance if a debt service coverage ratio is not separately stated in the report but all the metrics input into such a ratio are included in the report? If a factual table is no longer material or even generated by a municipal entity, may it be reasonably omitted without creating compliance issues? It would promote certainty, market efficiency and capital formation for the Commission to issue guidance indicating that a reasonable determination can be made that a failure to make a filing regarding such discrete information when it is no longer available (and/or material) is not a material failure to comply and, omitting it from an offering document, would not, in and of itself, constitute a material misstatement or omission. While the Rule requires continuing disclosure of information "of the type" included in the final official statement, the widespread practice has been, and will continue to be, to include a clear indication of which information is required to be updated. This facilitates compliance, as well as diligence.
- *Missing Failure to File Notice.* Rule 15c2-12(b)(5)(i)(D) requires an issuer to undertake to provide timely notice of any failure to file financial information. If an issuer cannot anticipate its inability to meet a disclosure deadline, then sometimes this leads to a duplicative filing whereby an issuer remediates the failure to disclose by providing the required information after the fact and then also must identify its failure to anticipate that it would not timely make the filing. It would promote certainty, market efficiency and capital formation for the Commission to issue guidance indicating that a reasonable determination can be made that a failure to

make a failure-to-file filing need not be separately identified in disclosures related to material non-compliance. Further, remediation of the information in a separate event filing with the required information and/or disclosure of such fact in an official statement disseminated to the market should be sufficient to serve as notice of an issuer's noncompliance with Rule 15c2-12(b)(5)(i)(D).

In the wake of the MCDC Initiative, transaction execution in the municipal securities market routinely gets bogged down in the foot faults and other minutiae of an issuer's prior continuing disclosure compliance. Without further clarity from the Commission how to properly interpret the settlement results of the MCDC Initiative, issuers are often advised to over disclose out of an abundance of caution and that the quantity of disclosure regarding foot faults will not adversely affect the marketing of the securities. As a result, long laundry lists of redundant and trivial non-compliance events are generated for inclusion in official statements, not because such disclosure provides meaningful information to investors, but because such laundry lists are viewed as necessary to avoid future regulatory liability with the SEC.

For these reasons, we believe the Commission would promote certainty and efficiency in the municipal securities market and, thereby, greater capital formation for issuers if it addressed common due diligence scenarios as falling within a safe harbor of reasonable-basis due diligence.

2. Updated interpretation regarding continuing disclosure undertaking amendments

We have more than 30 years of experience with CDAs. Disclosure practices have evolved over those 30 years and what investors desire and expect in terms of financial information and operating data in a primary offering document has also evolved. The MCDC Initiative highlighted a number of issues with the continuing disclosure process including the fact that a significant number of issuers have multiple contractual undertakings for the same credit that, in many cases, contractually obligated the issuer to provide information that is no longer relevant, available or easily produced and, in some cases, had different reporting deadlines. Through review of multiple CDAs entered into over a period extending back three decades, ambiguities and inconsistencies are prevalent and indeed may require overlapping, inconsistent, and/or outdated disclosures. Under existing guidance however, there is no simple way to amend and consolidate such CDAs.

The following example illustrates one of the many problems presented - when investors in utility system offerings often prefer new metrics than those previously provided.

Municipality A (the "City") owns and operates a water utility and has municipal securities outstanding that were issued in 2010, for which it entered into a CDA (the "2010 CDA"). In connection with the 2010 bond issue, the City 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 more than 10 years, the City provided an annual report that included the information contained in the tables identified in the CDA; however, some of the information was difficult to produce without expense to the City because the City's consultant's software was proprietary. In 2023, the City embarked on a

new bond issue for capital improvements to the water system. This time, it engaged disclosure counsel, who worked with the City’s internal disclosure working group to completely revamp, update and streamline the City’s disclosure document. Rather than copying tables from the various consultant reports, the City’s 2023 disclosure document includes internally prepared financial information and operating data for the water system compiled from reliable and accessible sources. The resulting official statement provides all the relevant information considered material for a water utility revenue bond transaction in 2023. However, unless the City amends its 2010 CDA, it will remain contractually obligated to produce the old tables until the 2010 bonds are defeased, mature or redeemed, in addition to providing annual updates of the system information contained in the new official statement.

