



Comments of the National Association of Health
and Educational Facilities Finance Authorities Regarding the Municipal Securities
Rulemaking Board Proposed Rule Change Relating to Voluntary Submissions to The
Electronic Municipal Market Access System ("EMMA")
(74 Federal Register 36294, July 22, 2009;
SEC Release No. 34-60315; File No. SR-MSRB-2009-10)

August 12, 2009

The National Association of Health and Educational Facilities Finance Authorities ("NAHEFFA") appreciates the opportunity to comment on the MSRB's proposal relating to voluntary submissions to EMMA by issuers and their designated agents.

NAHEFFA represents over 40 state and other authorities which issue tax exempt bonds on behalf of 501(c)(3) organizations, particularly in the areas of education and health care. While NAHEFFA's focus is on assisting not-for-profit health care and higher education institutions, some members also issue governmental, student loan, economic development and other bonds. Our comments will focus on the impact of the MSRB proposal on 501(c)(3) financings.¹

MSRB has proposed to amend the EMMA disclosure services to permit issuers and their designated agents to submit a variety of pre-sale documents, official statements, advance refunding documents and information related to the preparation and submission of audited financial statements and annual financial information. This comment is directed to the financial information component of the proposal.

¹ We recognize that other issuers and bond community organizations may wish to file more extensive comments and that the August 12 comment date creates difficulties to seek the views of constituents and draft comments. NAHEFFA supports extension of the comment date.

The proposal would allow issuers, obligated persons (as in our conduit financings) and their agents to make the following additional “voluntary” submissions:

- an undertaking to prepare audited financial statements pursuant to GAAP as established by GASB (the “GASB-GAAP undertaking”);
- an undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year (the “annual filing undertaking”);
- receipt of the GFOA’s Certificate of Achievement for Excellence in Financial Reporting (the “CAFR Certificate”); and
- the URL of the issuer’s or obligated person’s internet-based investor relations or other repository of financial/operating information.

NAHEFFA is enthusiastic about the advent of EMMA and believes it is a significant technological advance in enhancing disclosure. The proposal, however, to prominently disclose on the EMMA web portal, as a distinctive characteristic of the securities, that an issuer or obligated person has undertaken the voluntary submissions listed above likely will create prejudicial and unjustified marketplace distinctions. By introducing what amounts to a “Gold Seal” or “Good Housekeeping Seal of Approval,” these new voluntary undertakings could become de facto requirements which cannot be justified under the law as mandatory.

First, the GASB-GAAP undertaking is unavailable for 501(c)(3) financings since non-profit financial statements are prepared in accordance with FASB standards. It is inappropriate and could be deceptive to provide prominent notice of GAAP/GASB undertaking as distinct from FASB compliance. Therefore, the website should be organized so no improper inference is drawn by the inability of charitable organizations to make the GASB-GAAP undertaking.

The same is true with respect to the CAFR Certificate program which requires substantial compliance with GAAP and thus is considered largely irrelevant to our type of financing and to which few conduit borrowers are able to apply.

Most significant is the assumption of “one-size-fits-all” in the annual filing undertaking. The arbitrary deadline signals to the market that committing to provide such financial information on this schedule is commendable. Issuers or obligated persons who cannot meet the proposed timed frame may be viewed in the marketplace as being delinquent in making required filings. In certain instances, particularly for small issuers and obligated persons or those whose inability to submit audited financial statements within 120 days are based on systemic or external constraints, these inferences will be false and deceptive.

The annual filing undertaking is voluntary and not governed by Rule 15c2-12. Consequences for noncompliance are unspecified. Thus, an issuer could undertake to meet the 120 day deadline but fail to do so without consequences. There appears to be nothing to preclude the issuer from effectively advertising the undertaking on EMMA, and as a result receiving preferred status, irrespective of actual compliance.

Additionally, many issuers and obligated persons may not be able to comply with the annual filing undertaking because it is not feasible or is expensive, not because they lack commitment to disclosure.² It should be satisfactory that an issuer has certified that it will file by a date certain and has made the filings specified by its continuing disclosure agreements.

In the health sector, for example, many Critical Access Hospitals prepare and obtain Medicare review of their “cost report” before finalizing their financials because of the possible impact on financials. This mandated and uncontrollable outside government review may take a considerable period of time. Some hospital administrators and accounting firms require finalization of this review before issuing the final audit. Then, the governing board must approve the audited financial reports.

Another example where the annual filing undertaking may be unavailable is a hospital system with multiple members. These filers need increased time to complete their audits as the obligated group (which may include only some of the members) must complete individual hospital audits before the system and/or the obligated group audit can be obtained. These are examples of external constraints that make it impossible for some issuers or obligated persons in the health sector to comply with the proposed annual filing undertaking within 120 days.

The education sector faces different yet equally difficult constraints. Many colleges, for example, have a fiscal year ending in May or June following the end of the academic year. Financial statements are not released to the public until reviewed and approved at the governing board meeting which is typically held in late September or October after the start of the new academic year. Other delays may be the result of audits or events not caused by or under the control of the issuer or obligated persons such as investment valuations by third parties. These external constraints make it impossible for some issuers or obligated persons in the education sector to comply with the proposed annual filing undertaking within 120 days.

For these reasons, we believe that there are serious problems with the proposed voluntary undertaking and the implied criticism of those unable to make the undertaking. There will be an implication that those who cannot meet the deadlines are violating some industry or other performance standard. The annual filing undertaking is infeasible for many non-profits, and they should not be punished in the marketplace for failing to meet an unreasonable or unobtainable standard.

² We understand that applying for the CAFR Certificate only requires submission of audited financial statements within 180 days of fiscal year end.

We would be glad to provide further information to SEC or MSRB as requested.

Respectfully Submitted,

A handwritten signature in black ink that reads "Robert Donovan" followed by a stylized monogram "RD".

Robert Donovan
Executive Director
Rhode Island Health and Educational Building Corporation
170 Westminster Street, 2nd Floor
Providence, Rhode Island 02903-2103
(401) 831-3770
rdonovan@rihebc.com

Chair, NAHEFFA Advocacy Committee