

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61237; File No. SR-MSRB-2009-10)

December 23, 2009

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Relating to Additional Voluntary Submissions by Issuers to the MSRB's Electronic Municipal Market Access System (EMMA<sup>®</sup>)

On July 14, 2009, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change relating to additional voluntary submissions by issuers to the MSRB's Electronic Municipal Market Access System (EMMA<sup>®</sup>). The proposed rule change was published for comment in the Federal Register on July 22, 2009.<sup>3</sup> On December 18, 2009, the MSRB filed with the Commission Amendment No. 1 to the proposed rule change. The Commission is publishing this notice of Amendment No. 1 to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB has filed with the Commission the amendment to File No. SR-MSRB-2009-10, originally filed on July 14, 2009 (the "original proposed rule change"). The amendment amends and restates the original proposed rule change relating to additional voluntary submissions by issuers to the MSRB's Electronic Municipal Market Access system ("EMMA") (as amended, the "proposed rule change"). The proposed rule change would amend EMMA's primary market and continuing disclosure services to permit issuers and their designated agents

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 60315 (July 15, 2009), 74 FR 36294.

to submit preliminary official statements and other related pre-sale documents, official statements and advance refunding documents, as well as to permit issuers, obligated persons and their designated agents to submit information relating to the preparation and submission of audited financial statements and annual financial information and to post links to other disclosure information. The MSRB requests an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

The text of the proposed rule change is available on the MSRB's web site at [www.msrb.org/msrb1/sec.asp](http://www.msrb.org/msrb1/sec.asp), at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Preliminary Official Statements and Other Primary Market Documents

The proposed rule change would amend the EMMA primary market disclosure service<sup>4</sup> to permit issuers and their designated agents to make voluntary submissions to the primary market disclosure service of official statements, preliminary official statements and related pre-sale documents, and advance refunding documents (collectively, “primary market documents”).<sup>5</sup> Pre-sale documents other than a preliminary official statement (including but not limited to notices of sale or supplemental disclosures) would be accepted only if accompanied or preceded by the preliminary official statement.<sup>6</sup> An issuer seeking to make submissions of primary market documents to the EMMA primary market disclosure service would use the same accounts established with respect to submissions of continuing disclosure documents to the EMMA continuing disclosure service, subject to additional verification procedures to affirmatively establish the account holder’s authority to act on behalf of the issuer in connection with such primary market disclosure submissions.

Submissions of primary market documents by issuers and their designated agents will be accepted on a voluntary basis if, at the time of submission, they are accompanied by information necessary to accurately identify: (i) the category of document being submitted; (ii) the issues or specific securities to which such document is related; and (iii) in the case of an advance refunding document, the specific securities being refunded pursuant thereto. The primary market documents and related indexing information would be displayed on the EMMA web portal and also would be included in EMMA’s primary market disclosure subscription service.

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<sup>4</sup> This amendment does not modify the provisions of the original proposed rule change relating to the EMMA primary market disclosure service.

<sup>5</sup> Obligated persons would be permitted to submit primary market documents through the EMMA primary market disclosure service only if designated as an agent by the issuer.

<sup>6</sup> The MSRB believes that posting of such pre-sale documents without the related disclosure information provided in a preliminary official statement would be inconsistent with the core disclosure purposes of EMMA.

### Additional Continuing Disclosure Submissions and Undertakings

As amended and restated by this amendment, the proposed rule change also would amend the EMMA continuing disclosure service to permit issuers, obligated persons and their agents to make voluntary submissions to the continuing disclosure service of additional categories of disclosures, as well as information about their continuing disclosure undertakings. Such additional continuing disclosures and related indexing information would be displayed on the EMMA web portal and also would be included in EMMA's continuing disclosure subscription service. Such additional items are:

- an issuer's or obligated person's undertaking to prepare audited financial statements pursuant to generally accepted accounting principles ("GAAP") as established by the Governmental Accounting Standards Board ("GASB"), or pursuant to GAAP as established by the Financial Accounting Standards Board ("FASB"), as applicable to such issuer or obligated person and as further described below (the "voluntary GAAP undertaking");<sup>7</sup>
- an issuer's or obligated persons' undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year or, as a transitional alternative that may be elected through December 31, 2013, within 150 calendar days after the end of the applicable fiscal year, as further described below (the "voluntary annual filing undertaking");<sup>8</sup> and

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<sup>7</sup> In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by permitting issuers and obligated persons to elect either the GASB standard or the FASB standard for GAAP, as appropriate. The original proposed rule change only contemplated the use of the GASB standard.

<sup>8</sup> In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by permitting issuers

- uniform resource locator (URL) of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information.

