

March 8, 2022

Mr. Ronald Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I St NW Ste 1000  
Washington DC 20005

**Re: Municipal Securities Rulemaking Board (MSRB) Notice 2021-17**

Dear Mr. Smith,

The Public Finance Initiative (PFI) is pleased to provide comments on MSRB [Notice 2021-17](#), “Request for Information on Environmental, Social and Governance (ESG) Practices in the Municipal Securities Market” (hereafter, the “Notice”). Briefly, PFI is a fiscally sponsored organization of Third Sector New England, Inc., a non-profit corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. PFI designs public finance programs for leading foundations, governments, and other partners focused on best practices for integrating ESG aligned values, such as equity, sustainability, and inclusive growth, in fiscal decision making.

Most recently, PFI has undertaken original research to review issuer disclosures for self-designated ESG issuances using the MSRB’s new EMMA Labs platform and has uncovered noteworthy trends that have the potential to inform and educate the MSRB and other stakeholders in the ESG market. These findings will aid PFI in the development of new resources that will better support market stakeholders focused on ESG practices, particularly those whose central concern is racial equity in the context of social bond issuances.

To that end, below is a summary of noteworthy trends found in our preliminary research that address questions posed by the MSRB in Section E of the Notice. In addition, we propose innovative solutions that can support the MSRB in its mission to advance issuer and investor protection, as well as improve the overall fairness and efficiency of the market.

**Responses to Questions in Section E of the Notice**

**Regarding Question 1.** Using the EMMA Labs platform to identify and analyze data and information in official statements for self-designated ESG-Labeled Bonds longitudinally, PFI research has identified two important phenomena:

- At present the municipal bond market is experiencing rapid growth in investments by issuers that explicitly state the use of bond proceeds for funding projects with positive environmental, social, and governance (ESG) benefits. Moreover, there is greater attention by issuers to articulating their management of risks across several ESG domains which has enormous positive potential; and

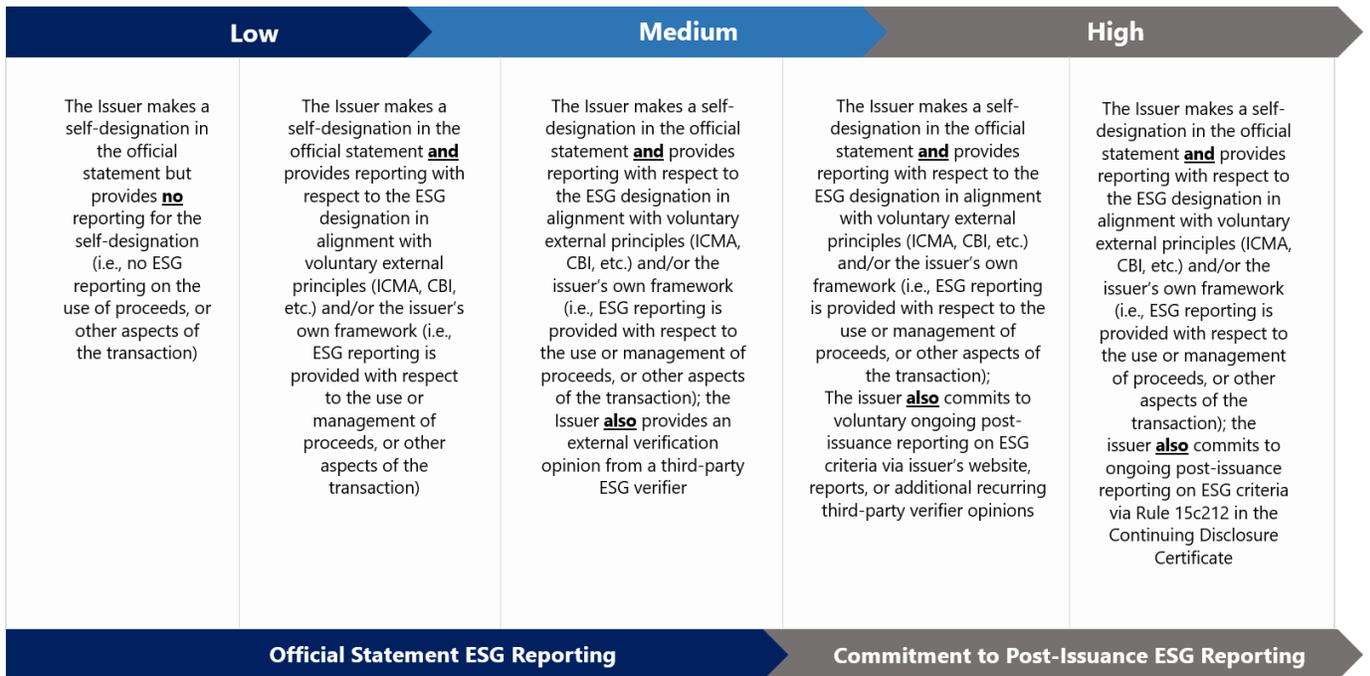
- A proliferation of highly varied and inconsistent disclosure practices for ESG-Labeled Bonds is emerging that risks worsening historic information irregularities and market fragmentation, which have long impeded the transparency, structure, and functioning of the municipal market.

