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17 CFR Parts 240 and 241
Amendment to Municipal Securities Disclosure; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 241

[Release No. 34–62184A; File No. S7–15–09]

RIN 3235–AJ66

Amendment to Municipal Securities Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Final rule and interpretation.

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") is adopting amendments to Rule 15c2–12 ("Rule 15c2–12" or "Rule") under the Securities Exchange Act of 1934 ("Exchange Act") relating to municipal securities disclosure. The amendments revise certain requirements regarding the information that a 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 to the Municipal Securities Rulemaking Board ("MSRB"). Specifically, the amendments require a broker, dealer, or municipal securities dealer to reasonably determine that the issuer or obligated person has agreed to provide notice of specified events in a timely manner not in excess of ten business days after the event's occurrence; amend the list of events for which a notice is to be provided; and modify the events that are subject to a materiality determination before triggering a requirement to provide notice to the MSRB. In addition, the amendments revise an exemption from the Rule for certain offerings of municipal securities with put features (defined below as "demand securities"). The Commission also is providing interpretive guidance intended to assist municipal securities brokers, dealers, and municipal securities dealers in meeting their obligations under the antifraud provisions of the federal securities laws.

DATES: *Effective Date:* August 9, 2010, except Part 241 will be effective June 10, 2010.

Compliance Date: December 1, 2010 with respect to § 240.15c2–12.

FOR FURTHER INFORMATION CONTACT: Martha Mahan Haines, Assistant Director and Chief, Office of Municipal Securities, at (202) 551–5681; Nancy J. Burke-Sanow, Assistant Director, Office of Market Supervision, at (202) 551–5620; Mary N. Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551–5683; Molly M. Kim, Special Counsel, Office of Market Supervision, at (202) 551–5644; Rahman J. Harrison, Special Counsel, Office of Market Supervision, at (202) 551–5663; and Steven Varholik, Special Counsel, Office of Market Supervision, at (202) 551–5615, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rule 15c2–12 under the Exchange Act.[1]

I. Executive Summary

On July 24, 2009, the Commission published for comment amendments to Rule 15c2–12 to improve the quality and timeliness of information about municipal securities that are outstanding in the secondary market.[2] The proposed amendments would have required a broker, dealer, or municipal securities dealer to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract for the benefit of holders of the issuer's municipal securities ("continuing disclosure agreement"), to provide notice to the MSRB of specified events in a timely manner not in excess of ten business days after the event's occurrence. The proposal also would have amended the list of events for which a notice is to be provided and would have modified the events that are subject to a materiality determination before triggering the obligation to submit a notice to the MSRB. In addition, the amendments would have revised an exemption from the Rule for certain offerings of demand securities.

The Commission received twenty-nine comment letters in response to the proposed amendments from a wide range of commenters.[3] The respondents included the MSRB; state and local governments; mutual funds; trade organizations representing broker-dealers, government financial officials, and bond lawyers; and individual investors. Of the comment letters received, four expressed support for the proposed amendments; ten expressed support, but suggested modifications to certain provisions of the proposed amendments; three supported some of the proposed amendments and objected to others; and eight opposed the proposed amendments. In addition, four comment letters neither expressed support for nor opposed the proposed amendments.

Some of the main concerns raised in the comment letters include: (i) The burden and costs associated with the proposed maximum ten business day time frame for submission of event notices; (ii) application of the proposed amendments to remarketings of demand securities;[4] and (iii) the proposed removal of the materiality condition from various disclosure events that trigger submission of an event notice to the MSRB. A number of commenters offered alternative approaches to the proposal to address their concerns and made suggestions regarding implementation of the proposed amendments. Also, some commenters addressed two proposals submitted by the MSRB relating to modifications to its Electronic Municipal Market Access ("EMMA") system.[5]

This release describes and addresses only those portions of the comment letters that are relevant to the proposed amendments. The portions of the comment letters that discuss the MSRB proposals relating to the EMMA system are being considered separately in the Commission's orders approving the MSRB proposals.[6]

The Commission has carefully considered all the comments it received regarding the proposed amendments and, as discussed below, is adopting the amendments substantially as proposed, with some modifications in response to comments. The amendments are intended to enhance the quality and availability of information about outstanding municipal securities. For

[1] 17 CFR 240.15c2–12.

[2] *See* Securities Exchange Act Release No. 60332 (July 17, 2009), 74 FR 36831 (July 24, 2009) ("Proposing Release"). The comment period for the proposed amendments expired on September 8, 2009.

[3] Copies of all comments received on the proposed amendments are available on the Commission's Internet Web site, located at *http://www.sec.gov/comments/s7-15-09/s71509.shtml.* Comments are also available for Web site viewing and printing 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. Exhibit A, which is attached to this release, contains a citation key to the comment letters received by the Commission on the proposed amendments.

[4] *See infra* note 28 and accompanying text for a description of demand securities.

[5] *See* Securities Exchange Act Release Nos. 60314 (July 15, 2009), 74 FR 36300 (July 22, 2009); 61238 (December 23, 2009), 75 FR 492 (January 5, 2010); 60315 (July 15, 2009), 74 FR 36294 (July 22, 2009); and 61237 (December 23, 2009), 75 FR 485 (January 5, 2010). The EMMA system is a component of the MSRB's central municipal securities document repository for the collection and availability of continuing disclosure documents over the Internet. *See http://emma.msrb.org.*

[6] *See* Securities Exchange Act Release Nos. 62182 (May 26, 2010) (SR–MSRB–2010–09) and 62183 (May 26, 2010) (SR–MSRB–2010–10) (pursuant to delegated authority).

the reasons discussed in this release,[7] the Commission believes that the amendments are consistent with the Commission's mandate to, among other things, adopt rules reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices in the market for municipal securities. In addition, the Commission is issuing interpretive guidance that is substantially the same as the guidance set forth in the Proposing Release and that is intended to assist municipal securities brokers, dealers, and municipal securities dealers in meeting their obligations under the antifraud provisions of the federal securities laws.

II. Background

Rule 15c2–12 is intended to enhance disclosure, and thereby reduce fraud, in the municipal securities market by establishing standards for obtaining, reviewing, and disseminating information about municipal securities by their underwriters.[8] In 1989, the Commission adopted paragraphs (a) and (b)(1)–(4) of Rule 15c2–12[9] to require brokers, dealers, and municipal securities dealers ("Participating Underwriters") acting as underwriters in primary offerings of municipal securities of $1,000,000 or more (subject to certain exemptions set forth in paragraph (d) of the Rule) to obtain, review, and distribute to potential customers copies of the issuer's official statement.[10] In 1994, the Commission adopted paragraph (b)(5) of the Rule ("1994 Amendments"),[11] which became effective in 1995 and was amended in 2008.[12] Paragraph (b)(5) prohibits Participating Underwriters from purchasing or selling municipal securities covered by the Rule in a primary offering, unless the Participating Underwriter has reasonably determined that an issuer or an obligated person [13] of municipal securities has undertaken in a continuing disclosure agreement to provide specified information to the MSRB in an electronic format as prescribed by the MSRB.[14] The information to be provided consists of: (1) Certain annual financial and operating information and audited financial statements ("annual filings"); [15] (2) notices of the occurrence of any of eleven specific events ("event notices"); [16] and (3) notices of the failure of an issuer or obligated person to make a submission required by a continuing disclosure agreement ("failure to file notices").[17]

Since the adoption of the 1994 Amendments, the amount of outstanding municipal securities has more than doubled to $2.8 trillion.[18] Notably, despite this large increase in the amount of outstanding municipal securities, direct investment in municipal securities by individuals remained relatively steady from 1996 to 2009, ranging from approximately 35% to 39% of outstanding municipal securities.[19] At the end of 2009, individual investors held approximately 35% of outstanding municipal securities directly and up to another 34% indirectly through money market funds, mutual funds, and closed end funds.[20] There is also substantial trading volume in the municipal securities market. According to the MSRB, almost $3.8 trillion of long and short term municipal securities were traded in 2009 in over 10 million transactions.[21] Further, there are approximately 51,000 state and local issuers of municipal securities, ranging from villages, towns, townships, cities, counties, and states, as well as special districts, such as school districts and water and sewer authorities.[22]

In addition, municipal bonds can and do default. In fact, at least 917 municipal bond issues went into monetary default during the 1990s, with a defaulted principal amount of over $9.8 billion.[23] Bonds for healthcare,

[7] *See also* Proposing Release, *supra* note 2, 74 FR 36831.

[8] *See* Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 (July 10, 1989) ("1989 Adopting Release"). For additional information relating to the history of the Rule, *see* Securities Exchange Act Release Nos. 34961 (November 10, 1994), 59 FR 59590 (November 17, 1994) ("1994 Amendments Adopting Release") and 59062 (December 5, 2008), 73 FR 76104 (December 15, 2008) ("2008 Amendments Adopting Release").

[9] *See* 1989 Adopting Release, *supra* note 8.

[10] 17 CFR 240.15c2–12(a).

[11] 17 CFR 240.15c2–12(b)(5).

[12] *See* 1994 Amendments Adopting Release and 2008 Amendments Adopting Release, *supra* note 8.

[13] The term "obligated person" means "any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations of the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities)." *See* 17 CFR 240.15c2–12(f)(10).

[14] On December 5, 2008, the Commission adopted amendments to Rule 15c2–12 ("2008 Amendments") to provide for a single centralized repository, the MSRB, for the electronic collection and availability of information about outstanding municipal securities in the secondary market. Specifically, the 2008 Amendments require a Participating Underwriter to reasonably determine that the issuer or obligated person has undertaken in its continuing disclosure agreement to provide the continuing disclosure documents: (1) Solely to the MSRB; and (2) in an electronic format and accompanied by identifying information, as prescribed by the MSRB. *See* 2008 Amendments Adopting Release, *supra* note 8. *See also* Securities Exchange Act Release No. 58255 (July 30, 2008), 73 FR 46138 (August 7, 2008) ("2008 Proposing Release"). The 2008 Amendments became effective on July 1, 2009.

[15] 17 CFR 240.15c2–12(b)(5)(i)(A) and (B).

[16] 17 CFR 240.15c2–12(b)(5)(i)(C). Currently, 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 certain primary offerings if, among other things, the issuer or obligated person has agreed to a limited disclosure obligation. *See* 17 CFR 240.15c2–12(d)(2). As discussed in detail in Section III.C. below, the Commission is adopting amendments to the Rule to eliminate the materiality determination for certain of these events.

[17] 17 CFR 240.15c2–12(b)(5)(i)(D). Annual filings, event notices, and failure to file notices are referred to collectively herein as "continuing disclosure documents."

[18] According to statistics assembled by the Securities Industry and Financial Markets Association ("SIFMA"), the amount of outstanding municipal securities grew from approximately $1.26 trillion in 1996 to $2.81 trillion at the end of 2009. *See SIFMA Holders of U.S. Municipal Securities* (available at *http://www.sifma.org/uploadedFiles/Research/Statistics/SIFMA_USMunicipalSecuritiesHolders.pdf)* ("SIFMA Report"). As noted in the Proposing Release, the amount of outstanding municipal securities was $2.69 trillion at the end of 2008, according to statistics assembled by SIFMA. *See* Proposing Release, *supra* note 2, 74 FR at 36834, n. 16 and accompanying text.

[19] *See* SIFMA Report, *supra* note 18. As noted in the Proposing Release, direct investment in municipal securities by individuals from 1996 to 2008 ranged from approximately 35% to 39% of outstanding municipal securities, according to statistics assembled by SIFMA. *See* Proposing Release, *supra* note 2, 74 FR at 36834, n. 17 and accompanying text.

[20] *See* SIFMA Report, *supra* note 18. As noted in the Proposing Release, at the end of 2008, individual investors held approximately 36% of outstanding municipal securities directly and up to another 36% indirectly through money market funds, mutual funds, and closed end funds, according to statistics assembled by SIFMA. *See* Proposing Release, *supra* note 2, 74 FR at 36834, n. 18 and accompanying text.

[21] *See* MSRB, *Real-Time Transaction Reporting, Statistical Patterns in the Municipal Market, Monthly Summaries 2009* (available at *http://www.msrb.org/msrb1/TRSweb/MarketStats/statistical_patterns_in_the_muni.htm*). As noted in the Proposing Release, in 2008, almost $5.5 trillion of long and short term municipal securities were traded in 2008 in nearly 11 million transactions. *See* Proposing Release, *supra* note 2, 74 FR at 36834, n. 19 and accompanying text.

[22] *See, e.g., Report on Transactions in Municipal Securities* prepared by Office of Economic Analysis and Office of Municipal Securities, the Division of Market Regulation, Commission, (July 1, 2004) (available at *http://www.sec.gov/news/studies/munireport2004.pdf*).

[23] *See* Standard and Poor's, *A Complete Look at Monetary Defaults in the 1990s* (June, 2000) (available at *http://www.kennyweb.com/kwnext/mip/paydefault.pdf*) ("Standard and Poor's Report").

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multifamily housing, and industrial development, together with land-backed debt, accounted for more than 80% of defaulted dollar amounts.[24] In 2007, a total of $226 million in municipal bonds defaulted (including both monetary and covenant defaults).[25] In 2008, 140 issuers defaulted on $7.6 billion in municipal bonds.[26] There are reports that approximately $5 billion in municipal bonds are in default today.[27]

The Commission's experience with the operation of the Rule over the past 20 years, changes in the municipal market since the adoption of the 1994 Amendments, and recent market events have suggested the need for the Commission to reconsider certain aspects of the Rule. In particular, the Commission proposed amendments to the Rule's exemption for primary offerings of municipal securities in authorized denominations of $100,000 or more which, at the option of the holder thereof, may be tendered to the issuer or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by the issuer or its designated agent ("demand securities").[28]

As the Commission discussed in the Proposing Release, at the time the Rule was adopted in 1989, demand securities were relatively new to the municipal market.[29] Approximately $13 billion of variable rate demand obligations ("VRDOs")[30] were issued in 1989.[31] However, by 2009, it has been reported that approximately $32 billion of VRDOs were issued,[32] with trading in VRDOs representing approximately 34% of trading volume of all municipal securities.[33] Further, it has been reported that as of early 2009, the outstanding amount of VRDOs was estimated at approximately $400 billion.[34] During the fall of 2008, the VRDO market experienced significant volatility.[35] As the size, volatility, and complexity of the VRDO market and the number of investors have grown, so have the risks associated with less complete disclosure. Moreover, representatives of the primary purchasers of VRDOs—money market funds—have expressed concerns suggesting that the exemption in Rule 15c2–12 for these securities may no longer be justified.[36] These developments highlight the need for the Commission to improve the availability to investors of important information regarding demand securities.

The Commission believes that investors and other municipal market participants today should be able to obtain continuing disclosure information regarding demand securities so that they can make more knowledgeable investment decisions and effectively manage and monitor their investments so as to reduce the likelihood of fraud facilitated by inadequate disclosure. Accordingly, the Commission is modifying the exemption in the Rule, as discussed below, for demand securities[37] by requiring

See also Moody's Investors Service, *The U.S. Municipal Bond Rating Scale: Mapping to the Global Rating Scale And Assigning Global Scale Ratings to Municipal Obligations* (March, 2008) (available at *http://www.moodys.com/cust/content/content.ashx?source=StaticContent/Free%20pages/Credit%20Policy%20Research/documents/current/102249_RM.pdf*) (regarding municipal defaults of Moody's rated municipal securities).

[24] *See* Standard and Poor's Report, *supra* note 23. *See also* Proposing Release, *supra* note 2, 74 FR at 36834.

[25] See Joe Mysak, *Subprime Finds New Victim as Muni Defaults Triple,* Bloomberg News, May 30, 2008.

[26] *See* Joe Mysak, *Municipal Defaults Don't Reflect Tough Times: Chart of Day,* Bloomberg News, May 28, 2009 (also noting that since 1999, issuers have defaulted on $24.13 billion in municipal bonds).

[27] *See, e.g.,* Mary Williams Walsh, *State Debt Woes Grow Too Big to Camouflage,* The New York Times, March 30, 2010.

[28] 17 CFR 240.15c2–12(d)(1)(iii).

[29] *See* Proposing Release, *supra* note 2, 74 FR at 36834–5.

[30] The Commission is not currently aware of any demand securities that were not issued as VRDOs. *The MSRB describes VRDOs as* "[f]loating rate obligations that have a nominal long-term maturity but have a coupon rate that is reset periodically (*e.g.,* daily or weekly). The investor has the option to put the issue back to the trustee or tender agent at any time with specified (*e.g.,* seven days') notice. The put price is par plus accrued interest." *See http://www.msrb.org/MSRB1/glossary/view_def.asp?vID=4310.*

[31] *See Two Decades of Bond Finance: 1989–2008,* The Bond Buyer/Thomson Reuters 2009 Yearbook 4 (Matthew Kreps ed., Source Media, Inc.) (2009).

[32] *See* Thomson Reuters, "A Decade of Municipal Bond Finance" (available at *http://www.bondbuyer.com/marketstatistics/decade_1*).

[33] According to the MSRB, trading volume in VRDOs in 2009 was approximately $1.3 trillion. Total trading volume in 2009 for all municipal securities was approximately $3.8 trillion. *See* E-mail between Martha M. Haines, Assistant Director and Chief, Office of Municipal Securities, Division, Commission, and Marcelo Vieira, Director of Research, MSRB, January 26, 2010. As noted in the Proposing Release, in 2008, approximately $115 billion of VRDOs were issued, with trading in VRDOs representing approximately 38% of trading volume of all municipal securities. *See* Proposing Release, *supra* note 2, 74 FR at 36834, n. 27 and accompanying text.

[34] *See* Andrew Ackerman, *Regulation: MSRB Files Disclosure Proposals; Board Offers Four New Rules to SEC,* The Bond Buyer, July 15, 2009. *See also* Proposing Release, *supra* note 2, 74 FR at 36834 and n. 27.

[35] *See* Diya Gullapalli, *Crisis On Wall Street: Muni Money-Fund Yields Surge—Departing Investors Send 7-Day Returns Over 5%,* Wall Street Journal, September 27, 2008; Andrew Ackerman, *Short-Term Market Dries Up: Illiquidity Leads to Lack of Bank LOCs,* The Bond Buyer, October 7, 2008. ("The reluctance of financial firms to carry VRDOs is evident in the spike in the weekly [SIFMA] municipal swap index, which is based on VRDO yields and spiked from 1.79% on Sept. 10 to 7.96% during the last week of the month. It has since declined somewhat to 5.74%."). *See also* Proposing Release, *supra* note 2, 74 FR at 36834, n. 33.

[36] *See, e.g.,* Letter from Karrie McMillan, General Counsel, Investment Company Institute ("ICI"), to Florence E. Harmon, Secretary, Commission (July 25, 2008) (available at *http://www.sec.gov/comments/s7-13-08/s71308-44.pdf*); comments of participants in the 2001 SEC Municipal Market Roundtable—"Secondary Market Disclosure for the 21st Century," (available at *http://www.sec.gov/info/municipal/roundtables/thirdmuniround.htm*) (Leslie Richards-Yellen, Principal, The Vanguard Group: " * * * what I'd like to see change the most is the inclusion of securities that have been carved out of Rule 15c2–12. I would like securities such as money market securities to be within the ambit of Rule 15c2–12. In addition, I'd like to see the eleven material events be expanded. The first eleven were very helpful. The ICI drafted a letter and we've added another twelve for the industry to think about and cogitate on * * *", and Dianne McNabb, Managing Director, A.G. Edwards & Sons, Inc: "I think that in summary, we could use more specificity as far as what needs to be disclosed, the timeliness of that disclosure, such as the financial statements, more events, I think that we would agree that there are more events * * *"); and National Federation of Municipal Analysts, *Recommended Best Practices in Disclosure for Variable Rate and Short-Term Securities,* February, 2003 (recommendations for continuing disclosures of specified information) (available at *http://www.nfma.org/publications/short_term_030207.pdf*); *see* Proposing Release, *supra* note 2, 74 FR at 36834, n. 15. *See also* ICI Letter at 5 ("We support the proposed amendment to improve VRDO disclosure * * *. Specifically, the availability of continuing disclosure information regarding VRDOs would greatly benefit investors by enhancing their ability to make and monitor their investment decisions and protect themselves from misrepresentations and questionable conduct in this segment of the municipal securities market."), and Fidelity Letter at 2. Fidelity indicated in its letter that it assisted in the preparation of the ICI Letter and expressed support for all of the statements made in the ICI Letter.

[37] *See* 17 CFR 240.15c2–12(d)(1)(iii). Specifically, the Commission is eliminating the exemption for primary offerings of demand securities contained in paragraph (d)(1)(iii) of the Rule and adding new paragraph (d)(5) to the Rule. Paragraph (d)(5) of the Rule, as revised, exempts primary offerings of demand securities from all of the provisions of the Rule except those relating to a Participating Underwriter's obligations pursuant to paragraph (b)(5) of the Rule and relating to recommendations by brokers, dealers, and municipal securities dealers pursuant to paragraph (c) of the Rule. As discussed in Section III.A. below, the Commission is adopting a modified version of its initial proposal to cover demand securities issued on or after the amendments' compliance date. As a result of these changes, Participating Underwriters, in connection with a primary offering of demand securities, will need to reasonably determine that the issuer or obligated person has entered into a continuing disclosure agreement with respect to the submission of continuing disclosure documents to

Participating Underwriters to reasonably determine that the issuer of demand securities, or any obligated person, has undertaken in a written agreement to provide continuing disclosure documents to the MSRB.

As discussed in detail below, the Commission is adopting, substantially as proposed, the amendments to Rule 15c2–12. In sum, the Commission is modifying, substantially as proposed, the Rule's exemption for demand securities by deleting current paragraph (d)(1)(iii) and adding new paragraph (d)(5) to the Rule, thereby applying the continuing disclosure requirements of paragraphs (b)(5) and (c) of the Rule [38] to a primary offering of demand securities. The amendments also modify, as proposed, paragraph (b)(5)(i)(C) of the Rule, thereby requiring all Participating Underwriters to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide event notices to the MSRB in a timely manner not in excess of ten business days, rather than merely in "a timely manner."

In addition, the Commission is adopting, with a few revisions from the proposal in the Proposing Release, an amendment to paragraph (b)(5)(i)(C) of the Rule relating to adverse tax events. Under the amendment, as revised from the proposal in the Proposing Release, this event item includes "the issuance by the IRS of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the security or other material events affecting the tax status of the security." The amendments also add, as proposed, the following events to paragraph (b)(5)(i)(C) of the Rule: (1) Tender offers; (2) bankruptcy, insolvency, receivership or similar event of the issuer or obligated person; (3) the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and (4) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

Finally, the amendments delete the general materiality condition from paragraph (b)(5)(i)(C) of the Rule. In connection with the deletion of the general materiality condition from paragraph (b)(5)(i)(C) of the Rule, the amendments also add a materiality condition to select events contained in paragraph (b)(5)(i)(C) of the Rule. For those events in paragraph (b)(5)(i)(C) of the Rule that do not contain a materiality condition, Participating Underwriters will now need to reasonably determine that an issuer or obligated person has undertaken in a written agreement to provide notice of such events in all circumstances. These events include: (1) Principal and interest payment delinquencies with respect to the securities being offered; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.

III. Discussion of Amendments and Comments Received

A. Modification of the Exemption for Demand Securities

As discussed in the Proposing Release, generally there are no continuing disclosure agreements for demand securities today because primary offerings of these securities are currently exempt from the Rule.[39] When the Rule was adopted in 1989, the Commission exempted demand securities from its coverage in response to concerns that the Rule "might unnecessarily hinder the operation of the market" [40] for VRDOs, or similar securities. Paragraphs (b)(1) through (b)(4) of the Rule require a Participating Underwriter to review an official statement that the issuer "deems final" before it may bid for, purchase, offer, or sell municipal securities in an offering, deliver preliminary and final official statements to any potential customer, on request, and contract with the issuer to receive an adequate number of the final official statements to fulfill its regulatory responsibilities. Although remarketings of VRDOs may be primary offerings,[41] the Commission did not impose the requirements of paragraphs (b)(1) through (b)(4) of the Rule on Participating Underwriters of each remarketing—which could occur as frequently as weekly, and sometimes even daily, for each outstanding demand security—in part because of the burden this could impose on Participating Underwriters to comply with the Rule's provisions.[42] The Commission, in the 1994 Amendments Adopting Release, did not specifically address the application of paragraph (b)(5) of the Rule, which currently requires Participating Underwriters to reasonably determine that an issuer of municipal securities or an obligated person [43] has undertaken in a continuing disclosure agreement to provide specified information to the MSRB, to remarketings of demand securities.[44]

As discussed above, the Commission today is modifying the Rule's exemption for demand securities because its experience with the operation of the Rule and market changes since the adoption of the 1994 Amendments have suggested a need to reconsider its scope. The increased issuance, trading volume, and outstanding dollar amount of VRDOs indicate that many more investors currently own such securities than when the Rule was adopted in 1989.[45] Further, despite the periodic

the MSRB. In addition, brokers, dealers, and municipal securities dealers recommending the purchase or sale of demand securities will need to have procedures in place that provide reasonable assurance that they would receive prompt notice of event notices and failure to file notices. *See* 17 CFR 240.15c2–12(c).

[38] *See supra* notes 11 through 16 and accompanying text for a description of paragraph (b)(5) of the Rule. Paragraph (c) of the Rule requires a broker, dealer, or municipal securities dealer that recommends the purchase or sale of a municipal security to have procedures in place that provide reasonable assurance that it will receive prompt notification regarding any event notice and any failure to file notice related to the municipal security. *See* 17 CFR 240.15c2–12(c).

[39] *See* Proposing Release, *supra* note 2, 74 FR at 36836.

[40] *See* 1989 Adopting Release, *supra* note 8, 54 FR at 28808, n. 68. *See also* Proposing Release, *supra* note 2, 74 FR at 36836.

[41] *See* Rule 15c2–12(f)(7) for the definition of "primary offering." 17 CFR 240.15c2–12(f)(7). Making a determination concerning whether a particular remarketing of demand securities is a primary offering by the issuer of the securities requires an evaluation of relevant provisions of the governing documents, the relationship of the issuer to the other parties involved in the remarketing transaction, and other facts and circumstances pertaining to such remarketing, particularly with respect to the extent of issuer involvement.

[42] *See* 1989 Adopting Release, *supra* note 8, 54 FR at 28808 and n. 68. *See also* Proposing Release, *supra* note 2, 74 FR at 36836.

[43] The term "obligated person" means "any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations of the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities)." *See* 17 CFR 240.15c2–12(f)(10).

[44] *See* 1994 Amendments Adopting Release, *supra* note 8.

[45] As stated in the Proposing Release, the increased investment interest and activity in VRDOs during 2008 may be attributable, in part, to the turmoil in the market for auction rate securities ("ARS") that began in February 2008. *See* Proposing Release, *supra* note 2, 74 FR at 36834 and 36835, n. 48.

ability to tender VRDOs to issuers for repurchase, some investors, such as mutual funds, appear to hold VRDOs for long periods of time and therefore have a need for continuing disclosure information about the issuer or obligated person.[46]

Accordingly, the Commission believes that developments since 1989 warrant narrowing the Rule's provision exempting demand securities from continuing disclosure obligations in order to improve the availability of information to investors. Indeed, representatives of money market funds, the primary purchasers of demand securities, have expressed difficulty or, on some occasions, the inability to obtain information that they believe is necessary to oversee their investments in demand securities.[47] By narrowing the exemption for demand securities, the Commission intends to improve the availability of continuing disclosures, not only to institutional investors, such as mutual funds, that acquire these securities for their portfolios, but also to individual investors who own, or who may be interested in owning, demand securities. The availability of information regarding demand securities, in turn, should help institutional and individual investors make more informed decisions with respect to investments in those securities and should reduce the likelihood that such investors will be subject to fraud facilitated by inadequate disclosure. The Commission believes that broader requirements for consistent and accurate disclosure of important information should enhance the efficiency of the relevant capital market segments by better allocating capital at appropriate prices.

Consequently, the Commission is deleting the exemption for demand securities[48] set forth in paragraph (d)(1)(iii) of the Rule and adding new paragraph (d)(5) to the Rule, thereby making the continuing disclosure provisions of paragraphs (b)(5)[49] and (c)[50] of the Rule apply to a primary offering[51] of demand securities.[52] This change applies to any primary offering of demand securities (including a remarketing that is a primary offering) occurring on or after the compliance date of the amendments.[53] However, as more fully discussed below,[54] the Commission is revising the amendment from that proposed to include a "limited grandfather provision" (as defined below) for remarketings of currently outstanding demand securities.[55] Specifically, the continuing disclosure provisions will not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the compliance date of the amendments and that continuously have remained outstanding[56] in the form of demand securities.

Thus, as amended, paragraph (d)(2)(B)(5) of the Rule states that "[w]ith the exception of paragraphs (b)(1) through (b)(4), this section shall apply to a primary offering of municipal securities in authorized denominations of $100,000 or more if such securities may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent; *provided, however, that paragraphs (b)(5) and (c) shall not apply to such securities outstanding as of November 30, 2010 for so long as they continuously remain in authorized denominations of $100,000 or more and may, at the option of the holder thereof, be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent*" (emphasis added to indicate revised language) ("limited grandfather provision").[57]

In the Proposing Release, the Commission requested comment on whether it is appropriate to revise the Rule's exemption for demand securities. The Commission specifically requested comment regarding investors' and other municipal market participants' need for continuing disclosure information relating to demand securities and the extent to which the amendment would provide benefits to these individuals. The Commission also requested comment regarding the effect of the amendment on Participating Underwriters, issuers, obligated persons, and others.

Commenters were generally supportive of applying the continuing disclosure provisions of paragraph (b)(5) of the Rule to demand securities, so that a Participating Underwriter of these securities will be required to reasonably determine that the issuer or obligated person has entered into a continuing disclosure agreement to submit continuing disclosure documents to the MSRB.[58] A number of commenters agreed that applying continuing disclosure obligations to demand securities is "critical" to assist investors in making informed investment decisions.[59] One commenter noted that the market for VRDOs was among the sectors most affected by the recent market turmoil and, consequently, there is good reason to increase the availability of information about these securities to investors.[60] Similarly, another commenter stated that, during the recent market downturn, investors in VRDOs were well served by those issuers or obligated persons who voluntarily provided continuing

[46] *See* Proposing Release, *supra* note 2, 74 FR at 36835, n. 45.

[47] *See* Proposing Release, *supra* note 2, 74 FR at 36836.

[48] *See supra* note 28 and accompanying text.

[49] *See supra* note 14 and accompanying text.

[50] *See supra* note 38 for a description of Rule 15c2–12(c).

[51] *See* Rule 15c2–12(f)(7) for the definition of primary offering. 17 CFR 240.15c2–12(f)(7).

[52] *See supra* note 41.

[53] As noted in Section III.G., the compliance date of the amendments to the Rule adopted herein is December 1, 2010.

[54] *See infra* notes 111 and 112 and accompanying text, as well as the paragraph following the accompanying text.

[55] *See infra* note 112 and accompanying text for discussion of comments related to the limited grandfather provision.

[56] "Outstanding" generally means bonds that have been issued but have not yet matured or been otherwise redeemed. *See, e.g,* MSRB Glossary of Municipal Security Terms at *http://www.msrb.org/msrb1/glossary/glossary_db.asp?sel=o.*

[57] The Commission also is slightly modifying the text of paragraph (d)(2)(B)(5) of the Rule from the version in the Proposing Release to clarify that demand securities remain exempt from paragraphs (b)(1)–(4) of the Rule, consistent with the Commission's description and discussion of the amendment in the Proposing Release.

[58] *See* California Letter at 1, CHEFA Letter at 2, Connecticut Letter at 1, DAC Letter at 3, e-certus Letter I at 11, Fidelity Letter at 3, Folts Letter at 1, ICI Letter at 2, NFMA Letter at 1, RBDA Letter at 2, and SIFMA Letter at 2.

Although the Commission is eliminating certain exemptions, demand securities will continue to be exempt from paragraphs (b)(1)–(4) of the Rule. In other words, a Participating Underwriter of a demand security will continue to be exempt from the obligation to review an official statement that the issuer "deems final" before it may bid for, purchase, offer, or sell municipal securities. Some commenters urged the Commission to eliminate the exemption for demand securities from these provisions. *See* Fidelity Letter at 3 and RBDA Letter at 2, and SIFMA Letter at 2. One commenter expressed concern that not requiring Participating Underwriters to comply with these provisions with regard to demand securities suggests that the information required in the continuing disclosure documents may not be material for investors at the initial issuance of the demand securities. *See* SIFMA Letter at 2. The Commission believes that it is important for investors to have adequate information in order to make informed investment decisions. The Commission also notes that many official statements are prepared for demand securities. *See http://www.emma.msrb.org.*

[59] *See* ICI Letter at 5. *See also* SIFMA Letter at 2 and RBDA Letter at 2.

[60] *See* RBDA Letter at 2. *See also* Fidelity Letter at 2.

disclosure documents, despite the Rule's exemption.[61]

Further, two commenters noted that application of paragraph (b)(5) of the Rule to demand securities might not significantly increase the disclosure burdens for many issuers and obligated persons.[62] One commenter noted that, because many VRDO issuers are already subject to continuing disclosure undertakings for their fixed rate debt, extending these obligations to VRDOs would impose minimal additional burdens, while enhancing disclosure to a much broader segment of investors.[63] Two commenters also noted that, as issuers of VRDOs, they have for a number of years voluntarily entered into continuing disclosure undertakings for those securities.[64]

Two commenters, however, disputed the assessment that extending paragraph (b)(5) to demand securities would not significantly increase the disclosure burdens for issuers and obligated persons.[65] These commenters focused particularly on the impact the amendment would have on borrowers who access tax-exempt debt markets through demand securities that are fully backed by direct-pay letters of credit ("LOC-backed demand securities"). One of the commenters noted that many of these are non-governmental conduit borrowers[66] who have no previous undertakings to provide continuing disclosure information and, for such entities, complying with paragraph (b)(5) of the Rule would not merely be an extension of preexisting obligations but a new and significant burden.[67] Moreover, the two commenters opposing the proposed change stated that many obligated persons with respect to LOC-backed demand securities do not prepare annual filings, such as audited financial statements, in the ordinary course of their business.[68] They therefore believed that eliminating the exemption from paragraph (b)(5) would impose costs and burdens that could potentially force some conduit borrowers using LOC-backed demand securities to withdraw from the tax-exempt bond market.[69]

As the Commission stated in the Proposing Release, it does not anticipate a significant increase in disclosure burdens with respect to demand securities.[70] Those issuers with outstanding demand securities—including LOC-backed demand securities—will have the limited grandfather provision available to them, and thus likely will not be subject to an undertaking to provide continuing disclosures for those securities. The Commission acknowledges that, if issuers of demand obligations, or obligated persons, have not previously issued securities that were subject to the Rule (*i.e.,* municipal securities other than demand securities), they will be entering into a continuing disclosure agreement for the first time and thereby will incur some costs and burdens to provide continuing disclosure documents to the MSRB.[71] However, as the Commission noted in proposing these amendments, a number of issuers of VRDOs, and obligated persons, already have outstanding fixed rate municipal securities, and some of these securities likely are subject to continuing disclosure agreements under the Rule.[72] Because any existing continuing disclosure agreement obligates an issuer or an obligated person to provide annual filings, event notices, and failure to file notices with respect to these fixed rate securities, providing disclosures by such issuers or obligated persons with respect to VRDOs is not expected to be a significant additional burden.[73] As the Commission stated in proposing these amendments,[74] it believes that any additional burden on issuers and obligated persons[75] with respect to demand securities is, on balance, justified by the enhancements to investor protection that should result from the improved availability of information with respect to these securities as a result of the amendments.[76] As noted above, a number of commenters supported this view.[77]

Regarding the concern that any new disclosure burdens may induce some obligated persons to withdraw from the tax-exempt municipal market because they do not prepare annual filings in the ordinary course of their business, the Commission notes that, for purposes of the Rule, annual filings are required only to the extent provided in the final official statements. Specifically, annual filings are composed of: (1) Audited financial statements, when and if available; and (2) other financial and operating data of the type included in the official statement. Pursuant to the undertaking contemplated by the Rule, annual financial information must be submitted for "each obligated person for whom financial information or operating data is presented in the final official statement. * * *"[78] Annual financial information is defined as "financial information or operating data * * * of the type included in the final official statement with respect to an obligated person. * * *"[79] As the Commission previously stated, the definition of annual financial information specifies both the timing of the information—that is, once a year—and, by referring to the final official statement, the type of financial information and operating data that is to be provided.[80] If financial information or operating data concerning an obligated person is included in the final official statement, then annual financial information would consist of the same type of financial information or operating data.[81]

[61] *See* CHEFA Letter at 2.

[62] *See* Connecticut Letter at 1 and NFMA Letter at 1.

[63] *See* NFMA Letter at 1.

[64] *See* California Letter at 1 and Connecticut Letter at 1.

[65] *See* CRRC Letter at 3–5 and NABL Letter at A–10.

[66] A "conduit borrower" is an obligated person for whose benefit a state, political subdivision, municipality, or governmental agency or authority may issue tax-exempt municipal bonds. The security for this type of issue is customarily the credit of the conduit borrower or pledged revenues from the project financed, rather than the credit of the issuer. *See, e.g.,* definitions of "conduit financing," "conduit borrower," and "issuer" in Glossary of Municipal Securities Terms (Second Edition—January 2004) of the MSRB, available at *http://www.msrb.org/msrb1/glossary/glossary_db.asp?sel=c.*

[67] *See* NABL Letter at A–2, n. 1.

[68] *See* CRRC Letter at 5 and NABL Letter at A–2.

[69] *See* CRRC Letter at 5 and NABL Letter at A–10. Two commenters also expressed concern that, in complying with the revised Rule, smaller and not-for-profit obligated persons could encounter similar costs and burdens. *See* NABL Letter at A–2 (noting that many small businesses and non-profit organizations utilize LOC-backed demand securities in accessing the tax-exempt debt markets) and SIFMA Letter at 2–3. *See also* Section VI.B.2(c).

[70] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[71] *Id.*

[72] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[73] *See infra* Section V.D. for a discussion regarding burden on issuers and obligated persons that do not currently provide annual filings, event notices, or failure to file notices.

[74] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[75] The Commission estimates that the amendment to modify the exemption from the Rule for a primary offering of demand securities would increase the number of issuers with municipal securities offerings that are subject to the Rule annually by 20%. *See infra* Section V.D.

[76] For discussion of the burdens associated with the modification of the Rule as it relates to demand securities, *see supra* Section V.D.

[77] *See, e.g.,* CHEFA Letter at 2, Connecticut Letter at 1, e-certus Letter I at 11, Folts Letter at 1, ICI Letter at 5, NFMA Letter at 1, RBDA Letter at 2, and SIFMA Letter at 2.

[78] 17 CFR 240.15c2–12(b)(5)(i)(A).

[79] 17 CFR 240.15c2–12(f)(9).

[80] *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59598.

[81] *Id. See* paragraph (f)(3) of the Rule for the definition of "final official statement." 17 CFR 240.15c2–12(f)(3).

Further, pursuant to paragraph (b)(5)(i)(B) of the Rule, audited financial statements need to be submitted, pursuant to the issuer's and obligated person's undertaking in a continuing disclosure agreement, only "when and if available." [82] This limitation, which is consistent with the Commission's position in the 1994 Amendments Adopting Release, should mitigate some concerns of those obligated persons that do not prepare audited financial statements in the ordinary course of their business.[83] Further, although not all issuers or obligated persons, in the ordinary course of their business, prepare audited financial statements or other financial and operating information of the type included in annual filings, a number of issuers and obligated persons do.[84]

The Commission acknowledges that issuers or obligated persons of demand obligations that assemble financial and operating data for the first time in response to their undertakings in a continuing disclosure agreement may incur incremental costs beyond those costs incurred by those issuers or obligated persons that already assemble this information. Also, smaller issuers or obligated persons may have relatively greater burdens than larger issuers or obligated persons. However, the overall burdens for these demand securities issuers or obligated persons in preparing financial information are expected to be commensurate with those of issuers or obligated persons that already are preparing financial information as part of their continuing disclosure undertakings.[85] The Commission believes that the burdens that will be incurred in the aggregate by issuers or obligated persons, as a result of the amendments with respect to demand securities, may not be significant and, in any event, are justified by the benefits to investors of enhanced disclosure.[86] The Commission further believes that the operations of an issuer or obligated person generally entail the preparation and maintenance of at least some financial and operating data.

The Commission also stated in the Proposing Release, and reiterates herein, its belief that the application of paragraph (b)(5) to demand securities will not significantly burden Participating Underwriters in connection with the initial issuance and remarketing of demand securities. Any primary offering, including a remarketing of demand securities that is a primary offering (other than those subject to the limited grandfather provision), that occurs on or after the compliance date of the Rule will require a Participating Underwriter (including a Participating Underwriter serving as a remarketing agent) [87] to make a determination that an issuer or an obligated person has entered into a continuing disclosure agreement. Subsequent determinations for remarketings of the same issue of demand securities should not be burdensome because, once the Participating Underwriter has made such a determination for a particular issue of demand securities, at the time of a subsequent remarketing, the Participating Underwriter will be aware of the existence of the continuing disclosure agreement. Furthermore, remarketing agents that did not previously participate in an offering of such securities could confirm that an issuer or an obligated person has entered into an undertaking by obtaining an official statement from the issuer, the MSRB,[88] or from a variety of vendors. Such an official statement by definition must include a description of the issuer's undertakings.[89] In addition, a remarketing agent could obtain a copy of the actual continuing disclosure agreement from the issuer or obligated person at the time that it enters into a contract to act as a remarketing agent.[90]

Some commenters argued that the amendment is too broad.[91] Specifically, these commenters stated that the amendment should not apply to conduit borrowers of LOC-backed demand securities, but rather to the letter of credit providers.[92] They stated that, for

[82] 17 CFR 240.15c2–12(b)(5)(i)(B).

[83] As discussed in the 1994 Amendments Adopting Release, the 1994 Amendments "[do] not adopt the proposal to mandate audited financial statements on an annual basis with respect to each issuer and significant obligor. Instead, the amendments require annual financial information, which may be unaudited, and may, where appropriate and consistent with the presentation in the final official statement, be other than full financial statements. * * * However, if audited financial statements are prepared, then when and if available, such audited financial statements will be subject to the undertaking and must be submitted to the repositories. Thus * * * the undertaking must include audited financial statements only in those cases where they otherwise are prepared." *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

[84] *See http://www.emma.msrb.org* for audited financial statements or other financial and operating information submitted to EMMA.

