



Invested in America

May 15, 2017

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549-1090

Re: Comment Letter on Release No. 34-80130; Proposed Amendments to Exchange Act Rule 15c2-12 File No. S7-01-17

Dear Secretary Fields:

The Municipal Securities Division of the Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to comment on proposed amendments (the “Proposal”) to Rule 15c2-12 under the Securities Exchange Act of 1934 (“Rule 15c2-12” or the “Rule”) relating to municipal securities disclosure included in the Release noted above (the “Release”).² The Proposal would (x) amend the list of events for which notice is to be provided to the MSRB to include (i) 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 (ii) 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; and (y) define the term “financial obligation.”

We recognize the efforts the Securities and Exchange Commission (the “SEC” or the “Commission”) and the SEC staff have made with respect to the Release. In June of 2016, together with our Asset Management Group (the “AMG”), SIFMA urged the SEC to develop a proposal to amend Rule 15c2-12 and release additional guidance as a more comprehensive avenue for ensuring that information regarding direct purchases, private placements, and bank loans entered into by issuers and obligated persons is consistently and uniformly reported to the MSRB’s EMMA Web site and made transparent to the market.³ Our position shared common ground with the MSRB as well as the National Federation of Municipal Analysts. Several months earlier in April 2016, SIFMA submitted to the SEC our Rule 15c2-12 Whitepaper⁴ (the “SIFMA 15c2-12 Whitepaper”), offering a current perspective on the existing framework for providing disclosure in the municipal securities market, the relative burdens placed upon municipal market participants by that framework, and identifying opportunities

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for improvement in Rule framework, structure, and guidance through simplification and elimination of cumbersome procedures devised in a pre-internet age.

We share the Commission's goals of investor protection and market transparency and appreciate the Commission's response, in the form of the Proposal, to our earlier request supporting disclosure of direct purchases, private placements, and bank loans. The scope of the Proposal, we note, extends far beyond that discrete subject. We are mindful of the relative burdens and benefits placed upon market participants by the existing Rule, in particular through the daily experience of our broker, dealer, and municipal securities dealer members. Their experience provides the foundation for our perspective of the burdens and benefits likely to result from adoption of the Proposal.

Executive Summary

We support event notice disclosure of incurrence of debt through a direct purchase, private placement, or bank loan. In addition, in our letter below, we:

- Support limitation of the definition of "financial obligation" to mean only "a direct purchase, private placement, or bank loan;"
- Advise that unchanged, the Proposal will make it extremely difficult for investors, and retail investors in particular, to find the very information the SEC wants to make available;
- Advise that the Proposal provides issuers and obligated persons an additional reason to use private-only financing methods;
- Advise that the Proposal is overly broad and will lead to over-disclosure. Rather than a vague materiality qualifier, we recommend a clear, bright-line condition for disclosure, similar to one used elsewhere by the Commission⁵ in disclosure filings;
- Advise that the Proposal will be time consuming and costly for brokers, dealers, and municipal securities dealers, both in the context of their time of trade obligations under MSRB Rule G-47 and in the context of an underwriter's duty in connection with a primary offering;
- Advise that the Commission's cost estimates fail to measure these effects by grossly underestimating or not measuring at all the hourly burden imposed;
- Recommend as a solution interpretive guidance as to the sufficiency under the antifraud provisions of reliance on certification by an official responsible for disclosure compliance; and

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- Recommend the Commission balance the costs and burdens imposed with the savings and efficiencies provided by the amendments recommended in the SIFMA 15c2-12 Whitepaper.

Discussion

Reflecting our shared interests with the Commission and other market participants in investor protection, market transparency, and fair and efficient markets, we offer the following general observations and recommendations:

1. We support event notice disclosure of incurrence of debt through a direct purchase, private placement, and bank loans, but the Proposal extends far beyond that discrete category, effectively imposing the broad reporting requirements of the complex system of corporate integrated disclosure regulation, specifically Form 8-K⁶, on issuers and obligated persons of municipal securities without the accompanying definitions and guidance provided by Regulation S-K, let alone the overall regulatory superstructure of the SEC's integrated disclosure system.

