



March 8, 2022

Municipal Securities Rulemaking Board
1300 I Street NW, Suite 1000
Washington, DC 20005

Submitted via <https://www.msrb.org/CommentForm.aspx>

Re: Request for Information on Environmental, Social and Governance (ESG) Practices
in the Municipal Securities Market (2021-17)

Dear Sir/Madam:

On behalf of the undersigned, we respectfully submit the following comments in response to the Municipal Securities Rulemaking Board's ("MSRB" or "Board") Request for Information on Environmental, Social and Governance (ESG) Practices in the Municipal Securities Market (2021-17) (RFI).

The seemingly innocuous RFI questions are actually precursors to MSRB rules that would require municipalities to make ESG-related disclosures. From the Founding, America's states and their subdivisions have been a cornerstone of her success. These communities require funding, and that means access to capital markets. Recognizing the special role of America's states and local governments, Congress enacted a unique regulatory regime for them, requiring that they abide by anti-fraud provisions but exempting them from onerous disclosure requirements that would otherwise drive up the costs of funding and threaten their ability to govern themselves. Congress maintained this balance when it created the MSRB, strictly forbidding it to demand disclosures from municipal issuers or to specify the content of disclosures. The MSRB should abandon this information gathering process and the creation of any disclosure rules governing municipal issuers.

First, the RFI thwarts Congress's decision to leave states free from bureaucratic securities supervision. The RFI seeks information that is useful for one purpose and one purpose alone: transgressing Congress's ban on requiring disclosures from municipal issuers or regulating their content. Here, MSRB is starting down the path towards such rulemaking and is thereby undermining that congressional proscription. The MSRB has no business seeking information that it cannot put to any lawful use.

Second, the Board's attempt to circumvent its statutory restrictions and disregard congressional objectives, as evident in the RFI, would render any eventual rulemaking arbitrary

in violation of the Administrative Procedures Act (APA). The RFI signals the Board’s myopic focus on transparency in the market for municipal bonds. Transparency is important, but it is not the only objective of the securities laws, and the Board’s inexplicable choice to pursue one of Congress’s objectives while ignoring others—such as preserving the independence of state and local governments and guaranteeing their access to affordable capital—would render any eventual regulation stemming from the RFI arbitrary and capricious.

Third, the RFI misunderstands the purpose of securities disclosures and therefore seeks to address a problem that does not exist. The Board candidly admits that the RFI’s purpose is to create access to information demanded by ESG “impact investors.” But the securities laws exist to ensure investors have material information, not whatever data they may seek in pursuit of social schemes.

Fourth, the RFI fails to seek the information the Board needs to make reasoned decisions about disclosures. Even if the Board had the authority to compel disclosures from municipal issuers and even if such disclosures could remedy a real problem in the market, the RFI fails to seek the information necessary to propose a sensible disclosure requirement. To do so, the MSRB would need to understand, at minimum, the costs of providing additional ESG-related information, the extent to which state and local self-governance would be displaced by the disclosure mandate, and the frightful human cost of diminished access to capital for local communities who refuse to change their policies on hot-button issues of the day.

DISCUSSION

I. The RFI thwarts Congress’s decision to leave states free from bureaucratic securities supervision.

Congress has exempted states and their subdivisions from the power of federal securities regulators to demand disclosures. The registration, disclosure, and reporting requirements of the Securities Act of 1933, and the SEC’s authority to implement these requirements, do not apply to municipal issuers.¹ Further, Congress specifically provided that neither the Commission nor the Board may “require any issuer of municipal securities ... to file” reports prior to and in connection with the sale of its securities.²

When it created the Board, Congress took great care to ensure that the Board may not evade this limitation. The statute bars the Board from creating indirect disclosure demands (i.e., demanding that issuers disclose to brokers, dealers, or advisors and then requiring that these pass disclosures along to purchasers).³ Nor may the Board demand that brokers, dealers, or advisors provide information that would in the ordinary course be available only from issuers and thus mobilize dealers, etc., to pressure issuers for disclosures, for the statute authorizes the Board to demand from dealers, etc., only such information about an issuer as “is generally available from

¹ 15 U.S.C. § 77c(a)(2); 15 U.S.C. § 77s(a).

² 15 U.S.C. § 78o-4(d)(1).

³ *Id.* at § 78o-4(d)(2).

a source other than such issuer.”⁴

Finally, Congress provided that the Board’s rules must “not be designed ... to regulate ... matters not related to the purpose of this title.”⁵ Because disclosures by municipal issuers fall outside the “purpose of this title,” the Board’s rules must not be designed to regulate them.