[85] Further, issuers or obligated persons that assemble financial and operating data for the first time may face a greater burden than those issuers or obligated persons that already assemble this information. The amendments therefore initially may have a disparate impact on those issuers or obligated persons, including small entities, entering into a continuing disclosure agreement for the first time, as compared with those that already have outstanding continuing disclosure agreements.

[86] *See infra* Section V.D. As discussed therein, some commenters believed that the amendment could force some small entities to withdraw from the tax-exempt market because: (1) Disclosure of small issuers' or obligated persons' financial information would provide their large, national competitors with information about these small issuers or obligated persons, which they believed could result in a competitive disadvantage to them; and (2) small issuers or obligated persons would have to prepare costly audited financial statements. *See, e.g.,* CRRC Letter at 3–4 and WCRRC Letter at 1. As discussed above, the undertakings contemplated by the amendments (and Rule 15c2–12 in general) require annual financial information only to the extent provided in the final official statement, and audited financial statements only when and if available.

[87] A remarketing agent is a broker-dealer responsible for reselling to new investors securities (such as VRDOs) that have been tendered for purchase by their owner. The remarketing agent also typically is responsible for resetting the interest rate for a variable rate issue and also may act as tender agent. *See* Proposing Release, *supra* note 2, 74 FR at 36836, n. 53. Further, a remarketing agent often serves as the Participating Underwriter in the initial issuance of the demand security.

[88] The MSRB makes official statements for public offerings of municipal securities available on the Internet through its EMMA system for free. *See* Securities Exchange Act Release No. 59061 (December 5, 2008), 73 FR 75778 (December 12, 2008) (File No. SR–MSRB–2008–05) (order approving the MSRB's proposed rule change to make permanent a pilot program for an Internet-based public access portal for the consolidated availability of primary offering information about municipal securities). *See also supra* note 5 and MSRB Rule G–32.

[89] 17 CFR 240.15c2–12(f)(3).

[90] One commenter believed the elimination of the exemption for LOC-backed demand securities would substantially increase a Participating Underwriter's burden in offering and remarketing these securities because the Participating Underwriter must: (1) Determine whether information concerning the obligated person is material and (2) if material, review the offering document to assure that it includes financial or operating data about the obligated person. In addition, this commenter stated that a Participating Underwriter would be required by the antifraud provisions of the Securities Act of 1933 and the Exchange Act to reasonably investigate key representations about the obligated person in the offering document before passing the securities along to investors and periodically repeat its "due diligence" of the obligated person before acting as a remarketing agent for primary offerings of such demand securities. *See* NABL Letter at A–11. However, such obligations of a Participating Underwriter already exist under the antifraud provisions of the federal securities laws.

[91] *See* CRRC Letter at 2, NABL Letter at 2, and WCRRC Letter at 1 (endorsing CRRC Letter in its entirety). One of these commenters maintained that the Commission should not adopt the amendment relating to demand securities without Congressional authority. The commenter stated that the Commission does not have the "statutory authority to regulate the content of prospectuses used to offer exempt securities, except possibly under the authority of the antifraud provisions of the federal securities laws." *See* NABL Letter at A–7. The Commission notes that the amendments do not address the contents of prospectuses used to offer exempt securities and, instead, are being adopted, among other things, pursuant to its authority under Section 15(c)(2)(D) of the Exchange Act, 15 U.S.C. 78*o*(c)(2)(D), which grants the Commission authority to define, and to prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative.

[92] *See* CRRC Letter at 2 and NABL Letter at 2.

Separately, another commenter remarked about the responsibilities of an issuer with respect to the

these securities, a bond trustee draws on the letters of credit issued by banks or financial institutions, rather than the underlying borrowers, for all payments of interest and principal, and to repurchase the securities if and when they are tendered.[93] Consequently, information in disclosure documents for some LOC-backed demand securities relates to the entities issuing the letters of credit, and not the conduit borrowers.[94] These commenters argued that, if the Commission applies paragraph (b)(5) of the Rule to LOC-backed demand securities,[95] the obligation to provide continuing disclosures should be imposed on the banks and financial institutions that provide credit enhancements, and not on the conduit borrowers.[96]

As noted in the Proposing Release, the Commission believes that information regarding conduit borrowers is material to investors in credit enhanced offerings and therefore should be included in the official statements.[97] As the Commission has stated before in the context of municipal securities offerings as well as other types of securities offerings, the existence of credit enhancement is not a substitute for information about the underlying obligor or other obligated entity.[98] For example, Regulation AB, relating to disclosures in offerings of asset-backed securities, requires disclosure about the underlying pool of assets in addition to disclosures about credit enhancement and credit enhancement providers.[99] Furthermore, for VRDOs, as well as fixed rate securities, many governmental issuers and conduit borrowers routinely provide full disclosure about themselves in official statements, suggesting that they consider this information to be useful to investors.[100] The Commission also notes that it is possible for the issuers of credit enhancements, including letters of credit providers, to default on their obligations[101] or to have their ratings downgraded.[102] The possibility of such occurrences supports the likelihood that investors would consider information concerning the underlying obligor important to making investment decisions.

With respect to demand securities, one commenter stated that the Rule should not be amended to apply continuing disclosure requirements to demand securities, because owners of demand securities can choose to terminate their investment by exercising the option to put such securities for repurchase at face value or more, at least as frequently as every nine months.[103] The commenter argued that these investors can therefore sufficiently protect their investments.[104] Further, the commenter noted that when investors need financial and operating data to evaluate their investments, they are able to get such information from conduit borrowers, who typically provide the information voluntarily in order to support pricing and remarketing.[105] The commenter also questioned the need for the amendment when investors, as a condition to purchasing or maintaining an investment in demand securities, are free to demand undertakings to provide notices of certain events.[106]

The Commission does not believe that an investor's ability to tender a demand security for repurchase obviates the need for continuing disclosures. While a holder of demand obligations, such as VRDOs, may tender these securities for repurchase at par value,[107] when the investor is unable to obtain necessary information to make an informed decision as to whether to continue to hold demand securities, the investor may have no other option but to tender. However, the Commission does not believe that such outcome is in the interest of the investing public or the municipal securities market. Without adequate information about the issuer or obligated person, including annual financial information and audited annual financial statements, it would be difficult for an investor to evaluate whether to buy, hold, sell, or put the security. Moreover, most holders of VRDOs are money market funds[108] subject to the requirements of Rule 2a–7 under Investment Company Act of 1940 ("Investment Company Act"),[109] with an obligation to monitor the securities in their funds.[110] The availability of continuing disclosure information should facilitate the fulfillment of these obligations. The Commission also notes that one commenter, whose membership includes many money market funds, stated that "the availability of continuing disclosure information regarding VRDOs would greatly benefit investors by enhancing their ability to make and monitor their investment decisions and protect themselves from misrepresentations and questionable

underlying obligor of a demand security. The commenter stated that, "if it is the SEC's intention to have issuers disclose information either in the official statement or on a continuing basis regarding the underlying obligor," issuers would be significantly burdened because they do not have such information first-hand. *See* GFOA Letter at 2. The Commission notes that its rulemaking does not amend provisions of Rule 15c2–12 relating to official statements. The Commission notes that, as with other conduit borrowings, issuers may require an obligated person of demand obligations to execute a continuing disclosure agreement as a condition of issuance, such that the underlying obligor bears the responsibility of providing continuing disclosures to the MSRB.

[93] *Id. See also* NABL Letter at A–1.

[94] *See* CRRC Letter at 2 and NABL Letter at A–2 and A–6.

[95] *See* CRRC Letter at 2–3 and NABL Letter at 1–2.

[96] *See* CRRC Letter at 3.

[97] *See* Proposing Release, *supra* note 2, 74 FR at 36844, n. 113, citing 1989 Adopting Release, *supra* note 8, 54 FR at 28812.

[98] *See* 1989 Adopting Release, *supra* note 8, 54 FR at 28812 ("The presence of credit enhancements generally would not be a substitute for material disclosure concerning the primary obligor on municipal bonds.")

[99] 17 CFR 229.1100–1123.

[100] For example, governmental obligors, non-profit health care facilities, colleges, and universities routinely provide disclosures about themselves in official statements. *See, e.g.,* Connecticut Letter at 1; Official Statement dated November 4, 2009 for VRDOs issued by the Arizona Health Facilities Authority for the benefit of Catholic Healthcare West (available at *http://emma.msrb.org/EP346945-EP47480-EP669523.pdf*); Official Statement dated August 22, 2008 for VRDOs issued by the Health and Educational Authority of the State of Missouri for the benefit of Saint Louis University (available at *http://emma.msrb.org/OSPreview/OSPreview.aspx?documentId=MS271933&transactionId=MS274477*); Official Statement dated October 12, 1994 for VRDOs of the City of Akron Ohio for its Sanitary Sewer System (available at *http://emma.msrb.org/OSPreview/OSPreview.aspx?documentId=MS80311&transactionId=MS105003*); and Official Statement dated April 15, 2005 for VRDOs of the Redevelopment Agency of the City and County of San Francisco Community Facilities District No. 7 for Hunters Point Shipyard Phase One Improvements (available at *http://emma.msrb.org/MS233193-MS208501-MD405363.pdf*).

[101] Since 1995, the Federal Deposit Insurance Corporation ("FDIC") has taken the position that it may not honor unsecured letters of credit issued by financial institutions that are placed in FDIC receivership. *See* FDIC Statement of Policy regarding Treatment of Collateralized Letters of Credit after Appointment of the FDIC as Conservator or Receiver, 60 FR 27976, May 26, 1995, effective May 19, 1995.

[102] *See* Proposing Release, *supra* note 2, 74 FR at 36839. In addition to the ratings downgrades of almost all issuers of municipal bond insurance over the past two years, the ratings of many issuers of letters of credit on municipal bonds were downgraded by one or more credit rating agencies. *See, e.g.,* Jack Herman, *S&P Downgrades Ratings or Revises Outlooks on 22 Banks,* The Bond Buyer, June 19, 2009 ("Standard & Poor's Wednesday downgraded its ratings or revised its outlooks on 22 U.S. banks—more than half of which have provided letters of credit on municipal securities—to reflect the ongoing change in the banking industry."); Dan Seymour, *1st-Half Credit Enhancers See a Topsy-Turvy World,* The Bond Buyer, July 16, 2009.

[103] *See* NABL Letter at A–4—A–6.

[104] *Id.*

[105] *See* NABL Letter at A–8.

[106] *See* NABL Letter at A–8 and A–9.

[107] *See* 17 CFR 240.15c2–12(d)(1)(iii).

[108] *See, e.g.,* Standard & Poor's, *Variable Rate Demand Obligations—A Primer: A Short Guide to Variable Rate Demand Obligations and the S&P National AMT-Free Municipal VRDO Index,* November 1, 2009 (available at *http://www2.standardandpoors.com/spf/pdf/index/VRDO_Primer.pdf*).

[109] 17 CFR 270.2a–7.

[110] 17 CFR 270.2a–7(c)(3)(iv).

conduct in this segment of the municipal securities market."[111]

Some commenters sought clarification with respect to the proposed amendment relating to demand securities. Specifically, some commenters asked the Commission to clarify the meaning of "primary offering" with respect demand securities[112] and asked for guidance to distinguish remarketings that are primary offerings requiring continuing disclosure agreements from those that are not primary offerings.[113] These comments appear to be based upon the concern that the amendments could require a broker, dealer, or municipal securities dealer to obtain continuing disclosure documents for demand securities that were issued prior to the compliance date of the amendments.

The Commission acknowledges that, although there may be beneficial effects from subjecting outstanding demand obligations to paragraphs (b)(5) and (c) of the Rule, regardless of their date of initial issuance, doing so may be unduly burdensome and costly for certain market participants. For example, if all outstanding issuances of demand securities, such as VRDOs which generally are long-term securities,[114] became subject to paragraph (b)(5)(i)(C) of the Rule, it would be necessary for a Participating Underwriter, in the first remarketing of each issue of demand securities following the compliance date of the amendments, to reasonably determine that an issuer or obligated person has executed a continuing disclosure agreement. For such an agreement to be consistent with the Rule, a Participating Underwriter must reasonably determine that the issuer or obligated person has agreed to provide "[a]nnual 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."[115] However, for outstanding issues of demand securities, referring back to information included in the final official statement may be problematic because that document may be many years old. Without the limited grandfather provision, issuers and obligated persons would be required under continuing disclosure agreements to update annual financial information that may no longer be prepared or available. In addition, application of the amendments to remarketings of demand securities occurring on or after the compliance date could necessitate a large number of issuers and obligated persons of demand securities to enter into continuing disclosure agreements in a very short time period, which could delay remarketings and temporarily negatively impact the market for demand securities.

The Commission has considered the potentially significant difficulties and costs associated with implementing the amendment with respect to outstanding demand securities and the potential negative implications this may have on the demand securities market and investors.[116] As a result, the Commission has revised its original proposal to include a limited grandfather provision so that paragraphs (b)(5) and (c) of the Rule are not applicable to demand obligations outstanding in the form of demand securities immediately prior to the compliance date of these amendments, and that have remained continuously outstanding in the form of demand securities.[117] The Commission believes that the adoption of the limited grandfather provision strikes an appropriate balance between the need to improve disclosure available to investors and the recognition that the practical effects of applying paragraphs (b)(5) and (c) of the Rule to outstanding issues of demand securities could unduly burden certain issuers and obligated persons and thus may adversely impact the market. Although the Commission recognizes that the amendment to demand securities now is narrower than what was originally proposed, the Commission does not believe that the change detracts from the benefits of greater information about new issuances of demand obligations that the amendment will foster. The Commission believes that the burdens of continuing disclosure obligations, noted above, with respect to these securities justify the benefits, and the grandfather provision is consistent with other amendments that have been applied on a prospective basis.[118] Further, the Commission notes that some issuers and obligated persons of demand securities also have issued fixed rate municipal securities, and thus are subject to existing continuing disclosure obligations.

In conclusion, the Commission continues to believe that any additional burden imposed on Participating Underwriters, issuers, obligated persons, the MSRB, or others as a result of the amendment to the Rule relating to demand securities is justified by the benefits to investors of enhanced disclosure with respect to this important and widely-held type of security. Eliminating the exemption for demand securities, subject to the limited grandfather provision regarding demand securities outstanding as of the day prior to the amendments' compliance date, will improve the availability of information about these securities and should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure. Further, access to more information will assist money market funds[119] in complying with their obligations under Rule 2a–7 of the Investment Company Act.[120] The Commission also believes that the amendment will assist a broker, dealer, or municipal securities dealer in fulfilling its responsibilities to its customers,[121] specifically by facilitating the disclosure of important facts and complying with suitability and other sales practice obligations.[122]

[111] *See* ICI Letter at 6. *See also* Fidelity Letter at 2.

[112] *See* Kutak Letter at 2, NABL Letter at 4–5 and A–11, and SIFMA Letter at 2.

[113] *Id.*

[114] *See supra* Section II. for statistics on the amount of outstanding VRDOs.

[115] 17 CFR 240.15c2–12(b)(5)(i)(A).

[116] *See infra* Section VI.B. for a detailed description of costs associated with implementing this change.

[117] Two commenters also expressed confusion regarding the application of paragraph (b)(5)(i)(A) of the Rule to demand securities. Paragraph (b)(5)(i)(A) requires that continuing disclosure agreements include annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement. These commenters specifically questioned how Participating Underwriters would comply with the requirement in the limited instances where no final official statement was or is produced with respect to a demand security or when the final official statement that is produced contains no information regarding the underlying obligor. *See* NABL Letter at 2–3 and A–9 and SIFMA Letter at 2. The Commission believes that demand securities are purchased primarily by tax-exempt money market funds and that money market funds typically require official statements. *See, e.g.,* Kutak Letter at 2 (commenting that VRDOs are typically targeted to money market funds) and NABL Letter at A–1 (acknowledging that demand securities are an important part of the investment portfolio of most tax-exempt money market funds).

[118] *See also infra* Section VI.B.4.

[119] *See supra* note 47.

[120] 17 CFR 270.2a–7.

[121] For example, a broker, dealer, or municipal securities dealer with access to annual filings and event notices submitted to the MSRB will be able to use information disclosed in these filings and notices when deciding to recommend the purchase or sale of a particular demand security. *See, e.g.,* MSRB Rule G–17.

[122] *See, e.g.,* the MSRB, *Reminder of Customer Protection Obligations in Connection with Sales of Municipal Securities,* Interpretative Notice of Rule G–17, dated May 30, 2007 (available at *http://www.msrb.org/msrb1/rules/notg17.htm*).

B. Time Frame for Submitting Event Notices Under a Continuing Disclosure Agreement

The Commission is adopting the amendment to paragraph (b)(5)(i)(C) of the Rule [123] to require a Participating Underwriter to reasonably determine that the issuer or obligated person has agreed in its continuing disclosure agreement to submit event notices to the MSRB "in a timely manner not in excess of ten business days after the occurrence of the event," rather than "in a timely manner" as the Rule currently provides. The Commission also is adopting a substantially similar revision to the limited undertaking in paragraph (d)(2)(ii)(B) of the Rule.[124]

Eighteen commenters provided their views on the proposed ten business day time period for the submission of event notices pursuant to a continuing disclosure agreement.[125] The majority of commenters opposed the proposal. Some commenters opposed establishing any outside time frame,[126] while others specifically objected to the proposed ten business day time period, particularly in the context of certain events.[127] One commenter cited the 1994 Amendments Adopting Release, in which the Commission stated that, at that time, it had not established a specific time frame with respect to submission of event notices because of the wide variety of events and circumstances the issuer could face.[128] This commenter believed that this rationale "was sound logic in 1994, and that it should still apply in 2009." [129] Another commenter stated that it disagreed "with the SEC that there is systemic abuse with material events not being filed in a timely manner" [130] and argued that the Commission "should not mandate a specific time frame for submissions." [131]

Four commenters expressed support for the ten business day time frame.[132] Two of these commenters stated that the proposal "would replace the imprecise 'timely manner' language in the current Rule." [133] These commenters also noted that "the absence of a specific time period with respect to 'timely' has resulted in event notices being submitted months after the events have occurred," [134] which has been detrimental "to investors who need this information to make informed investment decisions about when, and which, municipal securities to buy and sell." [135] Further, they emphasized that they "strongly support the establishment of a definitive timeframe by which event notices must be filed, and have repeatedly called for improvements to the timeliness of municipal securities disclosure." [136]

These commenters noted that timely submission of event notices directly impacts the pricing of a municipal bond. They posited that "reducing the time between the event and the required notice better informs the market that an event occurred, which is essential to evaluating a bond's credit quality and pricing." [137] They further noted that a definitive time frame provides more timely information to pricing evaluation services and relieves them of dependence on bondholders to disclose the required information to them.[138] These commenters asserted that "without the proper notification, bonds could be priced incorrectly until the disclosure had been made." [139]

As discussed in detail below, the Commission has considered the commenters' views and suggestions on this issue and continues to believe that the benefits of enabling investors to receive promptly information about important events affecting the issuer justify the incremental costs imposed on issuers and obligated persons as a result of the amendments. It has come to the Commission's attention,[140] as supported by some commenters,[141] that some event notices currently are not submitted until months after the events have occurred. Market participants, on the other hand, have emphasized the importance of the prompt availability of such information.[142]

The Commission believes that delays in providing notice of the events set forth in paragraph (b)(5)(i)(C) of the Rule undermine the effectiveness of the Rule. Delays can, among other things, deny investors important information that they need to make informed decisions regarding whether to buy, sell or hold municipal securities. As noted above, two commenters echoed this sentiment by noting the importance of having timely submission of event notices to maintain the transparency of a municipal security's credit quality and pricing.[143] The Commission anticipates that, in providing for a maximum time frame, the amendments should foster the availability of more current information about municipal securities, and thereby help promote greater transparency and further enhance investor confidence in the municipal securities market. Furthermore, more up-to-date information about municipal securities is likely to improve the transparency in the market, should increase the efficiency of markets in allocating capital at appropriate prices

[123] 17 CFR 240.15c2–12(b)(5)(i)(C).

[124] 17 CFR 240.15c2–12(d)(2)(ii)(B). *See supra* note 16 for a description of Rule 15c2–12(d)(2).

[125] *See* Halgren Letter, Los Angeles Letter, Portland Letter, CRRC Letter, WCRRC Letter, NFMA Letter, CHEFA Letter, NAHEFFA Letter, SIFMA Letter, Connecticut Letter, Kutak Letter, ICI Letter, Fidelity Letter, California Letter, San Diego Letter, NABL Letter, GFOA Letter, and Metro Water Letter. *See also* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59601.

[126] *See* NABL Letter at 5–6, GFOA Letter at 2–3, and Metro Water Letter at 1–2.

[127] *See* Halgren Letter, Los Angeles Letter, Portland Letter, CRRC Letter, WCRRC Letter, NFMA Letter, CHEFA Letter, NAHEFFA Letter, SIFMA Letter, Connecticut Letter, Kutak Letter, California Letter, and San Diego Letter. *See also* the discussion below in this section regarding commenters' concerns about becoming aware of and submitting notices for events such as rating changes and trustee changes.

[128] *See* NABL Letter at 5–6.

[129] *Id.*

[130] *See* GFOA Letter at 2.

[131] *Id.*

[132] *See* NFMA Letter at 1–2, SIFMA Letter at 3, ICI Letter at 6–7, and Fidelity Letter at 2. Fidelity indicated in its letter that it assisted in the preparation of the ICI Letter II and expressed support for all of the statements made in the ICI Letter. *See* Fidelity Letter at 2.

[133] *See* ICI Letter at 6 and Fidelity Letter at 2.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See* Proposing Release, *supra* note 2, 74 FR at 36837, n. 69. *See, e.g.,* Elizabeth Carvlin, *Trustee for Vigo County, Ind., Agency Taps Reserve Fund for Debt Service,* The Bond Buyer, April 2, 2004, at 3 (reporting the filing of a material event notice regarding a draw on debt service reserve fund that occurred in February); Alison L. McConnell, *Two More Deals Under Audit By TEB Office,* The Bond Buyer, April 5, 2006 (event notice of tax audit filed nine months after audit was opened); Susanna Duff Barnett, *IRS Answers Toxic Query; Post 1986 Radioactive Waste Debt Not Exempt,* The Bond Buyer, November 2, 2004 (material event notice filed October 29, 2004 regarding IRS technical advice memorandum dated August 27, 2004 that bonds issued to finance certain radioactive solid waste facilities were taxable; related preliminary adverse determination letter was issued in January, 2002); and Michael Stanton, *IRS: Utah Pool Bonds Taxable; Issuer Disputes Facts of Case,* The Bond Buyer, December 8, 1997 (issuer's receipt of August, 1997 IRS technical advice memorandum concluding certain bonds were taxable was disclosed on December 5, 1997). *See also* Peter J. Schmitt, *Estimating Municipal Securities Continuing Disclosure Compliance: A Litmus Test Approach* (available at *http://www.dpcdata.com/html/about-researchpapers.html).*

[141] *See supra* note 134 and accompanying text.

[142] *See* Proposing Release, *supra* note 2, 74 FR 36838, n. 70. *See, e.g.,* National Federation of Municipal Analysts, *Recommended Best Practices in Disclosure for General Obligation and Tax-Supported Debt* (December 2001) ("Any material event notices, including those required under SEC Rule 15c2–12, should be released as soon as practicable after the information becomes available.") (available at *http://www.nfma.org/disclosure.php*); Peter J. Schmitt, Letter to the Editor, *To the Editor: MuniFilings.com: The Once and Future Edgar?,* The Bond Buyer, October 9, 2007, Commentary, Vol. 362, No. 32732, at 36 ("[F]iling issues are the sole cause of lack of transparency and disclosure availability in the industry. These filing issues include * * * late filing. * * *").

[143] *See* ICI Letter at 6 and Fidelity Letter at 2.

that reflect the creditworthiness of issuers, which benefits issuers and investors alike, and should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.

The Commission further believes that more timely information will aid brokers, dealers, and municipal securities dealers in satisfying their obligation to have a reasonable basis to recommend the purchase or sale of municipal securities. The Commission notes that the amendment requires Participating Underwriters to reasonably determine that issuers and obligated persons have contractually agreed to submit event notices in timely manner no later than "ten business days after the occurrence of the event," rather than simply in a "timely manner." On the other hand, there will be a significant benefit to investors and municipal market participants, because they will have a greater assurance that information about municipal securities will be available within a specific time frame of an event's occurrence. Indeed, while issuers and obligated persons under continuing disclosure agreements entered into prior to the compliance date of these amendments would have committed to submit event notices in a timely manner, this amendment will help to make the timing of such submissions more certain in the case of issuers and obligated persons that enter into continuing disclosure agreements on or after the compliance date of these amendments.[144]

One commenter suggested that the Commission leave the current "timely" language in the Rule but provide examples of instances that it considers to be "timely."[145] The Commission believes that the suggestion solely to provide guidance would not effectively accomplish the Commission's goal of improving the timeliness of submissions. Moreover, as the Commission noted in the Proposing Release, there have been significant delays in the submission of event notices.[146] As expressed by two commenters, "the absence of a specific time period" with respect to what constitutes timely submission of event notices has been a contributing factor to delays in submitting notices.[147] While one commenter cautioned the Commission against "trying to create a uniform standard for various events that are very different from each other,"[148] it is the Commission's view that providing a specified time frame will provide clarity regarding the standard to be included in continuing disclosure agreements for timely submission of event notices in all circumstances. In some cases, however, particularly when issuers or obligated persons know about events well in advance, investors may view timely disclosure as occurring within a day or a few days of the event.

Although a number of commenters did not oppose a specified time frame for submission of event notices, they also did not support the ten business day proposal. Some of their concerns were: (i) The impracticability of meeting the time frame because of limited staff and resources, especially for smaller issuers;[149] (ii) the increased burdens and costs in connection with the additional monitoring and compliance necessary to submit notices within ten business days;[150] (iii) the difficulty in reporting events within ten business days when the issuer does not control the information (*e.g.,* rating changes, changes to the trustee, and changes to the tax status of bonds as a result of an IRS audit);[151] and (iv) the use of the "occurrence of the event" as the trigger for the obligation to submit a notice.[152]

Many of these commenters focused their comments on their concerns about the difficulties associated with providing notice of specified events, particularly rating changes and trustee changes, within ten business days of their occurrence.[153] These commenters noted that rating changes and trustee changes are not within the issuer's control and that, with respect to rating changes, rating organizations do not directly notify issuers of rating changes.[154] As a result, these commenters believed that it would be difficult for most issuers to submit an event notice for a rating change within ten business days of its occurrence without incurring substantial costs associated with monitoring for rating changes.

Some commenters, who expressed concern about the ability of an issuer to learn of the event and then submit an event notice within the ten business day time frame, proposed alternative time periods ranging from 30 to 45 days from the event's occurrence.[155] Others, however, recommended that the Commission reduce the time frame.[156] Two of these commenters advocated a time frame of five business days from the occurrence of the event, which they noted is the amount of time permitted for submitting similar notices in the taxable debt market.[157] Another commenter recommended a time frame of four business days from the occurrence of the event."[158]

Several commenters who opposed the ten business day time frame suggested a number of modifications. Some of these commenters proposed changing the trigger for submission of an event notice from the occurrence of the event to the issuer's actual knowledge of the event.[159] A number of commenters recommended removing "rating changes" from the list of disclosure events and requiring rating organizations to submit their rating changes directly to the MSRB's EMMA system.[160] Finally, one commenter suggested that, instead of specifying a time period, the Commission should modify the Rule to: (1) State that "issuers should disclose material events in a timely manner which in the normal course of business would be 10 business days;" (2) allow the ten business days to run from the time the issuer learned of the event, or 30 calendar days from the event itself; and (3) ensure that in the instances where issuers do not have control of the information (*e.g.,* a rating change due to the rating change of the credit enhancer), the issuer should not be responsible for submitting the information.[161]

[144] The Commission notes that the ten business day time frame will not apply to continuing disclosure agreements entered into with respect to primary offerings that occurred prior to the compliance date of these amendments or to remarketings of demand securities that qualify for the limited grandfather provision. *See infra* Section III.G.

[145] *See* NABL Letter at 6.

[146] *See supra* note 140.

[147] *See* ICI Letter at 6 and Fidelity Letter at 3.

[148] *See* GFOA Letter at 2.

[149] *See* CRRC Letter, WCRRC Letter, Portland Letter at 2, NAHEFFA Letter at 2–4, Metro Water Letter at 1–2, CHEFA Letter at 2, and NABL Letter at 5–6.

[150] *See* Halgren Letter, Los Angeles Letter at 1, CRRC Letter, WCRRC Letter, NAHEFFA Letter at 2–4, CHEFA Letter at 2, and NABL Letter at 5–6.

[151] *See* Connecticut Letter at 1–2, California Letter at 1–2, San Diego Letter at 1–2, NAHEFFA Letter at 2–4, CHEFA Letter at 2, Kutak Letter at 2, and GFOA Letter at 2–3.

[152] *See* California Letter at 1–2, NAHEFFA Letter at 2–4, CHEFA Letter at 2, San Diego Letter at 1–2, GFOA Letter at 3, Kutak Letter at 2, and NABL Letter at 5–6.

[153] *See* Halgren Letter, Los Angeles Letter at 1–2, NAHEFFA Letter at 2–4, San Diego Letter at 1–2, CHEFA Letter at 2, Kutak Letter at 2, California Letter at 1–2, NABL Letter at 8, and GFOA Letter at 3–4.

[154] *Id.*

[155] *See* Halgren Letter, Portland Letter at 2, NAHEFFA Letter at 4, and CHEFA Letter at 2.

[156] *See* ICI Letter at 7, Fidelity Letter at 2, and e-certus Letter at 8.

[157] *See* ICI Letter at 7 and Fidelity Letter at 3.

[158] *See* e-certus Letter I at 8.

[159] *See* Kutak Letter at 2, California Letter at 1–2, San Diego Letter at 1–2, and CHEFA Letter at 2.

[160] *See* Halgren Letter, Portland Letter at 2, Los Angeles Letter at 1–2, California Letter at 3, CHEFA Letter at 2, GFOA Letter at 3–4, and NABL Letter at 8.

[161] *See* GFOA Letter at 3.

The Commission has considered commenters' concerns about the potential costs and burdens associated with the ten business day time period for submission of event notices. The Commission also has considered commenters' suggestion that the triggering event should be actual knowledge of the event rather than the event's occurrence. As the Commission noted in the Proposing Release, however, the events currently specified in paragraph (b)(5)(i)(C) of the Rule, and the additional event items included in the amendments, are significant and should become known to the issuer or obligated person expeditiously.[162] For example, events such as payment defaults, tender offers, and bankruptcy filings generally involve the issuer's or obligated person's participation.[163] Other events (*e.g.,* failure of a credit or liquidity provider to perform) are of such importance that an issuer or obligated person likely will become aware of such events,[164] or will expect an indenture trustee, paying agent, or other transaction participant to bring them to the issuer's or obligated person's attention, within a very short period of time.[165] Indeed, issuers and obligated persons could seek to obtain contractual agreements to be advised of the occurrence of such events by those persons or entities that may be expected to have direct knowledge of the occurrence.

Consistent with the Commission's discussion in the Proposing Release, rating changes may affect the market price of the security, and thus bondholders and prospective investors should have access to this information.[166] While the Commission recognizes that an event such as a rating change is not directly within the issuer's control, Participating Underwriters today must reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide notice of rating changes, if material.[167] While the Commission notes that the obligation to provide notice of rating changes is not new for those issuers that have issued municipal securities subject to a continuing disclosure agreement, the ten business day time frame may cause some issuers to monitor more actively for rating changes than they do today. The amendments revise the Rule to require the Participating Underwriter to reasonably determine that the continuing disclosure agreement provide for submission of event notices, including rating changes and trustee changes (if material), within ten business days after the event's occurrence.

Several commenters raised concerns about meeting the ten business day time frame because of limited resources and staff, particularly with respect to smaller issuers,[168] and the increased burdens and costs associated with monitoring such events within the specified time frame. The Commission recognizes that some issuers, particularly smaller issuers, may require a greater effort initially to comply with their undertakings in continuing disclosure agreements that reflect the revised Rule.[169] The Commission notes that information about rating changes by organizations that rate municipal securities is readily accessible by issuers through the rating agencies' Internet Web sites. In addition, issuers may be able to subscribe to a service that provides them with prompt rating updates for their securities. For other events that may be outside of the issuer's control, such as a trustee change, issuers can contractually arrange to be notified of such an event immediately.[170] Accordingly, the Commission continues to expect that issuers and obligated persons generally will become aware of the Rule's disclosure events (or can make arrangements to ensure that they become aware) within ten business days after the event's occurrence and accordingly should be able to comply with their undertakings to submit event notices to the MSRB within the ten business day time frame.[171]

The Commission believes that, on balance, the ten business day time frame is appropriate. By specifying a ten business day time frame, the Commission intends to strike a balance between the need for event notices to be disseminated promptly and the need to allow adequate time for an issuer or obligated person to become aware of the event and to prepare and file the notice. The Commission believes that the ten business day time frame provides a reasonable amount of time for issuers to comply with their undertakings, while also allowing event notices to be made available to investors, underwriters, and other market participants in a timely manner.

C. Materiality Determinations Regarding Event Notices

1. Deletion of the Materiality Condition Generally

The Commission proposed to delete in certain instances the materiality condition found in paragraph (b)(5)(i)(C) of the Rule. Based on the Commission's experience with paragraph (b)(5)(i)(C), the Commission believes that notice of certain events currently listed therein need not be preceded by a materiality determination. These events include: (1) Principal and interest payment delinquencies with respect to the

[162] *See supra* note 16 for a description of events currently contained in Rule 15c2–12(b)(5)(i)(C). *See infra* Section III.E. for a description of events added to the Rule by these amendments.

[163] In addition, as the Commission noted in the Proposing Release, involvement of the issuer or obligated person is often required for substitution of credit or liquidity providers; modifications to rights of security holders; release, substitution, or sale of property securing repayment of the securities; and optional redemptions. *See* Proposing Release, *supra* note 2, 74 FR at 36838, n. 73. The Commission received no comments on this statement. *See also* Form Indenture and Commentary, National Association of Bond Lawyers, 2000.

[164] For example, as the Commission noted in the Proposing Release, issuers or obligated persons should have direct knowledge of principal and interest payment delinquencies, determinations of taxability from the IRS, tender offers that they initiate, and bankruptcy petitions that they file. The Commission received no comments on this statement.

[165] The Commission believes, as noted in the Proposing Release, that indenture trustees generally would be aware of principal and interest payment delinquencies; material non-payment related defaults; unscheduled draws on credit enhancements reflecting financial difficulties; the failure of credit or liquidity providers to perform; and adverse tax opinions. The Commission received no comments on this statement. The Commission notes that issuers and obligated persons may wish to consider negotiating a provision to include in indentures to which they are a party to require a trustee promptly to notify the issuer or obligated person in the event the trustee knows or has reason to believe that an event specified in paragraph (b)(5) of the Rule has or may have occurred.

[166] *See* Proposing Release, *supra* note 2, 74 FR at 36840.

[167] *See* infra Section IV., discussing the obligations of underwriters of municipal securities under the antifraud provisions of the federal securities laws.

[168] *See* CRRC Letter, WCRRC Letter, Portland Letter at 2, NAHEFFA Letter at 2–4, Metro Water Letter at 1–2, CHEFA Letter at 2, and NABL Letter at 5–6.

[169] The Commission recognizes that issuers that enter into continuing disclosure agreements for the first time, particularly smaller issuers, initially may need to become familiar with the steps necessary to ascertain whether there has been a rating change, and that there are burdens associated with this.

[170] For example, under a trust indenture, the trustee may be obligated to notify an issuer before the trustee changes its name. *See infra* Section IV., discussing the obligations of underwriters of municipal securities under the antifraud provisions of the federal securities laws.

[171] As noted in the Proposing Release, those issuers or obligated persons required by Section 13(a) or Section 15(d) of the Exchange Act to report certain events on Form 8–K (17 CFR 249.308) would already make such information public in a Form 8–K. *See* Proposing Release, *supra* note 2, 74 FR at 36838, n. 76. The Commission believes that such persons should be able to file material event notices, pursuant to the issuer's or obligated person's undertakings, within a short time after the Form 8–K filing. *See* 15 U.S.C. 78m and 78*o*(d). The Commission received no comments on these statements.

securities being offered; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.

A number of commenters expressed support for deletion of the materiality condition.[172] Two of these commenters stated that "these disclosure events are of such high consequence and relevance to investors in informing their investment decisions that they should be disclosed as a matter of course."[173] Another commenter noted that "these events should always be provided to investors because their occurrence is always important to investors and other market participants."[174] One commenter stated that the proposal "to delete a materiality qualifier is not useful, but also would not unduly burden issuers or obligated persons except in three circumstances.[175]

Three commenters opposed the proposed change.[176] One commenter stated that the elimination of the materiality condition for all the events included in paragraph (b)(5)(i)(C) of the Rule would "increase issuers' administrative burden for monitoring the possible occurrence of these events."[177] This commenter also believed that removal of the general materiality provision may result in the disclosure of non-material events.[178] Another commenter, while acknowledging the importance of these six events, argued that the materiality condition should be retained because "there is a risk that dividing event notices into two categories may introduce confusion where none now exists."[179] Further, one commenter remarked that "establishing materiality is important in order to ensure that relevant information is passed to investors" and is "best made on a case by case basis, along with advice of counsel."[180]

The Commission believes that a materiality determination remains appropriate for specific events, as discussed below.[181] However, under the amendments, for each event that no longer is subject to a materiality condition, a Participating Underwriter must reasonably determine that the issuer or obligated person has agreed to submit a notice to the MSRB within ten business days of the event's occurrence, without regard to its materiality. The Commission believes that each of these events by its nature is of such importance to investors that it should always be disclosed. In particular, these events are likely to have a significant impact on the value of the underlying securities. Moreover, the Commission believes that notice of these events should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.[182]

Further, the Commission continues to believe that the removal of the materiality condition for the aforementioned events is not expected to significantly increase the burden on issuers and obligated persons. Because of the significant nature of these events and their importance to investors in the marketplace, the Commission believes that issuers and obligated persons generally are already providing notice of most of these events pursuant to existing continuing disclosure agreements. It is the Commission's view that removing the materiality condition for these six disclosure events will help ensure that important information about significant events regarding municipal securities is promptly provided to investors and other market participants in all instances. The availability of this information to investors will enable them to make informed investment decisions and should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure. Furthermore, this information will assist brokers, dealers and municipal securities dealers in satisfying their obligation to have a reasonable basis to recommend municipal securities to investors. Deletion of the materiality condition also could simplify a determination by an issuer or obligated person with respect to whether a notice must be filed and facilitate their providing such notice promptly. Accordingly, the Commission is adopting the amendment as proposed.

2. Deletion of Materiality Condition for Specific Events

As noted above, some commenters generally supported the proposed revision to the Rule eliminating the general materiality condition from all events, but expressed concerns regarding its elimination for specific events. The Commission discusses these comments below but, for the reasons discussed, is adopting the amendment, as proposed.

a. Principal and Interest Payment Delinquencies

One commenter suggested that, in light of the Commission's proposed amendment to delete the materiality condition from specified events, the definition of "principal and interest payment delinquency" should be clarified to take into account contractual grace periods and similar operational considerations, so that "minor operational variances" would not require event disclosure.[183] Other commenters opposed the deletion of the materiality condition from the principal and interest payment delinquency event because otherwise it may include reporting of certain delays in payment that are the result of circumstances outside of the issuer's control or are very limited in time (*e.g.,* technological glitches; a short-term disruption of the Federal Reserve Wire system; an error or lapse by the trustee or paying agent that is quickly corrected; or clerical error at the Depository Trust Company that is quickly corrected).[184] Two of these commenters noted that these circumstances may result in a "very short-term delay in crediting payments to bondholders" and that "in the past [they] would have treated such an event as not material."[185] Further, these two commenters argued that requiring submission of notices in these circumstances "would create an

[172] *See* NFMA Letter at 2, SIFMA Letter at 3, e-certus Letter at 8, ICI Letter at 7–8, and Fidelity Letter at 3. *See also* California Letter at 2 and San Diego Letter at 2 (each of these commenters support elimination of the materiality qualifier for each of the six events set forth in the Proposing Release except for the event relating to rating changes); *see infra* Section III.C.2.e. for a discussion of rating changes.

[173] *See* ICI Letter at 7–8 and Fidelity Letter at 3.

[174] *See* SIFMA Letter at 8.

[175] *See* NABL Letter at 6–7. The three circumstances for which this commenter suggested retaining a materiality condition are: (i) Unscheduled draws of debt service reserves that reflect financial difficulties for LOC-backed demand securities; (ii) failed remarketings of LOC-backed demand securities; and (iii) defeasances. The Commission addresses each of these three circumstances later in this release. *See infra* Section III.C.2.

[176] *See* Metro Water Letter at 2, Connecticut Letter at 2, and GFOA Letter at 4.

[177] *See* Metro Water Letter at 2.

[178] *Id.*

[179] *See* Connecticut Letter at 2.

[180] *See* GFOA Letter at 4.

[181] The discussion in this section pertains to materiality determinations for events currently specified in paragraph (b)(5)(i)(C) of the Rule. For events to be added to the Rule by these amendments, the Commission discusses in Section III.E. below whether the materiality determination has been included for each such event.

[182] The Commission applied the same rationale discussed in this paragraph to determine which of the new event items that are being added to the Rule by these amendments should contain a materiality condition.

[183] *See* Kutak Letter at 3.

[184] *See* California Letter at 2, San Diego Letter at 2, and GFOA Letter at 4.