2. Adoption of the Proposal is likely to result in indiscriminate and mostly immaterial filings by issuers and obligated persons of documentation for a broad range of ordinary-course-of-business financial agreements, obligations, and judgments in order to avoid the time, uncertainty, and cost of assessing the necessity of an event notice within the ten-business day deadline after incurrence of the financial obligation. Timely filing of event notices will depend upon the wealth, access to outside counsel, sophistication and internal organization of an issuer or obligated person, including whether or not a disclosure committee with effective disclosure policies and procedures exists. Because of the experience of issuers, obligated persons, and underwriters with the overly broad application of materiality in 144 settled MCDC proceedings, "materiality" at least in the context of Rule 15c2-12, is unlikely to serve as an effective filter. Rather the MCDC experience⁷ teaches that safety resides in over-disclosure. The likely result is the opposite of the Commission's intention: investors and other market participants will have to wade through mountains of documentation in search of material, relevant financial information. In particular, the provision of information in this form will be of virtually no use to retail investors. As an alternative, in addition to refining the definition of financial obligation, we suggest a bright-line proviso similar to one used elsewhere by the Commission: "no notice is required if the financial obligations incurred, in the aggregate since the last notice filed under this section or the last annual financial information filed, whichever is more recent, constitutes less than 5% of the total outstanding debt of the issuer or obligated person."⁸

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3. The burden placed upon issuers and obligated persons by the Proposal, given its far-reaching scope, will likely be substantial. Organization and considerable time will be required for consideration of which agreements are “financial obligations” and “material” and then which covenants, events of default, remedies, priority rights, or other similar terms affect securities holders before determining whether an event notice is required and what it should report. As the term, financial obligation is broadly defined, it would cover many standard form financing agreements containing financing party non-disclosure restrictions, and issuers and obligated persons may therefore be reluctant or unable to report their terms.

4. For underwriters, absent clarifying guidance providing reasonable scope to a review required to form a reasonable basis of compliance by an issuer or obligated person with the Proposal, the task of reviewing an issuer’s or obligated person’s filings will be extremely difficult as they will contend with the absence of transparency of issuers and obligated persons cited by the SEC⁹ as the primary basis for the Proposal. Absent express guidance from the Commission that underwriters may rely on certifications from issuers and obligated persons on whether financial obligations and events have occurred, underwriters are obliged to second-guess the judgment of an issuer or obligated person as to whether a financial obligation and its terms are material and properly reported, a task that will be difficult and time consuming –substantially more than the 12 minutes per issue estimated by the Commission as described in the NABL OMB Letter referenced below.

5. Under MSRB Rule G-47, brokers, dealers and municipal securities dealers are required to disclose to customers all material information known about the transaction at or before the time of trade, as well as material information that is “reasonably accessible to the market,” i.e., “available publicly through established industry sources.” In addition, they are required to implement policies and procedures to ensure material information regarding securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer.¹⁰ The Release fails to take these burdens into account. In light of the potential volume of information likely to be filed under the Proposal, this failure overlooks substantial burdens of cost and time in the secondary market. Indeed, if as expected, issuers and obligated persons respond to the adoption of the Proposal by filing entire documents, it will be virtually impossible for registered representatives to evaluate the materiality of the information filed with EMMA in order to comply with their obligations under Rule G-47.

6. Accurate measurement of the burdens imposed under the Proposal is essential. We call to the Commission’s attention the comments of the National Association of Bond Lawyers on the Collection of Information Requirements (the “NABL OMB Letter”), in particular the conclusion, based upon a survey of NABL membership, that “the actual burdens are more than 100 times those estimated by the Commission.”¹¹

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We strongly agree with NABL's analysis, in particular that the Commission has grossly underestimated the burdens imposed by the Proposal's collection of information requirements.¹² Limiting the Proposal to disclosure of direct purchases, private placements, and bank loans, as recommended, will greatly alleviate this burden. Should the Commission remain committed to its broad Proposal, interpretive guidance, to the effect that underwriter reliance on certification as to filings by a responsible official of the issuer or obligated person suffices in formation of a reasonable basis for compliance with the Proposal, would alleviate the burden on underwriters and provide needed clarity.

7. In spite of the opportunity to address many of the anachronistic features of the continuing disclosure framework of the Rule in place from its design before commercial use of the internet and identified in the SIFMA 15c2-12 Whitepaper, the Release does not address or seek to implement any approaches to reduce the burden of compliance for issuers, obligated persons, and/or underwriters under the Rule.

8. In light of the above, we believe that the interests of investor protection and market transparency are best met, and excessive burdens hindering fair and efficient markets best avoided by modifying the definition of financial obligation under the Proposal to include only direct purchases, private placements, and bank loans. This would be consistent with our prior letter to you on this subject, the prior proposal by the MSRB, and consistent as well with the NFMA 2015 *Recommended Best Practices in Disclosure for Direct Purchase Bonds, Bank Loans, and Other Bank-Borrower Agreements*.

