



# Federal Register

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**Thursday,  
August 7, 2008**

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**Part II**

## **Securities and Exchange Commission**

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**17 CFR Part 240**

**Proposed Amendment to Municipal  
Securities Disclosure; Proposed Rule;  
Notice**

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 240

[Release No. 34-58255; File No. S7-21-08]

RIN-3235-AK20

### Proposed Amendment to Municipal Securities Disclosure

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) is publishing for comment proposed amendments to a rule under the Securities Exchange Act of 1934 (“Exchange Act”) relating to municipal securities disclosure. The proposal would amend certain requirements regarding the information that the broker, dealer, or municipal securities dealer acting as an underwriter in a primary offering of municipal securities must reasonably determine that an issuer of municipal securities or an obligated person has undertaken, in a written agreement or contract for the benefit of holders of the issuer’s municipal securities, to provide. Specifically, the amendments would require the broker, dealer, or municipal securities dealer to reasonably determine that the issuer or obligated person has agreed to provide the information covered by the written agreement to the Municipal Securities Rulemaking Board (“MSRB” or “Board”), instead of to multiple nationally recognized municipal securities information repositories (“NRMSIRs”) and state information depositories (“SIDs”), as the rule currently provides, and to provide such information in an electronic format and accompanied by identifying information as prescribed by the MSRB.

**DATES:** Comments should be received on or before September 22, 2008.

**ADDRESSES:** Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. S7-21-08 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File No. S7-21-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

#### FOR FURTHER INFORMATION CONTACT:

Martha Mahan Haines, Assistant Director and Chief, Office of Municipal Securities, at (202) 551-5681; Mary N. Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551-5683; Cyndi N. Rodriguez, Special Counsel, Office of Market Supervision, at (202) 551-5636; or Rahman J. Harrison, Special Counsel, Office of Market Supervision, at (202) 551-5663, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-6628.

**SUPPLEMENTARY INFORMATION:** The Commission is requesting public comment on a proposed amendment to Rule 15c2-12 under the Exchange Act.<sup>1</sup>

### I. Background

#### A. History of Rule 15c2-12

The Commission has long been concerned with improving the quality, timing, and dissemination of disclosure in the municipal securities markets. In an effort to improve the transparency of the municipal securities market, in 1989, the Commission adopted Rule 15c2-12<sup>2</sup> (“Rule” or “Rule 15c2-12”) and an accompanying interpretation modifying a previously published interpretation of the legal obligations of underwriters of municipal securities.<sup>3</sup> As adopted in 1989, Rule 15c2-12 required, and still requires, underwriters participating in primary offerings of municipal securities of \$1,000,000 or more to obtain, review,

and distribute to potential customers copies of the issuer’s official statement. Specifically, Rule 15c2-12 required, and still requires, an underwriter acting in a primary offering of municipal securities: (1) To obtain and review an official statement “deemed final” by an issuer of the securities, except for the omission of specified information, prior to making a bid, purchase, offer, or sale of municipal securities; (2) in non-competitively bid offerings, to send, upon request, a copy of the most recent preliminary official statement (if one exists) to potential customers; (3) to send, upon request, a copy of the final official statement to potential customers for a specified period of time; and (4) to contract with the issuer to receive, within a specified time, sufficient copies of the final official statement to comply with the Rule’s delivery requirement, and the requirements of the rules of the MSRB.

While the availability of primary offering disclosure significantly improved following the adoption of Rule 15c2-12, there was a continuing concern about the adequacy of disclosure in the secondary market.<sup>4</sup> To enhance the quality, timing, and dissemination of disclosure in the secondary municipal securities market, the Commission in 1994 adopted amendments to Rule 15c2-12.<sup>5</sup> Among

<sup>4</sup> In 1993, the Commission’s Division of Market Regulation (n/k/a the Division of Trading and Markets) conducted a comprehensive review of many aspects of the municipal securities market, including secondary market disclosure (“1993 Staff Report”). Findings in the 1993 Staff Report highlighted the need for improved disclosure practices in both the primary and secondary municipal securities markets. The 1993 Staff Report found that investors need sufficient current information about issuers and significant obligors to better protect themselves from fraud and manipulation, to better evaluate offering prices, to decide which municipal securities to buy, and to decide when to sell. Moreover, the 1993 Staff Report found that the growing participation of individuals as both direct and indirect purchasers of municipal securities underscored the need for sound recommendations by brokers, dealers, and municipal securities dealers. See Securities and Exchange Commission, Division of Market Regulation (n/k/a Division of Trading and Markets), *Staff Report on the Municipal Securities Market* (September 1993) (available at <http://www.sec.gov/info/municipal.shtml>).

<sup>5</sup> See Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590 (November 17, 1994) (“1994 Amendments”).

In light of the growing volume of municipal securities offerings, as well as the growing ownership of municipal securities by individual investors, in March 1994, the Commission published the *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others*. See Securities Exchange Act Release No. 33741 (March 9, 1994), 59 FR 12748 (March 17, 1994). The Commission intended that its statement of views with respect to disclosures under the federal securities laws in the municipal market would encourage and expedite

<sup>1</sup> 17 CFR 240.15c2-12.

<sup>2</sup> 17 CFR 240.15c2-12.

<sup>3</sup> See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 (July 10, 1989) (“1989 Adopting Release”).

other things, the 1994 Amendments placed certain requirements on brokers, dealers, and municipal securities dealers (“Dealers” or, when used in connection with primary offerings, “Participating Underwriters”). In adopting the 1994 Amendments, the Commission intended “to deter fraud and manipulation in the municipal securities market” by prohibiting the underwriting and subsequent recommendation of transactions in municipal securities for which adequate information was not available on an ongoing basis.<sup>6</sup>

Specifically, under the 1994 Amendments, Participating Underwriters are prohibited, subject to certain exemptions, from purchasing or selling municipal securities covered by the Rule in a primary offering, unless the Participating Underwriter has reasonably determined that an issuer of municipal securities or an obligated person<sup>7</sup> has undertaken in a written agreement or contract for the benefit of holders of such securities (“continuing disclosure agreement”) to provide specified annual information and event notices to certain information repositories. The information to be provided consists of: (1) Certain annual financial and operating information and audited financial statements (“annual filings”);<sup>8</sup> (2) notices of the occurrence of any of eleven specific events (“material event notices”)<sup>9</sup> and (3) notices of the failure of an issuer or other obligated person to make a submission required by a continuing

the ongoing efforts by market participants to improve disclosure practices, particularly in the secondary market, and to assist market participants in meeting their obligations under the antifraud provisions. *Id.*

<sup>6</sup> See 1994 Amendments, *supra* note 5.

<sup>7</sup> Obligated persons include persons, including the issuer, committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities to be sold in an offering. See 17 CFR 240.15c2–12(f)(10).

<sup>8</sup> 17 CFR 240.15c2–12(b)(5)(i)(A) and (B).

<sup>9</sup> 17 CFR 240.15c2–12(b)(5)(i)(C). The following events, if material, require notice: (1) Principal and interest payment delinquencies; (2) non-payment related defaults; (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 or events affecting the tax-exempt status of the security; (7) modifications to rights of security holders; (8) bond calls; (9) defeasances; (10) release, substitution, or sale of property securing repayment of the securities; and (11) rating changes.

In addition, Rule 15c2–12(d)(2) provides an exemption from the application of paragraph (b)(5) of the Rule with respect to primary offerings if, among other things, the issuer or obligated person has agreed to a limited disclosure obligation, including sending certain material event notices to each NRMSIR or the MSRB, as well as the appropriate SID. See 17 CFR 240.15c2–12(d)(2).

disclosure agreement (“failure to file notices”).<sup>10</sup> The 1994 Amendments require the Participating Underwriter to reasonably determine that an issuer of municipal securities or an obligated person has undertaken in the continuing disclosure agreement to provide: (1) Annual filings to each NRMSIR; (2) material event notices and failure to file notices either to each NRMSIR or to the MSRB; and (3) in the case of states that established SIDs, all continuing disclosure documents to the appropriate SID. Finally, the 1994 Amendments revise the definition of “final official statement” to include a description of the issuer’s or obligated person’s continuing disclosure undertakings for the securities being offered, and of any instances in the previous five years in which the issuer or obligated person failed to comply, in all material respects, with undertakings in previous continuing disclosure agreements.

#### *B. Disclosure Practices in the Secondary Market and Need for Improved Availability to Continuing Disclosure*

Since the adoption of Rule 15c2–12 in 1989 and its subsequent amendment in 1994, the size of the municipal securities market has grown considerably.<sup>11</sup> There were over \$2.6 trillion of municipal securities outstanding at the end of 2007.<sup>12</sup> Notably, at the end of 2007, retail investors held approximately 35% of outstanding municipal securities directly and up to another 36% indirectly through money market funds, mutual funds, and closed end funds.<sup>13</sup> There is also substantial trading volume in the municipal securities market. According to the MSRB, more than \$6.6 trillion of long and short term municipal securities were traded in 2007 in more than 9 million transactions.<sup>14</sup> Further, the municipal securities market is extremely diverse, with more than

<sup>10</sup> 17 CFR 240.15c2–12(b)(5)(i)(D). Annual filings, material event notices, and failure to file notices are referred to collectively herein as “continuing disclosure documents.”

<sup>11</sup> According to statistics assembled by the Securities Industry and Financial Markets Association (SIFMA), the amount of outstanding municipal securities grew from \$1.2616 trillion in 1996 to \$2.6174 trillion at the end of 2007. See SIFMA “Outstanding U.S. Bond Market Debt” (available at [http://www.sifma.org/research/pdf/Overall\\_Outstanding.pdf](http://www.sifma.org/research/pdf/Overall_Outstanding.pdf)).

<sup>12</sup> See SIFMA “Outstanding U.S. Bond Market Debt” (available at [http://www.sifma.org/research/pdf/Overall\\_Outstanding.pdf](http://www.sifma.org/research/pdf/Overall_Outstanding.pdf)).

<sup>13</sup> See SIFMA “Holders of U.S. Municipal Securities” (available at [http://www.sifma.org/research/pdf/Holders\\_Municipal\\_Securities.pdf](http://www.sifma.org/research/pdf/Holders_Municipal_Securities.pdf)).

<sup>14</sup> See MSRB’s Real-Time Transaction Reporting Statistical Information, Monthly Summaries 2007 (available at [http://www.msrb.org/msrb1/TRSweb/MarketStats/statistical\\_patterns\\_in\\_the\\_muni.htm](http://www.msrb.org/msrb1/TRSweb/MarketStats/statistical_patterns_in_the_muni.htm)).

50,000 state and local issuers of these securities.<sup>15</sup>

Currently, there are four NRMSIRs<sup>16</sup> and three SIDs.<sup>17</sup> Each of the NRMSIRs utilizes the information obtained from continuing disclosure documents to create proprietary information products that are primarily sold to and used by dealers, institutional investors and other market participants who subscribe to such products. With respect to the availability of municipal securities information to retail investors, each of the NRMSIRs also make continuing disclosure documents available for sale to non-subscribers.<sup>18</sup>

Although the existing practice for the collection and availability of municipal securities disclosures has substantially improved the availability of information to the market, the Commission believes that improvements could achieve more efficient, effective, and wider availability of municipal securities information to market participants.<sup>19</sup> Among other things, improvements in information availability may allow investors to obtain information more readily and may help them to make

<sup>15</sup> See Securities Exchange Act Release No. 33741, *supra* note 5.

<sup>16</sup> The four NRMSIRs are the Bloomberg Municipal Repository, DPC Data, Inc., Interactive Data Pricing and Reference Data, Inc., and Standard & Poor’s Securities Evaluations, Inc.

<sup>17</sup> The three SIDs are the Municipal Advisory Council of Michigan, the Municipal Advisory Council of Texas, and the Ohio Municipal Advisory Council.

<sup>18</sup> See <http://www.bloomberg.com/markets/rates/municontacts.html> (Bloomberg Municipal Repository); <http://www.munifilings.com/help/help.cfm> (DPC Data, Inc.); [http://www.interactivedata-prd.com/07company\\_info/about\\_us/MN/NRMSIR.shtml](http://www.interactivedata-prd.com/07company_info/about_us/MN/NRMSIR.shtml) (Interactive Data Pricing and Reference Data, Inc.); and <http://www.discloredirectory.standardandpoors.com/> (Standard & Poor’s Securities Evaluations, Inc.).

<sup>19</sup> The Commission notes that the aspects of the Rule that relate to the provision of continuing disclosure documents to multiple locations (*i.e.*, to each NRMSIR and SID) may have engendered certain inefficiencies in the current system. See 17 CFR 240.15c2–12(b)(5)(i)(A) through (D). For instance, there have been reports that NRMSIRs may not receive continuing disclosure documents concurrently, resulting in the uneven availability of documents from the various NRMSIRs for some period of time. There also have been reports of inconsistent document collections among NRMSIRs, possibly due to the failure of some issuers or obligated persons to provide continuing disclosure documents to each NRMSIR. Finally, there have been reports indicating possible weaknesses in document retrieval at the NRMSIRs. See, *e.g.*, Troy L. Kilpatrick and Antonio Portuondo, *Is This the Last Chance for the Muni Industry to Self-Regulate?*, THE BOND BUYER, August 6, 2007, and comments made at the 2001 Municipal Market Roundtable—“Secondary Market Disclosure for the 21st Century” held November 14, 2001 (“2001 Roundtable”), and the 2000 Municipal Market Roundtable held October 12, 2000 (available at <http://www.sec.gov/info/municipal/roundtables/thirdmuniround.htm> and <http://www.sec.gov/info/municipal/roundtables/2000participants.htm>, respectively).

more informed investment decisions. Specifically, the Commission believes that municipal securities disclosure documents should be made more readily and more promptly available to the public and that all investors should have better access to important market information that may affect the price of a municipal security, such as information in financial statements and notices regarding defaults and changes in ratings, credit enhancement provider, and tax status.

Furthermore, the Commission believes that improved access to the information in continuing disclosure documents not only would provide the investing public with important information regarding municipal securities, both during offerings and on an ongoing basis, but also would help fulfill the regulatory and information needs of municipal market participants, including Dealers, Participating Underwriters, mutual funds, and others. For example, many mutual funds include municipal securities in their portfolios that they routinely monitor for regulatory and other reasons.<sup>20</sup> They do so by reviewing annual filings, as well as material event notices and failure to file notices, obtained from NRMSIRs and SIDs.<sup>21</sup> In addition, the MSRB requires Dealers to disclose to a customer at the time of trade all material facts about a transaction known by the Dealer.<sup>22</sup> Further, the MSRB requires a Dealer to disclose material facts about a security when such facts are reasonably accessible to the market.<sup>23</sup> Accordingly, a Dealer is responsible for disclosing to a customer any material fact concerning a municipal security transaction made publicly available through sources such as NRMSIRs, the MSRB's Municipal Securities Information Library<sup>®</sup> ("MSIL"<sup>®</sup>) system,<sup>24</sup> the MSRB's Real-

Time Transaction Reporting System ("RTRS"), rating agency reports and other sources of information relating to the municipal securities transaction generally used by Dealers that effect transactions in the type of municipal securities at issue.<sup>25</sup> Dealers use the information contained in the continuing disclosure documents to carry out these obligations. Therefore, improving access to information in the continuing disclosure documents would help facilitate and simplify the process of gathering the necessary information to carry out their obligations. For these reasons, the Commission believes that municipal market participants should have more efficient access to information in continuing disclosure documents to satisfy their regulatory requirements and informational needs.

