



Rule 15c2-12 Whitepaper

April 2016

OVERVIEW

This Rule 15c2-12 Whitepaper has been prepared by the Securities Industry and Financial Markets Association (“SIFMA”) to offer a current perspective on the existing framework for provision of disclosure in the municipal securities market, the relative burdens placed upon municipal market participants by that framework, and opportunities for improvement in framework structure and guidance interpreting application and compliance. The Whitepaper begins with a review of the history of Rule 15c2-12 up to and including the ongoing MCDC initiative. Potential revisions to the Rule and topics for new or revised guidance as to compliance with the Rule are then discussed. The Whitepaper concludes with an invitation to the Commission for dialogue and a request for action.

HISTORY

Rule 15c2-12,¹ adopted by the Securities and Exchange Commission (the “SEC” or the “Commission”) under the Securities Exchange Act of 1934 (the “Exchange Act”) provides the framework for disclosure in the municipal securities markets by the issuers of municipal securities (“Issuers”). Federal securities laws exempt state and local governments and most other Issuers from the registration and reporting requirements under the Exchange Act and the Securities Act of 1933 (the “Securities Act”). As a result, the SEC may not directly require Issuer disclosure content or timing; rather the antifraud provisions of federal securities law alone reach the actions of and statements made by Issuers in connection with the offer, purchase and sale of their securities. Instead, the SEC has looked to the party it does regulate in municipal securities transactions -- brokers, dealers, and municipal securities dealers (“municipal broker dealers”) -- to establish a uniform framework for disclosure by adopting the Rule.

On the same day in 1988 that the SEC delivered its *Staff Report on the Investigation in the Matter of Transactions in Washington Public Power Supply System Securities* to Congress, the SEC proposed Rule 15c2-12, together with an interpretation of municipal underwriter responsibilities.² The SEC adopted Rule 15c2-12 in June 1989 mandating that municipal broker dealers contract with Issuers when underwriting their securities to receive preliminary and final official statements satisfying the terms of and at the times specified by the Rule.³ The adopting release also modified the interpretation of municipal underwriter responsibilities in the proposing release. Rule 15c2-12 introduced the voluntary use of private repositories called Nationally

¹ 17 CFR 240.15c2-12. The text of Rule 15c2-12 is provided in Attachment A.

² Securities Exchange Act Release No. 26100 (Sept. 22, 1988), 53 FR 37778.

³ Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799.

Recognized Municipal Securities Information Repositories or “NRMSIRs.” One year later, the Municipal Securities Rulemaking Board (“MSRB”) adopted and the SEC approved MSRB Rule G-36, requiring underwriters to provide final official statements and advance refunding documents to the MSRB; the documents were then made available on the MSRB’s MSIL system.⁴

Five years later, the 1994 amendments to the Rule 15c2-12 were added, prohibiting underwriters from participating in most municipal offerings in the absence of a second contract by an issuer or obligated person for the benefit of bondholders to provide annual financial information and certain event notices during the life of the bonds. This required continuing disclosure contract, or “CDA,” joined with the previously required contract to provide primary offering disclosure to complete the municipal market disclosure framework.

Eight months before adopting the continuing disclosure amendments to Rule 15c2-12, the SEC issued its *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others* (the “Interpretive Release”).⁵ The Interpretive Release is the only instance in which the Commission has addressed Issuers with respect to their disclosure obligations under the antifraud provisions. As the continuing disclosure amendments to Rule 15c2-12 came eight months after the Interpretive Release and addressed the obligations of municipal broker dealers only, the Commission did not have the opportunity to address the continuing disclosure obligations of Issuers nor has it found an occasion to do so since.