Since its July 5, 1995 effective date, with the foundation of "deter[ring] fraud in the municipal securities market," the Rule has focused on the particular securities offered in an offering and its continuing disclosure agreement. In contrast, the Proposal focuses on the general credit condition of the issuer or obligated person. The cumulative effect over time of event notices filed pursuant to the proposal would be information about the financial condition of the issuer or obligated person in scope and detail far greater than required or provided under the Rule in a final official statement.¹³ As explained in Appendix A, "Proposed Inversion of Scope of Disclosure," the Proposal appears to effectively reverse decisions the Commission made in November 1994, yet the Commission has not solicited comment on this fundamental change and has not identified one instance of fraud in the municipal securities market precipitated by an undisclosed financial obligation.

The Rule has always been, as the Commission acknowledges, an effort to do indirectly through broker dealer regulation what it cannot do directly. The Commission has carefully designed a structure requiring underwriters to extract by contract primary and continuing disclosure from issuers and obligated persons and, from time to time over

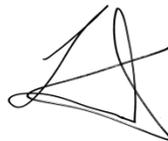
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the course of two decades, increased the disclosure items extracted. The Proposal and the burden accompanying it may place more weight upon that structure than it can effectively bear.

In the Release, the Commission request comments on the proposed amendments. In Appendix B, we respond to certain questions posed in the order presented in the Release. We encourage the Commission to give careful consideration to our observations above and our comments below, as well as the concerns raised in the NABL OMB Letter.

SIFMA sincerely appreciates the opportunity to provide comments on the proposed amendments and your consideration of the views presented herein. We stand ready to provide any additional information or assistance that the SEC might find useful. Please do not hesitate to contact Leslie Norwood at [REDACTED] or [REDACTED] with any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, stylized outline of a triangle.

Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, Executive Director
Robert Fippinger, Chief Legal Officer
Michael Post, General Counsel – Regulatory Affairs

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APPENDIX A

Proposed Inversion of Scope of Disclosure

While the Release asserts “Similar to the other events listed in Rule 15c2–12, the proposed events reflect on the creditworthiness of the issuer or obligated person and the terms of the securities that they issue,”¹⁴ careful examination of prior rulemakings from the 1994 Amendments through the Release illustrate that adoption of the Proposal would reverse Commission decisions made in 1994 and invert the scope of disclosure, a fundamental change to the current Rule. The Proposal shifts from a focus on the particular securities offered under the current Rule to a focus on the general credit condition of the issuer or obligated persons. The result contradicts and effectively reverses previous Commission rulemaking decisions made upon adoption of the 1994 Amendments.¹⁵

Both the Release and the SIFMA 15c2-12 Whitepaper provide a chronology of the 29-year creation and subsequent expansion Rule 15c2-12 as the framework for primary and continuing disclosure in the municipal securities market. In continuing expansion of the Rule, the Commission continues to pursue indirectly what it cannot do directly, as acknowledged in the July 31, 2012 Report on the Municipal Securities Market: “In the absence of a statutory scheme for municipal securities registration and reporting, the Commission’s investor protection efforts in the municipal securities market have been accomplished primarily through regulation of broker-dealers and municipal securities dealers, including through Exchange Act Rule 15c2-12, Commission interpretations, enforcement of the antifraud provisions of the federal securities laws, and Commission oversight of the MSRB.”¹⁶

The foundation for the Rule is “the Commission’s mandate to adopt rules reasonably designed to prevent fraud in Exchange Act Sections 15B(d)(2) and 15(c)(2)”¹⁷ and in 1989 adoption of “Rule 15c2–12 as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices in the municipal securities market.”¹⁸ In November 1994 the Commission amended Rule 15c2-12 (“1994 Amendments”) “to deter fraud and manipulation in the municipal securities market by prohibiting the underwriting and subsequent recommendation of securities for which adequate information is not available,” and prohibiting underwriters from the purchase or sale of municipal securities in connection with an offering, if not exempt, unless it reasonably determined that an issuer or obligated person had undertaken to provide continuing disclosure to central repositories consisting of annual financial information and notice of eleven events, if material.

