March 8, 2022

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street NW Suite 1000
Washington, DC 20005

Re: Request for Information on Environmental, Social, and Governance (ESG) Practices in the Municipal Securities Market

Dear Mr. Smith:

The American Securities Association (ASA)[1] welcomes this opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB) request for information on environmental, social, and governance (ESG) practices in the municipal securities market (Request).

<u>Discussion</u>

The ASA has actively engaged Congress and the Securities and Exchange Commission (SEC) regarding the debate over ESG investing and the growing market for ESG-labeled securities and products. Numerous fundamental issues and questions exist that regulators, issuers, and investors must consider when incorporating ESG criteria into their decisions or selecting certain investments based upon their ESG profile.

In June 2021, the ASA submitted comments, which included our Disclosure Resource Index, in response to the request for information on climate change and ESG disclosures initiated by then-SEC Acting Chair Herren Lee.[2] These comments highlighted the fact that there is no accepted "consensus" related to ESG investing, or whether the incorporation of ESG factors actually promotes long-term, sustainable returns for investors.

There is also growing concern surrounding the marketing of ESG-labeled products and the various, sometimes conflicting, set of metrics that are used to define the term "ESG." The SEC has acknowledged this problem, stating in an April 2021 "risk alert" that:

[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a diverse membership of almost one hundred members located in every geographic region of the United States.
[2] https://www.sec.gov/comments/climate-disclosure/cll12-8906849-244183.pdf

> The rapid growth in demand, increasing number of ESG products and services, and lack of standardized and precise ESG definitions present certain risks. For instance, the variability and imprecision of industry ESG definitions and terms can create confusion among investors if investment advisers and funds have not clearly and consistently articulated how they define ESG and how they use ESG-related terms, especially when offering products or services to retail investors. Actual portfolio management practices of investment advisers and funds should be consistent with their disclosed ESG investing processes or investment goals.

The same problems the SEC identified in this risk alert for investment funds exist within the municipal market as well.

As the Release notes, there are no uniform standards that currently exist for ESG disclosures by issuers or for ESG-labeled municipal bonds. This has led to the creation of a niche industry of self-styled ESG funds, standard setters and certification services seeking to place their imprimatur on certain practices or disclosures. This has also increased the risk the public will be misled.[3]

That said, the Government Finance Officers Association's recent letter to the SEC importantly articulates the reality in this market stating that "the notion of developing a uniform set of metrics to measure or evaluate risks is so impractical as to be virtually impossible to develop or implement."[4]

As you are aware, this issue is especially acute in the municipal space. According to the SEC, there are over 44,000 municipal issuers and close to one million different municipal bonds outstanding in the United States.[5] Each of these municipalities has their own unique infrastructure, geography, demographics, and other factors that make it impossible for a uniform set of ESG metrics – whether adopted by a private standard setter or government agency – to be adopted. Compare this to the challenges currently facing the SEC in adopting climate change disclosures for a universe of roughly 4,000 publicly listed companies.[6]

Further, municipal bonds – by their very nature – have long supported environmental and social policy objectives in communities all across the country. These bonds facilitate the financing of schools, local infrastructure and water projects, public health facilities including hospitals,

[3] https://amp.ft.com/content/ae78c05a-0481-4774-8f9b-d3f02e4f2c6f "To promote the funds, seemingly vague words such as "sustainable" and "green" have been widely used. Some industry insiders believe they are on the brink of a mis-selling scandal in the mold of payment protection insurance, mortgages or diesel cars. "Inconsistency, omissions, lack of clarity — that's prime territory for mis-selling claims."

[4] https://www.sec.gov/comments/climate-disclosure/cll12-9027450-246107.pdf

[5] https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_munibondsmarket#:~:text=Currently%2C%20there%20are%20over%2044%2C000,cities%2C%20counties%2C%20and%20states.

[6] https://www.natlawreview.com/article/internal-dissension-sec-delays-climate-change-disclosure-regulations

affordable housing, renewable energy, and other critical projects that benefit the environment and enhance the quality of life for millions of American.

Put another way, municipal bonds were ESG-friendly long before "ESG" became a marketable term that often encompasses issues that are financially immaterial to issuers of debt and equity.

Rating a municipality's bonds – or incorporating ESG criteria into the credit rating of an offering as many credit rating agencies now do – can pose thorny questions that are not easily resolved. This problem is heightened when the issue is not directly impacted by an environmental factor (i.e. it seems reasonable to include the cost impact of a hurricane in the credit evaluation of a Florida issuer's ability to repay, but should it be relevant for an issuer in Illinois?)

Various certification services, standard-setters, and credit rating agencies all use different criteria and processes to determine what a municipality's ESG "score" may be or how ESG topics factor into a municipality's credit rating. The risk inherent with this reality is that a small number of entities get to define what constitutes "ESG," even if certain issues are wholly unrelated to the ability of a municipality to honor its financial obligations.

A far more preferable approach would be to allow the issuers the ability to tailor disclosures in a way that discusses risks or other factors that are material – including any factors that may fall under the broad bucket of ESG.

The ASA has urged the SEC and other regulators to be cautious when considering "uniform" standards and needlessly costly disclosures surrounding ESG. While there is often a temptation amongst regulators to step in and mandate uniform rules when market-based standards sometimes differ from one another, the SEC and MSRB should avoid this approach. Instead, each regulator should continue to support disclosures made by municipal issuers that are tied to the concept of materiality which properly informs investors of the unique financial risks that a particular issuer may have.

It is also an open question as to whether financial services regulators have the legal authority to mandate any disclosures in this area without explicit Congressional authority to do so. As the Supreme Court said in *UARG v. EPA*, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[7]

[7] Utility Air Regulatory Group (UARG) v. Environmental Protection Agency, 134 S. Ct. 2427 (2014).

EMMA

We believe the MSRB should consider improvements to the Electronic Municipal Market Access (EMMA) system in addition to those enhancements that were implemented in 2018. Given heightened interest around ESG issues, a search function that allowed investors to easily access information around ESG-labeled bonds or ESG-related disclosures from issuers would help meet any demand for ESG information without applying uniform or prescriptive disclosure mandates.

Conclusion

In the context of the municipal bond market, we believe the SEC and MSRB should continue to support disclosures that allow investors to assess the *financial* creditworthiness of municipal issuers, while avoiding a regulatory adoption of any specific set of ESG or non-financial performance standards.

The ASA appreciates this opportunity to provide our perspective on this issue and look forward to continuing to work with the MSRB on issues affecting the municipal bond market.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association