NRMSIRs along with the small issue state-specific vehicle State Information Depositories or “SIDs, were the critical operating component under the Rule, but proved to be an unreliable means of collecting and disseminating primary and continuing disclosure, as pointed out by the Municipal Securities Rulemaking Board (“MSRB”) as early as December 2000.⁶ The MSRB’s concerns were echoed by participants in the SEC’s 2001 Municipal Market Roundtable, yet remained unaddressed for seven years.⁷ In December 2008, the SEC amended Rule 15c2-12 to correct the failed NRMSIR structure by approving the MSRB’s EMMA system, withdrawing recognition of the then existing NRMSIRs and designating EMMA as the sole NRMSIR effective July 1, 2009. At the time, the Commission acknowledged:

Under the current system, it is not possible to determine with certainty whether gaps in the continuing disclosure document collections of NRMSIRs are the result of failures by issuers to provide continuing disclosure documents as provided in their continuing disclosure agreements or failures of NRMSIRs to maintain accurate indices or adequate document retrieval systems.⁸

In 2009, Former Commissioner and Chair Walter announced the undertaking of a revision to the 1994 Interpretive Guidance. Market participants and representative groups such as NABL

⁴ Securities Exchange Act Release No. 28081 (June 1, 1990), 55 FR 23333. “MSIL” stood for municipal securities information library.

⁵ Securities Act Release No. 7094, Exchange Act Release No. 33741 (March 9, 1994).

⁶ See *MSRB Discussion Paper on Disclosure in the Municipal Securities Market* (Dec. 21, 2000).

⁷ Available at: <http://www.sec.gov/info/municipal/roundtables/thirdmuniround> and cited in the adopting release to the 2010 amendments to Rule 15c2-12, 75 FR 33100, 133123, n.331 (June 10, 2010).

⁸ Rel. No. 34-59062, 73 FR 76104, 76109 (Dec. 15, 2008).

prepared and submitted extensive comment letters to the SEC.⁹ While referenced by the Commission in footnotes to the 2012 Report, the update on interpretive guidance has not occurred.

The Rule was amended again in May of 2010, increasing the number of event notices, removing the “if material” qualifier from most events, adding a “within ten business days of occurrence” time requirement, and removing the exemption for VRDOs from the continuing disclosure agreement (“CDA”) requirement (but retaining the primary offering exemption). The Commission also “determined to further expound upon its prior interpretations regarding municipal underwriters’ responsibilities” in the 2010 amendments adopting release.¹⁰

In March 2012, the SEC Office of Compliance Inspections and Examinations issued *Strengthening Practices for the Underwriting of Municipal Securities*, a National Examination Risk Alert,¹¹ “on compliance measures to help broker-dealers fulfill their due-diligence duties when underwriting offerings of municipal securities.”¹²

On July 31, 2012, the Commission released its *Report on the Municipal Securities Market*. The Report “reflects input received from market participants through the public field hearings, meetings with Staff, and submissions to the Commission, as well as Staff-developed information, on the current state of the municipal securities market.” The Report makes recommendations and observations, including “the Commission could consider issuing updated interpretive guidance regarding disclosure obligations of municipal securities issuers and others” but provides no interpretive guidance on any topic.

Two years later, the SEC announced the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, under which the SEC Division of Enforcement offered to “recommend favorable settlement terms to issuers and obligated persons involved in the offer or sale of municipal securities (collectively, “issuers”) 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.”¹³

On June 18, 2015, September 30, 2015, and February 2, 2016 the SEC announced charges against 36, 22, and 14 firms respectively for “fraudulent municipal bond offerings” under the MCDC Initiative.¹⁴

POTENTIAL REVISIONS AND GUIDANCE

When the disclosure framework for the municipal securities market was put in place, market communication was paper-based. Disclosure was disseminated physically by overnight courier,

⁹ See NABL letters of September 2, 2011 and May 14, 2010, available at <https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=70>

¹⁰ Id., at 33124.

¹¹ Available at: <http://www.sec.gov/about/offices/ocie/riskalert-muniduediligence.pdf>

¹² SEC Press Release 2012-48 (Mar. 19, 2012).

¹³ *Municipalities Continuing Disclosure Cooperation Initiative* Division of Enforcement (Mar. 19, 2014), available at: <http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml>.

¹⁴ 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>.

Today disclosure dissemination occurs within fractions of a second and is available to anyone with access to the web, along with rating agency reports, market information, and news relating to the issuer, its locality, and events affecting all of the foregoing. Markets and market practice have evolved at a similar breakneck pace. The framework reflects a time long past, not the market of today.