Yet the Board’s RFI seeks information that can be useful *only* for making disclosure requirements that Congress has expressly forbidden. The RFI seeks information useful only for compelling and regulating disclosures:

- The RFI asks point-blank whether “municipal issuers [should] include a separate section in their ... offering documents expressly devoted to ESG-Related Disclosures.”⁶
- The RFI asks whether “the information included in ESG-Related Disclosures should be standardized”⁷— so the Board can decide whether to standardize it.
- The RFI also asks about what sorts of information should be included in ESG-Related Disclosures,⁸ which the Board needs to know only if it intends to specify the content of municipal disclosures.
- The RFI asks investors whether and how “ESG-related information [is] material to ... investment decisions,”⁹ as well as the extent to which investors already have access to this material information; information on these topics is relevant only for specifying the content of disclosures.
- Remarkably, the RFI even asks investors “how ... municipal issuers [can] best *present and disseminate* their ESG-related information,” and queries about the usefulness of including various sorts of information in municipal disclosures¹⁰—questions that make sense only if the Board plans to prescribe standards for disclosures.

Lest the RFI’s text leave any doubt, the MSRB’s CEO explained that its goal is “to enhance issuer and investor protections”¹¹; that is the purpose for which the MSRB will use the information submitted in response to the RFI. The MSRB cannot (falsely) claim to “enhance ... protections” pertaining to access to ESG information without mandating disclosure of that

⁴ *Id.*

⁵ *Id.* at § 78o-4(b)(2)(C).

⁶ RFI (A)(1).

⁷ *Id.* at (A)(2); *see also id.* at (B)(5).

⁸ *Id.* at (A)(2).

⁹ *Id.* at (B)(1).

¹⁰ *Id.* at (B)(4) (emphasis added).

¹¹ MSRB, “MSRB Seeks Stakeholder Perspectives on ESG-Related Disclosure and ESG-Labeled Bond Practices in the Municipal Securities Market” (Dec. 8, 2021), <https://msrb.org/News-and-Events/Press-Releases/2021/ESG-RFI>.

information in some way.

Under its statute and as explained above, the Board lacks authority to require municipal disclosures; it therefore has no business requesting information that would be useful only for that purpose. Nor may the Board mandate the content of disclosures that issuers *choose* to make. The statute prohibits the Board from “requir[ing] any issuer ... to furnish ... any ... information.”¹² The prohibition is categorical; it does not abate because an issuer has chosen to exercise its undoubted First Amendment right to offer purchasers information about itself and its securities. The Board thus cannot demand that, if an issuer chooses to disclose, it must include certain data elements in its disclosure.

The Board therefore has no business seeking information useful only for specifying the content of disclosures. The RFI makes sense only as part of a strategy for the Board to overstep its statutory limits. Accordingly, it must be withdrawn. Further, to reassure market participants who, in light of the RFI, may now doubt the Board’s view of its own authorities, the Board should issue a statement explaining that it acknowledges the statutory limits on its authority and intends to respect them.

II. The Board’s attempt to circumvent statutory restrictions and its disregard for congressional objectives would render any eventual rulemaking unlawful under the APA.

The securities laws represent Congress’s careful balance between the prevention of fraud and achievement of transparency and the need of states to obtain affordable funding for themselves and their subdivisions in a manner that preserves their freedom to govern themselves.

On the one hand, municipal issuers must comply with the antifraud provisions of 15 U.S.C. § 78j(b), which requires the revelation of any “material fact necessary in order to make the [issuers’] statements made, in the light of the circumstances under which they were made, not misleading.”¹³ Relying on this provision, the SEC maintains a regulation forbidding dealers and other securities professionals to buy or sell in a municipal offering unless the municipal issuer commits to disclose “information ... material to an evaluation of the [o]ffering,”¹⁴ with the goal of ensuring that issuers make available all information necessary to make their communications not misleading. If any ESG-related information is material, then by its own terms, this regulation would cover it.

On the other hand, the securities agencies’ authority to require disclosures is constrained by § 78o-4(d), which serves two main purposes. First, it lowers the burdensome costs of compliance for states and their subdivisions, which is to say, for American taxpayers. This is especially critical for the many small communities that issue municipal bonds. The MSRB estimates that more than half of all local governments have issued securities,¹⁵ and tens of

¹² 15 U.S.C. § 78o-4(d)(2).

¹³ 17 C.F.R. § 240.10b-5.