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At the outset of its efforts to require continuing disclosure in the 1994 amendments to Rule 15c2-12,¹⁹ the Commission at first considered implementing a broad scope for continuing disclosure.²⁰ Many at the time construed the proposal as inflexible and similar to that required of a corporate registrant. Instead the Commission adopted a more narrow, flexible approach to continuing disclosure based upon the final official statement for the securities being sold.²¹ The SEC staff and market participants termed this “the Footprint.” Similarly, the proposed phrase “notice of any of the following events, if material”²² was limited by addition of the phrase, “with respect to the securities being offered.”

The Release acknowledges that the Proposal goes well beyond the Footprint²³ and would collect detailed financial information about the issuer or obligated person having little or no direct relation to the securities being offered other than that it relates to the issuer or obligated person. The ongoing implications of the phrase “with respect to the securities being offered” are not discussed in the Release.²⁴ If amended as proposed, the Rule would parallel the requirements of corporate registrants under Form 8-K.²⁵ In some instances, the requirements placed upon municipal issuers and obligated persons would exceed those placed upon corporate registrants.²⁶

APPENDIX B

The Commission requests comment regarding all aspects of the proposed addition of subparagraph (b)(5)(i)(C) (15) concerning the event notice for the incurrence of a financial obligation of the issuer or obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material. When responding to the requests for comment, please explain your reasoning.

The Commission requests comment relating to the frequency of such event and the utility of this information by investors and other market participants in the secondary market.

- *Is the triggering of the obligation to provide the event notice clear?*
- *Should the rule or guidance explicitly address where an issuer or obligated person incurs a series of related financial obligations, where a single incurrence may not be material but in the aggregate the incurrences would be material?*
- *In such a scenario, when should the trigger of the obligation to provide the event notice occur?*

Response:

No, the triggering event is ambiguous. The event effectively adopts (and is arguably broader than) Form 8-K Item 2.03 without the benefit of definitions and guidance in the Form, Regulation S-K, and guidance from the Division of Corporation Finance and Office of Chief Accountant. The term “material” is not a helpful triggering event, at least in the context of Rule 15c2-12. Because of the experience of issuers and underwriters with the overly broad application of materiality in 144 settled MCDC proceedings, “materiality” is unlikely to serve as an effective filter. Rather the MCDC experience teaches that safety resides in over-disclosure. Issuers are likely to file any obligation, with all documentation, rather than incur cost or risk of review, analysis, and summary. As a result, substantial guidance is required to produce meaningful filings, particularly when contrasted to the robust structure, guidance, review under the corporate integrated disclosure system from which the Proposal is drawn. Application of guidance in daily practice may increase the time and cost incurred by issuers and obligated persons but may reduce time incurred in underwriters due diligence if the result is to provide an organized approach by issuers and obligated persons to compliance.

As a general matter, many issuers and obligated persons continue to lack a disclosure committee or disclosure controls and procedures. As a consequence, issuers and

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obligated persons will either assess need for event filing and content in a random and likely inconsistent manner, seek and incur cost of outside assistance in doing so, or avoid cost and time and file documentation of every obligation incurred.

Are there other events that should be included in subparagraph (b)(5)(i)(C)(15) of the Rule?

Response:

No.

Should any of the events proposed to be included be eliminated or modified?

Response:

Yes. Our prior letter encouraged an event notice limited to direct purchases, private placements, and bank loans. For the reasons explained above, we believe that presents the most viable approach, one achieved by defining financial obligation as meaning a direct purchase, private placement, or bank loan.

The Commission further requests comment as to whether the materiality conditions are appropriate conditions for subparagraph (b)(5)(i)(C) (15) of the Rule.

Response:

As noted above, because of the experience of issuers and underwriters with the overly broad application of materiality in 144 settled MCDC proceedings, “materiality,” at least in the context of Rule 15c2-12, is unlikely to serve as an effective filter. Rather that experience teaches that safety resides in over-disclosure. Instead, we suggest the Commission revise the definition of financial obligation under the Proposal to direct purchases, private placements, and bank loans.

Together with the above, or should the Commission not revise the definition as recommended, we suggest the Commission add to proposed event (15) the following, modeled on Form 8-K Item 3.02 (b), limiting the requirement in 3.02 (a) to furnish certain information in the event of the sale of equity securities in a transaction not registered under the Securities Act:

No notice is required under this event if the financial obligations incurred, in the aggregate since its last notice filed under this section or its last annual report, whichever is more recent, constitutes less than 5% of the total outstanding debt of the obligated person.

