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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2009 - 10
Amendment No. 2

Proposed Rule Change by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal	Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☐	☑	☐	☑	☐	☐

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name: Leslie Last Name: Carey
Title: Associate General Counsel
E-mail: lcarey@msrb.org
Telephone: (703) 797-6600 Fax: (703) 797-6700

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

Municipal Securities Rulemaking Board

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date: 05/21/2010

By: Ronald W. Smith
(Name)

Corporate Secretary
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Ronald Smith, rsmith@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

The Municipal Securities Rulemaking Board ("MSRB") is filing with the Securities and Exchange Commission (the "Commission") this partial amendment No. 2 ("Amendment No. 2"), which amends File No. SR-MSRB-2009-10 originally filed on July 14, 2009 (the "original proposed rule change"), as subsequently amended by Amendment No. 1 filed on December 18, 2009 ("Amendment No. 1" and, together with the original proposed rule change, the "pending proposal"). The pending proposal, as amended by this Amendment No. 2, is collectively referred to as the "proposed rule change."

This Amendment No. 2 partially amends the text of the pending proposal to make a clarification, at the request of Commission staff, with respect to the proposed changes to the continuing disclosure service of the MSRB's Electronic Municipal Market Access system ("EMMA") relating to the ability of issuers and obligated persons to submit information in connection with certain undertakings concerning the preparation and submission of audited financial statements and annual financial information. In addition, this Amendment No. 2 provides the MSRB's responses to comment letters received by the Commission in response to the notice for comment on Amendment No. 1 published in the Federal Register.[1] Finally, the MSRB requests that the Commission approve a revised 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.

Amendment to Text of Original Proposed Rule Change, as amended by Amendment No. 1

The changes made by Amendment No. 2 to the pending proposal are indicated below:[2]

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EMMA PRIMARY MARKET DISCLOSURE SERVICE

No additional changes.

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EMMA CONTINUING DISCLOSURE SERVICE

The EMMA continuing disclosure service, established as a service of EMMA, receives submissions of continuing disclosure documents, together with related information about continuing disclosures and indexing information to allow the public to readily identify and

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1 *See* Securities Exchange Act Release No. 61237 (December 23, 2009), 75 Fed. Reg. 485 (January 5, 2010).

2 Underlining indicates additions made by this Amendment No. 2 to the pending proposal; brackets indicate deletions made by this Amendment No. 2 to the pending proposal.

access such documents, from issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Exchange Act Rule 15c2-12, as well as other continuing disclosure documents concerning municipal securities, at no charge to the submitter. Submissions may be made through a choice of an Internet-based electronic submission interface or electronic computer-to-computer streaming connections. The EMMA continuing disclosure service makes continuing disclosures available to the public, at no charge, on the Internet through the EMMA portal. The EMMA continuing disclosure service also makes continuing disclosures available by subscription for a fee.

Submissions to the EMMA Continuing Disclosure Service

Designated Electronic Format for Documents. No change.

Method of Submission. No change.

Timing of Submissions. No change.

Document Types. The EMMA continuing disclosure service accepts submissions from issuers, obligated persons, and their agents of (i) the continuing disclosure documents described in Rule 15c2-12, and (ii) other continuing disclosure documents concerning municipal securities not specifically described in Rule 15c2-12.

The continuing disclosure documents described in Rule 15c2-12 consist of the following categories of documents:

- annual financial information concerning issuers or other obligated persons as described in paragraph (b)(5)(i)(A) of Rule 15c2-12, or other financial information and operating data provided by issuers or other obligated persons as described in paragraph (d)(2)(ii)(A) of Rule 15c2-12;

- financial statements for issuers or other obligated persons if not included in the annual financial information as described in paragraph (b)(5)(i)(B) of Rule 15c2-12;

- notices of certain events, if material, as described in paragraph (b)(5)(i)(C) of Rule 15c2-12; and

- notices of failures to provide annual financial information on or before the date specified in the written undertaking as described in paragraph (b)(5)(i)(D) of Rule 15c2-12.

Categories of other disclosure documents concerning municipal securities not specifically described in Rule 15c2-12 include:

- other financial or operating data disclosures, including but not limited to quarterly or monthly financial information; interim or additional financial information or operating data; budget documents; investment, debt or financial policies; consultant reports;

information provided to rating agencies, credit or liquidity providers or other third parties; changes in accounting standards, fiscal year or timing of annual disclosure; **contractual** undertaking**, for the benefit of bondholders,** of an issuer or obligated person to prepare audited financial statements pursuant to generally accepted accounting principles as established by the Governmental Accounting Standards Board (GASB) or the Financial Accounting Standards Board (FASB), as applicable; **contractual** undertaking**, for the benefit of bondholders,** of an issuer or obligated person to submit annual financial information to EMMA within 120 calendar days after the end of the applicable fiscal year (provided that the EMMA continuing disclosure service will accept the submission, through December 31, 2013, of an alternative transitional undertaking of an issuer or obligated person to submit annual financial information to EMMA within 150 calendar days after the end of the applicable fiscal year); uniform resource locator (URL) of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information; and other uncategorized financial or operating data; and

- other event-based disclosures, including but not limited to amendments to continuing disclosure undertakings; changes in obligated person; notices to investors pursuant to bond documents; communications from the Internal Revenue Service; tender offer or secondary market purchase notices; notices of bid for auction rate or other securities; capital or other financing plans; litigation or enforcement action documents; documents relating to mergers, consolidations, reorganizations, insolvency or bankruptcy; changes of trustee, tender agent, remarketing agent, or other on-going party; materials relating to derivative or other similar transactions; and other uncategorized event-based disclosures.