Voluntary GAAP Undertaking. The voluntary GAAP undertaking would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person will prepare its audited financial statements in accordance with GAAP. The MSRB contemplates that state or local governments or any other entities to which GASB standards are applicable would apply GAAP as established by GASB and that any other entities to which FASB standards are applicable would apply GAAP as established by FASB.

The voluntary GAAP undertaking would assist investors and other market participants in understanding how audited financial statements were prepared. The fact that an issuer or obligated person has entered into a voluntary GAAP undertaking, and the standard under which audited financial statements are to be prepared, would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies. An issuer or obligated person that has made a voluntary GAAP undertaking may later rescind such undertaking, which would be disclosed through EMMA. The MSRB would not review whether an entity has selected the appropriate accounting standard and would not review or confirm the conformity of submitted audited financial statements to GAAP. The MSRB contemplates that the making of a voluntary GAAP undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of the issuer or obligated person to perform as undertaken but

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and obligated persons to elect to undertake to submit annual financial information either within 120 days or 150 days after the end of the fiscal year. The original proposed rule change only contemplated a 120 day timeframe.

would not, by itself, necessarily create a contractual obligation of such issuer or obligated person.

Voluntary Annual Filing Undertaking. The voluntary annual filing undertaking would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person, as appropriate, will submit to EMMA its annual financial information as contemplated under Rule 15c2-12 of the Securities Exchange Act of 1934 (the “Exchange Act”) by no later than 120 calendar days after the end of such issuer’s or obligated person’s fiscal year (the “120 day undertaking”).<sup>9</sup> Alternatively, to and including December 31, 2013, the EMMA continuing disclosure service will provide the option for an issuer or obligated person to indicate its undertaking to submit to EMMA its annual financial information by no later than 150 calendar days after the end of such issuer’s or obligated person’s fiscal year (the “transitional 150 day undertaking”).<sup>10</sup> An issuer or obligated person that has made a transitional 150 day undertaking may convert such election to a 120 day undertaking at any time. On and after January 1, 2014, the transitional 150 day undertaking option would no longer be available for selection.

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<sup>9</sup> Under the Exchange Act, smaller public reporting companies, as non-accelerated filers, generally are required to file their annual reports on Form 10-K with the Commission within 90 days after the end of their fiscal year. The longer 120-day period included in the voluntary annual filing undertaking of the proposed rule change is designed to accommodate additional steps that state and local governments often must take – under state law, pursuant to their own requirements, or otherwise – in completing the work necessary to prepare their annual financial information as contemplated under Exchange Act Rule 15c2-12.

<sup>10</sup> The option to elect, through December 31, 2013, a transitional 150 day undertaking acknowledges that the 120 day undertaking may not be immediately achievable by most issuers and obligated persons, as described in the comments discussed below, and is designed to provide a means by which to recognize issuers and obligated persons that are taking steps toward ultimately making their annual financial information available within 120 days of fiscal year end in the future.

The voluntary annual filing undertaking would assist investors and other market participants in understanding when the annual financial information is expected to be available in the future. The fact that an issuer or obligated person has entered into a voluntary annual filing undertaking would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies. An issuer or obligated person that has made a voluntary annual filing undertaking may later rescind such undertaking, which would be reflected on the EMMA web portal. A transitional 150 day undertaking would continue to be displayed on the EMMA web portal through June 30, 2014, and would automatically cease to be displayed on the EMMA web portal after such date, unless the issuer or obligated person has previously changed or rescinded such undertaking.

The MSRB would not review or confirm the compliance of an issuer or obligated person with its voluntary annual filing undertaking. The MSRB contemplates that the making of a voluntary annual filing undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person. Unless the issuer or obligated person incorporates the 120 day undertaking or transitional 150 day undertaking as an obligation under its continuing disclosure agreement, the MSRB would view such issuer's or obligated person's performance pursuant to such undertaking as distinct from any performance obligations under its continuing disclosure agreement entered into consistent with Rule 15c2-12, although the MSRB believes that successful performance in accordance with a voluntary annual filing undertaking generally should also satisfy the obligation under a continuing disclosure agreement, depending on the specific terms of such agreement, if the agreement provides a longer timeframe for such submission.

Investor Relation URL Posting. A URL of an issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information would provide investors with an additional avenue for obtaining further financial, operating or other investment-related information about such issuer or obligated person.

Elimination of Proposed GFOA-CAFR Certificate. This amendment modifies the original proposed rule change by eliminating one item of additional voluntary submissions relating to the award of the Certificate of Achievement for Excellence in Financial Reporting awarded by the Government Finance Officers Association ("GFOA") in connection with the preparation of a Comprehensive Annual Financial Report ("CAFR") of an issuer. The MSRB notes that CAFRs are already frequently submitted to EMMA by issuers, and in most cases the issuers include the GFOA certificate in the submitted CAFR. Therefore, EMMA already effectively serves as a venue through which CAFRs and GFOA certificates are made available to investors.

