

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59966; File No. SR-MSRB-2009-02]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Relating to the Establishment of a Primary Market Disclosure Service and Trade Price Transparency Service of the Electronic Municipal Market Access System (EMMA®) and Amendments to MSRB Rules G-32 and G-36

May 21, 2009.

On March 23, 2009, the Municipal Securities Rulemaking Board (“MSRB”), filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to implement an electronic system for free public access to primary market disclosure documents and transaction price information for the municipal securities market through the MSRB’s Electronic Municipal Market Access system (“EMMA”). The proposed rule change was published for comment in the **Federal Register** on April 2, 2009.<sup>3</sup> The Commission received three comment letters on the proposed rule change.<sup>4</sup> On May 12, 2009 and May 18, 2009, the MSRB filed responses to the comment letters.<sup>5</sup> This order approves the proposed rule change.

The proposed rule change would: (i) Establish EMMA’s permanent primary market disclosure service for electronic submission and public availability on EMMA’s Internet portal of official

statements, advance refunding documents and related primary market documents and information; (ii) establish EMMA’s permanent transparency service making municipal securities transaction price data publicly available on the EMMA portal; (iii) establish a real-time subscription to the primary market document collection; (iv) terminate the existing pilot EMMA facility of the Municipal Securities Information Library (MSIL) system and suspend submissions of official statements, advance refunding documents and Forms G-36(OS) and G-36(ARD) to the MSIL system and (v) amend and consolidate current Rules G-32 and G-36 into new Rule G-32 on disclosures in connection with primary offerings, replace current Forms G-36(OS) and G-36(ARD) with new Form G-32, provide transitional submission requirements, and amend certain related recordkeeping requirements, to establish an “access equals delivery” standard for electronic official statement dissemination in the municipal securities market.

The MSRB requested approval of this proposed rule change, along with MSRB-2009-03 and MSRB-2009-04, by no later than May 22, 2009, so that the MSRB may commence operation of the EMMA services described therein, including but not limited to the permanent primary market disclosure service and pilot continuing disclosure service, on June 1, 2009.<sup>6</sup> A full description of the proposal is contained in the Commission’s Notice.<sup>7</sup>

As previously noted, the Commission received three comment letters relating to the proposed rule change.<sup>8</sup> One commenter, the ABA, expressed concerns regarding certain legal issues relating to the protection of its intellectual property and contractual rights in the CUSIP database (the “Database”) that it states have not yet been resolved. The ABA noted that it was the owner of the Database, which is administered by the CUSIP Service Bureau (“CSB”), as its exclusive licensee, and believed it was critical that these legal issues be resolved before the MSRB be allowed to move forward with the proposed expansion and full implementation of EMMA. It further requested that the operation of the EMMA Web site incorporate a variety of protections with respect to its intellectual property rights, including compliance with CSB’s current licensing practices, permissible use

guidelines, appropriate copyright notices and adequate security.<sup>9</sup>

In response to the ABA’s concerns, the MSRB and the CSB, as the ABA’s exclusive licensee, have entered into a memorandum of understanding dated May 15, 2009 (“MOU”) in which CSB expressly permits use of the CUSIP database for purposes, among other things, of displaying information on the MSRB’s EMMA public Web portal and for inclusion in data disseminated by the MSRB to subscribers of the EMMA data feed.<sup>10</sup> The MSRB has agreed in the MOU to provide certain safeguards with respect to the ABA’s intellectual property and contractual rights of the ABA in the Database. The Commission believes that the MSRB has taken sufficient action to ensure that all necessary arrangements will be in place in order to operate the permanent primary market disclosure service and pilot continuing disclosure service, as anticipated by the implementation date.

Another commenter, BFS, believed that the adoption of an “access equals delivery” standard for official statements would unintentionally result in less viewing of information by individual investors and suggested alternatives to obtaining industry efficiencies without reducing the number of investors that view information contained in official statements.<sup>11</sup> BFS cited to internal statistics generated in connection with the Commission’s adoption of rules on Internet availability of proxy materials in support of its view.<sup>12</sup> BFS also cited to the Commission’s recently adopted rules on delivery of summary mutual fund prospectuses and posting of the statutory prospectuses on the Internet as an alternative method of providing disclosure to investors while realizing cost savings.<sup>13</sup>

<sup>9</sup> See letter from the ABA, *supra* note 4.

