

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61238; File No. SR-MSRB-2009-09)

December 23, 2009

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Relating to Rule G-32, on Disclosures in Connection with Primary Offerings, Form G-32, and the Primary Market Disclosure and Primary Market Subscription Services of the MSRB's Electronic Municipal Market Access System (EMMA[®])

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")¹ and Rule 19b-4 thereunder,² a proposed rule change relating to Rule G-32, on disclosures in connection with primary offerings, Form G-32, and the primary market disclosure and primary market subscription services of the MSRB's Electronic Municipal Market Access System (EMMA[®]). The proposed rule change was published for comment in the Federal Register on July 22, 2009.³ 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-2009-09, originally filed on July 14, 2009 (the "original proposed rule change"). The amendment

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 60314 (July 15, 2009), 74 FR 36300.

amends and restates the original proposed rule change relating to Rule G-32, on disclosures in connection with primary offerings, Form G-32, and the primary market disclosure and primary market subscription services of the MSRB's Electronic Municipal Market Access system ("EMMA") (as amended, the "proposed rule change"). The proposed rule change would require brokers, dealers and municipal securities dealers ("dealers") acting as underwriters, placement agents or remarketing agents for primary offerings of municipal securities ("underwriters") to provide to EMMA, and to make available on the EMMA web portal and through the EMMA primary market subscription service, information about whether the issuer or other obligated person has undertaken to provide continuing disclosures, the identity of any obligated persons other than the issuer, and the timing by which such issuers or obligated persons have agreed to provide annual financial and operating data. 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, 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

This amendment makes certain modifications to the original proposed rule change based on comments received on the original proposed rule change, as described below.

The proposed rule change would amend Rule G-32 and Form G-32 to require underwriters of primary offerings of municipal securities to submit to the MSRB's EMMA system, as part of their primary offering submission obligation under Rule G-32(b), certain key items of information relating to continuing disclosure undertakings made by issuers and other obligated persons in connection with such primary offerings. These items of information would be made available to the public through the EMMA web portal and are intended to inform investors in advance whether continuing disclosures will be made available with respect to a particular municipal security, from and about whom such continuing disclosures are expected to be made, and the timing by which such disclosures should be made available.

The items of information regarding continuing disclosure undertakings to be provided by underwriters through Form G-32 would include:

- whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Securities Exchange Act Rule 15c2-12
- the name of any obligated person, other than the issuer of the municipal securities, that has or will undertake, or is otherwise expected to provide, continuing disclosure as

identified in the continuing disclosure undertaking⁴

- the timing set forth in the continuing disclosure undertaking, pursuant to Rule 15c2-12(b)(5)(ii)(C) or otherwise, for the submission of annual financial information each year by the issuer and/or any obligated persons to the EMMA system, either as a specific date or as the number of days or months after a specified end date of the issuer's or obligated person's fiscal year⁵

This amendment modifies the original proposed rule change by eliminating the proposed requirement to submit contact information for a representative of the issuer and/or any obligated persons for purposes of establishing continuing disclosure submission accounts for such issuer and/or obligated persons in connection with their submissions to the EMMA system.

Underwriters currently are able to provide contact information for issuer or obligated person representatives with respect to current and past primary offerings through EMMA on a voluntary basis and the MSRB believes that this process has been effective.

The name or names of obligated persons to be provided would be of the entity acting as an obligated person identified in the continuing disclosure undertaking, not an individual at such entity, unless the obligated person is in fact an individual. The timing for submission of annual financial information could be provided either as a specific date each year (i.e., month and day,

⁴ In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by conforming the definition of obligated person more closely with the definition used in Rule 15c2-12 and by making clear that the obligated persons to be identified are those that are specifically identified in the continuing disclosure undertaking.

⁵ In response to comments previously received by the MSRB, as discussed below, this amendment modifies the original proposed rule change by permitting this information to be provided as the number of days or months after the end of the fiscal year, if the fiscal year end date is also submitted, as an alternative to submission of the specific deadline date as provided in the original proposed rule change.

such as June 30) or the number of days or months after the end of the fiscal year (i.e., 120 days after the end of the fiscal year). The underwriter could use the day/month count alternative only if the underwriter also submits the day on which the issuer's or obligated person's fiscal year ends (i.e., month and day, such as June 30). If annual financial information is expected to be submitted by more than one entity and such information is expected to be submitted by different deadlines, each such deadline would be provided matched to the appropriate issuer and/or obligated person.

