



May 15, 2017

Via Email to: rule-comments@sec.gov

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

File No. S7-01-17 – Comments on proposed amendments to SEC Rule 15c2-12

Dear Secretary Fields:

I am writing on behalf of the Airports Council International – North America (ACI-NA) to comment on the Securities and Exchange Commission's (SEC) proposed amendments (Proposed Amendments) to Rule 15c2-12 under the Securities Exchange Act of 1934. The Proposed Amendments are described in SEC Release No. 34-80130 (the Proposing Release).

ACI-NA represents local, regional and state governing bodies that own and operate commercial airports in the United States and Canada. ACI-NA's 183 US airport members operate approximately 300 airports that serve over 95 percent of the domestic and virtually all of the international airline passenger and cargo traffic in the United States. Approximately 400 aviation-related businesses are also members of ACI-NA, providing goods and services to airports. ACI-NA has a long history of promoting best practices in the aviation industry. We believe these comments serve to further the goal of providing accurate and transparent disclosure to the capital markets regarding US airports.

Representing the airport industry, we believe the Proposed Amendments will have significant, unintended, negative consequences for issuers of municipal securities, including US airport operators, which comprise a substantial portion of the municipal securities market. As of the end of 2016, approximately \$86 billion of debt issued by US airports was outstanding, and a total of \$12.5 billion of airport debt was issued in 2016. The Proposed Amendments represent a significant broadening of, and departure from, the straightforward events that require disclosure under current Rule 15c2-12. Airports are concerned about meeting the proposed new, broader compliance requirements, including the proposed 10-day reporting limit. Ultimately the proposed changes will make airport infrastructure development projects more expensive and impede airports' ability to serve their communities and the nation effectively and efficiently.

Description of Proposed Amendments

Rule 15c2-12 currently requires that underwriters of municipal securities obtain an undertaking from issuers and obligors of municipal securities (collectively referred to in these comments as “issuers”) to provide certain information on an annual basis, as well as notice of certain specified events. The existing notice events primarily relate to the securities being issued and the security therefor. The Proposed Amendments would add two new events that must be disclosed within ten business days after the occurrence of any of the new events. The proposed additional events would be:

“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

“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.”

The term “financial obligation” would be defined as a “(i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding,” other than municipal securities for which a final official statement has been provided to the MSRB. The Proposing Release makes clear that the term “financial obligation” is to be broadly interpreted, indicating for example that it captures both short-term and long-term debt obligations within the phrase “debt obligations” and both capital leases and operating leases as “leases.” The Proposed Amendments do not define “material,” although the Proposing Release states that the Commission “... believes that including a materiality determination would strike an appropriate balance.”

Comments on the Proposed Amendments

1. The Scope of the Proposed Amendments is Overly Broad.

By statute, the SEC and the Municipal Securities Rulemaking Board (MSRB) are prohibited from directly or indirectly requiring issuers to file municipal securities documents with them before the securities are sold. Nevertheless, through Rule 15c2-12, the SEC has indirectly required issuers of municipal securities to provide not only a final Official Statement in connection with the primary offering of such securities, but also an annual filing that updates certain material information contained in the Official Statement as well as provide audited financial statements (if available) and notice of certain specified events. This regime has worked well to ensure that key, material events directly affecting a particular bond issue or obligations on a parity with it are promptly disseminated, while business dealings in the normal course are disclosed annually in their proper context and in a format that is readily digested by investors. The Proposed Amendments would significantly expand the scope of the required events that must be disclosed as they occur, by requiring disclosure regarding the incurrence of “financial obligations” and the terms of such obligations, if material, and events relating to such financial obligations reflecting financial difficulties.

In the Proposing Release, the SEC states that the information required to be disclosed pursuant to the Proposed Amendments would enable investors to make more informed decisions and “should

reduce the likelihood that investors would be subject to fraud facilitated by inadequate disclosure.” The SEC focuses in the Proposing Release on the volume and frequency of direct placements as an alternative to public offerings of municipal securities and notes that some market participants have raised concerns about the lack of secondary market disclosure regarding direct placements, “as well as other financial obligations.” However, *the SEC does not provide a single example of a securities fraud committed due to lack of such disclosure*, and it cites only a few letters supporting disclosure of financial obligations in addition to bank loans or direct placements.