<sup>10</sup> See Response Letter II, *supra* note 5. The MSRB stated that this agreement would expand and reposition existing language on the EMMA Web site to ensure that users of the EMMA Web site have a fuller understanding of the sources of information displayed on the EMMA Web site and of the proprietary rights of third parties (including but not limited to the proprietary rights of the ABA in the Database) in certain displayed data elements. Such language would advise users of the limitations on their use or re-use of any proprietary information accessed on the EMMA Web site, and users would be required to acknowledge such limitations before being provided access to any portion of the Database. Additional systemic and reporting mechanisms would be implemented to further protect against inappropriate use of the Database. See Response Letter I, *supra* note 5.

<sup>11</sup> See letter from the BFS, *supra* note 4.

<sup>12</sup> See Securities Exchange Act Release No. 55146 (January 22, 2007), 72 FR 4148 (January 29, 2007).

<sup>13</sup> See Securities Act Release No. 8998 (January 13, 2009), 74 FR 4546 (January 26, 2009).

<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. 59636 (March 27, 2009), 74 FR 15190 (“Commission’s Notice”).

<sup>4</sup> See letters from Douglas Adamson, Executive Vice President, Technical Services Division, American Bankers Association (“ABA”), dated April 24, 2009; Robert Schifellite, President, Broadridge Financial Solutions, Inc. (“BFS”), dated May 5, 2009; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated May 10, 2009.

Furthermore, on May 15, 2009, representatives of BFS met with Martha M. Haines, Chief and Mary N. Simpkins, Senior Special Counsel, Office of Municipal Securities, Division of Trading and Markets to discuss the proposed rule change and to provide additional materials related to their comments on the proposal. The materials may be found at <http://www.sec.gov/comments/sr-msrb-2009-02/msrb200902-2.pdf>.

<sup>5</sup> See letters from Ernesto A. Lanza, General Counsel, MSRB, to Elizabeth M. Murphy, Secretary, SEC, dated May 12, 2009 (“Response Letter I”) and May 18, 2009 (“Response Letter II”).

<sup>6</sup> See Response Letter II, *supra* note 5.

<sup>7</sup> See Commission Notice, *supra* note 3.

<sup>8</sup> See *supra* note 4.

The MSRB disagreed with BFS's comparison of on-line access to proxy materials with on-line access to official statements and, in Response Letter I, pointed out the differences between the two materials.<sup>14</sup> Specifically, the MSRB argued that: proxy statements are posted in a highly decentralized manner, whereas official statements are available on the centralized EMMA Web site specifically crafted for their presentation; proxy statements often are posted without any additional meaningful contextual information, whereas official statements are posted on EMMA along with transaction prices, rate/yield information and other relevant disclosures for the security being purchased and for all other securities in the marketplace, together with educational information to assist the individual investor in understanding the information in the official statement; proxy statements are unsolicited communications to a large group of investors triggered by company action (*i.e.*, the investor is passive), whereas the MSRB's official statement dissemination requirement is triggered by an investor taking action to purchase a municipal security; proxy statements typically relate to matters of a generalized importance relating to a company and normally do not relate directly to an investment, whereas official statements have direct relevance to the investor's investment; proxy statements are intended to provide information prior to an investor voting his or her proxy, whereas official statements (much like prospectuses) often serve to disclose the detailed terms of a security after the investment decision has already been made; and proxy statements generally have little value once the vote occurs, whereas official statements retain significant value for the remaining life of the security and would remain available to all investors throughout that period in EMMA's permanent library.

Furthermore, the MSRB believed that BFS seemed to place too much emphasis on cost savings as a reason for approving the proposed rule change. While acknowledging the sizeable cost saving associated with adoption of the proposal, the MSRB stated that it submitted the proposal primarily because of the significant improvements in the municipal securities disclosure system that would result from it. Specifically, the MSRB believed that the proposal would place individual investors on an equal footing with investment professionals with respect to access to key information and allow

such information to flow into the marketplace more quickly.

