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asset management group

May 15, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20540-1090

Re: Proposed Amendments to Exchange Act Rule 15c2-12: Request for Comment on Proposed Amendments to Municipal Securities Disclosure

File Number: S7-01-17

Dear Mr. Fields:

The Asset Management Group of the Securities Industry and Financial Markets Association (the "AMG")[1] appreciates this opportunity to comment on the Securities and Exchange Commission's ("Commission") proposed amendments to Rule 15c2-12 of the Securities Exchange Act 1934 ("Exchange Act") pursuant to Release No. 34-80130 (the "Proposed Rule"). The AMG supports the Commission in encouraging transparency and investor protection in the municipal securities market and is likewise strongly supportive of requiring issuers and other obligated persons to disclose to participants in the secondary market additional material information with respect to financial obligations incurred by the municipality.

The AMG supports the Commission's efforts to ensure that investors have timely access to important financial and operating information on municipal issuers and believes that such disclosures would both protect investors and promote better informed investment decisions. Further, we believe that any associated costs with such a requirement would be reasonable with respect to issuers, underwriters and dealers and that the benefits to investors and market integrity would substantially outweigh any of these costs. As discussed in more detail below, the AMG believes that the Commission's proposal can improve the disclosure of information on financial obligations of municipal issuers. Therefore, the AMG believes the Commission should proceed with implementing the Proposed Rule that would prohibit underwriters from purchasing or selling municipal securities in an offering unless the issuer or other obligated person has undertaken to disclose information about its financial obligations as proposed by the Commission, subject to certain modifications proposed by the AMG below.

[1] SIFMA AMG brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $39 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

AMENDMENTS TO RULE 15c2-12

As discussed in this letter, the AMG strongly supports the Commission's efforts regarding disclosure of the financial obligations of municipal issuers. The AMG believes that the additional disclosures in the Proposed Rule are generally proportionate and will provide great value to investors in the secondary market. In order to achieve a rule that provides an adequate level of disclosure but is also practical for the market generally, we have suggested certain clarifications and enhancements to the Proposed Rule in our responses below.[2] We have also suggested revised language for the Proposed Rule reflecting our comments in Exhibit I attached to this letter.[3]

RESPONSES TO RELEVANT QUESTIONS

A. "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"

A.1. 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.

The AMG cannot comment on the frequency of the notice events contemplated by the proposed new subparagraphs of Rule 15c2-12, which is likely to be specific to particular issuers or other obligated persons. However, frequency is not the issue. Regardless of frequency, real time disclosure of material financial obligations is critical to ensure that investors have appropriate information available to make investment decisions in the secondary market for municipal securities.

A.2. Is the triggering of the obligation to provide the event notice clear?

As a conceptual matter, the disclosure objectives of the Proposed Rule are clear. As discussed below, we recommend changes to the formulation of event notices to focus the notification requirements on information that is important to the investing public.

We also recommend that the Proposed Rule should clarify that both current and contingent financial obligations (including guarantees) are contemplated by subparagraph (b)(5)(i)(C)(15) and, as discussed in response to request for comment A8, suggest that the Proposed Rule should specify the timing of an "incurrence," particularly with respect to the incurrence of contingent obligations.

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[2] For ease of reference the requests for comment have been numbered, although there is no corresponding numbering system in the Release.

[3] The AMG is suggesting as well that the Commission consider certain revisions to existing subparagraph (b)(5)((i)(C). See "Additional Discussion," Section III ("Modifications to the Existing Rule") below.

A.3. 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?

Yes. The Proposed Rules should clarify that a series of related financial obligations must be aggregated for purposes of assessing materiality. The aggregation of similar or related transactions is a concept that is familiar from the integrated disclosure regime for corporate issuers,[4] which may serve as a useful paradigm under subparagraph (b)(5)(i)(C)(15).

In many cases, it is likely to be clear from the outset to the issuer or other obligated person that it will be incurring in a series of related obligations that will in the aggregate be material, and therefore the event notice would be provided at the time of the initial occurrence. Where the materiality of a series of incurrences becomes apparent at only a later time, presumably the obligated person will provide an event notice at such time.

A.4. Are there other events that should be included in subparagraph (b)(5)(i)(C)(15) of the Rule? Should any of the events proposed to be included be eliminated or modified?

