STANDARD
&POOR'S

55 Water Street
New York, NY 10041
Tel 212-438-5774
www.standardandpoors.com

September 22, 2008

Ms. Florence E. Harmon, Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: ***Proposed Amendment to Municipal Securities Disclosure***
Securities Exchange Act of 1934 Release No. 58255 (July 30, 2008)
File No. S7-21-08

Proposed Rule Change Relating to the Establishment of a Continuing Disclosure Service of the Electronic Municipal Market Access System
Securities Exchange Act of 1934 Release No. 58256 (July 30, 2008)
File No. SR-MSRB-2008-05

Ladies and Gentlemen:

Standard & Poor's Securities Evaluations, Inc. ("SPSE") submits this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comment on the two proposals referenced above, which, in combination, would establish the Municipal Securities Rulemaking Board (the "MSRB") as the sole official repository for municipal securities disclosure documents and eliminate the role that the nationally recognized municipal securities information repositories (the "NRMSIRs") currently have as recipients and disseminators of these documents (the "Proposals"). The Proposals would also require that municipal securities disclosure documents be filed electronically in a format determined by the MSRB.

Both as one of the four current NRMSIRs and as a long time active participant in the mutual efforts of the Commission and the industry to develop a comprehensive and efficient municipal securities disclosure framework, SPSE has a strong interest in the future development of this framework and welcomes the opportunity to participate in the rulemaking process.[1]

I. Executive Summary

We applaud and support the goals of both the Commission and the MSRB to improve the quality, timing, and dissemination to market participants of continuing disclosure documents that provide current information about municipal issuers and their securities. In particular we support those aspects of the

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[1] SPSE, a wholly-owned subsidiary of The McGraw-Hill Companies, Inc., is the successor to Kenny Information Systems ("KIS"), which was founded in 1974 and was designated as one of the original NRMSIRs on January 4, 1990. KIS was acquired by McGraw Hill on February 22, 1990.

Proposal that would require the filing of municipal securities disclosure documents in a standardized electronic format. However, we have a number of concerns about the approach taken in the Proposals and some suggestions for alternative approaches.

First, as the Commission noted in the release accompanying its proposal, replacing the current system of private vendors with the MSRB as the single, exclusive official repository and disseminator of municipal securities disclosure raises concerns about the potential adverse effects of eliminating competition from the existing system.[2] The Proposals also raise issues about consistency with Congressional intent regarding regulation of municipal securities.

At the same time, we believe the Proposals will not accomplish the Commission's informational goals, and thus will not result in benefits that outweigh these potential adverse effects, because they do not address the root cause of the current problems. In fact, because adoption of the Proposals could result in undue reliance by investors and broker-dealers on the content of the publicly available data base of continuing disclosure documents, we believe the Proposals raise the risk of undermining the fundamental purpose of Commission and MSRB regulation in this area, which is to protect investors against fraud in the municipal securities markets.

For these reasons, we propose that the Commission seek to improve the current system through the alternative means of a "central post office" approach, which would address those aspects of the system that can be remedied but would not raise the anti-competitive concerns or legislative authority issues. A central post office with standardized electronic filing requirements would provide ease of filing by issuers and obligors, ensure both a central index of filed documents and consistency of filed information among repositories, and effectively provide linkage among the repositories, while preserving the balance of investor protection, competition, and compliance with Congressional intent that the Commission has long struggled to achieve within its limited powers to regulate in this area.

Should the Commission determine to proceed with the Proposals, we request that the Commission take steps to minimize the potential anti-competitive effects by resolving in this proceeding the basis on which the current NRMSIRs and other vendors will have access to the MSRB's data. Also, in order to take advantage of the experience of the NRMSIRs and to guard against potential issues with respect to proprietary information, we ask the Commission to set up a process for involving the NRMSIRs in the design of the electronic filing format. Finally, we ask the Commission to consider dealing with any necessary transitional matters for the current NRMSIRs in a manner that does not impose on them any unfair or undue burdens.

With a view to submitting our comments in a manner that would be most helpful to the Commission, we have organized our comments to follow the Commission's requests for comment in specific subject areas.

II. The Proposals

The Commission proposes to amend Rule 15c2-12 in a manner that would, in effect, replace the NRMSIRs with the MSRB, by requiring the MSRB to take over the functions currently provided by the NRMSIRs under the Rule. Rule 15c2-12 currently requires "participating underwriters" in municipal securities offerings to determine that the issuer of municipal securities or an obligated person has undertaken to provide (i) certain annual financial information to all of the NRMSIRS and (ii) notices of material events and filing failures ("material event notices") to either the NRMSIRs or the MSRB (the

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[2] Proposed Amendment to Municipal Securities Disclosure, Exchange Act Release No. 58255, *see e.g.* at text accompanying notes 46, 48, and 129-30 (July 30, 2008) (the "Proposing Release").

financial information and material event notices are called "continuing disclosure documents").[3] Under the Commission's proposal, the participating underwriter must instead determine that the issuer or obligated person has undertaken to provide the continuing disclosure documents to the MSRB only, and to provide such information in an electronic format and accompanied by identifying information as prescribed by the MSRB.