[185] *See* California Letter at 2 and San Diego Letter at 2.

unwarranted implication that the issuer has suffered financial adversity." [186]

The Commission notes that a payment default often negatively affects the market value of a municipal security and may have adverse consequences for an investor who has an immediate need for such funds. The Commission therefore believes that notice of any payment default with respect to securities covered by the Rule, including those defaults that are quickly remedied or that result from a technological glitch or similar error, is important information for investors. The Commission notes that issuers and obligated persons may include the reason for a payment default in the event notice submitted to the MSRB. Delayed payment—even for a short period of time—may impact investors' investment decisions by inhibiting their ability to promptly reinvest such payment or by leaving them unsure whether to buy, hold, or sell municipal securities. Accordingly, the Commission believes that notice of principal and interest payment delinquencies on municipal securities should always be provided to aid investors in making investment decisions and help protect them from fraud, as well as to assist brokers, dealers, and municipal securities dealers in satisfying their obligation to have a reasonable basis to recommend a municipal security.

b. Unscheduled Draws on Debt Service Reserves or Credit Enhancements Reflecting Financial Difficulties

Unscheduled draws on debt service reserves and credit enhancements often adversely impact the market value of a municipal security and, in the Commission's view, should always be made available to investors and other market participants.[187] These events likely indicate that the financial condition of a municipal securities issuer or obligated person has deteriorated and that there is, potentially, an increased risk of a payment default or, in some cases, premature redemption. Bondholders and other market participants also would be concerned with the sufficiency of the amount of debt service and other reserves available to support an issuer or obligor through a period of temporary difficulty, as well as the present financial condition of the provider of any credit enhancement.

One commenter suggested that a materiality condition should be retained for unscheduled draws on debt-service reserves for LOC-backed demand securities.[188] This commenter argued that materiality is necessary in this limited instance because the proposed amendment "would require notice of unscheduled draws on debt service reserves that reflect financial difficulties of the obligated person, even when not material to an investment in the securities because they are traded on the strength of a bank letter of credit." [189]

The Commission notes that notice is needed only when an unscheduled draw on debt-service reserves or credit enhancement indicates financial difficulties "with respect to the securities." Thus, an issuer or obligor must consider, under the facts and circumstances of a particular municipal security and its relevant governing documents, whether or not such unscheduled draw reflects financial difficulties with respect to that security—a limitation that should help address some concerns about removal of the materiality condition.

The same commenter also suggested retaining the "if material" condition for LOC-backed demand securities because the deletion of this condition, coupled with the modification to the exemption for demand securities, "would require notice of each failure to remarket securities when they are put, even though not material to an investor due to the existence of a letter of credit or other liquidity facility." [190]

The Commission does not agree with this commenter's conclusion. One purpose of a letter of credit or other liquidity facility for demand securities is to provide liquidity in the event that a new investor is not found at the time the securities are tendered for repurchase. A draw in such a situation does not necessarily reflect financial difficulties "with respect to the securities" of the credit enhancement provider or the obligated person, but may reflect underlying market conditions, as evidenced by failed remarketings during 2008 and 2009.[191] In the event of a draw that does not reflect financial difficulties with respect to the securities, a notice would not be provided. A determination regarding the existence of financial difficulties must be made on a case-by-case basis, depending on the facts and circumstances surrounding such draws and failed remarketings.

Finally, one commenter, who supported the deletion of the materiality condition, recommended deleting the phrase "reflecting financial difficulties" for events relating to unscheduled draws on debt-service reserves or credit enhancements.[192] This commenter suggested that, even with the removal of the materiality condition from these event items, the phrase "reflecting financial difficulties" may allow an issuer, in certain circumstances, to make a judgment regarding whether the occurrence of such an event would require disclosure.[193]

Although the Commission continues to believe that the disclosure of unscheduled draws is important to investors and other market participants, the Commission also recognizes that, in some circumstances, such draws are not the result of financial difficulties that would impact the creditworthiness of an issuer or obligated person, or the price of a municipal security. Accordingly, the Commission believes that the phrase "reflecting financial difficulties" should be retained in the Rule at this time.

c. Substitution of Credit or Liquidity Providers, or Their Failure to Perform

One commenter opposed eliminating the materiality condition from this event, in light of the proposed ten business day frame for submitting event notices to the MSRB.[194] This commenter acknowledged the importance of disclosing this information, but believed that as a result of the recent market turmoil, determining whether the occurrence of this event is material as a condition to providing notice remains important.[195]

The Commission believes that the identity of credit or liquidity providers and their ability to perform is important

[186] *Id.*

[187] *See* Proposing Release, *supra* note 2, 74 FR at 36839.

[188] *See* NABL Letter at 6–7.

[189] *Id.*

[190] *Id.*

[191] *See, e.g.,* Richard Williamson, *HOUSING: HFAs Still Facing VR Debt Woes; No Relief Till 2011 Even With U.S. Aid,* The Bond Buyer, October 7, 2009; Frank Sulzberger and Andrew Flynn, *Lessons From Tough Times: Understanding VRDO Failures,* The Bond Buyer, July 21, 2008 ("Until the recent credit crisis, few bonds had ever experienced a remarketing failure and when they did, liquidity providers were able to step in with little risk to their balance sheet. * * * In a normal market, the remarketing agent might step in and buy the tendered bonds, in order to prevent an actual draw on an LOC or credit facility. But this time around, the volume of the tenders and restrictions on their own liquidity made this choice difficult, if not impossible, for many remarketing agents.")

[192] *See* Fidelity Letter at 2.

[193] *See* Fidelity Letter at 2.

[194] *See* GFOA Letter at 4. The commenter expressed concern about the removal of materiality condition in the context of the ten business day time frame. As the Commission noted earlier in this release, the events contained in paragraph (b)(5)(i)(C) of the Rule, which includes the substitution of credit or liquidity providers, or their failure to perform, are significant events that an issuer should become aware of within a very short period of time. *See supra* Section III.B.

[195] *See* GFOA Letter at 4.

information for investors.[196] The Commission understands that credit ratings of municipal securities are typically based on the higher of the obligor's rating or the rating of the credit provider[197] and that, with occasional exceptions, credit enhancement is obtained from a credit provider with a higher rating than that of the obligor. When a credit enhancer such as a bond insurer is downgraded, the market value and the liquidity of the securities that it has enhanced generally decline.[198] Similarly, the identity and ability of a liquidity provider to perform typically is critical to investors. Investors in demand securities, for example, depend on liquidity providers to satisfy holders' right to tender their securities for repurchase in a timely manner. Furthermore, substitution of credit or liquidity providers requires direct involvement of an issuer or obligated person.[199] Thus, an issuer or obligated person would be aware of the impending occurrence of such an event and should be able to provide notice of the event within the ten business day time frame. As a result, the Commission believes that notice of substitution of credit or liquidity providers, or their failure to perform, should always be provided to aid investors in making investment decisions and protecting themselves from fraud and to assist brokers, dealers and municipal securities dealers in satisfying their obligation to have a reasonable basis to recommend municipal securities.

d. Defeasances

One commenter expressly favored maintaining the materiality condition for notice of defeasances.[200] This commenter believed that removal of the materiality condition "would require notice of defeasances of securities regardless of how short the remaining term of the securities, and therefore would require an issuer to give notice whenever it creates a thirty-day or shorter escrow for refunded bonds in order to avoid giving notice of redemption before an issue of refunding bonds is closed."[201]

Typically, because defeased municipal securities are secured by escrows of cash, or Treasury securities, sufficient to pay principal and interest to maturity or the appropriate call date, the value of municipal securities increases significantly when they are defeased. Information about such changes in the value of municipal securities—positive as well as negative—is important to investors in making investment decisions, such as whether to sell their securities prior to the defeasance date and, if so, whether the sale price is appropriate. Also, notice of a defeasance should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure, by providing them with information concerning the defeasance so that they can better assess the value of their defeased municipal securities. Further, the Commission is of the view that, regardless of the length of the escrow period, notice of defeasance is justified, because of the significance of the event and because investors should be provided sufficient time to plan the re-investment of their funds. Consequently, the Commission believes that notice of defeasance should not be subject to a materiality condition and should be provided to the MSRB in each instance.

e. Rating Changes[202]

One commenter recommended that the term "rating change" should be defined if the materiality condition is removed from this event item.[203] The commenter suggested that the Rule should be limited to those changes, for which the issuer or obligated person has actual knowledge, in the highest published rating relating to a given security, whether the underlying rating or the credit-enhanced rating.[204] The commenter also stated that the term "rating change" should exclude changes in outlook, as well as changes in credit ratings of parties other than the issuer or obligated person, unless the issuer or obligated person has received specific notice of the change in such other party's rating.[205] Some commenters argued that the proposed deletion of the materiality condition for this event item, together with the ten business day time frame to submit event notices to the MSRB, would create a substantially larger burden for issuers.[206] The same commenters believed that rating changes should be removed from the list of disclosure events in the Rule entirely, and that rating organizations should be responsible for providing this information directly to the MSRB.[207]

The Commission notes that, as a practical matter, changes in credit ratings today are likely to impact the price of municipal securities, and thus investors in these securities, as well as market professionals, analysts, and others, should have access to this information.[208] As discussed earlier, the continuing disclosure agreements that issuers have entered into pursuant to Participating Underwriters' obligations under the Rule already require them to submit event notices to the MSRB for rating changes, if material. The Commission acknowledges that removal of the materiality condition may increase the number of event notices submitted in connection with rating changes.[209] However, the removal of the materiality condition from this event item will simplify the submission of event notices for ratings changes by removing the burden on issuers to make a determination as to whether or not such a change is material and thus requires submission of a event notice. The Commission notes that rating agencies typically indicate a rating change by changing the widely understood symbols used to indicate

[196] Two commenters recommended that the event notice pertaining to substitution of credit or liquidity providers or their failure to perform should be expanded to include any renewal, or modification, of any credit or liquidity facility or other agreements supporting or otherwise material to a municipal security. *See* ICI Letter at 8 and Fidelity Letter at 3. These commenters noted that changes to, or violations of, any of the credit or liquidity agreements pertaining to a municipal security can modify the security, thereby causing a mandatory tender event or impacting the prospects for its remarketing. In their view, these events can have significant implications for investors. The Commission, in this rulemaking, is taking a targeted approach at this time. The Commission will take these comments into account should it consider further improvements that could be made to the Rule.

[197] *See, e.g.,* Proposing Release, *supra* note 2, 74 FR at 36839, n. 80.

[198] *See, e.g.,* Proposing Release, *supra* note 2, 74 FR at 36839, n. 81.

[199] *See, e.g.,* Richard Williamson, *Houston Metro Seeks LOC for Light Rail,* The Bond Buyer, April 16, 2008; and Elizabeth Carvlin, *Trends in the Region: Bond Contracts Stand at Center of Detroit Airport Dispute,* The Bond Buyer, September 11, 2002.

[200] *See* NABL Letter at 7. A defeasance typically is understood as the termination of the rights and interests of the bondholders and of their lien on the pledged revenues or other security in accordance with the terms of the bond contract for an issue of securities. *See, e.g.,* the MSRB's definition of defeasance at *http://www.msrb.org/msrb1/glossary/glossary_db.asp?sel=d.*

[201] *See* NABL Letter at 7.

[202] *See also supra* Section III.B. for a discussion of rating changes in the context of the ten business day time frame.

[203] *See* Kutak Letter at 3–4.

[204] *Id.*

[205] *Id.*

[206] *See* Halgren Letter, Los Angeles Letter at 1–2, NAHEFFA Letter at 2–4, San Diego Letter at 1–2, California Letter at 1–2, NABL Letter at 8, and GFOA Letter at 3–4.

[207] *See supra* note 153 and accompanying text.

[208] The Commision recently adopted amendments to its rules and forms, and is considering other amendments, to remove certain references to credit ratings by nationally recognized statistical rating organizations, in order to discourage undue investor reliance on them. *See, e.g.,* Securities Exchange Act Release Nos. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008), and 60789 (October 5, 2009), 74 FR 52358 (October 9, 2009).

[209] *See infra* Section V.D. for discussion of the paperwork burden in connection with deletion of materiality condition.

rating categories, which should make a determination of the occurrence of a rating change very straightforward.[210] Under the amendments, a notice of a rating change by any rating agency would be included even if another rating agency has not revised its rating of the municipal security.

Three commenters argued that information about rating changes is already accessible to investors through the media or Internet.[211] In the Commission's view, investors would benefit from being able to access a central source to determine whether there has been a rating change with respect to a particular municipal security, rather than relying on the media or accessing each rating organization's Internet Web site. Two of these commenters suggested a limited exemption from the Rule for rating changes involving municipal securities that are the result of rating changes involving the bond insurer or credit enhancer.[212] The Commission does not believe that an exemption for bond insurers and credit enhancers from the Rule is appropriate. As discussed above, ratings for particular securities generally reflect the rating of the provider of credit enhancement, if any, in addition to the obligated person (or other source of payment).[213] If a credit-enhanced municipal bond is downgraded because of a rating change involving the bond insurer or credit enhancer, that is likely to impact the price of the security and is important information that should be disclosed to investors.

3. Retention of Materiality Condition for Specified Events

Finally, the Commission is adopting, as proposed, amendments to paragraph (b)(5)(i)(C) and subparagraphs (2), (7), (8), and (10) thereunder with regard to the Participating Underwriter's obligations by specifying that a materiality determination is retained for event notices regarding (1) non-payment related defaults; (2) modifications to rights of security holders; (3) bond calls; and (4) the release, substitution, or sale of property securing repayment of the securities.

Two commenters opposed retaining the materiality condition for notice of non-payment related defaults and for bond calls, which currently are set forth in paragraphs (b)(5)(i)(C)(2) and (8) of the Rule, respectively.[214] These commenters remarked that violation of a legal covenant is an important component of an investor's analysis of a bond; disclosure of such events should not be discretionary; and bond calls are always material to investors.[215]

The Commission believes that a materiality condition should be retained for notice of non-payment related defaults and bond calls, respectively. Regularly scheduled sinking fund redemptions (a type of bond call) that occur when scheduled, for example, are ordinary course events that typically are known to bondholders.[216] For such redemptions, the specific amounts to be redeemed and dates for such redemptions generally are included in official statements and usually this information will not be material to investors as they are already apprised of the occurrence of such redemptions in advance. The occurrence of other kinds of calls, such as optional calls and extraordinary calls, however, generally is not known to bondholders in advance. These typically are important events for investors because they may directly affect the value of the municipal security. Thus, such calls may be material and would need to be disclosed.

With respect to non-payment related defaults, under some circumstances, the occurrence of such defaults may not rise to the level of importance that they would need always to be disclosed to investors. For example, failure to comply with loan covenants to deliver updated insurance binders to the trustee or to take other ministerial actions by an annual deadline, if not cured within the period provided for in the loan documents, may constitute events of default, but such defaults may not be material to investors. On the other hand, failure to comply with covenants to maintain certain financial ratios or cash on hand, for example, may be of great importance to investors as they may be early warnings of a decline in the operations or financial condition of the issuer or obligated person. The Commission believes that this materiality determination is similarly appropriate in the context of modifications of rights of security holders and the release, substitution, or sale of property securing repayment of the securities. Accordingly, the Commission continues to believe that information about the four events for which the materiality conditions are retained is not necessarily important to investors and other market participants in all instances, and thus the Commission is retaining the materiality condition for these events.

D. Amendment Relating to Event Notices Regarding Adverse Tax Events Under a Continuing Disclosure Agreement

Currently, paragraph (b)(5)(i)(C)(6) of the Rule pertains to "adverse tax opinions or events affecting the tax-exempt status of the security." The Commission is adopting, with certain modifications from that proposed, an amendment to paragraph (b)(5)(i)(C)(6) of the Rule to require that Participating Underwriters reasonably determine that the issuer or obligated person has entered into a continuing disclosure agreement to submit a notice for "[a]dverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security." As discussed below, in adopting this amendment, the Commission is making certain changes to the text of the amendment from that which was proposed[217] to clarify the use of the word "material" in this event item and to replace the phrase "tax-exempt status" with "tax status" to focus the disclosure on information relevant to investors, whether the municipal security is taxable or tax-exempt.

Four commenters expressed support for the proposed modifications to the list of adverse tax events included in the

[210] Ratings are expressed as letter grades that range, for example, from 'AAA' to 'D', and may include modifiers such as +, −, or numbers (*e.g.,* 1, 2, 3) to communicate the agency's opinion of relative level of credit risk. *See, e.g., http://www.moodys.com/, http://www.standardandpoors.com/* and *http://www.fitchratings.com/.* For purposes of Rule 15c2–12, "ratings change" does not include indicators of an increased likelihood of an impending ratings change, such as "negative credit watch."

[211] *See* Portland Letter at 2, San Diego Letter at 2, and California Letter at 3.

[212] *See* Portland Letter at 2 and California Letter at 3.

[213] *See supra* Section III.C.2.b.

[214] *See* ICI Letter at 8 and Fidelity Letter at 3.

[215] *Id.*

[216] The fact that a security may be redeemed prior to maturity in whole, in part, or in extraordinary circumstances is essential to an investor's investment decision about the security and is one of the facts a broker-dealer must disclose at the time of trade. *See MSRB Interpretative Notice Concerning Disclosure of Call Information to Customers of Municipal Securities,* MSRB, March 4, 1986.

[217] In the Proposing Release, the Commission proposed modifying paragraph (b)(5)(i)(C)(6) of the Rule so that continuing disclosure agreements would provide for the submission of a notice for "[a]dverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax-exempt status of the securities, or other events affecting the tax-exempt status of the security." *See* Proposing Release, *supra* note 2, 74 FR at 36868.

Proposing Release.[218] One of these commenters noted that investors have a strong interest in being informed of actions taken by the IRS that present a material risk to the tax-exempt status of their holdings.[219] Several other commenters expressed concerns regarding the proposed items to be added to the disclosure for adverse tax events, particularly in light of the proposed removal of the materiality condition from this provision.[220] One commenter recommended that the materiality condition be retained for all items in paragraph (b)(5)(i)(C)(6) of the Rule, other than a final determination of taxability.[221] Other commenters, however, stated that the materiality condition should be retained for notice of all tax-related events.[222] One commenter noted that the municipal market may be flooded with notices due to the generality and vagueness of the proposed tax disclosure items.[223] This commenter further remarked that this provision will result in a "flood of notices" that could confuse and mislead investors, result in liquidations of municipal securities by multiple sellers simultaneously, or desensitize the market to such notices.[224]

In addition, three commenters expressed concerns about the impact of the disclosure of event notices during the IRS's audit process.[225] One commenter believed that an issuer's disclosure of event notices during the audit process could cause its bonds to be viewed unfavorably in the market and thus could result in higher borrowing costs for the issuer.[226] Another commenter noted that disclosure of a pending audit "would have adverse consequences to the issuer long before the IRS finally determines whether any tax code violations actually have occurred,"[227] while a third commenter indicated that disclosure of an audit would "confuse investors who may not be well versed in the IRS audit process."[228]

The Commission previously has noted that "an 'event' affecting the tax-exempt status of a security may include the commencement of litigation and other legal proceedings, including an audit by the Internal Revenue Service * * *."[229] While the Commission continues to believe that "an event affecting the tax-exempt status of the security" can include an audit (and thus an audit should be the subject of an event notice when it is material), it agrees with the comment that not all audits indicate a risk to the security's tax status. At times, IRS staff conducts audits as part of project initiatives where it is not examining a specific problem or bond issue.[230] On the other hand, some audits are targeted to examining specific bonds when, for example, IRS staff has received information from the public that has raised IRS staff concern.[231] Thus, a determination by the issuer or obligated person in possession of the facts concerning the audit of a particular bond issue regarding whether a particular audit is material (and, thus, is an "other material event affecting the tax status of the security") is appropriate. In contrast, proposed and final determinations of taxability and Notices of Proposed Issue, which are determinations by the IRS that the IRS believes that a security is or may be taxable and has begun a formal administrative process in that regard, suggests that there could be a significant risk to the tax status of that security.[232] Accordingly, the Commission believes that proposed and final determinations of taxability and Notices of Proposed Issue are of such importance to investors that they always should be disclosed pursuant to a continuing disclosure agreement.

Retail and institutional investors consider the tax status of a municipal security, specifically the issuance of IRS notices, to be of great importance when making the decision to invest in tax-exempt bonds as opposed to other fixed-income securities.[233] This is a view supported by several commenters.[234] The financial significance of the municipal security's tax-exempt status is reflected directly in the interest rate on a tax-exempt municipal bond, which generally is significantly lower than the interest rate on a comparable taxable bond.[235] Accordingly, investors are particularly sensitive to factors that could affect the tax-exempt status of interest earned on their municipal securities, because that status goes directly to the value of their investment.[236] Further, a determination by the IRS staff that interest on a security purchased as tax-exempt may, in fact, be taxable may not only reduce the security's market value, but also may adversely affect each investor's federal and, in some cases, state income tax liability.[237] A security's tax-exempt status is also important to many mutual funds whose governing documents, with certain exceptions, limit their investment to tax-exempt municipal securities.[238] Mutual funds may liquidate securities that become taxable, which could have adverse consequences for the fund and its holders and could cause adverse effects if many holders attempt at the same time to liquidate similar securities, which at times could be illiquid. Therefore, retail and institutional investors alike are very interested in events that could adversely affect the tax status of the bonds that they own or may wish to purchase.

Moreover, as the Commission noted in the Proposing Release, despite the possibility that the issuance of proposed and final determinations of taxability and Notices of Proposed Issue could adversely affect the tax-exempt status of a bond and thus could significantly affect the pricing of such municipal security,[239] it has been reported that notices regarding such tax events are not always submitted.[240] The Commission

[218] *See* SIFMA Letter at 3, NFMA Letter at 2, San Diego Letter at 2, and California Letter at 2.

[219] *See* SIFMA Letter at 3.

[220] *See* NABL Letter, Metro Water Letter, Connecticut Letter, Kutak Letter, and GFOA Letter.

[221] *See* NABL Letter at 7.

[222] *See* Metro Water Letter at 3, Connecticut Letter at 2, Kutak Letter at 4–7, and GFOA Letter at 4.

[223] *See* Kutak Letter at 4–7.

[224] *Id.*

[225] *See* Kutak Letter at 5, GFOA Letter at 4, and Metro Water Letter at 3.

[226] *See* Kutak Letter at 5.

[227] *See* Metro Water Letter at 3.

[228] *See* GFOA Letter at 4.

[229] *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59600. *See also* Proposing Release, *supra* note 2 74 FR at 36840.

[230] *See, e.g., IRS FY 2010 Tax-Exempt Bonds Work Plan,* IRS (available at *https://www.irs.gov/pub/irs-tege/fy_2010_teb_workplan.pdf*).

[231] *Id.*

[232] *See* Proposing Release, *supra* note 2, 74 FR at 36841.

[233] *See* Proposing Release, *supra* note 2, 74 FR at 36841, n. 89.

[234] *See* NFMA Letter at 2 and SIFMA Letter at 3. *See also* California Letter at 2, and San Diego Letter at 2.

[235] *See, e.g.,* SIFMA, "About Municipal Bonds—The Advantages of Tax Exemption," available at: *http://www.investinginbonds.com/learnmore.asp?catid=8&subcatid=53&id=233;* Morgan Stanley Smith Barney, "Tax-Free Municipal Bonds—Frequently Asked Questions," (question 4. Why is it better for me to own municipals when municipal bond rates are lower than taxable bond (Treasury bonds, corporate bonds) rates?), available at: *http://www.morganstanleyindividual.com/markets/bondcenter/school/faq/default.asp#4.*

[236] *See* Proposing Release, *supra* note 2, 74 FR at 36841, n. 90.

[237] For example, investors in such a circumstance may have to include interest on such a security as income when computing their federal income taxes for current and future tax years and may have to pay additional taxes for prior tax years. *See* Proposing Release, *supra* note 2, 74 FR at 36841.

[238] *See* Proposing Release, *supra* note 2, 74 FR at 36841, n. 92.

[239] *See* Proposing Release, *supra* note 2, 74 FR at 36842, n. 100.

[240] *See* Proposing Release, *supra* note 2, 74 FR at 36842, n. 101. *See, e.g.,* Susanna Duff Barnett, *IRS Answers Toxic Query; Post 1986 Radioactive Waste Debt Not Exempt,* The Bond Buyer, November 2, 2004 (material event notice filed October 29, 2004 regarding IRS technical advice memorandum dated August 27, 2004 that bonds issued to finance certain radioactive solid waste facilities were taxable; related preliminary adverse determination

believes that the issuance of proposed and final determinations of taxability and Notices of Proposed Issue by the IRS are important information that should be made available to investors and, accordingly, should be part of the continuing disclosure agreement obtained by a Participating Underwriter. The Commission believes that the IRS has issued a relatively small number of such determinations with respect to municipal securities when considered in light of the size of this market sector.[241] As a result, few issuers or obligated persons should be affected by adding proposed and final determinations of taxability and Notices of Proposed Issue to this event item. One commenter noted that disclosure of the issuance of proposed or final determinations of taxability and of material audits often results in a higher interest rate for VRDOs, resulting in an increased cost to the issuer.[242] That change in the interest rate supports the view that investors place a high degree of importance on events that may impact the tax status of their bonds. Thus, the Commission believes that disclosure in all instances of proposed and final determinations of taxability, Notices of Proposed Issue, and other material events affecting the tax status of a security, such as material audits, would help apprise investors of important information with respect to these securities.

Two commenters expressed specific concerns regarding the deletion of the materiality condition for submission of notices relating to adverse tax events.[243] One commenter believed that submitting a notice for all proposed tax determinations could limit the issuer's ability to negotiate with the IRS.[244] Another commenter remarked that without a materiality condition, disclosure of adverse tax events may mislead and confuse investors and could affect perceptions with respect to all of the issuer's securities, imposing interest and other costs that could limit future market access.[245] Other commenters, however, supported the proposed deletion of the materiality condition.[246]

As noted above, the Commission disagrees that disclosure of adverse tax events would "unnecessarily alarm investors," as one commenter argued.[247] Because investors place a high degree of importance on the tax status of their municipal securities, and the tax status of a security significantly affects the market price of a security, the Commission believes that disclosing a potential threat to that status is necessary and that investors have a keen interest in being informed of such events. Furthermore, the Commission believes that the failure to disclose adverse tax events potentially could mislead investors who would have no reason to know or other means to discover that the tax status of their bonds may be in doubt and the market value of those securities may be at risk.

One commenter noted that the text of the amendment in the Proposing Release included a materiality condition for one provision that impliedly applies to other provisions of paragraph (b)(5)(i)(C)(6) of the Rule.[248] This commenter suggested that the Commission clarify that the materiality condition applies to all tax events, except for a final determination of taxability.[249] As discussed above, the Commission does not believe that it is appropriate to provide for a materiality condition in the case of proposed or final IRS determinations of taxability. In the Commission's view, these IRS determinations are of such importance to investors that they always should be disclosed. However, in response to this commenter's recommendation, the Commission is revising the amendment to paragraph (b)(5)(i)(C)(6) from that proposed to clarify its original intention that the event item pertains to "other *material* events affecting the tax status of the security" (emphasis added). The Commission agrees with the commenter that it would be appropriate to clarify this phrase so that notices of events not specified in the Rule that affect the tax status of a security are required only if these events are material to investors.

Finally, in February 2009, Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA"),[250] which authorized the issuance of Build America Bonds and other taxable municipal bonds with associated tax credits or direct federal payments to the issuer (collectively, "ARRA Bonds").[251] Because ARRA Bonds are municipal securities, Participating Underwriters would need to comply with the Rule's provisions, including paragraph (b)(5)(i)(C), when these bonds are the subject of a primary offering. Thus, a Participating Underwriter will be required to reasonably determine that an issuer or an obligated person has entered into a continuing disclosure agreement to submit continuing disclosure documents to the MSRB. ARRA Bonds are required to comply with many of the same provisions of the Internal Revenue Code as are tax-exempt bonds, such as restrictions on arbitrage.[252] The benefits granted to ARRA Bonds (*e.g.,* tax credits and related federal payments to issuers) are only authorized for bonds that comply with the provisions of the Internal Revenue Code that grant these benefits.[253] Furthermore, like tax-exempt municipal bonds, adverse tax opinions, proposed or final determinations of taxability, Notices of Proposed Issue, or other material notices or determinations by the IRS with respect to the tax status of the securities, or other material events affecting the tax status of the security, may be applicable to ARRA Bonds. To clarify the applicability of paragraph (b)(5)(i)(C)(6) of the Rule, as amended, to ARRA Bonds, the Commission is adopting, for purposes of this paragraph, the phrase "tax status," rather than "tax-exempt status," of the security. The Commission believes that this limited change will clarify that Participating Underwriters

letter was issued in January, 2002). *See also supra* note 140.

[241] *See* Proposing Release, *supra* note 2, 74 FR at 36853, which notes that for Paperwork Reduction Act purposes, 130 event notices relating adverse tax events, including IRS determinations, are estimated to be submitted to the MSRB.

[242] *See* Kutak Letter at 5.

[243] *See* Metro Water Letter at 3 and Kutak Letter at 4–7.

[244] *See* Metro Water Letter at 3.

[245] *See* Kutak Rock Letter at 4–7.

[246] *See* ICI Letter at 2, NFMA Letter at 2 and SIFMA Letter at 3.

[247] *See* Connecticut Letter at 2.

[248] *See* SIFMA Letter at 3.

[249] *Id.*

[250] Public Law 111–5, 123 Stat. 115 (2009).

[251] The American Recovery and Reinvestment Act of 2009 introduced three new categories of tax-advantaged *taxable* bonds—Build America Bonds (I.R.C. § 54AA), Qualified School Construction Bonds (I.R.C. § 54F), and Recovery Zone Economic Development Bonds (I.R.C. §§ 1400U–2). In addition, the ARRA expanded the authority to issue *taxable* New Clean Renewable Energy Bonds (I.R.C. § 54C), Qualified Energy Conservation Bonds (I.R.C. § 54D) and Qualified Zone Academy Bonds (I.R.C. § 54E). This followed the introduction of taxable Qualified Forestry Conservation Bonds (I.R.C. § 54B) in the Heartland, Habitat, Harvest, and Horticulture Act of 2008. Taxpayers who hold such bonds on a "credit allowance date" generally are allowed a specified credit against their federal income tax liability (with the notable exceptions being Build America Bonds for which the issuer has elected to receive payments from the U.S. Treasury under I.R.C. § 54AA(g)(1), referred to herein as "Direct-Pay BABs," and Recovery Zone Economic Development Bonds). In addition, the tax credits may be "stripped" from the underlying taxable bonds (*see* I.R.C. §§ 54A(i), 54AA(f)(2)), either by the issuer or by a holder in the secondary market, and sold to different investors pursuant to Treasury Department regulations to be issued.

[252] *See, e.g.,* Section 54AA of ARRA (Build America Bonds); I.R.C. § 1400U–2(b) (Recovery Zone Economic Development Bonds); I.R.C. §§ 54A and 54C (New Clean Renewable Energy Bonds); IRC sections 54A and 54C (Qualified Energy Conservation Bonds); I.R.C. §§ 54A and 54E (Qualified Zone Academy Bonds); I.R.C. §§ 54A and 54F (Qualified School Construction Bonds). *See also,* IRS Notice 2009–26—Build America Bonds and Direct Payment Subsidy Implementation.

[253] *See* Public Law 111–5, 123 Stat. 115 (2009).

of ARRA Bonds are required to reasonably determine that issuers or obligated persons of such bonds have entered into a continuing disclosure agreement to submit to the MSRB, among other things, the tax-related disclosure events included in paragraph (b)(5)(i)(C)(6) of the Rule. For investors who hold ARRA Bonds with associated tax credits, the consequence of an issuer's failure to comply with the applicable requirements of the Internal Revenue Code is the loss of the benefit of a tax credit.[254] For investors who hold tax-exempt municipal securities, the consequence of an issuer's failure to comply with federal tax provisions is the loss of the benefit of tax-exempt interest income. In the Commission's view, the consequences to investors who hold either ARRA bonds or tax-exempt municipal securities are comparable. Therefore, the Commission believes that this minor revision to this disclosure event will allow investors in ARRA Bonds, like investors in tax-exempt bonds, to have timely access to important information concerning risks that may affect the tax status of their securities.

E. Addition of Events To Be Disclosed Under a Continuing Disclosure Agreement

The Commission is adopting, as proposed, the amendments adding four new events to paragraph (b)(5)(i)(C) of the Rule. These additional events are: (1) Tender offers; (2) bankruptcy, insolvency, receivership, or similar proceeding of the obligated person; (3) the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and (4) appointment of a successor or additional trustee, or the change of name of a trustee, if material. The Commission believes that the amendments relating to submission of events that are added to the Rule are justified by the transparency benefits that will result to investors, broker-dealers, analysts, and others.

1. Tender Offers

The Commission is adopting, as proposed, the amendment to add tender offers to the list of events in paragraph (b)(5)(i)(C)(8) of the Rule.[255] Under the amendment, a Participating Underwriter must reasonably determine that the issuer or obligated person has agreed in its continuing disclosure agreement to provide notice of tender offers to the MSRB. A number of commenters supported the addition of this event item.[256] Two commenters stated that notice of a tender offer will provide meaningful information regarding a particular bond.[257]

Some commenters, while supporting the amendment to add tender offers, recommended modifying this disclosure event. One commenter noted that it is not uncommon for tender offers to be made only to select municipal security holders.[258] This commenter stated that, in this instance, there is no reason to inform other security holders of a limited tender offer, unless the offer would have a material impact on those holders.[259] Accordingly, the commenter recommended restricting notice to only those tender offers made to all holders.[260] Further, this commenter and three other commenters suggested that the Commission add a materiality qualifier to the provision.[261]

The Commission continues to believe that notice of the occurrence of any tender offer should be made available to all bondholders because this information is important to an investor's ability to make an informed and timely decision regarding the security that is the subject of the tender offer. Even when tender offers are made to a limited number of bondholders, they may be material to other bondholders' evaluation of their investment. For example, a tender offer may be made to fewer than all bondholders by an obligated person facing financial difficulties. In such instance, those holders who are not invited to participate in the tender offer would have the option to consider and react (*i.e.,* buying, selling, or holding such securities) to the information contained in the notice about such a tender offer.[262]

Further, during a tender offer, some investors presently may be left in doubt as to whether their securities are subject to the offer because information about the tender offer is not readily available to them.[263] To determine the facts about a tender offer, it often is necessary for investors to seek pertinent information directly from the issuer or other obligated person. Currently, some investors may not be able to learn of the existence of a tender offer in a timely fashion, which may impair such investors' ability to react to the offer (*i.e.,* buying, selling, holding, and if the offer is available to them, tendering securities).[264] Consequently, the Commission believes that notice of the existence of a tender offer in a timely manner and in any event within ten business days of its occurrence would help to improve the timely availability of tender offer information so that investors would be offered the opportunity to make informed, timely decisions about whether to buy, sell, hold or tender their securities.[265] Furthermore, the Commission believes that such communication provides market participants with relevant

[254] *See, e.g.,* I.R.C. §§ 54A and 54AA.

[255] In passing the Williams Act, Public Law 90–439, in 1968, Congress recognized that regulation of tender offers was necessary for the purposes of disclosure of material information and substantive protection to investors. *See* Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) at 1. Municipal securities, however, generally are not subject to Commission rules governing tender offers, including rules that set forth disclosure, time periods, and other requirements governing tender offers by issuers.

[256] *See* ICI Letter at 8, Fidelity Letter at 2, NFMA Letter at 2, and SIFMA Letter at 4.

[257] *See* ICI Letter at 8 and Fidelity Letter at 2.

[258] *See* NABL Letter at 7.

[259] *Id.*

[260] *Id.*

[261] *See* Connecticut Letter at 2, GFOA Letter at 4, Metro Water Letter at 2, and NABL Letter at 7.

[262] In addition, two commenters recommended that the Commission provide a definition of "tender offer" for purposes of the Rule. *See* Kutak Letter at 4 and GFOA Letter at 4. Although the term "tender offer" has not been defined, the Commission notes that the meaning of "tender offer" for municipal securities purposes is no different from the meaning of "tender offer" for other securities subject to the tender offer provisions of the Exchange Act and related rules. *See generally* Rule 14d–1(g) under the Exchange Act. 17 CFR 240.14d–1(g). One of these commenters also suggested that the tender agent, rather than issuer, should submit the notice to the MSRB. *See* GFOA Letter at 4. The Commission notes, however, that an issuer already may negotiate to designate a tender agent to submit a tender offer notice to the MSRB on its behalf. *See* 17 CFR 240.15c2–12(b)(5)(i).

[263] *See* Proposing Release, *supra* note 2, 74 FR at 36843.

[264] Tender offers typically require an investor to respond within a limited time frame. *See* Proposing Release, *supra* note 2, 74 FR at 36843, n. 104.

[265] The amendment retains in Rule 15c2–12(b)(5)(i)(C)(8) the requirement that Participating Underwriters reasonably determine that the issuer or obligated person has agreed in a continuing disclosure agreement to provide to the MSRB notice of bond calls, if material. *See supra* Section III.C.3. Thus, unlike with respect to tender offers, the issuer will be able to make a materiality determination with respect to submitting a notice regarding a bond call. The Commission believes that this distinction is appropriate in light of the various types of bond calls (*e.g.,* sinking fund redemptions, extraordinary redemptions, and optional redemptions) that can occur. In addition, the specific amounts to be redeemed and dates for some redemptions (*e.g.,* sinking fund redemptions) are generally included in official statements. Therefore, information about such events should already be available to investors. Similar information regarding tender offers is not currently as readily available to investors.

information about the offer and should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.[266]

2. The Occurrence of Bankruptcy, Insolvency, Receivership, or Similar Events Regarding an Issuer or an Obligated Person

The Commission is adopting, as proposed, the amendment to add new paragraph (b)(5)(i)(C)(12) to the Rule, which requires a Participating Underwriter to reasonably determine that an issuer or obligated person has agreed in its continuing disclosure agreement to provide notice about bankruptcy, insolvency, receivership or a similar event with respect to the issuer or an obligated person. The Commission also is adopting, as proposed,[267] the Note to new paragraph (b)(5)(i)(C)(12), which explains that such an event will be considered to have occurred in the following instances: the appointment of a receiver, fiscal agent or similar officer for an obligated person in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the issuer or obligated person, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan of reorganization, arrangement or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the obligated person.[268] Most commenters supported the addition of bankruptcy to the list of disclosure events.[269]

As the Commission noted in the Proposing Release, although municipal issuers and obligated persons are rarely involved in bankruptcy, insolvency, receivership, or similar events, the occurrence of these events can significantly impact the value of the municipal securities.[270] Thus, information about these events is important to investors and other market participants.[271] Being informed about the occurrence of these events will allow investors to make informed decisions about whether to buy, sell, or hold the municipal security.[272]

Some commenters, however, opposed the addition of bankruptcy to the list of disclosure events if it was not limited by a materiality condition.[273] One of these commenters also stated that the bankruptcy provision should apply only to those obligated persons covered by paragraph (b)(5)(i)(A) of the Rule (*i.e.,* those obligated persons for whom annual financial information or operating data is presented in the final official statement).[274] This commenter believed that, without such a revision, this disclosure event could result in an obligation to provide a notice with respect to events that are largely irrelevant to the decision to buy, hold, or sell a particular issue of municipal securities.[275] In addition, this commenter believed that issuers or other obligated persons may be required to undertake perpetual due diligence of all obligated persons to determine whether any such events have occurred, including those obligated persons for whom financial or operating data is not included in the final official statement.[276]

The Commission believes that it is unnecessary to include a materiality condition for this event item. Bankruptcies and similar events involving municipal issuers or obligated persons are significant occurrences that are likely to affect the value of a particular security. Investors should be informed about such events so that they can make their own evaluation about the event's importance under the particular facts and circumstances. Moreover, since such bankruptcies and similar events are relatively rare,[277] the Commission believes that the burden on issuers or obligated persons to provide notice will be modest and is justified by the potential significance of these events to investors.

The Commission also does not believe that it is necessary to limit paragraph (b)(5)(i)(C)(12) to obligated persons for whom annual financial information and operating data is included in the final official statement. The Commission believes that there are a variety of methods by which issuers or obligated persons could avoid having to monitor directly the activities of other obligated persons, such as obtaining, at the time of a primary offering, an agreement from obligated persons for whom annual financial information and operating data are not included in the final official statement that they will provide information pertaining to a bankruptcy, insolvency, receivership or similar event to the party responsible for filing event notices.

[266] The recent events in the market for ARS illustrate the need to provide timely notice (*i.e.,* within ten business days) of the occurrence of a tender offer. Since approximately mid-February of 2008, the market for ARS has experienced severe illiquidity, with adverse consequences to investors who purchased what they may have believed to be liquid, cash equivalent investments. In response, some issuers and obligated persons offered to purchase some or all of their outstanding ARS from investors. *See* Proposing Release, *supra* note 2, 74 FR at 36843, n. 107. Notices about these tender offers, however, may not always be widely disseminated. *See* Proposing Release, *supra* note 2, 74 FR at 36843, n. 107.

[267] The Commission is correcting a typographical error in the Note to state "plan of reorganization" rather than "plan or reorganization."

[268] *See* Form 8–K, Item 1.03 for provisions relating to bankruptcy or receivership that are applicable to entities subject to Exchange Act reporting requirements. 17 CFR 249.308. Item 1.03 of Form 8–K requires the registrant to provide specified items of disclosure on Form 8–K if a receiver, fiscal agent, or similar officer has been appointed for a registrant or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state and federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the registrant or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority. The proposed Rule 15c2–12 event item is intended to be consistent with the Form 8–K, Item 1.03 provisions applicable to entities subject to the reporting requirements of the Exchange Act. *See also* Proposing Release, *supra* note 2, 74 FR at 36844.

[269] *See* GFOA Letter at 4, NFMA Letter at 2, Connecticut Letter at 2, ICI Letter at 8, Fidelity Letter at 2, NABL Letter at 8, California Letter at 2, and San Diego Letter at 2.

[270] *See* Proposing Release, *supra* note 2, 74 FR at 36844. Under paragraph (b)(5)(i)(C)(2) of the Rule, notice of a material "non-payment related default" is to be provided to the MSRB pursuant to a continuing disclosure agreement. The Commission understands that the governing documents for some municipal securities include bankruptcy, insolvency, receivership, or similar events involving an issuer or obligated person as a "non-payment related default." *See* National Association of Bond Lawyers ("NABL") Form Indenture, dated June 1, 2002 ("NABL Form Indenture"). However, this may not uniformly be the case. This amendment, therefore, will help improve the availability of notice of these events to all investors and market participants.

[271] *See* Proposing Release, *supra* note 2, 74 FR at 36844, n. 112.

