

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60315; File No. SR-MSRB-2009-10)

July 15, 2009

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Relating to Additional Voluntary Submissions by Issuers to the MSRB's Electronic Municipal Market Access System (EMMA[®])

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 14, 2009, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change 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 a proposed rule change to amend the primary market and continuing disclosure services of the Electronic Municipal Market Access system ("EMMA") to permit issuers and their designated agents to submit preliminary official statements and other related pre-sale documents, official statements and advance refunding documents, as well as information relating to the preparation and submission of audited financial statements and annual financial information and links to other disclosure information. 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 (<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

The proposed rule change consists of amendments to the EMMA primary market disclosure service 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").³ 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

³ 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.

preliminary official statement.⁴ 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.

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:

⁴ 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.

- 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"), as described below (the "GASB-GAAP undertaking");
- issuer's or obligated persons' undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year, as described below (the "annual filing undertaking");
- 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 ("GFOA-CAFR Certificate");⁵ and
- uniform resource locator (URL) of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information.

The GASB-GAAP undertaking 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. The GASB-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

⁵ The GFOA-CAFR Certificate is widely viewed as indicative of positive achievement in financial reporting by state and local governments. The MSRB would consider adding in the future additional voluntary disclosures of other widely accepted, merit-based and independently bestowed distinctions with respect to financial or other disclosures by issuers or obligated persons.

GASB-GAAP undertaking would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. If an issuer or obligated person that has made a GASB-GAAP undertaking later rescinds such undertaking, the issuer or obligated persons would be able to disclose such action through EMMA. The MSRB would not confirm the accuracy of any GASB-GAAP undertaking and would not review or confirm the conformity of submitted audited financial statements to GASB-GAAP.

The 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 Act by no later than 120 calendar days after the end of such issuer's or obligated person's fiscal year.⁶ The 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 an annual filing undertaking would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. If an issuer or obligated person that has made an annual filing undertaking later rescinds such undertaking, the issuer or obligated person would be able to disclose such action through

⁶ Under the 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.

EMMA. The MSRB would not review or confirm the compliance of an issuer or obligated person with its annual filing undertaking.

The GFOA awards the GFOA-CAFR 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. The GFOA-CAFR Certificate would assist investors and other market participants in assessments of information provided in an issuer's CAFR. If an issuer submits a copy of the GFOA-CAFR Certificate to EMMA, the EMMA Web portal would prominently disclose the issuer's receipt of a GFOA-CAFR Certificate as a distinctive characteristic of the applicable securities. The MSRB would not confirm the validity of a GFOA-CAFR Certificate submitted to EMMA.

Finally, 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.

The GASB-GAAP undertaking and annual filing undertaking could be included within the continuing disclosure undertaking entered into consistent with Exchange Act 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. 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 GASB-GAAP undertaking and annual filing undertaking or the issuer/obligated person URL. The MSRB would include an explanation of the GASB-GAAP undertaking, annual filing undertaking and GFOA-CAFR Certificate on the EMMA Web portal.

2. Statutory Basis

The MSRB has adopted the proposed rule change pursuant to Section 15B(b)(2)(C) of the Act,⁷ which provides that the MSRB's rules shall:

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 Act in that it serves to remove impediments to and helps 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

⁷ 15 U.S.C. 78o-4(b)(2)(C).

in a manner that is consistent with the MSRB's statutory authority. The GFOA-CAFR Certificate would assist investors and other market participants in assessments of information provided in an issuer's CAFR, while the GASB-GAAP undertaking would assist understanding of how such information was prepared and the 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 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. Issuers are not required to be members of the GFOA in order to be eligible for the GFOA-CAFR Certificate. Although a fee is assessed for the necessary review by the GFOA to qualify for the GFOA-CAFR Certificate, the GFOA has established a sliding fee scale based on revenues that it views as addressing affordability for small issuers. Some issuers may choose not to apply for the GFOA-CAFR Certificate based on the fees assessed or other considerations. However, the proposed rule change would provide for disclosure of the additional voluntary items if an issuer elects to make such disclosures.

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 on the proposed rule change. Therefore, no comments were received with regard to the proposed additional items of disclosure under the EMMA continuing disclosure service. However, 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 on the establishment of EMMA for purposes of official statement dissemination.⁸

SIFMA,⁹ 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 statements pursuant to Section 15B(d)(1) of the Act. 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, consistent with the MSRB's statutory authority, pursuant to a future filing with the

⁸ 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"), National Association of Bond Lawyers ("NABL"), and Securities Industry and Financial Markets Association ("SIFMA").

⁹ 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.

Commission.¹⁰ The proposed rule change would permit such voluntary submissions of preliminary official statements.

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 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

¹⁰ See Securities Exchange Act Release No. 59636 (March 27, 2009), 74 FR 15190 (April 2, 2009) (File No. SR-MSRB-2009-02).

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.

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.

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.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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. 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, 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 am and 3:00 pm. Copies of such 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 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.¹¹

Florence E. Harmon
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).