The Commission has also published for comment a proposal by the MSRB to establish a continuing disclosure service as part of its new Internet-based public access system, the Electronic Municipal Market Access system ("EMMA").[4] The MSRB service would receive electronic submissions of, and make publicly available on the Internet, the continuing disclosure documents and related information from issuers, obligated persons and their agents submitted pursuant to the undertakings required by Rule 15c2-12, as proposed to be amended by the Commission in the Commission's proposal. Under the MSRB's proposal, public access to the continuing disclosure documents would be provided on the Internet through the EMMA portal, at no charge, and real-time data stream subscriptions to continuing disclosure documents submitted to the MSRB would be made available for a fee, to be established in a separate proceeding prior to commencement of the continuing disclosure service, subject to Commission approval.

III. SPSE's Alternative Proposal – a "Central Post Office" Approach

As we will further discuss below, SPSE shares the concerns expressed by the Commission about the potential anti-competitive effects of the Proposals. Furthermore, we do not believe these adverse effects will be offset by the benefits the Commission seeks – ready and prompt access to the important information about municipal securities in the secondary markets that investors need to make informed investment decisions and broker-dealers need to fulfill their obligations to customers – because the Proposals do not and cannot address the primary root cause of the current lack of adequate information in the marketplace. This deficiency stems primarily from widespread non compliance by issuers and obligated persons with their continuing disclosure undertakings and the absence of uniform accounting and financial reporting standards for issuers in the municipal market, circumstances that are caused by limits on the Commission's regulatory authority and that will not be cured by changing the information repository. As has been observed by former Commission Chairman Arthur Levitt, "a complete overhaul of the existing system. . . would be the only meaningful way to ensure comprehensive disclosure both on an initial and continuing basis."[5]

Nonetheless, we believe that those aspects of the current system that are capable of improvement should be improved, and we believe that in many ways the Commission and the MSRB are on the right track. Specifically, we fully support those aspects of the Proposals that would require electronic filing of all documents in a standard format through a central facility. These features would make filing easier for the

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[3] In each case, the information must also be provided to the relevant State Information Depository ("SID"), if any.

[4] Proposed Rule Change Relating to the Establishment of a Continuing Disclosure Service of the Electronic Municipal Market Access System, Exchange Act Release No. 58256 (July 30, 2008).

[5] Arthur Levitt, Chairman, SEC, Testimony before the House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance (Sept. 9, 1993), *quoted in* Mark E. Laughman, *The Leaning Tower: Do the Proposed Amendments to SEC Rule 15c2-12 Violate the Securities Acts Amendments of 1975?* 69 Notre Dame L. Rev. 1167, 1197 (1994).

issuers/obligors, facilitate policing of filings by any authorized entity, and provide the foundation for an effective indexing system.

However, we believe that these features are best embodied in the central post office approach. Under this approach, issuers and obligors would file documents through a single electronic venue – the central post office or "CPO" – in a standardized format. The CPO would then forward the centrally-filed documents in real time to the NRMSIRs. The standard format would lead to the "single indexing logic" proposed by the MSRB and the ability to maintain a standard index of all filings for public access. Yet since each NRMSIR would still compete to provide the best format for both public and value-added subscriber access to the documents themselves, this would result in the best of both worlds. On the intake side, there would be a single, convenient filing venue for issuers, electronic filing, consistency in filed documents, a single central index and a consistent minimum data base content for each of the public repositories. This would be joined on the dissemination side with multiple options for public and subscriber access, where the forces of competition and market demand are likely to lead to better and more varied consumer options than if the entire function is handled as a monopoly by the MSRB.[6]

Significantly, we believe that a central post office approach would provide the "information linkage" among NRMSIRs that was within the Commission's original concept of the multiple repository system. In this regard, the Commission noted in its release adopting Rule 15c2-12 that "the creation of multiple repositories should be accompanied by the development of an information linkage among these repositories" so as to afford "the widest retrieval and dissemination of information in the secondary market."[7] The central post office would function as an information linkage by serving as the central, standardized intake point and identifying, by means of a centralized index, a complete and searchable list of all documents filed under Rule 15c2-12.

Both the Commission and the MSRB have implicitly recognized that a central post office approach can remedy the types of deficiencies and inefficiencies the Commission has observed in the current multiple NRMSIR system, most of which relate to uneven availability of documents from the various NRMSIRs.[8] In recent years, the Commission and the MSRB have both proposed eliminating the MSRB from serving as a permissible repository of continuing disclosure documents, and one of the bases for urging that the MSRB's function in receiving continuing disclosure documents was no longer necessary was the availability of an alternative single location delivery system.[9] Moreover, the Commission staff has

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6 We do not at this time have a view as to what entity should provide the central post office function, or how this should be determined.

7 Municipal Securities Disclosure, Exchange Act Release No. 26985 (June 28, 1989) (the "1989 Adopting Release").

8 This unevenness, in turn, stems from inconsistent time periods for receiving documents among the NRMSIRs, inconsistency in the body of documents received, and possible weaknesses in document retrieval, all of which will be substantially remedied by centralized, consistent, electronic filing. As discussed later in this letter, many of the difficulties we as a NRMSIR have experienced are caused by the inefficiencies inherent in handling paper documents.