The underwriter would be required to provide information regarding whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Rule 15c2-12 by no later than the date of first execution of transactions in municipal securities sold in the primary offering. The remaining items of information would be required to be provided by the closing date of the primary offering. Until closing, the underwriter would be required to update promptly any information it has previously provided on Form G-32 which may have changed or to correct promptly any inaccuracies in such information, and would be responsible for ensuring that such information provided by it is accurate as of the closing date. So long as the underwriter has provided such information accurately as of the closing date, it would not be obligated to update the information provided if there are any subsequent changes to such information, such as additions, deletions or modifications to the identities of obligated persons or changes in the timing for providing annual financial information. Issuers and obligated persons will be able to make changes to such information through their submission accounts established in connection with EMMA's continuing disclosure service.

Information regarding whether an offering is subject to a continuing disclosure undertaking, the names of obligated persons and the deadlines for providing annual financial information would be displayed on the EMMA web portal and also would be included in EMMA's primary market disclosure subscription service. These items are intended to provide investors and others with information on the expected availability of disclosures following the initial issuance of the securities. In particular, users of the EMMA web portal would be able to determine which obligated persons are expected to submit annual financial information, audited financial statements and material event notices on an on-going basis, as well as the date each year by which they should expect to have access to the annual financial information.

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,⁶ 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.

⁶ 15 U.S.C. 78o-4(b)(2)(C).

The MSRB believes that the proposed rule change is consistent with the 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. The information that underwriters would provide and that would be made available to the public with regard to the continuing disclosure undertakings of issuers and obligated persons would assist investors to understand whether and when they should expect to have access to key continuing disclosure information in the future. Investors and other market participants would be able to include such assessment of on-going access to information in the mix of factors upon which they may evaluate their investment decisions.

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 underwriters 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 underwriters. Specifically, the addition of these items of information to the existing EMMA primary market submission process would not 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. The proposed rule change also would not impose any additional burdens on competition among issuers of municipal securities since the proposed rule

change does not impose any direct or indirect obligations on issuers but merely provides for disclosure of information by underwriters regarding continuing disclosure undertakings entered into under Rule 15c2-12.

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

In a notice published by the MSRB on January 31, 2008, the MSRB described its plan for implementing a continuing disclosure service that would be integrated into other services to be offered through EMMA (the "MSRB Notice").⁷ In particular, the MSRB stated its plan to institute the continuing disclosure service to accept submissions of continuing disclosure information in a designated electronic format directly from issuers, obligated persons and their designated agents acting on their behalf. Among other things, the notice sought comment on whether underwriters for new issues should be required to submit to the MSRB information about (i) whether a continuing disclosure undertaking exists, (ii) the identity of any obligated persons other than the issuer, and (iii) the date identified in the continuing disclosure undertaking by which annual financial information is expected to be disseminated. Such information would be provided by underwriters through the same information submission process as, and simultaneously with, the information to be provided in connection with official statement submissions. The notice also asked whether other items of information should be required, such as the identify of designated agents for submitting continuing disclosure or the criteria for identifying obligated persons subject to the continuing disclosure obligations.

⁷ See MSRB Notice 2008-05 (January 31, 2008).

In addition, the original proposed rule change was published by the Commission for comment in the Federal Register and the Commission received comments from six commentators.⁸

General

Four commentators on the MSRB Notice provided comments on the issue of underwriter submission of information relating to the issuer's continuing disclosure obligations.⁹ First Southwest supported requiring the submission of the three items of information identified in the MSRB Notice and stated that no other information in addition to the three items listed in the notice should be required. NABL, NAHEFFA and SIFMA provided comments on the items relating to identification of obligated persons and the date on which annual financial information is expected to be disseminated.

In connection with the original proposed rule change, Connecticut, ICI and VGFOA were generally supportive. Connecticut stated that the original proposed rule change would make municipal disclosure more transparent, efficient, consistent, comparable and accessible to investors, including individual investors in particular. ICI stated that the original proposed rule change would ensure the accessibility and improve the utility of continuing disclosure

⁸ See Securities Exchange Act Release No. 60314 (July 15, 2009) (File No. SR-MSRB-2009-09), 74 FR 36300 (July 22, 2009). The Commission received comments from the Connecticut State Treasurer ("Connecticut"); Investment Company Institute ("ICI"); National Association of Bond Lawyers ("NABL"); Regional Bond Dealers Association ("RBDA"); Securities Industry and Financial Markets Association ("SIFMA"); 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-2009-09/msrb200909.shtml>.

⁹ National Association of Health and Educational Facilities Finance Authorities ("NAHEFFA"); First Southwest Company ("First Southwest"); NABL; and SIFMA.

information for investors and would further enhance transparency in the municipal securities market.

