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August 13, 2009

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE,  
Washington, DC, 20549-1090

**RE: NABL Comments on SEC Release No. 34-60314, File Number  
SR-MSRB-2009-09 and SEC Release No. 34-60315, File Number  
SR-MSRB-2009-10**

Dear Ms. Murphy:

The National Association of Bond Lawyers (“NABL”) respectfully submits the enclosed response to the Securities and Exchange Commission’s (“SEC”) solicitation of comments related to SEC Release No. 34-60314 and SEC Release No. 34-60315, dated July 15, 2009. The comments were prepared by an ad hoc subcommittee of NABL’s Securities Law and Disclosure Committee, as listed in Exhibit I, and approved by the NABL Board of Directors.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 3,000 members and is headquartered in Chicago.

If you have any questions concerning the comments, please feel free to contact me at 404/572-4663 ([bholby@kslaw.com](mailto:bholby@kslaw.com)) or Victoria Rostow in the NABL Governmental Affairs Office at 202/682-1498 ([vrostow@nabl.org](mailto:vrostow@nabl.org)).

Thank you in advance for your consideration of these comments.

Sincerely,

William A. Holby

Enclosure



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**COMMENTS  
OF THE  
NATIONAL ASSOCIATION OF BOND LAWYERS  
REGARDING**

**SEC RELEASE NO. 34-60314  
FILE NO. SR-MSRB-2009-09**

**PROPOSED RULE CHANGE RELATING TO RULE G-32,  
ON DISCLOSURES IN CONNECTION WITH PRIMARY OFFERINGS, FORM G-32,  
AND THE PRIMARY MARKET DISCLOSURE AND PRIMARY MARKET  
SUBSCRIPTION SERVICES OF THE MSRB'S ELECTRONIC  
MUNICIPAL MARKET ACCESS SYSTEM (EMMA)**

**and**

**SEC RELEASE NO. 34-60315  
FILE NO. SR-MSRB-2009-10**

**PROPOSED RULE CHANGE RELATING TO ADDITIONAL  
VOLUNTARY SUBMISSIONS BY ISSUERS TO  
THE MSRB'S ELECTRONIC  
MUNICIPAL MARKET ACCESS SYSTEM (EMMA)**

The following comments are submitted to the Securities and Exchange Commission ("SEC") on behalf of the National Association of Bond Lawyers ("NABL") relating to SEC Release No. 34-60314 ("Rule G-32 Release") and SEC Release No. 34-60315 ("EMMA Voluntary Submission Release" and, together with the Rule G-32 Release, "Releases"), each dated July 15, 2009, and Notice 2009-44 of the Municipal Securities Rulemaking Board ("MSRB"), dated July 15, 2009. The comments were prepared by an *ad hoc* subcommittee of the NABL Securities Law and Disclosure Committee comprised of those individuals listed on Exhibit I and were approved by the NABL Board of Directors.

The Releases request comment on whether the SEC should approve or the MSRB should adopt proposed changes to MSRB rules ("Proposals"). NABL welcomes the opportunity to respond to the requests for comment by the SEC and the MSRB. NABL's comments are focused on those particular questions for which NABL believes it has relevant expertise.

### ***The Rule G-32 Release.***

1. Additional Standard Required of Underwriters. In its February 25, 2008 comments to MSRB Notice 2008-05 (“2008 MSRB NABL Comments”), NABL expressed its concern that the MSRB rule change would 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) that underwriters ‘reasonably determine’ that a continuing disclosure obligation conforming to the Rule has been executed.”

In view of the statements in SEC Release No. 34-59636 dated March 27, 2009, concerning the duties of underwriters in submitting Form G-32, adoption of the proposed amendment would appear to hold underwriters to a higher standard in determining the identity of obligated persons (and which obligated persons, if any, are covered by continuing disclosure agreements) than the “reasonable determination” standard established by Rule 15c2-12. Not only must the underwriter “exercise due care with respect to the accuracy of the items of information provided on Form G-32,” the MSRB also “expects that the requirement that all information to be supplied through Form G-32 be accurately and completely submitted by the applicable deadlines, and particularly by the closing date, will be strictly enforced to promote the purposes of the revised Rule G-32 and the protection of investors.” SEC Release No. 34-59636 at Page 27.

