

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62182, File No. SR-MSRB-2009-09)

May 26, 2010

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, 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<sup>®</sup>)

I. Introduction

On July 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 ("Exchange Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change relating to Rule G-32, relating to 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.<sup>3</sup> The Commission received eight comment letters

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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. 60314 (July 15, 2009), 74 FR 36300 (July 22, 2009) (the "original proposed rule change").

about the proposed rule change.<sup>4</sup> On December 18, 2009, the MSRB filed with the Commission, pursuant to Section 19(b)(1) of the Exchange Act<sup>5</sup> and Rule 19b-4 thereunder,<sup>6</sup> Amendment No. 1 to the proposed rule change. Amendment No. 1 to the proposed rule change was published for comment in the Federal Register on January 5, 2010.<sup>7</sup> The Commission received no comment letters concerning Amendment No. 1. On May 21, 2010, the MSRB filed with the Commission, pursuant to Section 19(b)(1) of the Exchange Act<sup>8</sup> and Rule 19b-4 thereunder,<sup>9</sup> Amendment No. 2 to the proposed rule change requesting an additional three months to implement the proposal.<sup>10</sup> This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

## II. Description of the Proposed Rule Change, As Modified by Amendment Nos. 1

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<sup>4</sup> See letters from: Ernesto A. Lanza, General Counsel, MSRB, dated August 6, 2009; Michael Decker, Co-CEO and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association (“RBDA”), dated August 12, 2009 (“RBDA Letter”); Leon J. Bijou, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated August 12, 2009 (“SIFMA Letter”); John Wallingford, Executive Board Member, Virginia Government Finance Officers’ Association (“Virginia GFOA”), dated August 12, 2009; William A. Holby, President, The National Association of Bond Lawyers (“NABL”), dated August 13, 2009 (“NABL Letter”); Marycarol C. White, CPA, CPFO, President, Virginia Government Finance Officers’ Association, dated August 14, 2009 (“Virginia GFOA Letter”); Denise L. Nappier, Connecticut State Treasurer, dated August 20, 2009 (“Connecticut Treasurer Letter”); and Heather Traeger, Associate Counsel, Investment Company Institute (“ICI”), dated August 21, 2009 (“ICI Letter”).

<sup>5</sup> 15 U.S.C. 78s(b)(1).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</sup> See Securities Exchange Act Release No. 61238 (December 23, 2009), 75 FR 492 (January 5, 2010).

<sup>8</sup> 15 U.S.C. 78s(b)(1).

<sup>9</sup> 17 CFR 240.19b-4.

<sup>10</sup> This is a technical amendment and is not subject to notice and comment.

and 2 to the Proposed Rule Change

The proposed rule change consists of amendments to 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 undertaking;<sup>11</sup>

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<sup>11</sup> Amendment No. 1 proposes to modify 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.

- 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 year.<sup>12</sup>

Amendment No. 1 proposes to make certain modifications to the original proposed rule change based on comments received on the original proposed rule change. Amendment No. 1 would modify 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, such as June 30) or the number of days or months after the

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<sup>12</sup> Amendment No. 1 proposes to modify 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.

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.

In Amendment No. 2, the MSRB 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 one year after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

### III. Summary of Comments Received and the MSRB's Response

#### General Comments

As previously noted, the Commission received eight comment letters on the original proposed rule change<sup>13</sup> and no comments on Amendment No. 1. Most of the commenters expressed support for the proposal's general goal of increasing transparency

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<sup>13</sup> See supra note 4.

and disclosure in the market for municipal securities.<sup>14</sup> However, some commenters objected to specific new requirements that the proposal would place on underwriters,<sup>15</sup> requested clarification of certain aspects of the proposal,<sup>16</sup> suggested alternative approaches,<sup>17</sup> or expressed concern with the timing of the proposal.<sup>18</sup>

The Connecticut Treasurer, ICI and Virginia GFOA were generally supportive. The Connecticut Treasurer stated that the original proposed rule change would make municipal disclosure more transparent, efficient, consistent, comparable and accessible to investors, particularly individual investors. ICI stated that the original proposed rule change would ensure the accessibility and improve the utility of continuing disclosure information for investors and would further enhance transparency in the municipal securities market.

RBDA supported the goal of the original proposed rule change but suggested that underwriters be required to submit continuing disclosure agreements rather than the information specified in the proposal. SIFMA opposed the original proposed rule change. Both RBDA and SIFMA expressed concern that requiring underwriters to extract information from documents could result in submission of erroneous information

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<sup>14</sup> See, e.g., RBDA Letter, SIFMA Letter, Virginia GFOA Letter, Connecticut Treasurer Letter, ICI Letter. The MSRB filed a comment letter noting that it was extending the time period for Commission action on the proposed rule change. The first letter from the Virginia GFOA requested an extension of time to submit a comment letter.

<sup>15</sup> See, e.g., RBDA Letter, SIFMA Letter, NABL Letter, Connecticut Treasurer Letter.

<sup>16</sup> See, e.g., NABL Letter, Connecticut Treasurer Letter.

<sup>17</sup> See, e.g., RBDA Letter, SIFMA Letter.