[272] As the Commission noted in the Proposing Release, it is aware that bonds are often secured by letters of credit, bond insurance, and other forms of credit enhancement that some have argued could reduce the importance of the creditworthiness of an issuer or obligated person. However, the Commission has long been of the view that information regarding obligated persons generally is material to investors in credit-enhanced offerings. *See* 1989 Adopting Release, *supra* note 8, 54 FR at 28812 ("The presence of credit enhancements generally would not be a substitute for material disclosure concerning the primary obligor on municipal bonds."). *See also* Regulation AB, 17 CFR 229.1100 *et seq.* The Commission received no comments on these statements.

[273] *See* Connecticut Letter at 2, GFOA Letter at 4, Metro Water Letter at 2, and NABL Letter at 8.

[274] *See* NABL Letter at 8–9.

[275] *Id.*

[276] *Id.*

[277] To illustrate, it has been reported that there were 183 municipal bankruptcies from 1980 to early 2007. *See* Sylvan G. Feldstein, *The Handbook of Municipal Bonds,* April 25, 2008 (Wiley).

3. Merger, Consolidation, Acquisition, and Sale of All or Substantially All Assets

The Commission is adopting, as proposed, the amendment to add new paragraph (b)(5)(i)(C)(13) to the Rule, which requires a Participating Underwriter to reasonably determine that the continuing disclosure agreement provides for the submission of notice of any of the following events with respect to the securities being offered: The consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.[278]

A number of commenters supported adding mergers, consolidations, acquisitions and substantial asset sales to the list of disclosure events in paragraph (b)(5)(i)(C) of the Rule.[279] In addition, one of these commenters recommended deleting the "ordinary course" and "if material" qualifiers from the proposed rule text, because these transactions "are rarely, if ever, in the "ordinary course of business" or "immaterial."[280]

The Commission believes that notice of the events specified in this new Rule provision is important information for investors and market participants.[281] While these corporate-type events are believed to be rare among governmental issuers,[282] they are not uncommon for obligated persons, such as health care institutions, other non-profit entities, and for-profit businesses.[283] As the Commission noted in the Proposing Release, these events may signal that a significant change in the obligated person's corporate structure could occur or has occurred.[284] In such cases, investors reasonably expect to be informed about the identity and financial condition of the obligated person who would be responsible, following the event, for the payment of the subject security.

In addition, the Commission believes that it is appropriate to retain the "ordinary course" and "if material" conditions because some events, such as small acquisitions, may occur occasionally, but have little or no effect on the value of the municipal security or on an investor's decision whether to buy, sell or hold the security. Similarly, some obligated persons, such as large health care or senior living organizations may be permitted under their loan documents to sell small parcels of real estate that are not necessary to their operations or to change the legal structure of one or more of their component entities (such as a single nursing home), if certain covenants are met. Requiring notices to be filed in the case of all such actions or events that occur would impose a burden on such obligated persons, while providing little useful information to investors.

Two commenters opposed adding mergers and acquisitions to the list of disclosure events.[285] They argued that providing notice of a merger or acquisition, particularly for closely-held companies, upon signing of the relevant agreement would be "anti-competitive," because such agreements often are signed prior to public announcement and are contingent on approval of the municipality and the lender. In their view, such notice could allow competitors to interfere with the transaction's consummation prior to its closing.[286] However, the Commission believes that competition in the market for corporate control could be enhanced, not reduced, by the possibility of disclosure, creating more open conditions for the sale of privately-held companies. The Commission further notes that parties to mergers and acquisition agreements generally may, subject to legal obligations, include remedies in such agreements that are designed to balance the conflicting interests of the buyer and the seller. As noted in the Proposing Release, the Commission believes that notice of such mergers, consolidations, acquisitions and substantial asset sales, if material, is important to investors in assessing the value of their investments.[287] These transactions may have an impact on the issuer's or obligated person's financial condition, which, in turn, would have an impact on the price of the municipal securities issued by such parties and could change the identity of the obligor itself. Accordingly, the Commission believes that these disclosures are justified in light of the importance of this information to investors.

One commenter noted that the disclosure item pertaining to mergers, consolidations, acquisitions and substantial asset sales should be revised so that it only applies with respect to those obligated persons covered by paragraph (b)(5)(i)(A) of the Rule (*i.e.,* those obligated persons for whom annual financial information or operating data is presented in the final official statement).[288] This commenter

[278] The Commission also notes that reporting companies are required to make disclosures upon the occurrence of similar events. *See* Items 1.01 and 2.01 of Form 8–K relating to entry into a material definitive agreement and completion of the acquisition or disposition of assets, respectively, which require entities subject to Exchange Act reporting requirements to disclose specified information within four business days of the occurrence of such events. 17 CFR 249.308. Item 1.01 of Form 8–K requires the registrant to provide specified items of disclosure on Form 8–K if the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant. For purposes of Item 1.01, a "material definitive agreement" means an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more parties to the agreement, in each case whether or not subject to conditions. Item 2.01 of Form 8–K requires the registrant to provide specified items of disclosure on Form 8–K if the registrant or any of its majority-owned subsidiaries has completed the acquisition or disposition of a significant amount of assets, other than in the ordinary course of business.

[279] *See* Kutak Letter at 4, NFMA Letter at 2, SIFMA Letter at 4, Connecticut Letter, GFOA Letter at 4, ICI Letter at 8–9, and Fidelity Letter at 3. Two of these commenters recommended that this provision also provide for the submission of additional information pertaining to such transactions, including offer prices, changes in offer prices, withdrawal rights, identity of the offeror, the ability of the offeror to finance the offer, conditions of the offer, time frame of the transaction, and manner of tendering securities and method of acceptance. *See* ICI Letter at 8–9 and Fidelity Letter at 3. The Commission is taking a targeted approach at this time. These suggested modifications would require more detailed disclosures than the Commission intended for purposes of this rulemaking. Nevertheless, some issuers may voluntarily decide to incorporate some or all of this information in an event notice that is submitted pursuant to a continuing disclosure agreement.

[280] *See* Fidelity Letter at 2.

[281] *See supra* note 271 (suggesting that disclosure information should include information relating to material acquisitions and dispositions).

[282] *See* Proposing Release, *supra* note 2, 74 FR at 36845, n. 117.

[283] *See* Proposing Release, *supra* note 2, 74 FR at 36845, n. 118.

[284] *See* Proposing Release, *supra* note 2, 74 FR at 36845.

[285] *See* CRRC Letter at 5 and WCRRC Letter.

[286] *Id.*

[287] *See also* Proposing Release, *supra* note 2, 74 FR at 36845.

[288] *See* NABL Letter at 8. This commenter and several other commenters suggested that the Commission add the "if material" qualifier to this event item. *See* Connecticut Letter at 2, GFOA Letter at 4, Metro Water Letter at 2, and NABL Letter at 7. The Commission points out, however, that new paragraph (b)(5)(i)(C)(13) contains a materiality condition. As the Commission noted in the Proposing Release, it does not believe that all mergers, consolidations, acquisitions, and substantial asset sales are necessarily of sufficient importance that information pertaining to them needs to be made available in every instance. For example, a merger could involve the combination of a shell corporation or a small entity into a very large health care organization that is a conduit borrower. Such mergers generally would not have a significant impact on the business or financial condition of the larger corporation and, under all of the applicable facts and circumstances, generally would not be important to investors. *See* Proposing

believed that issuers or other obligated persons may be required to undertake perpetual due diligence on all obligated persons to determine whether any such events occurred, including those for whom financial or operating data is not included in the final official statement.[289]

Similar to the Commission's discussion in the context of the bankruptcy and insolvency disclosure event, the Commission does not believe that it is appropriate to limit paragraph (b)(5)(i)(C)(13) to obligated persons for whom annual financial information and operating data is presented in the final official statement. The Commission believes that there are a variety of methods by which issuers or obligated persons could avoid having to monitor directly the activities of other obligated persons, such as obtaining, at the time of a primary offering, an agreement from obligated persons for whom annual financial information and operating data are not included in the final official statement that they will provide information pertaining to a merger, consolidation, acquisition or substantial asset sale to the party responsible for filing event notices. The Commission also notes that a merger, consolidation, acquisition or substantial asset sale involving an obligated person would not trigger an event notice if such transaction by an obligated person does not meet the materiality standard.

4. Successor, Additional, or Change in Trustee

Finally, the Commission is adopting, as proposed, the amendment to add new paragraph (b)(5)(i)(C)(14) to the Rule, which requires that a Participating Underwriter must reasonably determine that the continuing disclosure agreement provides for the submission of notice of an appointment of a successor or additional trustee, or a change of name of a trustee, if material. Most commenters expressed general support for the addition of this event item to the Rule.[290]

Two commenters, however, expressed concern regarding the increased costs and burdens that some issuers would incur to report changes pertaining to trustees within the Rule's ten business day time frame.[291] One of these commenters noted that, "in the case of the small less sophisticated borrower * * * obligors do not have the resources available to track and report on changes in the trustee on a timely basis or to determine the materiality of a name change."[292] The other commenter noted that "turmoil in the banking sector has meant frequent cha[n]ges in trustees," and that "many issuers and obligated persons are not informed of these changes within the proposed ten-day time frame, much less in sufficient time to identify the need to file a notice and prepare the relevant notice within such time period."[293] These commenters recommended either that knowledge of the event rather than the occurrence of the event trigger the time period to disclose the event, or that the trustee disclose the changes directly to the MSRB.[294]

The Commission continues to believe in the importance of an investor's ability to be informed about material changes in a trustee's identity, given the significance of trustees for bondholders.[295] A trustee makes critical decisions that impact investors and is under a duty to represent the interests of bondholders. For example, a trustee often must determine whether: Proposed amendments to the governing documents of the municipal security are permissible without bondholder consent; parity obligations may be issued; security may be released; or a default event has occurred.[296] In addition, a trustee is responsible for sending payments to investors and computing applicable interest rates. In some cases, a trustee may be responsible for taking certain actions at the direction of a designated percentage of bondholders.[297] A trustee also may be responsible for providing information requested by investors. Often, the trustee serves as the issuer's dissemination agent for continuing disclosures. Although under normal circumstances the identity of the trustee may have little or no influence on a decision to buy or sell a security, bondholders would need to know who to contact, particularly when an issuer or other obligated person may be experiencing financial difficulty. The Commission is currently unaware of any method by which investors, particularly individual investors, have a consistent means of obtaining up-to-date information about changes to the identity of the trustee. In the Commission's view, these factors support the need for investors to know the identity of the trustee.

The Commission believes that issuers and other obligated persons could take steps to become aware promptly of any change of trustee or in the name of a trustee by obtaining an agreement from the trustee to provide advance notice of such an event to them, *e.g.,* by having the indenture specify that the trustee will immediately provide this information to the issuer or obligated person.[298] Furthermore, the addition of a substitute or additional trustee generally involves the participation of the issuer.[299] In such an event, the issuer would likely have adequate time to comply with its undertaking to submit notice of a change in trustee event within the requisite ten business day time frame in order for investors to become aware of the identity of the new trustee. Finally, an issuer or other obligated person could elect to designate the trustee as its agent to provide notice of such an event directly to the MSRB.[300]

A few commenters expressed concerns about the inclusion of a materiality condition in this provision.[301] Two commenters noted that small or less sophisticated issuers may have difficulty determining the materiality of a trustee's name change.[302] Another commenter suggested not including the materiality condition because it believed that all trustee changes are material and "it is critical that investors are informed of such changes as their rights are generally exercised through the actions of the trustee."[303] One commenter suggested that the Commission also should require that the event notice include the trustee's new contact information.[304]

As noted in the Proposing Release, the Commission believes that whether a change involving a trustee is material

Release, *supra* note 2, 74 FR at 36845. The Commission received no comments on this statement.

[289] *See* NABL Letter at 8.

[290] *See* Connecticut Letter at 2, NFMA Letter at 2, SIFMA Letter at 4, ICI Letter at 8, Fidelity Letter at 3, and GFOA Letter at 4.

[291] *See* CHEFA Letter at 3 and NAHEFFA Letter at 4.

[292] *See* CHEFA Letter at 3.

[293] *See* NAHEFFA Letter at 4.

[294] *Id.*

[295] *See* Proposing Release, *supra* note 2, 74 FR at 36845–46.

[296] *See* NABL Form Indenture, *supra* note 270.

[297] *Id.*

[298] *See infra* Section IV., discussing the obligations of underwriters of municipal securities under the antifraud provisions of the federal securities laws, and note 351.

[299] *See, e.g.,* NABL Form Indenture, *supra* note 270.

[300] Rule 15c2–12(b)(5)(i) permits an issuer or obligated person to provide documents to the MSRB either directly or indirectly through an indenture trustee or a designated agent. *See* 17 CFR 240.15c2–12(b)(5)(i).

[301] *See* CHEFA Letter at 3, NAHEFFA Letter at 4, and Fidelity Letter at 3.

[302] *See* CHEFA Letter at 3 and NAHEFFA Letter at 4.

[303] *See* Fidelity Letter at 3.

[304] *See* NFMA Letter at 2. Issuers should consider including the trustee's updated contact and identification information in any notice regarding a change in the trustee.

must be determined through a review of the particular facts and circumstances surrounding such an event.[305] It is possible that a change is so minor that it would not be material. For example, a name change such as "ABC National Bank and Trust Company of XYZ," to "ABC National Bank and Trust Company" may not be material in the absence of other factors, such as a change of the location at which the trustee can be reached.[306] On the other hand, when a trustee transfers all or part of its trust operations to a different organization, on account of a merger or otherwise, the Commission believes that it is important for a bondholder to be able to determine the identity of the new trustee.

F. Other Comments

Several commenters advocated additional changes to the Rule. Two commenters suggested that the Commission establish a definitive time period within which the delivery of required ongoing financial information should be provided.[307] Some commenters also suggested that the Commission add other disclosure events to the Rule. These events included: (i) Long-term funding commitments for payments; [308] (ii) potential termination liabilities for an issuer's interest rate swaps; [309] (iii) the creation of any material financial obligation (including contingent obligations); [310] (iv) a "catch all" event subject to a materiality determination; [311] (v) clarification of the tax-exempt status of a bond; [312] (vi) modifications to escrow agreements or escrows; [313] (vii) various events related to swap transactions; [314] (viii) the conversion of bank bonds to a loan or term note; [315] and (ix) the termination of a conditional liquidity facility.[316] Two commenters requested that the Commission provide interpretative guidance clarifying that climate risk disclosure is material information that should be disclosed to bondholders.[317] Finally, one commenter recommended that the Rule should require every continuing disclosure agreement to include language that successor parties will be bound by the terms of the agreement.[318]

Other commenters proffered additional recommendations to improve the municipal securities market in general and its transparency. In this regard, three commenters suggested that the Commission petition Congress to repeal the Tower Amendment, which restricts the Commission from directly imposing disclosure requirements on municipal issuers.[319] One commenter recommended that the Commission establish specific "listing" and "de-listing" conditions for the MSRB's EMMA system.[320] Another commenter suggested creating a 48-hour right of rescission for retail bond buyers to rescind a transaction if the seller has misrepresented information about a particular bond offering.[321] Finally, one commenter suggested the creation of an on-line marketplace for bond dealers and individuals to buy or sell municipal securities.[322]

The Commission welcomes the foregoing views and suggestions to revise Rule 15c2–12 and improve the transparency and other aspects of the market for municipal securities. As evidenced by its adoption of the 2008 Amendments and today's amendments, the Commission is committed to considering proposals to further enhance the scope of municipal market disclosures and their dissemination to investors. Although the Commission, in this rulemaking, is taking a targeted approach at this time, it will consider commenters' views as it continues its efforts to bring greater transparency and other improvements to the municipal securities market.

G. Compliance Date and Transition

The amendments to Rule 15c2–12 will impact only those continuing disclosure agreements that are entered into in connection with primary offerings of municipal securities that are subject to the Rule and that occur on or after the December 1, 2010 compliance date of these amendments. The Commission understands that existing undertakings by issuers and obligated persons that were entered into prior to the compliance date of these amendments do not require a broker, dealer, or municipal securities dealer to reasonably determine that the issuer or other obligated person had agreed to provide notice of specified events in a timely manner not in excess of ten business days of the event's occurrence or include the additional items discussed above that the amendments added to paragraph (b)(5)(i)(C) of the Rule. In addition, such existing undertakings provide for the submission of the events specified in paragraph (b)(5)(i)(C) of the Rule, "if material." Further, a Participating Underwriter in remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the compliance date of these amendments, and that continuously have remained outstanding in the form of demand securities, is not required to reasonably determine that the issuer or other obligated person has entered into a continuing disclosure agreement, as prescribed by the amended Rule. Likewise, in the case of municipal securities subject to a continuing disclosure agreement entered into prior to the compliance date of these amendments, the recommending broker, dealer, or municipal securities dealer will receive notice solely of those events covered by that continuing disclosure agreement, namely, the eleven events specified in the Rule prior to today's amendments. These continuing disclosure agreements do not cover any of the items to be added to the Rule by the amendments. Thus, in the case of continuing disclosure agreements entered into prior to the compliance date of these amendments, it is not necessary for the recommending broker, dealer, or municipal securities dealer to have procedures in place that provide reasonable assurance that it receive prompt notice of the events added to the Rule by these amendments.

The Commission requested comment on the impact of the amendments with respect to brokers, dealers, and municipal securities dealers that recommend the purchase or sale of municipal securities. The Commission received one comment [323] in response to its inquiry regarding the potential effects and implications of existing continuing disclosure agreements having different terms (*e.g.,* lacking the proposed additional events for which notices would be sent to the MSRB and the specified ten business day deadline as discussed above) than continuing disclosure agreements entered into on or after the compliance date of these amendments. This commenter recommended that the Commission require that each continuing disclosure agreement entered into by an issuer after

[305] *See* Proposing Release, *supra* note 2, 74 FR at 36845, n. 122.

[306] The Commission received no comments on this example.

[307] *See* e-certus Letter I at 9 and Fidelity Letter at 3–4.

[308] *See* Shalanca Letter at 1.

[309] *See* Folts Letter at 1.

[310] *See* ICI Letter at 9 and Fidelity Letter at 3.

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *See* NFMA Letter at 3.

[315] *Id.*

[316] *Id.*

[317] *See* T.R. Rose and Sierra Letter and NRDC Letter.

[318] *See* Fidelity Letter at 4.

[319] *See* e-certus Letter I at 3, ICI Letter at 10–11, and Fidelity Letter at 3.

[320] *See* e-certus Letter I at 10.

[321] *See* Becker Letter.

[322] *See* Boatwright Letter.

[323] *See* Fidelity Letter at 5.

the compliance date of these amendments should, by its terms, amend all prior continuing disclosure agreements entered into by the issuer to incorporate the new requirements of the amended Rule.[324] The Commission observes that, under the commenter's suggestion, the effect would be to mandate the amendment of existing contracts. The Commission believes that the better course is to apply the amendments to continuing disclosure agreements entered into on or after the compliance date. While the Commission is mindful of the implications of differing disclosure obligations that will occur over time as a result of this decision, this difference should diminish as existing municipal securities mature or are redeemed.

Four commenters concurred with the Commission's proposed compliance date of no earlier than three months after adoption of the amendments.[325] The Commission also received comments suggesting various time frames for the compliance date of the amendments. One commenter recommended a compliance date no later than three months after Commission approval,[326] and another commenter recommended no later than nine months after Commission approval.[327] Two commenters suggested a time frame of no earlier than six months after the adoption of the amendments by the Commission.[328] These two commenters believed that this suggested time frame is necessary to provide issuers, brokers and dealers with sufficient time to familiarize themselves with new amendments to the Rule and to establish processes to comply with the new amendments.[329] In addition, one of these commenters suggested an even further unspecified delay for implementation of the amendments pertaining to demand securities.[330]

The Commission has considered commenters' various recommendations and believes that a compliance date of approximately six months from the date of the Commission's approval of the amendments is appropriate. The Commission believes that this six month period should be sufficient time for the MSRB to make the necessary modifications to its EMMA system, for Participating Underwriters to revise their procedures to comply with the Rule, as revised, and for issuers and obligated persons to become aware of the amendments and plan for their implementation. Accordingly, the Commission is establishing December 1, 2010 as the compliance date of these amendments.

IV. Interpretive Guidance With Respect to Obligations of Participating Underwriters

The Commission is aware that municipal securities industry participants have expressed concern that some municipal issuers and other obligated persons may not consistently submit continuing disclosure documents, particularly event notices and failure to file notices, in accordance with their undertakings in continuing disclosure agreements.[331] Municipal security holders' access to meaningful information promotes informed investment decision-making about whether to buy, sell, or hold municipal securities [332] and better protection against misrepresentation and fraud. Availability of that information also will aid brokers, dealers, and municipal securities dealers in complying with their obligations to have a reasonable basis for recommending municipal securities. In the Commission's view, the flow of municipal securities disclosure to investors and other market participants depends on issuers and obligated persons abiding by their undertakings in continuing disclosure agreements.[333] Accordingly, the Commission emphasizes that it is important for an underwriter in a municipal offering to evaluate carefully the likelihood that the issuer or obligated person will comply on a timely basis with the undertakings it has made.[334]

In prior releases, the Commission set forth its interpretations of the obligations of municipal underwriters under the antifraud provisions of the federal securities laws.[335] The Commission discussed the duty of underwriters to the investing public to have a reasonable basis for recommending any municipal securities and, in fulfilling that obligation, their responsibility to review the issuer's or obligated person's disclosure documents in a professional manner with respect to the accuracy and completeness of statements made in connection with the offering.[336] The Commission today reaffirms its previous interpretations and provides additional guidance with respect to underwriters' responsibilities under the antifraud provisions of the federal securities laws.[337]

The provisions of paragraph (b) of Rule 15c2–12 are intended to assist a municipal underwriter in meeting its "reasonable basis" obligations, including the requirement that an underwriter receive and review a nearly complete final official statement prior to bidding for or purchasing securities in connection with the offering.[338] Under paragraph (b)(5)(i)(C) of the Rule, the underwriter is obligated to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract, for the benefit of the bondholders, to provide continuing disclosure documents to the MSRB.[339] Further, the Rule's definition of "final official statement" provides for the disclosure of any instances in the previous five years in which any person identified in the continuing disclosure agreement has failed to comply, in all material respects, with any previous

[324] *Id.*

[325] *See* Kutak Letter, CHEFA Letter, Fidelity Letter at 2, and ICI Letter at 10.

[326] *See* NFMA Letter at 3.

[327] *See* MSRB Letter at 2.

[328] *See* NABL Letter at 10 and GFOA Letter at 5.

[329] *Id.*

[330] *See* NABL Letter at 10.

[331] *See* Proposing Release, *supra* note 2, 74 FR at 36847. *See also* the comments of participants at the *2001 SEC Municipal Market Roundtable—Secondary Market Disclosure for the 21st Century,* (available at *http://www.sec.gov/info/municipal/roundtables/thirdmuniround.htm*), E-mail from Peter J. Schmitt, CEO, DPC Data Inc., to the Commission, Rule—Comments, dated September 19, 2008, regarding the 2008 Proposed Amendments, and Peter J. Schmitt, *Estimating Municipal Securities Continuing Disclosure Compliance: A Litmus Test Approach* (available at *http://www.dpcdata.com/html/about-researchpapers.html*).

[332] *See, e.g.,* 2008 Amendments Adopting Release, *supra* note 8, 73 FR at 76129.

[333] *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59594–5. The Commission notes that demand securities are subject to paragraph (b)(5), as well as paragraph (c), of the Rule as a result of the amendments being adopted today.

[334] The Commission received no comments on this statement.

[335] *See* 1988 Proposing Release, *supra* note 58; the 1989 Adopting Release, *supra* note 8, 54 FR at 28811–12; and Securities Exchange Act Release No. 33741 (March 9, 1994), 59 FR 12748 (March 17, 1994) ("1994 Interpretive Release") (reaffirming the Commission's interpretation of the obligations of municipal underwriters under the antifraud provisions of the federal securities laws).

[336] *See* 1989 Adopting Release, *supra* note 8, 54 FR at 28811. *See also* 1988 Proposing Release, *supra* note 128, 53 FR at 37787.

[337] In light of the underwriters' obligation, as discussed in the 1988 Proposing Release, *supra* note 335, 53 FR at 37787–91, the 1989 Adopting Release, *supra* note 8, 54 FR 28811–12, and in the 1994 Interpretive Release, *supra* note 335, 59 FR 12757–58, to review the official statement and to have a reasonable basis for its belief in the accuracy and completeness of the official statement's key representations, the Commission noted that a disclaimer by an underwriter of responsibility for the information provided by the issuer or other parties without further clarification regarding the underwriter's belief as to accuracy, and the basis therefor, is misleading and should not be included in official statements. *See* 1994 Interpretive Release, *supra* note 335, 59 FR 12758 n. 103.

[338] *See* 1988 Proposing Release, *supra* note 335, 53 FR at 37790.

[339] Pursuant to the 2008 Amendments, the MSRB is the sole information repository.

informational undertakings in the continuing disclosure agreement.[340] When the Commission in 1994 adopted these provisions of the Rule, it stated its belief that the failure of the issuer or other obligated person to comply in all material respects with prior informational undertakings is information that is important to the market and, therefore, should be disclosed in the final official statement.[341] As the Commission noted at that time, the provision in the Rule regarding disclosure of a prior history of material non-compliance by issuers or other obligated persons with their undertakings was specifically intended to serve as an incentive to comply with their undertakings to provide secondary market disclosure.[342] Moreover, such disclosure would assist underwriters and others in assessing the reliability of issuers' or obligated persons' disclosure representations.[343] The Commission continues to believe in the importance of these Rule provisions and would like to remind underwriters of their obligations under Rule 15c2–12.

The Commission previously has stated that, in its view, the reasonableness of a belief in the accuracy and completeness of the key representations in the final official statement, and the extent of a review of the issuer's or other obligated person's situation necessary to arrive at that belief, will depend upon all the circumstances.[344] In both negotiated and competitively bid municipal offerings, the Commission expects, at a minimum, that underwriters will review the issuer's disclosure documents in a professional manner for possible inaccuracies and omissions. The Commission previously has provided a non-exclusive list of factors that it believes generally would be relevant in determining the reasonableness of an underwriter's basis for assessing the truthfulness of key representations in final official statements.[345] These factors include: (1) The extent to which the underwriter relied upon municipal officials, employees, experts, and other persons whose duties have given them knowledge of particular facts; (2) the role of the underwriter (manager, syndicate member, or selected dealer); (3) the type of bonds being offered (general obligation, revenue, or private activity); (4) the past familiarity of the underwriter with the issuer; (5) the length of time to maturity of the bonds; and (6) whether the bonds are competitively bid or are distributed in a negotiated offering.[346] Sole reliance on the representations of the issuer will not suffice.[347]

The Commission has determined further to expound upon its prior interpretations regarding municipal underwriters' responsibilities. As articulated in a prior interpretation, the Commission believes that it is doubtful that an underwriter could form a reasonable basis for relying on the accuracy or completeness of an issuer's or obligated person's ongoing disclosure representations, if such issuer or obligated person has a history of persistent and material breaches or has not remedied such past failures by the time the offering commences.[348] The Commission believes that if the underwriter finds that the issuer or obligated person has on multiple occasions during the previous five years [349] failed to provide on a timely basis continuing disclosure documents, including event notices and failure to file notices, as required in a continuing disclosure agreement for a prior offering, it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would provide such information under a continuing disclosure agreement in connection with a subsequent offering. In the Commission's view, it also is doubtful that an underwriter could meet the reasonable belief standard without the underwriter affirmatively inquiring as to that filing history.[350] The underwriter's reasonable belief should be based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking. If the underwriter finds that the issuer or obligated person has failed to provide such information, the underwriter should take that failure into account in forming its reasonable belief in the accuracy and completeness of representations made by the issuer or obligated person.[351]

In the Proposing Release, the Commission solicited comment regarding alternative or additional ways in which an underwriter could satisfy its obligations, including obligations to ascertain if issuers or obligated persons are abiding by their municipal disclosure commitments.[352] The Commission specifically requested that commenters address the current practices used by underwriters to satisfy their "reasonable basis" obligation and any aspects of such practices that could be addressed through further Commission interpretation or rulemaking.

The Commission received comments expressing concern that it can be labor intensive and costly,[353] and even impossible,[354] for an underwriter to make a reasonable determination that an issuer or an obligated person would provide continuing disclosure information pursuant to the Commission's interpretation. These commenters particularly pointed to the difficulties underwriters face in examining event disclosures for sufficiency.[355] The commenters also

[340] Rule 15c2–12(f)(3), 17 CFR 15c2–12(f)(3).

[341] *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59594–5.

[342] *Id.* at 59595.

[343] *Id.*

[344] *See* 1988 Proposing Release, *supra* note 58, 53 FR at 37789, and 1989 Adopting Release, *supra* note 8, 54 FR 28811–12.

[345] *Id.*

[346] *Id.*

[347] *See* 1988 Proposing Release, *supra* note 58, 53 FR at 37789.

[348] *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59595.

[349] 17 CFR 240.15c2–12(f)(3).

[350] The Commission notes that, in light of the adoption of the 2008 Amendments and their effective date of July 1, 2009, for disclosures made on or after July 1, 2009, an underwriter could verify that the information has been submitted electronically to the MSRB.

[351] In connection with event notices concerning the appointment of a successor or additional trustee or the name change of a trustee, if an issuer or obligated person obtains a contractual commitment from the trustee specifying that the trustee will provide notice of a change in the trustee's name to the MSRB or the issuer or obligated person, the trustee fails to provide such notice, and the issuer or obligated person otherwise is unaware of the trustee's name change, the Commission believes that the underwriter may take the trustee's failure to notify into account as a substantial mitigating factor in forming a reasonable belief as to the accuracy and completeness of the issuer's or obligated person's representation regarding compliance with its undertakings.

Moreover, for so long as an issuer or obligated person establishes and maintains policies and procedures reasonably designed in light of the relevant facts and circumstances to ensure compliance with its undertaking to provide notice of a rating change with respect to its municipal security to the MSRB in a timely manner, not in excess of ten business days after the occurrence of the rating change, and the issuer or obligated person regularly reviews the effectiveness of its policies and procedures and takes prompt action to remedy any deficiencies, the Commission believes that an underwriter, in forming a reasonable belief as to the accuracy and completeness of the issuer's or obligated person's representations regarding compliance with its undertakings, may take into account the issuer's or obligated person's policies and procedures, regular reviews, and prompt remedial action as a substantial mitigating factor in the event of the issuer's or obligated person's unintentional failure to provide such notice in the prescribed manner.

[352] *See* Proposing Release, *supra* note 2, 74 FR at 36848.

[353] *See* RBDA Letter at 2.

[354] *See* NABL Letter at 11–12 and SIFMA Letter at 4.

[355] *See* NABL Letter at 11–12, RBDA Letter at 2–3, and SIFMA Letter at 4.

noted that, because underwriters are expected to examine disclosures over a five-year period preceding new offerings, they need to continue to depend on the Nationally Recognized Municipal Securities Information Repository ("NRMSIR") network for such information, which entails searching for various filings in each of the NRMSIRs.[356] Consequently, the commenters suggested that underwriters be permitted to rely on representations by issuers or obligated persons that they are in compliance with previous disclosure commitments as a basis for forming a reasonable determination that such persons would comply going forward.[357]

The Commission believes that the interpretation included in the Proposing Release is warranted, and it reiterates that interpretation in this Adopting Release. The Commission continues to believe that the benefits to investors from its interpretation justify the effort required of underwriters to determine whether an issuer has a history of repeatedly and materially breaching its undertakings.[358] The Commission has considered the comments described above and believes that it is appropriate to add to its interpretation to address the circumstances and extent of underwriter reliance on information provided by issuers and obligated persons concerning event disclosures, as raised by these comments.

The Commission acknowledges that it may not be possible in some cases for an underwriter independently to determine whether some events, for which an event notice is necessary, have occurred.[359] In order to obtain this information, an underwriter may take steps, such as asking questions of an issuer and, where appropriate, obtaining certifications from an issuer, obligated person or other appropriate party about facts, such as the occurrence of specific events listed in paragraph (b)(5)(i)(C) of the Rule (without regard to materiality), that the underwriter may need to know in order to form a reasonable belief in the accuracy and completeness of an issuer's or obligated person's ongoing disclosure representations. However, as discussed above, the underwriter may not rely solely upon the representations of an issuer or obligated person concerning the materiality of such events or that it has, in fact, provided annual filings or event notices to the parties identified in its continuing disclosure agreements (*i.e.,* NRMSIRs, MSRB, and State Information Depositories).[360] Instead, an underwriter should obtain evidence reasonably sufficient to determine whether and when such annual filings and event notices were, in fact, provided.[361] The underwriter therefore must rely upon its own judgment, not solely on the representation of the issuer or obligated person, as to the materiality of any failure by the issuer or obligated person to comply with a prior undertaking.[362]

The Commission notes that the obligation of a Participating Underwriter to determine whether an issuer or an obligated person has filed continuing disclosure documents is not new but dates back to when paragraph (b)(5) of the Rule was adopted in 1994.[363] Moreover, the Commission notes that the launch of the MSRB's EMMA system should assist underwriters in complying with their obligations. To the extent underwriters must rely on NRMSIRs for disclosures made prior to the creation of EMMA,[364] the Commission notes that such reliance is time-limited. Since final official statements of offerings subject to the Rule must disclose the failures of an issuer or obligated person to comply with continuing disclosure undertakings only for the previous five years, underwriters presumably will no longer need to rely on various NRMSIRs within approximately four years.[365]

V. Paperwork Reduction Act

The Rule, as amended, contains "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[366] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission 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.

In the Proposing Release, the Commission solicited comments on the collection of information requirements. The Commission noted that the estimates of the effect that the amendments will have on the collection of information were based on data from various sources, including the most recent PRA submission for Rule 15c2–12. As discussed above, the Commission received twenty-nine comment letters on the proposed rulemaking. Of the comment letters the Commission received, some commenters addressed the collection of information aspects of the proposal.[367] The Commission recently received data from the MSRB reflecting the number of submissions to its EMMA system's continuing disclosure service for the eight-month period from July 1, 2009, through February 28, 2010.[368] This data includes

[356] *See* RBDA Letter at 2 and SIFMA Letter at 4.

[357] *See* NABL Letter at 12, RBDA Letter at 3, and SIFMA Letter at 4. Further, one commenter asked the Commission to clarify that underwriters may take into account the significance, materiality, and extenuating circumstances of an issuer's or obligated person's non-compliance with event disclosure provisions of continuing disclosure agreements. *See* NAHEFA Letter at 4. As the Commission has stated above, an underwriter's determination to recommend any municipal security must be on a "reasonable basis." Therefore, the underwriter may consider such factors.

[358] Since the Commission has not applied the primary market provisions of the Rule to demand securities, the definition of "final official statement" does not apply to demand securities. The Commission notes, however, that investors may have an expectation that official statements for demand securities will contain comparable information (such as a failure to comply, in all material respects, with any previous continuing disclosure undertakings) to that referred in the definition of "final official statement" under the Rule.

[359] Some of such information, such as the receipt of proposed or final determinations of taxability, may be known solely to the issuer or obligated person.

[360] Therefore, the underwriter may not likewise rely solely on a written certification from an issuer or obligated person that it has provided all filings or notices.

[361] For example, for annual filings and event notices due prior to July 1, 2009, an underwriter could reasonably rely upon information obtained from NRMSIRs and SIDs. In addition, an underwriter could rely upon other evidence that such information was provided, such as a certified copy of the annual filing or an event notice from a responsible issuer official, representative of an obligated person, or a designated agent and a receipt from a delivery service or other evidence that the information had, in fact, been sent. For filings made on or after July 1, 2009, however, an underwriter should examine the filings available on the MSRB's EMMA system. If the underwriter finds that some annual filings or event notices appear to be missing, it may request the issuer official or representative of an obligated person to provide a written certification and evidence showing whether and when such information was provided to the MSRB.

[362] The Commission notes that the definition of "final official statement" in the Rule provides for the inclusion of any instances in the previous five years in which each person specified pursuant to Rule 15c2–12(b)(5)(ii) failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in Rule 15c2–12(b)(5)(i).

[363] *See* 1994 Amendments Adopting Release, *supra* note 8.

[364] *See* 2008 Amendments Adopting Release, *supra* note 8.

[365] Since EMMA became effective as of July 1, 2009, continuing disclosure documents for approximately the past year can be found centrally within that system. *Id.*

[366] 44 U.S.C. 3501 *et seq.*

[367] *See* NABL Letter, e-certus Letter I, SIFMA Letter, GFOA Letter, Connecticut Letter, California Letter, San Diego Letter, NAHEFFA Letter, CHEFA Letter, Kutak Letter, Halgren Letter, Los Angeles Letter, ICI Letter, Fidelity Letter, Metro Water Letter, NFMA Letter, CRRC Letter, and WCRRC Letter.

[368] *See* e-mail from Ernesto A. Lanza, General Counsel, MSRB, to Martha M. Haines, Assistant

Continued

the number of annual filings, event notices, and failure to file notices that were submitted to EMMA during this period. Because the EMMA system is now in operation and issuers or their agents are submitting continuing disclosure documents to it, the MSRB is able to provide the Commission with numbers for continuing disclosure documents for an eight-month period, based on its actual experience with the new system. When the eight months of EMMA data is annualized, the resulting estimate corresponds closely with the Commission's collection of information for estimates of continuing disclosure submissions in the Proposing Release.[369] The Commission is revising its estimates contained in the Proposing Release slightly, however, to provide estimates based on eight months of actual data provided by the MSRB for annual filings, event notices, and failure to file notices.[370]

A. Summary of Collection of Information

Pursuant to 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, event notices, and failure to file notices (*i.e.,* continuing disclosure documents) to the MSRB in an electronic format as prescribed by the MSRB. Under paragraph (c) of the Rule, a broker-dealer that recommends the purchase or sale of a municipal security is required to have procedures in place that provide reasonable assurance that it will receive prompt notice of any event specified in paragraph (b)(5)(i)(C) of the Rule and any failure to file annual financial information regarding the security.

Under the amendments, the Commission is modifying paragraph (d)(1)(iii) of the Rule by adopting changes to paragraph (d)(5) to the Rule, thereby applying paragraphs (b)(5) and (c) of the Rule to a primary offering of demand securities in authorized denominations of $100,000 or more (*i.e.,* demand securities). This change applies to any initial offering and remarketing that is a primary offering of demand securities occurring on or after the compliance date of the amendments. However, to address commenters' concerns about the impact of the proposal on existing demand securities, the amendment does not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the amendments' compliance date and that continuously have remained outstanding in the form of demand securities (*i.e.,* such securities can qualify for a limited grandfather provision).[371]

Under paragraph (b)(5)(i)(C) of Rule 15c2–12, a Participating Underwriter is required to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide an event notice to the MSRB upon any of the following events: (1) Principal and interest payment delinquencies with respect to the securities being offered; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.[372] Under the amendments, the Commission is deleting the "if material" condition that existed in the Rule with respect to these events.

The Commission, however, is retaining the "if material" condition regarding certain other events listed in paragraph (b)(5)(i)(C) of the Rule. A Participating Underwriter will continue to be required to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide notice to the MSRB with respect to the following events, if material: (1) Non-payment related defaults; (2) modifications to rights of security holders; (3) bond calls; and (4) release, substitution, or sale of property securing repayment of the securities.

In addition, under the amendments, the Commission is adding the following event items to paragraph (b)(5)(i)(C) of the Rule: (1) The issuance by the IRS of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the securities, or other material events affecting the tax status of the security; (2) tender offers; (3) bankruptcy, insolvency, receivership or similar event of the obligated person; (4) the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material; and (5) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

Further, under the amendments, Participating Underwriters will be required to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide event notices to the MSRB, in an electronic format as prescribed by the MSRB, in a timely manner not in excess of ten business days, rather than simply in "a timely manner."

B. Use of Information

By specifying the time period for submission of event notices, expanding the Rule's current categories of events, and modifying an exemption in the Rule for demand securities, the amendments are intended to promptly make available to broker-dealers, institutional and retail investors, and others important information about significant events relating to municipal securities and their issuers or obligated persons. The amendments should assist investors and other municipal securities market participants to obtain information about municipal securities, including demand securities, and thus facilitate their investment decisions and reduce the likelihood of fraud facilitated by inadequate disclosure. In addition, the amendments should provide brokers, dealers, and municipal securities dealers with access to important information about municipal securities

Director and Chief, Office of Municipal Securities, Division, Commission, dated March 3, 2010 (providing statistics relating to the number of submissions to the MSRB's EMMA continuing disclosure service). The MSRB commenced operating the continuing disclosure service of the EMMA system on July 1, 2009.

[369] *See infra* notes 417, 418, and 421.

[370] *See id. See also infra* Section V.D.

[371] *See supra* Section III.A.

[372] 17 CFR 240.15c2–12(b)(5)(i)(C).

that they can use to carry out their obligations under the securities laws. This information may be used by individual and institutional investors, underwriters of municipal securities, other market participants, including broker-dealers and municipal securities dealers, analysts, municipal securities issuers, the MSRB, vendors of information regarding municipal securities, the Commission and its staff, and the public generally.

C. Respondents

The paperwork collection associated with the Commission's amendments to Rule 15c2–12 applies to broker-dealers, issuers of municipal securities, and the MSRB. Although in the Proposing Release the Commission estimated that its proposed amendments would not change the number of broker-dealer respondents, the Commission estimated that there would be an increase in the number of issuer respondents. Because the proposed amendments would have expanded the types of securities covered under subparagraphs (b)(5) and (c) of the Rule, there would have been an increase in the number of issuers having a paperwork burden. As discussed below, the Commission estimated that the proposed revision of the Rule's exemption for demand securities would increase the number of issuers with a paperwork burden by 2,000 issuers, for a total of 12,000 issuer respondents.[373] In the Proposing Release, the Commission estimated that the number of respondents impacted by the paperwork collection associated with the Rule would consist of 250 broker-dealers,[374] 12,000 issuers,[375] and the MSRB.[376] The Commission included these estimates of the number of respondents in the Proposing Release and received no comments on them. The Commission continues to believe that they are appropriate.

As discussed above, the Commission is revising its amendment to the Rule's exemption for demand securities to include a limited grandfather provision for remarketings of currently outstanding demand securities.[377] The Commission believes that fewer issuers initially will be affected by the amendments than estimated in the Proposing Release as a result of the limited grandfather provision, which could result in a somewhat lower number of issuer respondents that are subject to the collection of information under the Rule than estimated in the Proposing Release. However, the Commission notes that the effects of the limited grandfather provision will diminish over time as demand securities mature or are redeemed and new demand securities that are subject to the Rule amendments are issued. In addition, the Commission has no reason to believe the overall number of issuers of demand securities will change materially going forward as a result of these amendments. Because of the effects of the limited grandfather provision will diminish over time, the Commission continues to believe that 12,000 issuer respondents is an appropriate estimate.