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With respect to modifications of the rights of holders of any securities, we recommend the following addition, modeled on Form 8-K Item 3.03(b) Material Modification to Rights of Security Holders:

If the rights evidenced by any debt securities have been materially limited or qualified by the issuance or modification of any other debt securities by the obligated person, briefly include in the notice the date of issuance or modification, the general effect of the issuance or modification of such other securities upon the rights of the holders of the affected debt securities.

Should any or all of the items included in the proposed rule text not be subject to the proposed materiality condition?

Response:

The scope needs to be narrowed, not broadened, as the provision of information under the Proposal is likely to be overwhelming.

Are there any events that should be added to subparagraph (b)(5)(i)(C)(15) of the Rule, but should not be subject to a materiality condition?

Response:

No.

The Commission further requests comment as to whether “any of which affect security holders” is an appropriate condition to include with respect to “agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person” in subparagraph (b)(5)(i)(C)(15) of the Rule.

- ***Should any of the items included in the proposed rule text not be subject to the “any of which affect security holders” condition?***
- ***Should the proposed condition be modified to only capture events which adversely affect security holders?***

Response:

We believe the best approach is to employ the language modeled on Form 8-K Item 3.03(b) Material Modification to Rights of Security Holders proposed above.

Should the Commission provide additional guidance on the types of information issuers and obligated persons should consider in drafting event notices?

Response:

Yes. As noted above, we believe substantial guidance is required to produce meaningful filings, particularly when contrasted to the structure, guidance, review, and enforcement of the corporate integrated disclosure system from which the Proposal is drawn.

The Commission also requests comment regarding the benefits and costs of adding this proposed event.

Response:

We agree with the observations made in the NABL OMB Letter and believe adoption of the Proposal will incur substantial costs far in excess of Commission estimates with the result that benefits are far outweighed by costs. Further, we believe the Commission should give consideration to the numerous opportunities to reduce costs and simplify Rule 15c2-12 described in the SIFMA 15c2-12 Whitepaper.

The Commission requests comment regarding all aspects of the proposed definition of financial obligation.

- *Are there any more appropriate alternative definitions? For example, would it be more appropriate to include a definition that does not identify each type of financial obligation?*
- *Should each type of financial obligation included in the proposed definition be defined? Or is there an existing definition of financial obligation that the Commission could instead use?*
- *Are there any financial obligations that would not be covered in the proposed definition that should be?*
- *Should other contracts that create future payment obligations (e.g., a contract for waste disposal services) be included in the proposed definition?*
- *Should any of the terms included in the definition be modified? Should any terms be added to the definition to achieve the stated goal?*

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Response:

We recommend the Commission limit the definition of financial obligation to direct purchases, private placements, and bank loans. If the phrase “financial obligation” is not revised, as the definition is based on the definition of “financial obligation” provided under Item 2.03 of Form 8-K, conform and add the definitions provided within the definition under Form 8-K.

Comment is also requested on whether including a definition in the Rule is necessary.

Response:

Yes, for purposes of avoiding extensive production of insignificant data.

The Commission requests comment regarding all aspects of the proposed addition of subparagraph (b)(5)(i)(C) (16) concerning the event notice for an occurrence of a default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the issuer or obligated person, any of which reflect financial difficulties.

- *Are there additional events that should be specified in the rule text?*
- *Is “other similar event” broad enough to capture all events that upon their occurrence may reflect that an issuer or obligated person is in financial difficulty?*
- *Are there events included in the proposed rule text that should be omitted?*

Response:

We recommend addition of the phrase “including written or verbal waivers” to “modification of terms” and of the phrase “previously disclosed material” before the term “financial obligation.” We also recommend addition of the following, modeled on Form 8-K Item 3.03(b) Material Modification to Rights of Security Holders:

If the rights evidenced by any debt securities have been materially limited or qualified by the issuance or modification of any other debt securities by the obligated person, briefly include in the notice the date of issuance or modification, the general effect of the issuance or modification of such other securities upon the rights of the holders of the affected debt securities.

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The Commission further requests comment as to whether the qualification “reflecting financial difficulties” is appropriate for subparagraph (b)(5)(i)(C) (16) of the Rule.