Entry into Material Agreements

The Commission should consider adding the entry by an obligated person into a material agreement to subparagraph (b)(5)(i)(C)(15).

A material agreement for these purposes may be defined as a definitive agreement, other than a financial obligation, not made in the ordinary course of business of an obligated person, that would be material[5] to the holders of securities issued by such person or with respect to which such person is liable. Amendments and other modifications to a material agreement that are themselves material should also trigger the obligation to provide an event notice.

The requirement to provide timely notice of the entry into material agreements is a lynchpin of the disclosure regime for corporate issuers, and corporate issuers routinely provide such

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[4] See Instruction 2 to Item 404(a) ("Transactions with Related Persons, Promoters and Certain Control Persons") of Regulation S-K (17 CFR 229.404(a)) ("For purposes of paragraph (a) of this Item, a transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships."); Instruction 4 to Item 2.01 ("Completion of Acquisition or Disposition of Assets") of Form 8-K (17 CFR 429.308) ("Acquisitions of individually insignificant businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses . . . and are significant in the aggregate.") See also, for example, Rule 312.03 of the New York Stock Exchange Listed Company Manual ("Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, ... ").

[5] See response to request for comment A5 for discussion of the concept of "materiality" generally under the Proposed Rule.

information. See Item 1.01 ("Entry into a Material Definitive Agreement") of Form 8-K (17 CFR 249.308). Rule 15c2-12 can readily leverage off of this experience. Requiring that agreements must be definitive (e.g. not a preliminary or non-binding agreement), that they must be made outside the ordinary course of business, and that they must be material to a reasonable investor assures that an event notice will only be required of agreements that will not overburden issuers and other obligated persons.

Terms and Conditions

As suggested in response to request for comment A8, the Rule should instruct that event notices must include the material terms and conditions of the incurrence or other event requiring disclosure. Subparagraph (b)(5)(i)(C)(15) of the Proposed Rule includes "Covenants, events of default, remedies and priority rights" of a financial obligation as items that would trigger an event notice. The AMG agrees, and would clarify that these items should always be deemed material but also believes that the list should not be exclusive. Depending on the context and circumstances, other terms and conditions may also be material and, if material, should be disclosed as well.[6]

Modifications

As suggested in response to request for comment C2, material modifications to the terms of a previously incurred financial obligation should themselves be a notice event, irrespective of whether they reflect financial difficulties. Consistent with this suggestion, modifications to the terms of financial obligations (as well as modifications to material agreements) are more appropriately included in subparagraph (b)(5)(i)(C)(15) rather than subparagraph (b)(5)(i)(C)(16).

Performance Reports and Periodic Financial Statements

It is customary for municipal issuers to provide periodic financial information and performance reports (discussing covenant compliance, the occurrence of events of default, the exercise of remedies against the issuer) to certain lenders or other creditors, which are typically not provided to the investing public. Investors need to know whether municipal issuers are performing or not performing under other financial obligation covenants and conditions. This information is material because it enables investors to form a complete understanding of a municipal issuer's distance to an event of default under all financial obligations. In the current environment, there exists an unfair disparity of information between public and non-public investors. This can be remedied without imposing undue burdens on issuers and other obligated parties. The reports are otherwise required to be prepared, and providing notice of their existence and posting them to EMMA, as proposed below under "Posting of Information," would not entail any extraordinary effort or expense.

The Commission should therefore consider adding the delivery of periodic financial information and performance reports to creditors of the obligated person as a notice event. Inclusion of the

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[6] See below under "Additional Discussion—Posting of Documentation" for the recommendation of the AMG that the full text of relevant documentation by posted to EMMA, to provide investors with full disclosure of material terms and conditions.

delivery of such materials among the notice events of subparagraph (b)(5)(i)(C)(15) is consistent with the objectives of the Proposed Rule to promote integrity and transparency in the secondary municipal securities markets and to eliminate opportunities for manipulative conduct that may result from the disparity of information.[7,8]

A.5. The Commission further requests comment as to whether the materiality conditions are appropriate conditions for subparagraph (b)(5)(i)(C)(15) of the Rule. Should any or all of the items included in the proposed rule text not be subject to the proposed materiality condition?