The initial architecture of Rule 15c2-12 -- the requirements relating to official statements, preliminary, “deemed final,” and final, in a primary offering, and exemptions to those requirements -- was designed 26 years ago. The additional architecture for continuing disclosure was added 21 years ago. While the 2008 amendments resulting in the MSRB’s role as the sole NRMSIR have allowed the MSRB to begin to harmonize accessibility of EMMA based disclosure with the extraordinary advances in technology and changes in market practice since the advent of the Rule, the same may not be said of the collection of disclosure information pursuant to the Rule itself. In addition, the experience of many market participants in the MCDIC Initiative served to highlight aspects of the Rule that may be outdated or could be more efficient. That same experience also served to highlight the need for revised or new guidance on compliance with the Rule. We have set out below a list of features of the Rule that may be ripe for revision, together with our recommendations on each. We then set out topics for new or revised guidance with respect to compliance with the Rule, and suggestions for interpretive guidance that would likely benefit Issuers and obligated persons in compliance with their CDAs and in assessing what constitutes “any instances in which [a] person ... failed to comply, in all material respects, with any previous undertakings in a written contract or agreement” when preparing a “final official statement” within the meaning of the Rule.

Suggested Revisions

- Deletion of 15c2-12(b)(5)(i)(C)(11) “Rating changes” as no longer necessary in light of provision on EMMA.

SIFMA recommends:

- Deletion of 15c2-12(b)(5)(i)(C)(11), accompanied by
- SEC amendments to Exchange Act Rule 17g-7, disclosure requirements for Nationally Recognized Statistical Rating Organizations requiring provision to EMMA of rating changes for municipal securities.
- Revise 15c2-12(b)(4) by eliminating “the earlier of [(i) and (ii)] and replacing it with “posted on EMMA.”

SIFMA recommends:

- Revision of 15c2-12(b)(4) to read: “ From the time the final official statement becomes available on EMMA until the closing of the Offering, the Participating Underwriter in an Offering shall provide a copy of the final official statement to any potential customer in accordance with the customer disclosure requirements of the Municipal Securities Rulemaking Board.
- Similarly revise 15c2-12(b)(3).

- Revision of Rule 15c2-12 (d)(1)(i) to read “Are sold during the [underwriting period] [primary offering disclosure period] to no more than...”

SIFMA recommends:

- Revision of Rule 15c2-12 (d)(1)(i)(A) to read “Is an SMMP (as defined by the MSRB), Qualified Institutional Buyer (as defined under Rule 144A of the Securities Act of 1933), Accredited Investor (as defined by Rule 215 of the Securities Act of 1933) or otherwise has such knowledge...”

Suggested Guidance

- Interpretation of “primary offering” as defined in 15c2-12(f)(7) to reflect and expand upon staff guidance in response to *Pillsbury, Madison Letter* of March 11, 1991, distinguishing among other things, between a primary and secondary offering, and the meaning of “indirectly on behalf of” available here:
<http://www.msrb.org/~media/Files/MISC/15c2-12RemarketingLetter.ashx?la=en>
 Confusion in the market exists as to interpretation of the term, in part as a result of statements of SEC staff from time to time of a personal view that certain transactions are primary offerings.

SIFMA recommends:

- The Commission provide guidance regarding interpretation of “primary offering” by incorporating the relevant guidance provided in *Pillsbury, Madison Letter* of March 11, 1991, as well as distinguishing among other things, between a primary and secondary offering, and the meaning of “indirectly on behalf of,” including treatment of the following elements:
 - Remarketing resulting in change in the authorized denomination of the bonds from \$100,000 or more to less than \$100,000
 - Remarketing resulting in a change in the period during which the bonds may be tendered for redemption or purchase from a period of nine months or less to a period of more than nine months
 - Mandatory tender upon expiration or replacement of a credit/liquidity facility pursuant to the terms of the governing documents (i.e. no changes to the governing documents)
 - Mandatory tender caused by a change in the security for the bonds in the governing documents or a change in obligor (not a change in the credit/liquidity facility provider)
- Revision of the existing interpretation of the phrase in 15c2-12(b)(5)(ii)(C) “specify the date on which the annual financial information for the preceding fiscal year will be provided” to require statement of a date certain, together with guidance as to harmonizing new with existing CDAs.