Facilitating an issuer’s ability to amend existing CDAs to be consistent with newer primary offering disclosure practices reflecting current information preferred by investors will benefit both issuers and investors and improve market efficiency. Issuers will be able to meet contemporary investor information demands and more efficiently meet their contractual obligations while the market enjoys the benefit of updated disclosure formats.

In 1995, in response to the question of whether a CDA can ever be amended, the SEC staff in the “NABL 1” letter⁵ set out an amendment process that was written (nearly verbatim) into many (if not most) CDAs.

Under the existing guidance, an amendment to an existing CDA must satisfy three requirements set out by the SEC staff in the “NABL 1” letter:

- (a) 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;
- (b) 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 amendments or interpretations of the rule, as well as any change in circumstances; and
- (c) 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 in 1995 that CDAs 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, CDAs include specific references to the information to be provided. Although this is not what the SEC staff anticipated, the use of specific references is useful to issuers in compiling annual reports and is particularly useful in compliance review, in part because of often

⁵ Available at <http://www.sec.gov/info/municipal/nabl-1-interpretive-letter-1995-06-23.pdf>.

difficult to reach an agreement on whether an issuer has complied when the CDA described the required information only in general terms.

We note that in 2004 the SEC staff issued a letter effectively interpreting 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.”⁶ 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 provided additional guidance that confirms that the method described in the NABL 1 letter is not the only acceptable method to amend a CDA. An amendment process designed to update the disclosure requirements set forth in older CDAs will be consistent with the intent of Rule 15c2-12 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 SEC staff would rescind the language included in the NABL 1 letter and agree that the following actions with regard to amending CDAs are consistent with the intent of the Rule:

- (a) The information required to be provided in the amended CDA is consistent with the disclosure that would be included in a primary market offering document if the bonds were being issued as of the date notice of the proposed amendment is given;
- (b) Absent any conflicting language in the CDA, notice provided through an EMMA filing may be an appropriate and adequate means of notifying holders of such an amendment if (a) the notice is provided at least one year prior to the effective date of the amendment, and (b) the notice contains contact information so that a bondholder may be able to register any objection to the amendment; and
- (c) Any other amendment process provided for in the original CDA or governing bond document (*e.g.*, bond resolution, ordinance or indenture) may provide an alternative and acceptable means for amendment of the CDA.

Although the SEC interpretation would be limited to application of Rule 15c2-12, such an interpretation would ameliorate uncertainty around the amendment process. It would likely allow counsel to conclude that the CDA may include an amendment process different from the one set forth in the NABL 1 letter, and would likely enable counsel to render an opinion that an amendment complies with the contractual requirements of the CDA. It would also promote market efficiency by reducing the time and expense that issuers and bondholders incur in producing and reviewing obsolete disclosure formats.

⁶ Letter from Martha Mahan Haines, Chief, Off. of Mun. Sec., Div. of Mkt. Regul., U.S. Sec. & Exch. Comm’n, to W. David Holland, Chairman, Tex. MAC & John M. McNally, Hawkins, Delafield & Wood LLP (Sept. 7, 2004)) (re DisclosureUSA.org).

3. Clarity on language of listed events in continuing disclosure undertakings

Practitioners, issuers and broker-dealers disagree about how to describe in CDAs the tax-related event notice required by Rule 15c2-12(b)(5)(i)(C)(6).

In the 2010 Release, certain amendments were adopted to Rule 15c2-12 (the “2010 Amendments”) including to clause (6), which was modified to read as follows:

(6) Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;

Prior to the 2010 Amendments, clause (6) of the then-eleven “material events” read as follows:

(6) adverse tax opinions or events affecting the tax-exempt status of the security;

Some practitioners and issuers, in current drafting of a CDA, will modify the last part of clause (6) to refer to the “tax-exempt” status of the security rather than the tax status of the security. Reasons for the language change from the Rule include that the change to tax status as part of the 2010 Amendments was only meant to apply to tax-advantaged bonds, and that a reference to tax-status in a transaction without a tax-advantaged bond creates confusion for compliance for the issuer at best and at worst, is misleading to an investor as to what is covered by that clause.

