

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60033, File No. SR-MSRB-2009-04)

June 3, 2009

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Relating to the Voluntary Submission of Continuing Disclosure Documents to Its Upcoming Continuing Disclosure Service of the Electronic Municipal Market Access System (EMMA[®])

On April 14, 2009, the Municipal Securities Rulemaking Board (“MSRB”), filed with the Securities and Exchange Commission (“Commission” or “SEC”), 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 to amend the continuing disclosure service of the MSRB’s Electronic Municipal Market Access system (“EMMA”) to accept, and to make publicly available on the Internet, voluntary electronic submissions by issuers, obligated persons and their agents of continuing disclosure documents provided other than in connection with Exchange Act Rule 15c2-12. The proposed rule change was published for comment in the Federal Register on April 29, 2009.³ The Commission received three comment letters about the proposed rule change.⁴ On May 8, 2009, May 18, 2009, and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59814 (Apr. 23, 2009), 74 FR 19612 (Apr. 29, 2009) (“Commission’s Notice”).

⁴ See letters from Douglas Adamson, Executive Vice President, Technical Services Division, American Bankers Association (“ABA”), dated April 24, 2009; letter from Heather Traeger, Associate Counsel, Investment Company Institute (“ICI”), dated May 20, 2009; and letter from Vickie A. Tillman, Executive Vice President, Standard & Poor’s Ratings Services (“S&P”), dated May 29, 2009.

June 1, 2009, the MSRB filed responses to the comment letters.⁵ This order approves the proposed rule change.

The Commission has previously approved the establishment of the continuing disclosure service of EMMA, which will commence operation on July 1, 2009.⁶ The EMMA continuing disclosure service will receive electronic submissions of, and will make publicly available on the Internet through the EMMA web portal,⁷ continuing disclosure documents and related information from issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Exchange Act Rule 15c2-12. As approved, the EMMA continuing disclosure service will accept submissions of (i) continuing disclosure documents as described in Rule 15c2-12,⁸

⁵ See letters from Ernesto A. Lanza, General Counsel, MSRB, to Elizabeth M. Murphy, Secretary, SEC, dated May 8, 2009 (“Response Letter I”), May 18, 2009 (“Response Letter II”), and June 1, 2009 (“Response Letter III”).

⁶ See Securities Exchange Act Release No. 59061 (December 5, 2008), 73 FR 75778 (December 12, 2008) (File No. SR-MSRB-2008-05) (approving the continuing disclosure service of EMMA with an effective date of July 1, 2009) (the “EMMA continuing disclosure service approval”). The EMMA continuing disclosure service is designed to commence operation simultaneously with the effectiveness of certain amendments to Exchange Act Rule 15c2-12 adopted by the Commission. See Securities Exchange Act Release No. 59062 (December 5, 2008), 73 FR 76104 (December 15, 2008) (adopting amendments to Exchange Act Rule 15c2-12). Approval of the proposed rule change on or prior to July 1, 2009 would allow the permanent EMMA continuing disclosure service to accept such voluntary disclosures upon commencement of operations.

⁷ The EMMA web portal is accessible at <http://emma.msrb.org>.

⁸ Such items consist of: (A) annual financial information concerning obligated persons; (B) audited financial statements for obligated persons if available and if not included in the annual financial information; (C) notices of the following events, if material: principal and interest payment delinquencies, non-payment related defaults, unscheduled draws on debt service reserves reflecting financial difficulties, unscheduled draws on credit enhancements reflecting financial difficulties, substitution of credit or liquidity providers or their failure to perform, adverse tax opinions or events affecting the tax-exempt status of the security, modifications to rights of security holders, bond calls, defeasances,

and (ii) other disclosure documents specified in continuing disclosure undertakings but not specifically described in Rule 15c2-12.

The proposed rule change would amend the EMMA continuing disclosure service to accept submissions of, and to make publicly available through the EMMA web portal, additional categories of continuing disclosure documents voluntarily submitted by issuers, obligated persons and their agents (“voluntary continuing disclosure document”). The proposed rule change would not establish an obligation upon any issuer or obligated person to make a submission of any voluntary continuing disclosure document. Voluntary continuing disclosure documents would be submitted, processed and disseminated in the same manner as provided with respect to disclosures made to the EMMA continuing disclosure service pursuant to continuing disclosure undertakings entered into consistent with Rule 15c2-12. In particular, such submissions would be accepted solely in electronic form as portable document format (PDF) files accompanied by appropriate indexing information. The MSRB has requested approval of the proposed rule change on or prior to July 1, 2009. A full description of the proposal is contained in the Commission’s Notice.