SIFMA recommends:

- The Commission revoke the interpretive guidance provided by Q&A 13 of NABL I and by Letter re: R.V. Norene & Associates, Inc. (May 4, 1995) regarding the phrase “specify the date by which the annual financial information for the preceding fiscal year will be provided” as used in 15c2-12(b)(5)(ii)(C) and replace it with guidance that the phrase requires, as its plain meaning indicates, identification of a date certain by which the annual financial information will be provided. be revised to and, (“specified number of days after the fiscal year-end of the person covered by the agreement”).
- The new interpretation could be accompanied by an observation that existing agreements likely provide for a period of time terminating a certain number of days following the end of the fiscal year, as indicated by the current guidance and that identification of a specific date within that time period would not require the amendment of such CDAs. Such an interpretation could accompany the guidance recommended below as to flexible interpretation of CDAs.
- Interpretation of the phrase of “any instances in the previous five years in which each person . . . failed to comply, in all material respects, with any previous undertakings” in 15c2-12(f)(3) definition of *final official statement*. Commission repeatedly states in 1994 Adopting Release interpretation of the CDA is a matter of state law. Has Commission, in interpreting meaning of “failed to comply, in all material respects” with the CDA applied state law or federal securities law?

SIFMA recommends:

- Commission provide interpretation of the phrase of “any instances in the previous five years in which each person . . . failed to comply, in all material respects, with any previous undertakings” including whether “a failure to comply in all material respects” is interpreted under state contract law or federal securities law.
- Guidance on continuing vitality of 15c2-12 interpretive letters “NABL I” available here: <http://www.sec.gov/info/municipal/nabl-1-interpretive-letter-1995-06-23.pdf> and “NABL II” available here: <http://www.sec.gov/info/municipal/nabl-2-interpretive-letter-1995-09-19.pdf>

SIFMA recommends:

- Commission provide guidance on interpretation of Rule 15c2-12 through incorporation of updated guidance on issues addressed in NABL I and NABL II, together with prior interpretation in Staff interpretive and no-action letters relating to Rule 15c2-12.
- Interpretation of 15c2-12(f)(2) *end of the underwriting period* “retain directly . . . an unsold balance of the securities for sale to the public.” When does a firm cease to be an underwriter when holding securities? Does it? If so, does it hold as a dealer? Do the

statements in the 1994 Interpretive Release apply: “A dealer, unlike an underwriter, ordinarily is not obligated to contact the issuer to verify information. A dealer must however, have a reasonable basis for its recommendation.” (See the text adjoining note 105 in the Interpretive Release).

SIFMA recommends:

- The Commission harmonize the definition of “end of the underwriting period” in 15c2-12 and the definition of “primary offering disclosure period” in MSRB Rule G-32
- Guidance on the vitality of the six factors enumerated in the Interpretation of Underwriter Responsibilities, including competitive bids. The Interpretation states “the Commission recognizes that municipal underwriters may have little initial access to background information concerning securities that have been bid on a competitive basis. ... The Commission believes that in a normal competitively bid offering, involving an established municipal issuer, a municipal underwriter generally would meet its obligations to have a reasonable basis for belief in the accuracy of the key representations in the official statement where it reviewed the official statement in a professional manner, and received from the issuer a detailed and credible explanation concerning any aspect of the official statement that appeared on its face, or on the basis of information available to the underwriter, to be inadequate.” “In a competitively bid offering, the task of assuring the accuracy and completeness of the disclosure is in the hands of the issuer...” (1988 Proposing Release, n. 92 and preceding text)

SIFMA recommends:

- The Commission affirm the 1988-1989 Interpretation of Underwriter Responsibility (with additional guidance drawing upon actions approved in the MCDC initiative).
- Guidance on the responsibilities of Municipal Advisors, a category of regulated persons that did not exist when the core provisions of the Rule and the Interpretation of Underwriter Responsibilities articulated. Footnote 92 to the 1988 Proposing Release states: “In a competitively bid offering, the task of assuring the accuracy and completeness of the disclosure is in the hands of the issuer, who usually will employ a financial adviser, which frequently is a broker dealer. Ordinarily, financial advisers in competitively bid offerings publicly associate themselves with the offering and perform many of the functions normally undertaken by the underwriters in corporate offerings and in municipal offerings sold on a negotiated basis. Thus, where such financial advisers have access to issuer data and participate in drafting the disclosure documents, they will have a comparable obligation under the antifraud provisions to inquire into the completeness and accuracy of disclosure presented during the bidding process” How does this statement apply to a municipal advisor in light of its statutory fiduciary duty under Dodd-Frank? How will proposed MSRB Rule G-42 affect its fiduciary duty and its duty of fair dealing in the circumstances described in note 92?