D. Total Annual Reporting and Recordkeeping Burden

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

1. Broker-Dealers

As discussed in the Proposing Release, the Commission estimated that approximately 250 broker-dealers potentially could serve as Participating Underwriters in an offering of municipal securities.[378] The Commission received no comments on this estimate. The Commission has reviewed this estimate and continues to believe that, under the amendments, the maximum number of broker-dealers subject to a paperwork burden will be 250.

a. Amendment To Modify the Exemption for Demand Securities

As discussed in the Proposing Release, the Commission estimated that the total annual burden on all 250 broker-dealers under the Rule is 250 hours (1 hour annually per broker-dealer).[379] In the Proposing Release, the Commission estimated that the amendment to modify the exemption from the Rule for a primary offering of demand securities would increase the number of issuers with municipal securities offerings that are subject to the Rule annually by 20%.[380] This percentage was based on the Commission's estimate of the ratio of demand securities outstanding to the municipal securities market generally.[381]

As noted above, the Commission is adopting a limited grandfather provision with respect to currently outstanding demand securities. Although the Commission believes that the limited grandfather provision initially could result in a somewhat lower number of issuer respondents, for the reasons noted above, it continues to believe that a 20% increase in the number of issuers with offerings subject to the Rule is appropriate.[382]

As discussed in the Proposing Release, the Commission estimated that this 20% increase in the number of issuers with offerings subject to the Rule also would increase the estimated average annual burden for each broker-

[373] *See* Proposing Release, supra note 2, 74 FR at 36849–50. *See also infra* note 402 and accompanying text.

[374] As discussed in the Proposing Release and below, the Commission estimates that 250 broker-dealers will serve as Participating Underwriters in offerings of municipal securities and will have a paperwork collection burden as a result of the amendments. This estimate is based on the Commission's 2008 PRA submission (defined below) that included the estimated number of broker-dealers that would serve as Participating Underwriters in offerings of municipal securities in any given year and would therefore be subject to a collection of information burden under Rule 15c2–12. Although this estimate of 250 broker-dealers was included in the 2008 PRA submission, the estimated number of broker-dealers that could serve as Participating Underwriters in offerings of municipal securities is not expected to change from the 2008 PRA submission or as a result of the amendments. *See* Proposing Release, *supra* note 2, 74 FR at 36849–50. *See also* PRA–2008-revised 15c2–12 Justification, Municipal Securities Disclosure (OMB Control No. 3235–0372), OMB, available at *http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200812–3235–013* ("2008 PRA submission").

[375] As discussed in the Proposing Release and below, the Commission estimates that 12,000 issuers will have a paperwork collection burden as a result of the amendments. This estimate is based on the Commission's 2008 PRA submission that included the estimate of 10,000 issuers that would have a paperwork burden under Rule 15c2–12 in any given year and is not expected to change from the 2008 PRA submission. *See* 2008 PRA submission, *supra* note 374. In the Proposing Release, this estimate of 10,000 issuers was estimated to increase by 20%, to 12,000 issuers, as described below, to account for the proposed amendment to the Rule relating to demand securities. As described below, the final amendments will not change the estimated number of issuers that will submit annual financial information, material event notices, and failure to file notices to the MSRB. *See* Proposing Release, *supra* note 2, 74 FR at 36850, n. 151 and accompanying text, for a discussion of how the Commission arrived at its estimate of a 20% increase in the number of issuers as a result of the proposed amendment relating to demand securities. *See also infra* note 402.

[376] *See* Proposing Release, *supra* note 2, 74 FR at 36849–50. *See also* 2008 PRA submission, *supra* note 374.

[377] *See infra* Section III.A.

[378] *See* Proposing Release, *supra* note 2, 74 FR at 36850.

[379] *Id.*

[380] *See also infra* note 402 and accompanying text for a description of how the Commission arrived at its estimate of a 20% increase in the number of issuers as a result of the amendment relating to demand securities.

[381] *Id.*

[382] As discussed in Section V.D.2., *infra,* the Commission in the Proposing Release solicited comment on the estimated 20% increase in the number of issuers affected by a paperwork burden and received no comments on this estimate. As discussed below, the Commission continues to believe that this estimate is appropriate.

dealer by 20%, or .20 hours,[383] and the total estimated annual paperwork burden for all broker-dealers by 20%, or 50 hours.[384] This increased burden represents the additional time broker-dealers would need annually to review the continuing disclosure agreements associated with the offerings of demand securities subject to the amended Rule. As discussed in the Proposing Release and below,[385] the Commission notes that the continuing disclosure agreements that are reviewed by broker-dealers as part of their obligation under the Rule tend to be form agreements. The amendments to the Rule that the Commission is adopting will result in minor changes to certain provisions of these agreements. However, because these continuing disclosure agreements tend to be standard form agreements, the Commission does not believe that there will be a substantial increase in the annual hourly burden for broker-dealers under the amendments.

In the Proposing Release, the Commission solicited comments on broker-dealers' collection of information burdens, including those relating to the amendment to modify the exemption for demand securities. One commenter believed that the proposal failed to assess the "substantial additional time and expense" required by Participating Underwriters and remarketing agents to review and verify disclosure about obligated persons in offerings of demand securities, unless the amendments to the Rule were clarified to exclude offerings of LOC-backed demand securities without primary or continuing disclosure about the underlying obligor.[386] This comment appears to relate to a Participating Underwriter's review of issuers' primary offering disclosure. As discussed in Section III above, the amendments are not eliminating the exemption for demand securities from paragraphs (b)(1)–(4) of the Rule, which relate to primary offering disclosure. As a result, Participating Underwriters in offerings of demand securities will continue to be exempt from the primary offering provisions of the Rule. For this reason, the Commission does not believe that a Participating Underwriter will incur "substantial additional time and expense" in connection with the amendments, as suggested by the commenter. The Commission has considered this comment, reviewed its estimate in the Proposing Release in light of the comment, and believes that it is unnecessary to revise the total hourly burden for broker-dealers from its estimate in the Proposing Release.

Therefore, the Commission continues to believe that its estimate that 250 broker-dealers will incur an estimated average burden of 300 hours per year to comply with the Rule, as amended, is appropriate.[387]

b. Amendments to Events To Be Disclosed Under a Continuing Disclosure Agreement

As described above, the amendments to paragraph (b)(5)(i)(C) of the Rule add four new disclosure events to the Rule, as well as amend an existing disclosure event, and modify the number of events that are subject to a materiality determination. In addition, the amendments to paragraphs (b)(5)(i)(C) and (d)(2)(ii)(B) of the Rule change the timing for filing event notices from "in a timely manner" to "in a timely manner not to exceed ten business days." The amendments do not change a broker-dealer's obligation under the Rule 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, event notices, and failure to file notices to the MSRB.[388] Accordingly, because the broker-dealer already is under an obligation to reasonably determine that an appropriate undertaking has been made, the Commission does not believe that the amendments relating to the timing and scope of event notices will affect the annual paperwork burden for broker-dealers. In the Proposing Release, the Commission solicited comments on broker-dealers' collection of information requirements, including this estimate relating to the amendments to events to be disclosed under a continuing disclosure agreement. The Commission received no comments on this estimate and continues to believe that it is appropriate.

c. One-Time Paperwork Burden

The Commission estimates that a broker-dealer will incur a one-time paperwork burden to have its internal compliance attorney prepare and issue a notice advising its employees about the final revisions to Rule 15c2–12. In the Proposing Release, the Commission estimated that it would take a broker-dealer's internal compliance attorney approximately 30 minutes to prepare and issue such a notice.[389] The Commission believes that the task of preparing and issuing a notice advising the broker-dealer's employees about the amendments is consistent with the type of compliance work that a broker-dealer typically handles internally. In the Proposing Release, the Commission solicited comments on broker-dealers' collection of information requirements, including this estimate relating to broker-dealers' one-time paperwork burden. The Commission received no comments on this estimate. Consistent with its estimate in the Proposing Release, the Commission estimates that 250 broker-dealers will each incur a one-time, first-year burden of 30 minutes to prepare and issue this notice.

d. Total Annual Burden for Broker-Dealers

Under the amendments, the total burden on broker-dealers is estimated to be 425 hours for the first year[390] and 300 hours for each subsequent year.[391] The Commission included these estimates in the Proposing Release and solicited comments on them. In addition to the comment discussed above relating to broker-dealers' obligations with respect to demand securities, one commenter stated generally that its "review of [the Proposing Release] does not suggest any unnecessary burden on municipal underwriters."[392] This commenter observed that, "[b]y contrast, [the Proposing Release] suggests that past practices have been too lax, and the Commission is simply making underwriters' due diligence burden reasonable."[393] This commenter supported the proposal and suggested

[383] 20% or .20 hours (12 minutes = 60 minutes × .20 (20%). *See* Proposing Release, *supra* note 2, 74 FR at 36850.

[384] 250 hours (total annual burden for all broker-dealers under the Rule prior to the amendments) × .20 (20% increase in total hourly burden) = 50 hours. This estimated increase in the annual burden for broker-dealers also accounts for their review of continuing disclosure agreements in connection with those remarketings of demand securities that are now subject to the Rule. *See* Proposing Release, *supra* note 2, 74 FR at 36850.

[385] *See infra* Section V.E.2.a. *See also* Proposing Release, *supra* note 2, 74 FR at 36850.

[386] *See* NABL Letter at 12–13.

[387] 250 hours (total estimated annual hourly burden for all broker-dealers under the Rule prior to the amendments) + 50 hours (total estimated additional annual hourly burden for all broker-dealers under the amendments) = 300 hours.

[388] The Commission notes that, while the amendments do not change this obligation, broker-dealers will need to reasonably determine that the written agreement or contract entered into by an issuer or obligated person contains the change to the timing for filing event notices (*i.e.,* not in excess of ten business days of the occurrence of the event), as well as the new and revised disclosure events.

[389] *See* Proposing Release, *supra* note 2, 74 FR at 36850–51.

[390] (250 (broker-dealers impacted by the amendments) × 1.20 hours) + (250 (broker-dealers impacted by the amendments) × .5 hour (estimate for one-time burden to issue notice regarding broker-dealer's obligations under the amendments)) = 425 hours.

[391] 250 (broker-dealers impacted by the amendments) × 1.20 hours = 300 hours.

[392] *See* e-certus Letter I at 9.

[393] *Id.*

additional changes to strengthen Participating Underwriters' obligations under the Rule.[394] The Commission has considered all of the comments relating to the paperwork collection burden applicable to broker-dealers and, for the reasons discussed above, continues to believe that its estimates are appropriate.[395]

2. Issuers

Issuers' undertakings regarding the submission of annual filings, event notices, and failure to file notices that are set forth in continuing disclosure agreements impose a paperwork burden on issuers of municipal securities.[396] In the Proposing Release, the Commission provided estimates regarding the number of annual filings, event notices, and failure to file notices that issuers would submit under the proposed amendments. These estimates were based on the best estimates of the MSRB staff at that time, which were made prior to the MSRB's experience with its new EMMA system. The Commission recently received data from the MSRB reflecting the number of submissions to the EMMA system's continuing disclosure service for the eight-month period from July 1, 2009, through February 28, 2010 ("Sample Period").[397] This data includes the number of annual filings, event notices, and failure to file notices that were submitted during this Sample Period. To provide PRA estimates that are based on the MSRB's actual experience with respect to submissions of annual filings, event notices, and failure to file notices to its EMMA system, the Commission has elected to use the data obtained for the Sample Period to revise its estimates in the Proposing Release.[398] Because the Sample Period is less than a full year,[399] the Commission has annualized these numbers for the purpose of revising its PRA estimates below.[400]

a. Amendment To Modify the Exemption for Demand Securities

The Commission believes that the amendment to delete paragraph (d)(1)(iii) from the Rule, which contains an exemption from the Rule for a primary offering of demand securities, and add new paragraph (d)(5) to the Rule to apply paragraphs (b)(5) and (c) of the Rule to demand securities, will increase the number of issuers with a paperwork burden under the Rule. In the Proposing Release, the Commission estimated that the Rule affected approximately 10,000 issuers.[401] Using the estimate of 10,000 issuers, the Commission estimated in the Proposing Release, and estimates again now, that the number of issuers with paperwork burden as a result of the amendments will increase by approximately 20% [402] to 12,000 issuers.[403] These additional issuers will increase the aggregate number of annual filings, event notices, and failure to file notices submitted each year. As noted above, the Commission is revising its amendment to the exemption for demand securities in the Rule to include a limited grandfather provision for remarketings of currently outstanding demand securities.[404] Also as noted above, the Commission believes that initially the limited grandfather provision could result in a somewhat lower number of issuer respondents that are subject to the collection of information under the Rule than was estimated in the Proposing Release. However, the Commission notes that the effects of the limited grandfather provision will diminish over time as demand securities mature or are redeemed. In addition, the Commission has no reason to believe that the overall number of issuers of demand securities will change materially going forward as a result of these amendments. Because of this factor, the Commission continues to believe that 12,000 issuer respondents is an appropriate estimate.

In the Proposing Release, the Commission stated that the revision to the Rule's exemption for demand securities would not alter the Commission's previous PRA estimates of the hourly burdens for an issuer to prepare and submit an annual filing (45 minutes), an event notice (45 minutes), and a failure to file notice (30 minutes).[405] Thus, the Commission estimated that the aggregate number of annual filings, event notices, and failure to file notices submitted by issuers also would increase by 20% from the previous estimates.[406] In the Proposing

[394] *See* e-certus Letter I at 9–11.

[395] In the Proposing Release, the Commission provided interpretive guidance with respect to the obligations of Participating Underwriters under the federal securities laws. In connection with this interpretation, the Commission solicited comment regarding alternative or additional ways in which an underwriter could satisfy its obligations, including obligations to ascertain if issuers or obligated persons are abiding by their municipal disclosure commitments. *See* Proposing Release, *supra* note 2, 74 FR at 36848. The Commission received comments in response to this solicitation, which are discussed in Section IV of this release.

[396] For purposes of this section, the term "issuers" refers to issuers and obligated persons.

[397] *See supra* note 368.

[398] The Commission's estimates in the Proposing Release are somewhat lower than those derived from the Sample Period for annual filings and event notices and somewhat higher for failure to file notices, *see infra* notes 417, 418, and 421.

[399] The Commission notes that, although the MSRB is able to provide actual numbers of continuing disclosure documents that it has received for the Sample Period, it is unable to provide any actual or estimated number of issuers that have submitted continuing disclosure documents to the EMMA system. This is because issuers submit their filings using the CUSIP number for the security. Because issuers could have several issuances of outstanding bonds, they could submit documents under more than one CUSIP number. Because of the potential for over-counting the number of issuers with a paperwork burden if the Commission were to rely on CUSIP numbers as a proxy for the number of affected issuers, it has elected to base its estimates for the number of issuers with a paperwork burden on estimates included in the Proposing Release.

[400] The Commission notes that annualizing the data provided by the MSRB for the Sample Period could have some limitations, particularly since the Sample Period covered the period of implementation of the EMMA system. Notwithstanding these limitations, the Commission has reviewed the eight months of data provided by the MSRB during the Sample Period and did not identify any particular trends in the data that would suggest that annualizing these numbers would result in an underestimate of number of filings that the MSRB would receive during a twelve-month period. Therefore, the Commission believes that annualizing this data provides a reasonable basis for revising its PRA estimates.

[401] *See* Proposing Release, *supra* note 2, 74 FR at 36851. *See also supra* note 375 for an explanation of the estimate of 10,000 issuers.

[402] *Id.* As described in the Proposing Release, in 2008, there were approximately 2,000 offerings of demand securities. *See also* Two Decades of Bond Finance: 1989–2008, The Bond Buyer/Thomson Reuters 2009 Yearbook 7 (Matthew Kreps ed., SourceMedia, Inc.) (2009). To provide conservative estimates, the Commission elected to assume that all 2,000 offerings of demand securities were issued by separate issuers and that each of those issuers currently is not a party to a continuing disclosure agreement that provides for the submission of continuing disclosure documents to the MSRB. Thus, the Commission estimated that approximately 2,000 additional issuers would be affected by the proposed amendments to the Rule. These 2,000 additional issuers represent a 20% increase in the total number of issuers that would have a burden under Rule 15c2–12 (10,000 (number of issuers affected by the Rule prior to the amendments)/2,000 (number of additional issuers under the amendments to the Rule) × 100 = 20%). The Commission notes that the above-referenced publication has not been updated and, accordingly believes that this estimate, which is predicated on 2,000 offerings of demand securities, continues to be based on the most recent information available.

[403] 10,000 (number of issuers affected by the Rule prior to the amendments) × 1.20 (20% increase) = 12,000. The Commission acknowledges that greater precision in determining the number of issuers that will have a burden under the amendment is not possible. For purposes of this analysis, the Commission assumes that all issuers of demand securities currently are not a party to a continuing disclosure agreement that provides for the submission of continuing disclosure documents to the MSRB. The Commission realizes that this assumption may result in an overestimate of the number of issuers with a burden.

[404] *See supra* Section III.A.

[405] *See* Proposing Release, *supra* note 2, 74 FR at 36851.

[406] The Commission believes that this estimated 20% increase in the number of each type of continuing disclosure document filed is appropriate since it maintains a corresponding relationship between the number of issuers and the number of each type of document submitted by these issuers,

Continued

Release, the Commission solicited comments on issuers' collection of information requirements. The Commission received comments relating to the hourly burdens associated with this amendment. These comments are addressed in Section V.D.2.a.i, below.

i. Comments Relating to Paperwork Burdens in Connection With the Amendment Relating to Demand Securities

Several commenters offered their views on the impact of the proposal to modify the exemption for demand securities.[407] Of these commenters, one expressed concern that the revision of the exemption for demand securities could have an "insurmountable administrative burden" on smaller issuers and non-profit obligated persons that issued securities before the compliance date of the proposed amendments.[408] This commenter believed that the proposal could be difficult for these entities to comply with, if they were required to enter into continuing disclosure agreements years after the original issuance of the bonds.[409] Although this commenter did not specifically define what it meant by "administrative burden," this commenter may be concerned about the paperwork collection hourly burden on smaller issuers and obligated persons resulting from this amendment.

As proposed by the Commission, the amendment would have applied to any initial offering and remarketing that is a primary offering of demand securities occurring on or after the compliance date of the amendments. However, to address commenters' concerns about the impact of the proposal on outstanding demand securities, the Commission is adopting a limited grandfather provision that provides that the amendments will not apply to a remarketing of demand securities that were issued prior to the amendments' compliance date and that continuously have remained outstanding as demand securities. While the Commission continues to acknowledge that the amendment will place some additional burden on issuers of demand securities issued on or after the compliance date of the amendments,[410] the amendment as adopted is forward-looking and generally will not apply to securities issued before the compliance date of the proposed amendments. Therefore, the Commission does not believe that the amendments will create an "insurmountable administrative burden" for issuers, including smaller issuers and obligated persons, as expressed by the above commenter. The Commission believes that the limited grandfather provision should largely alleviate the concerns expressed by this commenter with respect to demand securities that are currently outstanding.

As the Commission stated in the Proposing Release, and reiterates here, it does not anticipate a significant increase in disclosure burdens with respect to demand securities.[411] The Commission acknowledges that, if issuers or obligated persons with respect to demand securities have not previously issued securities subject to continuing disclosure agreements, they will be entering into such agreements for the first time and thereby will incur some time and expense to provide continuing disclosure documents to the MSRB.[412] The Commission believes that its estimate of a 20% increase in the number of issuers or obligated persons that may be affected by the Rule appropriately reflects the increase in the number of issuers that will have a paperwork burden. The commenter did not dispute this estimate. In addition, as the Commission noted in proposing these amendments, many issuers and obligated persons with respect to demand securities are likely to have outstanding fixed rate securities and already have entered into continuing disclosure agreements consistent with the Rule.[413] Because any existing continuing disclosure agreement would obligate an issuer or an obligated person to provide annual filings, event notices, or failure to file notices with respect to these fixed rate securities, providing disclosures with respect to these demand securities is not expected to be a significant additional burden.

Another commenter stated that the Proposing Release "largely failed to assess the substantial additional time and expense required by issuers and other obligated persons to prepare (and for underwriters and remarketing agents to professionally review and check) disclosure about obligated persons in offerings of demand securities, unless the proposed amendments are clarified so as not to preclude offerings of LOC-backed demand securities without primary or continuing disclosure about the underlying obligor."[414] As discussed above, the amendments are not eliminating the exemption for demand securities from paragraphs (b)(1) through (b)(4) of the Rule, which relate to primary offering disclosure. As a result, under the amendments, issuers of demand securities will not have a paperwork burden with respect to primary offering disclosures. Accordingly, the commenter's concern appears misplaced.

ii. Annual Filings

Under the amendment to modify the Rule's exemption for demand securities, the Commission estimates that 12,000 municipal issuers with continuing disclosure agreements will prepare and submit approximately 22,909 annual filings yearly.[415]

As discussed in the Proposing Release, the Commission estimated, and continues to believe, that an issuer will require approximately 45 minutes to prepare and submit annual filings to the MSRB in an electronic format.[416] Therefore, under the amendments, the total burden on issuers of municipal securities to prepare and submit 22,909 annual filings to the MSRB in an electronic format is estimated to be 17,182 hours.[417] Other than as noted

as discussed in the Proposing Release. *See* Proposing Release, *supra* note 2, 74 FR at 36850, n.151.

[407] *See, e.g.,* SIFMA Letter, NABL Letter, GFOA Letter (expressed support for the statements made in the NABL Letter), CRRC Letter, and WCRRC Letter (WCRRC endorsed all of the positions expressed in the CRRC Letter) (the concerns expressed by CRRC and WCRRC are discussed in *infra* Sections V.D.2.b and V.E.2.c).

[408] *See* SIFMA Letter.

[409] *Id.*

[410] Issuers of demand securities with fixed-rate debt outstanding already would be subject to a continuing disclosure agreement in which they undertake to provide continuing disclosure documents, so they would be subject to minimal—if any—increased burdens. *See supra* Section V.D.2.a.

[411] *See supra* notes 402 to 406 and accompanying text.

[412] *Id.*

[413] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[414] *See* NABL Letter (the GFOA Letter expressed support for the statements made in the NABL Letter). The Commission notes that this commenter disputed that the Commission's 45 minute estimate in connection with the amendment to the time frame for the submission of event notices. This comment is addressed in *infra* Section V.D.2.b.i.

[415] 19,091 (12,791 (total annual filings submitted to the MSRB during the Sample Period)/.67) (annualized number of annual filings submitted to the MSRB based on the Sample Period) × 1.20 (20% increase in filings under the amendments) = 22,909 annual filings (estimated number of annual filings under the amendments). In the Proposing Release, the Commission estimated 18,000 annual filings would be submitted to the MSRB under the amendments. The Commission is revising this estimate to 22,909 filings to reflect actual filings submitted to the MSRB. This revised estimate is higher than the Commission's estimate in the Proposing Release by 4,909 annual filings or by approximately 27.27%.

[416] The Commission received comments relating to the time it would take an issuer to prepare and submit an event notice under the amendments. These comments are addressed in *infra* Section V.D.2.b.

[417] 22,909 (estimated number of annual filings under the amendments) × .75 hours (45 minutes) (estimated time to prepare and submit annual filings under the amendments) = 17,181.75 (rounded to 17,182 hours). In the Proposing

above, the Commission received no other comments on its estimates to prepare and submit annual filings under the amendment for demand securities. The Commission has considered the comments received and believes that its estimates, as revised to take into account the data provided by the MSRB, are appropriate.

iii. Event Notices

Under the amendment to modify the Rule's exemption for demand securities, the Commission estimates that the 12,000 municipal issuers with continuing disclosure agreements will prepare and submit approximately 74,605 event notices yearly.[418] As the Commission discussed in the Proposing Release, the Commission estimated, and continues to believe, that the process for an issuer to prepare and submit event notices to the MSRB in an electronic format will require approximately 45 minutes.[419] Since the amendments to the Rule do not change the way event notices are prepared and submitted, the Commission estimates that an issuer still will require approximately 45 minutes to prepare and submit an event notice. Therefore, under the amendments, the total burden on issuers of municipal securities to prepare and submit 74,605 event notices to the MSRB is estimated to be 55,954 hours.[420] The Commission received comments relating to its estimates to prepare and submit event notice filings generally under the proposed amendments. These comments are addressed in Section V.D.2.b, below.

iv. Failure To File Notices

Under the amendment to modify the exemption for demand securities, the Commission estimates that the 12,000 municipal issuers with continuing disclosure agreements will prepare and submit approximately 1,458 failure to file notices yearly.[421] As the Commission discussed in the Proposing Release, since the amendments to the Rule will not change the way failure to file notices are prepared and submitted, the Commission estimated, and continues to believe, that an issuer will require approximately 30 minutes to prepare and submit a failure to file notice.[422] Therefore, under the amendments, the total burden on issuers of municipal securities to prepare and submit 1,458 failure to file notices to the MSRB is estimated to be 729 hours.[423] The Commission received no comments on its estimates to prepare and submit failure to file notices and believes that its estimates, as revised to take into account the data provided by the MSRB, are appropriate.

b. Amendments to Event Notice Provisions of the Rule

Under the amendment to paragraph (b)(5)(i)(C) of the Rule, a Participating Underwriter will be required to reasonably determine that an issuer or obligated person has entered into a continuing disclosure agreement that, among other things, provides for the submission of an event notice to the MSRB in an electronic format upon the occurrence of certain specified events, either in each instance that the event occurs or subject to a materiality determination, as set forth in the amended Rule. The amendments also add to the Rule four new event disclosure items and revise an existing event disclosure item. In addition, the amendments to paragraphs (b)(5)(i)(C) and (d)(2)(ii)(B) amend the Rule to provide that a Participating Underwriter must reasonably determine that an issuer of municipal securities or obligated person has undertaken, in a written agreement or contract for the benefit of holders of municipal securities, to provide event notices in a timely manner "not in excess of ten business days after the occurrence of the event," rather than simply in a timely manner.

As discussed above, the Commission estimates that the amendment to modify the Rule's exemption for demand securities will increase the number of event notices to be prepared and submitted to an aggregate of 74,605 event notices annually.[424] The Commission believes that the amendments to paragraphs (b)(5)(i)(C) and (d)(2)(ii)(B) of the Rule also will increase the annual paperwork burden for issuers because of the increase in the number of event notices to be prepared and submitted, as discussed below.[425]

i. Time Frame for Submitting Event Notices Under a Continuing Disclosure Agreement

The amendments revise paragraphs (b)(5)(i)(C) and (d)(2)(ii)(B) of the Rule to state that notice of an event should be provided "in a timely manner not in excess of ten business days after the occurrence of the event" instead of simply in "a timely manner." As noted above, the Commission estimates that an issuer can prepare and submit an event notice in 45 minutes.[426] The amendment to the Rule providing for a ten business day time limit for submission of event notices will not change this estimated burden of 45 minutes, which is the amount of time estimated under the Rule's previous paperwork collection to prepare and submit event notices. Rather, the overall change in burden results from the fact

Release, the Commission estimated number of hours to prepare and submit annual filings under the amendment would be 13,500 hours. The Commission is revising this estimate to 17,182 hours. This revised estimate is higher than the estimate in the Proposing Release by 3,682 hours or by approximately 27.27%.

[418] 62,171 (41,654 (total number of event notice filings submitted to the MSRB during the Sample Period)/.67) (annualized number of event notices submitted to MSRB based on the sample period) × .1.20 (20% increase in filings under the amendments) = 74,605 event notices (estimated number of event notices under the amendments)). In the Proposing Release, the Commission estimated 72,000 event notice filings would be submitted to the MSRB under the amendments. The Commission is revising its estimate to 74,605 event notice filings. This estimate is higher than the estimate in the Proposing Release by 2,605 event notices or approximately 3.62%. In its analysis of the data the Commission received from the MSRB for the Sample Period, the Commission noted that the MSRB received a significant number of event notices for bond calls relative to the event notices for other events. The Commission, however, did not identify any particular trend for this event item in the data that, in its view, would lead to an underestimate of event notices that would be submitted in connection with the amendments. The Commission's estimates of the number of additional event notices associated with the amendments relating to the materiality condition and number of additional event disclosure items contained in paragraph (b)(5)(i)(C) of the Rule are discussed in Section V.D.2.b, *infra*. As discussed below, the total number of event notices estimated to be submitted to the MSRB in connection with the amendments is 81,362 notices.

[419] *See* Proposing Release, *supra* note 2, 74 FR at 36851–52.

[420] 74,605 (estimated number of event notices under the amendments) × .75 hours (45 minutes) (estimated time to prepare and submit material event notices under the amendments) = 55,953.7 hours (rounded to 55,954 hours). In the Proposing Release, the Commission estimated that municipal issuers would spend 54,000 hours to prepare and submit event notices to the MSRB. The Commission is revising its estimate to 55,954 hours. This estimate is higher than the estimate in the Proposing Release by 1,954 hours or 3.62%.

[421] 1,215 (814 (total number of failure to file notice filings submitted to the MSRB during the Sample Period)/.67 (annualized number failure to file notices submitted to MSRB) × 1.20 (20% increase in filings) = 1,458 failure to file notices (estimated number of failure to file notices under the amendments)). In the Proposing Release, the Commission estimated that issuers would prepare and submit 2,400 failure to file notices. The Commission is revising its estimate to 1,458 failure to file notices. This estimate is lower than the estimate in the Proposing Release by 942 failure to file notices or by 60.75%.

[422] *See* Proposing Release, *supra* note 2, 74 FR at 36852.

[423] 1,458 (estimated number of failure to file notices under the amendments) × .5 hours (30 minutes) (estimated time to prepare and submit failure to file notices under the amendments) = 729 hours. In the Proposing Release, the Commission estimated that issuers would spend 1,200 hours to prepare and submit failure to file notices. The Commission is revising its estimate to 729 hours. This estimate is lower than the estimate in the Proposing Release by 471 hours or by 39.25%.

[424] *See supra* note 418 and accompanying text.

[425] *Id.*

[426] *See supra* note 405 and accompanying text.

that more event notices are expected to be filed as a result of the amendments, as discussed in Section V.D.2.a.iii., above.[427]

Several commenters offered their views on the impact of the proposal to establish a ten business day time frame for the submission of event notices.[428] A number of these commenters expressed concern that the requirement would increase the burden for issuers.[429] The concerns expressed by these commenters included: (i) The impracticability of meeting the ten business day time period because of limited staff and resources, especially for smaller issuers;[430] (ii) the increased burdens and costs due to the additional monitoring to comply with the ten business day time frame;[431] (iii) the difficulty in reporting events in which the issuer does not control the information (*e.g.,* rating changes, changes to the trustee, changes to tax status of bonds under an IRS audit) within the ten business day time period;[432] and (iv) the use of the "occurrence of the event" as the trigger for the obligation to submit a notice.[433] Many of these commenters focused their concerns on the potential burdens associated with reporting rating changes within the ten business day time frame.[434] These commenters noted that ratings information is not within the issuer's control and that rating organizations do not directly notify issuers of rating changes.[435]

a. Discussion of Comments Relating to Impracticability of Meeting Time Frame Due to Limited Staff and Resources, Especially for Smaller Issuers

The Commission has considered commenters' concerns about the potential costs and burdens associated with the ten business day time frame for submission of event notices, especially for smaller issuers with limited staff and resources. As discussed above, the Commission estimates that 12,000 issuers will file 74,605 event notices annually. Thus, an issuer will file on average approximately 6 event notices each year (74,605/12,000 = 6.05) and spend a total of approximately 4.5 hours annually on average preparing them.[436] The Commission does not believe that spending approximately 4.5 hours annually on average preparing and submitting event notices would be particularly burdensome for issuers, even those with limited staff and resources.[437]

b. Discussion of Comments Relating to Issuers' Increased Burdens and Costs Due to Additional Monitoring, Lack of Issuer Control Over Events, and Use of "Occurrence of the Events" as the Trigger

The Commission has considered comments that the Commission did not fully account for the increased burdens and costs due to additional monitoring to comply with the ten business day time frame, particularly with respect to rating changes.[438] As noted above, one or more commenters believed that the "actual knowledge" of the occurrence of the event should be used as the trigger for the obligation to submit an event notice.[439] These commenters expressed their concerns relatively generally, and in most cases did not present any specific evidence to support their conclusions or alternatives to the Commission's estimates.

The Commission has considered the comments and believes that most of the events currently specified in paragraph (b)(5)(i)(C) of the Rule, and the additional event items included in the amendments, are significant and should become known to the issuer or obligated person expeditiously.[440] Further, many events, such as payment defaults, tender offers, and bankruptcy filings, generally involve the issuer's or obligated person's participation.[441] Other events (*e.g.,* failure of a credit or liquidity provider to perform) are of such importance that an issuer or obligated person likely will become aware of such events,[442] or will expect an indenture trustee, paying agent, or other transaction participant to bring them to the issuer's or obligated person's attention within a very short period of time.[443]

One commenter also expressed concern that the addition of paragraphs (b)(5)(i)(C)(12) of the Rule (pertaining to notices of bankruptcy, insolvency, receivership or similar event of an issuer or obligated person) and (b)(5)(i)(C)(13) of the Rule (pertaining to notices of mergers, consolidations and acquisitions or asset sales with respect to an issuer or obligated person) would impose a burden on issuers to undertake continuous monitoring of obligated

[427] *See supra* note 419 and accompanying text.

[428] *See, e.g.,* Halgren Letter, Los Angeles Letter, Portland Letter, CRRC Letter, WCRRC Letter, NFMA Letter, CHEFA Letter, NAHEFFA Letter, SIFMA Letter, Connecticut Letter, Kutak Letter, ICI II Letter, Fidelity Letter, California Letter, San Diego Letter, NABL Letter, GFOA Letter, and Metro Water Letter.

[429] *See* Halgren Letter, Los Angeles Letter, CRRC Letter, WCRRC Letter, CHEFA Letter, NAHEFFA Letter, SIFMA Letter, Connecticut Letter, Kutak Letter, California Letter, San Diego Letter, NABL Letter, GFOA Letter, and Metro Water Letter.

[430] *See* CRRC Letter, WCRRC Letter, Portland Letter at 2, NAHEFFA Letter at 2–4, Metro Water Letter at 1–2, CHEFA Letter at 2, and NABL Letter at 5–6.

[431] *See* Halgren Letter, Los Angeles Letter at 1, CRRC Letter, WCRRC Letter, NAHEFFA Letter at 2–4, CHEFA Letter at 2, and NABL Letter at 5–6, and 8–9.

[432] *See* Connecticut Letter at 1–2, California Letter at 1–2, San Diego Letter at 1–2, NAHEFFA Letter at 2–4, CHEFA Letter at 2, Kutak Letter at 2, and GFOA Letter at 2–3.

[433] *See* California Letter at 1–2, NAHEFFA Letter at 2–4, CHEFA Letter at 2, San Diego Letter at 1–2, GFOA Letter at 3, Kutak Letter at 2, and NABL Letter at 5–6.

[434] *See* Halgren Letter, Los Angeles Letter at 1–2, NAHEFFA Letter at 2–4, San Diego Letter at 1–2, California Letter at 1–2, and GFOA Letter at 3–4.

[435] *Id.*

[436] The Commission estimates that issuers will spend approximately 45 minutes on average to prepare and submit each event notice. The comments that the Commission received relating to this estimate are discussed below.

[437] The Commission also notes that Rule 15c2–12 currently provides a limited exemption, contained in paragraph (d)(2) of the Rule, which provides that paragraph (b)(5) of the Rule does not apply to a primary offering if the conditions contained therein are met. This limited exemption from the Rule is intended to assist small governmental jurisdictions that issue municipal securities and, as a result of this exemption, most small issuers do not have a paperwork burden under the Rule.

[438] *See* Halgren Letter, Los Angeles Letter at 1, CRRC Letter, WCRRC Letter, NAHEFFA Letter at 2–4, CHEFA Letter at 2, NABL Letter at 5–6, 13, Connecticut Letter at 3, California Letter at 3, San Diego Letter at 1–2, GFOA Letter at 2, and SIFMA Letter at 3.

[439] *See, e.g.,* Kutak Letter at 1. *See also* NAHEFFA Letter, California Letter, San Diego Letter, CHEFA Letter, GFOA Letter, Metro Water Letter, and NABL Letter.

[440] *See supra* note 372 and accompanying text for a description of events currently contained in Rule 15c2–12(b)(5)(i)(C). *See supra* Section III.E. for a description of events added to the Rule by these amendments. The only events specified in the Rule that may not be known to an issuer or obligated person expeditiously are rating changes and trustee name changes.

[441] In addition, as the Commission noted in the Proposing Release, involvement of the issuer or obligated person is often required for substitution of credit or liquidity providers; modifications to rights of security holders; release, substitution, or sale of property securing repayment of the securities; and optional redemptions. *See* Form Indenture and Commentary, National Association of Bond Lawyers, 2000.

[442] For example, as the Commission noted in the Proposing Release, issuers or obligated persons should have direct knowledge of principal and interest payment delinquencies, proposed or final determinations of taxability from the IRS, tender offers that they initiate, and bankruptcy petitions that they file.

[443] The Commission believes that indenture trustees generally would be aware of principal and interest payment delinquencies; material non-payment related defaults; unscheduled draws on credit enhancements reflecting financial difficulties; the failure of credit or liquidity providers to perform; and adverse tax opinions. The Commission notes that issuers and obligated persons may wish to consider negotiating a provision in indentures to which they are a party to require a trustee promptly to notify the issuer or obligated person in the event the trustee knows or has reason to believe that an event specified in paragraph (b)(5) of the Rule has or may have occurred.

persons to determine whether such events occurred unless limited to certain obligated persons and accompanied by a materiality condition.[444] As discussed above,[445] bankruptcies and similar events involving municipal issuers or obligated persons are relatively rare and issuers may avoid directly monitoring obligated persons by obtaining an agreement from them at the time of the primary offering to notify the party responsible for making event notice filings of such an event if and when it occurs.[446] Similar to its discussion regarding bankruptcies and similar events, the Commission believes that there are a variety of methods by which issuers and obligated persons could avoid having to directly monitor the activities of other obligated persons, such as obtaining, at the time of the primary offering, an agreement from them to provide information pertaining to a merger, consolidation, acquisition or similar asset sale to the party responsible for filing event notices.[447]

One commenter believed that the time that would be required for issuers and other obligated persons to establish and implement procedures to provide notice of rating changes within ten business days after their occurrence exceeds the Commission's estimate of 45 minutes per event notice filing.[448] This commenter believed that the Commission's estimates did not include the time necessary to monitor for rating changes, and that issuers would spend 26 to 52 hours per year on such monitoring.[449] Another commenter stated that, during the 2008–2009 fiscal year, it filed 169 separate "material event notices" relating to rating changes and that submission of such notices consumed 340 to 420 hours of staff time.[450] This commenter further believed that the ten business day time frame would exacerbate its burden since it would have to devote more staff time to monitor for rating changes. A third commenter believed that the ten business day time frame for submission of event notices for rating changes would double compliance time.[451]

The Commission notes that issuers and obligated persons, under current continuing disclosure agreements, contract to provide event notices, including those relating to rating changes, "in a timely manner." The amendments add a maximum time frame of ten business days for submission of an event notice, and the Commission acknowledges that some issuers may have to monitor for certain events more frequently than in the past, if they have been interpreting "in a timely manner" as allowing them to submit event notices more than ten business days after the event occurred. The Commission's PRA estimate encompasses the average amount of time spent monitoring for all of the events in the Rule. As noted above, most of the Rule's events, except perhaps rating changes and, in some cases, trustee name changes, should become known to the issuer prior to the event, or immediately or within a short period of time after the event.[452] While the commenters asserted, either generally or based on their own experience, that the Commission underestimated the time required to monitor for rating changes, the Commission emphasizes that the continuing disclosure agreements that issuers enter into under the current Rule already require them to submit notices for rating changes, which necessarily entails some degree of monitoring.[453] Furthermore, information about rating changes is readily available on the Internet Web sites of the rating agencies.

With respect to changes in trustees, the Commission believes that issuers can minimize monitoring burdens simply by adding a notice provision to the trust indenture that requires the trustee to provide the issuer with notice of the appointment of a new trustee or any change in the trustee's name.

The Commission continues to expect that issuers and obligated persons generally will become aware of events subject to event notices well within the ten business day time frame for submission of event notices to the MSRB.[454] The Commission believes that its burden analysis takes into account compliance by issuers with the ten business day time frame for preparing and submitting event notices, including with respect to rating changes and trustee changes. The Commission stresses that its estimate is an average of the burden associated with all event notices referenced in the Rule. Although some issuers may need to monitor more actively for certain events than they have in the past, in particular for ratings changes, the Commission believes its 45 minute estimate continues to reflect, on average, the amount of time required to prepare and submit an event notice, as most event notices concern events that are within the issuer's control and therefore require little if any monitoring.

For the foregoing reasons, the Commission continues to believe that, with respect to the amendment to the Rule regarding the ten business day time frame for submission of event notices, its estimated burden of 45 minutes to prepare and submit an event notice is appropriate.

ii. Modification With Regard to Those Events for Which a Materiality Determination Is Necessary

As discussed above, the Commission believes that it is appropriate to delete the condition in paragraph (b)(5)(i)(C) of the Rule that previously provided that notice of all of the listed events need be made only "if material." In connection with the deletion of the materiality condition, the Commission reviewed each of the Rule's specified events to determine whether a materiality determination should be retained, and proposed to do so where appropriate.[455] As a result, for those events listed in paragraph (b)(5)(i)(C) for which the materiality condition no longer applies, the Participating Underwriter must reasonably determine that the issuer or other obligated person has agreed to submit event notices to the MSRB

[444] *See* NABL Letter at 8–9.

[445] *See supra* Section III.E.2.

[446] *Id.*

[447] *Id.*

[448] *See* NABL Letter at 5–6.

[449] *Id.*

[450] *See* California Letter at 3. *See also* San Diego Letter at 2 (expressing similar concern that complying preparing and submitting event notices for rating changes required a "significant commitment of staff time and resources.").

[451] *See* Halgren Letter at 1.