We have observed these phenomena via our research of issuer official statements in EMMA Labs to examine questions that include, but are not limited to: (1) issuer practices citing voluntary principles, frameworks, and taxonomies created by issuer and non-issuer stakeholders in the context of ESG-Labeled Bonds; (2) trends in the use of bond proceeds for ESG-Labeled Bonds; (3) the quality and character of issuer disclosures for ESG-Labeled Bonds (including the use of metrics or indicators to report on risks or the social benefits of projects) at two levels – in the official statement at the time of sale and commitments to ongoing voluntary or other reporting via the S.E.C. Exchange Act Rule 15c212 (“Rule 15c212”) of ESG criteria.

Our research in progress is revealing the following three noteworthy trends from our review of official statements and other disclosures for ESG-Labeled Bonds:

- **Use of Voluntary Frameworks, Taxonomies, Principles:** Over 98% of the issuers of ESG-Labeled bonds cite voluntary principles, taxonomies, and frameworks developed by the leading organizations that include the International Capital Markets Association (ICMA), the Climate Bonds Initiative (CBI), among others. Despite the prevalence of ICMA and CBI, there are a growing number of issuers who are also developing and integrating their own ESG frameworks in their official statement disclosures.
- **Use of Proceeds:** The majority of ESG-Labeled bonds (over 50%) appear to be arising in what is traditionally known as “new-money” issuances where bond proceeds fund new projects, described in the official statement across four sectors: education, housing, water/sewer, and general obligation bonds. However, we are also observing a growing number of ESG-Labeled Refunding Bond issuances, where an issuer refinances outstanding bonds by issuing new bonds. In many refunding issuances we are examining, the underlying bonds being refunded were not ESG-Labeled bonds but carried a use of proceeds that is considered by the issuer to have a natural overlap with ESG purposes.
- **Disclosure Patterns and Practices:** There is a high degree of variation in issuer disclosure patterns across ESG-Labeled Bonds with patterns that are evolving over time as different types of ESG-Labeled Bonds (green bonds, social bonds, and sustainability bonds) face different stages of maturity, growth, issuer engagement, and use of verification agents. Our initial research reveals a wide spectrum of disclosure practices in issuer official statements which we present in [Figure 1](#) to begin to classify the different issuer disclosure practices with respect to ESG designations:

**Figure 1: Issuer ESG-Labeled Bonds Disclosure Practices Spectrum**



The degree of market variation and fragmentation resulting from the factors observed over the course of our research, and other dynamics, poses several risks to municipal market stakeholders. Investors and holders of bonds, for example, may encounter information asymmetries when engaging in a risk or impact analysis of complex ESG factors. In addition, there are inconsistencies in the level of data and information that is available not just across primary market disclosures, but also with respect to secondary market longitudinal reporting for complex environmental, social, and other ESG issues arising in the post-issuance compliance period. We explore these issues in response to various questions below.

Addressing the range of complex dynamics of ESG issues as that segment of the municipal market grows so rapidly is incredibly complex and will require a body of careful regulatory and non-regulatory solutions that manifest over time. When developing regulatory solutions, it may be important to consider potential changes that can encourage issuers to voluntarily report clear and consistent voluntary disclosures in official statements and subsequent disclosure undertakings for ESG labeled issuances. Enhancements to Rule 15c212 may serve as an important point of departure.