The MSRB may combine two or more categories, may divide any category into two or more new categories or subcategories, or may form additional categories for purposes of indexing documents submitted as uncategorized financial/operating data or event-based disclosures, as appropriate, based on the types of documents received.

In addition, for the categories of continuing disclosures listed below, a submitter may provide, in lieu of or in addition to a continuing disclosure document, a statement of the information indicated below by means of a text/data input field: **contractual** undertaking of an issuer or obligated person to prepare audited financial statements pursuant to generally accepted accounting principles as established by GASB or FASB, as applicable; **contractual** undertaking of an issuer or obligated person to submit annual financial information to EMMA within 120 calendar days (or, through December 31, 2013, within 150 calendar days) after the end of the applicable fiscal year; and URL of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information. Submitters also may **indicate any** change or **rescission of** **[**rescind**]** any such **contractual** undertaking or change or remove any such URL at any time by means of a text/data input field, and any such changes, rescissions or removals will be reflected on the EMMA portal; provided that **a contractual** **[**an**]** undertaking of an issuer or obligated person to submit annual financial information to EMMA within 150 calendar days after the end of the applicable fiscal year will continue to be displayed on the EMMA portal through June 30, 2014, and will automatically cease to be displayed on the

EMMA portal after such date, unless the issuer or obligated person has previously changed or rescinded such **contractual** undertaking **and has indicated such change or rescission through the text/data input field.**

Information to be Submitted. No change.

Submitters. No change.

Public Availability of Continuing Disclosure Documents

No additional changes.

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Discussion of Changes Proposed in Amendment No. 2

Introduction

Among other things, the pending proposal would permit issuers, obligated persons and their agents to make voluntary submissions to the EMMA 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 included, among other things:

- an 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"), or pursuant to GAAP as established by the Financial Accounting Standards Board ("FASB"), as applicable to such issuer or obligated person and as further described below (the "voluntary GAAP undertaking");[3] and

- an issuer's or obligated persons' undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year or, as a transitional alternative that may be elected through December 31, 2013, within 150 calendar days

[3] In response to the comments received on the original proposed rule change, as discussed below, Amendment No. 1 modified the original proposed rule change by permitting issuers and obligated persons to elect either the GASB standard or the FASB standard for GAAP, as appropriate. The original proposed rule change only contemplated the use of the GASB standard.

after the end of the applicable fiscal year, as further described below (the "voluntary annual filing undertaking").[4]

Securities and Exchange Commission Amendment Request

The MSRB received a request from Commission staff on May 12, 2010 to amend the pending proposal to clarify that the voluntary GAAP undertaking and the voluntary annual filing undertaking should be made in continuing disclosure agreements (or amendments thereto) so that the indicator on EMMA would reflect the existence of such a contractual obligation in a continuing disclosure agreement (the "Commission Amendment Request").[5] After discussions with Commission staff and based on the Commission Amendment Request, the MSRB agreed to file this Amendment No. 2. This Amendment No. 2 modifies the portions of the pending proposal relating to the voluntary GAAP undertaking and the voluntary annual filing undertaking only and does not effect any other changes to the EMMA primary market disclosure service or the EMMA continuing disclosure service as set forth in the pending proposal, except with respect to the effective date as discussed below.

Amendments to Voluntary GAAP Undertaking and Voluntary Annual Filing Undertaking

Voluntary GAAP Undertaking. Amendment No. 1 described the modified voluntary GAAP undertaking as consisting 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 will prepare its audited financial statements in accordance with GAAP. The MSRB contemplated that state or local governments or any other entities to which GASB standards are applicable would apply GAAP as established by GASB and that any other entities to which FASB standards are applicable would apply GAAP as established by FASB. The issuer or obligated person entering into the voluntary GAAP undertaking would indicate such undertaking, and the applicable standard under which its audited financial statements are prepared, through the EMMA continuing disclosure service. The fact that an issuer or obligated person has entered into a voluntary GAAP undertaking, and the standard under which audited financial statements are to be prepared, would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the municipal securities to which such undertaking applies.

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4 In response to the comments received on the original proposed rule change, as discussed below, Amendment No. 1 modified the original proposed rule change by permitting issuers and obligated persons to elect to undertake to submit annual financial information either within 120 days or 150 days after the end of the fiscal year. The original proposed rule change only contemplated a 120 day timeframe.

5 *See* letter dated May 12, 2010 from Martha Mahan Haines, Chief, Office of Municipal Securities, Division of Trading and Markets, Commission, to Lynnette Hotchkiss, Executive Director, MSRB.

Based on the Commission Amendment Request, this Amendment No. 2 clarifies that the EMMA indicator with regard to the voluntary GAAP undertaking would be indicative of an issuer's or obligated person's voluntary undertaking, entered into as a contractual obligation, for the benefit of bondholders, under a continuing disclosure agreement or another contract, that it will prepare its audited financial statements in accordance with GAAP, either based on GASB or FASB standards as appropriate. If the issuer or obligated person later rescinds such undertaking through an amendment to its continuing disclosure agreement or other contractual arrangement, the issuer or obligated person would be expected to remove the indicator of its voluntary GAAP undertaking on EMMA. As a result of the changes made by this Amendment No. 2 to the voluntary GAAP undertaking provisions to limit its use solely to situations where such undertaking represents a contractual obligation, the statement by the MSRB in Amendment No. 1 to the effect that the making of a voluntary GAAP undertaking through EMMA by an issuer or obligated person would reflect the *bona fide* intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person is no longer applicable.