Such reasoning includes the discussion in the 2010 Release, regarding clause (6) and adverse tax opinions where the SEC discusses the change from “tax-exempt” to “tax status” as it related to the “tax advantaged” bonds (which bore taxable interest) created under the American Recovery and Reinvestment Act of 2009, as follows (internal citations omitted):

Finally, in February 2009, Congress enacted the American Recovery and Reinvestment Act of 2009 (“ARRA”), which authorized the issuance of Build America Bonds and other taxable municipal bonds with associated tax credits or direct federal payments to the issuer (collectively, “ARRA Bonds”). Because ARRA Bonds are municipal securities, Participating Underwriters would need to comply with the Rule’s provisions, including paragraph (b)(5)(i)(C), when these bonds are the subject of a primary offering. Thus, a Participating Underwriter will be required to reasonably determine whether an issuer or an obligated person has entered into a continuing disclosure agreement to submit continuing disclosure documents to the MSRB.

ARRA Bonds are required to comply with many of the same provisions of the Internal Revenue Code as are tax-exempt bonds, such as restrictions on arbitrage. The benefits granted to ARRA Bonds (*e.g.*, tax credits and related federal payments to issuers) are

only authorized for bonds that comply with the provisions of the Internal Revenue Code that grant these benefits. Furthermore, like tax-exempt municipal bonds, adverse tax opinions, proposed or final determinations of taxability, Notices of Proposed Issue, or other material notices or determinations by the IRS with respect to the tax status of the securities, or other material events affecting the tax status of the security, may be applicable to ARRA Bonds. To clarify the applicability of paragraph (b)(5)(i)(C)(6) of the Rule, as amended, to ARRA Bonds, the Commission is adopting, for purposes of this paragraph, the phrase “tax status,” rather than “tax-exempt status,” of the security. The Commission believes that this limited change will clarify that Participating Underwriters of ARRA Bonds are required to reasonably determine that issuers or obligated persons of such bonds have entered into a continuing disclosure agreement to submit to the MSRB, among other things, the tax-related disclosure events included in paragraph (b)(5)(i)(C)(6) of the Rule. For investors who hold ARRA Bonds with associated tax credits, the consequence of an issuer’s failure to comply with the applicable requirements of the Internal Revenue Code is the loss of the benefit of a tax credit. For investors who hold tax-exempt municipal securities, the consequence of an issuer’s failure to comply with federal tax provision is the loss of the benefit of tax-exempt interest income. In the Commission’s view, the consequences to investors who hold either ARRA bonds or tax-exempt municipal securities are comparable. Therefore, the Commission believes that this minor revision to this disclosure event will allow investors in ARRA Bonds, like investors in tax-exempt bonds, to have timely access to important information concerning risks that may affect the tax status of their securities.

On the other hand, a broker-dealer acting as a “Participating Underwriter” as described in the Rule (and its counsel), in determining if an issuer has agreed to provide the necessary information required by (b)(5)(i)(C) of the Rule when the language from the Rule is so modified, is left to determine if a CDA that does not follow the exact language of the Rule in fact complies with the Rule. In the 1995 “NABL 2” letter⁷, one of the questions noted that certain Participating Underwriters accepted CDAs that listed less than all of the events specified in the Rule in situations where certain of the events were not relevant in the primary offering (for example, the bonds have no reserve fund or there is no credit enhancement) while other Participating Underwriters required all eleven events to be listed in the CDA under all circumstances, and inquired whether the written undertaking could eliminate references to those of the eleven specified events that may not be applicable to the bonds in question, and if all eleven events should be listed, could the undertaking indicate that certain events may not be applicable. The response from the SEC was that:

⁷ Available at <https://www.sec.gov/info/municipal/nabl-2-interpretive-letter-1995-09-19.pdf>.

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 ... As a general matter, 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 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.

In light of such advice and the regulatory risk to the Participating Underwriter as compared to the contractual risk of an issuer (where generally specific performance is the remedy), certain Participating Underwriters are reluctant to accept such a change to clause (6), even while certain issuers are unwilling to enter into an undertaking unless the “tax-exempt” language is used.

We believe the Commission would promote certainty and efficiency in the market if it addressed whether clause (6) should be written as provided in the Rule or if it is permissible to revise the language to include the “tax-exempt” qualification for clarity.