Materiality is appropriate for determining whether an event notice should be required with respect to a financial obligation, entry into a material agreement (as discussed in response to request for comment A4), or modification to the terms of a financial obligation or material agreement. However, certain terms of financial obligations, as discussed in response to request for comment A4, should be regarded as *per se* material. For these items a materiality qualifier would not be appropriate, whether with respect to their initial disclosure or disclosure of any subsequent modification. Also, the Proposed Rule should provide that financial obligations requiring the delivery of performance reports or periodic financial information, as discussed in the response to comment A4 above, should be deemed material.

Definition of Materiality

Materiality should be defined in a manner that is consistent with other public disclosure requirements under the Securities Exchange Act.

It is suggested therefore that the Proposed Rule include a definition of "materiality" modeled on the definition included in Securities Exchange Act Rule 12b-2 (17 CFR 240.12b-2) along the following lines:

> "The term 'material' refers to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities of the obligated person."

Issuers, the courts and the investing public have substantial experience with this concept of materiality, so that it can be readily imported into Rule 15c2-12.

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[7] Several issuers of municipal securities currently disclose this type of information, which we believe represents best practice.

For example, a large hospital and university system, with a variety of both municipal securities and private bank debt, is posting on EMMA all quarterly compliance and financial reports provided to creditors. Secondary market investors have access thereby to updated and pertinent information concerning the system, are able to assess whether the system is in danger of default under its bank agreement, and can evaluate the overall creditworthiness of the system. Because investors have the information they need for informed investment decisions, the market for the securities of this issuer is likely to be more liquid.

[8] As suggested in response to request for comment A5, any financial obligation that requires an obligated person to provide performance reports or periodic information should be deemed *per se* material. At the very least, this will put investors on notice that other creditors are receiving this information.

The focus on materiality to investors is sensible, particularly because an obligated person may be indifferent to financial arrangements that are of considerable importance to investors. For example, an interest rate swap termination claim may be paid after bonds in a structured finance vehicle, but a municipality can reverse the subordination by separately guarantying the termination claim. The changes to the payment priorities of the termination claim versus the bonds would not affect the financial exposure of the municipality, but could be highly prejudicial to investing bondholders.

A.6. 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?

Although we are not proposing to add events to subparagraph (b)(5)(i)(C)(15) that would not be subject to materiality, certain terms and conditions of reportable events should be regarded as *per se* material. See response to request for comment A5.

A.7. 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?

We are proposing to define "materiality" in terms of materiality to investors, consistent with the definition of "materiality" generally under the federal securities laws, and to eliminate the concept of items "which affect security holders." A materiality qualifier, however, may not be appropriate in all circumstances, because certain items should be deemed material *per se*. See responses to request for comment A4 ("Terms and Conditions") and request for comment A5.

A.8. Should the Commission provide additional guidance on the types of information issuers and obligated persons should consider in drafting event notices?

Yes, the Commission should provide additional guidance as described below.

Disclosure of Material Terms and Conditions

The Rule should instruct that event notices must contain certain basic information concerning the financial obligations and other agreements whose notice is required. At a minimum, an event notice should disclose the identities of the counterparties to the obligations or agreements that are its subject and a description of material terms and conditions. In the case of financial obligations, these would include covenants, events of default and priority rights, as recited in the Proposed Rule.[9]

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[9] See below under "Additional Discussion—Posting of Documentation" for the recommendation of the AMG that the full text of relevant documentation be posted to EMMA, to provide investors with full disclosure of material terms and conditions.

With the suggested instruction, the phrase "or other similar terms of a financial obligation of the obligated person" may be eliminated, as the Rule would require the disclosure of all material terms and conditions of the financial obligation or agreement.

Incurrence

The Commission should provide guidance on the meaning of the term "incurrence."

"Incurrence" of a current financial obligation should be defined as the earlier of (i) the entry into an agreement providing for the creation of the financial obligation and (ii) the actual incurrence of the financial obligation.

"Incurrence" of a contingent financial obligation should be defined as (i) the entry into an agreement or other legally binding obligation with respect to the contingent financial obligation, (ii) the initial conversion of a contingent financial obligation into a present financial obligation or initial performance under the contingent financial obligation, and (iii) any subsequent conversion of or performance under the contingent financial obligation that is material. This would include, for example, the first time collateral is required to be posted under a swap, the first time a line of credit is utilized, the first time a draw is made under a letter of credit, or the first time an obligated person is called upon to perform under a guarantee.