Briefly, it is well documented in several SEC reports and law that in the absence of a direct statutory framework for municipal securities registration and reporting that governs issuers, the SEC's investor protection efforts in the municipal securities market have been accomplished primarily via the regulation of broker-dealers and municipal securities dealers pursuant to Rule 15c212, SEC interpretations, the enforcement of the antifraud provisions of federal securities laws, and SEC oversight of the MSRB. Rule 15c212 was also designed to assist underwriters in meeting their responsibilities under the antifraud provisions of the federal securities laws by requiring them to review issuer disclosure documents before

beginning sales to investors. Accordingly, Rule 15c212 created a limited framework for municipal market data to be disclosed by issuers who only engage in the sale of bonds via a public underwriting. All other municipal securities issuers are not subject to the rule – most notably private placements.

Under Rule 15c212, underwriters are required to reasonably determine that either the issuer of municipal securities or an obligated person (obligated to pay all, or some, portion of the principal and interest on the municipal securities) has undertaken in a written agreement or contract (commonly referred to as “continuing disclosure agreement”) to provide specified annual information and “material event” notices to certain information repositories. Since its adoption, Rule 15c212 has undergone several meaningful amendments, including most recently amendments in 2018 which provided investors not only with access to important information relating to obligated persons, but were also intended to enhance transparency in the municipal securities market by increasing the amount of information that is publicly disclosed regarding material financial obligations incurred by obligated persons.

The SEC and the MSRB can consider amendments to Rule 15c212 that include ongoing reporting of ESG data in support of the self-designated issuances, including any reports, statistics, indicators, or other metrics described at the time of sale, which the issuer introduces in the official statement in support of the ESG designation of the bond issue. Such amendments could be developed by the SEC and MSRB by examining existing issuer official statements that are currently voluntarily committing to ongoing reporting of ESG criteria in their continuing disclosure certificates and which we classify with the “High Disclosure” classification presented in [Figure 1](#). The amendment could also be developed by examining patterns and trends in how issuers are incorporating elements of voluntary ESG principles and frameworks, including the predominance for ESG use of proceeds and other patterns we are observing.

In developing regulatory solutions, it will be important to remain attentive to the fact that when issuers of municipal securities address complex issues that arise under ESG (i.e. matters of race, equity, equality, climate change, etc.), they often may make statements about the future outcomes or impact they hope to achieve, particularly where leading voluntary frameworks (mentioned earlier) place disproportionate emphasis on the use of proceeds to achieve a social, environmental, or sustainability benefit.

Providing such disclosure under the current anti-fraud standards pursuant to Rule 10(b)(5) of the Securities Exchange Act of 1934 (which apply to the preparation of the preliminary official statement, official statement, and S.E.C. Rule 15c212 ongoing disclosure) may pose challenges to issuers by creating the risk of liability if speculative statements of ESG outcomes or impact resulting from the bonds ultimately do not materialize or are incorrect. The SEC and MSRB should examine the development of safe harbors from private liability for such statements by municipal issuers focused on ESG non-financial data.

As background, a safe harbor is a legal provision that grants general protection from liability or penalty if certain conditions are met. A safe harbor provision may be included in statutes or regulations to give peace of mind to good-faith actors who might otherwise violate the law on technicalities beyond their reasonable control.

The safe harbors could be limited to issuers who are current in their ongoing disclosure obligations, restricted to only those issuers that satisfy certain conditions (including appropriate risk disclosure) or perhaps could be limited to issuers that provide information regarding the significant assumptions underlying their projections. The noted approach could enable issuers to undertake expanded structured

disclosure of important forward-looking statements in a consistent way that impact focused investors can rely on and minimize the legal risk posed to issuers drafting disclosures on complex social, environmental, and governance issues.

At present, municipal issuers can rely on the well-established “bespeaks caution” doctrine which holds that, when adequate cautionary language accompanies projections in a disclosure document, such forward-looking disclosures may not be actionable as securities fraud. The SEC has documented the importance of this doctrine in various reports to the market. This issue notwithstanding, there are novel questions with respect to the provision of forward-looking information in the ESG segment of the municipal securities market and it presents an opportunity for the MSRB and SEC to consider reforms that enable the provision of more clearly defined and calculated forward-looking information, while also preserving the application of the antifraud provisions of the federal securities laws to disclosures.