RBDA was supportive of the goal of the original proposed rule change but suggested that underwriters be required to submit a copy of the continuing disclosure undertaking rather than to input fielded information. SIFMA opposed the original proposed rule change. Both RBDA and SIFMA expressed concern that requiring underwriters to extract information from documents could result in admission of erroneous information to EMMA and would be an undue burden and risk on underwriters. ICI stated, however, that it believes that the benefits to investors stemming from the original proposed rule change would outweigh the perceived costs and risks. RBDA distinguished the type of fielded information currently required to be submitted by underwriters to EMMA, characterized as data necessary to create such basic record of the new issue, from the type of information proposed to be collected through the original proposed rule change, which RBDA characterized as unnecessary for creating the record in EMMA. SIFMA stated that the continuing disclosure undertaking is already required to be summarized in the official statement available through EMMA and that extracting information from the official statement would effectively discourage investors from having to read the official statement itself. SIFMA further stated that, if the MSRB wants to highlight issuers' continuing disclosure obligations, this can be done by creating a best practices standard. Finally, SIFMA urged the MSRB to commit to making EMMA compatible with information underwriters are providing to the Depository Trust and Clearing Corporation's New Issue Information Dissemination System ("NIIDS").

NABL did not state a position regarding the original proposed rule change but cautioned that the "reasonable determination" standard of Rule 15c2-12 with regard to whether a continuing disclosure undertaking in conformity with the rule has been entered into should not

be altered by the original proposed rule change. NABL also suggested that a more complete analysis of the MSRB's statutory authority for adopting the original proposed rule change be provided.

The MSRB continues to believe that collecting and displaying on the EMMA web portal the existence of a continuing disclosure obligation, the names of any obligated persons other than the issuer, and the deadline for submission of annual financial and operating data, all as fielded information rather than merely as information provided within documents, would provide significant benefits to investors and other market participants. The close proximity of this information to the links to posted continuing disclosure documents on the EMMA web portal would assist investors with understanding whether and when they should expect to have access to key continuing disclosure information in the future and about whom such information is expected to be provided. Investors and other market participants would be able to include an assessment of on-going access to information along with other factors upon which they may evaluate their investment decisions. The MSRB is firmly of the belief that the proposed rule change is within its statutory authority and notes that an MSRB rule change or system requirement would not have the effect of altering any obligations or standards under Rule 15c2-12 or any other Commission rule.

Existence of Continuing Disclosure Obligation

The original proposed rule change would require the underwriter to provide, on amended Form G-32, information on whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Rule 15c2-12. None of the commentators expressly opposed disclosure of whether a continuing disclosure undertaking has been entered into in connection with a primary offering, although RBDA

preferred that such information be conveyed through a filing of the document by the underwriter and SIFMA preferred that EMMA users determine this information by reading the official statement.

This amendment does not modify this proposed requirement.

Identification of Obligated Persons

With respect to identification of obligated persons, NABL and SIFMA noted in their comments on the MSRB Notice that only those obligated persons for whom financial or operating data is provided in the official statement are relevant. NABL suggested only requiring underwriters “to identify those persons expressly specified in the continuing disclosure undertaking who will be required to make continuing disclosure filings or to state that such persons will be determined by the functional descriptions contained in the continuing disclosure undertaking.” SIFMA stated that a requirement for the underwriter to provide such information is “unnecessarily complicated since the official statement itself, which is on the portal, has a summary paragraph stating who will be filing continuing disclosure and where it will be filed.”

The original proposed rule change would require the underwriter to provide, on amended Form G-32, the name of any obligated person, other than the issuer of the municipal securities, that has or will undertake, or is otherwise expected to provide, continuing disclosure pursuant to the continuing disclosure undertaking. The original proposed rule change made clear that underwriters would be required to provide the name of only those obligated persons that would be providing continuing disclosures pursuant to the continuing disclosure undertaking, rather than all obligated persons regardless of whether such obligated persons will be providing disclosure information. Connecticut noted that, for some issues, obligated persons can change over time and that it is unclear whether the original proposed rule change accommodates this

possibility. NABL supported the MSRB's formulation that the rule would require only that underwriters provide the name of any obligated person (other than the issuer) that would be providing continuing disclosures pursuant to the continuing disclosure undertaking, rather than all obligated persons regardless of whether such obligated persons will be providing disclosure information. NABL recommended that this requirement be viewed as a mechanical reporting provision requiring the underwriter to report which persons are identified in the continuing disclosure agreement as being responsible for providing continuing disclosures (or that such persons will be determined by the functional descriptions in the continuing disclosure undertaking) and that underwriters not be required to make a legal determination as to whether any such person is an obligated person within the meaning of Rule 15c2-12. NABL also recommended that the definition of obligated person more closely mirror the definition thereof in Rule 15c2-12.