In addition, in response to BFS's suggestion of the summary mutual fund prospectus as a possible alternative, the MSRB stated that it will monitor the level of adoption of the summary prospectus in the mutual fund market, as well as the impact its use may have on the quality and timeliness of disclosure for mutual funds. Noting that it has no authority over the nature, content or timing of issuer disclosures in the municipal securities market and therefore could not adopt a requirement for the creation and use of summary official statements by municipal issuers, the MSRB believed that the experience in the mutual fund market with summary prospectuses could be instructive in crafting future disclosure initiatives in the municipal securities market. The Commission believes that the MSRB has provided a rational response to counter BFS's belief that an "access equals delivery" standard for official statements would reduce viewing by individual investors of the information, and agrees with the MSRB that the proposal would make information easily available to all market participants in the municipal securities market.

Finally, the third commenter, SIFMA, was very supportive of the EMMA system, but expressed concern with certain operational and timing issues.<sup>15</sup> Specifically, SIFMA requested that the proposed rule change conform to the rules applicable to the registered securities market by not requiring broker dealers to accommodate a customer's standing request for copies of official statements for all of his or her transactions with the dealer. SIFMA argued that such an accommodation would require dealers to undertake an enormous amount of expense for such a limited number of retail investors and that the costs of such changes would interfere with the ability of issuers and other market participants to achieve anticipated cost savings.

In response, the MSRB stated it was important to allow investors to establish standing instructions with their dealers to receive paper copies of official statements for all of their new issue purchases and not to obligate them to make transaction by transaction requests for paper copies.<sup>16</sup> Although the potential for costs savings was an important factor in the MSRB's proposal, the MSRB again indicated that such a factor does not trump the needs of individual investors to obtain the

disclosures they are due. The MSRB also stated that revised Rule G-32 would not obligate dealers to rely on access to electronic official statements on EMMA, and that those dealers who are not yet prepared to do so upon launch of the new rule provisions could continue to meet their official statement dissemination obligation through actual delivery of the official statement to customers as under current Rule G-32. Therefore, the MSRB did not believe any change was merited.

SIFMA also urged the MSRB to permit an underwriter to designate to the MSRB that information it has submitted to the new issue information dissemination system ("NIIDS") under revised Rule G-34 also be used for purposes of completing new Form G-32. SIFMA requested that the MSRB make a firm commitment to take the outbound information feed from NIIDS to pre-fill the G-32 forms beginning no later than 90 days after SEC approval of the rule change proposal.

In response, the MSRB stated that, as noted in its proposed rule change, it will continue working toward permitting dealers to designate to the MSRB that information they have submitted to NIIDS under Rule G-34 should also be used for purposes of completing new Form G-32. The MSRB will publish a notice advising dealers of the availability of such functionality once it becomes available, but that it was not prepared at this time to commit to a specific timeframe for making this functionality available and that approval of the proposed rule change should not be contingent on such a commitment.

Finally, SIFMA requested that the MSRB provide dealers at least 30 calendar days' notice prior to implementing the proposed rule change, citing various factors regarding holiday and vacation schedules and lack of training and usage materials. In response, the MSRB stated that it will announce training sessions for use of the EMMA submission system and publish its user manual in the near future, and will have staff available to assist users in transitioning to the new submission process. The MSRB also indicated that, while it could not commit to providing the length of notice requested, it would provide notification of the operational date as soon as it becomes available. The Commission believes that the MSRB has reasonably addressed the operational and timing concerns raised by SIFMA, and that the changes suggested by SIFMA are not warranted at this time.

The Commission has carefully considered the proposed rule change,

<sup>14</sup> See Response Letter I, *supra* note 5.

<sup>15</sup> See letter from SIFMA, *supra* note 4.