B. "The Commission proposes to amend Rule 15c2–12(f) to add a definition for 'financial obligation.' Under the proposed definition, the term financial obligation means a debt obligation, lease, guarantee, derivative instrument, or monetary obligation resulting from a judicial, administrative, or arbitration proceeding. The term financial obligation does not include municipal securities as to which a final official statement has been provided to the MSRB consistent with Rule 15c2–12."

B.1. 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?

No. Subject to response to the response to request for comment B2, the definitions used in the Proposed Rules are appropriate and should be maintained.

B.2. 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?

Yes. It is important that the types of financial obligations be defined to avoid uncertainty regarding the reach of the notice obligations under proposed subparagraph (b)(5)(i)(C)(15) of the Rule. However, utilization of existing definitions of certain financial obligations may be helpful for clarity and consistency of disclosure under the federal securities laws.

Debt Obligations

As currently formulated, the definition of financial obligation suffers from ambiguity. "Debt obligation," which is used in the Proposed Rule could include liability on any claim. The Rule may therefore benefit by utilizing existing definitions from the disclosure regime under the Securities Exchange Act.

By importing concepts found in Form 8-K and Regulation S-K, the Rule would have the benefit of recognized accounting usage, would eliminate the ambiguity and possible overbreadth of the term "debt obligations" and sharpen the usage of the term "leases."

The Commission should therefore consider replacing references to "debt obligation" and "lease" in the proposed definition of "financial obligation" with the definition of "direct financial obligation" that appears in section (c) of Item 2.03 ("Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant") of Form 8-K(17 CFR 249.308). A "direct financial agreement" is defined there as a long-term debt obligation; a capital lease obligation; an operating lease obligation; or a short-term debt obligation that arises other than in the ordinary course of business. In turn,

- a "long-term debt obligation" is defined as a payment obligation under long-term borrowings referenced in FASB ASC paragraph 470-10-50-1 (Debt Topic) (Item 303(a)(5)(ii)(A) of Regulation S-K, 17 CFR Part 229);
- a "capital lease obligation" is defined as a payment obligation under a lease classified as a capital lease pursuant to FASB ASC Topic 840, Leases (Item 303(a)(5)(ii)(B) of Regulation S-K, 17 CFR Part 229);
- an "operating lease obligation" is defined as a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB ASC Topic 840 (Item 303(a)(5)(ii)(C) of Regulation S-K, 17 CFR Part 229); and
- a "short-term debt obligation" is defined as a payment obligation under a borrowing arrangement that is scheduled to mature within one year, or, for those that use the operating cycle concept of working capital, within a registrant's operating cycle that is longer than one year, as discussed in FASB ASC paragraph 210-10-45-3 (Balance Sheet Topic) (Item 2.03(e)) of Form 8-K, 17 CFR 249.308).

For similar reasons, the Commission may wish to define the term "derivatives instruments" by reference to the definition of "derivatives" contained in FASB ASC Topic 815 or as an "eligible OTC derivative instrument," as defined in Rule 3b-13 under the Securities Exchange Act (17 CFR 240.3b-13).

Guarantees

The Commission should also consider revising proposed subparagraph (b)(5)(i)(C)(16) of the Rule so that the "guarantees" referred to under the definition of "financial obligation" are those that guarantee debt obligations and leases (or, as proposed here, direct financial obligations) and derivative instruments. The term "guarantee" as utilized in the definition of "financial

obligation" should not include guarantees of agreements where the agreements themselves are not required to be noticed under subparagraph (b)(5)(i)(C)(15) of the Rule.

Guarantees of other obligations of an obligated person would be picked up in appropriate cases under the requirement to notice material agreements, as described above.

Other

No change is warranted with respect to the term "monetary obligation resulting from a judicial, administrative, or arbitration proceeding."

B.3. Are there any financial obligations that would not be covered in the proposed definition that should be?

No. Subject to the response to request for comment B2, all appropriate financial obligations appear to be covered by the definition in the Proposed Rules.

B.4. Should other contracts that create future payment obligations (e.g., a contract for waste disposal services) be included in the proposed definition?

See response to request for comment A4 ("Material Agreements").

B.5. Should any of the terms included in the definition be modified? Should any terms be added to the definition to achieve the stated goal?

See response to request for comment B2.

B.6. Comment is also requested on whether including a definition in the Rule is necessary.

As discussed in response to request for comment B2, it is necessary and appropriate that the Rule contain this definition, subject to the modifications suggested in this comment letter.