9 As indicated above in connection with the Commission's proposal, Rule 15c2-12 currently designates the MSRB, in addition to the NRMSIRs, as a permissible recipient of material event notices. In 2005, the MSRB asked the Commission to remove the MSRB from the rule as a permissible recipient of material event notices and for permission for the MSRB to close down its facility for receiving these documents because (1) few issuers and obligors chose to provide the MSRB with material event notices and (2) in the previous five years not a single person had requested this information from the MSRB. Moreover, the MSRB believed that the need for its continuing disclosure facility had been lessened "because an

granted relief necessary to permit issuers and obligors to satisfy their continuing disclosure undertakings to file documents with the NRMSIRs by filing them with a central post office facility. In granting this relief, the staff relied on the representations in the incoming request, which described the central post office as a remedy for exactly the same types of inefficiencies in document collection and retrieval that the Proposing Release identifies as calling for the approach outlined in the Proposals.[10]

IV. The Commission's Request for Comments – SPSE's Response

The Commission believes that the Proposals, if adopted, will help to provide the investing public with important information they need to make informed investment decisions regarding municipal securities, both during offerings and on an ongoing basis, and assist brokers and dealers in fulfilling their disclosure obligations to customers. In the Proposing Release, however, the Commission was careful to point out that the Proposals raise issues about eliminating competition in the municipal securities disclosure area and other matters, and has asked for comment on these and other issues, both in general and very specific terms. The following discussion sets out those areas of the Commission's request that we would like to address and our comments in response.

A. Burden on Competition

1. The Commission's Request

The Commission recognizes that all of the NMRSIRs have municipal securities disclosure businesses that are based on, but go beyond, the NRMSIR function. The NRMSIRs use the continuing disclosure documents filed with them under Rule 15c2-12 to create proprietary, value-added products that are offered to a wide spectrum of consumers of this information – dealers, institutional investors, and other market participants – on a subscription basis.

The Commission further recognizes that if the proposed amendments are adopted to provide for a single repository, competition with respect to services provided by the existing NRMSIRs could decline. The potential adverse impact on competition that the Commission identifies include:

- reduction in current services provided by the existing NRMSIRs relating to municipal securities that are not within the ambit of Rule 15c2-12;
- narrowing of competing information services regarding municipal securities; and
- loss of innovation in offering competing information services regarding municipal securities.

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alternative document delivery system has become available to Issuers and dissemination agents who prefer to send their filings to a single location for delivery to all of the NRMSIRs and any appropriate SID." In response to this request, on December 4, 2006, the Commission proposed amendments to Rule 15c2-12 that would have eliminated the MSRB as a permissible recipient of material events notices. Proposed Amendment to Municipal Securities Disclosure, Exchange Act Release No. 54863 (Dec. 4, 2006). While both the Commission's proposals to eliminate the MSRB as a permissible repository for continuing disclosure information and the MSRB's request to be so eliminated are still pending, the Commission and the MSRB are now considering withdrawing these proposals in connection with the current proposals to establish the MSRB as the sole repository for this information. *See* Proposing Release at text accompanying note 36.

10 *See* Municipal Advisory Council of Texas, SEC No-Action Letter (Sept. 7, 2004).

Accordingly, the Commission has requested comment on whether, in order to improve access to secondary market disclosure for investors and municipal market participants, it would be preferable to continue to have multiple sources for such information, rather than a single repository. In particular, the Commission asks for comment on any possible disadvantages of having only one repository responsible for the collection of and access to municipal securities information, and whether there are alternative ways of improving the efficiency of the current structure, including the use of the existing NRMSIRs, instead of amending the rules as proposed. While the Commission believes preliminarily that the potential effects on competition would be justified by the informational improvements that would result from the Proposals, the Commission has asked for comment on all aspects of its analysis.[11]

2. SPSE's Comment– The Proposal Would Burden Competition without Sufficient Compensating Benefits

We agree with the Commission that the Proposals raise issues about potential burdens on competition, and we greatly appreciate the Commission's candor and openness in addressing these issues and inviting comment. In our view, the Proposals are likely to have an adverse impact on competition in the provision of municipal securities disclosure, without achieving compensating benefits of full, accurate, and timely disclosure to the marketplace.

a. Effects on Competition

The Commission's request for comment on this issue is a continuation of a dialogue that began with the Commission's original proposal of Rule 15c2-12 in 1988, when the MSRB first proposed to create a mandatory central repository of municipal securities disclosure statements.[12] Recognizing that the proposal generated a number of issues "that deserve careful study," the Commission requested comment on the proposal, and a number of commenters, including our predecessor organization, urged that competing private organizations meeting government-imposed standards would offer a better approach than a single governmental or quasi-governmental service.[13]

The Commission has, to date, considered these concerns to be sufficiently serious as to be grounds for avoiding the "single governmental or quasi governmental service." In its adoption of Rule 15c2-12 in 1989, the Commission opted instead for the multiple repository approach, "recogniz[ing] the benefits that may accrue from the creation of competing private repositories."[14] Similarly, in adopting the amendments to Rule 15c2-12 in 1994, the Commission recognized that the requirement of delivery to the multiple NRMSIRs, as well as the appropriate SID, "allays the anti-competitive concerns raised by the

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11 The Commission's requests for comment on potential anti-competitive aspects of its proposal appear throughout the Proposing Release in a number of different sections, including Section II, Description of the Proposal; Section III, Request for Comments; Section V, Costs and Benefits of Proposed Amendments to Rule 15c2-12; Section VI, Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation; and Section VII, Consideration of Impact on the Economy.

12 Municipal Securities Disclosure, Proposed Rule, Exchange Act Release No. 26100 (Sept. 22, 1988) (the "1988 Proposing Release").