Manner of Submission. Issuers and obligated persons would make a voluntary GAAP undertaking or voluntary annual filing undertaking through a data input election on EMMA. Voluntary undertakings could later be rescinded through the same EMMA interface process. The URL of an issuer's or obligated person's investor relations or other repository of financial/operating information also could be entered through a text/data input field on EMMA. No document would be required to be submitted to EMMA in connection with the voluntary GAAP undertaking, voluntary annual filing undertaking or the issuer/obligated person URL. The input process for each of these additional items would include a free text input field permitting issuers and obligated persons to include limited additional information relating to each such item that they deem appropriate with respect thereto for public dissemination. Further,

the MSRB would include an explanation of the nature of the voluntary GAAP undertaking and voluntary annual filing undertaking on the EMMA web portal.

#### Effective Date of Proposed Rule Change

As noted above, the MSRB has requested an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

#### 2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the provisions of Section 15B(2)(C) of the Act,<sup>11</sup> which requires, among other things, that MSRB rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Exchange Act in that it serves to remove impediments to and help perfect the mechanisms of a free and open market in municipal securities and would serve to promote the statutory mandate of the MSRB to protect investors and the public interest. Voluntary dissemination of preliminary official statements through EMMA, particularly if made available prior to the sale of a primary offering to the underwriters, would provide timely access by investors and other market participants to key information useful in making an investment decision in a manner that is consistent with the

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<sup>11</sup> 15 U.S.C. 78o-4(b)(2)(C).

MSRB's statutory authority. The voluntary GAAP undertaking would assist understanding of how such information was prepared and the voluntary annual filing undertaking would assist understanding of when such information is expected to be available in the future. A URL provided by an issuer or obligated person would provide investors with an additional avenue for obtaining further financial, operating or other investment-related information about such issuer or obligated person.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The additional items of information submitted by issuers and obligated persons to the EMMA system for public dissemination would be available to all persons simultaneously. In addition to making such information available for free on the EMMA web portal to all members of the public, the MSRB would make such documents and information available by subscription on an equal and non-discriminatory basis. Further, the proposed rule change would apply equally to all issuers and obligated persons.

The MSRB does not believe that making the additional items of information to be included in the EMMA continuing disclosure service available to the public would compete with other information providers and, to the extent other information providers were to seek to make such information available to the public, such providers could obtain the information from the MSRB through the subscription service on an equal and non-discriminatory basis. Further, the MSRB does not believe that allowing issuers to submit documents to the EMMA primary market disclosure service would create a burden on or compete inappropriately with any other information providers to which such documents may also be provided and notes that other

information providers would be able to obtain the information from the MSRB through the subscription service on an equal and non-discriminatory basis.

The proposed rule change also would not impose any additional burdens on competition among issuers of municipal securities since the voluntary submissions provided for under the proposed rule change may be made by any issuer on an equal and non-discriminatory basis.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received by the MSRB on the original proposed rule change prior to filing with the Commission. The original proposed rule change was published by the Commission for comment in the Federal Register and the Commission received comments from a number of commentators.<sup>12</sup> In addition, several commentators provided comments to the MSRB with respect to the submission of preliminary official statements to EMMA in response to a series of notices published by the MSRB seeking comment

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<sup>12</sup> See Securities Exchange Act Release No. 60315 (July 15, 2009) (File No. SR-MSRB-2009-10), 74 FR 36294 (July 22, 2009). The Commission received comments from the City of Brookfield, Wisconsin (“Brookfield”); Connecticut State Treasurer (“Connecticut”); Government Finance Officers Association (“GFOA”); Village of Greendale, Wisconsin (“Greendale”); Village of Hinsdale, Illinois (“Hinsdale”); Inland Empire Utilities Agency (“Inland”); International City/County Management Association, National Association of Counties, National Association of State Auditors, Comptrollers and Treasurers, National League of Cities, U.S. Conference of Mayors, American Public Power Association, and Council on Infrastructure Financing Authorities, jointly (“Joint Issuer Groups”); Investment Company Institute (“ICI”); Township of Lower Merion, Pennsylvania (“Lower Merion”); Michigan State Treasurer (“Michigan”); National Association of Bond Lawyers (“NABL”); National Association of Health and Educational Facilities Finance Authorities (“NAHEFFA”); National Association of State Treasurers (“NAST”); Oregon Municipal Finance Officers Association (“OMFOA”); City of Portland, Oregon (“Portland”); City of Rock Hill, South Carolina (“Rock Hill”); Rutherford County, Tennessee (“Rutherford”); Securities Industry and Financial Markets Association (“SIFMA”); State of Tennessee (“Tennessee”); Utah Government Finance Officers Association (“UGFOA”); and Virginia Government Finance Officers’ Association (“VGFOA”). The comment letters received by the Commission are posted on the Commission’s Web site at <http://www.sec.gov/comments/sr-msrb-2009-10/msrb200910.shtml>.