NABL recommends that the SEC clarify, consistent with Rule 15c2-12, that the proposed amendment to Rule G-32 does not alter the standard established by paragraph (b)(5)(i) of Rule 15c2-12 of a “reasonable determination,” and that such standard will be the gauge by which compliance with Rule G-32, as amended, is to be measured.

2. Identification of Obligated Persons. As noted in the Rule G-32 Release, NABL had concerns about the identification of obligated persons by underwriters in their submissions. 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...” 2008 MSRB NABL Comments at Page 2. This suggestion is based on the requirements set forth in Rule 15c2-12(b)(5)(i), which requires that an underwriter “reasonably determine” that an “obligated person *for whom financial or operating data is presented in the final official statement* has undertaken” (emphasis added) in a written undertaking to provide continuing disclosure. This formulation reflects the approach implemented by the SEC in adopting the continuing disclosure provisions of Rule 15c2-12, by which the parties to the transaction determine on a transaction-by-transaction basis what information is material and therefore needs to be disclosed in an official statement, *viz.*, “[The Rule] leaves to the parties (including the issuer and the Participating Underwriters) the determination of whose financial information is material to an offering.” SEC Release No. 34-34961, November 10, 1994.

In response, the SEC replied that the MSRB believed 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.” Rule G-32 Release at Page 9. It appears from the text of the Rule G-32 Release that the proposed rule change would follow NABL’s suggestion by requiring only that “underwriters provide the name of any

obligated person (other than the issuer) that would be providing continuing disclosures pursuant to the continuing disclosure undertaking, *rather than* all obligated persons regardless of whether such obligated persons will be providing disclosure information” (emphasis added). Rule G-32 Release at Page 9. However, the proposed amendment to Form G-32 does not make such a distinction, listing under amended IX.B. only, “Obligated persons other than issuer, if any.” SEC File No. SR 2009-09 at Page 47.

In addition, even if the accompanying release language is controlling, it would require the underwriter to make a determination as to whether a person which has entered into a continuing disclosure undertaking is an “obligated person.” As footnote 72 to SEC Release No. 34-34961 demonstrates, it is not always clear whether a person whose credit is material to an offering is an “obligated person.” In such cases, a continuing disclosure undertaking may be entered into to either leave no doubt that the underwriter will comply with Rule 15c2-12 or merely because one is demanded by the market. NABL believes that the data which is relevant and should be available via EMMA is whether continuing disclosure will be provided by a person, rather than whether the undertaking to do so is by an obligated person, and that there would appear to be no purpose in requiring underwriters to make difficult determinations as to the status of a person as an obligated person, let alone for such determinations to be made on a firmer basis than is required by Rule 15c2-12. If the goal is, in fact, to have underwriters make these determinations, then NABL respectfully questions the statutorily permitted purpose to be achieved by this more expansive proposed rule change.

NABL recommends that the SEC make clear in the adopting release, or by requesting a revision to the proposed rule change, that MSRB 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.

3. Expected Date of Filing of Annual Financial Information. For the reasons set forth in 2 above, NABL also recommends that the proposed Form G-32 be revised such that IX.C. only lists those dates by which the issuer or those expressly identified obligated persons, if any, who have agreed to provide continuing disclosure pursuant to the continuing disclosure undertaking, as of the date of closing, have agreed to provide such information, as opposed to dates by which the data is expected to be submitted.

4. Proposed Amendment to Rule G-32. The proposed amendment to Rule G-32 includes the addition of a definition of “obligated person.” SEC File No. SR 2009-09 at Page 4. NABL believes that the modification of the term from that set forth in Rule 15c2-12 (f)(10) by modifying it with the phrase, “with respect to all or a portion of the municipal securities in a primary offering” is unnecessary and may create confusion. NABL therefore recommends the deletion of that phrase.

5. Statutory Authority. The Rule G-32 Release cites Section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as statutory authority for the proposed rule changes, and in particular, the MSRB’s authority to propose and adopt rules “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.”