The MSRB would not review whether an entity has selected the appropriate accounting standard, would not review or confirm the conformity of submitted audited financial statements to GAAP, and would not review whether the information submitted by such entity to the EMMA continuing disclosure service regarding the voluntary GAAP undertaking accurately reflects the provisions of, or is included within, the continuing disclosure agreement or other contractual arrangement of such entity.

Voluntary Annual Filing Undertaking. Amendment No. 1 described the voluntary annual filing undertaking as consisting 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 Securities Exchange Act of 1934 (the "Exchange Act") by no later than 120 calendar days after the end of such issuer's or obligated person's fiscal year (the "120 day undertaking").[6] Alternatively, to and including December 31, 2013, the EMMA continuing disclosure service will provide the option for an issuer or obligated person to indicate its undertaking to submit to EMMA its annual financial information by no later than 150 calendar days after the end of such issuer's or obligated person's fiscal year (the "transitional

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6 Under the Exchange 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.

150 day undertaking").[7] An issuer or obligated person that has made a transitional 150 day undertaking may convert such election to a 120 day undertaking at any time. On and after January 1, 2014, the transitional 150 day undertaking option would no longer be available. The fact that an issuer or obligated person has entered into a voluntary annual filing undertaking would be prominently disclosed on the EMMA web portal as a distinctive characteristic of the securities to which such undertaking applies. A transitional 150 day undertaking would continue to be displayed on the EMMA web portal through June 30, 2014, and would automatically cease to be displayed on the EMMA web portal after such date, unless the issuer or obligated person has previously changed or rescinded such undertaking. An issuer or obligated person that has made a voluntary annual filing undertaking may later rescind such undertaking, which would be reflected on the EMMA web portal.

Based on the Commission Amendment Request, this Amendment No. 2 clarifies that the EMMA indicator with regard to the voluntary annual filing undertaking would be indicative of an issuer's or obligated person's voluntary undertaking, entered into as a contractual obligation, for the benefit of bondholders, under a continuing disclosure agreement or another contract, that it will submit to EMMA its annual financial information as contemplated under Exchange Act Rule 15c2-12 by no later than 120 calendar days (or 150 calendar days, in the case of the transitional 150 day undertaking option) after the end of such issuer's or obligated person's fiscal year. If the issuer or obligated person later modifies the timeframe for submitting the annual financial information in its continuing disclosure agreement or other contractual arrangement to a period longer than contemplated by the voluntary annual filing undertaking, the issuer or obligated person would be expected to remove the indicator of its voluntary annual filing undertaking on EMMA. Since Amendment No. 2 modifies the pending proposal to limit the applicability of the voluntary annual filing undertaking solely to situations where such undertaking represents a contractual obligation, the statement by the MSRB in Amendment No. 1 to the effect that the making of a voluntary annual filing undertaking through EMMA by an issuer or obligated person would reflect the *bona fide* intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person is longer applicable. In addition, as a result of this Amendment No. 2, the statement in Amendment No. 1 to the effect that the MSRB would view an issuer's or obligated person's performance pursuant to the voluntary annual filing undertaking as distinct from any performance obligations under its continuing disclosure agreement entered into consistent with Rule 15c2-12 also is no longer applicable.

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7 The option to elect, through December 31, 2013, a transitional 150 day undertaking acknowledges that the 120 day undertaking may not be immediately achievable by many issuers and obligated persons, as described in the comments discussed below, and is designed to provide a means by which to recognize issuers and obligated persons that are taking steps toward ultimately making their annual financial information available within 120 days of fiscal year end in the future. Of course, those issuers and obligated persons that are already able to make their annual financial information available within 120 days or fewer after the end of the fiscal year could make the 120 day undertaking immediately.

The MSRB would not review or confirm the compliance of an issuer or obligated person with its voluntary annual filing undertaking and would not review whether the information submitted by such entity to the EMMA continuing disclosure service regarding the voluntary annual filing undertaking accurately reflects the provisions of, or is included within, the continuing disclosure agreement or other contractual arrangement of such entity.

Manner of Submission. Issuers and obligated persons would indicate the existence of a voluntary GAAP undertaking or voluntary annual filing undertaking through a data input election on EMMA. Changes to or rescissions of such voluntary contractual undertakings could also be indicated through the same EMMA interface process.

<u>Discussion of Comments Received by the Commission</u>

The Commission received 24 comment letters[8] regarding the original proposed rule change. Based on the MSRB's consideration of the comments and further discussion with Commission staff regarding the original proposed rule change, the MSRB filed Amendment No. 1. Amendment No. 1 includes a discussion of the comments to the original proposed rule