As previously noted, the Commission received three comment letters relating to the proposed rule change.⁹ One commenter, the ABA, expressed concerns regarding certain legal issues relating to the protection of its intellectual property and contractual rights in the CUSIP database (the “Database”) that it states have not yet been resolved. The ABA noted that it was the owner of the Database, which is administered by the

release/substitution/sale of property securing repayment of the securities, and rating changes; and (D) notices of failures to provide annual financial information on or before the date specified in the continuing disclosure undertaking.

⁹ See supra note 4.

CUSIP Service Bureau (“CSB”), as its exclusive licensee, and believed it was critical that these legal issues be resolved before the MSRB be allowed to move forward with the proposed expansion and full implementation of EMMA. It further requested that the operation of the EMMA Web site incorporate a variety of protections with respect to its intellectual property rights, including compliance with CSB’s current licensing practices, permissible use guidelines, appropriate copyright notices and adequate security.¹⁰

In response to the ABA’s concerns, the MSRB and the CSB, as the ABA’s exclusive licensee, have entered into a memorandum of understanding dated May 15, 2009 (the “MOU”) in which CSB expressly permits use of the CUSIP database for purposes, among other things, of displaying information on the MSRB’s EMMA public Web portal and for inclusion in data disseminated by the MSRB to subscribers of the EMMA data feed.¹¹ The MSRB has agreed in the MOU to provide certain safeguards with respect to the ABA’s intellectual property and contractual rights of the ABA in the Database. The Commission believes that the MSRB has provided adequate assurances that all necessary arrangements will be in place in order to operate the proposal as anticipated by the implementation date.

¹⁰ See letter from the ABA, supra note 4.

¹¹ See Response Letter II, supra note 5. The MSRB stated that this agreement would expand and reposition existing language on the EMMA Web site to ensure that users of the EMMA Web site have a fuller understanding of the sources of information displayed on the EMMA Web site and of the proprietary rights of third parties (including but not limited to the proprietary rights of the ABA in the Database) in certain displayed data elements. Such language would advise users of the limitations on their use or re-use of any proprietary information accessed on the EMMA Web site, and users would be required to acknowledge such limitations before being provided access to any portion of the Database. Additional systemic and reporting mechanisms would be implemented to further protect against inappropriate use of the Database. See Response Letter I, supra note 5.

Another commenter, the ICI, supported the proposal and the MSRB's continuing efforts to increase transparency in the municipal securities market, noting that the proposed rule change is another needed step in ensuring the dissemination of important information to investors. The ICI recommended that, in addition to the expansion of EMMA put forth in the proposal, that the SEC and MSRB publicly encourage issuers to submit information for all classes of municipal securities to EMMA, including securities not subject to Rule 15c2-12.¹²

In response to the ICI's recommendation, the MSRB noted that EMMA is designed to accept submissions of continuing disclosure documents from issuers, obligated persons and their agents for any municipal security in any of the established categories, regardless of whether an obligation exists under a continuing disclosure undertaking to provide such disclosure. Thus, EMMA will accept continuing disclosure submissions with respect to all municipal securities, including those disclosures in connection with municipal securities that are not subject to Rule 15c2-12, beginning on July 1, 2009 with the launch of the permanent continuing disclosure service in conjunction with the effective date of amendments to Rule 15c2-12.¹³ Accordingly, the Commission believes that the MSRB has adequately addressed the ICI's recommendation.

S&P, the third commenter, supported the proposal's goal of encouraging transparency in the market for municipal securities. However, S&P believed that the Commission and the MSRB should assess both the expected benefits and the potential

¹² See letter from the ICI, supra note 4.