In addition, the proposed definition of the term “financial obligation” is very broad and would include many business and legal obligations that are not direct placements of municipal securities or bank loans and that are not generally considered to be indebtedness. The SEC’s release suggests that it intends an expansive interpretation of an already broad definition of “financial obligation,” including covering short-term debt obligations and even operating leases. However, many leases and legal or administrative proceedings are incurred as part of an airport’s normal business operations and are typically disclosed to investors, if material, in primary offering documents and annual reports. As a frame of reference, ACI-NA estimates that US airports are party to well over 50,000 leases. The SEC’s overly broad proposed scope of the “financial obligations” that would be required to be disclosed under the Proposed Amendments will result in a deluge of filings with the MSRB’s Electronic Municipal Market Access (EMMA) website without adding significant clarity to the municipal market, and possibly leading to confusion on the part of investors forced to sort the wheat from the chaff without the contextual framework provided by an annual report or audited financial statements. ACI-NA does not believe that the Proposed Amendments will further the SEC’s stated goals.

Lastly, in 1994, the SEC considered and explicitly rejected requiring an event notice to be filed with respect to any event other than those specified events then included in Rule 15c2-12 that might reasonably be expected to have a material adverse effect on the holders of municipal securities of an issuer. Instead, the SEC opted to require that continuing disclosure mirror the financial information in the final official statement. The Proposed Amendments would appear to be an attempt to depart from the SEC’s prior policy without acknowledging that a substantial and significant change in the disclosure obligations of the issuers of municipal securities is being proposed. As the Supreme Court has stated, “An agency may not, for example, depart from a prior policy *sub silentio* ...” and that when adopting new rules, an agency must “... display awareness that it *is* changing position” and “... show good reasons for the new policy.”¹ ACI-NA is concerned that the scope of the Proposed Amendments exceeds the SEC’s regulatory authority in light of the Tower Amendment’s prohibition of the direct or indirect regulation of municipal issuers by the SEC or the MSRB, especially because the SEC has not articulated any good reason for these Proposed Amendments, particularly the portion of the definition of financial obligation that includes obligations in addition to direct placements and bank loans.

Our strong recommendation is that SEC withdraw the amendments and allow issuers to take advantage of the MSRB’s recently improved functionality on its EMMA website to voluntarily report the inurrence of direct placements, bank loans and other financial obligations deemed to be material by such issuers. However if the SEC will not adopt such an approach, then the Commission should narrow the definition of financial obligation as outlined above by limiting the scope of “financial obligations” to include only bank loans and other privately-placed financings (1) payable or secured on a parity with or senior to the obligations subject to the issuer’s continuing disclosure undertaking and (2) having a term of more than 13 months.

¹ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-515 (emphasis in original).

2. Since the MCDC Initiative, the Meaning of Materiality in the Context of Rule 15c2-12 Is Ambiguous.

Responding to allegations that both issuers and underwriters were not meeting their obligations under Rule 15c2-12 to provide timely notices of the listed events and make timely filings of annual financial information, the SEC announced its Municipalities Continuing Disclosure Cooperation (MCDC) initiative in the spring of 2014. Rule 15c2-12 provides that the Official Statement issued with respect to a bond issue must include, among other things, a description of all instances within the prior 5 years in which the issuer has failed to comply, in all material respects, with previous continuing disclosure undertakings. Under the MCDC initiative, the SEC entered into settlements on specified, favorable terms with issuers and underwriters that self-disclosed to the SEC, by the stated deadlines, their failures to comply with Rule 15c2-12's requirements regarding providing or monitoring on-going disclosure within the prior 5 years. In seeking to determine whether any failure to comply with a continuing disclosure undertaking should be reported to the SEC under the MCDC initiative, many participants in the municipal market had great difficulty determining whether an instance of non-compliance constituted a material failure. Although market participants sought express guidance from the SEC on this issue, the SEC demurred.

As a result of the settlements under the MCDC initiative, the vast majority of the underwriters of municipal bonds, including bonds issued by airport operators, have adopted new and more stringent policies regarding due diligence practices with regard to an issuer's compliance with the reporting requirements of Rule 15c2-12. In the experience of many airport issuers, this has resulted in underwriters generally requiring issuers to disclose even minor instances of failure to comply with a continuing disclosure undertaking, such as a filing made as little as a few days late, which most market participants would consider to be an immaterial "foot fault." This has resulted in what one person referred to as "hyper disclosure."