There are also non-regulatory solutions, particularly focused on the use of technology, that I believe should be considered. To that end, PFI presents possible enhancements to the EMMA Platform and EMMA Labs platform in response to Question 7 that are relevant to the issues addressed in this question.

**Regarding Question 2.** Organizations like ICMA and CBI have introduced important and valuable voluntary standards for issuing ESG-Labeled Bonds, and PFI research presented earlier in this letter suggests that such standards are being embraced by issuers, at unprecedented levels. The noted voluntary standards generally underscore the issuer’s use of proceeds to achieve a social benefit and encourage annual reporting centered on the bond-funded projects. However, voluntary reporting does not set mandatory performance standards nor require that issuers adhere to tracking, measuring, and reporting any metrics regarding the ESG-Labeled Bonds.

The flexibility afforded by such voluntary frameworks with respect to ESG criteria is appropriately aligned with the general broad autonomy and authority that issuers traditionally have with respect to the entire issuance process under state, local, or federal securities and tax law. However, this phenomenon has the potential to create risks for investors if an ESG-Labeled Bond reflects inadequate or insufficient attention to the measurement and reporting of performance indicators aligned with the ESG designation.

If a bond issuance results in de minimis social or environmental outcomes but reflects procedural alignment to the core components of the noted voluntary ESG framework, it would likely retain its ESG designation for the duration of the issuance. This can give rise to concerns around “social washing,” “green-washing” or “sustainability washing,” for investors who hold the bonds, if they come to believe that the results, outcomes, or impact of the projects funded with the proceeds of the ESG-Labeled Bonds is not truly materializing. In such instances, if an investor wishes to sell the bond it is unclear whether bond issuances perceived by investors to have weak ESG outcomes, characteristics, or disclosure are bearing a quantifiable pricing difference when traded in the secondary market.

Addressing the noted issues is incredibly complex and may require regulatory and non-regulatory solutions that manifest over time. The MSRB can, and should, consider playing an expanded role in how it enhances the collection, transparency, and reporting of voluntary data and information related to ESG-Labeled Bonds. To that end, we present concrete suggested enhancements to the EMMA Platform and EMMA Labs platform in response to Question 7.

**Regarding Question 5.** There is a myriad of stakeholders, including PFI, who are making important contributions to provide issuers with guidance, frameworks, taxonomies and principles as the ESG

market grows. This provides issuers with much needed guidance and support. However, we recognize that if such efforts are not undertaken carefully and thoughtfully, the proliferation of inconsistent approaches and frameworks can further exacerbate market fragmentation and lead to systemic risks that threaten market structure, potentially creating disruptions that impact bond pricing in the secondary and primary market – impacting the economic return and costs of capital expectations issuers and investors rely on in transactions.

At this stage, where different segments of the ESG markets have reached varying stages of maturity, the MSRB can play an important role by perhaps inviting stakeholders with promising research, views and contributions who offered responses to the Notice to form an MSRB working group comprised of issuers and other market participants to present and share information on the various taxonomies, frameworks, and principles that are both in existence and in development. These conversations can enable the MSRB to understand the current state of resources being developed in the ESG market to a deeper degree, helping it to examine and refine its short and long-term strategy in response, and consider how and whether it should explore the creation of centralized voluntary or mandatory standards to govern ESG labeled issuances and a potential centralized repository for ESG information that is in harmony with the evolution of the EMMA and EMMA Labs platforms. With respect to the latter, PFI offers concrete recommendations on improvements to the EMMA Platform and EMMA Labs platform in response to Question 7 which are relevant to the issues addressed in this question.

**Regarding Question 6.** The inclusion on the MSRB’s EMMA platform of IHS Markit ESG indicators data is an important enhancement that has the potential to make visible important ESG information in self-designated issuances, particularly when deals have been certified by one of several verifiers that assess the issuance for adherence to ESG criteria. Prior to this, market participants would have had to independently research this information at the issuer level, or on a myriad of independent platforms, or other sources. To further enhance how IHS Markit data can serve market participants and the MSRB’s mandate of transparency, the MSRB should consider two changes.