4. Safe harbor from application of federal securities laws for voluntary or forward-looking disclosures under the judicially developed “bespeaks caution” doctrine and appropriate disclaimers

The judicially developed “bespeaks caution” doctrine in securities fraud litigation protects defendants from liability for forward-looking statements when those statements are accompanied by meaningful cautionary language. The doctrine applies to both public and private parties and generally provides that a forward-looking statement, such as a projection, forecast, or opinion about future performance, is not actionable under the federal securities laws if the document in which it appears contains sufficient cautionary language to alert a reasonable investor to the risks and uncertainties that could cause actual results to differ materially from those projected, thus “bespeaking caution.”

Congress enacted a statutory safe harbor for forward-looking statements in the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which creates a safe harbor applicable to any private action under the Securities Act⁸ or the Exchange Act⁹ in which the claim is based on a misleading statement of material fact relating to a forward-looking statement. The safe harbor applies to

⁸ Securities Act of 1933, as amended (as codified at 15 U.S.C. §§ 77a *et seq.*).

⁹ Securities Exchange Act of 1934, as amended (as codified at 15 U.S.C. §§ 78a *et seq.*).

issuers that are reporting companies under section 13(a) or 15(d) of the Exchange Act. PSLRA does not apply to issuers that are not Exchange Act Reporting companies.

There are two prongs to the PSLRA safe harbor:

(a) Cautionary Language: A forward-looking statement (written or oral) is protected if it is identified as such and accompanied by meaningful cautionary statements. General or boilerplate disclaimers do not count, and such statements must point out important factors that could cause actual results to differ materially from what was predicted.

(b) Actual Knowledge: Unlike the bespeaks caution doctrine, even if a statement lacks proper cautionary language from the first prong, it remains protected unless the plaintiff proves that the person or entity made the statement with actual knowledge that it was false or misleading. For oral statements, this requires proof that the speaker personally knew it was false.

In the 2012 Report, the SEC emphasized the importance of “forward-looking or trend information regarding an issuer or obligated person,” but also acknowledged the PSLRA safe harbor is generally unavailable to issuers of municipal securities when they disclose such information. Among recommended reforms requiring Congressional legislation, the SEC proposed that Congress enact a public finance safe harbor that is similar to the PSLRA to “encourage municipal issuers to provide forward-looking information.”

In 2020, the COVID Statement emphasized that the municipal securities market is a large, diverse, important, complex and specialized segment of the U.S. capital markets. In particular, the COVID Statement noted the diversity of issuers in terms of size, purpose and capital needs, as well as the variety of bond types and issuer-specific credit structures. These factors generally mean that both issuer-specific disclosures and security-specific disclosures are material to a meaningful extent.

The COVID Statement recognized that the issue of liability is often raised when voluntary disclosures, or an expansion of required disclosures, are under consideration, but went on to advise that:

Accompanying those disclosures with meaningful cautionary language—including, for example, (1) a description of relevant facts or assumptions affecting the reasonableness of reliance on and the materiality of the information provided, (2) a description of how certain important information may be incomplete or unknown, and (3) the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information—will not only improve the quality of the disclosure but also will reduce legal and other risks.¹⁰

¹⁰ Statement by Chairman Jay Clayton and Rebecca Olsen, Director, Office of Mun. Sec., *The Importance of Disclosure for our Municipal Markets* (May 4, 2020), available at <https://www.sec.gov/newsroom/speeches-statements/statement-clayton-olsen-2020-05-04>.

The Commission could eliminate some uncertainty for issuers and promote disclosure of timely information to the marketplace by confirming the guidance offered in the COVID Statement that an issuer's approach to forward-looking disclosures should be informed by the judicially developed "bespeaks caution" doctrine applies outside of the context of the COVID Statement, and could create further certainty still by issuing a policy statement or supporting legislation that applies the PSLRA safe harbor to issuers of municipal securities when they disclose forward-looking or trend information.

5. Guidance with respect to the "total mix of information"

As noted in the General Observations section above, the nature of information publicly available to investors in the municipal market differs from that available to investors in the corporate market, as municipal entities are typically subject to a variety of state sunshine, open records and public meeting laws.¹¹ While an issuer may not be subject to the mandated continuous reporting requirements of the Exchange Act, when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions of the federal securities laws.