¹³ See Response Letter III, supra note 5.

consequences of including rating agency material as an EMMA disclosure category. In particular, S&P expressed concerns that material provided to rating agencies often includes “raw” data that may not be easily understood by most investors, that rating agency material may include data that is proprietary, confidential or subject to legal or contractual restrictions on redissemination that should be redacted by municipal issuers, that regulatory encouragement to submit rating agency data to EMMA could lead to reduced amounts of information that municipal issuers provide to rating agencies, and that an expectation that rating agency material be submitted to EMMA could create incentives for municipal issuers to “shop” for the rating agency that requires the least amount of information for its analysis, potentially affected ratings quality. S&P noted that without a specific EMMA category for rating agency material, municipal issuers could still choose to submit such material to EMMA under the category “other financial/operating data,” which is also set forth in the proposal. Finally, S&P noted that the proposal labels the disclosure category that includes rating agency material as “material provided to rating agency or credit/liquidity provider.” S&P believes that categorizing these entities together on an official public Web site could confuse some investors about the distinctly different roles played by these entities in the municipal securities marketplace, and believes that if rating agency material remains an EMMA disclosure category, that it should be separated from material provided to credit and liquidity providers.¹⁴

The MSRB agrees that S&P has raised important considerations with respect to whether materials provided by issuers to rating agencies should be submitted to EMMA

¹⁴ See letter from S&P, supra note 4.

for public dissemination. The MSRB stated that in making such a voluntary submission, issuers and others should carefully weigh the factors identified by S&P and any other appropriate considerations that may be applicable under the specific facts and circumstances. The MSRB further believes that various factors appropriate to the particular facts and circumstances should be assessed by issuers, obligated persons and their agents in coming to a decision on whether to make a voluntary submission on continuing disclosure to EMMA, regardless of the potential category, to the extent that such parties are not otherwise obligated to make such disclosures.

The MSRB does not agree that the establishment of a distinct category for the submission of rating agency materials creates an inappropriate regulatory encouragement for such disclosures. The MSRB noted that submitters may themselves assess the factors raised by S&P in determining whether to provide such disclosure and/or provide additional information necessary to make such disclosure effective and not misleading to the general public. Because such disclosure is wholly voluntary, the MSRB does not believe that there is a material likelihood that the creation of this category would serve as an incentive to reduce information provided to the rating agencies or to seek ratings only from the rating agency requiring the least amount of information.

With regard to the inclusion of rating agency materials in the same category as materials provided to credit or liquidity providers, the MSRB noted that the general categorization structure is intended to serve as a finding aid for public users and that, within any particular category, the nature of the specific documents submitted may vary. To clarify that the MSRB does not intend to equate rating agencies with credit or liquidity providers and to provide for a broader range of material to be included in this

category, the MSRB has determined to rename this category as “information provided to rating agency, credit/liquidity provider or other third party.” In submitting such information, submitters should consider including an indication of the type of third-party recipient, to the extent appropriate for purposes of understanding the nature of the information submitted.¹⁵ The Commission believes that the MSRB has reasonably addressed S&P’s concerns in light of the voluntary nature of the information allowed to be submitted to the continuing disclosure service.

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB’s responses to the comment letters and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB¹⁶ and, in particular, the requirements of Section 15B(b)(2)(C) of the Act¹⁷ and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB’s rules 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

¹⁵ See Response Letter III, supra note 5.

¹⁶ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78o-4(b)(2)(C).

investors and the public interest.¹⁸ In particular, the Commission finds that the proposed rule change is consistent with the Act because the EMMA continuing disclosure service, as amended by the proposed rule change, would serve as an additional mechanism by which the MSRB works toward removing impediments to and helping to 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 inclusion of voluntary continuing disclosure documents in the EMMA continuing disclosure service would further help make information useful for making investment decisions more easily accessible to all participants in the municipal securities market on an equal basis throughout the life of the securities. Broad access to continuing disclosure documents through the EMMA continuing disclosure service should assist in preventing fraudulent and manipulative acts and practices by improving the opportunity for public investors to access material information about issuers and their securities. A single centralized and searchable venue for free public access to disclosure information should promote a more fair and efficient municipal securities market in which transactions are effected on the basis of material information available to all parties to such transactions, which should allow for fairer pricing of transactions based on a more complete understanding of the terms of the securities and the potential investment risks. Free access to this information – previously generally available, if at all, through paid subscription services or on a per-document fee basis – should reduce transaction costs for dealers and investors.

¹⁸Id.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-MSRB-2009-04), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).