NABL is concerned that the proposed amendments to Rule G-32, if approved, may be subject to challenge on the grounds that the Rule G-32 Release does not fully explain the impediment(s) to a free and open market that are being addressed by the proposed rule change, nor explain how such proposed rule change would “protect investors and the public interest.” If these impediments are created by means or causes *other than* municipal securities dealer activities, then it would seem that any release approving the proposed amendment to Rule G-32 might benefit from more detailed explanations of the nature of the impediments, the relation of such means or causes to municipal securities dealer activities, and the expected results to be achieved in exchange for placement of a compliance burden and potential liability upon municipal securities dealers.

NABL accordingly respectfully suggests that the SEC reconsider whether the proper statutory foundation for the Rule G-32 Release exists, and if such foundation were to exist, to provide a more complete analysis for this conclusion in its adopting release. Where less burdensome rule changes would accomplish the goals of the Proposals, NABL also respectfully suggests that the proposed rules be revised accordingly.

#### ***The EMMA Voluntary Submission Release.***

1. Primary Disclosure Service. Until the proposed changes under the EMMA Voluntary Submission Release, there has been a clear distinction between those who could submit documents to EMMA’s primary disclosure service (underwriters and their agents) and those who could submit documents to EMMA’s continuing disclosure service (issuers, obligated persons and their agents). This hierarchical distinction makes sense, as the distribution of primary disclosure documents is a well established responsibility of underwriters regulated by MSRB rules and regulations, and the submission of continuing disclosure documents is a similarly well established responsibility of issuers or obligated persons (for whom financial or operating data is presented in the final official statement) under Rule 15c2-12.

Of course, if municipal securities are sold on a competitive basis, the underwriter is not known until after bids are submitted. Accordingly, it is understandable that issuers, obligated persons and their agents should be able to submit notices of sale, bid forms, preliminary official statements (and supplements or revisions) if the municipal securities are being sold on a competitive basis. However, MSRB Notice 2009-44 does not create a “competitive sale” exception for filings by issuers, obligated persons and their agents, and thus leaves open the possibility that an underwriter and issuer or obligated person may be submitting duplicate or contradictory filings.

NABL recommends that the submitters of primary disclosure documents continue to be restricted to underwriters and their agents *except* for submission of pre-sale documents (consisting of notices of sale, bid forms and preliminary official statements) prepared in connection with *competitively* sold municipal securities, for which submitters may include issuers or their agents.

## 2. Continuing Disclosure Service.

a. *Unnecessary Revision.* There is no current restriction in the proposed amendment to the EMMA Rules that would prevent issuers, obligated persons or their agents from providing the four categories of information described in the EMMA Voluntary Submission Release. EMMA Voluntary Submission Release at Pages 3-4. In the description of the EMMA Continuing Disclosure Service set forth in MSRB Notice 2009-44, under the subheading, “Document Types” under the heading, “Submissions to the EMMA Continuing Disclosure Service,” there is a listing of categories of other disclosure documents not specifically described in Rule 15c2-12 that is broad enough to include any of the four categories of information. MSRB Notice 2009-44 at Page 7. However, the GASB-GAAP and annual filing undertakings and the URL information are the only categories of information for which a text/data input field is available. For the reasons set forth below in b., NABL suggests that the SEC further consider whether creating additional text/data input fields for these categories of information will be beneficial for the municipal securities market.

b. *“Prominent Disclosure” of GASB-GAAP and Annual Filing Undertakings and GFOA-CAFR Certificates.* NABL defers to other industry participants as to whether there will be a market effect for municipal securities for which the GASB-GAAP undertaking, annual filing undertakings and GFOA-CAFR Certificates are disclosed on the EMMA Web portal. However, there seems little other reason for making such a distinction unless it is to separate municipal securities into those which have these voluntary undertakings and those which do not. NABL is concerned that the explicit support of the SEC and the MSRB of such classifications could lead investors to form mistaken impressions regarding the soundness or quality of the disclosure available for such municipal securities.