The underwriters that have entered into consent agreements with the SEC pursuant to MCDC will be enforcing compliance with the continuing disclosure undertakings adopted by issuers pursuant to Rule 15c2-12, including the disclosure of the additional events under the Proposed Amendments if they are adopted. The SEC has not provided any useful guidance to issuers and underwriters concerning the proper determination of materiality in the context of Rule 15c2-12. However, the experience of both bond issuers and underwriters with the SEC's MCDC initiative is a reminder of the broad interpretation the SEC's Enforcement Division has of the concept of materiality in this context. This broad interpretation can make it difficult for bond issuers to determine with a high level of confidence whether a financial obligation or a covenant or an event is material. Furthermore, the ambiguity associated with the use of materiality as the standard for disclosure of the proposed additional events is likely to lead to conflicting determinations of what information is material by issuers and underwriters. This could lead to disagreement between issuers and underwriters, especially where an underwriter asserts after the fact that an issuer's previous determination that a financial obligation was not material (and thus no filing was made by the issuer) is incorrect, resulting not only in a filing relating to such arguably immaterial financial obligation, but another filing by the issuer regarding a late notice and a five year penalty disclosure statement in future Official Statements.

Absent clear guidance from the SEC regarding the definition of materiality in the context of Rule 15c2-12, if the Proposed Amendments are adopted, issuers will be pressed to file notice of any obligation listed under the definition of "financial obligation" in the Proposed Amendments, whether or not such obligation is material, for fear that an underwriter or issuer could be second-guessed regarding

its determination of materiality. Further, issuers are likely to file entire business agreements and documents relating to legal proceedings rather than risk trying to summarize the material terms of lengthy business agreements and proceedings. If the Proposed Amendments are adopted, lacking clear guidance regarding materiality, airports will be constantly filing notices of financial obligations with EMMA, creating obscurity, rather than transparency, in the municipal market. Neither development would further the SEC's stated goal of effective disclosure. The revisions ACI-NA suggests for the definition of "financial obligations" would address this concern by providing a clear scope for the new required disclosures while allowing each issuer to determine a particular event's materiality in context. In any event ACI-NA strongly urges the SEC to reject a "one-size-fits-all" definition of materiality, since, as is evidenced by the diversity of our airport membership, what would be material to a smaller airport might be quite immaterial to a large hub airport.

3. The Proposed Amendments Would Be an Excessive Burden Upon Issuers.

The Proposed Amendments would cause airports and other issuers a substantial and excessive burden that is not accurately reflected or acknowledged in the Proposing Release. ACI-NA believes the actual burden will be substantially greater than any potential benefit to the municipal market.

First and foremost, airports typically order their operations by leases with the airlines, concessionaires and other parties operating at the airport. For example, one large hub airport operator estimates that it is a party to over 600 leases. Without additional clear guidance from the SEC regarding which of these obligations is material, it is probable that, if the Proposed Amendments are adopted, this airport operator would feel compelled to file notice of each of these 600 plus leases with EMMA. Given the time consuming and costly nature of developing a summary of each lease that meets the standards of Rule 10b-5, it is also probable that the issuer would elect to file a redacted copy of each lease, rather than spend the time, effort and money required to prepare a summary of each of 600 leases. If preparation and filing of a redacted copy of each lease takes only half an hour, a very conservative estimate, then this airport issuer would spend over 300 hours filing its leases with EMMA, and that does not address disclosure of any of the other "financial obligations" that are defined in the Proposed Amendments.

In addition to the burden on issuers to identify and file notices of "financial obligations" as they occur, there will also be additional burdens on issuers to support the due diligence necessary for underwriters to review and confirm issuers' compliance with the new requirements as part of each bond offering.

Another concern raised by the Proposed Amendments is determining when certain financial obligations have been "incurred." Although the date a bond is issued is generally easily determined, the date that a "monetary obligation resulting from a judicial, administrative or arbitration proceeding" is incurred may be extremely difficult to pinpoint. Is an initial decision an "incurrence" of such an obligation, or must all appeals first be completed? Issuers may be forced to file a notice of the incurrence of such an obligation before appeals are exhausted in fear of failing to comply with a disclosure undertaking but, if such a judgment is later overturned, then a further notice would be required to avoid misleading participants in the market. Given the volume of claims and litigation airport issuers face, this uncertainty results in a substantial administrative burden.

