

NABL takes complaints about SEC disclosure rule proposal to OMB

By Jack Casey

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WASHINGTON – In a highly unusual move, bond lawyers have complained to the Office of Management and Budget that the Securities and Exchange Commission’s recently proposed changes to its municipal disclosure rule greatly underestimate the burdens they will place on market participants and are too ambiguous to be approved without revisions.

The National Association of Bond Lawyers explained its concerns to OMB in a letter sent on Tuesday that also went to the SEC. The conclusions in the letter are partly based on the results of a survey NABL did of more than 70 of its members who were asked about the compliance burdens of the proposed rule.

Rick Weber, of counsel with Norton Rose Fulbright in Houston and the chair of the NABL ad hoc task force that produced the letter, said this is the first time he is aware of a group going to OMB to intercede with SEC muni rulemaking in his 40 years of practicing public finance.

“NABL has been critical of the SEC’s burden estimates in the past, but we’ve voiced that criticism to the SEC only and, in deference to the SEC, not to OMB,” he said.

Weber said there are two reasons NABL chose to write to OMB this time. One is President Trump’s executive order from January aimed at reducing regulation and controlling regulatory costs that is binding on OMB and is expected to be a guidepost for independent agencies like the SEC.

“To some extent, we are utilizing that tool to be better heard,” Weber said.

The second reason, he said, is that “the SEC has essentially ignored prior statements from knowledgeable industry participants that its prior cost estimates were far off and, notwithstanding that, they relied upon and repeated their prior estimates” in the recent Rule 15c2-12 proposal.

“The SEC’s persistent failure to make realistic cost estimates led us to believe it was time to address the issue with OMB,” Weber said.

The letter references the Paperwork Reduction Act, which charges the SEC with ensuring its rules that provide for “collection of information” are clear and unambiguous as well as avoid overburdening state and local governments and others. The SEC must submit their estimates of burden and other supporting information to OMB, which then has an opportunity to comment on the Paperwork Reduction Act aspects of the SEC proposal.

NABL wants OMB to comply with Trump’s executive order and tell the SEC that its proposed rule changes would impose ambiguous and overly burdensome collection of information requirements and are accompanied by cost estimates that are unrealistically low and should be assessed in light of current market practice.

If the SEC does not revise its rule to fix those concerns, NABL is asking OMB to disapprove the collection of information that the amendments contain.



Office of Management and Budget

The Office of Management and Budget can comment on the SEC's Rule 15c2-12 proposal under the Paperwork Reduction Act.

NABL said it will comment separately on the substance of the SEC's proposed rule changes closer to the May 15 comment deadline.

Other market groups agree with NABL's stance that the SEC cost estimates for the rule are underestimated but said they are not planning to file similar requests with OMB.

The SEC is proposing to add two material events to the current muni disclosure Rule 15c2-12. It would require event notices to be filed for a broad range of "financial obligations," if material, including, guarantees and monetary obligations resulting from a judicial, administrative or arbitration proceeding. It would also require such notices to be filed for actions and events related to financial obligations that "reflect financial difficulties" such as the modification of terms.

The SEC estimates that issuers would require two hours to prepare and file notices for each new event. It projected underwriters would require about 12 minutes per offering to compare issuer certifications of events to filed notices of the events. Those numbers were drawn from prior time

estimates that NABL said do not account for the qualitatively different compliance obligations the new events will bring.

The commission estimates that of the 20,000 issuers that file event notices annually, only 2,000 would be required to file these new notices under the new amendments, meaning issuers would take a total of 4,000 hours to comply. It also estimated that 250 underwriters would take an average of 30 minutes to give notice of the amendments to those who will be affected by them and an additional 10 hours a year to comply with the amendments. The SEC's total burden estimate for the market is 6,500 hours a year.

NABL wrote that its results, which incorporate Municipal Securities Rulemaking Board market data from 2016, finds that total burden estimate of 6,500 hours a year should be 2,417 times higher, coming in at about 15.71 million hours. That estimate is largely made up of the roughly 14.2 million hours of work NABL estimated brokers will need to do when obtaining and reviewing filings in connection with each secondary muni market transaction -- something the SEC completely left out of its calculations. The SEC estimate also does not consider the burdens participants will face in determining what is considered material, what new policies and procedures for compliance should look like, and the true work dealers must take to independently judge an issuer's compliance with its disclosure duties, NABL said.

The lack of consideration of materiality concerns is particularly problematic, according to the group, because recent enforcement actions like those under the SEC's Municipalities Continuing Disclosure Cooperation initiative have made issuers and underwriters take very conservative views about what materiality means. That could lead to issuers filing notices for almost every financial obligation and in turn force dealers to wade through the high volume of documents during their due diligence.

The use of materiality, which the SEC has continually avoided defining, also means the rule is unnecessarily ambiguous, NABL said.

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