¹⁴ 17 C.F.R. § 240.15c2-12(f)(3); *see also id.* at § 240.15c2-12(a), (b).

¹⁵ *Municipal Securities: Financing the Nation’s Infrastructure* n.10 (2021).

thousands of these represent very small villages and towns.¹⁶ The costs of compliance for these communities must be spread over a very small tax base. Further, America's smallest towns often seek very modest amounts of funding through securities offerings.¹⁷ Because the cost of disclosures typically does not depend significantly on the size of the offering, requiring additional securities disclosures would raise the per-dollar cost of funding for small offerings, again penalizing small communities.

Second, it protects the independence of states to operate with limited interference from federal securities regulators. Since the early days of the Republic, the states and their subdivisions have provided a prime experience of self-government for millions of citizens and constituted, in Tocqueville's memorable description, a school of freedom.¹⁸ Further, the states have stood as the best bulwark against aggrandizement and abuse of federal power. Both roles depend on the continuing independence of the states from federal control.

While Congress left room for the Commission to require certain kinds of disclosures,¹⁹ likely in recognition of the Commission's broad perspective with respect to the entire securities market, it denied that power to the Board,²⁰ whose exclusive focus on the municipal market creates a risk of myopic over-regulation. As far as the Board is concerned, Congress's choice of state freedom and access to capital over disclosures is clear and dispositive.

Rather than seeking to adhere to the balance struck by Congress, the RFI fails to take into account the objectives enshrined in § 78o-4(d). The Board recognizes that § 78o-4(d) constrains its actions, but rather than accepting direction from the policies embodied in that provision, the Board views it as an obstacle to evade. It goes so far as to say that the provision "presents *challenges* to more directly standardizing ESG-Related Disclosures and ESG-Labeled Bonds."²¹ But congressional directives are commands for the Board to obey rather than "challenges" to overcome. Any rulemaking that attempts to circumvent these statutory restrictions would be unlawful under the Administrative Procedures Act.²²

But such rulemaking would also be arbitrary and capricious in violation of the APA because it "relie[s] on factors which Congress has not intended it to consider" and disregards the *objectives* to which Congress wished it to attend.²³ The Board has shortchanged Congress's objectives in § 78o-4(d) and will continue to do so in any subsequent regulation in line with the RFI. The RFI evinces single-minded focus on achieving greater transparency with regard to ESG-related disclosures. Transparency is indeed one purpose of § 78o-4. "But no legislation

¹⁶ See, e.g., Amel Toukabri and Lauren Medina, "Latest City and Town Population Estimates of the Decade Show Three-Fourths of the Nation's Incorporated Places Have Fewer than 5,000 People" (May 21, 2020), <https://www.census.gov/library/stories/2020/05/america-a-nation-of-small-towns.html>.

¹⁷ MSRB, *Self-Regulation and the Municipal Securities Market* 7 (2018), <https://www.msrb.org/-/media/Files/Resources/MSRB-Self-Regulation-and-the-Municipal-Securities-Market.ashx> (referring to "offerings less than \$250,000 in size issued by small localities").

¹⁸ *Democracy in America* 57 (Mansfield trans., 2000).

¹⁹ See 15 U.S.C. § 78o-4(d)(1).

²⁰ *Id.* at § 78o-4(d)(2).

²¹ RFI Background (emphasis added).

²² See 5 U.S.C. § 706(2)(A), (C).

²³ *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

pursues its purposes at all costs,” and the trade-off among various statutory purposes “is the very essence of legislative choice.”²⁴ Here, the Board has failed even to inquire about the effect of potential disclosure requirements on the congressional objective of ensuring that states may obtain affordable funding for themselves and their subdivisions in a manner that preserves their freedom to govern themselves.

The Board’s failure to appreciate the full range of congressional objectives appears clearly in the RFI’s question (E)(5), which asks whether the availability of and expectations for ESG-related information in other markets, such as the market for corporate securities, influences expectations in the municipal bond market. But these markets differ radically, precisely because states and their subdivisions are bodies of American citizens engaged in self-governance and therefore present a different set of interests and concerns than private corporations. The Board should not base any future action on alleged similarities to private-sector securities markets. Congress weighed the benefits of giving the Board power to extend to states and local governments the securities laws’ mandatory disclosure regime against the costs of the Board’s possession of that power—and decided to withhold the power. The RFI not only fails to respect that balance but fails even to inquire after the factors that Congress found controlling. Any regulation that continues to make these mistakes will necessarily violate the APA.