Except in extremely rare cases, even the most significant lease or other financial obligation is not likely to materially affect an investor's judgment regarding an airport issuer in the short term.

GAAP-based financial statements already provide significant information on all expenses and liabilities that affect investors. The Proposed Amendments would be inconsistent with the GAAP approach to “long term debt” reflected in issuer’s financial statements. Imposing a second standard for reporting “financial obligations” will cause confusion and errors. Further, GAAP-based financial statements, which are provided annually to investors, present information about leases and other financial obligations in context and in a relatively standardized format. Event-based filings of contracts or summaries of contracts may lack this context and standardization, posing a challenge to investors who must sort through the details. The Proposed Amendments inappropriately seek to address problems with some issuers’ lack of timely financial statements by placing an unfair burden on all issuers and creating the potential for confusion on the part of investors.

Further, in order to assure compliance with the requirement that notice of material financial obligations be filed within ten business days of being incurred, additional staff persons would have to be tasked with monitoring the airport’s leases for changes, as well as for the incurrence of any of the other financial obligations that must be reported. For example, a lease for terminal space between another large airport and a single tenant airline has been amended 20 times since it was executed in 2006, and there are over 50 different airlines (excluding charter operators) that serve that specific airport.

Additionally, the finance staff at airports that is responsible for filing material or listed event notices under Rule 15c2-12 is generally different from the airport staff that is responsible for other legal requirements or for lease administration. Monitoring activities across all airport operations in order to address the requirements of the Proposed Amendments would simply be impractical under the majority of airport issuers’ current staffing. Airport issuers would need to create new positions and prepare and implement new procedures and approve and amend normal business agreements in order to comply with the burdens that would be imposed by the Proposed Amendments, especially with the inflexible ten-day notice requirement. For these reasons, it would take airport issuers much more than three months to adequately prepare for the effectiveness of the Proposed Amendments. Therefore, ACI-NA asks that, in the event the SEC moves forward with adopting any changes, the Commission provide that they do not become effective until at least six months after they are adopted, to enable the market to develop means and methods to comply with the amendments.

The SEC’s estimates of the financial burden of the Proposed Amendments set forth in the Proposing Release appear to dramatically underestimate the time and cost necessary to meet the proposed requirements. Moreover, as noted above, ACI-NA believes that the excessive burden imposed by the disclosure that would be required under the Proposed Amendments would yield little or no benefit to bondholders and prospective bondholders.

4. Ten Business Days Is Insufficient Time to File Notices Regarding Financial Obligations.

Requiring issuers to file notices of all of the events set forth in the Proposed Amendments within ten business days is not likely to be practicable, and ACI-NA does not believe that such a short deadline is necessary to protect the municipal securities market from potential fraud. As noted above, the volume of obligations that must be evaluated to determine whether a notice regarding their incurrence must be filed under the Proposed Amendments is substantial. Further, in order to assure compliance with the requirement that notice of material financial obligations be filed within ten business days of being incurred, additional staff would have to be engaged and trained. In addition, faced with a tight ten business day timeline, issuers are likely to file entire business agreements and legal proceedings rather than risk trying to summarize the material terms of lengthy business agreements and

proceedings. Lastly, in many cases, such as in connection with derivative instruments, issuers will have to obtain the consent of the counterparty to such financial obligation before any such notice may be filed. Ten business days will often be insufficient time to obtain such approval.

Conclusion

The airports that comprise the membership of ACI-NA want to provide accurate and complete financial information to their bondholders and other investors without adding excessive requirements or having to publish so much information that the critical issues are obfuscated by the quantity of material provided. ACI-NA appreciates your consideration of these comments regarding the Proposed Amendments to Rule 15c2-12. We hope that you find these comments helpful and look forward to working with you and the rest of the municipal finance industry to address any legitimate disclosure concerns without imposing excessive burdens on airport issuers. We request that the SEC reconsider its proposed changes and work with ACI-NA and other issuer groups prior to implementation of any revised or new rules.

Please contact Liying Gu or me at 202.293.8500 if you need additional information or require clarification regarding our comments.

Thank you for your consideration,

Airports Council International – North America



Kevin M. Burke
President and CEO