### C. The MSRB's Electronic Systems

In 2006, the Commission published for comment proposed amendments to Rule 15c2-12 in response to a petition from the MSRB<sup>26</sup> that would permit the MSRB to close its Continuing Disclosure Information Net ("CDINet") system, thereby eliminating the MSRB as a location to which issuers could submit material event notices and failure to file notices.<sup>27</sup> In the 2006 Proposed Amendments, the Commission indicated its belief that, given the limited usage of the MSRB's CDINet system, among other things, the proposed elimination of the provision in Rule 15c2-12 that allows the filing of

Document ("OS/ARD") system of the MSIL system was initially approved by the Commission in 1991 and was amended in 2001 to establish the MSRB's current optional electronic system for underwriters to submit official statements and advance refunding documents. See Securities Exchange Act Release Nos. 29298 (June 13, 1991), 56 FR 28194 (June 19, 1991) (File No. SR-MSRB-90-2) (order approving MSRB's proposal to establish and operate the OS/ARD of the MSIL system, through which information collected pursuant to MSRB Rule G-36 would be made available electronically to market participants and information vendors) and 44643 (August 1, 2001), 66 FR 42243 (August 10, 2001) (File No. SR-MSRB-2001-03) (order approving MSRB's proposal to amend the OS/ARD system to establish an optional procedure for electronic submissions of required materials under MSRB Rule G-36).

<sup>20</sup> See note 22, *supra*.

<sup>21</sup> See Letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, Commission, dated September 8, 2005 ("MSRB Petition").

<sup>22</sup> See Securities Exchange Act Release No. 54863 (December 4, 2006), 71 FR 71109 (December 8, 2006) ("2006 Proposed Amendments"). According to the MSRB Petition, the CDINet system was designed to permit issuers to satisfy their undertakings to provide material event notices through a single submission to the MSRB, rather than through separate submissions to each of the NRMSIRs. The MSRB stated that relatively few issuers had opted to use the CDINet system, and, in recent years, usage of the CDINet system had diminished. See MSRB Petition, *supra* note 26.

material event notices with the MSRB was warranted.<sup>28</sup>

The Commission recently approved the MSRB's proposed rule change, filed under section 19(b) of the Exchange Act,<sup>29</sup> to establish a pilot program for an Internet-based public access portal ("pilot portal") for the consolidated availability of primary offering information about municipal securities that currently is made available in paper form, subject to copying charges, at the MSRB's public access facility, and electronically by paid subscription on a daily over-night basis and by purchase of annual back-log collections.<sup>30</sup> The MSRB is implementing the pilot portal as a service of its new Internet-based public access system, which it is designating as the Electronic Municipal Market Access ("EMMA") system, as a pilot facility within the MSIL system.

In the course of developing the primary offering information component of the EMMA system, the MSRB determined that it could incorporate in the EMMA system the collection and availability of continuing disclosure documents, thus eliminating the need for the Commission to adopt its proposed changes to Rule 15c2-12 to remove the MSRB as a repository of material event notices.<sup>31</sup> As a result, the MSRB recently submitted to the Commission a proposed rule change, filed under section 19(b) of the Exchange Act,<sup>32</sup> to expand the EMMA system to accommodate the collection and availability of annual filings, material event notices and failure to file notices.<sup>33</sup> While the MSRB still intends to propose to terminate its CDINet System, subject to Commission approval,<sup>34</sup> the MSRB's subsequent decision to file a proposed rule change to expand the EMMA system to accommodate annual filings, material event notices, and failure to file notices<sup>35</sup> has led the MSRB to consider whether to withdraw the MSRB Petition.<sup>36</sup> In light of the collection and availability of continuing disclosure

<sup>28</sup> See 2006 Proposed Amendments, *supra* note 27.

<sup>29</sup> 15 U.S.C. 78s(b).

<sup>30</sup> See Securities Exchange Act Release No. 57577 (March 28, 2008), 73 FR 18022 (April 2, 2008) (File No. SR-MSRB-2007-06) (order approving the pilot portal). Primary offering information consists of the official statement and the advance refunding document that Participating Underwriters are required to send to the MSRB under MSRB Rule G-36.

<sup>31</sup> See Securities Exchange Act Release No. 58256 (July 30, 2008) (File No. MSRB-2008-05).

<sup>32</sup> 15 U.S.C. 78s(b).

<sup>33</sup> See Securities Exchange Act Release No. 58256, *supra* note 31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>20</sup> For example, Rule 2a-7 under the Investment Company Act of 1940 specifies the characteristics of investments that may be purchased and held by money market funds. Among other requirements, Rule 2a-7 requires a money market fund to limit its portfolio investments to those securities that the fund's board of directors determines present minimal credit risks (including factors in addition to any assigned rating). See Rule 2a-7(c)(3), 17 CFR 270.2a-7(c)(3).

<sup>21</sup> See, e.g., the comments of Leslie Richards-Yellen, Principal, The Vanguard Group, at the 2001 Roundtable, *supra* note 19.

<sup>22</sup> See MSRB "Interpretive Notice Regarding Rule G-17 on Disclosure of Material Facts" (March 20, 2002) (available at <http://www.msrb.org/msrb1/rules/notg17.htm>). See also Securities Exchange Act Release No. 45591 (March 18, 2002), 67 FR 13673 (March 25, 2002) (SR-MSRB-2002-01) (order approving MSRB's proposed interpretation of the duty to deal fairly set forth in MSRB Rule G-17).

<sup>23</sup> *Id.*

<sup>24</sup> Municipal Securities Information Library and MSIL are registered trademarks of the MSRB. The Official Statement and Advance Refunding

documents and in conjunction with the Commission's proposal today to amend Rule 15c2-12, the Commission is considering whether to withdraw its 2006 Proposed Amendments.

Under the MSRB's proposed rule change—filed under section 19(b) of the Exchange Act<sup>37</sup> and under separate consideration by the Commission<sup>38</sup>—the EMMA system would be expanded from the pilot program to allow for the electronic collection through the MSRB's Web site of continuing disclosure documents and related information received by the MSRB from issuers and obligated persons pursuant to undertakings under the Rule and for free public access to such information through MSRB web-based systems.<sup>39</sup> Information regarding the continuing disclosure documents would also be made available through a data stream by subscription for a fee.<sup>40</sup>

## II. Description of the Proposal

### A. Proposed Amendments to Rule 15c2-12

The Commission is considering whether the development of a centralized system for the electronic collection and availability of information about outstanding municipal securities would improve the current paper-based system. Since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems that allow market participants and investors, both retail and institutional, easily, quickly, and inexpensively to obtain information through electronic means. The exponential growth of the Internet and the capacity it affords to investors, particularly retail investors, to obtain, compile and review information has likely helped to keep investors better informed. In addition to the Commission's EDGAR system, which contains filings by public companies required to file periodic reports and by mutual funds, the Commission has increasingly encouraged and, in some cases required, the use of the Internet and Web sites by public reporting companies and mutual funds to provide

disclosures and communicate with investors.<sup>41</sup>

The Commission believes that, at present, information about municipal issuers and their securities that is accessible on the Internet may not be as consistently available or comprehensive as information about other classes of issuers and their securities. This may be due, in part, to the lack of a central point of collection and availability of information in the municipal securities sector.<sup>42</sup> Therefore, the Commission is proposing to amend Rule 15c2-12 to provide for a single centralized repository that receives submissions in an electronic format to encourage a more efficient and effective process for the collection and availability of continuing disclosure documents. In the Commission's view, a single repository that receives submissions in an electronic format could assist in facilitating and simplifying submissions of continuing disclosure documents under the Rule by enabling issuers and obligated persons to comply with their undertakings by submitting their continuing disclosure documents only to one repository, as opposed to multiple repositories.

The Commission also believes that having a centralized repository that receives submissions in an electronic format would provide ready and prompt access to continuing disclosure documents by investors and other municipal securities market participants. Rather than having to approach multiple locations, investors and other market participants would be able to go solely to one location to retrieve continuing disclosure documents, thereby allowing for a more convenient means to obtain such information. Moreover, the Commission believes that having one repository electronically collect and make available all continuing disclosure documents would increase the likelihood that investors and other

market participants obtain complete information about a municipal security or its issuer, since the information would not be dispersed across multiple repositories. In addition, the Commission preliminarily expects that the consistent availability of such information from a single source could simplify compliance with regulatory requirements by Participating Underwriters and others, such as mutual funds and Dealers. Information vendors (including NRMSIRs and SIDs) and others also would have ready access from a single source to continuing disclosure documents for use in their value-added products.

The Commission notes that, when it adopted Rule 15c2-12 in 1989, it strongly supported the development of one or more central repositories for municipal disclosure documents.<sup>43</sup> In this regard, the Commission noted in the 1989 Adopting Release that "the creation of multiple repositories should be accompanied by the development of an information linkage among these repositories" so as to afford "the widest retrieval and dissemination of information in the secondary market."<sup>44</sup> The Commission further stated that the "use of such repositories will substantially increase the availability of information on municipal issues and enhance the efficiency of the secondary trading market."<sup>45</sup> In addition, the Commission stated when it adopted the 1994 Amendments that the "requirement to deliver disclosure to the NRMSIRs and the appropriate SID also allay[ed] the anti-competitive concerns raised by the creation of a single repository."<sup>46</sup>

As noted earlier, the Commission has long been interested in improving the availability of disclosure in the municipal securities market. At the time the Commission adopted Rule 15c2-12 and amended it in 1994, disclosure documents were submitted in paper form. The Commission believed that, in such an environment where document retrieval would be handled manually, the establishment of one or more repositories could be beneficial in widening the retrieval and availability of information in the secondary market, since the public could obtain the disclosure documents from multiple locations. The Commission's objective

<sup>41</sup> See, e.g., Securities Exchange Act Release Nos. 52056 (July 19, 2005), 70 FR 44722 (August 3, 2005) (File No. S7-38-04) (adopting amendments to encourage and, in some cases, mandate the use of an Internet site in securities offering) and 56135 (July 26, 2007), 72 FR 42222 (August 1, 2007) (File No. S7-03-07) (adopting amendments to the proxy rules under the Exchange Act requiring issuers and other soliciting persons to post their proxy materials on an Internet Web site and providing shareholders with a notice of the Internet availability of the materials).

<sup>42</sup> Historically, there has been support for the concept of a central repository. For example, in response to the proposing release for Rule 15c2-12 in 1988, a majority of the comment letters supported a central repository and indicated a need to have a readily accessible central source of information about municipal bonds. See 1989 Adopting Release, *supra* note 3.

<sup>43</sup> See 1989 Adopting Release at 54 FR 28807, *supra* note 3. See also Securities Exchange Act Release No. 33742 (March 9, 1994), 59 FR 12759 (March 17, 1994) (File No. S7-5-94) (proposing release for the 1994 Amendments) ("1994 Proposing Release").

<sup>44</sup> See 1989 Adopting Release, *supra* note 3.

<sup>45</sup> *Id.*

<sup>46</sup> See 1994 Amendments, *supra* note 5.

<sup>37</sup> 15 U.S.C. 78s(b).

<sup>38</sup> The Commission is publishing for public comment this proposed rule change at the same time as it publishes these proposed amendments to Rule 15c2-12. Comments on the MSRB's proposed rule change should be directed to File No. SR-MSRB-2008-05.

<sup>39</sup> See Securities Exchange Act Release No. 58256, *supra* note 31.

<sup>40</sup> The Commission notes that the MSRB would be required to file a proposed rule change with the Commission under Section 19(b) of the Exchange Act regarding any fees it proposes to establish for the subscription service.

of encouraging greater availability of municipal securities information remains unchanged. However, as indicated earlier, there have been significant inefficiencies in the current use of multiple repositories that likely have impacted the public's ability to retrieve continuing disclosure documents.<sup>47</sup> Although the Commission in the 1989 Adopting Release supported the development of an information linkage among the repositories, none was established to help broaden the availability of the disclosure information. Also, since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems, including the use of the Internet, to provide information quickly and inexpensively to market participants and investors. In this regard, the Commission preliminarily believes that the use of a single repository to receive, in an electronic format, and make available continuing disclosure documents, in an electronic format, would substantially and effectively increase the availability of municipal securities information about municipal issues and enhance the efficiency of the secondary trading market.

The Commission acknowledges that, if the proposed amendments were adopted to provide for a single repository, competition with respect to services provided by the existing NRMSIRs could decline, including a potential reduction in current services relating to municipal securities that are not within the ambit of Rule 15c2-12 or a potential narrowing of competing information services regarding municipal securities.<sup>48</sup> The Commission, however, preliminarily believes that any potential effect on competition that could result from having a single repository would be justified by the more efficient and effective process for the collection and availability of continuing disclosure documents by a single repository. For instance, utilizing the Internet for the collection and availability of continuing disclosure documents would modernize the method of delivery of such documents to the single repository and make the documents more readily and easily accessible to investors and others. Moreover, in providing for a single repository for continuing disclosure documents that investors and others could easily access, the proposed amendments would foster the goals of the Exchange Act to protect investors

and promote the public interest. For example, investors would be able to readily retrieve information from the central repository about municipal securities, and thus it would be easier for them to make more informed decisions in assessing whether to purchase, sell, or hold municipal securities. Similarly, commercial vendors could readily access the information to redisseminate it or use it in whatever value-added products they may wish to provide.

As a result, the Commission preliminarily does not believe that having a single repository would have a significant adverse effect on the ability or willingness of private information vendors to compete to create and market value-added products. In fact, a single repository where documents are submitted in an electronic format could encourage the private information vendors to disseminate municipal securities information by reducing the cost of entry into the information services market. Vendors may need to make some adjustments to their infrastructure or facilities. However, some vendors could determine they no longer need to invest in the infrastructure and facilities necessary to collect and store continuing disclosure documents, and new entrants into the market would not need to purchase the information from multiple locations, but rather could readily access such information from one centralized source. Thus, all vendors would have equal availability to the continuing disclosure documents and be able to compete in providing value-added services.

The Commission requests comment on whether it should amend Rule 15c2-12 as proposed in this release, or whether it is preferable to continue to have multiple sources for such information. The Commission requests comment on whether having one repository instead of multiple repositories for the submission of, and access to, continuing disclosure documents would improve access to secondary market disclosure for investors and municipal securities market participants. The Commission also requests comment on whether the availability of such information from a single source would simplify compliance with regulatory requirements by Participating Underwriters and others. The Commission seeks comment on any possible disadvantages in having only one repository responsible for the collection of, and access to, municipal securities information. Furthermore, the Commission requests comment whether

it should contemplate alternative ways of improving the efficiency of the current structure, including the use of the existing NRMSIRs, instead of amending the Rule to provide for only one repository. In this regard, the Commission seeks comment concerning whether instead Rule 15c2-12 should be amended to require Participating Underwriters to reasonably determine that the continuing disclosure agreements provide solely for the electronic submission of such documents to each of the NRMSIRs. Commenters should provide reasons why submitting documents, electronically or otherwise, to multiple NRMSIRs, rather than to a single repository, would be preferable.