Does the statement in the 1988 Proposing Release “Underwriters that participate in multiple offerings for an issuer have a continuing opportunity to become familiar with the issuer’s financial and operating condition” explain the instances of competitively bid offerings preceded by a negotiated offering cited in the first round of MCDC settlements?

SIFMA recommends:

- The Commission provide revised interpretation under the 1988-1989 Interpretation of the responsibilities of Underwriters reflecting the then references to Financial Advisors now equate to the recently created regulated entities known as Municipal Advisors and provide similar guidance on Municipal Advisor responsibilities with respect to disclosure in an Official Statement in connection with a competitively bid offering as well as a negotiated offering.
- The Commission propose for comment a new Municipal Advisor rule, under provisions of the Exchange Act parallel to Rule 15c2-12, “designed to prevent fraud by improving the extent and quality of disclosure in the municipal securities markets.” The proposed rule would address the duties of Municipal Advisors providing advice to an issuer or obligated person:
 - in a primary offering subject to Rule 15c2-12, including but not limited to advice in connection with preparation of preliminary, deemed final, and final official statements (as such terms are defined in the Rule);
 - in preparation of a CDA for a primary offering; and
 - in compliance by an issuer or obligated person with its obligations under existing CDAs.
- Guidance to issuers and obligated persons as to their responsibilities under the antifraud provisions of federal securities laws in complying with their CDAs and when certifying that “an official statement is a final official statement as defined in Rule 15c2-12.” What considerations come into play for an issuer or obligated person with respect to the inclusion of “any instances in the previous five years in which each person . . . failed to comply, in all material respects, with any previous undertakings” in a final official statement?

SIFMA recommends:

- The Commission expand upon its statement in the 1989 Interpretation of Underwriter Responsibilities “that the primary responsibility for disclosure rests with the issuer” and its discussion of application of the antifraud provisions in the Interpretive Release, both of which pre-date the November 1994 adoption of the continuing disclosure amendments to Rule 15c2-12 and provide guidance to issuers and obligated persons with respect to antifraud implications of the description of and compliance with CDAs in official statements as well as EMMA filings made pursuant to CDAs.

Attachment A

§240.15c2-12 Municipal securities disclosure.

Preliminary Note: For a discussion of disclosure obligations relating to municipal securities, issuers, brokers, dealers, and municipal securities dealers should refer to Securities Act Release No. 7049, Securities Exchange Act Release No. 33741, FR-42 (March 9, 1994). For a discussion of the obligations of underwriters to have a reasonable basis for recommending municipal securities, brokers, dealers, and municipal securities dealers should refer to Securities Exchange Act Release No. 26100 (Sept. 22, 1988) and Securities Exchange Act Release No. 26985 (June 28, 1989).

(a) *General.* As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for any broker, dealer, or municipal securities dealer (a “Participating Underwriter” when used in connection with an Offering) to act as an underwriter in a primary offering of municipal securities with an aggregate principal amount of \$1,000,000 or more (an “Offering”) unless the Participating Underwriter complies with the requirements of this section or is exempted from the provisions of this section.

(b) *Requirements.* (1) Prior to the time the Participating Underwriter bids for, purchases, offers, or sells municipal securities in an Offering, the Participating Underwriter shall obtain and review an official statement that an issuer of such securities deems final as of its date, except for the omission of no more than the following information: The offering price(s), interest rate(s), selling compensation, aggregate principal amount, principal amount per maturity, delivery dates, any other terms or provisions required by an issuer of such securities to be specified in a competitive bid, ratings, other terms of the securities depending on such matters, and the identity of the underwriter(s).