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8 The Commission received comments from the City of Brookfield, Wisconsin ("Brookfield"); Connecticut State Treasurer ("August 20, 2009 Connecticut Letter"); E-Certus, Inc. ("E-Certus"); Government Finance Officers Association (Esser, Executive Director and CEO) ("August 17, 2009 GFOA Letter"); Government Finance Officers Association (Gaffney, Director, Federal Liaison Center) (GFOA 2"); Village of Greendale, Wisconsin ("Greendale"); Village of Hinsdale, Illinois ("Hinsdale"); Investment Company Institute ("ICI"); Inland Empire Utilities Agency ("Inland"); International City/County Management Association, National Association of Counties, National Association of State Auditors, Comptrollers and Treasurers, National League of Cities, U.S. Conference of Mayors, American Public Power Association, and Council on Infrastructure Financing Authorities, jointly ("Joint Issuer Groups"); Township of Lower Merion, Pennsylvania ("Lower Merion"); Michigan State Treasurer ("Michigan"); National Association of Bond Lawyers ("NABL"); National Association of Health and Educational Facilities Finance Authorities ("NAHEFFA"); National Association of State Treasurers ("NAST"); Oregon Municipal Finance Officers Association ("OMFOA"); City of Portland, Oregon ("Portland"); City of Rio Rancho, Rio Rancho, New Mexico ("Rio Rancho"); City of Rock Hill, South Carolina ("Rock Hill"); Rutherford County, Tennessee ("Rutherford"); Securities Industry and Financial Markets Association ("SIFMA"); State of Tennessee ("Tennessee"); Utah Government Finance Officers Association ("UGFOA"); Virginia Government Finance Officers' Association ("VGFOA"); and Virginia Government Finance Officers' Association (Wallingford, Executive Board Member) ("VGOA 2"). These comment letters are posted on the Commission's Web site at http://www.sec.gov/comments/sr-msrb-2009-10/msrb200910.shtml.

change.[9] The Commission received 3 comment letters regarding Amendment No. 1[10] and the Commission has requested that the MSRB respond. The MSRB will also address certain of the outstanding concerns that were raised by commentators to the original proposed rule change in connection with the voluntary annual filing undertaking and the voluntary GAAP undertaking.

Virtually all commentators to the original proposed rule change supported the proposals to submit voluntary information to EMMA and the ability of issuers and obligated persons[11] to post links to other sources of disclosure information. However, most commentators opposed the voluntary annual filing undertaking. Commentators to Amendment No. 1 expressed continued discontent with the portions relating to voluntary annual filing undertaking. Below is a discussion of the comments raised by commentators to the original proposed rule change and Amendment No. 1 by topic.

Voluntary Annual Filing Undertaking

In the original proposed rule change, the MSRB provided a timeframe of 120 days after the end of the fiscal year for issuers to voluntarily submit annual financial information, as contemplated under Exchange Act Rule 15c2-12, to EMMA. In response to commentators concerns with issuer's ability to meet the 120 day timeframe as discussed below, the MSRB provided in Amendment No. 1 a transitional option for issuers to elect a 150 day undertaking as an alternative to the 120 day undertaking. This alternative election would provide issuers seeking to make the voluntary annual filing undertaking, but that are not currently able to meet a 120 day timeframe, with a reasonable opportunity to overcome existing barriers to more rapid dissemination of financial information in an orderly and cost-effective manner. Commission staff has indicated that this alternative election would be an appropriate transitional timeframe. This option would only be available on a temporary basis to provide a pathway toward achieving the 120 day timeframe.

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9 See Amendment No. 1.

10 See letters from Denise L. Nappier, Treasurer, State of Connecticut, to Elizabeth Murphy, Commission Secretary, dated January 27, 2010 ("January 27, 2010 Connecticut Letter" and together with August 20, 2009 Connecticut Letter, "Connecticut"); Jeffrey L. Esser, Executive Director and CEO, Government Finance Officers Association, Washington, District of Columbia, dated January 25, 2010 ("January 25, 2010 GFOA Letter" and together with August 17, 2009 GFOA Letter, "GFOA Letter"); and Steven Apfelbacher, President, National Association of Independent Public Finance Advisors, dated February 5, 2010 ("NAIPFA").

11 For purposes of this discussion of comments, references herein to "issuers" include obligated persons, unless the context otherwise requires.

A large majority of the commentators expressed concerns about the proposed category in Amendment No. 1 that would allow issuers to undertake to voluntarily submit annual financial information within 120 days after the end of their fiscal year. Such opposition remained strong even with the addition of the transitional alternative undertaking of 150 days after the end of the fiscal year that would be available through December 31, 2013. In essence, the commentators that opposed the voluntary annual filing undertaking asserted that setting a deadline of 120 days is arbitrary, unnecessary, harmful and an excessive burden on issuers, and that the 120 day timeframe is also impractical or is a standard that cannot be met by issuers and may cause a negative perception in the market for those issuers that fail to voluntarily submit annual financial information within the proposed 120 day timeframe.

Below are the various factors that were raised by the commentators regarding the voluntary submission of annual financial information.

- *voluntary annual filing undertaking viewed as arbitrary and unnecessary*

GFOA, NAHEFFA, NAST and Tennessee made reference to the "arbitrary" nature of the 120 day timeframe. Specifically, NAHEFFA stated "the arbitrary deadline signals to the market that committing to provide such financial information on this schedule is commendable" but that those issuers that cannot meet the proposed timeframe may be viewed in the marketplace as being delinquent in making required filings.

MSRB Response: The determination to establish 120 days as the timeframe in the original proposed rule change was not arbitrary. Under the federal securities laws, 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. In consultation with the Commission, it was believed that providing issuers with 120 days to voluntarily submit annual financial information for purposes of the undertaking would provide an ample timeframe to accommodate the 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 Rule 15c2-12. The alternative 150 day timeframe was added in Amendment No. 1 to provide additional time for undertaking such steps during a transitional period in response to concerns that, as state and local governments currently prepare their financial information, the additional 30 days beyond the Form 10-K timeframe for non-accelerated filers would not be sufficient for many municipal issuers. The MSRB believes that the timeframe provided for under the pending proposal was arrived at on a rational basis.