13 *See* 1988 Proposing Release, at text accompanying notes 25-26; 1989 Adopting Release, at note 58 (*referencing* Letter from J. Kevin Kenny, Chairman and Chief Executive Officer, J.J. Kenny Co., Inc. to Jonathan G. Katz, Secretary, SEC (Dec. 27, 1988)).

14 1989 Adopting Release.

creation of a single NRMSIR."[15] Finally, in prior proceedings, the Commission has been careful to note that if the MSRB sought NRMSIR status, the Commission would consider the competitive implications of such a request.[16]

While these earlier releases do not elaborate on "the benefits that may accrue from the creation of competing private repositories" or the "anti-competitive concerns raised by the creation of a single NRMSIR," it is widely recognized that competition among multiple providers generally leads to a range of beneficial effects, including downward price trends, innovation, and multiplicity of consumer options, that monopoly conditions, by contrast, do not provide. Applying these concepts to the current proposal, it is hard to improve upon the Commission's own discussion of the potential anti-competitive effects in the Proposing Release. As the Commission has recognized, SPSE, like the other NRMSIRs, supports the NRMSIR function as part of a broad-based securities disclosure service business. Taking away the NRMSIR function would, in itself, upset the balance of our current business model and have an impact on our ability to provide our value-added products and services. Moreover, the Commission and the SEC propose to put the MSRB, a quasi-governmental entity with the equivalent of taxing power over its constituents, in the position of providing value-added services for free. This approach slants the playing field considerably and puts SPSE and other vendors at a competitive disadvantage, a situation which, in turn, could lead to removal or diminution both in the services currently offered in the market place and in the incentives for new innovative products. In the long run, this will not serve the interests of consumers. There is also a fairness issue in supporting a quasi-governmental organization to displace private vendor products and services that reflect investment of time, creativity, and money by those vendors.[17]

b. Absence of Benefits Justifying Elimination of Competition

As described above, the Commission recognizes the potential anticompetitive effects of establishing a single repository, and in fact does not appear to refute them. Rather the Commission has preliminarily concluded that the potential burdens on competition resulting from the Proposals would be justified by the benefits likely to be realized.[18] We do not believe that this is the case. Specifically, we do not believe that adoption of the Proposals is likely to lead to any appreciable improvement in the ultimate goal – complete and accurate information about municipal securities widely available on a timely basis – that cannot be achieved by an approach that does not raise the competition issues.

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15 Municipal Securities Disclosure, Exchange Act Release No. 34961 at text accompanying notes 175-176 (Nov. 10, 1994).

16 Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change Relating to the Delivery of Official Statements and Recordkeeping, Exchange Act Release No. 28081, notes 15 and 26 (June 7, 1990); Municipal Securities, Proposed Amendments, Exchange Act Release No. 33742, note 25 (Mar. 9, 1994).

17 We believe this may be at the heart of the Commission's past reassurances that it would consider the anti-competitive effects of installing the MSRB as a NRMSIR. *See supra* note 16.

18 The Commission's press release accompanying the proposals describes the benefits expected from the proposals as follows: "'The proposals would bring dramatic improvements in disclosure to investors in municipal securities,' said SEC Chairman Christopher Cox. 'Retail investors — who own two-thirds of municipal securities — will soon have the same one-stop, cost-free, instant electronic access to disclosure documents about municipal bonds that they've long had for corporate stocks and bonds. This is a giant step forward for municipal bond investors.'" *SEC, MSRB Propose "Giant Step Forward" for Municipal Bond Investors*, Press Release 2008-159 (July 30, 2008).

We believe that the root cause of the deficiencies in the current municipal securities disclosure system lies not in the presence of multiple repositories, but rather in the quality and timeliness of the information that is filed. As reported in a recent study of issuer/obligor compliance with the continuing disclosure provisions of Rule 15c2-12 conducted by DPC DATA, Inc., one of the other NRMSIRs, "a large percentage of obligors disregard their bond disclosure covenants with regularity."

> [T]his study has brought to light a serious and systemic credit transparency problem in the municipal marketplace. Our findings indicate that nondisclosure is an established practice and a growing trend among obligors. It affects an increasing amount of public debt, and presents risks to investors as well as the intermediaries that serve them.[19]

Even more fundamentally, municipal issuers are not subject to uniform accounting and financial reporting standards or required to implement policies or procedures adequate to ensure accurate and full disclosure.[20]

These fundamental deficiencies are not caused by the NRMSIR system, and they will not be fixed by eliminating the NRMSIRs. Rather they are caused by "the statutory limits of [the Commission's] present authority to address the needs of investors in municipal securities for information upon which investment decisions may be made."[21] Because of the exempt status of municipal securities under the 1933 and 1934 Acts, as well as the restrictions of the Tower Amendment, the filing "requirements" of Rule 15c2-12 were intentionally structured not to be directly enforceable by the Commission or the MSRB, thus issuer/obligor non compliance with the filing provisions appears to persist with impunity.[22] As the Commission staff has recognized "[t]o provide investors in municipal securities with access to full, accurate, and timely information like that enjoyed by investors in many other US. capital markets, the Commission requires expanded authority over the municipal securities markets."[23]

Nonetheless, there are aspects of the current system that can be substantially improved without raising the competition issues, and SPSE urges the Commission to pursue those aspects of the proposal, and further to consider our proposal of a central post office approach.

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19 Peter J. Schmitt, *Estimating Municipal Securities Continuing Disclosure Compliance – A Litmus Test Approach*, DPC DATA, Inc. at 5 (Sept. 2, 2008) (the "DPC Report").

