May 15, 2017

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Amendments to Municipal Securities Disclosures (Release No. 34-80130; File No. S7-01-17)

Dear Mr. Fields:

Better Markets[1] appreciates the opportunity to comment on the above-captioned proposal ("Proposal" or "Rule Proposal") released for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). We commend the Commission and the staff for a pro-investor and pro-transparency Proposal, and with some minor additions, we support its approval by the Commission. But we also implore the Commission to act on other, equally important policy matters that would better protect investors and improve the municipal securities markets.

SUMMARY

The Commission proposes to amend Rule 15c2-12 under the Securities Exchange Act of 1934 ("Exchange Act") to require underwriters of certain municipal securities to ensure that the issuer or obligated person has agreed in its continuing disclosure agreement with the underwriter to provide disclosures of certain triggering events within 10 business days. The Proposal also adds "financial obligations" (i.e., bank loans and other debt obligations) to the list of triggering events requiring timely disclosure. The Proposal, if approved as released, would enable investors and others to gain access to new material information, in timely fashion, that could be used in making better-informed investment decisions.

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

Today, municipal securities investors often wait more than a year to learn whether the issuer of the municipal securities has entered into any covenants or priority rights agreements with new lenders or other investors that could potentially adversely affect the rights of existing "old" bondholders.[2] Additionally, today, underwriters of municipal bonds are not required to learn whether the issuer they have engaged has, in addition to issuing municipal debt, borrowed from other lenders. Such bank loans have increasingly become an important source of funding for municipalities, and have grown substantially in the past five years. The FDIC Call Report data shows commercial bank loans to state and local governments have more than doubled in total dollar amount since 2010, from $66.5 billion to $153.3 billion in 2015.[3] Such loans can have a significant impact on the financial condition of the issuer and in turn the creditworthiness of the bond. Yet this important information is rarely disclosed in timely and accessible fashion to municipal securities investors.

In sum, the proposed amendments would provide the kind of information investors could use to "better assess the risks involved with an investment in a municipal security, and therefore make more informed investment decisions."[4] Investors cannot adequately protect themselves without having access to this material information.

BACKGROUND

The Commission and the Congressionally-designated self-regulatory organization for the municipal securities market, the Municipal Securities Rulemaking Board ("MSRB"), have traditionally overseen the municipal securities markets by regulating the intermediaries such as underwriters, broker-dealers, and, since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), municipal advisors. While Congress has expressly barred the Commission and the MSRB from regulating the actual issuers (i.e., state and local governments) of municipal securities,[5] it has, overtime,

2 Release at 13929-30.

3 Release at 13947.

4 Release at 13951.

5 This prohibition is often referred to as the Tower Amendment. It essentially prohibits the SEC and the MSRB from requiring the registration of bond issues, unlike the world of equities, where registration is the linchpin of the regulatory framework. Section 15B(d) of the Securities Exchange Act of 1934 states: ''(1) Neither the Commission nor [the MSRB] Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or [the MSRB] Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities. (2) The [MSRB] Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise, to furnish to the [MSRB] Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer: Provided, however, That the [MSRB] Board may require municipal securities brokers and municipal securities dealers or municipal advisors to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title.''

strengthened the regulators' authority to promulgate rules that regulate the activities of intermediaries. For example, Sections 15c(2) and 15B(d)(2) of the Exchange Act expressly require the Commission to adopt rules that are reasonably designed to prevent fraud in the municipal securities markets. Additionally, Section 975 of the Dodd-Frank Act, for the first time, required the registration of municipal advisors with the Commission and MSRB, and mandated that municipal advisors adhere to a fiduciary duty to the municipal securities issuers, some of whom lack a high level of financial sophistication since they seldom issue bonds.

Commission Rule 15c2-12 Protects Investors by Requiring Underwriters and Broker-Dealers To Obtain Material Information From Issuers and Provide It to Investors.

The Commission exercises its mandate to prevent fraud in the municipal securities markets largely through its Rule 15c2-12. Adopted in 1989, Rule 15c2-12 is designed to "prevent fraudulent, deceptive or manipulative acts or practices in the municipal securities markets."[6] The Rule requires underwriters to obtain and review the official statement[7] from the issuer and provide it to prospective investors, prior to agreeing to bid, purchase, offer, or sell municipal securities.