- *Should any or all of the items included in the proposed rule text not be subject to the proposed qualification?*
- *Although the concept of “reflecting financial difficulties” has been used since the adoption of Rule 15c2–12, the Commission asks whether it should provide guidance regarding the use of this concept in the context of these proposed amendments to Rule 15c2–12.*

Response:

We recommend the Commission consider replacement of “reflecting financial difficulties” with “materially impairs the ability of the issuer/obligated person to pay debt service as scheduled on outstanding obligations,” or in the alternate, “materially impairs the creditworthiness of the issuer/obligated person.”

In addition, commenters should address the benefits and costs of this aspect of the proposed amendments.

Response:

As stated above, adoption of the Proposal will incur substantial costs far in excess of Commission estimates (see NABL OMB Letter), with the result that the benefits achieved are far outweighed by costs imposed. The Commission does not seek to implement any approaches to reduce the burden of compliance for issuers, obligated persons and/or underwriters identified in the SIFMA Rule 15c2-12 Whitepaper.

In addition to the comments requested throughout the proposing release, comment is requested on whether the proposed amendments would further enhance the availability of important information to investors, and whether the proposed amendments would help facilitate investors’ ability to obtain such information.

Response:

The likely result of adoption of the Proposal is the flooding of EMMA with extensive documentation of every obligation incurred by an issuer or obligated person, requiring extensive review and analysis to extract what significance if any the obligation has to issuer or obligated person’s creditworthiness or ability to pay its obligations as scheduled. Substantial effort will be required by investors to discern the relevance, if any, of material filed.

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Further, the Commission seeks comment regarding the impact of the proposed amendments on Participating Underwriters, dealers, issuers, obligated persons, investors, the MSRB, information vendors, and others that may be affected by the proposed amendments.

Response:

Same as above and in the main body of our letter.

In addition, the Commission seeks comment on whether there are alternative approaches or modifications to the Commission's proposed approach to achieve our objectives with regard to the two events proposed here to be included in Rule 15c2-12(b)(5)(i)(C).

Response:

Same as above and in the main body of our letter.

Commenters are requested to indicate their views and to provide any other suggestions that they may have.

Response:

We agree with the observations made in the NABL OMB Letter and reference that letter, available here:
<https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=1099>

Pursuant to 44 U.S.C. 3506(c)(2), the Commission solicits comments regarding:

- (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;*
 - (2) the accuracy of the Commission's estimate of the burden of the revised collections of information;*
 - (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected;*
 - (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology;*
- and*

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(5) whether there are cost savings associated with the collection of information that have not been identified in the proposal.

Response:

As we have observed above, the Release ignores the multiple opportunities identified in SIFMA 15c2-12 Whitepaper to reduce costs and improve efficiency. Imposition of additional burdens upon underwriters as well as issuers and obligated persons should not be added without first taking steps to reduce the costs and burdens under the existing Rule.

To assist the Commission in evaluating the costs and benefits that could result from the proposed amendments to the Rule, the Commission requests comments on the potential costs and benefits identified in this proposal, as well as any other costs or benefits that could result from the proposed amendments to the Rule. In addition, the Commission also seeks comment on alternative approaches to the proposed amendments and the associated costs and benefits of these approaches. Specifically, the Commission seeks comment with respect to the following questions:

- *Are there any costs and benefits to any entity that are not identified or misidentified in the above analysis?*
- *Are there any effects on efficiency, competition, and capital formation that are not identified or misidentified in the above analysis? Please be specific and provide analysis and data in support of your views.*

Response:

Please see our comments above as well as the NABL OMB Letter.

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

² SEC Release No. 34-80130; 82 Fed. Reg. 13928 (March 15, 2017).

³ See <http://www.sifma.org/issues/item.aspx?id=8589960638> for the SIFMA letter and <http://www.sifma.org/issues/item.aspx?id=8589960637> for the AMG letter.

⁴ See <http://www.sifma.org/issues/item.aspx?id=8589959201>

⁵ See Item 3.02(b) of Form 8-K for sales of equity securities in a transaction not registered under the Securities Act. We recommend addition of “no notice is required if the financial obligations

incurred, in the aggregate since the last notice filed under this section or the last annual financial information filed, whichever is more recent, constitutes less than 5% of the total outstanding debt of the issuer or obligated person” as an effective qualifier.

⁶ Items 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant, 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement, and 3.03 Material Modifications to Rights of Securities Holders.