20 *Disclosure and Accounting Practices in the Municipal Securities Market* issued by the SEC staff to Congress (July 26, 2007) (the "White Paper").

21 *Id.* at text accompanying notes 18-19.

22 The Tower Amendment and its relation to Rule 15c2-12 are described below in Section IV.D.2. of this letter, "SPSE's Comment – The Commission Should Address Its and the MSRB's Authority to Adopt the Proposed Rules under the Tower Amendment."

23 White Paper, at text accompanying page 18-19. *See also* Paul S. Maco, *Building a Strong Subnational Debt Market: A Regulator's Perspective*, 2 Rich. J. Global L. & Bus. 1 (2001); Ann J. Gellis, *Municipal Securities Market: Same Problems – No Solutions*, 21 Del. J. Corp. L. 427, 430,465-467 (1996); Christine A. Scheel, *Amended SEC Rule 15c2-12: An Attempt to Improve Disclosure Practices in the Municipal Securities Market*, 45 Depaul L. Rev. 1117 (1996).

B. Requirement for Electronic Submission and Identifying Information

1. The Commission's Request

The Commission believes that electronic submission would better enable the information to be promptly posted and made available to the public without charge. The Commission requests comment on whether an electronic submission requirement would increase efficiency of submission and facilitate wider availability of the information, and whether the NRMSIRs should establish new comprehensive electronic systems for this purpose.

In addition, the Commission is proposing that the electronic submission be accompanied with identifying information prescribed by the MSRB, to permit the repository to sort and categorize the documents efficiently and accurately and facilitate use of the information by consumers. The Commission requests comment on whether there are alternative methods that would assist investors and market participants in locating specific information about a municipal security.

2. SPSE's Comment – We Support Electronic Filing and Request a Procedure that would Allow Us to Participate in Designing the Electronic Format

We welcome and support the proposed requirement for electronic submission of continuing disclosure documents. Processing and storage of paper documents is labor intensive and conducive to human error. We have the foundation, capability and expertise to develop a system for receiving electronic submissions and are willing and happy to assist in this undertaking.

We also support the Commission's idea of requiring additional information that improves the format and searchability of the electronic filings. We do not, however, believe that the design of this system should be the sole prerogative of the MSRB. This is an important front end endeavor that can profoundly affect how all users, including vendors, can reformat and package the information filed. It can involve high implementation costs, and thus can be expected to have a long life. If it is not designed properly, all market participants will live with the burdens created for a long time. Accordingly, we suggest that the design of the electronic filing format be entrusted to a joint industry committee. While the Proposing Release states that the MSRB would be required to file a proposed rule change with the Commission regarding the electronic format it proposes to use, we do not believe the notice and comment process, which does not permit ongoing dialogue, would be an adequate substitute for a joint industry working group.[24]

We also note that some of the information required in the filings, for example ratings information, may involve third party proprietary information. Accordingly, we would urge the Commission to keep in mind the need for any appropriate protection of that proprietary information, and believe that the group design approach described above would be an effective means of identifying and protecting these interests.

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[24] *See* Proposing Release at note 57.

C. Costs and Benefits of the Proposal

1. The Commission's Request

The Commission recognizes that the Proposals could impose costs on the NRMSIRs and other market participants if the Proposals are adopted. The Commission has requested comments on the costs and benefits on all market participants, including the NRMSIRs, broker-dealers, issuers, the MSRB, other vendors and investors.

2. SPSE's Comment– The Potential Harm to Investors Outweighs the Likely Benefits

We believe our views expressed above address the main economic costs of the Proposal, which relate to the potential adverse effect on competition.

In addition, however, we are concerned that adoption of the Proposals could, inadvertently, undermine investor protection, and thus the very antifraud goals that give the Commission its authority to adopt Rule 15c2-12. We are concerned that the Commission's holding out the MSRB, a quasi-governmental organization functioning with Commission oversight, as the exclusive central repository of municipal securities disclosure, may actually mislead the market by implying that this is a complete and accurate database. There will be an inevitable tendency to view this as a "muni-EDGAR" system, comparable to the real EDGAR system, whereas the two systems cannot be compared.[25] Issuers of non exempt securities comply with their filing requirements in a timely manner, or fail at their peril, and timely compliance is all but universal. As the DPC Report indicates, the world of municipal issuer/obligor filers is entirely different:

> What we uncovered in this study was significant evidence that disclosure delinquency in the municipal securities market is not an anomaly concentrated among relatively few rogue issuers and obligors. Neither is it purely a small issuer problem. Rather, it is a much broader problem common to all issue size categories, all sectors of the market, and all geographic regions of the country.[26]

Finally, we believe that the Proposals may in fact reduce, rather than augment, the effectiveness of Rule 15c2-12 as a broker-dealer antifraud mechanism. As a "means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices," Rule 15c2-12(c) prohibits a broker-dealer or municipal securities dealer from recommending the purchase or sale of a municipal security unless that person has procedures in place that provide reasonable assurance that it will receive prompt notice of any event disclosed in a material event filing. Under the current system, sophisticated broker-dealers typically comply with this provision by means of subscriptions to value-added services. If the Proposals were adopted and the MSRB were established as a government sponsored repository, broker-dealers might believe they could fulfill their obligations by using the MSRB system exclusively. Because of the filing delinquencies described above, this could lead broker-dealers to rely on a system that is less complete and less geared toward investor protection than the ones they currently have in place.