Further, any MSRB action that pressures states and cities into providing additional ESG disclosures would raise similar concerns. The RFI hints that the MSRB may introduce disclosures through the back door—for instance, by requiring dealers to exercise their leverage over issuers to demand additional ESG disclosures²⁵ or by making changes to its Electronic Municipal Market Access (EMMA) website to promote such disclosures.²⁶ But in all its actions—not just in issuance of any rule formally compelling disclosures—the MSRB has a duty to take into account the factors Congress considered relevant in creating the Board and conferring its mission. Thus, any rule affecting dealers, any modifications to the EMMA website, and any other actions the MSRB may take must respect the decision of Congress to protect municipal issuers from Board-compelled disclosures, rather than seeking a workaround to § 78o-4(d).

Any regulation of dealers designed to promote disclosures would also run into Congress’s ban on Board-mandated disclosure requirements that operate “indirectly through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise.”²⁷ To cure its incipient rulemaking of this defect, the Board should withdraw the RFI and, if it (incorrectly) continues to believe that it needs information on these topics, should issue an RFI that affords proper attention to the full range of congressional objectives embodied in § 78o-4.

²⁴ *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

²⁵ RFI (C).

²⁶ *Id.* at (E)(4)-(7).

²⁷ 15 U.S.C. § 78o-4(d)(2).

III. The RFI misunderstands the purpose of securities disclosures and therefore seeks to address a problem that does not exist.

The purpose of securities disclosures is to ensure that investors have access to material information.²⁸ And, as noted above, a regulation by the SEC currently requires the disclosure of material information in connection with municipal securities offerings.²⁹ The RFI does not suggest, or even ask whether, issuers are declining to provide any material ESG-related information that the SEC regulation demands.

The RFI, then, is driven not by the need for material information, but by a different concern: “[i]ncreasing investor appetite for ‘sustainable investing’ or ‘impact investing.’”³⁰ The information needed to satisfy this “appetite” is “beyond what historically has been provided to the market” under the existing demand to “include any material ESG-related information.”³¹ In short, the RFI aims to bring about the disclosure of *non-material* ESG-related information on the basis that impact investors now happen to want such information. Indeed, the RFI’s first question asks whether issuers are “providing ESG-Related Disclosures or ESG-related information beyond the legally required disclosures” mandated by the materiality standard.³² Likewise, the RFI seeks information about additional “benefit[s]” from issuers describing ESG-related projects beyond “material ESG-related risk factors.”³³

The RFI’s approach is fundamentally unsound, for the choice of issuers to disclose only any material ESG-related information is not a problem to be addressed but a sound decision to be protected. The Supreme Court has warned about the dangers of “an overabundance of information.”³⁴ Disclosing only material ESG-related information avoids these dangers. Further, even if the MSRB had authority to demand disclosures from issuers, demanding disclosures of non-material information would be arbitrary and capricious as unrelated to the purpose of disclosures under the securities laws.

In light of the foregoing, the MSRB must withdraw the RFI and, if it mistakenly decides to proceed in this area, must issue a new RFI focused on investors’ need for *material* ESG-related information.

IV. The RFI fails to seek the information the Board needs to make reasoned decisions about disclosures.

Even if the Board had the authority to require or regulate disclosures of ESG-related information—which it does not—the RFI does not seek the information the Board would need to propose a sensible disclosure mandate. At a minimum, to propose a disclosure mandate the Board would need to know the following information, which the RFI fails to solicit:

²⁸ See, e.g., *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

²⁹ 17 C.F.R. § 240.15c2-12.

³⁰ RFI Background.

³¹ *Id.*

³² *Id.* at (A)(1).

³³ *Id.* at (B)(4).

³⁴ *Basic*, 485 U.S. at 231.

- The costs to issuers of gathering, storing, analyzing, and disclosing ESG-related information;
- The changes in state policy that a disclosure mandate would force; and
- The potential of a disclosure mandate to cut off some communities, especially “dissident” ones, from funding.

Remarkably, among its five questions and twenty-four sub-questions directed to issuers, the RFI includes not one asking about the gathering, storing, analyzing or any other costs—even though the Board itself has admitted that concerns about costs for issuers was a driving factor in Congress’s decision to exempt municipal securities from the reach of the securities laws’ disclosure requirements.³⁵ Obtaining information about costs is all the more vital because, as the Supreme Court has made clear, failure to assess the costs of a regulation and to compare them to its benefits renders a regulation irrational.³⁶

As for changes in state policy, any ESG-disclosure mandate would call for states and their subdivisions to label themselves with regard to some of the most controversial matters in America’s culture wars. As the RFI itself notes, one “ESG-related practice” that may be subject to disclosure is “a municipal issuer’s approach to equity and inclusion”³⁷—one of today’s most controversial topics and the object of acrimonious dispute in, e.g., the U.S. Supreme Court.³⁸ Any disclosure mandate may also likely require information about a state’s asserted climate risks and “initiatives and other projects ... to address such risks,”³⁹ as well as information about any contributions the state assertedly makes to climate risk.