[452] With respect to one commenter's assertion that monitoring for rating changes would take 26–52 hours each year, the Commission notes that 45 minutes per event notice is an average. With respect to the comment that, during the fiscal year 2008–2009, one commenter spent 340–420 hours of staff time preparing and submitting notices of rating changes, the Commission notes that this commenter is one of the very largest municipal securities issuers and, as such, likely has a large number of issues of municipal securities outstanding with a variety of credit ratings that may change at a variety of times. Accordingly, this issuer likely spends much more time than the average issuer preparing and submitting event notices. In addition, the Commission notes that the time period referenced by this commenter encompasses the period prior to the establishment of the MSRB's EMMA system as a single repository for continuing disclosure, when issuers submitted continuing disclosure documents to four information repositories. Accordingly, the Commission would expect that the time spent by the average issuer to monitor for rating changes would be substantially less than the estimate provided by this commenter.

[453] *See* 17 CFR 240.15c2–12.

[454] Those issuers or obligated persons required by Section 13(a) or Section 15(d) of the Exchange Act to report certain events on Form 8–K (17 CFR 249.308) would already make such information public in a Form 8–K. The Commission believes that such persons should be able to file material event notices, pursuant to the issuer's or obligated person's undertakings, within a short time after the Form 8–K filing. *See* 15 U.S.C. 78m and 78*o*(d).

[455] The discussion in this section pertains to materiality determinations for events previously specified in paragraph (b)(5)(i)(C) of the Rule. For new events being added to the Rule as a result of these amendments, a materiality determination discussion, if any, is included in the applicable section for each new event.

whenever such an event occurs. These events include: (1) Principal and interest payment delinquencies with respect to the securities being offered; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.[456]

Prior to the Commission's consideration of the Proposing Release, the Commission staff was advised that the total number of event notices as a result of the change to the materiality condition would increase by no more than 1,000, taking into account the revised exemption for demand securities.[457] Thus, in the Proposing Release, the Commission conservatively estimated that this change to the materiality condition would increase the total number of event notices to be submitted annually by issuers by 1,000 notices. The Commission received no comments on this estimate. Although the Commission has slightly increased the total number of continuing disclosure documents it expects the MSRB to receive based on actual submissions the MSRB received during the Sample Period,[458] it continues to believe that its estimate of 1,000 notices in connection with a change to the materiality condition is appropriate.

Several commenters offered their views on the impact of the proposal to delete the condition in paragraph (b)(5)(i)(C) of the Rule that previously provided that notice of all of the listed events need be made only "if material."[459] Two of these commenters expressed concern that this change would increase the burden for issuers, but did not specify whether the Commission's estimate of increased burdens was inaccurate, or offer an alternative estimate.[460]

One commenter believed that the proposal to delete the "if material" qualification could burden issuers in certain circumstances.[461] Another commenter believed the deletion of the materiality condition would increase monitoring burdens and require disclosure of events that otherwise would not be disclosed.[462] These commenters, however, did not specifically call into question the Commission's burden estimate, or offer an alternative estimate. The Commission has reviewed its estimates in light of commenters' views and believes that they do not reflect any new or additional burden that is not contemplated by the Commission's estimates.

iii. Amendment to the Submission of Event Notices Regarding Adverse Tax Events Under a Continuing Disclosure Agreement

Paragraph (b)(5)(i)(C)(6) of the Rule contemplates an event notice in the case of certain adverse tax events. Under the amendments, paragraph (b)(5)(i)(C)(6) of the Rule refers specifically to "adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the securities, or other material events affecting the tax status of the security." As discussed above,[463] the Commission believes that the amendment to paragraph (b)(5)(i)(C)(6) of the Rule clarifies that IRS proposed and final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of a municipal security are events that should be disclosed under a continuing disclosure agreement. As discussed in the Proposing Release, the Commission estimated that the amendment to paragraph (b)(5)(i)(C)(6) of the Rule would increase the total number of event notices to be submitted by issuers annually by approximately 130 notices.[464]

As described in greater detail above, the Commission is making a few changes to the proposed text of the Rule to clarify the use of the word "material" in this event item and to replace the phrase "tax-exempt status" with "tax status" to provide greater clarity with respect to the application of this disclosure event to a particular kind of taxable municipal security. The Commission does not believe that these changes will affect its estimate of 130 additional event notices.

As discussed in Section III.D above, several commenters offered their views on the impact of the proposal to amend the Rule to include "the issuance by the IRS of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax-exempt status of the securities, or other events affecting the tax-exempt status of the security."[465] One commenter noted that the municipal market may be flooded with notices due to the generality and vagueness of the proposed tax disclosure items, but did not specifically call into question the Commission's burden estimate or offer an alternative estimate.[466] In addition, none of the other commenters specifically called into question the Commission's estimate of 130 additional notices. The Commission has reviewed its estimate in light of these comments and believes that its estimate of 130 notices for this disclosure event item remains appropriate.

iv. Tender Offers

Paragraph (b)(5)(i)(C)(8) of the Rule refers to notice of an event in the case of bond calls. Paragraph (b)(5)(i)(C)(8) of the Rule is amended to include tender offers as a disclosure event. The inclusion of tender offers as an event item expands the circumstances in which issuers undertake to submit an event notice to the MSRB. As discussed in the Proposing Release, the Commission estimated that this amendment would increase the total number of event notices to be submitted by issuers annually by approximately

[456] *See supra* Section III.C.3. for a discussion of the Commission's rationale regarding why it retained a materiality condition for these events.

[457] Telephone conversation between Ernesto A. Lanza, General Counsel, MSRB, and Martha M. Haines, Assistant Director and Chief, Office of Municipal Securities, Division, Commission, June 12, 2009. As noted in the Proposing Release, although the MSRB staff believed that the potential increase could be much smaller, the Commission is continuing to use the estimate of 1,000 event notices to provide a conservative estimate. *See* Proposing Release, *supra* note 2, 74 FR at 36853.

[458] *See supra* Section V.D.2.

[459] *See, e.g.,* NABL Letter, Metro Water Letter, California Letter, ICI Letter, and SIFMA Letter.

[460] *See* NABL Letter and Metro Water Letter.

[461] *See* NABL Letter at 6–7. The three circumstances where the commenter believes a materiality qualifier should be retained are: (1) With respect to LOC-backed demand securities, notices of unscheduled draws on debt service reserves that reflect financial difficulties of the obligated person because they might not be material to an investment in the securities because they are traded on the strength of a bank letter of credit; (2) with respect to demand securities, generally, require notice of each failure to remarket securities when they are put, because they might not be material to an investor due to the existence of a letter of credit or other liquidity facility; and (3) notice of defeasances of securities, because they might not be material to an investor if the remaining term of the securities is very short.

[462] *See* Metro Water Letter at 2.

[463] *See supra* Section III.D.

[464] Prior to the Commission's consideration of the proposed amendments, in conversations with the Commission staff in December 2008, the staff of the IRS indicated that during a 12-month period it issues approximately 130 notices of determinations of taxability. *See* Proposing Release, *supra* note 2, 74 FR at 36853, n. 188.

[465] *See, e.g.,* Connecticut Letter at 2, Metro Letter at 2, NABL Letter at 7, Kutak Letter at 5–6, and GFOA Letter at 2.

[466] *See* Kutak Letter at 4–7.

100 notices.[467] The Commission received no comments on this estimate and continues to believe that this estimate is appropriate.

v. The Occurrence of Bankruptcy, Insolvency, Receivership or Similar Event of the Obligated Person

Under the amendments, paragraph (b)(5)(i)(C)(12) is being added to the Rule to provide for the submission of an event notice in the case of bankruptcy, insolvency, receivership or similar event of the obligated person. Adding bankruptcy, insolvency, receivership or similar event of the obligated person as a disclosure event expands the circumstances in which obligated persons undertake to submit an event notice to the MSRB. Based on industry sources, the Commission estimated in the Proposing Release that this amendment would increase the total number of event notices submitted by obligated persons annually by approximately 24 notices.[468]

Several commenters offered their views on the impact of the proposal to add bankruptcy, insolvency, receivership or similar event of the obligated person as a new disclosure event.[469] One of these commenters expressed concern that the event item, unless revised, could increase the burdens for issuers to engage in continuous monitoring of obligated persons in certain circumstances.[470] The Commission has discussed this comment in Sections III.E.2 and V.D.2.b, above. None of these commenters, however, called into question the Commission's estimate of 24 additional event notices or offered an alternative estimate. The Commission has reviewed its estimate in light of these comments and believes that its estimate of 24 notices for this disclosure event remains appropriate.

vi. Merger, Consolidation, Acquisition, or Sale of All or Substantially All Assets

Under the amendments, paragraph (b)(5)(i)(C)(13) is being added to the Rule to provide for the submission of event notices in the case of a merger, consolidation, acquisition involving an obligated person or sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material. The addition to the Rule of this disclosure event will expand the circumstances in which issuers will undertake to submit an event notice to the MSRB. The Commission believes that this amendment will increase the total number of event notices submitted by issuers annually. Based on industry sources, the Commission estimated in the Proposing Release that adding the new event item in paragraph (b)(5)(i)(C)(13) of the Rule would increase the total number of event notices submitted by issuers annually by approximately 1,783 notices.[471]

Several commenters offered their views on the impact of the proposal to add a new disclosure event in the case of a merger, consolidation, acquisition or sale of all or substantially all assets.[472] One of these commenters expressed concern that the event item, unless revised, could increase the burdens for issuers to engage in continuous monitoring of obligated persons in certain circumstances.[473] The Commission has discussed this comment in Sections III.E.3 and V.D.2.b, above. None of these commenters, however, called into question the Commission's estimate of 1,783 additional event notices, or offered an alternative estimate. The Commission has reviewed its estimate in light of these comments and believes that its estimate of 1,783 notices for this disclosure event remains appropriate.

vii. Successor or Additional Trustee, or Change in Trustee Name

Under the amendments, paragraph (b)(5)(i)(C)(14) is being added to the Rule to provide for the submission of an event notice in the case of the appointment of a successor or additional trustee or the change of name of a trustee, if material. Adding this event item to the Rule expands the circumstances in which issuers undertake to submit an event notice to the MSRB. As the Commission noted in the Proposing Release, the Commission believes that trustee changes occur infrequently and a change affecting the largest trustee of municipal securities provides a reasonable and conservative estimate of the number of additional event notices that will be submitted annually under this amendment to the Rule.[474] The largest trustee was involved in approximately 31% of the municipal issuances in 2008,[475] and the Commission continues to believe that this represents a reasonable estimate of the percentage of issuers covered by the largest trustee. Thus, the Commission estimates that a change to the largest trustee will impact approximately 31%, or 3,720 issuers. The Commission believes this serves as a conservative proxy for the number of event notices to be submitted regarding a change in trustee.[476] Therefore, the Commission estimates that adding the new event item contained in paragraph (b)(5)(i)(C)(14) of the Rule will increase the total number of event notices

[467] *See* Proposing Release, *supra* note 2, 74 FR at 36853. Based on industry sources that include lawyers, trade associations and vendors of municipal disclosure information, the Commission estimated that there are typically no more than 100 tender offers annually in the municipal securities market.

[468] This estimate was based on the following: (i) 917 (number of issuances of municipal securities that defaulted during the 1990s based on statistics contained in Standard and Poor's "A Complete Look at Monetary Defaults in the 1990s" (June, 2000))/10 (number of years in a decade) = 91.7 (estimated number of issuances defaulting per year) (rounded to 92); (ii) 92 (estimated number of issuances defaulting per year)/50,000 (estimated total number of municipal issuers) = .002 (.2%) (estimated percentage of all issuers that default annually); and (iii) 12,000 (estimated number of issuers under amendments to the Rule) × (.002) (.2%) (estimated percentage of all issuers that default annually) × 1 (estimated number of material event notices that an issuer will file) = 24 notices. The Commission notes that not all issuers or obligated persons that default eventually enter bankruptcy so the number of actual notices may be less.

[469] *See* Connecticut Letter at 2, GFOA Letter at 4, Metro Water Letter at 2, and NABL Letter at 8.

[470] *See* NABL Letter at 8.

[471] *See* Proposing Release, *supra* note 2, 74 FR at 36853. This estimate was based on the following: (i) 2,201 (total number of merger transactions reported under the Hart-Scott-Rodino Act in 2007 contained in the *Hart-Scott-Rodino Annual Report Fiscal Year 2007* (November 2008) available at *http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf* ("HSR Report") × 81% (percentage of mergers in industries in which municipal securities may exist) = 1782.81 notices (rounded to 1783). The estimate of the percentage of mergers in the municipal industry was based on data contained in the HSR Report. The HSR Report contained data regarding the percentage of merger transactions reported from nine industry segments. Of these nine segments, the only segment that does not issue municipal securities is banking and insurance, which accounted for 19% of reported merger transactions. As discussed in the Proposing Release, the Commission notes that each of the mergers reported under the other industry segments may not involve entities that have issued municipal securities so the number of affected municipal securities issuers may be less.

[472] *See* Kutak Letter at 4, NFMA Letter at 2, SIFMA Letter at 4, Connecticut Letter, GFOA Letter at 4, ICI Letter at 8–9, Fidelity Letter at 3, CRRC Letter at 5, and WCRRC Letter.

[473] *See* NABL Letter at 8.

[474] *See* Proposing Release, *supra* note 2, 74 FR at 36854.

[475] *See Two Decades of Bond Finance: 1989–2008,* The Bond Buyer/Thomson Reuters 2009 Yearbook 7 (Matthew Kreps ed., SourceMedia, Inc.) (2009) and *Top 50 Trustee Banks: 2008,* The Bond Buyer/Thomson Reuters 2009 Yearbook 89 (Matthew Kreps ed., SourceMedia, Inc.) (2009).

[476] This estimate is based on the following: 12,000 (estimated number of issuers under amendments) × .31 (31%) (estimated percentage of issuers that would be impacted by a change to the largest trustee of municipal securities) = 3,720 issuers.

submitted by issuers annually by approximately 3,720 notices.[477]

Two commenters expressed concern regarding the increased costs and burdens that some issuers would incur to report changes pertaining to trustees within the Rule's ten business day time frame.[478] These comments are addressed in Section V.D.2.b, above. None of these commenters, however, called into question the Commission's estimate of 3,720 notices, or offered an alternative estimate. The Commission has reviewed its estimate in light of these comments and believes that its estimate of 3,720 notices for this disclosure event remains appropriate.

c. Total Burden on Issuers for Amendments to Event Notices

In the Proposing Release, the Commission estimated and continues to believe that the process for an issuer to prepare and submit event notices to the MSRB in an electronic format will require approximately 45 minutes.[479] As discussed above, the amendment to modify the Rule's exemption for demand securities will increase total number of issuers affected by the Rule to 12,000 issuers,[480] the total number of event notices submitted by issuers to 74,605 notices,[481] and the annual paperwork burden for issuers to submit event notices to 55,954 hours.[482]

Under the amendments to paragraph (b)(5)(i)(C) of the Rule, the Commission estimates that the 12,000 municipal issuers with continuing disclosure agreements will prepare an additional 6,757 event notices annually,[483] raising the total number of event notices prepared by issuers annually to approximately 81,362.[484] This increase in the number of event notices will result in an increase of 5,068 hours in the annual paperwork burden for issuers to submit event notices.[485] In total, the amendments will result in an annual paperwork burden of approximately 61,022 hours (55,954 hours + 5,068 hours) for issuers to submit notices to the MSRB.

d. Total Burden for Issuers

Accordingly, under the amendments, the total burden on issuers to submit annual filings, event notices and failure to file notices will be 78,933 hours.[486]

3. MSRB

As discussed in the Proposing Release, the Commission estimated, and continues to believe, that the MSRB will incur an annual burden of approximately 7,000 hours to collect, index, store, retrieve, and make available the pertinent documents under the Rule.[487] The Commission anticipates that the amendment to modify the Rule's exemption for demand securities will increase filings to the MSRB by approximately 20% annually.[488] In addition, the Commission estimates that the amendments to the event notice provisions of the Rule will increase filings submitted to the MSRB approximately 9% annually.[489] Accordingly, the Commission estimates that the total burden on the MSRB of collecting, indexing, storing, retrieving and disseminating information requested by the public also will increase by approximately 29% (20% + 9%) or 2,030 hours (7,000 hours × .29). Thus, the Commission estimates that the total burden on the MSRB as a result of the amendments will be 9,030 hours annually.[490] The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe that these estimates are appropriate.

4. Annual Aggregate Burden for Amendments

The Commission estimates that, as a result of the amendments, the ongoing annual aggregate information collection burden under the Rule will be 88,263 hours.[491]

E. Total Annual Cost Burden

1. Broker-Dealers and the MSRB

The Commission does not expect broker-dealers to incur any additional external costs associated with the amendments since there is no change to the obligation of broker-dealers under the Rule 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, event notices, and failure to file notices to the MSRB. The Commission included this cost burden estimate in the Proposing Release and received no specific comments on it. However, the Commission received one comment relating to broker-dealers' costs under the Rule.[492] This commenter believed that the Commission underestimated the additional burdens and costs that the amendments would impose on Participating Underwriters to review disclosure about obligated persons in offerings for demand securities, unless the amendments to the Rule were clarified for offerings of LOC-backed demand securities.[493]

[477] This estimate is based on the following: 3,720 (estimated number of issuers that will be impacted by a change to the largest trustee of municipal securities) × 1 (estimated number of event notices that an issuer will file) = 3,720 notices. The Commission believes that the actual number of changes involving the trustee, which occur annually, is likely to be significantly less than 3,720. However, to provide a conservative estimate for the paperwork burden, the estimate takes into account a change involving the largest trustee.

[478] *See* CHEFA Letter at 3 and NAHEFFA Letter at 4.

[479] *See* Proposing Release, *supra* note 2, 74 FR at 36851.

[480] *See supra* note 375.

[481] *See supra* note 418.

[482] *See supra* note 420.

[483] 1,000 (estimated number of additional notices due to change to materiality condition) + 130 (estimated number of additional adverse tax event notices) + 100 (estimated number of tender offers event notices) + 24 (estimated number of bankruptcy/insolvency event notices) + 1,783 (estimated number of merger or acquisition event notices) + 3,720 (estimated number of appointment/change of trustee event notices) = 6,757 (total estimated number of additional event notices that will be prepared under the amendments). *See also* Proposing Release, *supra* note 2, 74 FR at 36854.

[484] 72,000 (number of event notices estimated under the Rule under the amendments modifying the exemption for event notices in the Proposing Release) + 2,605 (revised number of event notices under amendments modifying the exemption for demand securities exemption) + 6,757 (total number of additional event notices that will be prepared under the amendments to the event notice provisions of the Rule) = 81,362 event notices. This estimate is higher than the estimate in the Proposing Release by 2,605 filings or 3.31%. *See supra* notes 418, 483, and accompanying text.

[485] 6,757 (total number of additional event notices that will be prepared under the amendments to the event notice provisions of the Rule) × .75 hours (45 minutes) (estimated time to prepare an event notice) = 5,067.75 hours (rounded to 5,068 hours). *See supra* note 483 and accompanying text.

[486] 17,182 hours (estimated burden for issuers to submit annual filings) + 61,022 hours (estimated burden for issuers to submit event notices) + 729 hours (estimated burden for issuers to submit failure to file notices) = 78,933 hours. This estimate is higher than the estimate in the Proposing Release by 5,165 hours or 7%. *See supra* notes 417, 420, 423, 485 and accompanying text.

[487] *See* Proposing Release, *supra* note 2, 74 FR at 36854. This estimate is further described in the Commission's 2008 PRA submission. *See* 2008 PRA submission, *supra* note 374.

[488] *See supra* note 402 and accompanying text.

[489] 6,757 (estimated additional event notices under the final event notice amendments)/77,000 (estimated number of continuing disclosure documents submitted under the Rule prior to the amendments (60,000 (event notices) + 15,000 (annual filings) + 2,000 (failure to file notices) = 77,000)) = .087 × 100 = approximately 9%. For additional information regarding PRA estimates related to Rule 15c–12 prior to the amendments, including the estimate of 77,000, *see* 2008 PRA submission, *supra* note 374.

[490] Annual burden for MSRB: 7,000 hours (annual burden under the Rule prior to the amendments) + 2,030 hours (additional hourly burden under amendments) = 9,030 hours.

[491] 300 hours (total estimated burden for broker-dealers) + 78,933 hours (total estimated burden for issuers) + 9,030 hours (total estimated burden for MSRB) = 88,263 hours. This estimate is higher than the estimate in the Proposing Release by 5,165 hours or 6.22%.

[492] *See* NABL Letter.

[493] *See* NABL Letter at 12–13.

In the Proposing Release, the Commission solicited comment regarding the accuracy of its cost burden estimates in connection with the revised collection of information that would apply to broker-dealers.[494] Although the commenter noted above provided general comments relating to broker-dealers' burdens and costs under the Rule, which are addressed in Section V.D.1.a, it did not offer specific information or data that conflicts with the Commission's estimates nor did it provide alternative estimates. Also, this commenter made a similar statement with respect to burdens on issuers with respect to demand securities, which the Commission addressed in Section V.D.2.a.i above, and its response is also applicable here.

In addition, the Commission believes that the MSRB may incur costs to modify the indexing system of its EMMA system to accommodate the amendments to the Rule that incorporate additional disclosure events. As discussed in the Proposing Release, based on information provided to the Commission staff by MSRB, the Commission estimated that the MSRB's costs to update its EMMA system to accommodate the new or revised disclosure events would be no more than approximately $10,000.[495] The Commission also included this cost estimate in the Proposing Release and received no comments on it. The Commission continues to believe that this estimate is appropriate.

2. Issuers

a. Current Issuers

The Commission expects that some issuers that already submit continuing disclosure documents to the MSRB in an electronic format (referred to herein as "current issuers") may be subject to some costs associated with the amendments to the Rule. For current issuers that convert their annual filings, event notices and/or failure to file notices into the MSRB's prescribed electronic format through a third party, there will be costs associated with any additional submissions of event notices and failure to file notices.

The cost for an issuer to have a third-party vendor convert paper continuing disclosure documents into the MSRB's prescribed electronic format may 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. As discussed in the Proposing Release, the Commission estimated 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.[496] The Commission also estimated that event notices and failure to file notices consist of one to two pages.[497] Accordingly, the approximate cost for an issuer to use a third-party vendor to scan an event notice or failure to file notice would be $8 per notice. The Commission included this cost estimate in the Proposing Release and received no comments on it. The Commission believes that this estimate is still accurate.

In addition, the Commission estimated that an issuer submits three event notices to the MSRB annually.[498] As discussed above, the Commission recently received updated information from the MSRB relating to the actual number of annual filings, event notices and failure to file notices submitted to its EMMA system during the Sample Period. Based on this information from the MSRB, the Commission is updating its PRA estimates of the total number of event notices that will be submitted by issuers. The Commission also is updating its estimate to reflect that an issuer on average will submit five event notices to the MSRB annually plus an additional notice as a result of the new event items.[499] Under the amendments, some current issuers will need to prepare additional event notices for submission to the MSRB. Some current issuers may need to submit these additional event notices to a third party for conversion into an electronic format for submission to the MSRB. The Commission estimated that the number of additional event notices that an issuer will need to submit annually under the amendments is one, increasing the total estimate to six notices per year.[500] Each of these issuers will incur an annual cost of $8 to convert the additional event notice into an electronic format for submission to the MSRB.[501] The Commission believes that current issuers that already have the technological resources to convert continuing disclosure documents into an electronic format for submission to the MSRB will not incur any additional external costs associated with the amendments. The Commission included this $8 cost estimate in the Proposing Release and received no comments on it.

As the Commission noted in the Proposing Release, there may be some costs incurred by issuers to revise their current template for continuing disclosure agreements to reflect the amendments to the Rule.[502] The Commission understands that models currently exist for continuing disclosure agreements that are relied upon by legal counsel to issuers and, accordingly, these documents are likely to be updated by outside attorneys to reflect the amendments. Based on industry sources and as discussed in the Proposing Release, the Commission believes that continuing disclosure agreements are form agreements.[503] Additionally, based on industry sources, the Commission estimates that it will take an outside attorney approximately 15 minutes to revise the template for continuing disclosure agreements for a current issuer.[504] Thus, the Commission estimates that, for each current issuer, the approximate cost to revise a continuing disclosure agreement to reflect the amendments will be approximately $100,[505] for a one-time total cost of $1,000,000[506] for all current issuers. The Commission included these cost estimates in the Proposing Release and received no specific comments on them.

[494] *See* Proposing Release, *supra* note 2, 74 FR at 36858.

[495] *See* Proposing Release, *supra* note 2, 74 FR at 36855, n. 205. Telephone conversation between Harold Johnson, Deputy General Counsel, MSRB, and Martha M. Haines, Assistant Director and Chief, Office of Municipal Securities, Division, Commission, November 7, 2008.

[496] *See* Proposing Release, *supra* note 2, 74 FR at 36855.

[497] *Id.*

[498] *Id.*

[499] *See* discussion of estimate of the average number of event notices to be submitted by each issuer, *supra* Section V.D.2.b.

[500] 6,757 (estimated additional event notices submitted under amendments)/12,000 (estimated number of issuers under amendments) = .563 notices per issuer (rounded up to 1) (estimated number of additional event notices submitted annually per issuer).

[501] $8 (cost to have third party convert an event notice or failure to file notice into an electronic format) × 1 (estimated number of additional event or failure to file notices filed per year per issuer) = $8.

[502] *See* Proposing Release, *supra* note 2, 74 FR at 36855.

[503] *Id.*

[504] *Id.* Continuing disclosure agreements are prepared and executed at the time of an offering of municipal securities, when an issuer has already retained bond counsel for other purposes. Accordingly, the Commission believes that there should only be minimal incremental costs for an outside attorney to revise the template for continuing disclosure agreements.

[505] 1 (continuing disclosure agreement) × $400 (hourly wage for an outside attorney) × .25 hours (estimated time for outside attorney to revise a continuing disclosure document in accordance with the amendments to the Rule) = $100. The $400 per hour estimate for an outside attorney's work is based on industry sources.

[506] $100 (estimated cost to revise a continuing disclosure agreement in accordance with the amendments to the Rule) × 10,000 (number of current issuers) = $1,000,000.

b. Demand Securities Issuers

As discussed above, the Commission estimates that the amendments relating to demand securities will increase the number of issuers affected by the Rule by approximately 20% or 2,000 issuers or obligated persons (referred to herein as "demand securities issuers").[507] As discussed in the Proposing Release, demand securities issuers may have some external costs associated with the preparation and submission of annual filings, event notices and failure to file notices.[508]

Under the Rule, Participating Underwriters are required to reasonably determine that an issuer has entered into a continuing disclosure agreement to provide continuing disclosure documents to the MSRB in an electronic format as prescribed by the MSRB. Under the amendments, Participating Underwriters will need to reasonably determine that these demand securities issuers have entered into continuing disclosure agreements. This change applies to any initial offering and remarketing that is a primary offering of demand securities occurring on or after the compliance date of the amendments.[509] However, to accommodate commenters' concerns about the proposal's impact on existing demand securities, the amendment does not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the amendments' compliance date and that continuously have remained outstanding in the form of demand securities.

The Commission understands that models currently exist for continuing disclosure agreements that are relied upon by legal counsel to issuers and, accordingly, these documents are likely to be updated by outside attorneys to reflect the amendments. Based on industry sources, the Commission believes that continuing disclosure agreements are form agreements. Also, based on industry sources, the Commission estimates that it will take an outside attorney approximately 1.5 hours to draft a continuing disclosure agreement. Thus, the Commission estimates that the cost of preparing a continuing disclosure agreement for each demand securities issuer will be approximately $600,[510] for a one-time total cost of $1,200,000[511] for all demand securities issuers, if an outside counsel prepares the agreement. The Commission included these estimates in the Proposing Release and did not receive any comments on them. The Commission continues to believe they are appropriate.

The Commission believes that demand securities issuers generally will not incur any other external costs associated with the preparation of annual filings, event notices (including notices for the new event disclosure items included in the amendments) and failure to file notices. The Commission believes that demand securities issuers will prepare the information contained in these continuing disclosure documents internally and that these internal costs have been accounted for in the hourly burden section above.[512]

The Commission believes that the only external costs demand securities issuers may incur in connection with the submission of continuing disclosure documents to the MSRB will be the costs associated with converting them into an electronic format. The Commission believes that many issuers of municipal securities already 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. Demand securities issuers that presently do not have the ability to prepare their annual filings, event notices or failure to file notices in an electronic format may incur some costs to obtain electronic copies of such documents if they are prepared by a third party (*e.g.,* an accountant or attorney) or, alternatively, to have a paper copy converted into an electronic format. These costs may vary depending on how the demand securities issuer elects 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 may vary depending on the issuer's current technological resources. An issuer also could elect to use a designated agent to submit its continuing disclosure documents to the MSRB.

As discussed in the Proposing Release, the Commission estimated that 30% of issuers would elect to use designated agents to submit continuing disclosure documents to the MSRB.[513] Generally, when issuers utilize the services of a designated agent, they enter into a contract with the agent for a package of services, including the submission of continuing disclosure documents, for a single fee. Based on industry sources, the Commission estimated this fee to range from $100 to $500 per year depending on the designated agent an issuer uses.[514] Accordingly, the Commission estimated that the high end of the total annual cost that may be incurred by demand securities issuers that use the services of a designated agent will be $300,000.[515] The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe they are appropriate.

The cost for an issuer to have a third-party vendor convert its paper continuing disclosure documents into an appropriate electronic format may vary depending on the type of resources that are required. One method would be to scan paper-based continuing disclosure documents into an electronic format. As discussed in the Proposing Release, the Commission estimated that the approximate cost for an issuer to use a third-party vendor to scan an event notice or failure to file notice would be $8 per notice, and that the maximum number of event notices or failure to file notices that an issuer would submit annually is three.[516] The Commission included these estimates in the Proposing Release and received no comments on them. As discussed above, the Commission now estimates that an issuer will file five event notices. The Commission believes that these estimates are appropriate. Under the amendments, the Commission estimates that the maximum number of event notices and failure to file notices submitted by issuers will increase to six.[517] Accordingly, the Commission

[507] *See supra* Section V.D.2.a.

[508] *See supra* note 402 and accompanying text.

[509] As noted above, the compliance date of the amendments to the Rule is December 1, 2010.

[510] 1 (continuing disclosure agreement) × $400 (hourly wage for an outside attorney) × 1.5 hours (estimated time for outside attorney to draft a continuing disclosure document) = $600. The $400 per hour estimate is based on industry sources. *See supra* note 504.

[511] $600 (cost for continuing disclosure agreement) × 2,000 (number of demand securities issuers) = $1,200,000.

[512] *See supra* Section V.D.2.a.

[513] *See* Proposing Release, *supra* note 2, 74 FR at 36856.

[514] This estimated range of the annual fee for the services of a designated agent is based on industry sources in December 2008.

[515] 2,000 (number of demand securities issuers) × .30 (percentage of issuers that use designated agents) × $500 (estimated annual cost for issuer's use of a designated agent) = $300,000.

[516] *See* Proposing Release, *supra* note 2, 74 FR at 36856.

[517] 6,757 (estimated additional event notices submitted under the amendments)/12,000 (estimated number of issuers under the amendments) = .563 notices per issuer (rounded up to 1) (estimated number of additional event notices submitted annually per issuer). To provide a conservative estimate, the Commission estimates

estimates that the maximum external costs for a demand securities issuer that elects to have a third party scan continuing event notices or failure to file notices into an electronic format under the amendments is $48.[518]

As discussed in the Proposing Release, the Commission estimated that the approximate cost for an issuer to use a third-party vendor to scan an average-sized annual financial statement would be $64 per annual statement, and that the maximum number of annual filings submitted per year is two.[519] The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe that these estimates are appropriate. Although the amendments will increase the number of issuers submitting annual filings each year, the number of annual filings each issuer submits will not increase. Thus, the Commission expects that the number of annual filings submitted yearly, per issuer, under the amendments will remain unchanged. Accordingly, the Commission estimates that the maximum external costs for a demand securities issuer that elects to have a third party scan its annual filings into an electronic format will be $128.[520]

Alternatively, a demand securities issuer that currently does not have the appropriate technology to convert paper continuing disclosure documents into an electronic format could elect to purchase the necessary resources to do so.[521] As discussed in the Proposing Release, the Commission estimated that an issuer's initial cost to acquire these technological resources could range from $750 to $4,300.[522] Some demand securities issuers, however, 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 an electronic format. In the Proposing Release, the Commission estimated that an issuer's cost to update or acquire this software could range from $50 to $300.[523] The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe that these estimates are appropriate.

In addition, demand securities issuers without direct Internet access may incur some costs to obtain such access to submit the documents. As discussed in the Proposing Release, the Commission noted that Internet access is now broadly available to and utilized by businesses, governments, organizations and the public, and the Commission expects that most issuers of municipal securities currently have Internet access.[524] In the event that a demand securities issuer does not have Internet access, it may incur costs in obtaining such access, which the Commission estimated to be approximately $50 per month, based on its limited inquiries to Internet service providers.[525] 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 amendments.[526] The Commission included this estimate in the Proposing Release and received no comments on it. The Commission continues to believe that this estimate is appropriate.

The Commission estimated in the Proposing Release that the costs to some of the demand securities issuers to acquire the technology necessary to convert continuing disclosure documents into an electronic format to submit to the MSRB may include: (i) Approximately $8 per notice to use a third-party vendor to scan an event notice or failure to file notice, and approximately $64 to use a third-party vendor to scan an average-sized annual financial statement; (ii) approximately $750 to $4,300 to acquire the technological resources to convert continuing disclosure documents into an electronic format; (iii) approximately $50 to $300 solely to upgrade or acquire the software to submit documents in an electronic format; and (iv) approximately $50 per month to establish Internet access. The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe that they are appropriate.[527]

For a demand securities 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 estimated total maximum external cost such issuer would incur will be $776 per year.[528] 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 estimated total maximum external cost such demand securities issuer would incur will be $4,900 for the first year and $600 per year thereafter.[529] To provide a conservative estimate for PRA purposes, the Commission estimated that any demand securities issuers that incur costs associated with converting continuing disclosure documents into

that each issuer will submit one additional event notice as a result of the amendments.

[518] The maximum cost is the cost to scan and convert six event or failure to file notices: 6 (number of notices submitted annually) × $8 (cost to scan and convert each notice) = $48.

[519] *See* Proposing Release, *supra* note 2, 74 FR at 36856.

[520] The maximum cost is the cost to scan and convert two annual filings: 2 (number of annual filings submitted annually) × $64 (cost to scan and convert each annual filing) = $128.

[521] Generally, the technological resources necessary to convert 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.

[522] *See* Proposing Release, *supra* note 2, 74 FR at 36857.

[523] *Id.*

[524] *Id.*

[525] *Id.*

[526] *Id.*

[527] *Id.*

[528] *See* Proposing Release, *supra* note 2, 74 FR at 36857. The total maximum external cost for a Category 1 demand securities issuer is calculated as follows: [$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 event notices or failure to file notices into an electronic format) × 6 (maximum estimated number of event or failure to file notices filed per year per issuer)] + [$50 (estimated monthly Internet charge) × 12 months] = $776. The Commission estimates that an issuer will file one to eight continuing disclosure documents per year. These documents generally will consist of no more than two annual filings and six event or failure to file notices. The Commission estimates the maximum number of documents filed annually per issuer as follows: 7 documents (consisting of 2 annual filings and 5 event or failure to file notices) + 1 document (consisting of the additional event notice that would be filed under the amendments). In the Proposing Release, the Commission estimated that the maximum number of documents filed annually per issuer would be $760. This estimate was based on 5 documents (consisting of 2 annual filings and 3 event or failure to file notices) + 1 document (consisting of the additional event notice that would be filed under the amendments). As discussed above, the Commission is updating this number to reflect more current data submitted to the MSRB. *See supra* note 368 and accompanying text. The above cost estimate is higher than the estimate in the Proposing Release by $16 or 2.1%.

[529] *See* Proposing Release, *supra* note 2, 74 FR at 36857. The total maximum external cost for a Category 2 demand securities issuer is to be calculated as follows: [$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 will have only the cost of obtaining Internet access. $50 (estimated monthly Internet charge) × 12 months = $600.

an electronic format will choose the Category 2 option.[530] The Commission estimated that approximately no more than 400 demand securities issuers will incur costs associated with acquiring technological resources to convert continuing disclosure documents into an electronic format.[531] The Commission included these estimates in the Proposing Release and received no comments on them. The Commission continues to believe they are appropriate.

In addition, the Commission estimates that the aggregate maximum annual costs for those demand securities issuers that need to acquire technological resources to submit documents to the MSRB will be approximately $1,960,000[532] for the first year after the adoption of the amendments and approximately $240,000[533] for each year thereafter. The Commission included these cost burden estimates in the Proposing Release and received no comments on them. The Commission continues to believe that these estimates are appropriate.

c. Current Issuers and Demand Securities Issuers

Some current issuers and demand securities issuers may incur a one-time external cost associated with the amendment to revise the time frame for submitting event notices from "in a timely manner" to "in a timely manner not to exceed ten business days after the occurrence of the event." In particular, some current issuers and demand securities issuers may incur a one-time external cost associated with becoming apprised of the appointment of a new trustee or for the change in the trustee's name. One way an issuer may become apprised of such a change would be for its counsel to add a notice provision to the issuer's trust indenture that requires the trustee to provide the issuer with notice of the appointment of a new trustee or any change in the trustee's name. Based on industry sources, the Commission estimates that it will take an outside attorney approximately 15 minutes to draft and add a provision to an indenture agreement requiring notice of a change of trustee or to the trustee's name. Thus, the Commission estimates that the approximate cost of adding this notice provision to an issuer's trust indenture will be approximately $100 per issuer,[534] for a one-time annual cost of $1,200,000[535] for all issuers. The Commission included these cost burden estimates in the Proposing Release and received no comments on them. The Commission continues to believe they are appropriate.

As discussed in the Proposing Release, the Commission solicited comment regarding the accuracy of its cost burden estimates in connection with the revised collection of information applicable to issuers. As noted above, although some commenters offered general comments relating to issuers' burdens and costs under the Rule, they did not quantify these burdens or costs. For example, some commenters expressed the view that the Commission underestimated the burdens or costs that would be imposed on issuers and obligated persons as a result of the amendments.[536] A number of commenters expressed concern about additional burdens or costs, which they believed issuers would incur as a result of the ten business day time frame for submitting notices for events outside of the issuer's control.[537] These commenters also remarked that these increased burdens or costs would be particularly difficult for small issuers.[538] Although these commenters provided general views relating to issuers' burdens and costs under the Rule, which are addressed in Section V.D.2 above, they did not offer specific information or data that conflicted with the Commission's cost estimates nor did they provide alternative estimates. As discussed above, the Commission agrees that some issuers, including small issuers, will have increased burdens and costs under the Rule. However, for the reasons discussed in Section V.D.2 above, the Commission continues to believe that these burdens and costs are accounted for in the Commission's PRA burden analysis.

In addition to the commenters discussed above, two commenters opposed the proposed amendment to modify the exemption for demand securities because they viewed it as imposing an audit requirement on small issuers.[539] One of these commenters stated that the proposal could increase costs to a small issuer by $30,000–40,000 annually to prepare audited or consolidated financial statements.[540] The commenter believed that such costs could force small demand securities issuers to withdraw from the tax-exempt municipal market and thus recommended that the Commission withdraw the proposed amendment to modify the exemption for demand securities or create a limited exception for LOC-backed demand securities.[541]

As discussed further in Section III.A. above, the Commission notes that, for purposes of paragraph (b)(5)(i)(B) of the Rule, audited financial statements need to be submitted, pursuant to the issuer's and obligated person's undertaking in a continuing disclosure agreement, only "when and if available."[542] This limitation, which is consistent with the Commission's position in the 1994 Amendments Adopting Release, should mitigate some concerns of those obligated persons that do not prepare audited financial statements in the ordinary course of their business.[543] Further, although not all issuers or obligated persons, in the ordinary course of their business, prepare audited financial statements or other financial

[530] *See* Proposing Release, *supra* note 2, 74 FR at 36857.

[531] 2,000 demand securities issuers × 20% = 400 demand securities issuers. The Commission used a 20% estimate in the Proposing Release. The Commission believes that this estimate is still appropriate.

[532] 400 (Category 2 issuers) × $4,900 = $1,960,000.

[533] 400 (Category 2 issuers) × $600 = $240,000.

[534] 1 (continuing disclosure agreement) × $400 (hourly wage for an outside attorney) × .25 hours (estimated time for outside attorney to draft and add a change of name notice provision to a trust indenture) = $100. The $400 per hour estimate for an outside attorney's work is based on industry sources.

[535] $100 (estimated cost to have outside counsel add a notice provision to a trust indenture) × 12,000 (number of issuers under the amendments) = $1,200,000.

[536] *See* Connecticut Letter at 3 ("I suspect that the Commission has underestimated the true costs of some of these proposals"), NABL Letter at 12–13 ("The Commission's estimates of costs and other regulatory impacts * * * greatly underestimate the likely impact of the amendments"), and GFOA Letter at 5 ("The SEC's estimated time needed and costs associated with implementing the proposals are a fraction of what issuers will likely incur. This is true for both small and large issuers, as compliance costs and monitoring will increase, as will an issuer's need to retain bond counsel").

[537] *See* Halgren Letter at 1–2, Kutak Letter at 2, NAHEFFA Letter at 3, Los Angeles Letter at 2, San Diego Letter at 3, California Letter at 2–3, CHEFA Letter at 2–3, CRRC Letter at 5, WCRRC Letter at 1, and Connecticut Letter at 3. *See supra* Section V.D.2.i.a.c.

[538] *Id.*

[539] *See* CRRC Letter at 5 and WCRRC Letter at 1 (generally expressed support for comments in CRRC Letter).