on the establishment of EMMA for purposes of official statement dissemination (the “MSRB Notices”).<sup>13</sup>

### General

Except with respect to the voluntary annual filing undertaking, virtually all commentators on the original proposed rule change supported the proposal. Most commentators opposed the voluntary annual filing undertaking, with some of these commentators not expressing opinions on the remaining portions of the original proposed rule change. NABL suggested delaying action on changes to the EMMA continuing disclosure service until the Commission’s proposed amendments to Rule 15c2-12 are finalized,<sup>14</sup> and also noted general concerns regarding whether prominent display of the voluntary undertakings would be construed as recommendations by the MSRB and regarding the specific process by which issuers and obligated persons could later rescind any undertakings they make. SIFMA asked what responsibilities dealers may have arising from an issuer’s failure to meet a voluntary undertaking. Various commentators provided comments on specific elements of the original proposed rule change, as described below.

### Preliminary Official Statements

The original proposed rule change would amend the EMMA primary market disclosure service to permit issuers and their designated agents to make voluntary submissions to the

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<sup>13</sup> MSRB Notice 2006-19 (July 27, 2006) (the “Concept Release”); MSRB Notice 2007-5 (January 25, 2007) (the “January 2007 Notice”). Comments relating to preliminary official statement submissions were received in response to the Concept Release from American Government Financial Services Company (“AGFS”), TRB Associates (“TRB”), UMB Bank, N.A. (“UMB”), and Zions Bank Public Finance (“Zions”). Comments relating to preliminary official statement submissions were received in response to the January 2007 Notice from American Municipal Securities, Inc. (“AMS”), DPC DATA Inc. (“DPC”), Ipreo Holdings LLC (“Ipreo”), NABL and SIFMA. These notices and comment letters are included in Exhibit 2.

<sup>14</sup> See Securities Exchange Act Release No. 60332 (July 17, 2009) (File No. S7-15-09), 74 FR 36832 (July 24, 2009).

primary market disclosure service of official statements, preliminary official statements and related pre-sale documents, and advance refunding documents. Pre-sale documents other than a preliminary official statement (including but not limited to notices of sale or supplemental disclosures) would be accepted only if accompanied or preceded by the preliminary official statement.

A number of commentators on the original proposed rule change expressed general support for the various elements thereof (other than the voluntary annual filing undertaking), including the element to permit issuers to submit preliminary official statements and related pre-sale documents. In addition, in comment letters to the MSRB on the MSRB Notices, SIFMA,<sup>15</sup> along with AMS, DPC, Ipreo, NABL, TRB, UMB and Zions, supported the concept of voluntary submissions of preliminary official statements. DPC and AGFS suggested that the MSRB explore making the submission of preliminary official statements mandatory, while SIFMA, AMS and NABL emphasized that preliminary official statement submissions should not be made mandatory.

The MSRB believes that there is considerable value in providing a means for centralized access to preliminary official statements at or prior to the time of trade and in sufficient time to make use of the information in coming to an investment decision. However, the MSRB is precluded from mandating pre-sale submission of preliminary official statement pursuant to Exchange Act Section 15B(d)(1). In its filing with the Commission to establish the EMMA primary market disclosure service, the MSRB stated that it expected to provide the opportunity for voluntary submissions of and access to preliminary official statements through EMMA,

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<sup>15</sup> Bear Stearns & Co., Inc. and Griffin, Kubik, Stephens & Thompson, Inc. stated that they participated in the formulation of SIFMA's comments on the January 2007 Notice and fully supported SIFMA's positions.

consistent with the MSRB's statutory authority, pursuant to a future filing with the Commission.<sup>16</sup> The proposed rule change would permit such voluntary submissions of preliminary official statements.

Connecticut noted in its comments on the original proposed rule change that preliminary official statements would generally not have CUSIP numbers associated with them and that EMMA's usability would be improved by making such documents identifiable by means other than CUSIP numbers, such as by issuer. NABL supported submissions of preliminary official statements and related pre-sale documents for competitive sales of new issues but expressed concerns with regard to potentially conflicting submissions by underwriters and issuers in the case of negotiated issues and therefore recommended that the ability to make preliminary official statement submissions by issuers be restricted solely to competitive issues.

The MSRB expects to provide search capabilities tailored to the types of indexing information that would be available for preliminary official statements, including issuer name, issue description, state, and appropriate date ranges, among other things. Submissions made by issuers would be noted as such on the EMMA web portal. The MSRB believes that postings of preliminary official statements by issuers should be available for any new issue, not just those sold on a competitive basis, and the EMMA primary market submission process would be designed to discourage duplicative submissions by issuers and underwriters.