The OMS SLB reiterates that the staff believes, consistent with the Commission's prior statements, that all statements of an issuer that are reasonably expected to reach investors and the trading markets are subject to the antifraud provisions of the federal securities laws, regardless of the issuer's compliance with its continuing disclosure obligations. The trading market and how it gets information, however, has changed dramatically since the 1994 Interpretive Release and even since the Harrisburg Report, as has the information that can reach the investing public and the means by which such information is accessed, including through artificial intelligence and, as noted in the OMS SLB, social media, such that nearly all information from all members of an issuer might be expected to reach the investing public.

This problem with the widespread access to information was articulated by former Commissioner Hester Peirce in her introductory remarks to the Municipal Securities Disclosure Conference in June 2020.¹² Commissioner Peirce noted that in considering how standards designed for corporate issuers carry over to municipal issuers, while the antifraud provisions are the same, the application thereof is different and difficult. "A municipal issuer official may make statements that make their way to the ears of investors, even though their intended audience is constituents. At what point is it appropriate for us to bring an antifraud action, and how do we balance the need to protect investors with the political implications of fact-checking government officials' public statements?" Commissioner Peirce went on to note that:

¹¹ As noted in the 1994 Interpretive Release: "[M]unicipal issuers do not have the option of remaining silent. Given the wide range of information routinely released to the public, formally and informally, by those issuers in their day-to-day operations, the stream of information on which the market relies does not cease with the close of a municipal offering."

¹² Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *Introductory Remarks: 2020 Municipal Securities Disclosure Conference* (June 16, 2020).:

Disclosures prepared for other constituencies may well be useful for investors, and allowing issuers to point investors to those documents can benefit both issuers and investors. How can we recognize this fact without forcing all communications by municipal issuers—including websites, public reports, speeches, media interviews, social media posts—to be scrutinized by securities lawyers? How can we affirm the importance of antifraud protections for investors without allowing them to hobble well-intentioned municipal issuer officials trying to do their jobs?

Although the Harrisburg Report contained a helpful framework for the total mix of information, the OMS SLB emphasized the point that the total mix of information for an issuer may indeed be everything from every person. The Commission should recognize that there is a distinction between information that is made publicly available in the normal course of government operations by a variety of employees for a variety of purposes and information that is made publicly available for the purpose of reaching the marketplace. While the OMS SLB recognizes certain parameters of policies and procedures for disseminating information, the practical reality is that although such policies and procedures may provide guardrails for the information that is known to be reaching the investing public, they may not provide adequate protections for an issuer across all forms of communication in a marketplace where that information is becoming increasingly available instantaneously to everyone. There needs to be a means that would provide some level of control within an issuer's organization as to what information is and is not considered to be reasonably expected to reach the investing public. Staff guidance pointing to "facts and circumstances," while legally defensible, does not provide a practical solution in today's technological and political environment without discussion of how common facts and circumstances will be analyzed. The Commission should consider adopting safeguards along the following lines:

- (a) Guidance specific to the municipal securities market that disclaimers or terms of use on a website or in public documents can be effective to establish the circumstances under which information is provided (although they will not provide insulation from liability for actual fraud). If an issuer has a multi-purpose website, it should be acceptable to cordon off information that is intended for investors, including information that has been vetted by appropriate staff and, where needed, legal counsel. A clear statement to investors that, in connection with making an investment decision, they should NOT rely on information elsewhere on the website should be sufficient to protect against inadvertent reliance by an investor on inconsistent information. This is particularly important in the context of public meeting agenda packages in which draft bond documents, including offering documents, may be accessed before being finalized.
- (b) The designation by the issuer of "official" communications by certain parties within an issuer, and the exclusion of certain public meetings and proceedings from the total mix of information.
- (c) In the municipal context, the "total mix of information" should not include all public information, but rather only the information a reasonable investor has access to in their capacity as an investor and not merely as a member of the general public.

- (d) Absent actual fraud, the intent of the issuer should be a material, if not defining, factor in determining whether information can be reasonably expected to reach the market.

Such safeguards should consider the process by which a municipal entity's information becomes public and whether such disclosure was a deliberate action to direct information to the investing public (*e.g.*, information submitted to EMMA or posted on an investor relations page) versus information that exists in the public domain simply as a result of the entity's public nature.

EXHIBIT I

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