First, where the “ESG Type” title appears on the EMMA Platform’s New Issue Calendar, the MSRB should revise the definition to more clearly state that the field endeavors to report IHS Markit data, rather than generic ESG data. The current definition does not clearly communicate that. Second, the MSRB should include IHS Markit data anywhere across the EMMA Platform and EMMA Labs in which issuer data appears. In this way, clear and consistent information on the presence of ESG designations and verifiers will be accessible as market participants look for pre- and post-issuance information.

**Regarding Question 7.** We suggest that the MSRB consider the creation of a New EMMA Lab dedicated to ESG Disclosures & Taxonomies. As the MSRB’s “innovation sandbox”, the EMMA Labs data and technology platform is uniquely positioned to host a new lab that serves as the first voluntary repository with which to collate and disseminate existing ESG frameworks, principles, reports, and taxonomies. The lab could be designed to automatically filter and show industry stakeholders every ESG-Labeled Bond and its related continuing disclosure filings, coupled with trade data. This would enhance the capacity of market participants to answer important macro-level questions that have, to date, remained opaque.

In addition, the lab could enable issuers interested in self-reporting additional ESG information the capacity and platform with which to do so, providing an additional resource for issuers, financial advisors, and underwriters that are preparing new offerings and wish to learn from others in the field, thereby encouraging the discourse surrounding future ESG best practices. It can also accommodate reporting for bond issuances that have ESG-focused use of proceeds but do not carry an ESG label,

particularly refunded bonds and others. Furthermore, the lab could also provide ESG information to investors on a level playing field, serving as an important first step to address the unequal and irregular access to information. Additionally, the SEC, MSRB, and other stakeholders that are working to define future market standards, could use the lab as a resource to observe the evolution of the ESG landscape over time, as new regulatory or non-regulatory long-term solutions take form.

**Regarding Question 8.** The current environment for federal aid to fund infrastructure has undergone dramatic shifts via the passage of the \$1.85 trillion American Rescue Plan Act (ARP) and \$1.2 trillion Infrastructure Investment and Jobs Act (IIJA). The IIJA and ARP are changing the intergovernmental resource base available for infrastructure (and other) investment in many issuer jurisdictions, with funding streams that in many instances explicitly encourage equitable investment across many functional areas such as broadband, water, sewer, and others aligned with ESG values.

It is important for the MSRB to be attentive to such trends where federal aid is blended with municipal bond proceeds as joint co-investment avenues for infrastructure projects. If bond issuers rely on municipal bonds as part of the wider capital funding strategy for a jurisdiction that leverages the noted aid packages, such issuers may engage in reporting of non-financial factors (particularly social and other equity-focused and ESG criteria) for a project when meeting reporting requirements for the U.S. Treasury and other federal or state agencies and departments charged with the administration of grant funds.

With respect to ARP, for example, certain issuer jurisdictions who are recipients of State and Local Fiscal Recovery Funds are required to submit Recovery Plan Performance Reports to the U.S. Treasury documenting the federal aid expenditures and how funds are being used to promote a strong and equitable recovery. Such reports often include important information about recipients' forward-looking strategy for how they plan to use funds between 2021 and the 2026 deadline for State and Local Fiscal Recovery Funds expenditures. Recovery Plan Performance Reports, and other reporting occurring under the IIJA and ARP, could contain important information that is highly relevant to market participants where forward-looking statements are made for bond funded projects that will also receive federal aid. The MSRB should consider collaborations with the US Treasury to examine the data and information arising from reporting that will occur for the IIJA and ARP that may have a relevant nexus to bond funded projects and consider whether including access to any such disclosures on EMMA Labs or the EMMA platform could enhance and inform our understanding of ESG criteria in the context of certain bond funded projects that also include federal aid funding.

### **Closing**

PFI appreciates the continued outreach that the MSRB and this opportunity to engage with the MSRB to share our input with the Board and staff at this important stage of growth of the market activity in ESG self-designated issuances. All the areas we describe above are active areas where PFI is conducting research and developing programs. We would be delighted to share our research and work with the MSRB and welcome the opportunity to discuss our comments and provide additional assistance.

Sincerely,



Lourdes Germán  
Executive Director