If the Commission should determine to amend the Rule to refer to one repository, the Commission also is proposing to revise Rule 15c2-12 to delete all references to NRMSIRs and instead to insert references to the MSRB. Established pursuant to an act of Congress<sup>49</sup> as a self-regulatory organization ("SRO") for brokers, dealers and municipal securities dealers engaged in transactions in municipal securities, the MSRB is subject to Commission oversight, as provided by the Exchange Act. As an SRO, the MSRB is required to file its rules and changes to those rules with the Commission for notice and comment and Commission review under Section 19(b) of the Exchange Act.<sup>50</sup> Pursuant to Section 15B(b)(2)(C) of the Exchange Act, the MSRB's rules are required to be designed, in part, "to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, \* \* \* to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest."<sup>51</sup> The MSRB's existing RTRS and MSIL systems, and the primary offering information component of the EMMA system that has been approved by the Commission (relating to the submission of official statements and advance refunding documents),<sup>52</sup> were subject to notice and comment and Commission review. Similarly, the MSRB's proposal to establish a continuing disclosure

<sup>49</sup> 15 U.S.C. 78o-4.

<sup>50</sup> 15 U.S.C. 78s(b).

<sup>51</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>52</sup> See Securities Exchange Act Release No. 57577, *supra* note 30.

<sup>47</sup> See note 19, *supra*.

<sup>48</sup> See also discussion in Sections V. and VI., *infra*.

component within the EMMA system, as well as any future changes to that component, would be subject to Commission review under section 19(b) of the Exchange Act.<sup>53</sup> Further, the Commission believes that, in addition to being subject to Commission oversight as an SRO, the MSRB is both familiar with the complexities of municipal securities and the municipal securities market and has experience in developing and maintaining electronic information systems for that market.<sup>54</sup> Collectively, these factors lead the Commission to propose to amend Rule 15c2-12 to provide that the MSRB be the centralized location for collecting (in an electronic format) and making information about municipal securities available to the public at no cost.

The Commission previously stated that it would specifically consider the competitive implications of the MSRB becoming a repository.<sup>55</sup> In addition, the Commission stated that, if the MSRB's status as a repository might have adverse competitive implications, it would consider whether it should take any action to address these effects.<sup>56</sup> As noted above, the Commission recognizes that competition with respect to certain information services regarding municipal securities that are provided by the existing NRMSIRs could decline should the MSRB become the central repository. However, the Commission believes that the reasons it provided above regarding the competitive implications with respect to having a single repository similarly would apply if the MSRB were the sole repository. The Commission does not believe that there are competitive implications that would uniquely apply to the MSRB in its capacity as the sole repository, as opposed to any other entity that could be the sole repository. In fact, the Commission believes that, if the MSRB were the sole repository, its status as an SRO would provide an additional level of Commission oversight, as any changes to its rules relating to

continuing disclosure documents would have to be filed for Commission consideration as a proposed rule change under section 19(b) of the Exchange Act.

Accordingly, similar to the discussion above, the Commission believes that any competitive impact that could result from the MSRB's status as the sole repository would be justified by the benefits that such status could provide. The Commission believes that one of the benefits in having the MSRB be the sole repository would be its ability to provide a ready source of continuing disclosure documents to all investors, broker-dealers and information vendors who wish to use that information for their products. Private vendors could utilize the MSRB in its capacity as a repository as a means to collect information from the continuing disclosure documents to create value-added products for their customers. As noted earlier, vendors may need to make some adjustments to their infrastructure or facilities in using the MSRB's services as a repository of continuing disclosure documents. However, some vendors could determine they no longer need to incur the cost of obtaining and storing continuing disclosure documents, and new entrants into the information services market would not need to purchase the information from multiple locations. Thus, all vendors would have equal availability to these public documents and would be able to develop whatever services they choose.

The Commission requests comment concerning whether the MSRB should serve as the sole repository of continuing disclosure documents or whether another entity, such as a private vendor, should serve as the sole repository, instead of the MSRB. If commenters believe another entity should be the sole repository, commenters should provide reasons for their viewpoint. The Commission seeks comment on whether the MSRB would be an appropriate operator of a centralized repository for the collection and availability of continuing disclosure information about municipal securities, and whether there is a more appropriate location or means through which such information could be made readily available to the public without charge. Commenters are also asked to address whether the MSRB's status as an SRO would be an advantage or disadvantage to its serving as the sole repository. In addition, the Commission requests comment on whether having the MSRB serve as the sole repository would encourage or discourage competition between the MSRB and private vendors, or others.

If the Commission were to amend the Rule to provide for the MSRB to serve as the sole repository, the Commission would amend Rule 15c2-12(b)(5), which sets forth the undertakings to which Participating Underwriters must reasonably determine that issuers or other obligated persons have contractually agreed to provide in connection with primary offerings subject to the Rule. The proposed amendments would revise subparagraphs (b)(5)(i)(A) through (D) of Rule 15c2-12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has agreed at the time of a primary offering: (1) To provide the continuing disclosure documents directly to the MSRB instead of to each NRMSIR and appropriate SID, and (2) to provide the continuing disclosure documents in an electronic format and accompanied by identifying information as prescribed by the MSRB. Specifically, the Commission proposes to amend Rule 15c2-12(b)(5)(i)(A) through (D) by deleting references in each of those provisions to NRMSIR and SID and adding language to require Participating Underwriters to reasonably determine that issuers or obligated persons have undertaken to provide continuing disclosure documents to the MSRB in an electronic format as prescribed by the MSRB.<sup>57</sup>

The Rule requires that Participating Underwriters reasonably determine that the information undertaken to be provided, in addition to being submitted to the NRMSIRs, or, in some cases, to the MSRB, must be submitted to a SID, if an appropriate SID has been established by that state.<sup>58</sup> The Commission adopted an exemption from paragraph (b)(5) of the Rule that, among other things, contains conditions on limited undertakings relating to making financial information or operating data available upon request or at least annually to a SID, and providing material event notices to each NRMSIR or the MSRB, and to a SID.<sup>59</sup> Because the Commission is now proposing to amend the Rule to provide for a single repository for the electronic collection and availability of continuing disclosure documents that the Commission believes would efficiently and effectively improve disclosure in the municipal securities market, the Commission believes that it is no longer necessary to specifically require in the

<sup>57</sup> The Commission notes that the MSRB would be required to file a proposed rule change with the Commission under Section 19(b) of the Exchange Act regarding the electronic format it proposes to use.

<sup>58</sup> 17 CFR 240.15c2-12(b)(5)(i)(A) through (D).

<sup>59</sup> 17 CFR 240.15c2-12(d)(2)(ii)(A) and (B).

<sup>53</sup> See Securities Exchange Act Release No. 58256, *supra* note 31.

<sup>54</sup> For example, the MSRB is experienced with operating CDINet, the MSIL system, and the RTRS system.

<sup>55</sup> Specifically, the Commission stated that it would consider the competitive implications of an MSRB request for NRMSIR status. See Securities Exchange Act Release No. 28081 (June 1, 1990), 55 FR 23333 (June 7, 1990) (File No. SR-MSRB-89-9). See also 1994 Proposing Release and 1994 Amendments, *supra* notes 43 and 5, respectively. Although the MSRB is not seeking NRMSIR status, the MSRB essentially would become a repository if the proposed amendments were adopted.

<sup>56</sup> See Securities Exchange Act Release No. 28081, *supra* note 55.

Rule that Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to provide continuing disclosure documents to the SIDs. The Commission, therefore, is proposing to delete references to the SIDs in the Rule. As discussed further below, the Commission, however, notes that there may be an obligation to provide such documents to a SID, if required by applicable state law, which also could be beneficial in improving disclosure in the municipal securities market.

Specifically, the Commission is proposing to delete references to the SIDs in Rule 15c2-12(b)(5)(i)(A) through (D). Under these proposed amendments, Participating Underwriters no longer would need to reasonably determine that issuers or obligated persons have agreed in the continuing disclosure agreements to provide continuing disclosure documents to the appropriate SID, if any. The proposed amendments, however, would not affect the legal obligations of issuers and obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that are required under the appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of the proposed amendments to the Rule to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that may be required under the appropriate state law.

The Commission requests comment on whether the reference to the SIDs should be deleted in the Rule. The Commission requests comment on the impact of deleting the references to the SIDs in the Rule, including the impact of the proposed deletion on the obligations of Participating Underwriters, issuers and obligated persons. The Commission also requests comment on the effect of the proposed deletion on SIDs and their role in the collection and disclosure of continuing disclosure documents.

The proposed amendments also would revise Rule 15c2-12(d)(2)(ii), which is part of an exemptive provision from Rule 15c2-12(b)(5). The exemption in Rule 15c2-12(d)(2) currently provides that paragraph (b)(5) of the Rule, which relates to the submission of continuing disclosure documents pursuant to continuing disclosure agreements, does not apply to a primary

offering if three conditions are met: (1) The issuer or the obligated person has less than \$10 million of debt outstanding;<sup>60</sup> (2) the issuer or obligated person has undertaken in a written agreement or contract (“limited undertaking”) to provide: (i) Financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, including financial information and operating data which is customarily prepared by such obligated person and is publicly available, upon request to any person or at least annually to the appropriate SID,<sup>61</sup> and (ii) material event notices to each NRMSIR or the MSRB, as well as the appropriate SID;<sup>62</sup> and (3) the final official statement identifies by name, address and telephone numbers the persons from which the foregoing information, data and notices can be obtained. The proposed amendments would revise the limited undertaking set forth in 15c2-12(d)(2)(ii)(A) and (B) by deleting references to the NRMSIRs and SIDs and solely referencing the MSRB. Accordingly, under the proposed amendment to Rule 15c2-12(d)(2)(ii), a Participating Underwriter would be exempt from their obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking to provide financial information, operating data and material event notices to the MSRB in an electronic format as prescribed by the MSRB, and the exemption’s other conditions are satisfied. In conjunction with this proposed change, the Commission also would amend the provision of the exemption relating to the limited undertaking to provide that the type of financial information or operating data described in Rule 15c2-12(d)(2)(ii)(A) regarding each obligated person be submitted at least annually to the MSRB.<sup>63</sup>

<sup>60</sup> 17 CFR 240.15c2-12(d)(2)(i).

<sup>61</sup> 17 CFR 240.15c2-12(d)(2)(ii)(A).

<sup>62</sup> 17 CFR 240.15c2-12(d)(2)(ii)(B).

<sup>63</sup> Similar to the earlier discussion regarding the deletion of references to the SIDs in Rule 15c2-12(b)(5)(i), the proposed amendments to Rule 15c2-12(d)(2)(ii)(A) and (B) would not affect the legal obligations of issuers and obligated persons to provide financial information, operating data and material event notices, along with any other submissions, to the appropriate SID, if any, that are required under the appropriate state law. Furthermore, the proposed amendments to Rule 15c2-12(d)(2)(ii)(A) and (B) would have no effect on the obligations of issuers and obligated persons under outstanding limited undertakings entered into prior to any effective date of the proposed amendments to the Rule to submit financial information, operating data and material event notices to the appropriate SID, if any, as stated in their existing limited undertakings, nor on their

With respect to the proposed electronic submission of continuing disclosure documents, the Commission believes that this method would better enable the information to be promptly posted and made available to the public without charge. Electronic submission also would eliminate the need for manual handling of paper documents, which can be a less efficient and more costly process. For instance, the submission of paper documents would require the repository to manually review, sort and store such documents. There is also a potential for a less complete record of continuing disclosure documents at the repository if such documents are submitted in paper to the repository and, for instance, are misplaced or misfiled. As discussed below, the Commission believes that submissions in an electronic format should not be very burdensome on issuers or other obligated persons, since many continuing disclosure documents already are being created in an electronic format and, as a result, are readily transmitted by electronic means.<sup>64</sup>

The Commission requests comment on the proposed amendment to provide continuing disclosure documents in an electronic format. The Commission requests comment on whether submitting continuing disclosure documents in an electronic format would increase the efficiency of submission and availability of continuing disclosure documents, and whether submitting the documents in an electronic format would facilitate wider availability of the information. The Commission also requests comment on alternative methods of providing secondary market disclosure, including whether commenters instead believe that the NRMSIRs should establish new comprehensive electronic systems for the submission of such documents. Furthermore, the Commission requests comment concerning whether the proposed amendments to Rule 15c2-12 should allow for the submission of paper documents and, if so, whether any conditions should be imposed in connection with paper submissions. Comments are also requested on whether the proposed amendments to Rule 15c2-12 should allow for the

obligation to make other submissions that may be required under the appropriate state law.

<sup>64</sup> In addition, the availability of audited financial statements and other financial and statistical data in an electronic format by issuers subject to the Rule could encourage the establishment of the necessary taxonomies and permit states and local governments to make use of XBRL in the future, should they wish to do so.



availability of paper copies upon request from the central repository.

To enable the continuing disclosure documents to be identified and retrieved accurately, the Commission is proposing new subparagraph (b)(5)(iv) of Rule 15c2-12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has undertaken in writing to accompany all documents submitted to the MSRB with identifying information as prescribed by the MSRB. Similarly, the Commission is proposing a conforming change in subparagraph (d)(2)(ii)(C) of Rule 15c2-12 relating to the limited undertaking set forth in Rule 15c2-12(d)(2)(ii) to provide that all documents provided to the MSRB would be required to be accompanied by identifying information as prescribed by the MSRB.<sup>65</sup>

The Commission believes that providing identifying information with each submitted document would permit the repository to sort and categorize the document efficiently and accurately. The Commission also anticipates that including in each submission the basic information needed to accurately identify the document would facilitate the ability of investors, market participants, and others to reliably search for and locate relevant disclosure documents. Furthermore, the Commission preliminarily expects that there would be a minimal burden on Participating Underwriters to comply with the proposed new subparagraph (b)(5)(iv) of Rule 15c2-12 since it would only require that the Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to one additional provision relating to the identifying information, while there would be a significant benefit to investors and other municipal market participants to easily retrieve the information. Indeed, issuers and other obligated persons that choose to submit continuing disclosure documents through some existing dissemination agents and document delivery services already are supplying identifying information with their submissions.<sup>66</sup>

<sup>65</sup> The Commission notes that the MSRB would be required to file a proposed rule change with the Commission pursuant to Section 19(b) of the Exchange Act regarding any such identifying information that it wished to specify.

<sup>66</sup> The commitment by an issuer to provide identifying information would exist only if it were included in a continuing disclosure agreement. As a result, issuers submitting continuing disclosure documents pursuant to the terms of undertakings entered into prior to the effective date of the proposed amendments that did not require identifying information could submit documents without supplying identifying information.