[540] *Id.*

[541] *Id.*

[542] 17 CFR 240.15c2–12(b)(5)(i)(B). *See also supra* Section III.A. concerning audited financial statements and 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

[543] As discussed in the 1994 Amendments Adopting Release, the 1994 Amendments "[do] not adopt the proposal to mandate audited financial statements on an annual basis with respect to each issuer and significant obligor. Instead, the amendments require annual financial information, which may be unaudited, and may, where appropriate and consistent with the presentation in the final official statement, be other than full financial statements. * * * However, if audited financial statements are prepared, then when and if available, such audited financial statements will be subject to the undertaking and must be submitted to the repositories. Thus * * * the undertaking must include audited financial statements only in those cases where they otherwise are prepared." *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

and operating information of the type included in annual filings, a number of issuers and obligated persons do.[544]

The Commission acknowledges that issuers or obligated persons of demand obligations that assemble financial and operating data for the first time in response to their undertakings in a continuing disclosure agreement may incur incremental costs beyond those costs incurred by those issuers or obligated persons that already assemble this information.[545] Also, smaller issuers or obligated persons may have relatively greater burdens than larger issuers or obligated persons. However, the overall burdens for these demand securities issuers or obligated persons in preparing financial information are expected to be commensurate with those of issuers or obligated persons that already are preparing financial information as part of their continuing disclosure undertakings.[546] The Commission believes that the burdens that will be incurred in the aggregate by issuers or obligated persons, as a result of the amendments with respect to demand securities, may not be significant and, in any event, are justified by the benefits to investors of enhanced disclosure.[547]

As indicated above, another commenter stated its view that the proposed amendments would increase an issuer's need to retain bond counsel.[548] To the extent that bond counsel will need to be retained to revise the continuing disclosure agreement or add a notice provision to the issuer's trust indenture, the Commission has provided estimates relating to these costs in Section V.E.2, above.

F. Retention Period of Recordkeeping Requirements

The amendments do not contain any recordkeeping requirements. However, as a self-regulatory organization subject to Rule 17a-1 under the Exchange Act,[549] the MSRB is 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 amendments to the Rule contain no recordkeeping requirements for any other persons.

G. Collection of Information Is Mandatory

The collection of information is mandatory.

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

The collection of information will not be confidential and will be publicly available. The collection of information will be accessible through the MSRB's EMMA system and thus will be publicly available via the Internet.

VI. Costs and Benefits of Amendments to Rule 15c2–12

A. Background

Rule 15c2–12 is intended to enhance disclosure and deter fraud in the municipal securities market by establishing standards for obtaining, receiving and disseminating information about municipal securities by their underwriters.[550] The amendments to Rule 15c2–12 revise certain requirements regarding the information that a Participating Underwriter 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 to the MSRB. Specifically, the amendments: (1) Narrow a previously-existing exemption from the Rule for demand securities, subject to the limited grandfather provision; (2) specify that the time period as to which the Commission's rules require a Participating Underwriter to reasonably determine that the issuer or obligated person has agreed to provide notice of specified events in a timely manner must not be in excess of ten business days after the event's occurrence; (3) eliminate materiality qualifications for certain events triggering a notice to the MSRB; and (4) add additional events to the list of events for which a notice is provided.

The Commission is deleting the exemption for demand securities set forth in paragraph (d)(1)(iii) of the Rule and adding new paragraph (d)(5) to the Rule, thereby making the continuing disclosure provisions of paragraphs (b)(5) and (c) of the Rule apply to a primary offering of demand securities,[551] subject to the limited grandfather provision described below. This change applies to any primary offering of demand securities (including a remarketing that is a primary offering) occurring on or after the compliance date of the final amendments.[552] The Commission's amendment differs from the amendment the Commission originally proposed in that it includes a "limited grandfather provision" for remarketings of currently outstanding demand securities. Specifically, the continuing disclosure provisions will not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the compliance date of the final amendments and that continuously have remained outstanding in the form of demand securities. This amendment will increase the amount of information in the market relating to primary offerings of demand securities occurring on or after the compliance date and will provide investors with valuable information, thereby enabling them to make better informed investment decisions relating to whether they should buy, sell, or hold such securities and reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.

The amendment to the Rule regarding notice of specified events "in a timely manner not in excess of ten business days" after the event's occurrence will have the effect of establishing a definitive time frame for the submission of event notices. This provision will supplement the "in a timely manner" language that existed in the Rule prior to these amendments, which allowed for the possibility of event notices being submitted to the MSRB at inconsistent times for similar events, because each issuer could decide for itself what constitutes "in a timely manner."

[544] *See http://www.emma.msrb.org* for audited financial statements or other financial and operating information submitted to EMMA.

[545] The Commission, however, believes that the operations of an issuer or obligated person generally entail the preparation and maintenance of at least some financial and operating data.

[546] Further, issuers or obligated persons that assemble financial and operating data for the first time may face a greater burden than those issuers or obligated persons that already assemble this information. The amendments therefore initially may have a disparate impact on those issuers or obligated persons, including small entities, entering into a continuing disclosure agreement for the first time, as compared with those that already have outstanding continuing disclosure agreements.

[547] *See supra* Section V.D. As discussed therein, some commenters believed that the amendment could force some small entities to withdraw from the tax-exempt market because: (1) Disclosure of small issuers' or obligated persons' financial information would provide their large, national competitors with information about these small issuers or obligated persons, which they believed could result in a competitive disadvantage to them; and (2) small issuers or obligated persons would have to prepare costly audited financial statements. *See, e.g.,* CRRC Letter at 3–4 and WCRRC Letter at 1. As discussed above, the undertakings contemplated by the amendments (and Rule 15c2–12 in general) require annual financial information only to the extent provided in the final official statement, and audited financial statements only when and if available.

[548] *See* GFOA Letter at 5.

[549] 17 CFR 240.17a–1.

[550] *See* 1989 Adopting Release, 1994 Amendments Adopting Release, and 2008 Amendments Adopting Release, *supra* note 8.

[551] *See supra* note 38 and accompanying text.

[552] As noted in Section III.G., the compliance date for the amendments to the Rule is December 1, 2010.

Because the Rule did not contain a specific time frame for submission of event notices, investors could not be certain whether or not an event had occurred over an indefinite period in the past. This amendment still requires Participating Underwriters to reasonably determine that a continuing disclosure agreement provides for timely disclosure, but sets an outside time frame of ten business days after the event's occurrence for submission of an event notice. To the extent that issuers provide disclosure within ten business days, consistent with their continuing disclosure agreements, there likely will be more certainty for investors concerning when they will receive information concerning such events and, on the whole, more timely information to investors and the municipal securities market generally. More up-to-date information about municipal securities can serve to protect investors from fraud facilitated by inadequate disclosure and assist investors in determining whether the price of a municipal security is appropriate.

The amendment to remove the "materiality" condition for six specified events in paragraph (b)(5)(i)(C) of the Rule will have the effect of increasing the disclosure of such events to investors and the municipal securities market generally.[553] In addition, issuers and obligated persons no longer will have to separately analyze whether each occurrence of such events is material.

In addition, the amendment to modify paragraph (b)(5)(i)(C)(6) of the Rule, which relates to a Participating Underwriter's obligation to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide notice to the MSRB of certain tax events, will have the effect of enhancing the disclosure of events that are important to investors in determining whether the tax status of their municipal securities is at risk.

The amendment to modify paragraph (b)(5)(i)(C) of the Rule adds four new event items to be disclosed to investors.[554] The disclosure of these events will provide investors and the market with important information regarding municipal securities.

These amendments are intended to help improve the availability of timely and important information to investors and other market participants regarding municipal securities, including demand securities, so that investors can make more knowledgeable investment decisions, effectively manage and monitor their investments, and help reduce the likelihood of fraud facilitated by inadequate disclosure. In addition, the amendments are intended to help brokers, dealers, and municipal securities dealers to satisfy their obligation to have a reasonable basis on which to recommend a municipal security.

The Commission is sensitive to the costs and benefits that result from its rules. In the Proposing Release, the Commission identified certain costs and benefits of the amendments as proposed and requested comment on all aspects of its cost-benefit analysis, including the identification and assessment of any cost and benefits not discussed in the analysis. The Commission sought comment on the value of the benefits identified and the accuracy of its cost estimates. The Commission also encouraged commenters to provide relevant data. The Commission received some comments relating to the Commission's cost-benefit analysis. For the reasons discussed below, the Commission continues to believe that its estimates of the benefits and costs of the amendments to the Rule 15c2–12, as set forth in the Proposing Release, are appropriate.

B. Benefits

The Commission discusses below the benefits of the Rule for each amendment to the Rule.

1. Increased Disclosure Relating to Demand Securities

The Commission is modifying the Rule's exemption for primary offerings of demand securities (including any remarketing that is a primary offering) to narrow the Rule's prior exemption, which will result in the greater availability of information about these securities to investors, broker-dealers, municipal securities analysts, and the securities markets generally. In addition, under this amendment, a broker, dealer or municipal securities dealer that recommends the purchase or sale of demand securities will need to have procedures in place that provide reasonable assurance that it will receive prompt notice of event notices and failure to file notices.[555]

The greater availability of information regarding demand securities should increase the efficiency of markets in allocating capital at appropriate prices that reflect the creditworthiness of issuers and increase the efficiency of prices in the secondary market, benefiting issuers and investors alike, and should also benefit investors by allowing them to make more informed decisions whether to buy, sell or hold these securities. This greater availability of information is also likely to benefit brokers, dealers, or municipal securities dealers by reducing their costs in forming a reasonable basis for recommending demand securities. Specifically, these market participants will have more information about these securities to draw upon when they are deciding whether or not to recommend demand securities to investors. Greater availability of information also will benefit broker-dealers and municipal securities dealers by reducing their costs in establishing secondary market quotations for demand securities. In addition, greater transparency in the market due to the applicability of the continuing disclosure requirements to demand securities should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure, resulting in potentially reduced costs associated with such fraud.

By 2009, the outstanding amount of VRDOs was estimated to be approximately $400 billion, which is a significant percentage of the municipal securities market.[556] The Commission recognizes that some issuers of demand securities voluntarily provide continuing disclosure documents, notwithstanding the exemption for demand securities that existed prior to the amendments. Therefore, the above-referenced benefits will result primarily from the additional disclosure that is provided by issuers of demand securities that did not previously provide continuing disclosure documents.

A number of commenters were supportive of applying the continuing disclosure to demand securities.[557]

[553] These events are: (1) Principal and interest payment delinquencies; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.

[554] These events are: (1) Tender offers; (2) bankruptcy, insolvency, receivership or similar event of the obligated person; (3) consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to such actions, other than pursuant to its terms, if material; and (4) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

[555] *See* 17 CFR 240.15c2–12(c).

[556] *See* Andrew Ackerman, "Concerns Raised on VRDOs," The Bond Buyer, June 9, 2009.

[557] *See* California Letter at 1, CHEFA Letter at 2, Connecticut Letter at 1, DAC Letter at 3, e-certus Letter I at 11, Fidelity Letter at 3, Folts Letter at 1,

Several commenters agreed that the amendments relating to demand securities are critical to assist investors in making informed investment decisions.[558] One commenter noted that the market for demand securities was among the sectors most affected by the recent market turmoil and, consequently, stated its view that there is "little justification for exempting VRDOs from continuing disclosure requirements."[559] Similarly, another commenter stated that, during the recent market downturn, investors in demand securities were well served by those issuers or obligated persons who voluntarily provided continuing disclosures about these securities, despite the Rule's exemption.[560] Another commenter believed that, because many VRDO issuers already are subject to requirements for continuing disclosure and the submission of material event notices for their fixed rate debt, the submission of information with respect to their VRDOs will not be a significant burden and will provide access to information about these securities to a much broader segment of the market.[561]

2. More Timely Disclosure

Establishing an outside timeframe of ten business days after the occurrence of the specified event to submit an event notice will help improve the timeliness of the dissemination of the information to investors and the market. The more timely availability of event notices will help improve the efficient pricing of municipal securities and will benefit investors by allowing them to make more informed investment decisions and to do so with greater certainty as to the timeliness of available information. The more timely availability of event notices also will contribute to the speedier dissemination of event notices to the market, which may, in turn, trigger important contractual rights that may have otherwise been delayed. In addition, the increased availability of *up-to-date information about municipal securities* is likely to improve the transparency in the market; should increase the efficiency of markets in allocating capital at appropriate prices that reflect the creditworthiness of issuers, which benefits issuers and investors alike; and should reduce the likelihood that investors will be subject to fraud facilitated by inadequate disclosure.

Four commenters supported the proposal to establish a ten business-day timeframe for the submission of event notices pursuant to a continuing disclosure agreement.[562] Two of these commenters indicated that the benefits of the proposed amendment include more timely and efficient access to comprehensive and accurate information about municipal securities, which is critical to investors.[563] These commenters also noted that the establishment of a definitive timeframe by which event notices are to be submitted better informs the market that an event has occurred, which assists in the efficient pricing of their municipal securities.[564] Two commenters also noted that the definitive time frame provides more timely information to pricing evaluation services and relieves investors of dependence on bondholders to disclose information to these services.[565]

3. Increased Disclosure Due to the Deletion of the Materiality Condition for Six Events

The Commission is adopting the proposal to delete the "if material" condition with respect to notice for six of the Rule's disclosure events.[566] The deletion of the materiality condition for these six events will benefit issuers by eliminating the costs presently incurred by an issuer in making such a determination. Further, because issuers will not need to make a materiality determination, this Rule revision is likely to help speed the disclosure of these six events to investors and other market participants and help improve the efficient pricing of municipal securities. Greater certainty that information about these events will be disclosed pursuant to continuing disclosure agreements also is likely to help improve the transparency of the municipal security's pricing. The greater availability of information regarding events that have an immediate effect on the valuation of the security will help reduce the likelihood of fraud facilitated by inadequate disclosure, and in return will help reduce costs associated with such fraud.

A number of commenters supported the deletion of the "if material" qualification for these six events and believed that this change would be beneficial.[567] For example, one commenter believed that notice of these events should always be provided because their occurrence is always important to investors and other market participants. The commenter also noted that, in all probability, the amendment will not result in many changes to current practice.[568] Two other commenters also agreed that these events are important to investors, and generally should be known immediately to issuers.[569] Another two commenters concurred that many disclosure events are of such high consequence and relevance to investors in informing their investment decisions that they should be disclosed as a matter of course.[570] These commenters also supported the unqualified disclosure of two events, *i.e.,* bond calls and non-payment related defaults, for which a materiality condition is retained.[571]

4. Increased Disclosure of Tax-Related Events

The amendments also require a Participating Underwriter to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide notice to the MSRB of adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security. The improved disclosure of the tax status of municipal securities will benefit investors by helping to ensure that the information about the tax status of the municipal security is reflected in the price of the security in a timely manner.

Two commenters agreed that the amendment will benefit investors and the market. One commenter stated that the tax status of tax-exempt debt is of critical concern to many municipal investors, particularly municipal mutual funds, and that an adverse tax opinion likely will substantially decrease the market value and liquidity of a security.[572] Thus, the subsequent sale of the affected security could have a significant financial impact on

ICI Letter at 2, NFMA Letter at 1, RBDA Letter at 2, and SIFMA Letter at 2.

[558] *See, e.g.,* ICI Letter at 5, SIFMA Letter at 2, and RBDA Letter at 2.

[559] *See* RBDA Letter at 2.

[560] *See* CHEFA Letter at 2.

[561] *See* NMFA Letter at 1.

[562] *See* NFMA Letter at 1–2, SIFMA Letter at 3, ICI Letter at 6–7, and Fidelity Letter at 3–4.

[563] *See* ICI Letter at 1 and Fidelity at 2.

[564] *Id.*

[565] *Id.*

[566] *See supra* note 553 describing the events.

[567] *See* California Letter at 2, San Diego Letter at 2, SIFMA Letter at 3, ICI Letter at 7–8, and Fidelity Letter at 3.

[568] *See* SIFMA Letter at 3.

[569] *See* California Letter at 2 and San Diego Letter at 2.

[570] *See* ICI Letter at 7–8 and Fidelity Letter at 3.

[571] *Id.*

[572] *See* NFMA Letter at 2.

investors.[573] A second commenter believed that investors have a strong interest in being informed of actions taken by the IRS that present a material risk to the tax-exempt status of their holdings.[574]

5. Increased Disclosure of Additional Events

The amendments also add four new event items to Rule 15c2–12. The amendments add the disclosure of tender offers to the provision of the Rule that currently applies only to bond calls.[575] Information regarding a tender offer, which necessitates that an investor decide whether or not to tender within the prescribed time period, will improve the ability of issuers and other obligated persons to communicate tender offers to bondholders effectively and of bondholders to respond within the tender offer period. In addition, the amendment should help reduce the possibility of investor confusion regarding whether a certain municipal security is the subject of a tender offer.

The amendments also add the disclosure of bankruptcy, insolvency, receivership or similar event of the obligated person.[576] While these events are uncommon in the municipal market, their improved disclosure can have a significant effect on the price of the municipal securities.

In addition, the amendments add the disclosure of the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.[577] As with bankruptcy, insolvency, receivership or similar event of the obligated person, the improved disclosure of the consummation of a material merger, consolidation, or acquisition or the sale of all or substantially all of the assets of the obligated person can have a significant effect on the price of the municipal securities. This amendment is likely to help improve investors' and other market participants' ability to obtain knowledge of the identity of the entity that will have responsibility for municipal security repayment obligations after the transaction is consummated. In addition, investors and other market participants will have the opportunity to review the creditworthiness and other aspects of the acquiring entity that support repayment of the security following the transaction.

The addition of these new disclosure events to the Rule will help improve the informativeness of the municipal security prices with respect to these events, which will benefit investors, issuers, broker-dealers, municipal securities analysts and other market participants. In addition, greater transparency should reduce the likelihood of fraud facilitated by inadequate disclosure, and in return will help reduce costs associated with such fraud.

Under the amendments, the appointment of a successor or additional trustee or the change of name of a trustee, if material, is added to the list of events contained in the Rule. As discussed earlier, the trustee of a municipal security performs important functions for investors in that security, including providing information to bondholders.[578] This amendment is likely to benefit investors by helping reduce the costs associated with determining the identity of and contact information for the most current trustee and that of any new trustee.

Several commenters supported the addition of the new event items to the Rule.[579] For example, two commenters believed that disclosure of trustee-related events will provide meaningful insights and information regarding a particular bond.[580] One of these commenters particularly noted that it was critical that investors are informed of trustee name changes since bondholders' rights are generally exercised through the actions of the trustee.[581] Another commenter noted that disclosure of trustee-related events will likely always be of importance to both retail and institutional investors.[582]

B. Costs

The Commission discusses below the costs of the amendments to the Rule for various market participants.

1. Broker-Dealers

Broker-dealers are not likely to incur significant additional recurring external or internal costs in connection with the implementation of the Rule, as amended, because the amendments will not significantly alter the Rule's existing requirements for broker-dealers. As discussed above, broker-dealers acting as Participating Underwriters have an existing obligation to reasonably determine that issuers or obligated persons have undertaken in their continuing disclosure agreements to provide notice to the MSRB of specified events. The Commission does not expect that the addition of several new disclosure events to the Rule and a provision establishing the time frame for submission of such notices are likely to significantly alter broker-dealers' obligations under the Rule and thus their costs. As a practical matter, broker-dealers' obligations affected by the amendments involve verifying that the continuing disclosure agreement contains an undertaking by the issuer or obligated person to provide notice to the MSRB of the events that are listed in the Rule, including the new events, within ten business days after the event's occurrence. Moreover, because continuing disclosure documents generally are form documents, a broker-dealer simply will need to make sure that the continuing disclosure agreement reflects the amendments to the Rule.

The amendments also modify the Rule's exemption for demand securities. This change applies to any initial offering and remarketing that is a primary offering of demand securities occurring on or after the compliance date of the amendments and does not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the compliance date and that continuously have remained outstanding in the form of demand securities (*i.e.,* the limited grandfather provision).

Although the amendments relating to demand securities are not likely to result in external recurring costs for broker-dealers, broker-dealers may incur an increase in internal recurring costs because the proposals will increase the number of municipal securities offerings subject to the Rule's disclosure requirements. As noted above, the Commission estimates that the modification of the exemption for demand securities will increase the number of issuers with municipal securities offerings subject to the Rule by 20%.[583] The Commission estimates

[573] *Id.*

[574] *See* SIFMA Letter at 3.

[575] *See supra* Section III.E.1.

[576] *See supra* Section III.E.2.

[577] *See supra* Section III.E.3.

[578] *See supra* Section III.E.4.

[579] *See* ICI Letter at 8, Fidelity Letter at 2–3, Connecticut Letter at 2, NFMA Letter at 2, and SIFMA Letter at 4.

[580] *See* ICI Letter at 8 and Fidelity Letter at 2.

[581] *See* Fidelity Letter at 3.

[582] *See* NFMA Letter at 2.

[583] *See supra* Section V.D.2.a. As noted above, adoption of the limited grandfather provision will not materially affect the Commission's estimate of the number of demand securities issuers that will be affected by the amendments. Therefore, the Commission is retaining its estimate that there will

that the annual information collection burden for each broker-dealer under this amendment will be 1.20 hours (1 hour and 12 minutes).[584] Accordingly, the Commission estimates that it will cost each broker-dealer $349 annually to comply with the Rule, which represents a cost increase of $79 annually over each broker-dealer's current annual cost.[585]

In addition, the Commission estimates that a broker-dealer may 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 about the final revisions to Rule 15c2–12. The Commission estimates that it will take internal counsel approximately 30 minutes to prepare this memorandum,[586] for a cost of approximately $146.[587] The Commission further believes that the ongoing obligations of broker-dealers under the Rule will be handled internally because compliance with these obligations is consistent with the type of work that a broker-dealer typically handles in-house.

The Commission included these specific cost estimates in the Proposing Release and received no comments on them.[588]

2. Issuers

a. Current Issuers

Some current issuers are likely to be subject to some internal and external costs associated with the amendments. The costs for current issuers will result from the amendments relating to the new and modified event notice provisions and the elimination of the materiality determination for certain of the Rule's events.[589] Current issuers will incur internal costs associated with the preparation of the additional event notices that may result from these changes to the Rule. Current issuers also will incur costs if they issue demand obligations, as discussed in the next sub-section. As noted above, the revisions to the Rule regarding the ten business day time frame for submission of event notices and the elimination of the materiality condition for many of the Rule's disclosure events will not change the substance of an event notice, the method for filing an event notice, or the location to which an event notice will be submitted. Consequently, issuers may not incur costs associated with the new ten business day time frame for submission of event notices. As discussed above, some issuers, including small issuers, may need to submit event notices more promptly than they do now and may need to monitor events not within their direct control, such as a rating change, that will prompt submission of an event notice.

The Commission also believes that current issuers may incur some internal labor costs associated with the preparation and submission of additional event notices. As discussed above,[590] the Commission estimates that a current issuer will submit a maximum of one additional event notice annually.[591] Thus, the Commission estimates that the maximum annual labor cost to prepare and submit the additional event notice is approximately $44 per current issuer.[592]

For current issuers that convert their annual filings, event notices and/or failure to file notices into the MSRB's prescribed electronic format through a third party, there will be costs associated with any additional submissions of event notices and failure to file notices. As noted above, the Commission estimates that each current issuer will submit one additional event notice annually as a result of the amendments.[593] If a current issuer uses a third-party vendor to scan the additional event notice into an electronic format for submission to the MSRB, the Commission estimates that such issuer will have an additional annual cost of $8 per notice.[594] For current issuers that convert their annual filings, event notices and/or failure to file notices into the MSRB's prescribed electronic format internally there will be no additional external costs associated with such conversion. Further, some current issuers may incur a one-time cost of $100 associated with a revision to the template for continuing disclosure agreements.[595]

The Commission included these specific cost estimates in the Proposing Release and received no comments on them.[596]

be a 20% increase in the number of issuers affected by the amended Rule.

[584] *Id.*

[585] 1.20 hours (estimated annual information collection burden for each broker-dealer) × $291 (hourly cost for a broker-dealer's internal compliance attorney) = $349. The hourly rate for the compliance attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2009, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. Cost increase for Broker-Dealers under the amendments: $349 (annual cost under amendments) − $270 (previous annual cost) = $79. This estimated cost for broker-dealers also accounts for their review of continuing disclosure agreements in connection with remarketings of demand securities that are primary offerings. The Commission has slightly revised this cost estimate upward from the estimate contained in the Proposing Release to reflect updated hourly rate information from SIFMA for 2009.

[586] *See supra* Section V.D.1.c.

[587] .5 hours (estimated annual information collection burden for each broker-dealer) × $291 (hourly cost for a broker-dealer's internal compliance attorney) = $146. The hourly rate for the compliance attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2009, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission has slightly revised this cost estimate upward from the estimate contained in the Proposing Release to reflect updated hourly rate information from SIFMA for 2009.

[588] These cost estimates correspond with the burden estimates set forth in Section V.D.1., above. Therefore, to the extent the Commission received comments that generally relate to broker-dealers' costs under the Rule, they are discussed above, and the responses to those comments are incorporated herein by reference. The Commission does not believe that these comments affect these cost estimates.

[589] The amendments include a materiality condition for two of the new disclosure events. A materiality determination may result in costs to investors, market professionals and others to the extent that the issuer or obligated person determines that the event is not material and thus does not submit a notice to the MSRB. If investors, market professionals and others would consider the information important and have access to it, they may reach a different investment decision.

[590] *See supra* Section V.E.2.a.

[591] This estimate includes additional event notices that may be submitted as a result of the modification of the materiality condition in paragraph (b)(5)(i)(C) of the Rule.

[592] 1 (maximum estimated number of additional material event notices submitted per year per issuer) × $59 (hourly wage for a compliance clerk) × .75 hours (45 minutes) (estimated time for compliance clerk to prepare and submit a material event notice) = $44.25 (rounded to $44). The $59 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2009, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. The Commission has slightly revised this cost estimate downward from the estimate contained in the Proposing Release to reflect updated hourly rate information from SIFMA for 2009. To provide an estimate of total costs for issuers that will not be under-inclusive, the Commission elected to use the higher end of the estimate of annual submissions of continuing disclosure documents.

[593] *See supra* Section V.E.2.a. These cost estimates correspond with the burden estimates set forth in Section V.D.2., above. Therefore, to the extent the Commission received comments that generally relate to issuers' costs under the Rule, they are discussed above, and the responses to those comments are incorporated herein by reference. The Commission does not believe that these comments affect these cost estimates.

[594] *Id.*

[595] *Id.* The Commission estimates that there is an approximate cost of $100 associated with revising the issuer's continuing disclosure agreement by the current issuer's outside counsel to conform the agreement to the amendments. Thus, the total cost for revising continuing disclosure agreements for all current issuers by the current issuers' outside counsel will be approximately $1,000,000.

[596] The Commission has slightly revised these cost estimates upward from the estimates contained

Continued

b. Demand Securities Issuers

As discussed above, the Commission estimates that the modification of the Rule's exemption for demand securities will increase the number of issuers affected by the Rule by approximately 20% or 2,000 issuers.[597] These demand securities issuers are likely to have some costs associated with the preparation and submission of continuing disclosure documents. Also as discussed in the PRA section above, the Commission estimates that each demand securities issuer may have a one-time external cost of $600 associated with preparing into a continuing disclosure agreement.[598]

Other external costs for demand securities issuers are likely to be the costs associated with converting continuing disclosure documents into an electronic format to submit to the MSRB. As noted in the PRA section above, the Commission believes 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.[599] Demand securities issuers that presently do not have the ability to prepare their annual filings, event notices and/or failure to file notices in an electronic format may 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 will vary depending on how the demand securities issuer elects to convert its continuing disclosure documents into an electronic format. An issuer may elect to have a third-party vendor transfer its paper continuing disclosure documents into the appropriate electronic format. An issuer also may decide to undertake the work internally, and its costs will vary depending on the issuer's current technological resources. An issuer also may use the services of a designated agent to submit its continuing disclosure documents to the MSRB. In the Proposing Release, the Commission noted that approximately 30% of municipal issuers rely on the services of a designated agent to submit continuing disclosure documents for them.[600] Generally, when issuers utilize the services of a designated agent, they enter into a contract with the agent for a package of services, including the submission of continuing disclosure documents, for a single fee. The Commission estimates that the annual fees for designated agents range from $100 to $500 per issuer, for a total maximum annual cost of $300,000 for all demand securities issuers.[601]

The Commission estimates that some demand securities issuers may have to convert continuing disclosure documents into an electronic format to submit to the MSRB. The costs associated with this conversion may include: (i) Approximately $8 per notice to use a third-party vendor to scan a event notice or failure to file notice, and approximately $64 to use a third-party vendor to scan an average-sized annual financial statement; (ii) approximately $750 to $4,300 to acquire technological resources to convert continuing disclosure documents into an electronic format; (iii) approximately $50 to $300 solely to upgrade or acquire the software to submit documents in an electronic format; and (iv) approximately $50 per month to establish Internet access.[602]

Based on the PRA section above, the Commission estimates that Category 1 demand securities issuers will incur a total maximum external cost of $776 per year.[603] The Commission estimates that Category 2 demand securities issuers will incur a total maximum external cost of $4,900 for the first year and $600 per year thereafter.[604] As noted above, the Commission estimates that any demand securities issuer that incurs costs associated with converting continuing disclosure documents into the MSRB's prescribed electronic format will choose the more expensive Category 2 option.[605] The Commission estimates that approximately 400 demand securities issuers will incur costs associated with acquiring technological resources to convert continuing disclosure documents into an electronic format.[606] In addition, the Commission estimates that the maximum annual costs for those demand securities issuers that need to acquire technological resources to submit documents to the MSRB will be approximately $1,960,000 for the first year after the adoption of the amendments and approximately $240,000 for each year thereafter.[607]

The Commission included these specific cost estimates in the Proposing Release and received no comments on them.[608]

c. Current Issuers and Demand Securities Issuers

Lastly, as discussed in the PRA section above, some current issuers and some demand securities issuers are likely to incur external costs associated with the amendment to revise the timing for submitting event notices from "in a timely manner" to "in a timely manner not to exceed ten business days after the occurrence of the event."[609] In particular, some current issuers and some demand securities issuers may incur external costs associated with monitoring the appointment of a new trustee or a change in the trustee's name. One way an issuer may monitor such a change would be for its counsel to add a notice provision to the issuer's trust indenture that requires the trustee to provide the issuer with notice of the appointment of a new trustee or any change in the trustee's name. The Commission estimates that the approximate cost of adding this notice provision to an issuer's trust indenture will be approximately $100 per issuer,[610] for a one-time annual cost of $1,200,000[611] for all issuers. The Commission included these specific cost estimates in the Proposing Release and received no comments on them.[612]

in the Proposing Release to reflect updated hourly rate information from SIFMA for 2009.

[597] *See supra* Section V.C.

[598] *See supra* Section V.E.2.b. The Commission estimated that there is an approximate cost of $600 associated with drafting a continuing disclosure agreement by the demand securities issuer's outside counsel. Thus, the total cost for preparing continuing disclosure documents for all demand securities issuers by the demand securities issuers' outside counsel will be approximately $1,200,000.

[599] *Id.*

[600] *See* Proposing Release, *supra* note 2, 74 FR at 36862.

[601] *See supra* Section V.E.2.b.

[602] *Id.*

[603] A Category 1 demand securities issuer is one that does not have Internet access and needs to have a third party convert continuing disclosure documents into an electronic format. *See supra* Section V.E.2.b.

[604] A Category 2 demand securities issuer is one that does not have Internet access and elects to acquire the technological resources to convert continuing disclosure documents into an electronic internally. *See supra* Section V.E.2.b.

[605] *Id.*

[606] 2,000 demand securities issuers × 20% = 400 demand securities issuers.

[607] *See supra* Section V.E.2.b.

[608] These cost estimates correspond with the burden estimates set forth in *supra* Section V.D.2. Therefore, to the extent the Commission received comments that generally relate to issuers' costs under the Rule, they are discussed above, and the responses to those comments are incorporated herein by reference. The Commission does not believe that these comments affect these cost estimates.

[609] *See supra* Section V.E.2.c.

[610] *Id.*

[611] *Id.*

[612] *Id.* These cost estimates correspond with the burden estimates set forth in *supra* Section V.D.2. Therefore, to the extent the Commission received comments that generally relate to issuers' costs under the Rule, they are discussed above, and the responses to those comments are incorporated herein by reference. The Commission does not believe that these comments affect these cost estimates.

In addition to the burdens and costs discussed in the PRA section above, the Commission received several comments relating to other costs and burdens associated with the proposed amendments. Several commenters expressed general concerns about the burdens and costs associated with the establishment of a maximum ten business day time frame for the submission of event notices. Some of these concerns included the impracticability of meeting the time frame because of limited staff and resources, especially for smaller issuers,[613] and the increased burdens and costs in connection with the additional monitoring and compliance necessary to submit notices within ten business days.[614] Other commenters expressed concerns relating to the submission of event notices for information that the issuer does not control (*e.g.,* rating changes, changes to the trustee, and changes to the tax status of bonds as a result of an IRS audit) within the ten business day time frame.[615] In particular, many of these commenters expressed concerns regarding the costs associated with the reporting of rating changes within the ten business day time frame. These commenters noted that rating changes are not within the issuer's control and that rating organizations do not directly notify issuers of rating changes.[616] As a result, these commenters believed that it would be difficult for most issuers to meet the proposed ten business day time frame without incurring substantial costs associated with monitoring for rating changes,[617] such as devoting more staff to the task of monitoring for rating changes and/or subscribing to a service that will provide issuers notice of rating changes.

The foregoing comments chiefly relate to concerns regarding submission of notices for events outside of the issuer's control. In this regard, the Rule currently contains a disclosure event relating to rating changes and so the concerns raised by these commenters are inherent in the Rule as it existed prior to the amendments, except that the amendments provide for event notices to be submitted within ten business days of the event's occurrence. In addition, for some event items, including rating changes, a materiality condition no longer will be a part of the Rule. Ratings for municipal issuers are available on the Internet Web sites of the rating agencies and thus issuers should be able to ascertain readily whether a rating change has occurred. In addition, issuers may be able to subscribe to a service that provides them with prompt rating updates for their securities. The Commission notes, however, that some issuers may have to monitor for these events more frequently than in the past. However, as discussed above, the Commission believes that its estimate of the time that issuers will spend, on average, to prepare and submit notices of events, including rating changes, is appropriate. With respect to the concern that some issuers will have to pay a vendor to provide them with notice of rating changes, the Commission reiterates that information regarding rating changes is available for free on the Internet Web sites of the rating agencies.

Several commenters also expressed general concerns about the costs of the amendment that eliminates the materiality condition from certain events. For example, one commenter believed that removal of the "if material" condition from some events creates a risk of dividing events into two disclosure categories that could cause confusion.[618] Two commenters believed that there are circumstances when an event, such as delinquent payments, are beyond an issuer's control and do not represent a financial failure on the issuer's part.[619] According to these commenters, in the past they would have treated such events as immaterial.[620] These commenters believed that if issuers have to file notice in such circumstances, it could create an unwarranted implication that the issuer has suffered financial adversity.[621] Some commenters believed that the materiality qualification should be retained or included for certain specified events to prevent a large volume of notices that are irrelevant to investors' decision to buy, sell or hold municipal securities.[622]

In addition, several commenters expressed concerns about the costs associated with the revised disclosure item regarding adverse tax events. For example, one commenter stated that the Rule should not be expanded to include notice of routine reviews and random audits because they would unnecessarily alarm investors.[623] Some commenters believed that disclosure of potential taxability determinations could limit issuers' options to negotiate settlements with the IRS in ways that do not present material risk to bondholders[624] and could affect market perceptions of municipal issuers' securities, which would impose increased interest rates and other costs to issuers, and would limit future market access.[625] Some of these commenters believed that the proposal would lead to a flood of information about preliminary taxability actions[626] that could confuse and mislead investors[627] or desensitize investors regarding adverse tax event determinations.[628] One of these commenters suggested that event notices regarding adverse tax events should include a materiality condition.[629]

Furthermore, as discussed in Section III.A. above, several commenters expressed general concerns about the costs of the proposal relating to the modification of the exemption for demand securities. For example, one commenter noted that the elimination of the Rule's exemption for demand securities from the Rule would impose such insurmountable administrative costs that small issuers and non-profit organizations would refuse to enter continuing disclosure agreements.[630] Similarly, some commenters also believed that the elimination of the exemption for demand securities would hinder or prevent many issuers, particularly small issuers and non-profits, from using LOC-backed demand securities to access the tax-exempt markets.[631] They opined that local communities would be hurt as a result of the proposed amendment to delete the exemption for demand securities because small issuers and obligated persons that rely on the exemption will have to pass along to users of their service any increased costs that they

[613] *See* CRRC Letter, WCRRC Letter, Portland Letter at 2, NAHEFFA Letter at 2–4, Metro Water Letter at 1–2, CHEFA Letter at 2, and NABL Letter at 5–6.

[614] *See* Halgren Letter, Los Angeles Letter at 1, CRRC Letter, WCRRC Letter, NAHEFFA Letter at 2–4, CHEFA Letter at 2, and NABL Letter at 5–6.

[615] *See* Halgren Letter, Los Angeles Letter at 1–2, NAHEFFA Letter at 2–4, San Diego Letter at 1–2, California Letter at 1–2, NABL Letter at 8, and GFOA Letter at 3–4.

[616] *Id.*

[617] *See, e.g.,* Halgren Letter at 1.

[618] *See* Connecticut Letter at 2.

[619] *See* California Letter at 2 and San Diego Letter at 2.

[620] *Id.*

[621] *Id.*

[622] *See* NABL Letter at 8 and Kutak Letter at 4.

[623] *See* Connecticut Letter at 2.

[624] *See* Metro Letter at 2, Kutak Letter at 5, and NABL Letter 7.

[625] *See* Metro Letter at 2 and Kutak Letter at 5.

[626] *See* Kutak Letter at 6.

[627] *See* Kutak Letter at 6, NABL Letter at 7, and GFOA Letter at 4.

[628] *See* Kutak Letter at 6.

[629] *See* NABL Letter at 7.

[630] *See* SIFMA Letter at 2–3.

[631] *See* CRRC Letter at 3–5, NABL Letter A–9—A–12, and WCRRC Letter at 1.

may incur.[632] One of the commenters remarked that many non-governmental conduit borrowers[633] have no previous undertakings to provide continuing disclosure information and, for such persons, complying with paragraph (b)(5) of the Rule would not merely be an extension of pre-existing obligations but a new and significant burden.[634]

Moreover, two commenters stated that many obligated persons of LOC-backed demand securities do not prepare annual filings, such as audited financial statements, in the ordinary course of their business.[635] As discussed in the PRA section above, one of these commenters believed that they would incur $30,000–$40,000 per year to prepare audited or consolidated financial statements.[636] The commenters therefore believed that eliminating the exemption for demand securities would impose administrative costs and burdens that could potentially force some conduit borrowers of LOC-backed demand securities to withdraw from the tax-exempt bond market.[637]

As discussed in Section III.A. above, the Commission has considered the comments concerning the costs and burden on demand securities issuers and obligated persons. In response to commenters' concerns, the Commission has revised the proposal relating to demand securities to include a limited grandfather provision. The Commission notes that a number of demand securities issuers and obligated persons, including some small issuers and non-profit organizations, do voluntarily enter into continuing disclosure agreements.[638] Further, many demand securities issuers and obligated persons are likely also to have outstanding fixed rate securities[639] that are subject to continuing disclosure agreements. Because any such existing continuing disclosure agreement would obligate an issuer or an obligated person to provide annual filings, event notices, or failure to file notices with respect to these fixed rate securities, providing disclosures with respect to demand securities should not be a significant additional burden for issuers and obligated persons that already have outstanding fixed rate securities.

Regarding the concern that any new disclosure burdens may induce some obligated persons to withdraw from the tax-exempt municipal market because they do not prepare annual filings in the ordinary course of their business, the Commission notes that, for purposes of the Rule, annual filings are required only to the extent provided in the final official statements.[640] Further, pursuant to paragraph (b)(5)(i)(B) of the Rule, audited financial statements need to be submitted, pursuant to the issuer's and obligated person's undertaking in a continuing disclosure agreement, only "when and if available."[641] This limitation, which is consistent with the Commission's position in the 1994 Amendments Adopting Release, should mitigate some concerns of those obligated persons that do not prepare audited financial statements in the ordinary course of their business.[642] Further, although not all issuers or obligated persons, in the ordinary course of their business, prepare audited financial statements or other financial and operating information of the type included in annual filings, a number of issuers and obligated persons do.[643]

The Commission acknowledges that issuers or obligated persons of demand obligations that assemble financial and operating data for the first time in response to their undertakings in a continuing disclosure agreement may incur incremental costs beyond those costs incurred by those issuers or obligated persons that already assemble this information.[644] Also, smaller issuers or obligated persons may have relatively greater burdens than larger issuers or obligated persons. However, the overall burdens for these demand securities issuers or obligated persons in preparing financial information are expected to be commensurate with those of issuers or obligated persons that already are preparing financial information as part of their continuing disclosure undertakings.[645] The Commission believes that the burdens that will be incurred in the aggregate by issuers or obligated persons, as a result of the amendments with respect to demand securities, may not be significant and, in any event, are justified by the benefits to investors of enhanced disclosure.[646]

3. *MSRB*

Since the number of continuing disclosure documents submitted will increase as a result of the amendments, the MSRB may incur costs associated with the amendments. The Commission estimates that these costs for the MSRB may include: (i) The cost to hire additional clerical personnel at an estimated annual cost of $119,770 to process the additional submissions associated with the amendments;[647]

[632] *See* CRRC Letter at 3–5 and WCRRC Letter at 1.

[633] *See* NABL Letter at A–2, n. 1.

[634] *Id.*

[635] *See* CRRC Letter at 5 and NABL Letter at A–2.

[636] *See* CRRC Letter at 5. *See also supra* note 539 and accompanying text.

[637] *See* CRRC Letter at 5 and NABL Letter at A–10. Two commenters also expressed concern that, in complying with the revised Rule, smaller and not-for-profit obligated persons could encounter similar administrative costs and burdens. *See* NABL Letter at A–2 (noting that many small businesses and non-profit organizations utilize LOC-backed demand securities in accessing the tax-exempt debt markets) and SIFMA Letter at 2–3.

[638] *Id.*

[639] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[640] *See supra* Section III.A. for additional discussion concerning the provision of annual filings and audited financial statements.

[641] 17 CFR 240.15c2–12(b)(5)(i)(B). *See also supra* Section III.A.

[642] As discussed in the 1994 Amendments Adopting Release, the 1994 Amendments "[do] not adopt the proposal to mandate audited financial statements on an annual basis with respect to each issuer and significant obligor. Instead, the amendments require annual financial information, which may be unaudited, and may, where appropriate and consistent with the presentation in the final official statement, be other than full financial statements. * * * However, if audited financial statements are prepared, then when and if available, such audited financial statements will be subject to the undertaking and must be submitted to the repositories. Thus * * * the undertaking must include audited financial statements only in those cases where they otherwise are prepared." *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

[643] *See http://www.emma.msrb.org* for audited financial statements or other financial and operating information submitted to EMMA.