C. "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"

C.1. 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?

Termination Events

The Rule should be clarified such that "termination events" includes all manner of termination of a material financial obligation (other than at its stated maturity), whether by its terms or by voluntary action of the obligated person or its counterparty to the financial obligation.

Modification Events

Any modifications of the terms of a financial obligation that would themselves require notice if included in the initially incurred financial obligation should be noticed irrespective of whether it reflects financial difficulty. As discussed above, therefore, modification of terms is more appropriately contained in subparagraph (b)(5)(i)(C)(15) of the Rule and should be omitted from subparagraph (b)(5)(i)(C)(16).

Other Events

To clarify the scope of "other similar events" in subparagraph (b)(5)(i)(C)(16), it may be advisable to add "which materially affect the obligations, liabilities or performance" of the obligated person under a reportable financial obligation.

C.2. 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.

The AMG believes that the qualification "reflecting financial difficulties" is not appropriate for the items included in the text of subparagraph (b)(5)(i)(C)(16). A default, event of acceleration, termination event, or material event under a financial obligation would be important to investors, irrespective of whether such events reflect financial difficulties. Financial difficulties are not the only cause for default, event of acceleration, termination event or other material event of concern to investors in municipal securities. Events of this type could be indicative, for example, of legislative dysfunction or managerial or administrative difficulty, whose disclosure would also be important to investors in the municipal securities markets.

General Cost Benefit Analysis

The AMG believes that the additional disclosures in the Proposed Rule will provide significant value to investors in the secondary market and will increase market integrity, liquidity, transparency and efficiency in the secondary municipal securities markets. Without the kinds of information that would be provided under the Proposed Rule, the secondary markets may continue to be plagued with uncertainty, investors may be reluctant to trade and markets may experience significant disruptions.

The AMG cannot quantify the increased burden upon issuers, other obligated persons or other market participants by reason of the Proposed Rule. We do note, however, that the Proposed Rule and the recommendations of the AMG do not require obligated persons to engage in extensive document preparation, and are, moreover, consistent with the disclosure obligations for other participants in the U.S. debt markets.

The Proposed Rule would not only provide for broad market efficiencies, it would also be protective of investors at the issuer level. Had the Proposed Rule been previously effective, municipal securities investors in certain situations would have been armed with information with which they might have avoided substantial losses or more effectively protected their rights. For example:

- Investors in the securities of a prominent municipality learned only after the municipality filed for bankruptcy that their bonds were effectively subordinated to swap termination payments, notwithstanding the express priorities of their instruments, because the municipality had separately guaranteed the swaps under an arrangement that was previously undisclosed.
- Holders of municipal conduit bonds were unaware of an impending default under the bank debt of the obligated person. When the bank lenders threatened to exercise remedies, holders of the bonds ultimately purchased new bonds in order to refinance the bank debt, and provide the obligated person with working capital, so that the obligated person could continue as a going concern.
- Investors in municipal securities of a university learned only after the securities were downgraded by multiple notches from a rating agency that the university was in violation of covenants in a bank reimbursement agreement of a letter of credit supporting other variable rate debt of that university.

ADDITIONAL DISCUSSION

I. Obligations of Underwriters

Paragraph (b)(1) of Rule 15c-2 provides that "[p]rior 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 . . . ." Where an issuer or other obligated person has represented in an official statement that it has complied with its obligations under previously executed continuing disclosure agreements ("CDAs") to provide event notices, and the obligated person has not done so, an underwriter could be liable in respect of the offering of the securities covered by the official statement.

Some municipal market participants may take the position that it is inappropriate to import into the municipal securities markets concepts and rules from the Commission's integrated disclosure system for corporate issuers. The corporate disclosure system, they may argue, functions as an integrated whole, cannot be incorporated piecemeal and benefits from regulatory guidance that is currently absent from the arena of municipal securities.

The AMG also understands that a suggestion has been made to permit underwriters to rely on a certification of the obligated person that it has complied with CDA obligations to provide the new event notices in the Proposed Rule.

While the AMG is sensitive to the concerns of these municipal market participants, the AMG believes their concerns do not outweigh the substantial benefits that will be realized with the Proposed Rule.