The Commission requests comment on the proposed amendments to the Rule regarding supplying identifying information as prescribed by the MSRB. The Commission also requests comment on alternative methods that would assist investors and municipal market participants in locating specific information about a municipal security that is submitted under the Rule.

In addition, because the Commission is proposing to amend the Rule to reference the MSRB as the sole repository, the Commission proposes to make a similar change to Rule 15c2-12(b)(4)(ii), which currently refers to a NRMSIR with respect to the time period in which the Participating Underwriter must send the final official statement to any potential customer. Specifically, under Rule 15c2-12(b)(4), from the time the final official statement becomes available until the earlier of: (1) Ninety days from the end of the underwriting period, or (2) the time when the official statement is available to any person from a NRMSIR, but in no case less than twenty-five days following the end of the underwriting period, the Participating Underwriter in a primary offering is required to send to any potential customer, upon request, the final official statement. The Commission proposes to amend the language in Rule 15c2-12(b)(4)(ii) to refer to the MSRB instead of to a NRMSIR. Accordingly, Participating Underwriters would have the time period from when the final official statement becomes available until the earlier of: (1) Ninety days from the end of the underwriting period, or (2) the time when the official statement is available to any person from the MSRB, but in no case less than twenty-five days following the end of the underwriting period, to send the final official statement to a potential customer, upon request. The Commission requests comment on this proposed change to Rule 15c2-12(b)(4)(ii), including whether Participating Underwriters or others would encounter problems complying with this provision as a result of the proposed revision.

Finally, the Commission proposes to make similar changes in Rule 15c2-12(f)(3) and (f)(9), which define the terms “final official statement” and “annual financial information,” respectively. Rule 15c2-12(f)(3) defines the term “final official statement” to mean 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 and that sets forth information concerning, among other things, 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. Rule 15c2-12(f)(9) defines the term “annual financial information” to mean 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. Both definitions allow for financial information or operating data to be set forth in the document or set of documents, or be included by specific reference to documents previously provided to each NRMSIR, and to a SID, if any, or filed with the Commission. The Commission is proposing amendments to Rule 15c2-12(f)(3) and (f)(9) to replace references to a NRMSIR and SID, with references to the MSRB’s Internet Web site. Accordingly, the proposed amendments to paragraphs (f)(3) and (f)(9) of the Rule would allow issuers to reference financial information or operating data set forth in specified documents available to the public from the MSRB’s Internet Web site (or filed with the Commission) as part of the final official statements and annual financial information, instead of referencing specific documents previously provided to each NRMSIR and SID. The Commission requests comment on the proposed changes to the definitions of “final official statement” and “annual financial information” contained in Rule 15c2-12.

#### *B. Submissions Required by Existing Undertakings*

The proposed amendments to Rule 15c2-12 would only impact continuing disclosure agreements that are entered into in connection with primary offerings occurring on or after the effective date of these proposed amendments, if they were adopted by the Commission. In accordance with the proposed amendments, Participating Underwriters would have to reasonably determine that a continuing disclosure agreement specifically referenced the MSRB as the sole repository to receive and make available the issuer’s or obligated person’s continuing disclosure documents. The Commission understands, however, that existing

undertakings by issuers and obligated persons that were entered into prior to the effective date of these proposed amendments may specify in their continuing disclosure agreements that continuing disclosure documents be submitted to the current NRMSIRs in existence at the time a submission is made.

The Commission believes that, if the proposed amendments to Rule 15c2-12 were adopted, it would be more efficient and effective to implement a sole repository expeditiously. Towards this end, the Commission wishes to create a mechanism by which issuers or obligated persons could comply with their existing undertakings by submitting the continuing disclosure documents to one location, thereby providing investors and municipal market participants with prompt and easy access to continuing disclosure documents at no charge.

One approach that the Commission could consider to address this situation would be to direct its staff to withdraw all “no action” letters recognizing existing NRMSIRs<sup>67</sup> and for the Commission to designate the MSRB as the only NRMSIR. As a result, continuing disclosure documents that are provided pursuant to existing continuing disclosure agreements—*i.e.*, those agreements entered into prior to the effective date of the proposed amendments which typically reference the NRMSIRs as the location to which a submission should be made—would be provided to the MSRB in its capacity as the sole NRMSIR.<sup>68</sup> Providing all submissions—for both past and future offerings—to the same location preliminarily would be expected to be less confusing to, and could simplify the submission process for, issuers and other obligated persons subject to continuing disclosure agreements, as

well as to investors and others who wish to obtain such information.

The Commission requests comment relating to the potential withdrawal of the “no action” letters provided to the NRMSIRs and having one NRMSIR—the MSRB—be the sole NRMSIR for those continuing disclosure agreements entered into prior to any Commission adoption of the proposed amendments to Rule 15c2-12. The Commission requests comment on the effect of the potential withdrawal of the “no action” letters on Participating Underwriters, issuers, NRMSIRs, investors and others. The Commission requests comment on possible alternative methods of transitioning from the current system of sending documents to multiple NRMSIRs. The Commission requests comment on whether there are any transition issues with respect to the proposed amendments, such as whether there would be any conflicts with respect to terms in existing continuing disclosure agreements. The Commission seeks comment on whether there are concerns that the NRMSIRs would not retain the historical continuing disclosure documents and whether commenters anticipate any problems in obtaining such documents from the current NRMSIRs, if they were no longer recognized as such. If commenters foresee any such problems, they should suggest alternative approaches for the retention of and access to historical information. The Commission also seeks comment on any issues or problems that could arise if investors seek to obtain and compare information from multiple repositories—*e.g.*, historical continuing disclosure documents from the NRMSIRs and current continuing disclosure documents from the MSRB—and whether there are any alternative methods that would allow them to obtain complete information about municipal securities, including obtaining historical information.

The Commission seeks comment on any other transition issues in connection with the proposed amendments to Rule 15c2-12. In this regard, the Commission seeks comment on whether it would be appropriate to immediately move to an electronic form of submission if the Commission were to approve the proposed amendments to the Rule or whether there would be a need to maintain the option of submitting documents in paper form either as a temporary option during a transition period or as a permanent option. Finally, with respect to the transition to a sole repository for continuing disclosure documents, the Commission requests comment on whether commenters foresee any

differences that could occur between the existing structure of multiple NRMSIRs and one repository regarding the scope, quantity, and continuity of information.

### III. Request for Comments

The Commission seeks comment on all aspects of the proposed amendments to the Rule. In addition to the comments requested throughout the proposing release, comment is requested on whether the proposed amendments would further the Commission’s goal of enhancing investors’ prompt and efficient access to important information regarding municipal issuers, and whether the proposed amendments would improve the access to the information. Further, the Commission seeks comment regarding whether the proposed amendments would simplify the ability of municipal issuers and other obligated persons to provide annual filings, material event notices, and failure to file notices. In addition, the Commission requests comment regarding the impact of the proposed amendments on Participating Underwriters and Dealers, as well as on the NRMSIRs and SIDs. The Commission requests comment on the impact on investors, vendors and others that may be affected by the proposed amendments. Further, the Commission requests comment on whether there are alternative approaches to improving the public’s access to information about municipal securities that the Commission should consider. For example, the Commission seeks comment on possible alternatives including: Whether the Commission should retain the current process of collecting and making available continuing disclosure documents through the existing NRMSIRs and, if so, whether the NRMSIRs should only accept submissions in an electronic format and allow for electronic access to them; whether the Commission should open the process and allow any other person or entity be the sole repository for the collection and availability of continuing disclosure documents, rather than proposing to amend the Rule to establish the MSRB as the sole repository. In addition, the Commission seeks comment on the operation of a system of continuing disclosure by the MSRB as opposed to another entity, such as a private vendor that is not an SRO. In this regard, the Commission requests comment on whether it is appropriate for an SRO, such as the MSRB, to function in the capacity as the sole information repository under the Rule. Finally, the Commission requests comment on the advantages and

<sup>67</sup> See Letters from Brandon Becker, Director, Division of Market Regulation (n/k/a Division of Trading and Markets), Commission, to: Michael R. Bloomberg, President, Bloomberg L.P., dated June 26, 1995, and Aaron L. Kaplow, Vice President, Kenny S&P Information Services, dated June 26, 1995; and Letters from Robert L.D. Colby, Deputy Director, Division of Market Regulation (n/k/a Division of Trading and Markets), Commission, to: Peter J. Schmitt, President, DPC Data, Inc., dated June 23, 1997, and John King, Chief Operating Officer, Interactive Data, dated December 21, 1999.

<sup>68</sup> Issuers or obligated persons with existing limited undertakings under Rule 15c2-12(d)(2)(ii)(B) that reference the MSRB rather than the NRMSIRs as the location to submit material event notices would not be affected by this proposed approach because they would continue to submit such notices to the MSRB as stated in their limited undertaking. However, issuers or obligated persons with existing limited undertakings that reference the NRMSIRs as the location to submit material event notices would provide such notices to the MSRB in its capacity as the sole NRMSIR.

disadvantages of having one repository instead of having multiple NRMSIRs.

#### IV. Paperwork Reduction Act

Certain provisions of the proposed amendments to the Rule contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>69</sup> In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission has submitted revisions to the currently approved collection of information titled "Municipal Securities Disclosure" (17 CFR 240.15c2-12) (OMB Control No. 3235-0372) to OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

##### A. Summary of Collection of Information

Currently, under paragraph (b) of Rule 15c2-12, a Participating Underwriter is required: (1) To obtain and review an official statement "deemed final" by an issuer of the securities, except for the omission of specified information, prior to making a bid, purchase, offer, or sale of municipal securities; (2) in non-competitively bid offerings, to send, upon request, a copy of the most recent preliminary official statement (if one exists) to potential customers; (3) to send, upon request, a copy of the final official statement to potential customers for a specified period of time; (4) to contract with the issuer to receive, within a specified time, sufficient copies of the final official statement to comply with the Rule's delivery requirement, and the requirements of the rules of the MSRB; and (5) before purchasing or selling municipal securities in connection with an offering, to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract, for the benefit of holders of such municipal securities, to provide annual filings, material event notices, and failure to file notices (*i.e.*, continuing disclosure documents) to each NRMSIR (or, alternatively, to the MSRB in the case of material event notices and failure to file notices).<sup>70</sup> Under the proposed amendments to the Rule, Participating Underwriters would be required to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide continuing disclosure documents to the MSRB, in an electronic format and accompanied

by identifying information, in each case as prescribed by the MSRB. The proposed amendments to the Rule would not substantively change any of the current obligations of Participating Underwriters, except to the extent that Participating Underwriters would have to reasonably determine that the issuer or obligated person has agreed in the continuing disclosure agreement to provide continuing disclosure documents to a single repository instead of to multiple NRMSIRs.

The proposed amendments also would revise Rule 15c2-12(d)(2)(ii), which is part of an exemptive provision from Rule 15c2-12(b)(5). The exemption in Rule 15c2-12(d)(2) currently provides that paragraph (b)(5) of the Rule, which relates to the submission of continuing disclosure documents pursuant to continuing disclosure agreements, does not apply to a primary offering if three conditions are met: (1) The issuer or the obligated person has less than \$10 million of debt outstanding;<sup>71</sup> (2) the issuer or obligated person has undertaken in a written agreement or contract to provide: (i) Financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, including financial information and operating data which is customarily prepared by such obligated person and is publicly available, upon request to any person or at least annually to the appropriate SID,<sup>72</sup> and (ii) material event notices to each NRMSIR or the MSRB, as well as the appropriate SID;<sup>73</sup> and (3) the final official statement identifies by name, address and telephone number the persons from which the foregoing information, data and notices can be obtained. The proposed amendments would revise the limited undertaking set forth in 15c2-12(d)(2)(ii)(A) and (B) by deleting references to the NRMSIRs and SIDs and solely referencing the MSRB. Accordingly, under the proposed amendment to Rule 15c2-12(d)(2)(ii), a Participating Underwriter would be exempt from its obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking to provide financial information, operating data and material event notices to the MSRB in an electronic format as prescribed by the MSRB, and the exemption's other conditions are satisfied. In conjunction with this proposed change, the Commission also would amend the

provision of the exemption relating to the limited undertaking to provide that the type of financial information or operating data described in Rule 15c2-12(d)(2)(ii)(A) regarding each obligated person be submitted at least annually to the MSRB.

##### B. Proposed Use of Information

The proposed amendments to the Rule would provide for a single repository that receives submissions in an electronic format to encourage a more efficient and effective process for the collection and availability of continuing disclosure documents. The proposed amendments to Rule 15c2-12 are intended to improve the availability of continuing disclosure documents that provide current information about municipal issuers and their securities. The proposed amendments would enable investors and other municipal securities market participants to have ready and prompt access to the continuing disclosure documents of municipal securities issuers. This information could be used by retail and institutional investors; underwriters of municipal securities; other market participants, including broker-dealers and municipal securities dealers; municipal securities issuers; vendors of information regarding municipal securities; the MSRB and its staff; Commission staff; and the public generally.

##### C. Respondents

In 2006, the Commission submitted a request to OMB for extension and approval of the collection of information associated with the existing Rule ("2006 PRA Submission"). OMB approved the extension of the 2006 PRA Submission on March 29, 2007. The current paperwork collection associated with Rule 15c2-12 applies to broker-dealers, issuers of municipal securities, and the NRMSIRs.<sup>74</sup> Currently, there are four NRMSIRs. The proposal would require that a Participating Underwriter in a primary offering of municipal securities reasonably determine that the issuer or an obligated person has undertaken in a continuing disclosure agreement to submit specified continuing disclosure documents to the MSRB in an electronic format and accompanied by identifying information, as prescribed by the MSRB. In the 2006 PRA Submission, the Commission estimated that the respondents impacted by the paperwork collection associated with the current Rule would consist of: 500 broker-dealers, 10,000 issuers, and four

<sup>69</sup> 44 U.S.C. 3501 *et seq.*

<sup>70</sup> 17 CFR 240.15c2-12(b).

<sup>71</sup> 17 CFR 240.15c2-12(d)(2)(i).

<sup>72</sup> 17 CFR 240.15c2-12(d)(2)(ii)(A).

<sup>73</sup> 17 CFR 240.15c2-12(d)(2)(ii)(B).

<sup>74</sup> NRMSIRs currently collect, index, store, retrieve and disseminate disclosure documents.

NRMSIRs.<sup>75</sup> Commission staff expects that there would be a reduction in the number of broker-dealers included in the current paperwork collection associated with the Rule, based on current information it obtained, as described below. Commission staff expects that there would be no change from the current paperwork collection associated with the Rule in the number of respondents that are issuers. The only other change in the number of respondents from the current paperwork collection would be that, in lieu of the four existing NRMSIRs, there would be a single repository.

#### *D. Total Annual Reporting and Recordkeeping Burden*

In the 2006 PRA Submission, the Commission included estimates for the hourly burdens that the Rule would impose upon broker-dealers, issuers of municipal securities, and the NRMSIRs. Commission staff has relied on these estimates and on updated information its staff has obtained to prepare the analysis discussed below for each of the aforementioned entities and to compare current paperwork burdens associated with the Rule to paperwork burdens associated with the Rule as proposed to be amended.