Although the voluntary annual filing undertaking would, by its very nature, not be a requirement and thus it would be unnecessary for an issuer to make such undertaking, it is appropriate for the MSRB to make such information available to the municipal market through EMMA, should the information be provided. In conjunction with a separate MSRB proposal filed with the Commission to require underwriters, in connection with new issues they underwrite, to provide to EMMA information regarding the deadline for submitting annual financial information by issuers to EMMA under their continuing disclosure agreements (the "companion proposal"),[12] the voluntary annual filing undertaking would assist investors in understanding when they can expect to have access to issuers' annual financial information. Therefore, investors would be better prepared to undertake any analyses or other steps they deem appropriate in connection with evaluating their investment decisions and municipal securities holdings. Issuers that seek to make their financial information available under the voluntary annual filing undertaking also would be bringing the timing of their disclosures into closer conformity with the timeframes that investors in the registered securities market have come to rely upon. Recent experiences of issuers who have begun to issue Build America Bonds that are marketed at least in part to such other investor types suggest that important benefits both to investors and issuers may be realized from moving toward a more universal disclosure timeframe.

- *voluntary annual filing undertaking viewed as impracticable or impossible and does not take into account variances in the size and complexities of issuers which may impact their ability to meet the timeframes in the undertaking*

Connecticut, which opposed the voluntary annual filing undertaking as structured in the original proposed rule change, reiterated its opposition to the voluntary filing of annual reports even with the longer 150 days following the end of a fiscal year as modified in Amendment No. 1 because it viewed the pending proposal as continuing to fail to address the impracticality of meeting such timeframe. Other commentators agreed with Connecticut's impracticality concerns and also noted the overall inability or difficulty of governments to meet such timeframe.[13] Hinsdale believes the 120 day timeframe is a "good start towards meeting the objective of making financial statements of governments timely and useful in the public securities market."

Commentators argued that the original proposed rule change failed to take into account the variances in issuers, including, but not limited to, size and complexity. Brookfield noted that as a smaller jurisdiction it has many duties in addition to financial reporting and that moving up an audit schedule, "is not practical due to the nature of their services and capabilities." Connecticut noted that the voluntary filing schedule is untenable because it places an "onerous burden on large and complex muni issuers". Other commentators made similar arguments regarding the variances amongst issuers, including GFOA which noted there may be "several unintended adverse consequences of promoting a "one-size fits all" 120 day deadline." Similar concerns were raised by other commentators.[14]

GFOA further stated that many governments must include data from legally separate component units, which they do not control, in their year-end financials. In addition it was noted by VGFOA "that obtaining a component unit's audited financial information in time for the

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12 *See* File No. SR-MSRB-2009-09 originally filed on July 14, 2009, as amended.

13 See Greendale, Joint Issuer Groups, NAST, Rio Rancho, Rutherford, Tennessee, UGFOA and VGFOA.

14 See Greendale, Inland and NAHEFFA.

primary government to finish its own financial statements would create significant strain on the component unit," a sentiment that was supported by other commentators.[15] Finally, VGFOA noted that the 120 day requirement may conflict with state law.

MSRB Response: The MSRB understands that each issuer will need to, and the MSRB believes that it is crucial that each issuer in fact, assess whether meeting the timeframe of the voluntary undertaking is impracticable or impossible under the specific facts and circumstances that such issuer faces. The MSRB expects that some issuers will find the voluntary undertaking to be possible and practicable while others will find it to be either impossible or, if possible, impracticable. Of those issuers that view the voluntary undertaking as currently impossible or impracticable, some may determine to make adjustments to their current processes or to devote additional resources to meet the undertaking at a future date, and others may determine that such efforts may better be devoted to ensuring the quality and completeness of the financial information or for other public purposes of the issuer.

In addition, the MSRB is aware that the nature of municipal issuers varies widely and that such differences can be classified in any number of different, sometimes mutually exclusive, but largely equally valid manners. These significant differences may in fact make it more difficult for some types of issuers, or issuers in certain states, or issuers facing certain sets of facts and circumstances, to make and comply with the voluntary undertaking. For example, the MSRB understands that some issuers may be separate and distinct units in governmental structures that require information from third parties to complete their audited financial statements, and such third parties may operate under timeframes that differ from the issuers' own fiscal year cycles, thereby creating additional barriers to meeting the timeframe of the voluntary undertaking.

Given this complex variety of issuer types and the high likelihood that appreciable percentages of issuers would not be well positioned to make the voluntary undertaking, the MSRB believes that a single consistent voluntary submission timeframe available to all issuers with the full knowledge that only some issuers would be able to make the voluntary undertaking at the current time provides an appropriately uniform initial target under the voluntary annual filing undertaking, rather than making an attempt to parse the essential structure of the marketplace to develop numerous separate timeframes based on very limited information. After a period of experience with the uniform timeframe of the undertaking, the MSRB could revisit, in consultation with market participants and the Commission, the question of whether multiple timeframes for different types of issuers would be appropriate.

- *voluntary annual filing undertaking viewed as creating risk of negative perception of issuers that do not make the voluntary undertaking and thereby creating a two-tiered market based on the voluntary undertaking*

Connecticut stated that the creation of the voluntary annual filing undertaking and the decision by an issuer not to make the undertaking could carry an "unjustified negative

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15 See GFOA, Joint Issuer Groups, NAST and VGFOA.

perception" and could create "a two-tier perception in the bond markets." In addition, Inland stated "the many jurisdictions that will fail to meet this standard will carry a figurative 'black eye' in the mind of investors."