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[25] This concern is already born out in comments to the proposal to date. *See e.g.* Letter from Elizabeth V. Mooney (Aug. 21, 2008) ("I believe the public is entitled to the same full disclosure about municipal bond issues and issuers as it is about securities issued by the private sector and the corporations that issue them... [G]ood for you for tackling this problem now."); Letter from Aramintha Grant (Aug. 17, 2008).

[26] DPC Report at 25.

Accordingly, if the Proposals are adopted, we urge the Commission to consider adding some type of cautionary legend on the new system that will advise users not to rely on the completeness of the information available.

Regarding the more quantifiable costs of the Proposals, both the Commission and the MSRB emphasize that the proposed EMMA data base will be "free" to municipal securities market participants. However, as was pointed out in the open meeting where the Commission determined to propose the rule, this service is not actually "free." The MSRB will pay for this repository service with fees assessed against its constituent broker-dealers and municipal securities dealers. Thus instead of providing for a "free" service, the Proposals will merely shift the cost of the service from the persons who use it to the broker-dealer community. Because it can be expected that at least some of this cost will then, in some form, be passed on to the broker-dealers' customers, it is those customers who will ultimately bear the cost of EMMA.[27]

In considering the benefits of the proposed repository system, the Commission should also solicit comment on the likelihood that investors will use the MSRB continuing disclosure service. To date use volumes have been strikingly low.[28] While it may be logical and intuitive to predict that a better system would lead to increased use, we would recommend that, before embarking on a major revision of the system on the premise that investors and consumers will radically change their past behavior, the Commission should obtain more concrete evidence to that effect.

D. Appropriateness of MSRB as Sole Repository

1. The Commission's Request

The history of SEC and MSRB efforts to regulate the municipal securities markets is deeply influenced by Congressional concerns for intergovernmental comity that underlie both the basic exemptions for municipal securities under the 1933 and 1934 Acts and the later amendments to these Acts that authorized the MSRB and clarified the Commission's antifraud authority in this area. While the Proposing Release does not explicitly refer to these issues, the Commission, in its general request for comments, does seek comment specifically on "the operation of a system of continuing disclosure by the MSRB as opposed to another entity, such as a private vendor that is not [a self-regulatory organization]."

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27 It may be worth noting that, in the recent past, the Commission has considered similar costs to be more than negligible. In its December 2006 proposal to eliminate the MSRB repository function, the Commission cited the related cost savings to broker-dealers as a reason supporting elimination of the MSRB repository. The Commission preliminarily concluded that the proposal could save the MSRB "substantial funds" of $500,000 to $1 million by not being required to perform certain upgrades to its systems. "As the costs of the MSRB are paid primarily from fees paid by brokers, dealers and municipal securities dealers, those parties **and their customers** would benefit from this savings." Proposed Amendment to Municipal Securities Disclosure, Exchange Act Release No. 54863 (Dec. 4, 2006) (emphasis added).

28 *See supra*, note 9.

2. SPSE's Comment – The Commission Should Address Its and the MSRB's Authority to Adopt the Proposed Rules under the Tower Amendment

a. Legal Background – Federal Regulation of Municipal Securities, the Tower Amendment and Rule 15c2-12

In enacting the federal securities laws, Congress "was persuaded that direct regulation of the process by which municipal issuers and municipalities raise funds to finance governmental activities would place the Commission in the position of a gate-keeper to the financial markets, a position inconsistent with intergovernmental comity."[29] Municipal securities are thus exempted securities under both the Securities Act of 1933 and the Securities Exchange Act of 1934, although the Commission retains authority over the municipal securities markets and participants in those markets under the antifraud provisions of both Acts.[30]

In 1975, in response to scandals in the municipal securities markets involving significant non disclosures by municipal issuers and misconduct by underwriters, Congress enacted legislation providing a limited regulatory scheme for municipal securities (the "1975 Amendments"). This legislation required the registration of municipal securities brokers and dealers, established the MSRB, a self-regulatory organization ("SRO") with the authority to promulgate rules governing the sale of municipal securities, subject to Commission oversight (although unlike the other SROs, the MSRB does not have inspection or enforcement powers with respect to its rules), and amended the definition of the term "exempted security" in the Exchange Act to provide that municipal securities are not exempted securities for purposes of Section 15 of the Act.

As the Commission has observed, in crafting the 1975 Amendments, Congress balanced the concerns of investor protection and intergovernmental comity. This balance is reflected in two provisions, Sections 15B(d)(1) and 15B(d)(2) of the Exchange Act, which together are generally known as the "Tower Amendment."[31] The Tower Amendment "bars the MSRB from requiring issuer filings, both pre- and post-sale, and the Commission from requiring pre-sale filings."[32] More specifically, Section 15B(d)(1) prohibits both the Commission and the MSRB from requiring any municipal securities issuer, either directly or indirectly through an underwriter, to file any documents with the Commission or the MSRB prior to the sale of its securities.[33] Section 15B(d)(2) prohibits the MSRB from circumventing this

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29 1988 Proposing Release.

30 1988 Proposing Release at text accompanying note 69.

31 Technically, the Tower Amendment added only Section 15B(d)(2). *See* 1988 Proposing Release (stating that the Tower Amendment refers to the 1975 amendment which added section 15B(d)(2) to the Exchange Act). However, the term is more generally used to refer to both Sections 15B(d)(1) and 15B(d)(2). Ann J. Gellis, *Municipal Securities Market: Same Problems – No Solutions*, 21 Del. J. Corp. L. at 432.