⁷ Under the SEC Division of Enforcement’s Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, a voluntary program targeting material misstatements and omissions in municipal bond offering documents relating to prior compliance with continuing disclosure agreements, 72 underwriting firms and 72 issuers and obligated persons settled enforcement proceedings for violation of the antifraud provisions of federal securities laws. *See*: SEC Charges California School District with Misleading Investors (Press Release 2014-133, July 8, 2014); Completes Muni-Underwriter Enforcement Sweep (Press Release 2016-18); and SEC Charges 71 Municipal Issuers in Muni Bond Disclosure Initiative (Press Release 2016-166 Aug. 24, 2016)

⁸ *See supra* note 5.

⁹ 82 Fed. Reg. 13930.

¹⁰ Rule 15c2-12(c); MSRB Rule G-47 (Supplementary Material .04).

¹¹ Letter of Clifford M. Gerber, President, National Association of Bond Lawyers of April 11, 2017, available at: <https://www.sec.gov/comments/s7-01-17/s70117-1698938-149892.pdf>

¹² **Gross Underestimation of Burden:** The Commission has grossly underestimated the burdens imposed by the Proposed Amendments’ collection of information requirements.

a. **Reliance on Inapposite, Faulty Prior Estimates:** The Commission estimated the time required by issuers to prepare and file notices of the new events (2 hours per event), as well as the time required for underwriters to compare issuer certifications of events to filed notices of the events (12 minutes per offering). The Commission, however, simply used prior time estimates for that purpose, even though (a) the new events impose qualitatively different compliance obligations, (b) the Commission was previously informed by knowledgeable industry participants that its prior estimates had greatly underestimated the compliance burdens of the existing Rule, and (c) as discussed in 3. below, as a result of subsequent Commission actions, its prior estimates are no longer indicative.

b. **Inconsistency with Commission Enforcement Positions:** In estimating underwriter compliance burdens, the Commission assumed that underwriters would employ procedures that are far less time-consuming than those the Commission previously stated are required to be followed to comply with the antifraud provisions of the federal securities laws.

c. **Overlooked Compliance Burdens:** The Commission failed to estimate the time required (a) by issuers to identify and evaluate events for materiality, (b) by underwriters to review financial obligation documents to assess materiality, and (c) by brokers to obtain and review event filings when they conduct secondary market transactions.

d. **Off by Over Two Orders of Magnitude:** Based on responses to a questionnaire completed by more than 70 NABL members, NABL estimates the actual annual burdens of the proposed collection of information requirements (in hours) to be as follows, more than 100 times (i.e., more than two orders of magnitude) greater than the Commission’s estimates. *See* NABL OMB Letter at 1.

¹³ The Commission expressly acknowledges in the Release that the Proposal will require periodic reporting more extensive than currently required annually. “The Commission understands that to the extent information about financial obligations is disclosed and accessible to investors and other market participants, such information currently may not include certain details about the financial obligations. For example, disclosure about a financial obligation in an issuer’s or obligated person’s audited financial statements or in an official statement may be limited to the amount of the financial obligation and may not provide certain details, such as whether the financial obligation contains covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation, any of which affect security holders, if material.” 82 Fed. Reg. 13930.

¹⁴ *Id.* 13935.

¹⁵ *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

¹⁶ Report at iii.

¹⁷ *Id.* at 13931.

¹⁸ *Id.* citing Exchange Act Release No. 34–26985 (June 28, 1989), 54 Fed. Reg. 28799 (July 10, 1989).

¹⁹ 59 Fed. Reg. 12759 (Mar. 17, 1994).

²⁰ 59 Fed. Reg. 59590, 59593 (Nov. 17, 1994).

²¹ *Id.* “Under the amendments as adopted, the financial information and operational data to be provided on an annual basis pursuant to the undertaking will mirror the financial information and operating data contained in the final official statement with respect to both the issuers and obligated persons that will be the subject of the ongoing disclosure, and the type of information provided (emphasis added).”

²² 59 Fed. Reg. 12759.

²³ *See supra* note 13.

²⁴ The phrase “with respect to the securities being offered” appears once in the Release, under IV. Paperwork Reduction Act at 82 Fed. Reg. 13942.

²⁵ Items 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant, 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement; Item 3.02 Unregistered Sales of Equity Securities; and Item 3.03 Material Modifications to Rights of Security Holders.

²⁶ For example, Item 2.03(c)(4) of Form 8-K defines financial obligation as excluding short-term obligations arising in the ordinary course of business, while the Release states: “[a]s proposed, the term debt obligation is intended to capture short-term and long-term debt obligations of an issuer or obligated person.” *Id.* at 13937.