<sup>18</sup> See, e.g., SIFMA Letter.

to EMMA and would create an undue burden and compliance risk for 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, and that integrating and packaging the proposed information would greatly assist investors and potential investors in monitoring their investments by easily identifying for them whether and when they should expect to have access to key continuing disclosure information.

RBDA distinguished the type of information currently required to be reported on Form G-32, characterized as data necessary to create the database record of the issue on the EMMA system, from the type of information proposed to be collected in the 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 recommended clarifications and modifications. NABL recommended that the Commission clarify, consistent with Rule 15c2-12, that the proposed amendment to Rule G-32 does not alter the "reasonable determination" standard of Rule 15c2-12(b)(5)(i) or require underwriters to provide information about obligated persons that could be viewed

as additional certification beyond the obligations prescribed by Rule 15c2-12(b)(5)(i). 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 noted 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.<sup>19</sup> According to the MSRB, 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.<sup>20</sup> The MSRB stated that investors and other market participants would be able to include an assessment of ongoing access to information along with other factors upon which they may evaluate their investment decisions.<sup>21</sup> The MSRB remarked that it firmly believes that the proposed rule change is within its statutory authority and noted 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.<sup>22</sup>

#### Identification of Obligated Persons

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<sup>19</sup> See Amendment No. 1, supra note 7.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

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.

NABL suggested that underwriters only be required “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.” NABL recommended that the Commission make clear in any approval order that Rule G-32 is intended to be a mechanical reporting requirement by which the underwriter is required to report which persons are identified in the applicable continuing disclosure agreement as being responsible for continuing disclosure, and is not intended to impose on the underwriter any new requirement to determine who are the various obligated persons with respect to a particular offering. NABL also recommended that the definition of obligated person more closely mirror the definition thereof in Rule 15c2-12. The Connecticut Treasurer noted that, for some issues, obligated persons can change over time and believed that it was unclear whether the original proposed rule change accommodated this possibility.

In Amendment No. 1, the MSRB noted its view 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.<sup>23</sup> The MSRB stated that such indexed information would assist

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Id.

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.<sup>24</sup>

In Amendment No. 1, the MSRB proposes 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, Amendment No. 1 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 emphasized 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. The MSRB stated that 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.<sup>25</sup>

#### Deadline for Annual Filing and End of Fiscal Year

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

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<sup>24</sup> Id.

<sup>25</sup> Id. The MSRB indicated that issuers and obligated persons would be able to make changes to such information through their submission accounts established in connection with EMMA's continuing disclosure service.

obligated persons to the EMMA system. NABL recommended that the proposed Form G-32 be revised to list those dates by which the issuer or those expressly identified obligated persons who have agreed to provide continuing disclosure pursuant to the continuing disclosure undertaking have agreed to provide such information, as opposed to dates by which the data is expected to be submitted.

In Amendment No. 1, the MSRB stated 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.<sup>26</sup> 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.<sup>27</sup> The MSRB further noted that 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.<sup>28</sup>

In Amendment No. 1, the MSRB proposed 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

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<sup>26</sup> See Amendment No. 1, supra note 7.

<sup>27</sup> Id.

<sup>28</sup> Id.

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. The Connecticut Treasurer 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 noted that its current voluntary process has been effective; therefore Amendment No. 1 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.<sup>29</sup>

#### IV. Discussion and Commission Findings

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 Exchange Act and the rules and regulations thereunder applicable to the MSRB<sup>30</sup> and, in particular, the

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<sup>29</sup> Id.

<sup>30</sup> 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).

requirements of Section 15B(b)(2)(C) of the Exchange Act<sup>31</sup> and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Exchange 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 investors and the public interest.<sup>32</sup> In particular, the Commission finds that the proposed rule change is consistent with the Exchange Act because 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. 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 in understanding 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.

The Commission believes that the MSRB has adequately responded to the concerns expressed in the comment letters. The Commission agrees with the MSRB that

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<sup>31</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>32</sup> Id.

any additional burdens on underwriters are outweighed by the benefits of providing information to investors and other users in a user friendly manner. Investors, potential investors and other users of the EMMA system would not have to search through official statements to locate continuing disclosure information. The type of information to be reported by underwriters pursuant to the proposal is not substantially different from other information underwriters already submit to EMMA.

Amendment No. 1 should adequately address commenters' concerns about the definition and identification of obligated parties and the expected date of filing of annual financial information. The additional disclosure and transparency made possible by this proposal will serve to promote the statutory mandate of the MSRB to protect investors and the public interest.

The proposed rule change, as amended, will become effective on a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than one year after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date, as requested by the MSRB in Amendment No. 2.

#### V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Exchange Act and the rules and regulations thereunder applicable to the MSRB<sup>33</sup> and, in particular, the requirements of Section 15B(b)(2)(C) of the Exchange Act<sup>34</sup> and the rules and regulations thereunder.

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<sup>33</sup> 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).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>35</sup> that the proposed rule change (SR-MSRB-2009-09), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>34</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>35</sup> 15 U.S.C. 78s(b)(2).

<sup>36</sup> 17 CFR 200.30-3(a)(12).