For example, what exactly does a governmental entity’s compliance with generally accepted accounting principles (GAAP) signify? The auditor’s report is not an opinion on the financial health of an entity, but simply provides a review as to whether the entity followed the rules of accounting and reporting, not whether finances have been managed properly. Conversely, otherwise sound credits which follow a state statutory basis for accounting, such as many local governments in New Jersey, may be stigmatized as being less creditworthy simply because they do not have the GASB-GAAP undertaking disclosed on the EMMA Web portal. As disclosure of financial statements will be accompanied by a description of the accounting principles under which they are compiled, the additional voluntary filing would appear to be unnecessary to inform readers of the accounting principles governing the financial statements.

Similarly, what is an investor likely to think when he or she sees that an issuer has received a Certificate of Achievement for Excellence in Financial Reporting Program awarded by the Government Finance Officers Association (“GFOA”)? As stated on its website, the GFOA established this certification program in 1945 to “encourage and assist state and local governments to go beyond the minimum requirements of generally accepted accounting principles to prepare comprehensive annual financial reports that evidence the spirit of transparency and full disclosure and then to recognize individual governments that succeed in achieving that goal.” The certificate appears to recognize the quality of the issuer’s application of accounting principles. It does not appear to be an affirmation of the creditworthiness of the entity requesting the Certificate.<sup>1</sup>

NABL is concerned that by prominently highlighting certain voluntary undertakings, the MSRB could be construed to have recommended the creditworthiness of the associated municipal securities. In addition, although the EMMA Voluntary Submission Release states that the issuer or obligated person may later rescind these designations, there is no follow-up ensuring that the accompanying “prominent disclosure” will be deleted from the EMMA Web portal. NABL recommends that the procedure by which the GASB-GAAP and annual filing undertakings will be rescinded should be clarified.

c. *Confusing Overlay of MSRB and SEC Rules and Continuing Evolution of SEC Rule 15c2-12.* NABL believes that the establishment of EMMA’s disclosure services is of tremendous benefit to municipal securities market participants, and NABL commends the MSRB for these efforts. However, NABL is concerned that the proposed amendments to the EMMA Primary Market Disclosure Service and Continuing Disclosure Service are not being subjected to the appropriate due process safeguards associated with a sufficient comment period, and NABL recommends that the proposed rule changes for EMMA’s continuing disclosure service be deferred for further consideration until the process for the proposed amendments to Rule 15c2-12 has been completed.

NABL also is concerned that the types of documents submitted to EMMA may change significantly if the proposed Rule 15c2-12 amendments set forth in SEC Release No. 34-60332 are implemented. Accordingly, NABL recommends that the SEC defer action on adding additional voluntary submissions by issuers until after the proposed Rule 15c2-12 amendments are considered and adopted in order that there be an orderly integration of revised Rule 15c2-12 required submissions and EMMA voluntary submissions.

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<sup>1</sup> As the SEC is aware, certain municipal issuers that had received and disclosed the GFOA Certificate of Achievement have been the subject of recent SEC enforcement actions for misleading disclosures, including misleading financial statements for which the Certificate had been awarded.



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## **EXHIBIT I**

### **NABL SECURITIES LAW AND DISCLOSURE COMMITTEE AD HOC SUBCOMMITTEE MEMBERS**

NABL COMMENTS ON PROPOSED RULE CHANGES RELATING TO RULE G-32, ON DISCLOSURE IN CONNECTION WITH PRIMARY OFFERINGS, FORM G-32, AND THE PRIMARY MARKET DISCLOSURE AND PRIMARY MARKET SUBSCRIPTION SERVICE OF THE MSRB'S ELECTRONIC MUNICIPAL MARKET ACCESS SYSTEM (EMMA), SEC RELEASE NO. 34-60314, FILE NO. SR-MSRB-2009-09 & PROPOSED RULE CHANGE RELATING TO ADDITIONAL VOLUNTARY SUBMISSIONS BY ISSUERS TO THE MSRB'S ELECTRONIC MUNICIPAL MARKET ACCESS SYSTEM (EMMA), SEC RELEASE NO. 34-60315, FILE NO. SR-MSRB-2009-10

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