In commenting on the MSRB Notices, SIFMA and DPC noted the importance of ensuring version control where both preliminary official statements and official statements are made available (as well as in handling "stickers" to official statements), suggesting that the MSRB include a mechanism for notification to the public when the final official statement is

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<sup>16</sup> See Securities Exchange Act Release No. 59636 (March 27, 2009), 74 FR 15190 (April 2, 2009) (File No. SR-MSRB-2009-02).

posted in cases where a preliminary official statement has previously been submitted. DPC suggested that preliminary official statements be deleted when final official statements are submitted, while NABL suggested that underwriters be permitted to request that the preliminary official statement be removed from the centralized electronic system once the “timeliness of a POS has ended,” noting that its continued availability may confuse investors. However, SIFMA opposed the removal of the preliminary official statement.

The MSRB notes that the current operation of the EMMA web portal provides processes that address each of these suggestions. Under current Rule G-32, preliminary official statements, if available, are required to be submitted by the underwriter by closing solely in the circumstance where an official statement is not being prepared by the issuer or if the official statement is not available for submission to EMMA by the closing. Once the official statement is provided by the underwriter, the preliminary official statement generally is moved to a document archive that is accessible through the EMMA portal directly from the page where the link to the official statement is provided, thereby distinguishing the final official statement from the preliminary official statement while maintaining public access for those wishing to refer back to the preliminary official statement. Users of the EMMA portal are able to request to receive e-mail notifications for updates to the disclosure document for a specific security, which applies to the situation where an official statement is submitted to EMMA following an initial submission of the preliminary official statement.

#### Voluntary Annual Filing Undertaking

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to undertake, on a voluntary basis, to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year.

This would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person, as appropriate, will submit to EMMA its annual financial information as contemplated under Rule 15c2-12 by no later than 120 calendar days after the end of such issuer's or obligated person's fiscal year. Issuers and obligated persons would indicate the existence of such an undertaking through a data input election on EMMA. No document would be required to be submitted to EMMA in connection with this undertaking. The fact that an issuer or obligated person has entered into such an undertaking would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies and the MSRB would include an explanation of the undertaking on the EMMA web portal. If an issuer or obligated person that has made an undertaking later rescinds such undertaking, the issuer or obligated person would be able to disclose such action through EMMA. The MSRB would not review or confirm the compliance of an issuer or obligated person with this undertaking.

This element of the original proposed rule change generated significant, but not universal, negative commentary, with virtually all commentators, except as noted below, strongly objecting.<sup>17</sup> GFOA stated that it believes that “setting an ‘ideal’ deadline of 120 days is unnecessary, arbitrary, and likely harmful to the quality of financial reporting.” GFOA noted that many issuers that meet the 180 day timeframe for receiving its Certificate of Achievement for Excellence in Financial Reporting with respect to the preparation of their CAFRs must “struggle” to achieve that deadline and that a significantly shorter deadline “might reasonably be expected to persuade any number of such governments to abandon a CAFR altogether in favor of

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<sup>17</sup> See Brookfield, Connecticut, GFOA, Greendale, Inland, Joint Issuer Groups, Lower Merion, Michigan, NABL, NAHEFFA, NAST, OMFOA, Portland, Rock Hill, Rutherford, Tennessee, UGFOA and VGFOA.

a plain set of basic financial statements.” GFOA also noted that GAAP requires reporting of data from legally separate component units over which most issuers have no legal ability to compel to provide such data in a timeframe that would make meeting the voluntary annual filing undertaking possible. GFOA further suggested that the voluntary annual filing undertaking could encourage the use of less qualified audit firms and the increased use of estimates. The Joint Issuer Groups and NAST stated that they “strongly encourage the SEC and the MSRB to withdraw this part of the proposal, as it is not consistent with current practices and would diminish the quality of financial reporting and auditing standards.” Various other issuers and issuer groups made arguments similar to those raised by the GFOA.<sup>18</sup>

Numerous issuers and issuer groups argued that the voluntary annual filing undertaking would likely become a de facto standard that issuers would feel compelled to meet.<sup>19</sup> They noted that the accelerated production of financial information would create significant financial and personnel burdens that would likely have adverse consequences to issuers while providing questionable benefits to investors.<sup>20</sup> Small issuers observed that their internal staffs are not able to support this timeframe and are given low priority by their auditors as compared to their larger clients.<sup>21</sup> Portland stated that “even if the City ‘staffed up’ on its end, there are not a sufficient number of independent auditors available to conduct the auditing function within the 120-day time period.” Rock Hill stated that auditing firms “are increasingly less inclined to bid for

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<sup>18</sup> See Brookfield, Connecticut, Greendale, Inland, Joint Issuer Groups, Lower Merion, Michigan, NABL, NAHEFFA, NAST, OMFOA, Portland, Rock Hill, Rutherford, Tennessee, UGFOA and VGFOA.

