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SIFMA Asks SEC To Update 15c2-12, Create Parallel Rule for MAs.

WASHINGTON — The Securities Industry and Financial Markets Association is pressing the Securities and Exchange Commission to update and modernize its municipal securities disclosure rule as well as develop a parallel rule that gives municipal advisors continuing disclosure responsibilities.

SIFMA made its request on Tuesday in a white paper on SEC Rule 15c2-12 on disclosure. That rule was adopted for primary market disclosure in 1989 and then amended in 1994 to cover secondary market disclosure. The rule was amended again in May 2010, mostly regarding event notices.

The SIFMA white paper notes that 15c2-12 dates back 26 years and that enormous changes have occurred since then in technology, electronic communications, regulations and market practices.

Rule 15c2-12 goes through dealers, which the SEC regulates, to get to issuer's disclosure practices because the SEC can't regulate issuers.

Under the 1994 amendments on continuing disclosure, for example, dealers cannot underwrite bonds unless they have reasonably determined that the issuer has contractually agreed to disclose annual financial and operating data as well as event notices when certain events happen.

Underwriters also must review the issuer's official statement for municipal securities and have a reasonable basis for believing that the representations in it are true and accurate.

Leslie Norwood, associate general counsel and co-head of munis for SIFMA who authored the letter, said that while the white paper calls for muni advisors to take on some continuing disclosure responsibilities, it is not trying to shift dealer's duties onto them.

"We're not here to eliminate underwriter's responsibilities. We're here to add responsibilities [to MAs] where it is appropriate," she said.

The group's recommendations for updating and modernizing the rule are meant to make it less confusing and more helpful, she added.

"There's no reason to play hide the ball with any of this stuff," Norwood said, referring to some confusing aspects of 15c2-12.

The new MA rule would relate to a footnote in the SEC's 1988 proposed Rule 15c2-12 that dealt with the role of financial advisors in an issuer's preparation of a financial statement. The footnote said that issuers will generally employ an FA to help on a competitive offering and the FA will ordinarily perform many of the functions normally undertaken by the underwriters in corporate and muni negotiated offerings.

"Thus … [FAs] will have a comparable obligation under the antifraud provisions [of federal securities

laws] to inquire into the completeness and accuracy of disclosure presented during the bidding process," the footnote read.

SIFMA said 15c2-12 should be revisited with regard to municipal advisors now that they are federally regulated and subject to Municipal Securities Rulemaking Board regulations, as mandated by the Dodd-Frank Act.

Norwood used competitive deals to explain why an MA rule would be beneficial. In competitive deals, underwriters have much less time to conduct due diligence and review the offering statements, Norwood said. They bid on the bonds, but don't become involved with them unless they win the bid.

"It begs the question of who else has the responsibility," she said. "It seems like a natural fit if newly regulated parties, municipal advisors, who are there all along helping the issuer put together their offering document, have the responsibility."

The white paper recommends that when municipal advisors help prepare official statements, they share with underwriters the due diligence responsibilities for reviewing those documents to ensure the information is true and accurate.

"Just having similar duties for the municipal advisors would be helpful to the industry overall," Norwood said.

But Susan Gaffney, executive director of the National Association of Municipal Advisors, said SIFMA's paper "appears to be much ado about nothing" and that NAMA "strongly opposes suggestions to shift onto MAs, broker-dealer responsibilities for documents provided to their investor customers."

"NAMA members are well aware of their long standing responsibilities under the anti-fraud provisions of the federal securities laws," Gaffney said. "The suggestions for changes to 15c2-12 appear to unnecessarily complicate the rule in a way that does not appear workable."

SIFMA would also like to see the SEC upgrade and modernize provisions of 15c2-12. It wants the commission to eliminate the requirement that issuers file event notices for rating changes since those changes are all posted on the MSRB's EMMA system, Norwood said.

The requirement "is a lot of redundant work for not a lot of additional benefit," she explained.

SIFMA is also asking the SEC to clarify several portions of 15c2-12 rule and to incorporate into it past guidance and recent guidance, such as from the commission's Municipalities Continuing Disclosure Cooperation (MCDC) initiative MCDC offered favorable settlement terms to municipal bond underwriters and issuers that self-reported continuing disclosure violations.

The SEC said in interpretive guidance on underwriter responsibilities in 15c2-12's primary disclosure requirements in 1989 that "the primary responsibility for disclosure rests with the issuer." SIFMA wants that repeated in the continuing disclosure amendments to 15c2-12.

The group also is asking that the SEC affirm the position it took in its initial proposing release for 15c2-12 that given the structure of a competitive deal, "the task of assuring the accuracy and completeness of the disclosure [in competitive deals] is in the hands of the issuer."

Past guidance on disclosure has also generally focused on underwriter responsibilities without giving much detail on issuer and obligated persons, Norwood said.

Additionally, SIFMA wants the SEC to codify in 15c2-12 the staff guidance from 1991 to help underwriters distinguish between primary and secondary offerings, as well as the 1995 guidance it provided to questions from the National Association of Bond Lawyers. Muni market participants should not have to go back and forth between 15c2-12 to these documents, Norwood said. Instead the guidance should all be in one place, she said.

SIFMA is seeking some changes to the timing and availability of disclosure information under 15c2-12.

The group of dealers wants to eliminate current complex language in 15c2-12 that dictates when participating underwriters are expected to send customers copies of final OS'. Instead the rule should require underwriters to provide final official statements to customers from when they are posted on EMMA until the offerings close.

The white paper also asks the SEC to change 15c2-12 to require that the "primary offering disclosure period" lasts for 25 days after the closing date to align the rule with the MSRB's Rule G-32.

SIFMA recommends 15c2-12 require issuers to set an actual date as the due date for their disclosures of annual financial and operating information. Currently issuers typically say the information will be disclosed within so many days after the close of the fiscal years, leaving underwriters to "burn brain cells" and count days, Norwood said. It would be so much easier if the issuer said the information will be posted on June 1 of any other specific date, she said.

Another recommendation is for the provision of 15c2-12 that exempts from disclosure requirements primary offerings with institutional investors to be expanded to explicitly include primary offerings with sophisticated municipal market professionals, qualified institutional buyers, and accredited investors.

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The Bond Buyer

By Jack Casey

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