Underwriters have a lesser degree of exposure for official statements under Rule 15c2-12 than they do for registration statements under Section 11 of the Securities Act. Under Section 11, the burden is on the underwriters to establish a diligence defense.[10] Underwriters may incur liability in respect of official statements under Section 17(a)(2) or Section 17(a)(3) of the Securities Act even absent scienter,[11] but the Commission must affirmatively demonstrate the elements of liability for negligence. Importantly, there is no private right of action under Section 17(a) of the Securities Act.[12]

The AMG recognizes the legitimacy of a perception of excessive government enforcement against underwriters, particularly under the Commission's MCDC initiative. The appropriate response, however, is to temper government enforcement activity so as not to unfairly penalize these municipal market participants, not to resist the Commission's move to bring essential disclosures to the municipal securities market.

The AMG does not agree that concepts from the integrated disclosure system are inappropriate for municipal securities issuers, because municipal issuers lack the guidance and experience that have developed under that regime. To the contrary, disclosure compliance by corporate issuers, particularly under Form 8-K, provides a useful paradigm for the municipal securities markets. While the Commission's staff has provided some guidance on the interpretation of Form 8-K,[13] compliance is almost entirely, and successfully, self-policed by issuers and their advisors, as any practitioner in this space is aware.

Moreover, the integrated disclosure system is an "all or nothing" package. The AMG is indeed of the view that the municipal securities market would benefit from a more holistic reporting regime that goes beyond often belated annual financial reporting and a limited number of event driven notices. However, the unavailability of an all-encompassing scheme for municipal securities disclosures at the current time does not mean that the municipal securities markets should be deprived of a subset of disclosures that are essential to an informed and transparent trading market.

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[10] See Section 11(b)(3) of the Securities Act.

[11] See *SEC v. Aaron,* 446 U.S. 680 (1980), and, e.g., "Municipalities Continuing Disclosure Cooperation Initiative," at fn 6; available at https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml.

[12] Although the Supreme Court has not spoken to the issue, most circuit courts have held that there is no private right of action. See, e.g., *Finkel v. Stratton Corp.*, 962 F.2d 169 (2d Cir. 1992). For a private litigant to recover against an underwriter of municipal securities, the litigant would be required to plausibly allege and prove fraud under Section 10(b) and Rule 10b-5 of the Securities Exchange Act. It is not surprising therefore that it is difficult to identify private actions against underwriters in the municipal securities market. (An action under Section 32 of the Securities Exchange Act, which requires a demonstration of willful misconduct, is unavailable to private litigants.)

[13] See https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm

The Commission has stated that an underwriter cannot rely solely on certifications of an obligated person.[14] Obtaining certifications from an obligated person in the context of a multi-pronged diligence program is entirely appropriate, as the Commission has acknowledged.[15] However, for an underwriter to rely exclusively on such certifications would defeat the underwriter review function contemplated by paragraph (b)(1) of the Rule.

II. Posting of Documentation

Notice of financial obligations (and, as proposed here, material agreements and periodic financial information and performance reports provided to creditors), including a description of material terms and conditions as proposed, is important information for investors in the secondary market because it provides notice of material changes to the financial profile of an obligated person. A summary description of the obligations, however, is not a substitute for the availability of the actual documentation. Experience demonstrates that, while the posting of a notice is important to direct investors' attention to significant financial developments with respect to an issuer or other obligated person, a summary description cannot fully and fairly encapsulate all the material terms of debt instruments. This is particularly true with respect to credit agreements, trust agreements, indentures and the like, which tend to be complex, contain detailed definitions and involve the interplay of numerous interrelated provisions.

Issuers and other obligated persons should not object to a requirement to post on EMMA the documentation for financial obligations (and as proposed here material agreements) required to be noticed under subparagraph (b)(5)(i)(C)(15) of the Rule, since the requirement would not impose an obligation to produce documents that have not already been prepared. Also, because the documentation is being posted, obligated persons, and underwriters and dealers who may subsequently be reviewing compliance with the obligated persons' performance under their continuing disclosure agreements, should appreciate the ability to rely on the availability to the investing public of the actual documentation and thereby allow the notice disclosure to be adjusted to a manageable level of detail.