(2) Except in competitively bid offerings, from the time the Participating Underwriter has reached an understanding with an issuer of municipal securities that it will become a Participating Underwriter in an Offering until a final official statement is available, the Participating Underwriter shall send no later than the next business day, by first-class mail or other equally prompt means, to any potential customer, on request, a single copy of the most recent preliminary official statement, if any.

(3) The Participating Underwriter shall contract with an issuer of municipal securities or its designated agent to receive, within seven business days after any final agreement to purchase, offer, or sell the municipal securities in an Offering and in sufficient time to accompany any confirmation that requests payment from any customer, copies of a final official statement in sufficient quantity to comply with paragraph (b)(4) of this rule and the rules of the Municipal Securities Rulemaking Board.

(4) From the time the final official statement becomes available until the earlier of—

(i) Ninety days from the end of the underwriting period or

(ii) The time when the official statement is available to any person from the Municipal Securities Rulemaking Board, but in no case less than twenty-five days following the end of the

underwriting period, the Participating Underwriter in an Offering shall send no later than the next business day, by first-class mail or other equally prompt means, to any potential customer, on request, a single copy of the final official statement.

(5)(i) A Participating Underwriter shall not purchase or sell municipal securities in connection with an Offering unless the Participating Underwriter has reasonably determined that an issuer of municipal securities, or an obligated person for whom financial or operating data is presented in the final official statement has undertaken, either individually or in combination with other issuers of such municipal securities or obligated persons, in a written agreement or contract for the benefit of holders of such securities, to provide the following to the Municipal Securities Rulemaking Board in an electronic format as prescribed by the Municipal Securities Rulemaking Board, either directly or indirectly through an indenture trustee or a designated agent:

(A) Annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement, or, for each obligated person meeting the objective criteria specified in the undertaking and used to select the obligated persons for whom financial information or operating data is presented in the final official statement, except that, in the case of pooled obligations, the undertaking shall specify such objective criteria;

(B) If not submitted as part of the annual financial information, then when and if available, audited financial statements for each obligated person covered by paragraph (b)(5)(i)(A) of this section;

(C) In a timely manner not in excess of ten business days after the occurrence of the event, notice of any of the following events with respect to the securities being offered in the Offering:

(1) Principal and interest payment delinquencies;

(2) Non-payment related defaults, if material;

(3) Unscheduled draws on debt service reserves reflecting financial difficulties;

(4) Unscheduled draws on credit enhancements reflecting financial difficulties;

(5) Substitution of credit or liquidity providers, or their failure to perform;

(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;

(7) Modifications to rights of security holders, if material;

(8) Bond calls, if material, and tender offers;

(9) Defeasances;

(10) Release, substitution, or sale of property securing repayment of the securities, if material;

(11) Rating changes;

(12) Bankruptcy, insolvency, receivership or similar event of the obligated person;

Note to paragraph (b)(5)(i)(C)(12): For the purposes of the event identified in paragraph (b)(5)(i)(C)(12) of this section, the event is considered to occur when any of the following occur: The appointment of a receiver, fiscal agent or similar officer for an obligated person in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the obligated person, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan of reorganization, arrangement or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the obligated person.

(13) The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material;

(14) Appointment of a successor or additional trustee or the change of name of a trustee, if material; and

(D) In a timely manner, notice of a failure of any person specified in paragraph (b)(5)(i)(A) of this section to provide required annual financial information, on or before the date specified in the written agreement or contract.

(ii) The written agreement or contract for the benefit of holders of such securities also shall identify each person for whom annual financial information and notices of material events will be provided, either by name or by the objective criteria used to select such persons, and, for each such person shall:

(A) Specify, in reasonable detail, the type of financial information and operating data to be provided as part of annual financial information;

(B) Specify, in reasonable detail, the accounting principles pursuant to which financial statements will be prepared, and whether the financial statements will be audited; and

(C) Specify the date on which the annual financial information for the preceding fiscal year will be provided.

(iii) Such written agreement or contract for the benefit of holders of such securities also may provide that the continuing obligation to provide annual financial information and notices of events may be terminated with respect to any obligated person, if and when such obligated person no longer remains an obligated person with respect to such municipal securities.

