

December 21, 2018

Submitted Electronically

Rebecca J. Olsen
Director
Office of Municipal Securities
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

RE: Amendments to Municipal Securities Disclosure (Release No. 34-83885).

Dear Ms. Olsen:

On behalf of the Bond Dealers of America (“BDA”), I am writing this letter to request guidance from the Office of Municipal Securities (the “Office”) concerning the final rule by the United States Securities and Exchange Commission (the “Commission”) amending Rule 15c2-12 (Release No. 34-83885) (the “Amendments”). The BDA requests that the Office provide guidance concerning how it views the due diligence obligations of underwriters with respect to compliance by issuers and obligated persons with obligations to disclose the new events added by the Amendments (the “New Events”). The BDA is the only DC-based group representing the interests of securities dealers and banks exclusively focused on the U.S. fixed income markets.

The BDA is requesting this guidance so that it can understand the Office’s view of how the interpretative guidance in the Commission’s last amendment to Rule 15c2-12 in May 2010 (Release No. 34-62184a) (the “2010 Release”) applies to the New Events. In the interpretative guidance in the 2010 Release, the Commission stated that underwriters have an obligation to perform an affirmative investigation into the compliance by obligated persons of their continuing disclosure obligations, and that underwriters may not merely rely on representations by issuers and obligated persons concerning that compliance. The BDA notes that the New Events are different in kind than other continuing disclosure obligations that underwriters routinely due diligence. Ordinarily, underwriters affirmatively investigate the timeliness and completeness of annual reports and whether event notices were filed resulting from rating changes because EMMA provides a known location for them to investigate whether the issuer or obligated person made the filings. The New Events are similar to other listed events which underwriters do not routinely affirmatively investigate because there is not known location to do so, and underwriters investigate them through questions to the issuer or obligated person. The Commission made this same observation in the 2010 Release with respect to other listed events. The Commission stated that it “acknowledge[d] that it may not be possible in some cases for an underwriter 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....” The BDA believes that the New Events largely fall within this category of event notices; and therefore the BDA is seeking guidance from the Office to understand its view of the obligations of underwriters to perform an affirmative investigation into compliance by issuers and obligated persons of the New Events.

Similar to past requests for guidance, we have prepared a draft question and answer and ask the Office to consider whether it captures the Office’s view of how the 2010 Release would apply to the New Events. Here are the proposed questions and answers:

Do underwriters have a requirement to conduct an affirmative investigation into the compliance by obligated persons of the New Events?

In the interpretative guidance in the 2010 Release, the Commission stated that underwriters have a responsibility to conduct an affirmative investigation into the compliance by issuers and obligated persons of their continuing disclosure obligations and may not solely rely on representations from the issuer or obligated person concerning that compliance. The staff notes that the New Events would entail a different scope of investigation than an investigation into compliance with the timeliness and completeness of annual reports and listed events for rating changes because there may not exist known, publicly available sources to review in conducting such an investigation. The staff believes that, in addition to making inquiry of the issuer or obligated person concerning its compliance with the New Events, an underwriter still is required to conduct some affirmative investigation of the compliance by obligated persons of the New Events, but that the scope of that investigation should take into consideration the limited sources of information that could fall into a reasonable scope of investigation. For most obligated persons, the staff believes that if an underwriter reviews the most recent audited financial statements and any prepared and reasonably available unaudited financial statements, and the financial statements do not disclose the incurrence of a financial obligation or other events that would suggest that a New Event occurred for which a notice was not timely filed, an underwriter should be able to conclude that it conducted a reasonable affirmative investigation. In that case, the underwriter could reasonably rely on representations of the issuer or obligated person concerning its compliance with the New Events.

What is an underwriter's responsibility to perform an affirmative investigation into compliance with the New Events in competitively bid transactions?

As the Commission has stated previously, the scope of reasonable investigation of an underwriter into the key representations in an offering document, including the affirmative investigation of an underwriter of compliance with continuing disclosure obligations, is different in a competitively bid transaction. The staff would expect that an underwriter in the context of a competitively bid transaction would review the offering document for the transaction in a professional manner and if, in the course of that review, any red flags arose concerning the compliance by the issuer or obligated person with the New Events arose, the underwriter would raise those concerns with the issuer or obligated person and ensure that the concerns are appropriately addressed.

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If you or your staff has any questions or need additional information, please do not hesitate contact me directly at 202.204.7901 or mnicholas@bdamerica.org. We look forward to your response.

Sincerely,

A handwritten signature in blue ink that reads "M. Nicholas". The signature is written in a cursive, flowing style.

Michael Nicholas
Chief Executive Officer
Bond Dealers of America