<sup>19</sup> See Brookfield, Connecticut, Inland, Joint Issuer Groups, NAHEFFA, NAST and VGFOA.

<sup>20</sup> See Brookfield, Connecticut, GFOA, Greendale, Inland, Joint Issuer Groups, NAHEFFA, NAST, OMFOA, Portland, UGFOA and VGFOA.

<sup>21</sup> See Brookfield, Greendale, Inland, NAHEFFA, OMFOA, Portland, Rock Hill, Rutherford, UGFOA and VGFOA.

governmental audits because of the specialized continuing education requirements and the perception that the work is not lucrative.”

Inland Empire expressed concern that the potential “black eye” for not making the voluntary annual filing undertaking could create pressure from elected officials to meet it that, in turn, could cause professional staff and their auditors to produce less accurate information just to meet the deadline. While not expressly opposing the voluntary annual filing undertaking, Connecticut questioned the usefulness of this element and expressed concern if this element is used by the market to screen issues. Many issuers stated that the 180 day standard used by GFOA in connection with its CAFR program is a more appropriate timeframe.<sup>22</sup> VGFOA cited difficulties in simultaneously meeting GFOA’s CAFR timeframes, state law requirements and the existing annual financial undertaking in its continuing disclosure undertaking entered into pursuant to Rule 15c2-12. Several commentators noted various adjustments that are uniquely required to be made for governmental entities or conduit borrowers after the end of the fiscal year that make meeting the 120 day timeframe difficult or impossible.<sup>23</sup> Tennessee reviewed various statistics on timing of preparation of audited statements and concluded that “[s]electing a timeframe of 120 days without understanding the differences in reporting environments appears arbitrary and may unnecessarily limit the municipal market volume.” Tennessee further noted that states have met to discuss “timeliness barriers and ways of reducing the timeframe of financial reporting” and requests that further study be undertaken. NAHEFFA noted that, since there are apparently no legal ramifications for failing to meet the deadline in an issuer’s voluntary annual filing undertaking, nothing would “preclude the issuer from effectively

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<sup>22</sup> See Inland, Michigan, Portland and UGFOA.

<sup>23</sup> See GFOA, Inland, Joint Issuer Groups, NAHEFFA, NAST, Rock Hill, Tennessee, UGFOA and VGFOA.

advertising the undertaking on EMMA, and as a result receiving preferred status, irrespective of actual compliance.”

Hinsdale, however, noted that “the proposed 120 day period for submitting annual financial information is a good start toward meeting the objective of making financial statements of governments timely and useful in the public securities market.” GFOA stated that it “certainly could support a voluntary disclosure field indicating that a government was, in fact, in compliance with its continuing disclosure agreement obligations.”

The ICI stated that it is “particularly supportive” of the voluntary annual filing undertaking proposal, although it continued to press for “the establishment of a meaningful, mandatory timeframe for filing financial reports.” ICI recommended, with regard to a mandatory standard, a 180-day deadline as an incremental improvement over the current industry practice of 270 days. SIFMA also supported the voluntary annual filing undertaking.

The MSRB acknowledges and appreciates the detailed explanations provided by commentators on the original proposed rule change with respect to the existing difficulties and barriers to meeting the 120 day timeframe of the voluntary annual filing undertaking as proposed in the original proposed rule change. The MSRB understands that a significant portion of the issuer and obligated person community is likely unable to make such a 120 day undertaking at this time and that such inability does not necessarily reflect problems with the issuer’s or obligated person’s credit or the quality of disclosures they make. As the MSRB had previously noted, this voluntary undertaking was originally proposed after consultation between the MSRB and Commission staff.<sup>24</sup> After a careful review of the comments and further discussions with Commission staff on the voluntary annual filing undertaking, the MSRB understands that the

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<sup>24</sup> See MSRB Notice 2009-44 (July 15, 2009).

Commission staff strongly believes that, given its voluntary nature, the undertaking to provide annual financial information within the originally proposed 120 day timeframe remains the appropriate undertaking for display on the EMMA web portal.

In light of the commentators' widespread concerns regarding the attainability of the 120 day timeframe, the MSRB has determined to provide a transitional option for issuers and obligated persons to elect a 150 day undertaking as an alternative to the 120 day undertaking. This alternative election would provide issuers and obligated persons seeking to make the voluntary annual filing undertaking, but that are not currently able to meet a 120 day timeframe, with a reasonable opportunity to overcome existing barriers to more rapid dissemination of financial information in an orderly and cost-effective manner. Commission staff has indicated that an alternative election of 150 days after fiscal year end would be an appropriate transitional alternative but that this option should be available only on a temporary basis to provide a pathway toward achieving the 120 day timeframe.