(iv) Such written agreement or contract for the benefit of holders of such securities also shall provide that all documents provided to the Municipal Securities Rulemaking Board shall be accompanied by identifying information as prescribed by the Municipal Securities Rulemaking Board.

(c) *Recommendations.* As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for any broker, dealer, or municipal securities dealer to recommend the purchase or sale of a municipal security unless such broker, dealer, or municipal securities dealer has procedures in place that provide reasonable assurance that it will receive prompt notice of any event disclosed pursuant to paragraph (b)(5)(i)(C), paragraph (b)(5)(i)(D), and paragraph (d)(2)(ii)(B) of this section with respect to that security.

(d) *Exemptions.* (1) This section shall not apply to a primary offering of municipal securities in authorized denominations of \$100,000 or more, if such securities:

(i) Are sold to no more than thirty-five persons each of whom the Participating Underwriter reasonably believes:

(A) Has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment; and

(B) Is not purchasing for more than one account or with a view to distributing the securities; or

(ii) Have a maturity of nine months or less.

(2) Paragraph (b)(5) of this section shall not apply to an Offering of municipal securities if, at such time as an issuer of such municipal securities delivers the securities to the Participating Underwriters:

(i) No obligated person will be an obligated person with respect to more than \$10,000,000 in aggregate amount of outstanding municipal securities, including the offered securities and excluding municipal securities that were offered in a transaction exempt from this section pursuant to paragraph (d)(1) of this section;

(ii) An issuer of municipal securities or obligated person has undertaken, either individually or in combination with other issuers of municipal securities or obligated persons, in a written agreement or contract for the benefit of holders of such municipal securities, to provide the following to the Municipal Securities Rulemaking Board in an electronic format as prescribed by the Municipal Securities Rulemaking Board:

(A) At least annually, financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, as specified in the undertaking, which financial information and operating data shall include, at a minimum, that financial information and operating data which is customarily prepared by such obligated person and is publicly available; and

(B) In a timely manner not in excess of ten business days after the occurrence of the event, notice of events specified in paragraph (b)(5)(i)(C) of this section with respect to the securities that are the subject of the Offering; and

(C) Such written agreement or contract for the benefit of holders of such securities also shall provide that all documents provided to the Municipal Securities Rulemaking Board shall be accompanied by identifying information as prescribed by the Municipal Securities Rulemaking Board; and

(iii) The final official statement identifies by name, address, and telephone number the persons from which the foregoing information, data, and notices can be obtained.

(3) The provisions of paragraph (b)(5) of this section, other than paragraph (b)(5)(i)(C) of this section, shall not apply to an Offering of municipal securities, if such municipal securities have a stated maturity of 18 months or less.

(4) The provisions of paragraph (c) of this section shall not apply to municipal securities:

(i) Sold in an Offering to which paragraph (b)(5) of this section did not apply, other than Offerings exempt under paragraph (d)(2)(ii) of this section; or

(ii) Sold in an Offering exempt from this section under paragraph (d)(1) of this section.

(5) With the exception of paragraphs (b)(1) through (b)(4), this section shall apply to a primary offering of municipal securities in authorized denominations of \$100,000 or more if such securities may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent; provided, however, that paragraphs (b)(5) and (c) of this section shall not apply to such securities outstanding on November 30, 2010, for so long as they continuously remain in authorized denominations of \$100,000 or more and may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent.

(e) *Exemptive authority.* The Commission, upon written request, or upon its own motion, may exempt any broker, dealer, or municipal securities dealer, whether acting in the capacity of a Participating Underwriter or otherwise, that is a participant in a transaction or class of transactions from any requirement of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such an exemption is consistent with the public interest and the protection of investors.

(f) *Definitions.* For the purposes of this rule—

(1) The term *authorized denominations of \$100,000 or more* means municipal securities with a principal amount of \$100,000 or more and with restrictions that prevent the sale or transfer of such securities in principal amounts of less than \$100,000 other than through a primary offering; except that, for municipal securities with an original issue discount of 10 percent or more, the

term means municipal securities with a minimum purchase price of \$100,000 or more and with restrictions that prevent the sale or transfer of such securities, in principal amounts that are less than the original principal amount at the time of the primary offering, other than through a primary offering.