Commission staff estimates the aggregate information collection burden for the amended Rule to consist of the following:

##### 1. Broker-Dealers

Under the 2006 PRA Submission, the Commission estimated that the Rule imposes a paperwork collection burden for 500 broker-dealers.<sup>76</sup> In addition, the Commission estimated that it would require each of these broker-dealers an average burden of one hour per year to comply with the Rule.<sup>77</sup> This burden accounted for the time it would take a broker-dealer to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract, for the benefit of holders of such municipal securities, to provide annual filings, material event notices, and failure to file notices (*i.e.*, continuing disclosure documents) to each NRMSIR (or, alternatively, to the MSRB in the case of material event notices and failure to file notices).

Based on information provided to Commission staff by MSRB staff in a telephone conversation on April 11, 2008, Commission staff estimates that currently 200 to 250 broker-dealers potentially could serve as Participating

Underwriters in an offering of municipal securities. Therefore, Commission staff estimates that, under the proposed amendments, the maximum number of broker-dealer respondents would be 250. This estimate represents a reduction of 250 broker-dealers from the current paperwork collection associated with the Rule.<sup>78</sup> Commission staff believes that this estimated reduction in the number of broker-dealer respondents could be attributed in part to the fact that it may have been over-inclusive in estimating the number of broker-dealer respondents in the past. Further, both large and small broker-dealer firms increasingly have consolidated their operations during the past several years and some firms have left the municipal securities business, which also could account for a reduction in the number of broker-dealer respondents. Moreover, in connection with developing the proposed amendments, Commission staff has attempted to obtain more current information with respect to the number of respondents that would be subject to a paperwork collection. The proposed amendments, however, would not alter the paperwork burden of broker-dealers from that of the current Rule. Accordingly, Commission staff estimates that 250 broker-dealers would incur an estimated average burden of one hour per year to comply with the Rule, as proposed to be amended.

Commission staff estimates that a broker-dealer would incur a one-time paperwork burden to have its internal compliance attorney prepare and issue a notice advising its employees who work on primary offerings of municipal securities about the proposed revisions to Rule 15c2-12, if they are adopted by the Commission. Commission staff estimates that it would take the internal compliance attorney approximately 30 minutes to prepare a notice describing the broker-dealer's obligations in light of the proposed amendments to Rule. Commission staff believes that the task of preparing and issuing a notice advising the broker-dealer's employees about the proposed amendments is consistent with the type of compliance work that a broker-dealer typically handles internally. Accordingly, Commission staff estimates that 250 broker-dealers would each incur a one-

time, first-year burden of 30 minutes to prepare and issue a notice to its employees regarding the broker-dealer's obligations under the proposed amendments.

Therefore, under the proposed amendments, the total burden on these respondents would be 375 hours for the first year<sup>79</sup> and 250 hours for each subsequent year.<sup>80</sup>

##### 2. Issuers

The Commission believes that issuers prepare annual filings and material event notices as a usual and customary practice in the municipal securities market. Issuers' undertakings regarding the submission of annual filings, material event notices, and failure to file notices that are set forth in continuing disclosure agreements contemplated by the existing Rule, as well as the proposed amendments to the Rule, impose a paperwork burden on issuers of municipal securities.

In the 2006 PRA Submission, the Commission estimated that Rule 15c2-12 imposed a total paperwork burden of 5,000 hours on 10,000 issuers in any given year.<sup>81</sup> In determining the paperwork burden for issuers under the 2006 PRA Submission, the Commission estimated that each issuer would submit each year one annual filing that describes its finances and operations. Thus, under the 2006 PRA Submission, the Commission estimated that issuers would prepare approximately 10,000 packages of annual filings yearly and that it would take each issuer 30 minutes to do so, for a total burden of 5,000 hours.<sup>82</sup> However, based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, Commission staff estimates that, in connection with the proposed amendments, 10,000 municipal issuers with continuing disclosure agreements would prepare approximately 12,000 to 15,000 annual filings yearly.<sup>83</sup>

<sup>79</sup>  $(250 \text{ (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule)} \times 1 \text{ hour}) + (250 \text{ (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule)} \times .5 \text{ hour (estimate for one-time burden to issue notice regarding broker-dealer's obligations under the proposed amendments to the Rule)}) = 375 \text{ hours.}$

<sup>80</sup>  $250 \text{ (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule)} \times 1 \text{ hour} = 250 \text{ hours.}$

<sup>81</sup> See 2006 PRA Submission.

<sup>82</sup>  $10,000 \text{ (annual filings)} \times 30 \text{ minutes} = 5,000 \text{ hours.}$

<sup>83</sup> The revision in the number of annual filings from the 10,000 annual filings included in the 2006 PRA Submission to approximately 12,000 to 15,000 annual filings reflects current information provided to Commission staff by MSRB staff, which advised that some issuers submit more than one annual

<sup>75</sup> See 2006 PRA Submission.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup>  $500 \text{ (number of broker-dealer respondents in 2006 PRA Submission)} - 250 \text{ (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule)} = 250 \text{ (broker-dealers).}$  In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff elected to use the higher end of the estimate for the total number of broker-dealers impacted by the proposed amendments.

Issuers could submit continuing disclosure documents directly to the single repository or could do so indirectly through a designated agent. Based on telephone conversations with industry sources in May 2008, Commission staff estimates that approximately 30% of issuers today utilize the services of a designated agent to submit disclosure documents to NRMSIRS. An issuer would engage the services of a designated agent as a matter of convenience to advise it of the timing and type of continuing disclosure documents to be submitted to the repository. Commission staff does not believe that the percentage of issuers that rely on the services of a designated agent would change appreciably as a result of the proposed amendments because the proposed amendments simply would revise the location to which continuing disclosure documents would be submitted.

In the 2006 PRA Submission, the Commission estimated that the process for an issuer to submit the annual filings to each of the four NRMSIRs would require approximately 30 minutes.<sup>84</sup> Commission staff estimates that, under the proposed amendments, an issuer would take approximately 45 minutes to submit the same annual filings to a single repository in an electronic format and accompanied by identifying information. This estimate includes approximately 30 minutes to prepare the annual filing, which is consistent with the 2006 PRA Submission, plus a new burden of an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository may prescribe.<sup>85</sup> Therefore,

filing each year. Also, the estimate for the number of annual filings includes the submission of annual financial information or operating data described in Rule 15c2-12(d)(2)(ii)(A).

<sup>84</sup> See 2006 PRA Submission.

<sup>85</sup> This additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that

under the proposed amendments, the total burden on issuers of municipal securities to submit 15,000 annual filings to the MSRB is estimated to be 11,250 hours.<sup>86</sup> This amount represents an increase of 6,250 hours from the 5,000 hours included in the 2006 PRA Submission.<sup>87</sup>

In connection with developing the proposed amendments, the Commission has attempted to obtain more current information regarding the number of material event notices that potentially would be submitted annually to the proposed single repository. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, it is estimated that, on an annual basis, the MSRB would receive approximately 50,000 to 60,000 notices of the occurrence of a material event.<sup>88</sup> Commission staff notes that this new estimate represents a substantial increase in the estimated number of material event notices that issuers would file relative to the number of material event notices included in the 2006 PRA Submission, and believes that the disparity could be due in part to the difficulty in obtaining an accurate, non-duplicative estimate of the number of paper documents filed with the various NRMSIRs, as well as Commission staff's decision to use conservative estimates for purposes of this rulemaking.

Under the 2006 PRA Submission, the Commission estimated that the process for an issuer to submit a material event notice to a NRMSIR would require approximately 30 minutes.<sup>89</sup> Commission staff estimates that, under the proposed amendments, providing

implement computer-to-computer interfaces with the MSRB.

<sup>86</sup> 15,000 (maximum estimate of annual filings) × 45 minutes = 11,250 hours. In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff elected to use the higher end of the estimate for the total number of annual filings estimated to be submitted each year.

<sup>87</sup> Under the proposed amendments, the increase in the annual paperwork burden for issuers with respect to the submission of annual filings is a result of the 15 minute increase in time it would require each issuer to submit annual filings, as well as Commission staff's revision of the estimate for the total number of annual filings submitted by issuers, which increased by 5,000 over the Commission's estimates in the 2006 PRA Submission. Issuers' burden under the 2006 PRA Submission is as follows: 10,000 annual filings × 30 minutes = 5,000 hours. Issuers' burden under the proposed amendments is as follows: 15,000 annual filings × 45 minutes = 11,250 hours. The difference in burden between the proposed amendments and the 2006 PRA Submission is as follows: 11,250 hours – 5,000 hours = 6,250 hours.

<sup>88</sup> This estimate for material event notices includes the submission of material event notices described in Rule 15c2-12(d)(2)(ii)(B).

<sup>89</sup> See 2006 PRA Submission.

this same information to the MSRB would require approximately 45 minutes. This estimate includes approximately 30 minutes to prepare the material event notice, which is consistent with the 2006 PRA Submission, plus a new burden of an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository may prescribe.<sup>90</sup> Therefore, under the proposed amendments, the total burden on issuers to submit material event notices to the MSRB would require 45,000 hours.<sup>91</sup> This amount represents an increase of 44,250 hours from the 750 hours included in the 2006 PRA Submission.<sup>92</sup>

Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, Commission staff estimates that, on an annual basis, the MSRB would receive approximately

<sup>90</sup> Commission staff notes that this additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe, as set forth in the proposed amendments. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that implement computer-to-computer interfaces with the MSRB.

<sup>91</sup> 60,000 (maximum estimate of material event notices) × 45 minutes = 45,000 hours. In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff has elected to use the higher end of the estimate for the total number of material event notices estimated to be submitted each year.

<sup>92</sup> Under the proposed amendments, the increase in the annual paperwork burden for issuers with respect to the submission of material event notices is a result of the 15 minute increase in time it would require each issuer to submit material event notices, as well as Commission staff's upward revision of its estimate for the total number of material event notices that issuers would submit, which is estimated to increase by 58,500 notices over the Commission's estimate in the 2006 PRA Submission, as noted earlier. See text accompanying note 88. Issuers' burden under the 2006 PRA Submission is as follows: 1,500 material event notices × 30 minutes = 750 hours. Issuers' burden under the proposed amendments is as follows: 60,000 material event notices × 45 minutes = 45,000 hours. The difference in burden between the proposed amendments and the 2006 PRA Submission is as follows: 45,000 hours – 750 hours = 44,250 hours.

1,500 to 2,000 failure to file notices. Commission staff estimates that the current process of preparing and submitting a failure to file notice to a NRMSIR would require approximately 15 minutes. Commission staff estimates that, under the proposed amendments, providing this same information to the MSRB would require approximately 30 minutes. This estimate includes approximately 15 minutes to prepare and submit the failure to file notice, plus an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository would prescribe.<sup>93</sup> Therefore, under the proposed amendments, the total burden on issuers to prepare and submit failure to file notices to the MSRB would be 1,000 hours.<sup>94</sup> Thus, the estimated 1,000 hours to prepare and submit failure to file notices to the MSRB represents a new paperwork burden of 1,000 hours.

Accordingly, under the proposed amendments, the total burden on issuers to submit annual filings, material event notices and failure to file notices to the MSRB would be 57,250 hours.<sup>95</sup> This represents an increase in the total number of burden hours for issuers of 51,500 hours from the 5,750 hours included in the 2006 PRA Submission.

### 3. The MSRB

In the 2006 PRA Submission, the Commission estimated that the total burden on each NRMSIR of collecting, indexing, storing, retrieving and disseminating information requested by

<sup>93</sup> Commission staff notes that this additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that implement computer-to-computer interfaces with the MSRB.

<sup>94</sup> 2,000 (maximum estimate of failure to file notices) × 30 minutes = 1,000 hours.

<sup>95</sup> 11,250 hours (estimated burden for issuers to submit annual filings) + 45,000 hours (estimated burden for issuers to submit material event notices) + 1,000 hours (estimated burden for issuers to submit failure to file notices) = 57,250 hours.

the public to be 29,400 hours and that the total burden on all four NRMSIRs was 117,600 hours (4 NRMSIRs × 29,400 hours). The proposed amendments contemplate that the MSRB would be the sole repository and would receive disclosure documents in an electronic, rather than paper, format. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, Commission staff estimates that the burden to collect, index, store, retrieve, and make available the pertinent documents would be the number of hours that MSRB employees would be assigned to the system for collecting, storing, retrieving, and making available the documents. In a series of telephone conversations between MSRB staff and Commission staff in February 2008, the MSRB advised that three full-time employees and one half-time employee would be assigned to these tasks and that each full-time employee would spend approximately 2,000 hours per year working on these tasks. Therefore, the total burden on the MSRB to collect, store, retrieve, and make available the disclosure documents covered by the proposed amendments would be 7,000 hours per year.<sup>96</sup> Thus, the total burden on the MSRB to collect, store, retrieve, and make available the disclosure documents covered by the proposed amendments would be 22,400 hours<sup>97</sup> less than the burden for each NRMSIR to collect, index, store, retrieve and make available disclosure documents under the 2006 PRA Submission, and 110,600 hours<sup>98</sup> less than the burden for all four NRMSIRs to collect, index, store, retrieve and make available disclosure documents as estimated in the 2006 PRA Submission. The difference in the burden hour estimate for the MSRB to collect, store, retrieve, and make available continuing disclosure documents under the proposed amendments in comparison to the burden on the NRMSIRs estimated in the 2006 PRA Submission could be attributed to the fact that the proposed amendments contemplate that the continuing disclosure documents would be collected, stored, retrieved and made available electronically, whereas the

<sup>96</sup> 2,000 hours × 3.5 (3 full-time employees and 1 half-time employee) = 7,000 hours.

<sup>97</sup> 29,400 hours (estimated burden for each NRMSIR in the 2006 PRA Submission)—7,000 hours (estimated burden for MSRB under the proposed amendments) = 22,400 hours (estimated reduction from current Rule's burden).

<sup>98</sup> 117,600 hours (estimated burden for all four NRMSIRs in the 2006 PRA Submission)—7,000 hours (estimated burden for MSRB under the proposed amendments) = 110,600 hours (estimated reduction from current Rule's burden).

2006 PRA Submission contemplated that these documents would be collected, stored, retrieved and made available in paper format. In part, the estimate in the 2006 PRA Submission was based on the expectation that the documents would be collected, stored, retrieved and made available in paper rather than electronic format, which would require more people to perform these tasks.