The MSRB has accordingly modified the original proposed rule change to allow the election, through December 31, 2013, of a transitional 150 day alternative, which election would be displayed on the EMMA web portal through June 30, 2014 unless the issuer or obligated person changes or rescinds such undertaking. On and after January 1, 2014, the transitional 150 day undertaking option would no longer be available for selection. An issuer or obligated person that makes a transitional 150 day undertaking could convert such election to a 120 day undertaking at any time. Of course, an issuer or obligated person that believes it is able to meet the 120 day timeframe could make the 120 day undertaking immediately upon the effectiveness of the proposed rule change. The fact that an issuer or obligated person has entered into such an undertaking, including the timeframe elected, would be prominently disclosed on the EMMA

web portal as a distinctive characteristic of the securities to which such undertaking applies. The EMMA web portal would not include information regarding the availability or existence of the voluntary annual filing undertaking in those cases where an issuer or obligated person does not make a voluntary annual filing undertaking.

The MSRB reiterates that the voluntary annual filing undertaking would in fact be voluntary and that an issuer or obligated person that makes a voluntary annual filing undertaking may later rescind such undertaking. The MSRB contemplates that the making of a voluntary annual filing undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person. Unless the issuer or obligated person incorporates the 120 day undertaking or transitional 150 day undertaking as an obligation under its continuing disclosure agreement, the MSRB would view the issuer's or obligated person's performance pursuant to such undertaking as distinct from any performance obligations under its continuing disclosure agreement entered into consistent with Rule 15c2-12. By making a voluntary annual filing undertaking, an issuer that has a contractual obligation under its continuing disclosure agreement to provide its annual financial information within a longer timeframe would be indicating its intent to make a good faith effort to submit its annual financial information to EMMA more rapidly than it is otherwise obligated under the continuing disclosure agreement.

The MSRB would include an explanation of the nature of the voluntary annual filing undertaking on the EMMA web portal. In particular, the MSRB would disclose that the voluntary annual filing undertaking is voluntary, is solely indicative of the timing by which the annual financial information is intended to be made available and is not indicative of the

accuracy or completeness of the annual financial information or of the financial health of the issuer or obligated person. Further, the MSRB would disclose that a decision by an issuer or obligated person not to make such an undertaking does not raise a negative inference in regard to the accuracy or completeness of its annual financial information or of the financial health of the issuer or obligated person.

#### Voluntary GAAP Undertaking

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to undertake, on a voluntary basis, to prepare audited financial statements pursuant to GAAP as established by GASB. This would consist of a voluntary undertaking by an issuer or obligated person (in the case of an obligated person that is a state or local governmental entity), either at the time of a primary offering or at any time thereafter, that the issuer or obligated person will prepare its audited financial statements in accordance with GAAP as established by GASB. This undertaking could be included within the continuing disclosure undertaking entered into consistent with Rule 15c2-12 or could be made in a separate agreement. Issuers and obligated persons would indicate the existence of such an undertaking through a data input election on EMMA. No document would be required to be submitted to EMMA in connection with this undertaking. The fact that an issuer or obligated person has entered into such an undertaking would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies and the MSRB would include an explanation of the undertaking on the EMMA web portal. If an issuer or obligated person that has made an undertaking later rescinds such undertaking, the issuer or obligated person would be able to disclose such action through EMMA. The MSRB would not

confirm the accuracy of this undertaking and would not review or confirm the conformity of submitted audited financial statements to GAAP.

Commentators generally supported permitting issuers to make an undertaking with respect to their use of GAAP according to GASB, although several commentators provide suggestions. GFOA supported a voluntary submission with regard to preparation of financial statements according to GAAP but did not support stating the standard used, noting that some submitters may be subject to FASB standards instead. The Joint Issuer Groups and NAST agreed with GFOA. NAHEFFA also noted that FASB standards, rather than GASB standards, are applicable to 501(c)(3) entities.

The MSRB agrees that many obligated persons may be subject to FASB standards rather than GASB standards and therefore has modified the voluntary GAAP undertaking to permit the submitter to select either the GASB or FASB standard for GAAP.

NABL expressed concern that an issuer that does not elect a voluntary GAAP undertaking will be stigmatized as less creditworthy even where they follow other standards, including statutory standards, and notes that financial statements are accompanied by a statement of the accounting principles applied. NAHEFFA stated that the EMMA website should be organized so that no improper inference is drawn by a charitable organization, as a conduit borrower, not making the voluntary GAAP undertaking. While not opposing the voluntary GAAP undertaking, Connecticut questioned the usefulness of this element and stated that use of GASB GAAP may not always be answerable on a yes-or-no basis and that, since it prepares its information on a modified GAAP basis, it would probably not be able to make this undertaking.