(2) The term *end of the underwriting period* means the later of such time as

(i) The issuer of municipal securities delivers the securities to the Participating Underwriters or

(ii) The Participating Underwriter does not retain, directly or as a member or an underwriting syndicate, an unsold balance of the securities for sale to the public.

(3) The term *final official statement* means a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to the Participating Underwriter(s) and that sets forth information concerning the terms of the proposed issue of securities; information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the Offering; and a description of the undertakings to be provided pursuant to paragraph (b)(5)(i), paragraph (d)(2)(ii), and paragraph (d)(2)(iii) of this section, if applicable, and of any instances in the previous five years in which each person specified pursuant to paragraph (b)(5)(ii) of this section failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in paragraph (b)(5)(i) of this section. Financial information or operating data may be set forth in the document or set of documents, or may be included by specific reference to documents available to the public on the Municipal Securities Rulemaking Board's Internet Web site or filed with the Commission.

(4) The term *issuer of municipal securities* means the governmental issuer specified in section 3(a)(29) of the Act and the issuer of any separate security, including a separate security as defined in rule 3b-5(a) under the Act.

(5) The term *potential customer* means (i) Any person contacted by the Participating Underwriter concerning the purchase of municipal securities that are intended to be offered or have been sold in an offering, (ii) Any person who has expressed an interest to the Participating Underwriter in possibly purchasing such municipal securities, and (iii) Any person who has a customer account with the Participating Underwriter.

(6) The term *preliminary official statement* means an official statement prepared by or for an issuer of municipal securities for dissemination to potential customers prior to the availability of the final official statement.

(7) The term *primary offering* means an offering of municipal securities directly or indirectly by or on behalf of an issuer of such securities, including any remarketing of municipal securities.

(i) That is accompanied by a change in the authorized denomination of such securities from \$100,000 or more to less than \$100,000, or

(ii) That is accompanied by a change in the period during which such securities may be tendered to an issuer of such securities or its designated agent for redemption or purchase from a period of nine months or less to a period of more than nine months.

(8) The term *underwriter* means any person who has purchased from an issuer of municipal securities with a view to, or offers or sells for an issuer of municipal securities in connection with, the offering of any municipal security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; except, that such term shall not include a person whose interest is limited to a commission, concession, or allowance from an underwriter, broker, dealer, or municipal securities dealer not in excess of the usual and customary distributors' or sellers' commission, concession, or allowance.

(9) The term *annual financial information* means financial information or operating data, provided at least annually, of the type included in the final official statement with respect to an obligated person, or in the case where no financial information or operating data was provided in the final official statement with respect to such obligated person, of the type included in the final official statement with respect to those obligated persons that meet the objective criteria applied to select the persons for which financial information or operating data will be provided on an annual basis. Financial information or operating data may be set forth in the document or set of documents, or may be included by specific reference to documents available to the public on the Municipal Securities Rulemaking Board's Internet Web site or filed with the Commission.

(10) The term *obligated person* means any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).

(g) *Transitional provision.* If on July 28, 1989, a Participating Underwriter was contractually committed to act as underwriter in an Offering of municipal securities originally issued before July 29, 1989, the requirements of paragraphs (b)(3) and (b)(4) shall not apply to the Participating Underwriter in connection with such an Offering. Paragraph (b)(5) of this section shall not apply to a Participating Underwriter that has contractually committed to act as an underwriter in an Offering of municipal securities before July 3, 1995; *except that* paragraph (b)(5)(i)(A) and paragraph (b)(5)(i)(B) shall not apply with respect to fiscal years ending prior to January 1, 1996. Paragraph (c) shall become effective on January 1, 1996. Paragraph (d)(2)(ii) and paragraph (d)(2)(iii) of this section shall not apply to an Offering of municipal securities commencing prior to January 1, 1996.

[54 FR 28813, July 10, 1989, as amended at 59 FR 59609, Nov. 17, 1994; 73 FR 76132, Dec. 15, 2008; 75 FR 33155, June 10, 2010]