The MSRB believes that collecting the identity of obligated persons in a fielded manner that permits automated indexing and search functions is an important feature that would make the EMMA web portal considerably more useful for users. Such indexed information would assist EMMA web users in finding some or all of the offerings for a particular obligated person, thereby allowing the user to review the continuing disclosure undertakings that more fully spell out how the continuing disclosure obligations will be fulfilled.

The MSRB has determined to modify the definition of obligated person in proposed Rule G-32(d)(xiii) to more closely conform to the definition thereof in Rule 15c2-12(f)(10) to avoid any definitional ambiguity. Furthermore, this amendment would modify Form G-32 to explicitly provide that the obligated persons to be identified are those that are specifically identified in the continuing disclosure undertaking. The MSRB emphasizes that the underwriter's obligation is

solely to provide the identities of those obligated persons who have a specific commitment under the continuing disclosure agreement to provide continuing disclosures. Underwriters would not be required to undertake any independent analysis of what other persons might be covered, to submit descriptions of bases for determining future obligated persons, or to maintain the currency of the list of obligated persons beyond the closing date.¹⁰

Deadline for Annual Filing and End of Fiscal Year

With respect to the expected date of filing of annual financial information as described in the MSRB Notice, NABL and SIFMA questioned the value of providing this information.

NABL noted that the information is already provided in the official statement's description of the continuing disclosure undertaking and can become confusing if several obligated persons are required to file annual filings on different dates, while SIFMA noted that the information can be vague, often based on a stated period of time following the end of a fiscal year, and will become readily apparent based on the pattern of posting over time. NAHEFFA sought clarification of the purpose for requiring this date and requested that the data entry be flexible enough to reflect a deadline measured from the end of a fiscal year or other milepost, rather than a date certain.

The original proposed rule change would require the underwriter to provide, on amended Form G-32, the date or dates identified in the continuing disclosure undertaking, pursuant to Rule 15c2-12(b)(5)(ii)(C) or otherwise, by which annual financial information is expected to be submitted each year by the issuer and/or any obligated persons to the EMMA system. Other than RBDA's and SIFMA's concerns about extraction of information from the continuing disclosure

¹⁰ Issuers and obligated persons will be able to make changes to such information through their submission accounts established in connection with EMMA's continuing disclosure service.

undertaking or the official statement, none of the commentators on the original proposed rule change expressly opposed disclosure of the submission date for the filing of annual financial information.

The MSRB believes that there is considerable value in providing the deadline for submission of annual financial information in a manner that is extracted from the official statement. This would permit investors and the general public to readily identify when such disclosures should become available from each issuer or obligated person expected to provide the annual filings. Issuers and obligated persons would be able to update the timing requirement, as well as the identity of any obligated persons, through EMMA as appropriate.

The MSRB has further considered the comments on the MSRB Notice with respect to potential difficulties in specifying a date certain for the filing of annual financial information in certain circumstances. As a result, the MSRB has determined to modify this provision to provide a new alternative method for reporting the deadline for submissions of annual financial and operating data based on the disclosed end of fiscal year, so that underwriters could disclose as the submission deadline either a specific date each year (i.e., month and day, such as June 30) or the number of days or months after the end of the fiscal year (i.e., 120 days after the end of the fiscal year). The underwriter could use the day/month count alternative only if the underwriter also submits the day on which the issuer's or obligated person's fiscal year ends (i.e., month and day, such as June 30). Form G-32 would be modified to allow for submission of this new data element.

Issuer/Obligated Person Contact Information

The original proposed rule change would require the underwriter to provide, on amended Form G-32, contact information for a representative of the issuer and/or any obligated persons

for purposes of establishing continuing disclosure submission accounts for such issuer and/or obligated persons in connection with their submissions to the EMMA system. Connecticut requested that the current voluntary process for providing contact information for representatives of the issuer or obligated person for purposes of establishing EMMA submission accounts not be made mandatory.

The MSRB believes that its current voluntary process has been effective and therefore this amendment would eliminate from Form G-32 the requirement that underwriters provide the contact information for a representative of the issuer and/or any obligated person.

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. Please include File Number SR-MSRB-

2009-09 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-2009-09. 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 submission¹¹, 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

¹¹ 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-2009-09 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.¹²

Florence E. Harmon
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).