### 4. Annual Aggregate Burden for Proposed Amendments

Accordingly, Commission staff expects that the ongoing annual aggregate information collection burden for the proposed amendments to the Rule would be 64,500 hours.<sup>99</sup> The current annual aggregate information collection burden for the Rule is 123,850 hours.<sup>100</sup> Therefore, if the Commission were to adopt the proposed amendments, the ongoing annual aggregate information collection burden for Rule 15c2-12 is estimated to be reduced by 59,350 hours.<sup>101</sup>

#### E. Total Annual Cost Burden

##### 1. Issuers

The Commission expects that some issuers could be subject to some costs associated with the proposed electronic submission of annual filings, material event notices and failure to file notices, particularly if they (or their agent) currently submit paper copies of these documents to the NRMSIRs. It is likely, however, that many issuers of municipal securities currently have the computer equipment and software necessary to convert paper copies of continuing disclosure documents to electronic copies and to electronically transmit the documents to the MSRB. For issuers that currently have such capability, the start-up costs to provide continuing disclosure documents to the MSRB would be minimal because they already would possess the necessary resources internally. Some issuers may have the necessary computer equipment to transmit documents electronically to

<sup>99</sup> 250 hours (total estimated burden for broker-dealers) + 57,250 hours (total estimated burden for issuers) + 7,000 hours (total estimated burden for MSRB) = 64,500 hours. The initial first-year burden would be 64,625 hours: 375 hours (total estimated burden for broker-dealers in the first year) + 57,250 hours (total estimated burden for issuers) + 7,000 hours (total estimated burden for MSRB) = 64,625 hours.

<sup>100</sup> See 2006 PRA Submission.

<sup>101</sup> 123,850 hours (total burden under current Rule)—64,500 hours (total burden under amended Rule) = 59,350 hours. In the first year, the aggregate burden would be reduced by 59,225 hours: 123,850 (total burden under current Rule)—64,625 hours (total burden under amended Rule in the first year) = 59,225 hours.

the MSRB, but may need to upgrade or obtain the software necessary to submit documents to the MSRB in the electronic format that it prescribes. For these issuers, the start-up costs would be the costs of upgrading or acquiring the necessary software. Issuers that presently do not provide their annual filings, material event notices and/or failure to file notices in an electronic format and that are currently sending paper copies of their documents to the NRMSIRs pursuant to their continuing disclosure agreements could incur some costs to obtain electronic copies of such documents if they are prepared by a third party (e.g., accountant or attorney) or, alternatively, to have a paper copy converted into an electronic format. These costs would vary depending on how the issuer elected to convert its continuing disclosure documents into an electronic format. An issuer could elect to have a third-party vendor transfer its paper continuing disclosure documents into the appropriate electronic format. An issuer also could decide to undertake the work internally, and its costs would vary depending on the issuer's current technology resources.

The cost for an issuer to have a third-party vendor transfer its paper continuing disclosure documents into an appropriate electronic format could vary depending on what resources are required to transfer the documents into the appropriate electronic format. One example of such a transfer would be the scanning of paper-based continuing disclosure documents into an electronic format. Based on information provided to Commission staff through limited inquiries to commercial vendors in February 2008, Commission staff estimates that the cost for an issuer to have a third-party vendor scan documents would be \$6 for the first page and \$2 for each page thereafter. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, Commission staff estimates that material event and failure to file notices consist of one to two pages, while annual filings range from eight to ten pages to several hundred pages, but average about 30 pages in length. Accordingly, the approximate cost for an issuer to use a third party vendor to scan a material event notice or failure to file notice would be \$8 each, and the approximate cost to scan an average-sized annual financial statement would be \$64. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February

2008, Commission staff estimates that an issuer would submit one to five continuing disclosure documents annually.

Alternatively, an issuer that currently does not have the appropriate technology could elect to purchase the resources to electronically format the disclosure documents on its own.<sup>102</sup> Based on information obtained by Commission staff through limited inquiries of commercial vendors in February 2008, Commission staff estimates that an issuer's initial cost to acquire these technology resources could range from \$750 to \$4,300.<sup>103</sup> Some issuers may have the necessary hardware to transmit documents electronically to the MSRB, but may need to upgrade or obtain the software necessary to submit documents to the MSRB in the electronic format that it prescribes. Based on information obtained by Commission staff through limited inquiries of commercial vendors in February 2008, Commission staff estimates that an issuer's cost to update or acquire this software could range from \$50 to \$300.<sup>104</sup>

In addition, issuers without direct Internet access could incur some costs to obtain such access to submit the documents. However, Commission staff notes that Internet access is now broadly available to and utilized by businesses, governments, organizations and the public, and Commission staff expects that most issuers of municipal securities currently have Internet access. In the

<sup>102</sup> Generally, the technology resources necessary to transfer a paper document into an electronic format are a computer, scanner and possibly software to convert the scanned document into the appropriate electronic document format. Most scanners include a software package that is capable of converting scanned images into multiple electronic document formats. An issuer would only need to purchase software if the issuer (i) has a scanner that does not include a software package that is capable of converting scanned images into the appropriate electronic format, or (ii) purchases a scanner that does not include a software package capable of converting documents into the appropriate electronic format.

<sup>103</sup> Commission staff estimates the cost for an issuer to upgrade or acquire the necessary technology to transfer its paper continuing disclosure documents into an electronic format are based upon the following estimates for purchasing the necessary equipment from a commercial vendor: (i) An issuer's cost for a computer would range from \$500 to \$3,000; (ii) an issuer's cost for a scanner would range from \$200 to \$1,000; and (iii) an issuer's cost for software to submit documents in an electronic format would range from \$50 to \$300.

<sup>104</sup> Commission staff estimates the cost for an issuer to upgrade or acquire the software to submit documents in an electronic format would range from \$50 to \$300. Issuers that only need to upgrade existing software would incur costs closer to the lower end of this estimate, while those issuers that need to purchase completely new software packages would incur costs closer to the higher end of this estimate.

event that an issuer does not have Internet access, it would incur costs in obtaining such access, which Commission staff estimates to be approximately \$50 per month, based on its limited inquiries to Internet service providers. Otherwise, there are multiple free or low cost locations that an issuer could utilize, such as various commercial sites, which could help an issuer to avoid the costs of maintaining continuous Internet access solely to comply with the proposed amendments to the Rule.

Accordingly, Commission staff estimates that the costs to some issuers to submit continuing disclosure documents to a single repository in electronic format could include: (i) An approximate cost of \$8 per notice to use a third party vendor to scan a material event notice or failure to file notice, and an approximate cost of \$64 to use a third party vendor to scan an average-sized annual financial statement, (ii) an approximate cost ranging from \$750 and \$4,300 to acquire technology resources to convert continuing disclosure documents into an electronic format, (iii) \$50 to \$300 solely to upgrade or acquire the software to submit documents in an electronic format; and (iv) approximately \$50 per month to acquire Internet access.

For an issuer that does not have Internet access and elects to have a third party convert continuing disclosure documents into an electronic format ("Category 1"), the total maximum external cost such issuer would incur would be \$752 per year.<sup>105</sup> For an issuer that does not have Internet access and elects to acquire the technological resources to convert continuing disclosure documents into an electronic format internally ("Category 2"), the total maximum external cost such issuer would incur would be \$4,900 for the first year and \$600 per year thereafter.<sup>106</sup> Accordingly, Commission

<sup>105</sup> [\$64 (cost to have third party convert annual filing into an electronic format) × 2 (maximum estimated number of annual filings filed per year per issuer)] + [\$8 (cost to have third party convert material event notice or failure to file notice into an electronic format) × 3 (maximum estimated number of material event or failure to file notices filed per year per issuer)] + [\$50 (estimated monthly Internet charge) × 12 months] = \$752. Commission staff estimates that an issuer would file one to five continuing disclosure documents per year. These documents generally consist of no more than two annual filings and three material event or failure to file notices.

<sup>106</sup> [\$4300 (maximum estimated one-time cost to acquire technology to convert continuing disclosure documents into an electronic format)] + [\$50 (estimated monthly Internet charge) × 12 months] = \$4900. After the initial year, issuers who acquire the technology to convert continuing disclosure documents into an electronic format internally

staff estimates that the total cost for issuers, if they all were classified as Category 1, would be \$7,520,000 per year, and that the total cost for issuers, if they all were classified as Category 2, would be \$49,000,000 for the first year and \$6,000,000 per year thereafter.<sup>107</sup>

Alternatively, an issuer could elect to use the services of a designated agent to submit continuing disclosure documents to the MSRB. As noted above, Commission staff believes that approximately 30% of municipal issuers that submit continuing disclosure documents today rely on the services of a designated agent. Generally, when issuers utilize the services of a designated agent, they enter into a contract with the designated agent for a package of services, including the submission of continuing disclosure documents, for a single fee. Based on information provided to Commission staff by industry sources in telephone conversations in May 2008, it is anticipated that five of the largest designated agents would submit documents electronically to the MSRB via a direct computer-to-computer interface. Based on information provided to Commission staff by MSRB staff during telephone conversations in May 2008, Commission staff estimates that the start-up cost for an entity to develop a direct computer-to-computer interface with the MSRB would range from approximately \$69,360 to \$138,720.<sup>108</sup> Thus, the maximum estimated total start-up cost of developing a direct computer-to-computer interface by each of the five designated agents for the submission of

would only have the cost of obtaining Internet access. \$50 (estimated monthly Internet charge) × 12 months = \$600.

<sup>107</sup> Total cost for Category 1: 10,000 issuers × \$752 (annual cost per issuer to have a third party convert continuing disclosure documents into an electronic format and for Internet access) = \$7,520,000. Total cost for Category 2: 10,000 issuers × \$4,900 (one-time cost to acquire technology to convert continuing disclosure documents into an electronic format and annual cost for Internet access) = \$49,000,000. 10,000 issuers × \$600 (annual cost per issuer for Internet access) = \$6,000,000. In order to provide an estimate of the total costs to issuers that would not be under-inclusive, Commission staff elected to use all 10,000 issuers for each Category's estimate.

<sup>108</sup> The MSRB estimated that it would take an entity approximately 240 to 480 hours of computer programming to develop the computer-to-computer interface with the MSRB. \$289 (hourly wage for a senior programmer) × 240 hours = \$69,360. \$289 (hourly wage for a senior programmer) × 480 hours = \$138,720. The \$289 per hour estimate for a senior programmer is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

continuing disclosure documents to the MSRB would be \$693,600.

The Commission believes that, in light of the estimated cost to develop and implement a computer-to-computer interface with the MSRB, it is unlikely that issuers would elect to proceed with this approach given the availability of less expensive alternatives to submitting continuing disclosure documents electronically to the MSRB. However, some issuers could choose to submit their continuing disclosure documents to the MSRB through a designated agent. A designated agent could submit continuing disclosure documents along with identifying information to the MSRB on behalf of numerous issuers. Depending on its business model, a designated agent could submit continuing disclosure documents along with identifying information to the MSRB via the Internet or through a direct computer-to-computer interface. In either case, the issuer could incur a cost associated with the designated agent's electronic submission of the pertinent continuing disclosure document and any identifying information to the MSRB. Commission staff estimates that this cost could be approximately \$16 per continuing disclosure document.<sup>109</sup>

## 2. MSRB

The MSRB would incur costs to develop the computer system to allow it to collect, store, process, retrieve, and make available continuing disclosure documents furnished to it by issuers of municipal securities. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, MSRB's start-up costs associated with developing the portal for continuing disclosure documents, including hardware, an additional hosting site, and software licensing and acquisition costs, would be approximately \$1,000,000. In addition, the MSRB indicated that the annual operating costs for this system, excluding salary and other costs related to employees, would be approximately \$350,000. Accordingly, Commission

<sup>109</sup> For this estimate, Commission staff has included the cost of having the designated agent's compliance clerk submit electronically the pertinent continuing disclosure document and any identifying information to the MSRB. 15 minutes (.25 hours) (estimated time per document to gather identifying information) × \$62 (hourly wage for a compliance clerk) = \$15.50 (approximately \$16). The \$62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

staff estimates that the total costs for the MSRB would be \$1,350,000 for the first year and \$350,000 per year thereafter, exclusive of salary and other costs related to employees.<sup>110</sup>

## F. Retention Period of Recordkeeping Requirements

As an SRO subject to Rule 17a-1 under the Exchange Act,<sup>111</sup> if the proposed amendments to the Rule were adopted, the MSRB would be required to retain records of the collection of information for a period of not less than five years, the first two years in an easily accessible place. The proposed amendments to the Rule would contain no recordkeeping requirements for any other persons.

## G. Collection of Information is Mandatory

Any collection of information pursuant to the proposed amendments to the Rule would be a mandatory collection of information.

## H. Responses to Collection of Information Will Not Be Kept Confidential

The collection of information pursuant to the proposed amendments to the Rule would not be confidential and would be publicly available.

## I. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments regarding: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the Commission's estimate of the burden of the revised collections of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Commission has submitted to OMB for approval the proposed

<sup>110</sup> \$1,000,000 (cost to establish computer system) + \$350,000 (annual operation costs for computer system, excluding salary and other related costs for employees) = \$1,350,000 (first year cost to MSRB). After the first year, the only cost would be the annual operation cost of \$350,000. These costs do not include the salary and other overhead costs related to the employees who would maintain the system. MSRB staff advised Commission staff that the personnel costs associated with operating the portal for continuing disclosure documents would be approximately \$400,000 per year.

<sup>111</sup> 17 CFR 240.17a-1.



revisions to the current collection of information titled "Municipal Securities Disclosure." Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-0609, with reference to File No. S7-21-08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, should refer to File No. S7-21-08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549.

#### V. Costs and Benefits of Proposed Amendments to Rule 15c2-12

The Commission is considering the costs and benefits of the proposed amendments to Rule 15c2-12 discussed above. As discussed below, the Commission believes that there would be an overall reduction in costs based on the proposed amendments. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data regarding any such costs or benefits.

##### A. Benefits

Under the proposed amendments to the Rule, a Participating Underwriter would be prohibited from purchasing or selling municipal securities covered by the Rule in a primary offering, unless it has reasonably determined that the issuer of a municipal security has undertaken in a continuing disclosure agreement to provide continuing disclosure documents to the MSRB.<sup>112</sup>

<sup>112</sup> Under the proposed amendments to paragraph (d)(2)(ii) of the Rule, a Participating Underwriter would be exempt from its obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking that the publicly available financial information or operating data described in paragraph (d)(2)(ii)(A) of the Rule would be submitted to the MSRB annually, instead of upon request to any person or at least annually to the appropriate SID, if any, and that the material event

The Commission believes that providing for a single repository that receives submissions in an electronic format, rather than multiple repositories, would encourage a more efficient and effective process for the collection and availability of continuing disclosure information. In the Commission's view, a single electronic point of collection and accessibility of continuing disclosure documents could assist issuers and obligated persons in complying with their undertakings. Submission of continuing disclosure documents only to one repository rather than multiple repositories would reduce the resources issuers and obligated persons need to devote to the process of gathering and submitting continuing disclosure documents. Because the proposed amendments would provide for the electronic submission and availability of continuing disclosure documents, the costs to issuers and obligated persons of gathering and submitting this information ultimately could be reduced because they no longer would have to gather and submit documents in a paper format. As described more fully in Section IV. above, Commission staff estimates that the ongoing annual information collection burden under the proposed amendments would be 64,500 hours.<sup>113</sup> This is a reduction of 59,350 hours from the 2006 PRA Submission.<sup>114</sup> This overall reduction in the Rule's paperwork burden—and the costs associated with that burden—principally would benefit issuers or obligated persons.