MSRB Response: The MSRB does not believe that the decision by an issuer not to voluntarily submit annual financial information under the voluntary annual filing undertaking will, by itself, cause an inappropriate negative perception of such issuer. Although the voluntary undertaking will assist investors in framing their expectations as to the timing of disclosure, it would not serve as a proxy for the accuracy and completeness of the financial information nor of the credit quality of the issuer. The EMMA portal will provide clear disclosure of the purpose of the voluntary undertaking and that the undertaking should not be viewed as indicative of the accuracy or completeness of financial information or of the financial health of the issuer. Thus, the voluntary undertaking as disclosed on the EMMA portal will be an accurate representation of an issuer's affirmative undertaking as to the timing of its disclosure, and nothing more. No indicator will be provided for issuers that choose not to make the voluntary undertaking.

The MSRB also understands concerns that the voluntary undertaking could create a two-tiered system in the market between those issuers that choose to make the voluntary undertaking and those that do not. However, the MSRB does not believe that there is any significant risk of such a tiered market perception developing in the near future based solely on the voluntary undertaking and the MSRB has noted that it will make the appropriate EMMA portal disclosures regarding the limited nature of the undertaking to help minimize the possibility that market participants may place undue emphasis on a single factor when making an investment decision. The MSRB believes that the marketplace would rightly view the voluntary undertaking as an initial step in a process toward more rapid dissemination of disclosure information to the public, and not as a selection filter for favored investments.

- *voluntary annual filing undertaking viewed as creating an excessive burden on issuers and harming investors due to reduced quality of disclosures to meet the timeframe*

GFOA states that the timeframes under the voluntary undertaking "would increase both the costs associated with preparing annual financial reports and auditing costs." Other commentators also expressed concerns with costs (both fiscal and resource oriented) associated with issuers voluntarily submitting annual financial information.[16] GFOA also noted that to meet the 120 day timeframe "governments may be forced to use estimates, rather than actual data….this practice would decrease the reliability of information and is not beneficial to the government or to investors." A number of commentators agreed that there would be increased usage of estimates to meet the 120 day timeframe as well as less accurate audits because of the increased use of estimates.[17] A number of commentators also noted that there are a limited number of auditing firms that are able or capable of completing governmental audits and NAST

16 See Brookfield, NAHEFFA, OMFOA, Portland and VGFOA.

17 See Brookfield, GFOA, Issuers, OMFOA and Portland.

stated the 120 day timeframe "could lead to governments using auditors who do not have the extensive governmental accounting background needed to review these statements." GFOA, Joint Issuer Group, OMFOA and Portland agreed.

Commentators also noted that the voluntary submission that issuers would aspire to comply with might be "possibly at the expense of providing the highest quality financial information."[18] GFOA noted, "By creating 120 and 150 day deadlines, governments might feel forced to scale back the information they provide to a plain set of basic financial statements, versus the robust information that is found in a CAFR today." Brookfield agreed with the possibility of scaled back comprehensive annual financial reports ("CAFRs") as a result of the proposed rule change. Also, Brookfield noted that it might consider not preparing a CAFR due to time constraints of the timeframe under the voluntary annual filing undertaking and that the CAFR contains "statistical and other financial information beyond the basic financial statements required by GAAP, and in general has significant information for use by investors and other market participants beyond that provided in many private sector financial statements." Joint Issuer Groups agreed and GFOA noted, "Promoting a 120 day deadline might reasonably be expected to persuade any number of such governments to abandon a CAFR altogether in favor of a plain set of basic financial information."

MSRB Response: The MSRB believes that the voluntary annual filing undertaking would be beneficial, rather than harmful, to investors to the extent that an issuer felt that it was able to meet the undertaking's timeframe and voluntarily elected to comply with the undertaking. The existence of this optional undertaking is not intended to create an inference that issuers should sacrifice the quality of the information provided in their annual filings in order to meet a specific timeframe, and the MSRB does not believe that the undertaking would have such a negative effect. More specifically, the MSRB believes that efforts to provide financial information within the suggested timeframe should not be at the expense of accuracy and completeness, and the EMMA portal would include disclosures reflecting this view to ensure that issuers that have refrained from making the undertaking in order to focus the necessary resources and time on preparing their financial information in a full and accurate manner are not inappropriately penalized by the marketplace for this decision.

As the MSRB noted in Amendment No. 1, the MSRB would disclose on the EMMA portal that the annual filing undertaking is voluntary, is solely indicative of the timing by which the annual financial information is intended to be made available and is not indicative of the accuracy or completeness of the annual financial information or of the financial health of the issuer. Thus, no negative inference regarding such accuracy, completeness or financial health would be warranted from a decision by an issuer not to make such an undertaking. No indicator will be provided for issuers that choose not to make the voluntary undertaking. Finally, the MSRB would make clear that an investor should not choose an investment based solely on the timing of disclosures.

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18 See Lower Merion.