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[14] See Securities And Exchange Commission, Release No. 34-62184a, "Amendment To Municipal Securities Disclosure" (May 6, 2010) ("The Commission acknowledges that it may not be possible in some cases for an underwriter independently to determine whether some events, for which an event notice is necessary, have occurred. In order to obtain this information, an underwriter may take steps, such as asking questions of an issuer and, where appropriate, obtaining certifications from an issuer, obligated person or other appropriate party about facts, such as the occurrence of specific events listed in paragraph (b)(5)(i)(C) of the Rule (without regard to materiality), that the underwriter may need to know in order to form a reasonable belief in the accuracy and completeness of an issuer's or obligated person's ongoing disclosure representations. However, as discussed above, the underwriter may not rely solely upon the representations of an issuer or obligated person concerning the materiality of such events or that it has, in fact, provided annual filings or event notices to the parties identified in its continuing disclosure agreements . . . .")

[15] Id.

Item 601(b)(10) of Regulation S-K (17 CFR Part 229) requires corporate issuers to file debt documentation and other material agreements with their quarterly and annual reports to the Commission, and the investing public has come to rely upon the availability of this documentation for their investment decisions and analyses.[16]

The obligation to post documentation to EMMA is not new. Municipal issuers are accustomed to making certain documentation available on EMMA. Consistent with the spirit and objectives of the Proposed Rule, this obligation could easily be extended to financial obligations and material agreements that require event notices.[17]

III. Other Modifications

The AMG is also proposing that the Commission consider modification to certain existing provisions of Rule 15c2-12, [and the inclusion of an additional event notice], consistent with the Proposed Rule and the responses to the request for comment provided in this letter.

Materiality

A materiality qualifier appears in a number of the clauses of existing subparagraph (b)(5)(i)(C). Consistent with the recommendation of the AMG regarding the Proposed Rule, we believe that certain events are *per se* material to investors in municipal securities, and that appending a materiality condition to these items inappropriately leaves open to obligated persons a determination not to make disclosures.

We therefore suggest deletion of the "materiality" condition for the events described in the following clauses of subparagraph (b)(5)(i)(C): (7) (modification of security holder rights); (8)(bond calls); (10) (Release, substitution, or sale of property securing repayment of securities); (13) (mergers, consolidations or the sale of all or substantially all of assets); and (14) (appointment of a successor or additional trustee or the change of name of a trustee).

IRS Audits

There is currently insufficient disclosure regarding audits of bonds by the IRS. Any notices, determinations or events that may affect the tax status of a security are material to investors:

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[16] It may be appropriate in limited circumstances for an issuer or other obligated person to redact competitively sensitive information from posted documentation. The basis for doing so should be informed by the Commission's rule regarding submission of information to the Commission on a confidential basis. See 17 CFR 200.83, and in particular clauses (d)(2)(iv) ("The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position") and (d)(2)(v) ("The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the Commission") regarding substantiation of a request for confidential treatment.

[17] Certain issuers of municipal securities currently post to EMMA other financial obligations, which the AMG believes represents best practice. For example, a large nursing home provider recently posted on EMMA a loan agreement with a bank.

that includes preliminary audit notices, proposed conclusions by the IRS, and voluntary settlement discussions**.** We therefore suggest revising existing subparagraph (b)(5)(i)(C)(5) along the following lines:

"(6) Adverse tax opinions, the issuance by the Internal Revenue Service (IRS) of any notices related to selection of bonds for IRS examination or notices related to IRS proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701 – TEB), or other notices or determinations with respect to the tax status of the security, or other events that may affect the tax status of the security (including, without limitation, the commencement and/or the conclusion of voluntary closing agreement discussions with the IRS)."

Escrow Arrangements

The Commission should consider adding a recommendation to disclose modifications to escrow agreements or escrows, or to any security pledged to bondholders, such as mortgaged property. These agreements may impact the creditworthiness of a particular municipal securities issuer. They also provide visibility into substitution requirements, and assist investors in making diversification assessments.

IV. Suggested Reformulation of Proposed Rule

Suggested textual revisions of the Proposed Rule, reflecting the responses in this comment letter, are included with his comment letter as Exhibit I.

* * * *

The AMG sincerely appreciates the opportunity to provide comments and your consideration of these views. We stand ready to provide any additional information or assistance that the Commission might find useful. Please do not hesitate to contact Tim Cameron at [redacted] or [redacted] or Lindsey Keljo at [redacted] or [redacted] with any questions.