<sup>16</sup> See Response Letter I, *supra* note 5.

the comment letters received, and the MSRB's responses to the comment letters and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB and, in particular, the requirements of Section 15B(b)(2)(C) of the Act<sup>17</sup> and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.<sup>18</sup>

In particular, the Commission finds that the proposed rule change is consistent with the Act because it would serve as an additional mechanism by which the MSRB works toward removing impediments to and helping to perfect the mechanisms of a free and open market in municipal securities by providing a centralized venue for free public access to primary market disclosure documents and transaction price information for the municipal securities market through EMMA. The proposed rule change would provide greater access to primary market disclosure documents and transaction price information about municipal securities information to all participants in the municipal securities market on an equal basis, thereby removing potential barriers to obtaining such information, and will allow the municipal securities industry to produce more accurate trade reporting and transparency. Broad access to primary market disclosure documents and price transparency information through the EMMA portal should also assist in preventing fraudulent and manipulative acts and practices by improving the opportunity for public investors to access material information about issuers, their securities and the prices at which such securities trade. Furthermore, free public access to disclosure and transaction price information should promote a more fair and efficient municipal securities

market in which transactions are effected on the basis of material information available to all parties to such transactions, and thereby allow for fairer pricing of transactions. In addition, the electronic dissemination of primary market disclosure documents should enable issuers to reduce their issuance costs by eliminating the need to print and to distribute in paper official statements in connection with their primary offerings, thereby resulting in lower costs to issuers and savings to their citizens, lower expenses for underwriters, and potentially lower prices for investors. All of these factors serve to promote the statutory mandate of the MSRB to protect investors and the public interest.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-MSRB-2009-02), be, and it hereby is, approved.

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

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59962; File No. SR-FINRA-2009-020]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to the FINRA Regulation Board Composition and Conforming Changes to the FINRA Regulation By-Laws

May 21, 2009.

#### I. Introduction

On March 27, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the By-Laws of FINRA Regulation, Inc. ("FINRA Regulation") to modify the composition of the board of directors of FINRA Regulation ("FINRA Regulation Board"), to adopt changes to conform the FINRA Regulation By-Laws to the FINRA By-

Laws, and to make various non-substantive or conforming changes. The proposed rule change was published for comment in the **Federal Register** on April 8, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

On July 30, 2007, NASD and New York Stock Exchange Regulation, Inc. ("NYSE Regulation"), the regulatory subsidiary of the New York Stock Exchange, consolidated their member firm regulation operations into a combined organization, FINRA. As part of the consolidation, the Commission approved amendments to the NASD By-Laws to implement governance and related changes.<sup>4</sup> The approved changes included a FINRA Board governance structure that balanced public and industry representation. FINRA Regulation (formerly known as NASD Regulation, Inc. ("NASD Regulation")) is a subsidiary of FINRA that operates according to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, as amended, which NASD adopted in 1996 when it formed NASD Regulation. FINRA Regulation's By-Laws were not amended at the time of the consolidation, other than in a few sections where those By-Laws conflicted with the new FINRA By-Laws.

The proposed rule change would modify the FINRA Regulation By-Laws to parallel more closely the composition and governance structure of the FINRA board of directors ("FINRA Board"). In addition, the proposed rule change would modify the FINRA Regulation By-Laws to reflect current business and legal practices concerning the administration and capital stock of FINRA Regulation. Furthermore, the proposed rule change would make non-substantive or conforming changes, including updating the FINRA Regulation By-Laws to reflect the corporate name change. A more detailed description of the proposed rule change is provided in the Notice.<sup>5</sup> The Commission discusses below the most significant aspects of the proposed changes to the FINRA Regulation By-Laws.

<sup>3</sup> See Securities Exchange Act Release No. 59696 (April 2, 2009), 74 FR 16020 ("Notice").

<sup>4</sup> See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007), as amended by Securities Exchange Act Release No. 56145A (May 30, 2008), 73 FR 32377 (June 6, 2008) (File No. SR-NASD-2007-023) ("Consolidation Approval Order").

<sup>5</sup> See *supra* note 3.

<sup>17</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>18</sup> *Id.* 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).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.