The MSRB also does not believe that the voluntary annual filing undertaking would create an excessive burden on issuers. The MSRB reiterates that this undertaking is voluntary in nature and is not mandated. Rather, any issuer considering whether to make such a voluntary undertaking by providing in its continuing disclosure agreement to submit its annual filing within the specified timeframe should consider whether any additional efforts that might be needed to comply with the undertaking is an appropriate use of its resources in light of the issuer's other needs and obligations. If an issuer does not have adequate resources to meet the suggested timeframe for submitting annual financial information to EMMA, or if it believes that any such resources are better utilized to improve the quality of such information or for other public purposes, the issuer need not expend such resources and should not realize a corresponding negative impact. Some issuers may find that more efficient production of their annual financial information in order to meet the proposed timeframe could result in long-term cost savings as new processes are put in place. Other issuers may determine that efforts needed to produce such information more rapidly might detract from their ability to devote resources needed to ensure completeness and accuracy of the information. In the first case, issuers may find it appropriate and not unduly burdensome to make the voluntary undertaking; in the second case, issuers may rationally determine not to make the voluntary undertaking.

- *voluntary annual filing undertaking viewed as potential becoming mandatory*

Several commentators believe that the voluntary annual filing undertaking could result in the Commission mandating that issuers comply with the 120 day timeframe. The Joint Issuer Groups stated "such efforts by the SEC or the MSRB may indirectly make such voluntary submissions mandatory obligations in the future." Further, NAHEFFA noted that the voluntary undertakings "could become de facto requirements which cannot be justified under the law as mandatory." Other commentators made similar arguments,[19] including NAIPFA, which stated "it is essential, therefore, that care be taken that any identified or highlighted voluntary submissions not have unintended outcomes or migrate to become the new minimum for disclosure instead of the actual standards." ICI, on the other hand, stated that the 120 day timeframe will promote market transparency and provide investors in the municipal markets with needed information regarding municipal bonds and will assist industry participants that have pressed for the "the establishment of a meaningful, mandatory timeframe for filing financial reports."

MSRB Response: As the commentators are well aware, the MSRB has no authority to regulate issuers and therefore could not establish a mandatory standard. As discussed below, the GFOA has established a 180 day timeframe for completion of a CAFR – a standard that has been in place for many years – as one of the requirements for receiving recognition from GFOA through its Certificate of Achievement for Excellence in Financial Reporting, and such 180 day timeframe has not itself served to establish a *de facto* standard. The commentators have provided abundant information to make clear that there is little likelihood that the voluntary annual filing undertaking would result, by itself, in the establishment of a single market-wide *de facto* standard any time in the near future. The MSRB views the possibility of the timeframe of

[19] See Brookfield, Connecticut, Inland, NAST and VGFOA.

the voluntary annual financial undertaking itself becoming a *de facto* standard as highly conjectural at best.

In the past, any such *de facto* standards have been the result of slow evolution in the market through natural economic forces or the result of collaboration among the various interested parties, such as with the evolving *de facto* standard for quarterly information provided by many hospital borrowers arising from the collaborative work of issuers, borrowers and investors in recent years. As noted above, the MSRB believes that the single consistent voluntary submission timeframe under the voluntary annual filing undertaking, available to all issuers with the full knowledge that only some issuers would be able to make the voluntary undertaking at the current time, would serve to provided an appropriately uniform initial target for those market participants seeking to work toward more timely availability of financial information in the marketplace. As market participants work together to develop more certain standards for specific types of issues or issuers, or for particular market sectors, the MSRB would be able to revisit the precise nature of the voluntary undertaking armed with the consensus views of such market participants and the experience of the initial market-wide timeframe under the voluntary undertaking as the bases for any potential adjustments to the specific features of such undertaking.

- *voluntary annual filing undertaking should provide for a 180 day timeframe or a longer alternative timeframe to submit annual financial information*

The GFOA noted that its Certificate of Achievement for Excellence in Financial Reporting Program sets a 180 day filing deadline for financial information from issuers, which many issuers struggle to meet. NAIPFA believes that the CAFR deadline is “achievable given current GASB and FASB standards” and “has demonstrated itself as a standard that is achievable, but demanding.” Inland, Joint Issuer Groups, Michigan, NAST, OMFOA, Portland and UGFOA agreed with either setting the CAFR deadline as the submission standard under the voluntary undertaking, because it is practicable and consistent with municipal practices, or establishing even longer time alternatives. In addition, Michigan noted that annual financial information should be submitted when it becomes available and NAIPFA stated that “direction should be given to GASB and FASB to see if there is an effective way to modify the existing requirements so that issuers could successfully prepare audited financial statement in a shorter period of time.”

MSRB Response: The MSRB appreciates the achievements of issuers in meeting the various requirements established by GFOA in connection with its CAFR certificate program, including but not limited to the preparation of financial statements within 180 days of the end of the fiscal year. The scope and purpose of the voluntary annual filing undertaking, as amended by the Amendment No. 2, is more limited to providing a means by which an issuer may disclose its contractual commitment to provide access to annual financial information within the suggested timeframe, which is a shorter period than is currently the norm in the municipal marketplace. Thus, the timeframe set forth in the voluntary undertaking should be shorter than other timeframes currently in use, such as the GFOA CAFR certificate program’s 180 day timeframe.

The transitional 150 day timeframe included in Amendment No. 1 provides a mid-point between the original 120 day timeframe of the voluntary undertaking and the GFOA's 180 timeframe.

- *instead of the voluntary annual filing undertaking, EMMA should allow issuers to specify a specific date by which annual financial information is expected to be submitted and should indicate whether the issuer was in compliance with such deadline*

NAHEFFA noted that it should be enough that the issuer has certified that it will file its annual financial information by a date certain and has made the filings specified by its continuing disclosure agreements. NAHEFFA further noted that "There appears to be nothing to preclude the issuer from effectively advertising the undertaking on EMMA, and as a result receiving preferred status, irrespective of actual compliance." GFOA and Inland also noted that they could support a voluntary disclosure field indicating that a government was, in fact, in compliance with its continuing disclosure agreement obligations. Inland suggested that the submission of the voluntary disclosure information be provided consistent with other legal documents such as bond indentures and local ordinances/bylaws that have date requirements for the submission of financial statements.