In 1994, to further "deter fraud and manipulation in the municipal securities market," the Commission amended Rule 15c2-12 to now prohibit the underwriting and subsequent recommendation of municipal securities for which the underwriter has not been able to obtain adequate information from the issuer. The 1994 Amendments also prohibited the underwriting of municipal securities if the underwriter had not "undertaken in a written agreement or contract for the benefit of holders of such securities to provide continuing disclosure of information regarding the security and the issuer" for the life of the municipal security.[8]

This obligation to provide "continuing disclosures" ensured that investors of municipal securities would have access to: (i) annual financial and operating information and audited financial statements; (ii) notices of the occurrence of certain credit-related events; and (iii) notices of the failure of an issuer or obligated person to provide required annual financial information, on or before the date specified in the continuing disclosure agreement.[9] Finally, the 1994 Amendments prohibited a "dealer from recommending the purchase or sale of a municipal security unless it has procedures in place that provide

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6 Release at 13931.

7 An "official statement" is "a document prepared by or on behalf of the issuer of municipal securities in connection with a primary offering that discloses material information on the offering of such securities. Official statements typically include information regarding the purposes of the issue, how the securities will be repaid, and the financial and economic characteristics of the issuer, conduit borrower or other obligated person with respect to the offered securities. Investors and market intermediaries may use this information to evaluate the credit quality of the securities and potential risks of the primary offering." *See* MSRB Glossary at http://www.msrb.org/glossary/definition/official-statement-_os_.aspx.

8 Release at 13931 & n. 40.

9 Release at 13932.

reasonable assurance that such dealer will promptly receive any event notices and failure to file notices with respect to that security."[10]

MSRB's Role in Regulating the Municipal Securities Market.

Since its creation by Congress in 1975 as the primary self-regulatory organization for the municipal securities market, the MSRB has also regulated the activities of municipal securities underwriters, broker-dealers, and municipal advisors. In pursuing its mission of investor protection, the MSRB rules govern the underwriting of and trading in municipal securities. It also promulgates rules on professional qualifications, fair dealing, and market transparency.

In 2008, to facilitate the collection and dissemination of both official statements and continuing disclosure documents, the Commission approved the MSRB's creation of the Electronic Municipal Market Access ("EMMA") portal. EMMA today centralizes and offers access to disclosure documents (submitted either by issuers or the underwriters they engage) and secondary market trading data (submitted by broker-dealers) free of charge to investors.

The Proposal, if approved, would in essence require underwriters to obtain from issuers and provide to EMMA the above mentioned new disclosures. EMMA would in turn make these disclosure documents available to investors.

COMMENTS

The Proposal Would Empower Investors By Providing Material Information in Timely Fashion

We agree with the Commission that the Proposal would "facilitate investors' and other market participants' access to important information in a timely manner, help to enhance transparency in the municipal securities market, and improve investor protections."[11] We further believe that empowering investors with more complete and useful information regarding an issuer's indebtedness level would help investors better appreciate the risks involved with the investment, and in any case, help investors more accurately price their investments. As the Commission argues, when an issuer's liquidity and creditworthiness is impacted, the "credit quality and price of the issuer's outstanding municipal securities could be affected."[12]

We also believe informing existing investors in timely fashion whether the issuer has entered into new agreements with lenders containing covenants or re-scheduled payment priorities that might affect existing investors' seniority rights is critically important, as that information would bear directly on existing investors' decision whether to maintain or

10 *Id.*
11 Release at 13929.
12 Release at 13936 & n. 93.

liquidate their investments. The Proposal would require underwriters to obtain from issuers and provide to EMMA within 10 business days just such critically important information.

The Proposal Would "Level the Playing Field" For Market Participants.

We agree with the Commission that the Proposal has the potential to reduce "information asymmetries between investors and other more informed parties such as issuers, obligated persons, counterparties, and lenders, and therefore enhance investor protection."[13] Today, issuers may enter into agreements with new lenders that afford preferential terms to the new lender. For example, "a bank loan agreement could give the lender a lien on assets or revenues that also secure the repayment of an issuer's outstanding municipal securities which could adversely affect the rights of existing security holders."[14]

Because these terms are not disclosed publicly, the new lender and issuer have an informational advantage over existing investors. The Proposals aims to increase transparency in this area. As the Commission argues, "if disclosure is not available to security holders about such events, they will be unable to take any actions they would have taken had they been informed, such as exiting."[15] The Commission would empower investors by requiring the timely disclosure of information related to the same investors' contractual rights, especially in instances when those rights have been negatively affected by the issuer's agreeing to preferential terms to secure new bank loans.

The Proposal has the Potential to Reduce Borrowing Costs for Issuers.