32 Paul S. Maco, *Building a Strong Subnational Debt Market: A Regulator's Perspective*, 2 Rich. J. Global L. & Bus. at 18.

33 Section 15B(d)(1) of the Exchange Act provides:

> Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by

provision by forbidding any requirement that brokers and dealers furnish documents related to an issuer unless such information is "generally available from a source other than such issuer."[34]

The Commission adopted Rule 15c2-12 in 1989 with respect to primary offering documents, and amended the rule in 1994 to cover continuing disclosure documents, pursuant to its authority under section 15(c) of the Exchange Act. Rule 15c2-12 is, by design, not a complete parallel reporting regime for municipal securities, which would be *ultra vires* given the exemptions described above, but a means of preventing fraud by improving the extent and quality of disclosure in the municipal securities markets. In adopting and amending the Rule – and in particular in adopting the indirect method of employing "the influence of underwriters to compel adequate disclosure by municipal issuers"[35] – the Commission was deeply cognizant of the importance of working within the balance of state and federal power that Congress had struck in the 1975 Amendments. The Commission relied heavily on its antifraud authority, which was expanded by the 1975 Amendments, stating that the rule and its amendments "[are] consistent with its Congressional mandate to adopt rules reasonably designed to prevent fraud in the municipal securities markets.[36]

b. Discussion

As discussed above, the Tower Amendment "restricts the regulatory efforts of both the SEC and the MSRB."[37] In these provisions of the 1975 Amendments, Congress included language "prohibiting the MSRB from requiring municipal issuers, directly or indirectly, through municipal securities broker-dealers or otherwise, to furnish the MSRB or prospective investors with any documents, including official statements."[38] Specifically, the Tower Amendment was designed to protect the special status granted to municipal securities under the 1933 and 1934 Acts and "to ensure against the imposition of de facto

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the issuer any application, report or document in connection with the issuance, sale or distribution of such securities.

34 Section 15B(d)(2) of the Exchange Act provides:

> The Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities broker or municipal securities dealer or otherwise, to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer: *provided, however*, that the Board may require municipal securities brokers and municipal securities dealers to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title.

35 *Recent Legislation: Securities Law – Municipal Securities Disclosure Statute – Newly Amended Securities Exchange Act Rule 15c2-12 Requires Municipal Securities Issuers to Provide Additional Information to the Market*, 109 Harv. L. Rev. 882, note 25 (1996).

36 1988 Proposing Release at text accompanying note 70.

37 Mark E. Laughman, *The Leaning Tower: Do the Proposed Amendments to SEC Rule 15c2-12 Violate the Securities Acts Amendments of 1975?* 69 Notre Dame L. Rev. 1167, 1172 (1994).

38 Paul S. Maco, *Building a Strong Subnational Debt Market: A Regulator's Perspective*, 2 Rich. J. Global L. & Bus. at 23.

registration requirements for issuers of municipal securities" that would hinder their access to capital markets."[39]

For these reasons, in both adopting and amending Rule 15c2-12, the Commission was very mindful of the Tower Amendment and included an analysis of its intent and limits in the relevant releases. Nonetheless, especially with respect to the 1994 amendments to Rule 15c2-12, a number of commenters have raised issues as to whether the amendments exceeded the Commission's authority. The rules were described as an "end run" around the Tower Amendment and "deeply vulnerable to legal challenge."[40] The concern was that the rules accomplished indirectly what the Commission was prohibited from doing directly, by using underwriters to force issuers to file with a "surrogate" of the SEC.[41] Others questioned, in addition, whether the rules were in fact reasonably designed to prevent fraudulent practices by broker dealers.[42] Recently the Commission staff conceded that in the current Rule 15c2-12, as amended in 1994, "the Commission is near to the statutory limits of its present authority to address the needs of investors in municipal securities for information upon which investment decisions may be made."[43]

The Proposals, in combination, go further than the 1994 amendments into the area protected by the Tower Amendment. First, instead of relying on private vendors as the "surrogate" for the SEC as filing recipients, they establish a single SEC supervised body, the MSRB, for this purpose. The MSRB is the very entity that Congress said cannot require issuer filings, either directly or indirectly, through a municipal securities broker or municipal securities dealer or otherwise. Second, because the Proposals are akin to a joint initiative between the SEC and the MSRB, they should be subject to the limits of both provisions of Section 15B(d). Third, based on the very questionable extent to which the Proposals will in fact improve the availability of municipal securities disclosure, and may in fact diminish market transparency by encouraging investors to rely on incomplete information and allowing broker-dealers to reduce their procedures for obtaining material information – it is even harder to link the Proposals to preventing fraud, which is the basis for the Commission's authority.

Finally, despite recognizing in another forum that it is already "near to the statutory limits of its authority," and clearly being much nearer to these limits than before the Commission either adopted Rule

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39 *Recent Legislation: Securities Law – Municipal Securities Disclosure Statute – Newly Amended Securities Exchange Act Rule 15c2-12 Requires Municipal Securities Issuers to Provide Additional Information to the Market*, 109 Harv. L. Rev. 882, note 1, (*citing* Frederic H. Marienthal III & Wendy W. Wolfe, *Recent Developments in Disclosure Requirements for Municipal Securities*, 28 Rev. Sec. & Commodities Reg. (S & P) No. 3 at 19 (Feb. 8, 1995)).

