NATIONAL ASSOCIATION OF MUNICIPAL ADVISORS

May 15, 2017

Mr. Brent Fields
Secretary, Securities and Exchange Commission
100 F Street, SE
Washington, DC 20549
Via electronic submission

RE: S7-01-17

Dear Secretary Fields:

The National Association of Municipal Advisors ("NAMA") appreciates the opportunity to comment on the SEC's Proposed Amendments to Rule 15c2-12, File Number S7-01-17 ("Proposed Rule"). NAMA represents independent Municipal Advisory Firms and Municipal Advisors (MA) from across the country, who in turn provide advice to municipal securities issuers and obligated persons. NAMA, among other objectives, serves to promote and provide educational efforts and assist its members navigate the federal regulatory and municipal market landscapes. These comments are submitted with a focus on how the proposed rule would impact the clients of NAMA members.

While supporting appropriate issuer disclosure practices, NAMA must express its serious concerns with the SEC's proposed rule. As other groups have commented, most notably issuers and issuer associations, the proposal unfortunately includes ill-defined terms that would place excessive burdens on issuers with little positive benefits for investors, especially retail investors. In the economic analysis accompanying the SEC's proposal, the Commission admitted that the trading patterns of most municipal securities made it difficult to quantify the scope of potential improvement in pricing for investors. Additionally, the SEC underestimated the proposal's costs to issuers. Most striking are the costs issuers would be subjected to when having to consult counsel to determine the materiality of numerous types of potential financial obligations that might be subject to the rule.

The fundamental problem with the SEC's proposal is that the definition of "financial obligations" is too broad and will require the consideration of the materiality of many types of financings and financial obligations that do not affect a government or entity's ability to pay debt or the creditworthiness of the entity. Many of these financial obligations are part of the day-to-day 'operations' of governments that are already understood, and in many cases, specifically agreed to by bondholders either explicitly in the bond documents or by operation of the statutory or constitutional basis by which debt is issued and which are imputed into the bond documents. The costs of having to consider the materiality of such a broad range of documents, a consideration that will have to be undertaken independently by both issuers and underwriters, will likely result in issuers simply submitting massive amounts of contracts and documents to EMMA. In most cases, these data dumps would not yield useful or important information to investors, and would be particularly overwhelming and not useful to retail investors, who make up the majority of municipal bondholders.

The costs and burdens to issuers would be more palatable if the SEC's justification for this additional disclosure was based on actual problematic activity in the market instead of the SEC's "concerns" that are not based on actual market practice. Although the SEC has correctly identified that the use of bank loans and private placements has temporarily increased (a historical blip that may disappear when interest rates rise), it is not correct in its "concern" that such financings include the granting of priority liens or include acceleration provisions.

These concerns that municipal issuers are not disclosing provisions within private placements and bank loans that may be potentially harmful to investors are exaggerated because, in most cases, granting these types of superior rights are already explicitly prohibited by the legal provisions that allow issuers to incur debt or by existing contracts with the holders of publicly offered debt. In addition, if an issuer did engage the type of actions that are of most concern to the SEC, such as granting priority rights, these actions would already trigger disclosure of a material event under Rule 15c2-12.

Currently under Rule 15c2-12, an issuer must disclose when any material modifications are made that impact the rights of outstanding bond holders (see 15c2-12(a)(5)(C)(7)). Further, bondholders already agree, through their purchase of a security, to the specifics included in each bond ordinance or indenture, and know that an issuer will likely engage in future financings both for capital purposes and for operations. If an investor is not comfortable with these terms or the possibility of a government engaging in future financings, they may choose to not purchase those securities. In several places in the proposal, the SEC mentions concerns about actions that may impact the "liquidity" or "creditworthiness" of the obligated person as the justification for protecting investors. Notably, issuers are already required to file a material event notice when there is a change in their "creditworthiness" as determined by a rating agency. In addition, in the centuries that municipal entities have been issuing bonds, there is only a very narrow class of municipal securities where investors have demanded any covenants with respect to "liquidity" and these are generally the very same types of municipal securities (e.g. health care) where issuers and obligated persons are already required to provide to the market the types of ongoing disclosure sought by the proposed rule.

There are also similar problems in the proposed rulemaking related to having issuers report when they face "financial difficulties" on a broad array of financings or occurrences. Again, this is an area that is not well defined, and will place costly burdens on issuers to determine what may need to be disclosed and when. Issuers would have to incur costs to put procedures and systems in place to monitor potential changes to a wide variety of debt and non-debt financial obligations. Again, the expected "data dump" of information will not be particularly useful to investors, especially retail investors. Further, this provision would apply to potential changes made to <u>current and existing</u> contracts, a retroactive action by the SEC, which makes it especially problematic and intrusive to state and local governments and entities.