The MSRB believes that permitting investors to understand the standards applied to the preparation of an issuer's or obligated person's financial statements would be valuable but

acknowledges that it is important that information about the nature of the voluntary GAAP undertaking should be disclosed. The fact that an issuer or obligated person has entered into a voluntary GAAP undertaking, including whether the financial statements are to be prepared pursuant to GASB or FASB standards, would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies. The EMMA web portal would not include information regarding the availability or existence of the voluntary GAAP undertaking in those cases where an issuer or obligated person does not make a voluntary GAAP undertaking. The MSRB would include an explanation of the nature of the voluntary GAAP undertaking on the EMMA web portal. In particular, the MSRB would disclose that the voluntary GAAP undertaking is voluntary, is solely indicative of the accounting standards that the issuer or obligated person intends to use in preparing its financial statements and is not indicative of the accuracy or completeness of the financial statements or of the financial health of the issuer or obligated person. Further, the MSRB would disclose that a decision by an issuer or obligated person not to make such an undertaking does not raise a negative inference in regard to the accuracy or completeness of its financial statements or of the financial health of the issuer or obligated person. The MSRB contemplates that the making of a voluntary GAAP undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person.

Issuer/Obligated Person URL

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to post the URLs for their Internet-based investor relations or other repository of financial/operating information. The URL of an issuer's or

obligated person's investor relations or other repository of financial/operating information would be entered through a text/data input field on EMMA and no document would be required to be submitted to EMMA.

Commentators generally supported permitting issuers and obligated persons to provide a hyperlink to their investor relations or similar web page, with Connecticut noting that this hyperlink may be more useful to the general public than CUSIP-based EMMA filings for general financial information that is not issue-specific. GFOA observed the importance of guidance being provided on responsibilities with regard to posting of hyperlinks on EMMA and that issuers be given an ability to correct or withdraw URLs as necessary. SIFMA supported the posting of URLs for continuing disclosures but expresses concerns about their use during a primary offering due to potential liability issues.

The MSRB has determined to retain this element as proposed. Issuers and obligated persons will be able to make appropriate changes to the URLs posted through EMMA. The hyperlinks will be posted in a manner designed to segregate access to the URL from postings of official statements for new issues.

#### GFOA's CAFR Certificate

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers to submit the Certificate of Achievement for Excellence in Financial Reporting awarded by GFOA in connection with the preparation of its CAFR. The original proposed rule change noted that GFOA awards this certificate to a government if, based on a review process, its CAFR substantially complies with both GAAP and GFOA's CAFR program policy. According to current GFOA eligibility requirements, financial reports must include all funds and component units of the governmental entity, in accordance with GAAP, in order to be

considered a CAFR. If an issuer were to submit a copy of the GFOA certificate to EMMA, the EMMA web portal would prominently disclose the issuer's receipt thereof as a distinctive characteristic of the applicable securities and the MSRB would include an explanation of the certificate on the EMMA web portal. The MSRB would not confirm the validity of any such certificate submitted to EMMA.

GFOA recommended that EMMA disclose the basis for the certificate and provide a link to the GFOA's web pages describing the CAFR program. GFOA also encouraged the MSRB to consider permitting a similar submission for issuers that have received GFOA's Distinguished Budget Presentation Award. NABL questioned whether investors would understand that this certificate recognizes the issuer's application of accounting principles but is not an affirmation of its creditworthiness. NABL also noted that some issuers that have received the GFOA certificate have been the subject of Commission enforcement actions for misleading disclosure, including misleading financial statements covered by such certificate. NAHEFFA noted that the GFOA certificate is generally inapplicable to conduit borrowings. While not opposing the disclosure of the GFOA certificates, Connecticut questioned the usefulness of this element.

The MSRB has determined not to proceed with this element of the original proposed rule change at this time. The MSRB notes that CAFRs are already frequently submitted to EMMA by issuers as the audited financial statements element of their annual financial information filings, and in most cases the issuers include the GFOA certificate in the submitted CAFR. As part of the MSRB's standard EMMA update and maintenance process, the MSRB expects to modify the input process for all continuing disclosure submissions to permit issuers and obligated persons to input specific document titles and/or subcategories, which would permit

submitters of CAFRs to indicate that their submitted audited financial statements are CAFRs.

This document title/subcategory would be displayed on the EMMA web portal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2009-10 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2009-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission<sup>25</sup>, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

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<sup>25</sup> The text of Amendment No. 1 to the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/>.

that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2009-10 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).