ESG advocates like to say that securities disclosures merely provide information rather than force conduct. But as the D.C. Circuit held in the context of another securities disclosure case, demanding an entity to “publicly condemn itself is undoubtedly a[n] ... effective way for the government to stigmatize and shape behavior.”⁴⁰ Here, cash-strapped states, towns, and villages would be forced to change their policies on today’s hot-button issues to avoid a scarlet letter that would cut them off from essential funding. That would especially be true were the MSRB to adopt any disclosure mandate that requires “issuers ... [to] describ[e] the initiatives and other projects they are pursuing to address” asserted ESG-related “risks.”⁴¹ Such a mandate would spark a bidding war, with states and cities launching new initiatives in hopes of attracting ampler and more favorable funding. If the Board mistakenly and unlawfully issues a disclosure mandate, it should at the very least not require the disclosure of such initiatives.

There is also potential that a disclosure mandate would cut off some communities from funding, especially “dissident” ones. While some states and local governments would change

³⁵ *Self-Regulation*, supra n. 19, at 6.

³⁶ *Michigan v. EPA*, 576 U.S. 743 (2015).

³⁷ RFI Overview n.1.

³⁸ See, e.g., Scott Jaschik, “Supreme Court Takes Affirmative Action Cases” (Jan. 31, 2022), <https://www.insidehighered.com/admissions/article/2022/01/31/supreme-court-will-hear-harvard-and-unc-affirmative-action-cases>.

³⁹ RFI (B)(4).

⁴⁰ *Nat’l Ass’n of Manufacturers v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (internal quotation marks omitted).

⁴¹ RFI (B)(4).

their policies, others would refuse and face the consequences. These may include losing access to funding for essential infrastructure like hospitals, schools, homeless shelters, safe streets, and environmental treatment facilities,⁴² along with massive adverse effects to the people this infrastructure serves.

This loss of funding is likely to hit small, often impoverished towns and villages in rural America hardest, for these are more likely to hold the unpopular, conservative views that mandatory disclosures would disfavor. Blacklisting these communities from the widespread funding available to other cities would constitute precisely the “unfair discrimination ... among municipal entities” against which Congress warned the MSRB.⁴³ Further, it would only exacerbate our national partisan divide, as “blue” municipalities are perceived to be favored over “red” ones. The RFI does not even attempt to acquire the information needed to measure this human cost of the disclosure mandate it contemplates.

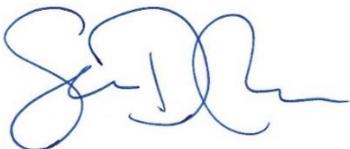
Because the current RFI seeks a radically incomplete set of data, MSRB must rescind the RFI and, if it mistakenly elects to proceed in this area, must issue a new RFI that seeks all the information the MSRB needs to make a sound decision.

CONCLUSION

The MSRB should abandon this RFI and any further steps towards rulemaking that would require ESG-related disclosures for municipal issuers because it is contrary to statute and congressional objectives, and seeks to address a problem that does not exist.

Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Utah Attorney General, Office of the Utah State Treasurer, or Office of the Utah State Auditor.

Respectfully submitted,



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⁴² See, e.g., MSRB, *Financing*, *supra* n.17, at 4.

⁴³ 15 U.S.C. § 78o-4(b)(2)(C).



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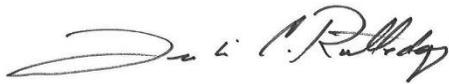
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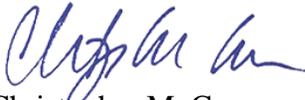
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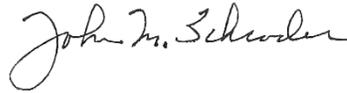
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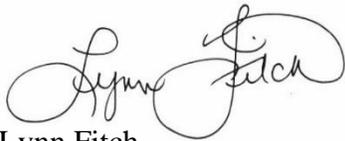
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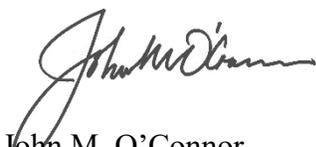
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