The Proposal has the potential to reduce borrowing costs for issuers through increased transparency and investor confidence gained by the new disclosures. As the Commission states:

> "in the context of corporate issuers, economic theories suggest that information asymmetry can lead to an adverse selection problem and therefore reduce the level of liquidity for firms' equity. In an asymmetric information environment, investors recognize that issuers may take advantage of their position by issuing securities at a price that is higher than justified by the issuer's fundamental value. As a result, investors demand a discount to compensate themselves for the risk of adverse selection. This discount translates into a higher cost of capital. By committing to increased levels of disclosure, the firm can reduce the risk of adverse selection faced by investors, reducing the discount they demand and ultimately decreasing the firm's cost of capital."[16]

Based on the above, and our understanding of the benefits of investor confidence born out of transparent and stable markets, we join the Commission in its preliminary

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13 Release at 13951.
14 *Id.*.
15 *Id.*
16 Release at 13952.

analysis that increased disclosure in the municipal securities market will reduce the costs of raising capital for issuers.

The Commission Should Include Crowdfunding-related Obligations in the Definition of Financial Obligation.

While we think the "financial obligation" definition as proposed is appropriately broad, in response to the Commission's request for comment whether other financial obligations should be included in the list of obligations requiring timely notice, we believe material information related to crowdfunding campaigns or public projects that pledge future revenues to backers of the projects should be included in the list. If these projects are neither financed through the issuance of municipal securities, nor through loans from banks, and yet the issuer has still pledged future revenues to the funders, investors would benefit knowing about them.

The Larger Challenges the Commission Must Address.

While the Proposal is a positive step forward in improving oversight of the municipal securities market, it is modest in scope and incremental in effect. In addition to approving the Proposal, we believe that there are other more substantial flaws in this market that the Commission should address as soon as possible. Any improvement in this market will have a particularly significant and direct impact on retail investors, as over 2/3 of municipal debt is held by retail investors. The Commission should address other longstanding deficiencies in the regulatory framework governing the municipal securities markets. Here three of those most important problems that deserve the Commission's prompt attention:

1. Disclosure documents are not user-friendly. Today, retail investors remain less informed and empowered than they should be because some of the most essential disclosure documents, such as the official statement and even the continuing disclosure documents contemplated by this very Proposal, are not standardized or clear, nor do they lend themselves easily to affordable analysis by market professionals. Only the most sophisticated users are able to digest and process these documents, while intermediaries that serve retail investors may not be able to afford the manpower that is necessary for the analysis of non-uniform and non-machine readable documents.

2. Pre-Trade Transparency: Municipal securities markets are particularly opaque and illiquid. There is near complete absence of pre-trade price information. In order to provide more price transparency, the Commission must require any trading venues that cater to the municipal securities market to publicly disseminate both their best bid and offer prices, and the responses to their "bids wanted" auctions. For example, as the Commission staff itself wrote back in 2012, "ATS account for a substantial portion of the number of transactions (perhaps as high as 30-50 percent), and appear to be used primarily for smaller retail size orders. Accordingly, the prices displayed by dealers on ATSs – which today often are available only to ATS subscribers – represent a potentially valuable source of

pricing information to retail investors and their broker-dealers. Enhancing the transparency of the best prices on these platforms, and assuring that market participants have fair access to them, could facilitate best execution, improve market efficiency, and promote price competition in municipal securities."[17] There is no better time to do this than now.

3. Improve and Better Oversee the Self-Regulation of the Market: The Commission and the investing public rely heavily on the self-regulatory organizations to ensure that market participants do not manipulate the markets and exploit investors. This mission of ensuring market integrity and investor protection should be the governing principle at the SROs that regulate the municipal securities markets. Both the MSRB and the Financial Industry Regulatory Authority (FINRA) (which enforces MSRB's rules and generally examines broker-dealers) have investor protection mandates, but both are dominated by the undue influence of the industry. Self-regulation can work only when it is combined with strong oversight by the federal government, which is statutorily charged and obligated to protect, empower, and advance investors' interests. The Commission must do more to ensure that the governance of the SROs, their rules, and their enforcement practices are all designed and applied to more effectively achieve these goals.

CONCLUSION

We encourage the Commission to approve the Proposal as it will empower investors with new, material information. It will bring much-needed transparency into the municipal securities markets, help investors and other market participants more accurately analyze the indebtedness of the issuer, and provide a deeper understanding of the overall health and stability of the municipal securities market. However, the Commission should not be satisfied with the approval of this Proposal alone. The Commission should better fulfill its mission of investor protection by acting on other, even more fundamental policy reforms that are necessary to bring our municipal securities markets into the 21st Century.

Sincerely,

Dennis M. Kelleher
President & CEO

[17] *See* "Report on the Municipal Securities Market." U.S. Securities and Exchange Commission. Available at https://www.sec.gov/news/studies/2012/munireport073112.pdf. p.144.

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