MSRB Response: The MSRB has proposed in the companion proposal to require underwriters, in connection with new issues they underwrite, to provide to EMMA information regarding the deadline for submitting annual financial information by issuers to EMMA pursuant to their continuing disclosure agreements. This deadline would be displayed on the EMMA portal in close proximity to information showing the timing of actual submissions made by issuers of their annual financial information, thus achieving the objectives set out by the commentators. The voluntary annual filing undertaking would provide a process for issuers to advise investors of their contractual commitment to make their annual financial information available within 120 days after the end of the fiscal year. Information regarding the voluntary undertaking also would be displayed in close proximity to information showing the timing of actual submissions made by issuers, thus providing a method for investors to check on the issuer's performance in connection with the undertaking.

Voluntary GAAP Undertaking

The original proposed rule change included an election for issuers to undertake to prepare their financial statements according to generally accepted accounting principles (GAAP) as established by the Governmental Accounting Standards Board (GASB). Amendment No. 1 also provided for issuers to be able to indicate either GASB or the Financial Accounting Standards Board (FASB) as the standard setting body for the version of GAAP used in preparation of the financial statements, due primarily to the fact that many conduit borrowers are private entities to which FASB standards apply rather than governmental entities.

A few commentators expressed concerns about the voluntary GAAP undertaking. In commenting on Amendment No. 1, Connecticut noted that while it is moving toward full GAAP compliance, "the State has not yet prescribed compliance with either." Connecticut suggested that a possible solution is to "provide a text field that would allow the State to establish that it followed "modified GAAP." Commentators to the original proposed rule change noted that many conduit borrowers may be subject to FASB standards rather than GASB and the MSRB addressed these concerns in Amendment No. 1, which added FASB as a choice for the applicable GAAP standard-setting body along with GASB. In addition, GFOA did not support the modified proposal in Amendment No. 1 to have a field that references "a particular standard-setting body" and noted that "it is redundant for the MSRB to also include the body in which GAAP standards are established. We therefore suggest that the MSRB create a field that indicates only whether the financial statements are prepared in accordance with GAAP." NAIPFA agreed with issuers and conduit borrowers designating whether their audited financials are prepared pursuant to GAAP but not "whether using GASB standards since some issuers may be required to use other GAAP standards."

MSRB Response: The MSRB continues to believe that permitting investors to understand the standards applied to the preparation of an issuer's or conduit borrower's financial statements would be valuable, which many of the commentators on the original proposed rule change supported. As noted in Amendment No. 1, each of the undertakings in the proposed rule change would permit a free text input field permitting issuers to include additional information relating to each such item that they may deem appropriate with respect thereto for public dissemination. We believe that this should provide such issuers with adequate opportunity to disclose appropriate information to investors.

Uniform Resource Locator ("URL")

The pending proposal would permit issuers to post URLs for their Internet-based investor relations or other repository of financial/operating information. In responding to Amendment No. 1, GFOA encouraged the MSRB to allow governments to include multiple links, with a description of each, so that "as much of a government's financial information as possible can easily be accessed through EMMA."

MSRB Response: The MSRB intends to provide flexibility to issuers regarding the posting of appropriate links that will provide the ability suggested by GFOA.

GFOA Certificate of Achievement for Excellence in Financial Reporting

The original proposed rule change proposed an option for an issuer to indicate on a voluntary basis that it has been awarded the Certificate of Achievement for Excellence in Financial Reporting Program by the GFOA in connection with the preparation of its CAFR. Amendment No. 1 eliminated this element since the EMMA web site already provides a venue for submitting CAFRs (which include the GFOA certificate) and a new capability to designate a submission as such for display on the EMMA portal would soon be incorporated into the system. Such capability has since become available to submitters. In response to Amendment No. 1, GFOA requests that this element be retained.

MSRB Response: The MSRB continues to believe that the current channels for disseminating CAFRs and the related GFOA certificate are adequate but may consider further action in this area in the future.

Miscellaneous Comments

In response to Amendment No. 1, NAIPFA provided a series of comments and suggestions relating to other elements of the pending proposal. These include: (i) support for the proposal to permit issuers to post preliminary official statements, other related pre-sale documents and advance refunding documents; (ii) a suggested edit in the facility language for the EMMA primary market disclosure service regarding issuers being able to designate an agent for purposes of making primary market submissions; (iii) support for voluntary submission of information on swaps, swaptions and variable rate debt; and (iv) encouragement for the MSRB to pursue submission of ratings from rating agencies.

MSRB Response: The MSRB appreciates these various comments and suggestions. With regard to the suggestion regarding facility language, the MSRB believes that the language in Amendment No. 1 appropriately ensures that an issuer can designate an agent and notes that the filing indicates that the term "designating underwriter" has been changed to "designating party" specifically to permit an issuer to make such designation. In addition, the MSRB currently is in the early stages of developing a process to receive electronic feeds of municipal securities credit rating information from Nationally Recognized Statistical Rating Organizations for purposes of displaying on the EMMA portal.

<u>Effective Date for Proposed Rule Change</u>

MSRB requests that the Commission approve a revised 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..