[644] The Commission, however, believes that the operations of an issuer or obligated person generally entail the preparation and maintenance of at least some financial and operating data.

[645] Further, issuers or obligated persons that assemble financial and operating data for the first time may face a greater burden than those issuers or obligated persons that already assemble this information. The amendments therefore initially may have a disparate impact on those issuers or obligated persons, including small entities, entering into a continuing disclosure agreement for the first time, as compared with those that already have outstanding continuing disclosure agreements.

[646] *See supra* Section V.D. As discussed therein, some commenters believed that the amendment could force some small entities to withdraw from the tax-exempt market because: (1) Disclosure of small issuers' or obligated persons' financial information would provide their large, national competitors with information about these small issuers or obligated persons, which they believed could result in a competitive disadvantage to them; and (2) small issuers or obligated persons would have to prepare costly audited financial statements. *See, e.g.,* CRRC Letter at 3–4 and WCRRC Letter at 1. As discussed above, the undertakings contemplated by the amendments (and Rule 15c2–12 in general) require annual financial information only to the extent provided in the final official statement, and audited financial statements only when and if available.

[647] 2,030 hours (estimated additional annual number of hours worked by a compliance clerk) × $59 (hourly wage for a compliance clerk) = $119,770 (annual salary for compliance clerk). The $59 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2009, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. The estimate for additional annual hours worked by a compliance clerk is the

and (ii) the cost to update its EMMA system to accommodate indexing information in connection with the changes to the Rule's disclosure events. Based on information provided to the Commission staff by the MSRB staff in a telephone conversation on November 7, 2008, the MSRB staff estimated that the MSRB's costs to update its EMMA system to accommodate the final changes to the disclosure events would be approximately $10,000.[648] Therefore, in connection with the amendments, the MSRB would incur a one-time cost of approximately $10,000 as well as a recurring annual cost of approximately $119,770.[649]

The Commission received a comment letter from the MSRB relating to its costs associated with the proposed amendments.[650] The MSRB stated that, in determining whether to approve or modify the proposed amendments, the Commission should note that changes to the manner of providing disclosures under the Rule or to the parties expected to make submissions, *i.e.,* if third parties were to submit event notices rather than issuers or obligated persons, may have an impact on the design and timing of necessary EMMA system changes to implement the revised continuing disclosure provisions.[651] The MSRB also stated that the Commission should verify that any such revisions can reasonably be implemented; that the revisions would improve the efficiency, timeliness and public access process; and that no direct charges would be imposed on the MSRB for revisions such as third-party submissions.[652] Further, the MSRB noted that certain revisions would likely result in a longer planning, development and implementation time frame and could result in greater development and operational costs.[653]

C. Limited Grandfather Provision Relating to Modification of Exemption for Demand Securities

As discussed in Section III.A. above, the Commission is revising the amendment relating to demand securities from that proposed in the Proposing Release to include a limited grandfather provision, so that paragraphs (b)(5) and (c) will not apply to demand securities outstanding as of November 30, 2010. The Commission believes that the limited grandfather provision strikes an appropriate balance between the need to improve disclosure available to investors and the recognition that the practical effects of applying paragraphs (b)(5) and (c) of the Rule to outstanding issues of demand securities could unduly burden issuers and obligated persons and thus may adversely impact the market. As the Commission noted in Section III.A. above, there would be benefits to making outstanding demand obligations subject to paragraphs (b)(5) and (c) of the Rule because greater information about these securities would be available to investors on a timely basis. However, demand securities, such as VRDOs, generally are long-term securities. If an outstanding demand security became subject to paragraph (b)(5)(i)(C) of the Rule, a Participating Underwriter, in the first remarketing of the VRDO following the compliance date of the amendments, would have to reasonably determine that an issuer or an obligated person has executed a continuing disclosure agreement to provide annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement.

For an outstanding issue of demand securities, however, referring back to information included in the final official statement may be problematic, if not impossible, because the official statement may be years old. Thus, its information would be out-of date, thereby increasing the underwriter's cost of complying with Rule 15c2–12 substantially. In addition, the official statement may be difficult to obtain if the remarketing agent was not the underwriter of the original offering. Further, absent the limited grandfathering provision, the issuer or the obligated person of such security, pursuant to its continuing disclosure undertaking, would have needed to update annual financial information that may no longer be prepared or available, which may also be a potentially costly undertaking. In addition, application of the amendments to remarketings of demand securities occurring on or after the compliance date would necessitate a large number of issuers or obligated persons of demand securities entering into continuing disclosure agreements in a very short time period, which could delay remarketings and temporarily disrupt the markets for demand securities. The Commission believes that the benefits of applying paragraphs (b)(5) and (c) of the Rule to demand securities outstanding prior to the compliance date would not justify the high cost of such change to both Participating Underwriters and issuers or obligated persons of such securities and therefore is adopting the limited grandfather provision. The Commission further notes that some issuers or obligated persons of demand securities also have issued fixed rate municipal securities and, in that case, continuing disclosures about those issuers or obligated persons should be available to investors.

VII. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act[654] 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, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act[655] 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 municipal securities market is comprised of approximately 51,000 issuers that are states and local governments or their agencies and instrumentalities. As discussed in more detail above, there are approximately $400 billion of new issuances of municipal securities annually and approximately $2.8 trillion of municipal securities are outstanding.[656] There are two primary types of municipal securities: general obligation bonds and revenue bonds. General obligation bonds are backed by the full faith and credit of the issuer and are also usually secured by specific tax levies. In contrast, revenue bonds are generally secured by a pledge of specific revenues of the issuer, which are typically

estimated additional hourly burden the MSRB will incur on an annual basis under the amendments. The Commission has slightly revised this cost estimate downward from the estimate contained in the Proposing Release to reflect updated hourly rate information from SIFMA for 2009. *See supra* Section V.D.3.

[648] *See* Proposing Release, *supra* note 2, 74 FR at 36855, n. 205. Telephone conversation between Harold Johnson, Deputy General Counsel, MSRB, and Martha M. Haines, Assistant Director and Chief, Office of Municipal Securities, Division, Commission, November 7, 2008.

[649] *See supra* notes 487 through 490.

[650] *See* MSRB Letter at 2.

[651] *Id.*

[652] *Id.*

[653] *Id.*

[654] 15 U.S.C. 78c(f).

[655] 15 U.S.C. 78w(a)(2).

[656] *See supra* Section II.

derived from the facility financed by the bonds (for example, water rates may be used to pay principal and interest on the bonds issued to pay for construction of a water system). Revenue bonds are further divided into two general types: Governmental and private purpose. Governmental bonds are issued to finance the needs of the states or local governments, their agencies and instrumentalities. Private purpose bonds (often referred to as conduit bonds), however, are issued to provide the benefit of a tax-exempt interest rate to a private entity as permitted by various provisions of the Internal Revenue Code. The obligation to pay conduit bonds rests entirely on the private borrower, such as 501(c)(3) hospitals, colleges and universities, the owners of low and moderate income housing projects and of small industrial facilities.

As described above, because of the diversity of disclosure practices, the Commission believes that the informational efficiency of the municipal bond market could be improved. As a result, the Commission believes that the amendments are appropriate to enhance the efficiency of the municipal securities market, particularly in the sense of informational efficiency. Informational efficiency helps investors efficiently allocate capital, since it helps to ensure that a security's price accurately reflects important information. When accurate information is available, the municipal security's price serves to convey aggregate information to investors, further facilitating investment decisions. The amendments encourage disclosure of information that, in the Commission's view, reasonable investors consider important in their transaction decisions. The amendments strengthen the municipal disclosure process because of the new events being added to paragraph (b)(5)(i)(C) of the Rule. In addition, inclusion of the provision that submissions of event notices to the MSRB be made in a timely manner not in excess of ten business days of the event's occurrence, and the deletion of the exemption for demand securities (other than those demand securities that qualify for the limited grandfather provision), also is expected to promote the efficiency of the municipal securities market, as described above including in the cost-benefit section. Currently, the Rule does not contain a specific time frame within which event notices must be provided to the MSRB pursuant to a continuing disclosure agreement. Thus, the Commission believes that the revision relating to the time frame for submission of event notices will help individuals and others to obtain greater information about municipal securities within ten business days of the event's occurrence. In addition, certain events regarding municipal securities that may be important to investors, such as certain tender offers or the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material, are now included as event items in the Rule. Further, certain events listed in paragraph (b)(5)(i)(C) of the Rule will now be disclosed without the issuer first having to make a materiality determination.

Moreover, the Rule's exemption for demand securities has been narrowed, although a limited grandfather provision is in place for many pre-existing demand obligations.[657] As a consequence of the amendments, in some cases, greater information about municipal securities and their issuers will be more readily accessible on a more timely basis to broker-dealers, mutual funds analysts and other market professionals, institutional and retail investors, and the public generally. Thus, these individuals and entities are expected to have access to important information about municipal securities within a specific ten business day time frame, which could aid them in making better informed and more efficient investment decisions and should help reduce the likelihood of fraud facilitated by inadequate disclosure. To the extent that greater information efficiency ultimately allows for better allocation of investments in the municipal securities market, the amendments are expected to promote allocative efficiency as well.

The Commission considers the existing state of the municipal securities market to be a competitive one, given the large number and diversity of issuers, and the volume of municipal securities regularly issued and remarketed, as noted above, despite certain characteristics of municipal bonds, discussed below, that lead to a certain degree of non-fungibility and market segmentation. The size of the municipal securities market—with approximately 51,000 issuers, $400 billion of new issuances annually, and approximately $2.8 trillion in securities outstanding—suggests that the market for issuance and purchase of municipal securities may be highly competitive. Additionally, investors can substitute to some degree their portfolios between municipal securities and other securities, particularly fixed-income securities of comparable credit quality. Depending on the municipality, these may include U.S. Treasury obligations, corporate bonds, and, more recently, taxable bonds known as Build America Bonds. Such substitutability implies that municipal issuers must currently compete not only with each other but also with other comparable opportunities available to investors. Relative to this existing competitive benchmark, the Commission believes that the amendments promote competition in the purchase and sale of municipal securities, as described below.

Because of the limited grandfather provision and the transition aspects of the amendments discussed in Section IV above, a number of issuers will have differing disclosure undertakings. In this regard, some issuers of demand securities will qualify for the limited grandfather provision. In addition, the Commission recognizes that by not applying the amendments to continuing disclosure agreements entered into prior to the amendments' compliance date, for a period of time there will be municipal securities that are subject to differing disclosure. This circumstance may cause some confusion and thus could lead to some inefficiency with respect to investors and broker-dealers who otherwise would prefer uniform disclosure. Because of the nature of the market for demand securities, the Commission does not believe that it is appropriate to impose requirements that would mandate revisions to existing continuing disclosure agreements.

The Commission believes that the amendments will promote competition in the purchase and sale of municipal securities due to the greater availability and timeliness of information as a result of the amendments. Competition is generally more robust when many willing buyers and many willing sellers transact with full information. Competition in the municipal securities market is generally based on the premise that investors are informed of

[657] As discussed above, although it may be optimal for all outstanding demand obligations to be subject to paragraph (b)(5) and (c) of the Rule, the application of the continuing disclosure requirements of the Rule to all outstanding demand securities issued prior to the compliance date may be burdensome for issuers and Participating Underwriters because they would need to enter into a continuing disclosure agreement for any remarketing that is a primary offering that occurs on or after the compliance date, which, potentially, could temporarily disrupt the market for demand securities.

the various attributes of the investment instruments, and issuers are competing for investors. Even with multiple sellers and buyers, if there are high search costs (that is, if investors have to incur high costs to gather relevant information), these costs can be a barrier to effective competition. The Commission believes that its amendments will tend to remove this barrier. As a result, more investors may be attracted to this market sector and broker-dealers and municipal issuers can compete for their business.

The amendments are designed to encourage improvement in the completeness and timeliness of issuer disclosures and thus foster additional interest in municipal securities by retail and institutional customers. In addition, the greater availability of information about municipal securities will be beneficial to vendors of municipal securities information as they develop their value-added products. Thus, the amendments will promote competition among those vendors of municipal securities information that utilize the information provided to the MSRB pursuant to continuing disclosure agreements and compete with each other in creating and offering for sale value-added products relating to municipal securities. As discussed above,[658] the amendments may result in some additional cost and hourly burdens for broker-dealers, issuers and the MSRB.

By providing more timely disclosure of important information to an important segment of the capital markets as a whole, the Commission believes that these amendments also will improve the allocative efficiency of capital formation both within the municipal segment of the fixed income market and within the municipal bond market, in particular. Allocative efficiency of capital is enhanced when investors are able to make better-informed investment decisions since capital should flow to its most efficient use. The amendments will provide investors and other municipal market participants with notice of additional events, to be provided in a timely manner not in excess of ten business days of the event's occurrence, and the Commission has provided a limited grandfathering provision. The Commission believes that the limited grandfather provision strikes an appropriate balance between the need to improve disclosure available to investors and the recognition that the practical effects of applying paragraphs (b)(5) and (c) of the Rule to outstanding issues of demand securities could unduly burden issuers and obligated persons and thus may adversely impact the market. In addition, the amendments will help to provide investors and other municipal market participants with access to important information about demand securities that previously were not subject to the Rule's disclosure provisions. To assess the effect of the amended Rule on capital formation, the Commission has evaluated the benefits of enhanced disclosure on the allocative efficiency of the capital market.

In the Proposing Release, the Commission considered the proposed amendments in light of the standards set forth in the above-noted Exchange Act provisions. The Commission solicited comment on whether, if adopted, the proposal would result in any anti-competitive effects or would promote efficiency, competition or capital formation. The Commission asked commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that might result from the proposed amendments. The Commission received some comments about the competitive effects of the proposed amendments.

As discussed above,[659] some commenters believed that the elimination of the Rule's exemption for demand securities would force some issuers, particularly small issuers and non-profit organizations, to choose between accepting the burdens of complying with the continuing disclosure provisions of the Rule and withdrawing from the tax-exempt market.[660] Two of these commenters argued that the proposed amendment would have a chilling effect on competition for small issuers and obligated persons because it would favor their large national competitors that are either already reporting companies or have superior financial and employee resources to comply with the Rule.[661] In their view, the proposed amendment would force small and local businesses that rely on the exemption for demand securities to choose between giving up their proprietary financial information and accessing tax-exempt financing. Revelation of this financial information, in their view, would favor competitors, relative to the status quo.[662] They opined that there could be a negative impact on capital formation if these businesses decided to forego tax exempt financing and were unable to obtain other sources of lending and if investors were not afforded the opportunity to acquire the securities that these businesses otherwise would have issued.[663]

The Commission acknowledges that for those primary offerings of demand securities that no longer will be exempt from the Rule and for which the issuer is not currently submitting continuing disclosure documents to the MSRB, the practice will be different than it was prior to the amendments. In such cases, Participating Underwriters will need to reasonably determine that the issuer or obligated person has undertaken, in a continuing disclosure agreement, to provide continuing disclosure documents to the MSRB. This change applies to any initial offering and remarketing that is a primary offering of demand securities unless the limited grandfather provision applies. Those issuers that have not previously issued securities covered by the Rule will be entering into a continuing disclosure agreement for the first time and thereby will incur some costs to provide continuing disclosure documents to the MSRB. Although the Commission recognizes that, if some small entities elected to forego tax-exempt financing because of the impact of the amendments, the amendments could have an adverse impact on those entities; however, it believes that any additional burden on issuers and obligated persons is, on balance, justified by the improved availability of information with respect to demand securities. This conclusion, moreover, is supported by a number of commenters.[664] Therefore, while the Commission is mindful of the additional burdens that may befall certain competitors in the market, based on its analysis as well as other comments submitted, the Commission continues to believe the overall result of the amendments will be to promote competition in the municipal securities market.

In addition, as the Commission previously noted, a number of issuers and obligated persons of demand securities are likely to have outstanding fixed rate securities. Some of these securities, in turn, likely would be subject to continuing disclosure agreements under the Rule. Because any

[658] *See supra* Sections V.E.1. and V.E.2.

[659] *See supra* Section III.A.

[660] *See* NABL Letter A–9–A–12, CRRC Letter at 3–5, and WCRRC Letter at 1.

[661] *See* CRRC Letter at 3–5, and WCRRC Letter at 1.

[662] *Id.*

[663] *See* CRRC Letter at 3–5, and WCRRC Letter at 1.

[664] *See, e.g.,* CHEFA Letter at 2, Connecticut Letter at 1, e-certus Letter I at 11, Folt Letter at 1, ICI Letter at 5, NFMA Letter at 1, RBDA Letter at 2, and SIFMA Letter at 2.

existing continuing disclosure agreement would obligate an issuer or an obligated person to provide annual filings, event notices, or failure to file notices with respect to these fixed rate securities, providing disclosures with respect to demand securities is not expected to be a significant additional burden for these issuers and obligated persons.

Regarding the concern that any new disclosure burdens may induce some obligated persons to withdraw from the tax-exempt municipal market because they do not prepare annual filings in the ordinary course of their business, the Commission notes that, for purposes of the Rule, annual filings are required only to the extent provided in the final official statement.[665] Further, pursuant to paragraph (b)(5)(i)(B) of the Rule, audited financial statements need to be submitted, pursuant to the issuer's and obligated person's undertaking in a continuing disclosure agreement only "when and if available."[666] This limitation, which is consistent with the Commission's position in the 1994 Amendments Adopting Release, should mitigate some concerns of those obligated persons that do not prepare audited financial statements in the ordinary course of their business.[667] Further, although not all issuers or obligated persons, in the ordinary course of their business, prepare audited financial statements or other financial and operating information of the type included in annual filings, a number of issuers and obligated persons do.[668]

The Commission acknowledges that issuers or obligated persons of demand obligations that assemble financial and operating data for the first time in response to their undertakings in a continuing disclosure agreement may incur incremental costs beyond those costs incurred by those issuers or obligated persons that already assemble this information.[669] Also, smaller issuers or obligated persons may have relatively greater burdens than larger issuers or obligated persons. However, the overall burdens for these demand securities issuers or obligated persons in preparing financial information are expected to be commensurate with those of issuers or obligated persons that already are preparing financial information as part of their continuing disclosure undertakings.[670] The Commission believes that the burdens that will be incurred in the aggregate by issuers or obligated persons, as a result of the amendments with respect to demand securities, may not be significant and, in any event, are justified by the benefits to investors of enhanced disclosure.[671]

Two commenters viewed the addition of the event item for mergers, acquisitions, and substantial asset sales as "anti-competitive," because they believed that disclosure of such events by closely held companies prior to public announcement would allow competitors to interfere with the transaction.[672] However, the Commission believes that competition in the market for corporate control would be enhanced, not reduced, by the possibility of disclosure creating more open conditions for the sale of privately held-companies. The Commission further notes that parties to mergers and acquisition agreements generally may, subject to legal obligations, include remedies in such agreements that are designed to balance the conflicting interests of the buyer and the seller.

For the foregoing reasons, pursuant to Section 3(f) of the Exchange Act, the Commission has considered the amendments to the Rule and believes that they, on balance, should promote efficiency and capital formation and increase competition. In addition, pursuant to Section 23(a)(2) of Exchange Act, the Commission does not believe that they impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

VIII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the provisions of the Regulatory Flexibility Act ("RFA").[673] It relates to amendments to Rule 15c2–12[674] under the Exchange Act.[675] The amendments revise certain requirements regarding the information that a 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 beneficial holders of the issuer's municipal securities, to provide, and revise an exemption from the rule. Specifically, the amendments: (1) Require a Participating Underwriter to reasonably determine that an issuer or obligated person has agreed to provide notice of specified events in a timely manner not in excess of ten business days of the occurrence of the event; and (2) modify the list of events for which notices are to be provided. In addition, the amendments modify the condition that event notices are to be submitted to the MSRB "if material," for some, but not all, of the Rule's specified events. Further, the amendments revise an exemption from the Rule for demand securities, by making the offering of those securities subject to the continuing disclosure obligations set forth in the Rule. This change applies to any initial offering and remarketing that is a primary offering of demand securities occurring on or after the compliance date of the amendments.[676] However, to address commenters' concerns about the impact of the

[665] *See supra* Section III.A. for additional discussion concerning the provision of annual filings and audited financial statements.

[666] 17 CFR 240.15c2–12(b)(5)(i)(B). *See also supra* Section III.A. concerning audited financial statements and 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

[667] As discussed in the 1994 Amendments Adopting Release, the 1994 Amendments "[do] not adopt the proposal to mandate audited financial statements on an annual basis with respect to each issuer and significant obligor. Instead, the amendments require annual financial information, which may be unaudited, and may, where appropriate and consistent with the presentation in the final official statement, be other than full financial statements. * * * However, if audited financial statements are prepared, then when and if available, such audited financial statements will be subject to the undertaking and must be submitted to the repositories. Thus * * * the undertaking must include audited financial statements only in those cases where they otherwise are prepared." *See* 1994 Amendments Adopting Release, *supra* note 8, 59 FR at 59599.

[668] *See http://www.emma.msrb.org* for audited financial statements or other financial and operating information submitted to EMMA.

[669] The Commission, however, believes that the operations of an issuer or obligated person generally entail the preparation and maintenance of at least some financial and operating data.

[670] Further, issuers or obligated persons that assemble financial and operating data for the first time may face a greater burden than those issuers or obligated persons that already assemble this information. The amendments therefore initially may have a disparate impact on those issuers or obligated persons, including small entities, entering into a continuing disclosure agreement for the first time, as compared with those that already have outstanding continuing disclosure agreements.

[671] *See supra* Section V.D. As discussed therein, some commenters believed that the amendment could force some small entities to withdraw from the tax-exempt market because: (1) Disclosure of small issuers' or obligated persons' financial information would provide their large, national competitors with information about these small issuers or obligated persons, which they believed could result in a competitive disadvantage to them; and (2) small issuers or obligated persons would have to prepare costly audited financial statements. *See, e.g.,* CRRC Letter at 3–4 and WCRRC Letter at 1. As discussed above, the undertakings contemplated by the amendments (and Rule 15c2–12 in general) require annual financial information only to the extent provided in the final official statement, and audited financial statements only when and if available.

[672] *Id.*

[673] 5 U.S.C. 604(a).

[674] 17 CFR 240.15c2–12.

[675] 15 U.S.C. 78a *et seq. See also* Proposing Release, *supra* note 2, 74 FR at 36836.

[676] As noted above, the compliance date of the amendments to the Rule is December 1, 2010.

amendments on existing demand securities, the amendment does not apply to remarketings of demand securities that are outstanding in the form of demand securities on the day preceding the amendments' compliance date and that continuously have remained outstanding in the form of demand securities.

A. Need for Amendments to Rule 15c2–12

The main purpose of the amendments is to improve the availability of significant and timely information to the municipal securities markets and to help deter fraud and manipulation in the municipal securities market by prohibiting the underwriting of, and subsequent recommendation of transactions in, municipal securities for which adequate information is not available on an ongoing basis.

The amendments modify paragraphs (b)(5)(i)(C) and (d)(2)(ii)(B) of Rule 15c2–12 to require a Participating Underwriter to reasonably determine that the issuer or obligated person has agreed in its continuing disclosure agreement to provide event notices to the MSRB in an electronic format as prescribed by the MSRB, in a timely manner not in excess of ten business days after the occurrence of any such event. Previously, the Rule stated that event notices were to be provided "in a timely manner." In 1994, the Commission adopted amendments to Rule 15c2–12 and noted at that time that it had not established a specific time frame with respect to "timely" because of the wide variety of events and issuer circumstances.[677] However, the Commission stated that, in general, this determination must take into consideration the time needed to discover the occurrence of the event, assess its materiality, and prepare and disseminate the notice.[678] It has been reported that there have been some instances in which event notices were not submitted until months after the events occurred.[679] The Commission believes that such delays can deny investors important information that they need to make informed decisions regarding whether to buy, sell, or hold municipal securities. Moreover, notice of important events can aid investors in determining whether the price that they pay or receive for their municipal security transactions is appropriate.[680]

The Commission believes that codifying in the Rule a specific time within which event notices are to be provided to the MSRB, in accordance with the continuing disclosure agreement, should result in these notices being made available more promptly than at present. Accordingly, the amendments require a broker, dealer, or municipal securities dealer (*i.e.,* a Participating Underwriter) to reasonably determine that an issuer or obligated person has agreed, in a continuing disclosure agreement, to provide notice of the Rule's specified events in a timely manner not in excess of ten business days after the event's occurrence. The Commission believes that this change will help promote more timely disclosure of this important information to municipal security investors.

Paragraph (b)(5)(i)(C)(6) of the Rule currently requires Participating Underwriters reasonably to determine that the issuer or obligated person has entered into a continuing disclosure agreement to submit a notice for "[a]dverse tax opinions or events affecting the tax-exempt status of the security." The Commission is adopting, with certain modifications from that proposed, an amendment to paragraph (b)(5)(i)(C)(6) of the Rule to require that Participating Underwriters reasonably determine that the issuer or obligated person has entered into a continuing disclosure agreement to submit a notice for "[a]dverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security." A determination by the IRS that interest on a municipal security may, in fact, be taxable not only could reduce the security's market value, but also could adversely affect each investor's federal and, in some cases, state income tax liability.[681] The tax-exempt status of a municipal security is also important to many mutual funds whose governing documents, with certain exceptions, limit their investments to tax-exempt municipal securities.[682] Therefore, retail and institutional investors alike are very interested in events that could adversely affect the tax-exempt status of the municipal securities that they own or may wish to purchase.[683]

Under the Rule, as amended, a materiality determination is no longer necessary for the following six existing events: (1) Principal and interest payment delinquencies with respect to the securities being offered; (2) unscheduled draws on debt service reserves reflecting financial difficulties; (3) unscheduled draws on credit enhancements reflecting financial difficulties; (4) substitution of credit or liquidity providers, or their failure to perform; (5) defeasances; and (6) rating changes.[684] The Commission believes that these events are of such importance to investors that notice of their occurrence should always be provided pursuant to a continuing disclosure agreement. Furthermore, the Commission believes that eliminating the necessity to make a materiality decision upon the occurrence of these events will simplify issuer compliance with the terms of their continuing disclosure agreements and will help to make such filings available more promptly to investors and others.

The amendments also add the following events, for which disclosure notices are to be provided pursuant to a continuing disclosure agreement: (i) Tender offers (paragraph (b)(5)(i)(C)(8) of the Rule);[685] (ii) bankruptcy, insolvency, receivership or similar event of the obligated person (paragraph (b)(5)(i)(C)(12) of the Rule);[686] (iii) the consummation of a merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material (paragraph (b)(5)(i)(C)(13) of the Rule);[687] and (iv) appointment of a successor or additional trustee, or the change of name of a trustee (paragraph (b)(5)(i)(C)(14) of the Rule), if material.[688] The Commission believes that there is a need to make available to all investors this important information because it can affect their investment decisions and the value of their municipal securities. The Commission further believes that the addition of these four events disclosure items to the Rule will substantially improve the

[677] *See* 1994 Amendments, *supra* note 7, 59 FR at 59601

[678] *Id.*

[679] *See* Proposing Release, *supra* note 2, 74 FR at 36837.

[680] *Id.*

[681] *See* Proposing Release, *supra* note 2, 74 FR at 36840–41.

[682] *Id.*

[683] *Id.*

[684] *See* Proposing Release, *supra* note 2, 74 FR at 36839–40.

[685] *See* Proposing Release, *supra* note 2, 74 FR at 36842–46.

[686] *Id.*

[687] *Id.*

[688] *Id.*

availability of important information in the municipal securities market.

Finally, the amendments modify the Rule's exemption for demand securities by eliminating paragraph (d)(1)(iii) to Rule 15c2–12 and adding new paragraph (d)(5) to the Rule. The Commission's experience with the operation of the Rule and changes in the municipal securities market suggest a need to increase the availability of information to investors regarding demand securities.[689] Furthermore, the recent period of turmoil in the market for municipal auction rate securities and demand securities also suggests that the Rule's exemption for demand securities is no longer appropriate and that the exemption should be modified to apply paragraphs (b)(5) and (c) of the Rule, relating to the submission of continuing disclosure documents and recommendations by brokers, dealers, and municipal securities dealers, respectively, to primary offerings of demand securities.[690]

B. Objectives

The purpose of the amendments is to achieve more efficient, effective, and wider availability of municipal securities information to broker-dealers, mutual funds, analysts and other market professionals, institutional and retail investors, and the public generally, and to help prevent, fraudulent, deceptive, or manipulative acts or practices in the municipal securities market.

C. Significant Issues Raised by Public Comment

In the Proposing Release, the Commission requested comment on matters discussed in the IRFA.[691] No commenter suggested that the Rule would have a significant impact on smaller broker-dealers, who are not entities directly subject to the Rule. As discussed in greater detail above, several commenters raised concerns regarding the impact of the proposed amendments on small issuers, although they are not directly subject to the rule.[692]

D. Small Entities Subject to the Rule

The amendments apply directly to any broker, dealer, or municipal securities dealer that acts as a Participating Underwriter in a primary offering of municipal securities with an aggregate principal amount of $1,000,000 or more and indirectly issuers of such securities.

The RFA defines "small entity" to mean "small business," "small organization," or "small government jurisdiction."[693] The Commission's rules define "small business" and "small organization" for purposes of the RFA for each of the types of entities the Commission regulates.

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."[694]

A municipal securities dealer that is a bank (including a separately identifiable department or division of a bank) is a small business if it 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."[695]

For purposes of Commission rulemaking, 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."[696]

Based on information obtained by the Commission's staff, the Commission estimates that 250 broker-dealers, including municipal securities dealers, would be Participating Underwriters within the meaning of Rule 15c2–12.[697] Based on a recent review of industry sources, the Commission does not believe that any Participating Underwriters would be small broker-dealers or municipal securities dealers.[698] The Commission did not receive any comments on this issue.

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."[699] Currently, there are approximately 51,000 state and local issuers of municipal securities[700] that are subject to the amendments. The Commission estimates that approximately 40,000 state and local issuers are "small" entities for purposes of the RFA. However, the Commission believes that most issuers of municipal securities qualify for the limited exemption in paragraph (d)(2) of the Rule.[701] In the 2008 Amendments Adopting Release, the Commission estimated that 10,000 issuers would enter into continuing disclosure agreements that provide for their submitting continuing disclosure documents to the MSRB.[702] Under the amendment to narrow the Rule's exemption for demand securities, the number of affected issuers is estimated to increase to 12,000 issuers.[703] Some of these issuers may be small issuers.

In the Proposing Release, the Commission requested comment on the above estimates. The Commission received no comments responding to these estimates and continues to believe that they are appropriate.

E. Reporting, Recordkeeping and Other Compliance Requirements

The amendments apply to all small entities that are currently subject to Rule 15c2–12. Because small entities already may submit notices to the MSRB to disclose events already covered by the Rule, these entities should be able to prepare notices for events that are incorporated into the Rule by the amendments. The Commission expects that adding the new disclosure events will increase costs incurred by small entities, to the extent that their primary offerings of municipal securities are covered by the Rule, because they potentially will have to provide a greater number of event notices than they do currently.

F. Action To Minimize Effect on Small Entities and Consideration of Alternatives

In connection with the final revisions to the Rule, the Commission considered the above comments and the following alternatives:

(1) Establishing differing compliance or reporting requirements or timetables

[689] *See* Proposing Release, *supra* note 2, 74 FR at 36835–37.

[690] *Id.*

[691] *See* Proposing Release, *supra* note 2, 74 FR at 36867.

[692] *See* CRRC Letter, WCRRC Letter, Kutak Letter, CHEFA Letter, NAHEFFA Letter, Connecticut Letter, SIFMA Letter, NABL Letter, and GFOA Letter. *See supra* Sections III.B., III.E., and V.D.

[693] 5 U.S.C. 601(6).

[694] 17 CFR 240.0–10(c).

[695] 17 CFR 240.0–10(f).

[696] 17 CFR 230.157. *See also* 17 CFR 240.0–10(a).

[697] *See supra* Section V.C.

[698] *See* Proposing Release, *supra* note 2, 74 FR at 36866.

[699] 5 U.S.C. 601(5).

[700] *See* Securities Exchange Act Release No. 33741 (March 9, 1994), 59 FR 12748 (March 17, 1994).

[701] Specifically, Rule 15c2–12(d)(2) provides an exemption from the application of paragraph (b)(5) of the Rule (Rule's provision regarding Participating Underwriters obligations with respect to continuing disclosure agreements) 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 the MSRB. *See* 17 CFR 240.15c2–12(d)(2).

[702] *See* 2008 Adopting Release, *supra* note 7, 73 FR at 76121.

[703] *See* Proposing Release, *supra* note 2, 74 FR at 36850.

which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

As noted above, breaker-dealers who are the entities directly subject to the Rule are not likely to be significantly affected by the amendments. The Commission notes, however, that it has adopted a delayed compliance date of December 1, 2010, to allow broker-dealers, and other entities indirectly affected by the Rule, additional time to familiarize themselves with the amendments and to give the MSRB time to make the necessary system changes to its EMMA system. As for issuers who are not directly subject to the Rule, the Commission notes that Rule 15c2–12 currently provides differing compliance criteria for larger and smaller issuers because most small issuers of municipal securities are eligible for the limited exemption currently contained in paragraph (d)(2) of the Rule. The exemption in Rule 15c2–12(d)(2) provides that paragraph (b)(5) of the Rule, which relates to the submission of continuing disclosure documents, does not apply to a primary offering if the conditions contained therein are met.[704] This limited exemption from the Rule is intended to assist small governmental jurisdictions that issue municipal securities. In the case of primary offerings by small governmental jurisdictions that are not covered by the exemption, the Commission notes that the amendments balance the informational needs of investors and others with regard to municipal securities issued by small governmental jurisdictions with the impact effects of the amendments on such small issuers.[705]

Further, the Commission believes that, in the case of those issuers that do not qualify for the exemption in paragraph (d)(2) of the Rule and that issue securities after the amendments compliance date, there should be comparable standards for municipal securities disclosure events. The Commission nevertheless recognizes that by not applying the amendments to continuing disclosure requirements entered into prior to the amendments' compliance date, for a period of time there will be municipal securities that are subject to differing disclosure. The Commission is mindful of the potential difficulties presented by revising continuing disclosure agreements that reflect contractual commitments entered into by the municipal issuer at the time of the security's issuance. These differences in disclosure that will result from applying the amendments to new issuances and not to municipal securities outstanding prior to the compliance date will, however, diminish over time. With respect to the clarification, consolidation, or simplification of disclosure for small entities, the Commission notes that, although the amendments are uniform for large and small issuers, they are largely based on existing requirements.

IX. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 2, 3(b), 10, 15(c), 15B, 17 and 23(a)(1) thereof, 15 U.S.C. 78b, 78c(b), 78j, 78*o*(c), 78*o*–4, 78q and 78w(a)(1), the Commission is adopting amendments to § 240.15c2–12 of Title 17 of the *Code of Federal Regulations* in the manner set forth below.

Text of Rule Amendments

List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

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

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

■ 1. The 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, 78*l,* 78m, 78n, 78*o,* 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 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 the introductory text of paragraph (b)(5)(i)(C), and paragraphs (b)(5)(i)(C)(*2*), (b)(5)(i)(C)(*6*), (b)(5)(i)(C)(*7*), (b)(5)(i)(C)(*8*), (b)(5)(i)(C)(*10*), and (b)(5)(i)(C)(*11*);

■ B. Add new paragraphs (b)(5)(i)(C)(*12*), (*13*) and (*14*);

■ C. Revise paragraph (d)(1)(ii);

■ D. Remove paragraph (d)(1)(iii);

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

■ F. Add new paragraph (d)(5).

The additions and revisions read as follows.

§ 240.15c2–12 Municipal securities disclosure.

* * * * *

(b) * * *

(5)(i) * * *

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

* * * * *

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

* * * * *

(*6*) Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701–TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;

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

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

* * * * *

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

(*11*) Rating changes;

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

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

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

[704] *See* 17 CFR 240.15c2–12(d)(2).

[705] The Commission also notes that the Rule's exemption for primary offerings of municipal securities that have an aggregate principal amount of less than $1,000,000 may also apply to small issuers and small governmental jurisdictions. *See* 17 CFR 240.15c2–12(a).

such actions, other than pursuant to its terms, if material;

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

* * * * *

(d) * * *

(1) * * *

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

* * * * *

(2) * * *

(ii) * * *

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

* * * * *

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

* * * * *

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 3. Part 241 is amended by adding Release No. 34–62184A and the release date of May 26, 2010, to the list of interpretative releases.

By the Commission.

Dated: May 26, 2010.

Elizabeth M. Murphy,

Secretary.

Note: Exhibit A to the Preamble will not appear in the Code of Federal Regulations

Exhibit A

Key to Comment Letters Cited in Adopting Release Amendment to Municipal Securities Disclosure (File No. S7–15–09)

1. Letter from Bill Boatwright, Wealth Advisor, UBS Financial Services, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 16, 2009 ("Boatwright Letter").
2. Letter from James R. Folts, Investor, to Elizabeth M. Murphy, Secretary, Commission, dated August 4, 2009 ("Folts Letter").
3. Letter from Leonard Becker, Investor, to Elizabeth M. Murphy, Secretary, Commission, dated August 12, 2009 ("Becker Letter").
4. Letter from Charles Halgren, Financial Analyst, to Elizabeth M. Murphy, Secretary, Commission, dated August 18, 2009 ("Halgren Letter").
5. Letter from Philip A. Shalanca, Retired School Business Administrator, to Elizabeth M. Murphy, Secretary, Commission, dated August 30, 2009 ("Shalanca Letter").
6. Letter from Glenn Byers, Assistant Treasurer and Tax Collector, County of Los Angeles, to Mary Schapiro, Chairman, Commission, dated August 31, 2009 ("Los Angeles Letter").
7. Letter from Kenneth L. Rust, Chief Administrative Officer, City of Portland, Oregon ("Portland"), and Eric H. Johansen, Debt Manager, Portland, to Elizabeth M. Murphy, Secretary, Commission, dated September 1, 2009 ("Portland Letter").
8. Letter from Jerry Moffatt, State President, California Refuse Recycling Council ("CRRC"), and Doug Button, North District President, CRRC, to Elizabeth M. Murphy, Secretary, Commission, dated September 2, 2009 ("CRRC Letter").
9. Letter from Lisa S. Good, Executive Director, National Federation of Municipal Analysts ("NFMA"), to Elizabeth M. Murphy, Secretary, Commission, dated September 2, 2009 ("NFMA Letter").
10. Letter from Connecticut Health and Educational Facilities Authority ("CHEFA"), to Elizabeth M. Murphy, Secretary, Commission, dated September 4, 2009 ("CHEFA Letter").
11. Letter from Robert Donovan, Executive Director, Rhode Island Health and Educational Building Corporation, on behalf of the National Association of Health and Education Facilities Finance Authorities ("NAHEFFA"), to Elizabeth M. Murphy, Secretary, Commission, dated September 4, 2009 ("NAHEFFA Letter").
12. Letter from Brian G. Thomas, Assistant General Manager/Chief Financial Officer, The Metropolitan Water District of Southern California ("Metro Water"), to Elizabeth M. Murphy, Secretary, Commission, dated September 4, 2009 ("Metro Water Letter").
13. Letter from Trish Roath, Executive Director, CRRC, Kristan Mitchell, Executive Director, Oregon Refuse & Recycling Association, and Brad Lovas, Executive Director, Washington Refuse & Recycling Association, on behalf of West Coast Refuse & Recycling Coalition ("WCRRC"), to Elizabeth M. Murphy, Secretary, Commission, dated September 7, 2009 ("WCRRC Letter").
14. Letter from Ronald A. Stack, Chair, Municipal Securities Rulemaking Board ("MSRB"), to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("MSRB Letter I").
15. Letter from Richard T. McNamar, President, e-certus, Inc. ("e-certus"), to Elizabeth M. Murphy, Chairman, Commission, dated September 8, 2009 ("e-certus Letter I").
16. Letter from Leon J. Bijou, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("SIFMA Letter").
17. Letter from Michael Decker, Co-Chief Executive Officer, Regional Bond Dealers Association ("RBDA"), and Mike Nicholas, Co-Chief Executive Officer, RBDA, to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("RBDA Letter").
18. Letter from Denise L. Nappier, Treasurer, State of Connecticut, to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("Connecticut Letter").
19. Letter from Daniel C. Lynch, Kutak Rock LLP, to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("Kutak Letter").
20. Letter from Tom Sanzillo, Consultant, T.R. Rose Associates, Mark Kresowick, Corporate Accountability Representative, Sierra Club, and Lisa Anne Hamilton, Counsel, to Elizabeth M. Murphy, dated September 8, 2009 ("T.R. Rose and Sierra Letter").
21. Letter from Paula Stuart, Chief Executive Officer, Digital Assurance Certification, LLC ("DAC"), to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("DAC Letter").
22. Letter from Karrie McMillan, General Counsel, Investment Company Institute ("ICI"), to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("ICI Letter").
23. Letter from Mark Paxson, General Counsel, Office of California State Treasurer, to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("California Letter").
24. Letter from Donald F. Steuer, Chief Financial Officer, County of San Diego, to Elizabeth M. Murphy, Secretary, Commission, dated September 8, 2009 ("San Diego Letter").
25. Letter from Scott C. Goebel, Senior Vice President and General Counsel, FMR Co., Fidelity Investments ("Fidelity"), to Elizabeth M. Murphy, Secretary, Commission, dated September 11, 2009 ("Fidelity Letter").
26. Letter from William A. Holby, President, National Association of Bond Lawyers ("NABL"), to Elizabeth M. Murphy, Secretary, Commission, dated September 23, 2009 ("NABL Letter").
27. Letter from Frank R. Hoadley, Chairman, Governmental Debt Management Committee, Government Finance Officers Association ("GFOA"), to Elizabeth M. Murphy, Secretary, Commission, dated September 24, 2009 ("GFOA Letter").
28. Letter from Richard T. McNamar, President, e-certus, Inc. ("e-certus"), to

Elizabeth M. Murphy, Secretary, Commission, dated October 14, 2009 ("e-certus Letter II").

29. Letter from Peter Lehner, Executive Director, Natural Resources Defense Council ("NRDC"), to Elizabeth M. Murphy, Secretary, Commission, dated December 15, 2009 ("NRDC Letter").

[FR Doc. 2010–13165 Filed 6–9–10; 8:45 am]

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