The Commission also believes that having a single repository that receives and makes available submissions in an electronic format would provide ready and prompt access to this information by investors and municipal securities market participants. Investors and market participants would be able to go solely to one location to retrieve continuing disclosure documents rather than having to approach multiple locations, thereby allowing for a more convenient means to obtain such information. In addition, the Commission preliminarily believes that having one repository electronically collect and make available all continuing disclosure documents would

notices described in paragraph (d)(2)(ii)(B) of the Rule would be submitted to the MSRB, instead of to each NRMSIR or the MSRB and to the appropriate SID, if any, and as long as the other conditions of the exemption are met.

<sup>113</sup> Commission staff estimates that the annual information collection burden under the proposed amendments in the first year would be 64,625 hours.

<sup>114</sup> In the first year, this is a reduction of 59,225 from the 2006 PRA Submission.

increase the likelihood that investors and other market participants would obtain complete information.

The Commission expects that a single repository that receives submissions in an electronic format could simplify compliance with regulatory requirements by broker-dealers and others, such as mutual funds, by providing them with consistent availability of continuing disclosure documents from a single source. Information vendors (including NRMSIRs and SIDs) and others also would have ready access to all continuing disclosure documents that they in turn could use in their value-added products. The Commission also expects that having a single repository that receives submissions in an electronic format would make the information available to all users.

Under the current Rule, Commission staff estimates that the current annual paperwork cost for all four NRMSIRs to collect, index, store, retrieve and disseminate continuing disclosure information requested by the public to be approximately \$7.3 million.<sup>115</sup> Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, the MSRB staff estimated that the MSRB's annual total costs to collect, index, store, retrieve and make available continuing disclosure information, would be \$1,350,000 for the first year and \$350,000 per year thereafter. Providing for a single repository could reduce the paperwork costs that NRMSIRs currently incur because they no longer would have to maintain personnel and other resources solely in connection with their status as a NRMSIR.

Finally, the Commission preliminarily believes that the proposed amendments could encourage the dissemination of information in the information services markets by providing easier access to continuing disclosure documents. As a result, there potentially could be an increase in the number of information vendors disseminating continuing disclosure documents and value-added products because the cost of entry into the municipal securities information services market could be reduced.

<sup>115</sup> 117,600 hours (total annual hourly burden for all four NRMSIRs from 2006 PRA Submission) × \$62 (hourly wage for a compliance clerk) = \$7.3 million. The \$62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

The Commission seeks comment on the anticipated benefits of the proposed amendments.

#### B. Costs

If the amendments to the Rule were adopted, the Commission would not expect broker-dealers to incur any additional recurring costs because the proposed amendments would not alter substantively the existing Rule's requirements for these entities, except with respect to the place to which issuers would agree to make filings. The proposed amendments would change the location where the continuing disclosure documents of issuers or obligated persons would be submitted pursuant to continuing disclosure agreements. As noted above, Commission staff estimates that the annual information collection burden for each broker-dealer under the proposed amendments to the Rule would be one hour. This annual burden is identical to the burden that a broker-dealer has under the current Rule.<sup>116</sup> Accordingly, Commission staff estimates that it would cost each broker-dealer \$270 annually to comply with the Rule.<sup>117</sup>

In addition, Commission staff estimates that a broker-dealer could have a one-time internal cost associated with having an in-house compliance attorney prepare and issue a memorandum advising the broker-dealer's employees who work on primary offerings of municipal securities about the proposed revisions to Rule 15c2-12, if they are adopted by the Commission. Commission staff estimates it would take internal counsel approximately 30 minutes to prepare this memorandum, for a cost of approximately \$135.<sup>118</sup>

The Commission believes that the ongoing obligations of broker-dealers under the Rule would be handled internally because compliance with these obligations is consistent with the type of work that a broker-dealer typically handles internally. The Commission does not believe that a broker-dealer would have any recurring external costs associated with the proposed amendments to the Rule. The Commission requests comment on any

costs broker-dealers could incur under the proposed amendments.

Although Rule 15c2-12 relates to the obligations of broker-dealers, issuers or obligated persons indirectly could incur costs as a result of the proposed amendments. Pursuant to continuing disclosure agreements, issuers of municipal securities currently undertake to provide continuing disclosure documents to the NRMSIRs either directly or indirectly through an indenture trustee or a designated agent. In either case, some issuers could be subject to the costs associated with the proposed electronic filing of annual filings, material event notices and failure to file notices, particularly if they (or their agent) currently submit paper copies of these documents to the NRMSIRs. For those issuers that currently deliver their continuing disclosure documents electronically to the NRMSIRs, there should be minimal change in costs as a result of the proposed requirement that documents be submitted electronically.

Issuers that presently do not provide their annual filings, material event notices and/or failure to file notices in an electronic format and that are currently sending paper copies of their documents to the NRMSIRs pursuant to their continuing disclosure agreements could incur some costs to obtain electronic copies of such documents from the party who prepared them or, alternatively, to have a paper copy converted into an electronic format. These costs would vary depending on how the issuer elected to convert their continuing disclosure documents into an electronic format. An issuer could elect to have a third-party vendor transfer their paper continuing disclosure documents into the appropriate electronic format. An issuer also could decide to undertake the work internally, and its costs would vary depending on the issuer's current technology resources. An issuer also would need to have Internet access to submit documents electronically and would incur the costs of maintaining such service, if the issuer currently does not have Internet access, unless it relies on other sources of Internet access.

It is likely, however, that many issuers of municipal securities currently possess the computer equipment and software necessary to convert paper copies of continuing disclosure documents to electronic copies and to electronically transmit the documents to the MSRB. For issuers that currently have such capability, the start-up costs to provide continuing disclosure documents to the MSRB would be

minimal because they already would have the necessary resources internally.

As described more fully in section IV. above, Commission staff estimates that the costs to some issuers to submit continuing disclosure documents to a single repository in an electronic format may include: (i) An approximate cost of \$8 per notice to use a third party vendor to scan a material event notice or failure to file notice, and an approximate cost of \$64 to use a third party vendor to scan an average-sized annual financial statement; (ii) an approximate cost ranging from \$750 and \$4,300 to acquire technology resources to convert continuing disclosure documents into an electronic format; (iii) \$50 to \$300 to upgrade or acquire the software to submit documents in an electronic format; (iv) approximately \$50 per month to acquire Internet access; and (v) an approximate cost of \$16 per continuing disclosure document to have a designated agent submit electronically continuing disclosure documents and identifying information to the MSRB. Also, as more fully described in Section IV. above, the total estimated cost of five designated agents developing computer-to-computer interfaces for the submission of documents to the MSRB would be \$693,600.

Issuers or obligated persons also would have to provide certain identifying information to the repository pursuant to their undertakings in continuing disclosure agreements. As described more fully in section IV. above, Commission staff estimates that each issuer would submit one to five continuing disclosure documents annually to the MSRB, for a maximum estimated annual labor cost of approximately \$232.50 per issuer.<sup>119</sup>

The Commission expects that the costs to issuers could vary somewhat, depending on the issuer's size. The Commission believes that any such difference would be attributable to the fact that larger issuers may tend to have more issuances of municipal securities; thus, larger issuers may tend to submit more documents than smaller issuers. Thus, the costs of submitting documents

<sup>119</sup> 5 (maximum estimated number of continuing disclosure filed per year per issuer) × \$62 (hourly wage for a compliance clerk) × 45 minutes (.75 hours) (average estimated time for compliance clerk to submit a continuing disclosure document electronically) = \$232.50. The \$62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. In order to provide an estimate of total costs for issuers that would not be under-inclusive, the Commission elected to use the higher end of the estimate of annual submissions of continuing disclosure documents.

<sup>116</sup> See 2006 PRA Submission.

<sup>117</sup> 1 hour (estimated annual information collection burden for each broker-dealer) × \$270 (hourly cost for a broker-dealer's internal compliance attorney) = \$270. The hourly rate for the compliance attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

<sup>118</sup> See Section IV.D.1., *supra*.

could be greater for larger issuers. The Commission requests comments on costs that issuers and obligated persons could incur as a result of the proposed amendments.

Further, the Commission does not anticipate that issuers would incur any costs associated with the need to revise the template for continuing disclosure agreements, if the proposed amendments are adopted. Commission staff contacted National Association of Bond Lawyers (“NABL”) staff in April 2008 regarding the potential costs to issuers for bond lawyers to revise the provisions of continuing disclosure agreements that would be affected by the proposed amendments. According to NABL staff, the NABL members advised that the cost of revising the template for continuing disclosure agreements to reflect the proposed amendments would be insignificant and stated their belief that the costs would not be passed on to issuers.

As discussed in section IV. above, the MSRB would incur costs to develop the computer system to allow it to collect, store, process, retrieve, and make available continuing disclosure documents furnished to it by issuers of municipal securities. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, MSRB’s start-up costs associated with developing the portal for continuing disclosure documents, including hardware, an additional hosting site, and software licensing and acquisition costs, would be approximately \$1,000,000. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, the MSRB staff estimated that the MSRB’s ongoing costs of operating the system, including allocated costs associated with such items as office space and licensing fees, would be approximately \$1,350,000 for the first year and \$350,000 per year thereafter. In addition, MSRB staff advised Commission staff that the personnel costs associated with operating the portal for continuing disclosure documents would be approximately \$400,000 per year.<sup>120</sup>

Some NRMSIRs and other vendors of municipal disclosure information could incur costs in transitioning their business models if the Commission were to adopt the proposal to establish

a single repository for municipal disclosure documents. In fact, existing NRMSIRs could be adversely affected by the proposed amendments because the proposal contemplates a single repository. Any NRMSIR that currently provides municipal disclosure documents as its primary business model could face a significant decline in its business, and thus in income, as a result of the proposed amendments.<sup>121</sup> In addition, to transition from multiple repositories to a single repository, the Commission is considering whether to direct its staff to withdraw the “no action” letters issued to the NRMSIRs and to designate the MSRB as the NRMSIR. As a result, the NRMSIRs could experience an immediate decline in income with respect to those parts of their business that provide municipal disclosure documents to persons who request them. Also, NRMSIRs could have some costs if they continued to maintain historical continuing disclosure information that they have already received under existing continuing disclosure agreements. The Commission requests comment and empirical data on any anticipated costs that NRMSIRs could incur.

Finally, under the proposed amendments, Rule 15c2–12 no longer would refer to SIDs. The proposed amendments would not affect the legal obligations of issuers or obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that may be required under the appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of amendments to the Rule, if the Commission were to adopt such amendments, to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that may be required under the appropriate state law. Unlike NRMSIRs, SIDs are membership organizations and use information submitted to them in products for their members. While SIDs can charge fees for requested documents, the Commission believes, based on telephone conversations between Commission staff and representatives of SIDs in April 2008, that this is not a primary source

of revenue for them. The Commission does not expect that SIDs would experience a decline in operations or incur any costs as a result of the proposed amendments, but seeks comment on any anticipated impact that the proposed amendments could have on SIDs.

### C. Request for Comment on Costs and Benefits

To assist the Commission in evaluating the costs and benefits that could result from the proposed amendments to the Rule, the Commission requests comments on the potential costs and benefits identified in this proposal, as well as any other costs or benefits that could result from the proposed amendments to the Rule. Commenters should provide analysis and data to support their views on the costs and benefits. In particular, the Commission requests comment on the costs and benefits of the proposed amendments on broker-dealers, issuers, the MSRB, NRMSIRs and other vendors, as well as any costs on others, including market participants and investors.

## VI. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act<sup>122</sup> requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act<sup>123</sup> requires the Commission, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed amendments to the Rule would revise subparagraph (b)(5) of Rule 15c2–12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has agreed at the time of a primary offering: (1) To provide the continuing disclosure documents to the MSRB instead of to each NRMSIR and appropriate SID; and (2) to provide the continuing disclosure documents in an electronic format and accompanied by identifying information as prescribed by the MSRB.

<sup>120</sup> Based on information provided to Commission staff by MSRB staff in telephone conversations in May 2008, this amount represents the estimated personnel costs associated with the MSRB’s having three and one-half persons devoted to operating the continuing disclosure portal.

<sup>121</sup> See, e.g., Letter from Peter J. Schmitt, Chief Executive Officer, DPC Data, dated January 23, 2008, regarding SR-MSRB-2007-06, submitted to [www.sec.gov/comments](http://www.sec.gov/comments). (“DPC Data Letter”).

<sup>122</sup> 15 U.S.C. 78c(f).

<sup>123</sup> 15 U.S.C. 78w(a)(2).

The Commission preliminarily believes that the proposed amendments to the Rule should help make the municipal securities disclosure process more efficient and help conserve resources for municipal security issuers, as well as investors and market participants. Under the current regulatory framework, issuers of municipal securities in their continuing disclosure agreements undertake to submit continuing disclosure documents to four separate NRMSIRs, and they submit such documents in paper or electronic form. The Commission anticipates that amending the Rule could promote the efficiency of the municipal disclosure process by reducing the resources municipal security issuers would need to devote to the process of submitting continuing disclosure documents.

As noted above, the Commission has long been interested in improving the timing and availability of disclosure in the municipal securities market. At the time the Commission adopted Rule 15c2-12 in 1989 and adopted the 1994 Amendments, disclosure documents were submitted in paper form. The Commission believed that, in such an environment where document retrieval would be handled manually, the establishment of one or more repositories could be beneficial in widening the retrieval and availability of information in the secondary market, since the public could obtain the disclosure documents from multiple locations. The Commission's objective of encouraging greater availability of municipal securities information remains unchanged.

However, there have been significant inefficiencies in the current use of multiple repositories that likely have affected the public's ability to retrieve continuing disclosure documents.<sup>124</sup> In this regard, the Commission noted in the 1989 Adopting Release that "the creation of multiple repositories should be accompanied by the development of an information linkage among these repositories" so as to afford "the widest retrieval and dissemination of information in the secondary market."<sup>125</sup> Although the Commission in the 1989 Adopting Release supported the development of an information linkage among the repositories, none was established to help broaden the availability of the disclosure information. Also, since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems, including the

use of the Internet, to provide information quickly and inexpensively to market participants and investors. In this regard, the Commission preliminarily believes that the use of a single repository to receive, in an electronic format, and make available continuing disclosure documents in an electronic format would substantially and effectively increase the availability of municipal securities information about municipal issues and enhance the efficiency of the secondary trading market for these securities.

In addition, the Commission preliminarily believes that having a single repository for electronically submitted information would provide investors, market participants, and others with a more efficient and convenient means to obtain continuing disclosure documents and would help increase the likelihood that investors, market participants, and others would make more informed investment decisions regarding whether to buy, sell or hold municipal securities.

With respect to the Exchange Act goal of promoting competition, the Commission notes that, when it adopted Rule 15c2-12 in 1989, it strongly supported the development of one or more central repositories for municipal disclosure documents.<sup>126</sup> The Commission "recognize[d] the benefits that may accrue from the creation of competing private repositories," and indicated that "the creation of central sources for municipal offering documents is an important first step that may eventually encourage widespread use of repositories to disseminate annual reports and other current information about issuers to the secondary markets."<sup>127</sup> Further, when it adopted the 1994 Amendments, the Commission stated that the "requirement to deliver disclosure to the NRMSIRs and the appropriate SID also allay[ed] the anti-competitive concerns raised by the creation of a single repository."<sup>128</sup>

There have been significant advances in technology and information collection and delivery since that time, as discussed throughout this release, that indicate that having multiple repositories may not be necessary because the widespread availability and dissemination of information can be achieved through different, more efficient, means. Because the current environment differs markedly from the

time when Rule 15c2-12 was adopted in 1989 and subsequently amended in 1994, the Commission believes that it is appropriate to propose an approach that utilizes the significant technological advances, such as the development and use of various electronic formats, that have occurred in the intervening years.