Sincerely yours,

Timothy W. Cameron, Esq.
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Asset Management Group
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Managing Director and Associate General Counsel
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Exhibit I

Suggested Modifications to the Proposed Rule

§ 240.15c2-12 Municipal Securities Disclosure

(b) * * *

(5) * * *

(i) * * *

(C) * * *

(15) Incurrence of a material financial obligation, entry into a material agreement, any modification of the material terms of a material financial obligation or material agreement and the delivery of a creditor report.

Note to subparagraph (b)(5)(i)(C)(15): 1. Financial obligations include current financial obligations and contingent financial obligations, including guarantees.

2. Notice of the incurrence of a material financial obligation or entry into a material agreement, or the modification of the material terms of a material financial obligation or material agreement, should identify the parties and the material terms and conditions thereof. Material terms and conditions of a financial obligation include, without limitation covenants, events of default, remedies and priority rights.

3. The incurrence of a current material financial obligation occurs the earlier to occur of (i) the entry into an agreement providing for the creation of the financial obligation, and (ii) the actual incurrence of the financial obligation. The incurrence of a contingent financial agreement occurs at (i) the entry into an agreement or other legally binding obligation with respect to the contingent financial obligation, (ii) the initial conversion of a contingent financial obligation into a present financial obligation or initial performance under the contingent financial obligation, and (iii) any subsequent conversion of or performance under the contingent financial obligation that is material.

4. The incurrence of a series of financial obligations that are individually immaterial but are material in the aggregate shall be treated as the incurrence of a material financial obligation.

5. Financial obligations pursuant to which an obligated person is required to provide creditor reports shall be deemed material.

(16) Default, event of acceleration, termination event or other material events affecting the obligations, liabilities or performance of the obligated person under a material financial obligation or material agreement of the obligated person.

* * * *

(v) Such written agreement or contract for the benefit of holders of such securities also shall provide that an obligated person shall provide to the Municipal Securities Rulemaking Board in an electronic format as prescribed by the Municipal Securities Rulemaking Board the material documentation for the financial obligations and material agreements, and any modifications to financial obligations and material agreements, for which notice must be provided pursuant to subparagraph (b)(5)(i)(C)(15).

* * * *

(f) ***

(11) The term *financial obligation* means a (i) direct financial obligation, (ii) derivative instrument, or (iii) monetary obligation resulting from a judicial, administrative, or arbitration proceeding or a guarantee of any such obligation provided by the obligated person. The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.

(12) The term *direct financial agreement* means a long-term debt obligation; a capital lease obligation; an operating lease obligation; or a short-term debt obligation that arises other than in the ordinary course of business. For these purposes,

(a) a *long-term debt obligation* means a payment obligation under long-term borrowings referenced in FASB ASC paragraph 470-10-50-1 (Debt Topic) (Item 303(a)(5)(ii)(A) of Regulation S-K, 17 CFR Part 229);

(b) a *capital lease obligation* means a payment obligation under a lease classified as a capital lease pursuant to FASB ASC Topic 840, Leases (Item 303(a)(5)(ii)(B) of Regulation S-K, 17 CFR Part 229);

(c) an *operating lease obligation* means a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB ASC Topic 840 (Item 303(a)(5)(ii)(C) of Regulation S-K, 17 CFR Part 229); and

(d) a *short-term debt obligation* is defined as a payment obligation under a borrowing arrangement that is scheduled to mature within one year, or, for those that use the operating cycle concept of working capital, within a registrant's operating cycle that is longer than one year, as discussed in FASB ASC paragraph 210-10-45-3 (Balance Sheet Topic) (Item 2.03(e)) of Form 8-K, 17 CFR 249.308).

(13) The term *derivative instrument* means a derivative, as defined in FASB ASC Topic 815 an eligible OTC derivative instrument, as defined in 24 CFR 240.3b-13.

(14) The term *material* refers, unless otherwise specified, to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities of the obligated person.

(15) The term *material agreement* means a definitive agreement that is not a financial obligation, made outside the ordinary course of business that would be material to a reasonable investor.

(16) The term *termination event* means any event or circumstance that results in the termination of a material financial obligation prior to its stated maturity or other ending date, whether in accordance with the terms of the financial obligation, by voluntary agreement of the obligated person and the counterparty to the financial obligation or otherwise.

(17) The term *creditor report* means a report of periodic financial information or a report of the performance of the obligated person under a material financial obligation, provided that for these purposes the second sentence of the definition of financial obligation shall be disregarded.