40 Lynn S. Hume, *SEC Disclosure Rules Can Be Legally Challenged, Some Say*, The Bond Buyer, Apr. 17, 1995.

41 *Id.*

42 *Id.* To our knowledge the 1994 amendments have not been challenged in court. This may be attributable, however, to the highly collaborative and inclusive process that was used to shape the rule. Chairman Levitt said that the amendments "represent the culmination of an extraordinary dialogue that the commission has had over the past year with issuers, dealers, and investors." *SEC Adopts Rule Amendments to Improve Muni-Bond Disclosure*, 26 Sec. Reg. & L. Rep. (BNA) No. 45, at 1539 (Nov. 18, 1994), *quoted in Recent Legislation: Securities Law – Municipal Securities Disclosure Statute – Newly Amended Securities Exchange Act Rule 15c2-12 Requires Municipal Securities Issuers to Provide Additional Information to the Market*, 109 Harv. L. Rev. 882.

43 White Paper at 4.

15c2-12 in 1989 or expanded it in 1994, unlike in the adopting releases for those initiatives, the Commission does not even mention the Tower Amendment or include any discussion of the balance of interests that the Amendment represents in the Proposing Release. For these reasons, we urge the Commission to analyze this issue further and publish its conclusions for comment before adopting the Proposals.

E. Transition

1. The Commission's Request

The Proposals would only affect continuing disclosure documents for primary offerings occurring on or after the effective date of the proposed rule amendments. However, because the mechanism of the rule is to impose the filing requirement through agreements entered into by the parties at the time of the offering, many existing agreements already call for filing documents with the NRMSIRs. The Commission requests comment on how to deal with these outstanding undertakings, and other transition issues, such as how to handle historical documents currently in the NRMSIR data bases.

2. SPSE's Comment

SPSE recognizes that the Commission has genuine and legitimate concerns about the availability of municipal securities disclosure that fall within its authority and responsibility to prevent fraud in these markets. SPSE also believes that there will be many views expressed in response to the Proposals. Also, as we have expressed in this letter, we support some critical aspects of the changes the Commission proposed, such as electronic filing. Accordingly, we expect that a new framework may emerge from this rulemaking proceeding, and it is difficult to predict what the role of private vendors, especially the current NRMSIRs, will be in the future.

We hope, however, that the Commission will address any transitional issues with a sense of fairness, particularly with respect to investments the NRMSIRs have made in their businesses and, in SPSE's case, its strong history of cooperation with the Commission in the Commission's monitoring of the municipal markets.[44] The primary issues we see that could require equitable resolution, should the Commission decide that the NRMSIR function should be discontinued, are (i) any continuing obligation to serve as a NRMSIR for existing offerings and historical documents and (ii) access to information filed with the MSRB or other central repository on a reasonable basis.

With respect to the first issue, there is precedent indicating that the Commission can adjust permissible recipients by no-action letter.[45] As to historical documents, we do not believe it would be practical or efficient to require the former NRMSIRs to provide ongoing access to these documents. With respect to the second issue, we believe that in order to minimize adverse effects on competition, it will be essential to resolve the basis on which private vendors have access to the EMMA data base in advance of changing the entire structure, or at least have an understanding of the range of fees the MSRB has in mind. For example, the MSRB should provide for public comment, in advance of action on the Proposals, some indication of whether the subscription fees will be similar to those currently charged for a subscription to the Municipal Securities Information Library (the "MSIL") system or whether they will be substantially higher or based on a different type of price structure.

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44 *See, e.g.*, Report on Transactions in Municipal Securities (July 1, 2004).

45 *See* Municipal Advisory Council of Texas, SEC No-Action Letter (Sept. 7, 2004).

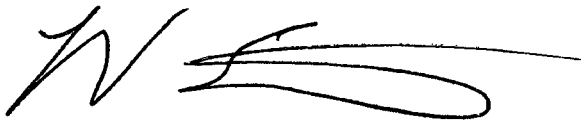
V. Conclusion

For the reasons stated above, we urge the Commission to consider the central post office alternative we suggest in this letter, in combination with requiring electronic filing of continuing disclosure documents. We note that when the Commission originally rejected the MSRB as the single central repository in 1994, in favor of the multiple NRMSIR approach, the Commission concluded that the multiple NRMSIR approach with adequate linkage was the best solution. "The advent of a linked repository system would afford the widest retrieval and dissemination of information to the secondary markets."[46] We suggest that the central post office approach with standard electronic filing requirements will provide this type of linkage by creating a central point of intake and a complete index system, while still providing for multiple access points that will compete to provide the best and most varied array of products for investors, broker-dealers, and other users of information in the municipal securities markets.

Should the Commission determine to adopt the Proposals, we request that such adoption be delayed until such important competitive and transparency issues as the MSRB's proposed fees for making its database available to vendors and the format of electronic filing can be resolved. Finally, we request that if the NRMSIR designations are withdrawn, the Commission take all necessary steps to prevent the prior NRMSIRs from experiencing any ongoing unfair burdens.

We appreciate your consideration of our comments and concerns.

Sincerely yours,



Louis V. Eccleston
President
Standard & Poor's Securities Evaluations, Inc.

cc: Hon. Christopher Cox, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner

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46 1989 Adopting Release.