Finally, it is worth noting that this proposed rulemaking would impose greater and broader responsibilities on governmental entities than are currently imposed on corporate entities that file Form 8-K. In particular, Item 2.03 of Form 8-K requires disclosure of an event of acceleration, but does not require disclosure of an event of default (unless it triggers an off-balance sheet liability), and also on Form 8-K, Item 2.03 only requires disclosure of short-term debt if it is outside the ordinary course of business. The SEC has not explained why these standards differ and greater standards are needed for municipal securities. Additionally, the current proposal does not include any of the additional guidance afforded corporate issuers to help determine what they should file with respect to these types of obligations. In the proposal, the Commission asks several times whether it should provide more

guidance with respect to items like "information issuers and obligated persons should consider in drafting event notices" and the phrase "reflecting financial difficulties." The answer to these questions is definitely "yes" if the Commission moves forward with this proposal.

NAMA recommends that instead of moving forward with the proposed rulemaking, the SEC should evaluate current platforms and marketplace activities and determine if the goal of providing more relevant information about bank loans and private placements into the hands of investors can be achieved. These include:

- Enhancing the MSRB's EMMA system to more readily and easily have issuers file and investors review information related to bank loans and private placements, and recognition that the specific filing tab for bank loans was only added to EMMA in September of 2016.
- Supporting continued and heightened promotion of industry best practices developed by GFOA and other groups. This is especially true of the GFOA's Best Practices: *Understanding Your Continuing Disclosure Obligations* (see recommendations to make voluntary disclosure filings or posting on government's web site of ongoing and already prepared budget and financial information); *Understanding Bank Loans* (see recommendations to disclose material bank loan information); *Using Technology for Disclosure* (see recommendation to have issuers publish on their web site and submit through EMMA information about their financial condition and other relevant information); and the GFOA Advisory, *Use of Debt-Related Derivatives Products* (see recommendation to develop guidelines for disclosure of swap information for primary and secondary market purposes.
- Promoting investor education to locate different types of information that is <u>already included</u> within a government's annual financial filing and official statements.
- Highlighting <u>current</u> disclosure obligations under 15c2-12 regarding when a financial obligation, various financial situations, and alterations to outstanding financial contracts trigger a material event.
- Having underwriters and issuers agree to include in future continuing disclosure agreements that the issuer will provide notices for bank loans and private placements when certain parameters and thresholds are met that are appropriate to the type of debt being offered, as determined by the issuer and the underwriters.

If the SEC determines to move forward with the proposed rulemaking, we suggest that significant changes be made to more narrowly tailor the information that should be submitted. Additionally, we suggest key issues be addressed, including:

- The definition of "financial obligations" should focus only on the specific behavior for which the SEC has expressed concern, namely, bank loans and private placements that have certain characteristics such as acceleration or priority rights provisions.
- Financial obligations that are related to the operations and ordinary course of business of governments should not be part of the "financial obligation" definition. Non-debt obligations such as operating leases should be specifically excluded and the SEC should limit the disclosure to debt instruments payable on a superior or parity basis from the same source of revenues as the securities that are the subject of the continuing disclosure agreement.
- The SEC should strive to recommend what information is warranted for the use of investors within various types of obligations. For example, the SEC provides much more guidance to corporate issuers, including exceptions and recommended dollar thresholds for litigation disclosure, than it has sought to do here. Even under a more expansive definition of "financial obligations," for many

types of municipal securities disclosure of the amount of the debt, interest rates and any maturity schedule would be sufficient to investors. In the case of the proposed rule application to derivatives, having the confirmation sheet and the ISDA agreement disclosed would be burdensome for the issuer and unhelpful to the investor. In this case, we would recommend that the SEC determine specific types of variables to be used, or develop guidance that would recommend, for example, that the information currently required under GASB 53 for outstanding derivatives be used for newly executed transactions. This would allow investors to see the pertinent information that matters to them as a bondholder.

- The implementation period should be longer than three months. The SEC has underestimated the amount of time that governments will have to spend to develop numerous policies, procedures and systems, and in some cases to get approval from elected officials for these revised policies, procedures and systems, to be able to support compliance with the rulemaking.

NAMA supports strong disclosure practices and availability of information to investors. However, this proposal is not reasonably tailored to allow issuers to submit relevant information to investors and for investors to access useful information. The proposal creates obligations for issuers that go well beyond even the stated concerns of the SEC about provisions in new debt instruments that negatively impact existing investors. We would welcome the opportunity to further discuss the proposed rulemaking's impact on issuers and the marketplace, as well as our suggestions for the SEC to explore current platforms and initiatives before resorting to additional rulemaking.

Sincerely,

Susan Gaffney
Executive Director