The Commission's proposal to provide for the establishment of a single repository for continuing disclosure documents would help further the Exchange Act objective of promoting competition because information about municipal securities, provided in an electronic format, would be more widely available to market professionals, investors, information vendors, and others as a result of the proposed amendments. For example, the Commission believes competition among vendors could increase because vendors could utilize this information to provide value-added services to municipal market participants. The Commission's proposal also could promote competition in the purchase and sale of municipal securities because the greater availability of information as a result of the proposed amendments could instill greater investor confidence in the municipal securities market. Moreover, the greater availability of information also could encourage improvement in the completeness and timeliness of issuer disclosures and could foster interest in municipal securities by retail and institutional customers. As a result, more investors could be attracted to this market sector and broker-dealers could compete for their business.

The Commission acknowledges that, if the proposed amendments were adopted to provide for a single repository, they potentially could have an adverse impact on one or more existing NRMSIRs, especially if their business models depended on their status as a NRMSIR.<sup>129</sup> Moreover, NRMSIRs have received compensation for providing copies of continuing disclosure documents to persons who request them. Thus, one or more NRMSIRs possibly could be adversely affected by the proposal, if they no longer have available to them a steady flow of funds from providing for a fee

<sup>129</sup> In responding to the MSRB's proposed rule change to revise its MSIL system, one NRMSIR expressed concern about the MSRB's proposed competition with vendors to offer what it viewed as value-added features and services relating to disclosure documents. This NRMSIR stated that, if the MSRB were permitted to offer value-added content and features in connection with its proposed Internet-based portal for disclosure documents, it would inflict economic harm on existing data vendors. See DPC Data Letter, *supra* note 121.

<sup>126</sup> See 1989 Adopting Release at 54 FR 28807, *supra* note 3. See also 1994 Proposing Release, *supra* note 43.

<sup>127</sup> See 1989 Adopting Release, *supra* note 3. See also 1994 Proposing Release, *supra* note 43.

<sup>128</sup> See 1994 Amendments, *supra* note 5.

<sup>124</sup> See note 19, *supra*.

<sup>125</sup> See 1989 Adopting Release, *supra* note 3.

copies of continuing disclosure documents to persons who request them. As a result of the proposed amendments, a NRMSIR could find that it would have to revise its current manner of doing business or face a significant downturn in its business operations. Vendors of information about municipal securities, other than NRMSIRs, also could be affected by the proposed amendments if the sole repository provides information electronically for no charge.

In addition, there would be just one repository, and not four NRMSIRs as is currently the case, if the Commission were to adopt the proposed Rule 15c2–12 amendments. Thus, the proposal could reduce competition with respect to services provided by NRMSIRs as information vendors. In addition to supplying municipal disclosure documents upon request, NRMSIRs also provide value-added market data services to municipal investors that incorporate continuing disclosure information. If NRMSIRs were adversely affected by the proposal to establish a single repository, it is possible that there could be a reduction in these value-added market data services relating to municipal securities or a loss of innovation in offering competing information services regarding municipal securities.

The Commission preliminarily does not believe that having a single repository would have a significant adverse effect on the ability or willingness of private information vendors to compete to create and market value-added data products. Commercial vendors could readily access the information made available by the repository to re-disseminate it or use it in whatever value-added products they may wish to provide. In fact, a single repository in which documents are submitted in an electronic format could encourage the private information vendors to disseminate municipal securities information by reducing the cost of entry into the information services market. Existing vendors could need to make some adjustments to their infrastructure or facilities. However, some vendors could determine that they no longer need to invest in the infrastructure and facilities necessary to collect and store continuing disclosure documents, and new entrants into the market would not need to obtain the information from multiple locations, but rather could readily access such information from one centralized source. Thus, all vendors should be able to obtain easily continuing disclosure documents and should be able to

compete in providing value-added services.

The Commission, therefore, preliminarily believes that any potential effect on competition that could result from the proposed amendments would be justified by the more efficient and effective process for the collection and availability of continuing disclosure documents. A single repository for the electronic collection and availability of these documents would foster the Exchange Act objective of promoting competition by simplifying the method of submission of continuing disclosure documents to one location and making the documents more readily accessible to investors and others by virtue of the documents being in an electronic format.

The Commission previously stated that it would specifically consider the competitive implications of the MSRB becoming a repository.<sup>130</sup> In addition, the Commission stated that if the Commission were to conclude that the MSRB's status as a repository might have adverse competitive implications, it would consider whether it should take any action to address these effects.<sup>131</sup> As noted earlier, the Commission recognizes that competition with respect to certain information services regarding municipal securities that are provided by the existing NRMSIRs could decline should the MSRB become the central repository. The Commission believes that one of the benefits in having the MSRB be the sole repository would be its ability to provide a ready source of continuing disclosure documents to other information vendors who wish to use that information for their products. Private vendors could utilize the MSRB in its capacity as a repository as a means to collect information from the continuing disclosure documents to create value-added products for their customers.

In addition, the Commission believes that the reasons it provided above regarding the competitive implications with respect to having a single repository similarly would apply if the MSRB were the sole repository. The Commission does not believe that there are competitive implications that would uniquely apply to the MSRB in its capacity as the sole repository as opposed to any other entity that could be the sole repository. In fact, the Commission believes that, if the MSRB were the sole repository, its status as an SRO would provide an additional level

of Commission oversight, as changes to its rules relating to continuing disclosure documents would have to be filed for Commission consideration as a proposed rule change under section 19(b) of the Exchange Act. Accordingly, the Commission believes that any competitive impact that could result from the MSRB's status as the sole repository would be justified by the benefits that such status could provide.

The Commission preliminarily believes that the proposed amendments could have a positive effect on capital formation by municipal securities issuers. The Rule is addressed to the obligations of broker-dealers participating in a primary offering of municipal securities (*i.e.*, Participating Underwriters). Because continuing disclosure documents would be submitted electronically to a single repository, investors and other market participants potentially could obtain information about these issuers more readily than they can today. They no longer would have to contact several NRMSIRs to make sure that they have obtained complete information about the municipal issuer. Easier access to continuing disclosure documents regarding municipal securities could provide investors and other market participants with more complete information about municipal issuers. Moreover, this ready availability of continuing disclosure documents could encourage investors to consider purchasing new issuances of municipal securities because they could readily access information from a single repository and review that information in making an investment decision. As a result, the proposed amendments could help foster the Exchange Act goal of capital formation.

The Commission proposes to delete references to the SIDs in Rule 15c2–12. Since the Commission is now proposing to amend the Rule to provide for a single repository for the electronic collection and availability of continuing disclosure documents that the Commission believes would efficiently and effectively improve disclosure in the municipal securities market, the Commission believes that it is no longer necessary to require in the Rule that Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to provide continuing disclosure documents to the SIDs.

The proposed amendments would not affect the legal obligations of issuers and obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that are required under the

<sup>130</sup> See Securities Exchange Act Release No. 28081, *supra* note 55.

<sup>131</sup> *Id.*

appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of the proposed amendments to the Rule to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that are required under the appropriate state law. The Commission preliminarily does not believe that its proposal to delete references to SIDs in Rule 15c2-12 would have any potential effect on efficiency, competition or capital formation.

Based on the analysis above, the Commission preliminarily believes that the proposed amendments to the Rule would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission requests comment on all aspects of this analysis and, in particular, on whether the proposed amendments to the Rule would place a burden on competition, as well as the effect of the proposed amendments on efficiency, competition, and capital formation. The Commission specifically seeks comment on whether the proposed amendments would place a burden on competition or have an effect on efficiency, competition, and capital formation with respect to issuers, NRMSIRs or other vendors, the MSRB, broker-dealers, other market participants, investors, or others.

#### VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"<sup>132</sup> the Commission must advise the OMB as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rule amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other

factual support for their view to the extent possible.

#### VIII. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act<sup>133</sup> ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the proposed amendments to the Rule on small entities, unless the Commission certifies that the proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>134</sup>

For purposes of Commission rulemaking in connection with the RFA, a broker-dealer is a small business if its total capital (net worth plus subordinated liabilities) on the last day of its most recent fiscal year was \$500,000 or less, and is not affiliated with any entity that is not a "small business."<sup>135</sup> Some broker-dealers that would be subject to the proposed amendments meet these definitions of a "small business." In addition, for purposes of Commission rulemaking in connection with the RFA, a "small business" may also include a municipal securities dealer that is a bank (including a separately identifiable department or division of a bank) which has total assets of less than \$10 million at all times during the preceding fiscal year; had an average monthly volume of municipal securities transactions in the preceding fiscal year of less than \$100,000; and is not affiliated with any entity that is not a "small business."<sup>136</sup>

The proposed amendments to the Rule would not substantively change any of the current obligations of broker-dealers or municipal securities dealers, except to the extent that they would have to reasonably determine that the issuer or obligated person has agreed in writing to provide continuing disclosure documents to a single repository instead of to multiple NRMSIRs. The paperwork burden for broker-dealers or municipal securities dealers would not be altered by the proposed amendments, except to the extent that the firm's compliance attorney would need to prepare and issue a notice to members or a memorandum explaining the impact of the proposed amendments to pertinent personnel, if the proposal is adopted by the Commission.<sup>137</sup>

For purposes of Commission rulemaking in connection with the RFA, an issuer or person, other than an

investment company, is a "small business" or "small organization" if its "total assets on the last day of its most recent fiscal year were \$5 million or less."<sup>138</sup> The Commission believes that at least three of the four NRMSIRs are part of large business entities that have assets in excess of \$5 million.<sup>139</sup> One of the current four NRMSIRs and possibly one or more vendors of continuing disclosure documents may be a "small business" for purposes of the RFA. As noted above, the proposed amendments could have a significant economic impact on the business model of one NRMSIR and possibly on the business models of one or more other vendors of municipal securities information. While the Commission acknowledges that the proposed amendments to the Rule could have a significant economic impact on certain vendors of municipal securities information, the Commission does not believe that the number of such vendors that could be affected by the proposed amendments represents a substantial number of small businesses.

In addition, the Commission believes that two of the three SIDS may be a "small business" or "small organization" for purposes of the RFA. The proposed amendments, however, would not affect any legal obligations issuers or obligated persons may have to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that may be required under the appropriate state law.

A "small governmental jurisdiction" is defined by the RFA to include "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."<sup>140</sup> Since the Rule applies to primary offerings of municipal securities with an aggregate principal amount of at least \$1,000,000 or more, some issuances by small governmental jurisdictions would not be covered by the Rule. For those small issuers whose primary offerings of municipal securities are impacted by the Rule, the Commission notes that issuers of municipal securities currently are familiar with, and provide, pursuant to their continuing disclosure agreements, continuing disclosure documents. Under the proposal, issuers would submit, pursuant to their undertakings in continuing disclosure agreements, continuing disclosure documents to the MSRB in an electronic

<sup>133</sup> 5 U.S.C. 603(a).

<sup>134</sup> 5 U.S.C. 605(b).

<sup>135</sup> 17 CFR 240.0-10(c).

<sup>136</sup> 17 CFR 240.0-10(f).

<sup>137</sup> See Section IV.D.1., *supra*.

<sup>138</sup> 17 CFR 230.157. See also 17 CFR 240.0-10(a).

<sup>139</sup> Commission staff based this determination on its review of various public sources of financial information about these three NRMSIRs.

<sup>140</sup> 5 U.S.C. 601(5).

<sup>132</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

format and accompanied by identifying information, instead of to each of the four existing NRMSIRs. Accordingly, to the extent a small governmental jurisdiction has conducted a primary offering of municipal securities for which a Participating Underwriter has reasonably determined that the issuer has entered into a contractual undertaking covered by the Rule, its continuing disclosure documents would be submitted to one repository, instead of multiple ones as is the case today, and thus the small governmental jurisdiction would incur no significant additional economic impact as a result of the proposed amendments to the Rule. The Commission believes that many municipal issuers currently have the capability to convert paper documents to electronic documents. Those small governmental jurisdictions that: (i) Do not have continuing disclosure information in an electronic format; or (ii) do not have the internal means to convert continuing disclosure information into an electronic format, would have to incur a cost to convert their paper documents into an electronic file.<sup>141</sup> Although some small governmental jurisdictions could incur costs to submit documents electronically to a single repository, the Commission does not believe that these costs would result in a significant economic impact for a substantial number of small governmental jurisdictions.<sup>142</sup>

In the Commission's view, the proposed amendments would not have a significant economic impact on a substantial number of small entities, including broker-dealers, municipal securities dealers, small governmental jurisdictions, NRMSIRs and other vendors of municipal disclosure documents, SIDs, or other small businesses or small organizations. For the above reasons, the Commission certifies that the proposed amendment to the Rule would not have a significant economic impact on a substantial number of small entities. The Commission requests comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including broker-dealers and municipal securities dealers, small governmental jurisdictions, NRMSIRs and other vendors of municipal disclosure documents, SIDS, or other small businesses or small organizations, and provide empirical data to support the extent of the impact.

<sup>141</sup> See Section V.B., *supra*.

<sup>142</sup> *Id.*

## IX. Statutory Authority

Pursuant to the Exchange Act, and particularly sections 3(b), 15(c), 15B and 23(a)(1) thereof, 15 U.S.C. 78c(b), 78o(c), 78o-4, and 78w(a)(1), the Commission is proposing amendments to § 240.15c2-12 of Title 17 of the *Code of Federal Regulations* in the manner set forth below.

### List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

### Text of Proposed Rule Amendments

For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is proposed to be amended as follows.

### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

2. Section 240.15c2-12 is amended by the following:

A. Revise paragraph (b)(4)(ii), the introductory text of paragraph (b)(5)(i), and paragraphs (b)(5)(i)(A) and (B);

B. In the introductory text of paragraph (b)(5)(i)(C) and in paragraph (b)(5)(i)(D) remove the phrase "to each nationally recognized municipal securities information repository or to the Municipal Securities Rulemaking Board, and to the appropriate state information depository, if any,";

C. In paragraph (b)(5)(ii)(C) remove the phrase "and to whom it will be provided";

D. Add new paragraph (b)(5)(iv);

E. Revise paragraph (d)(2)(ii); and

F. Revise paragraphs (f)(3) and (f)(9).

The additions and revisions read as follows.

#### § 240.15c2-12 Municipal securities disclosure.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(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;

\* \* \* \* \*

(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.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(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, 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, if material; 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

\* \* \* \* \*

(f) \* \* \*

(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.

\* \* \* \* \*

(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.

\* \* \* \* \*

By the Commission.

Dated: July 30, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

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