SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42205; File No. SR–MSRB–98–08]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval to Proposed Rule Change Relating to Rule G–38, on Consultants, Rule G–37, Political Contributions and Prohibitions on Municipal Securities Business, Rule G–8, on Books and Records, and Revisions to the Attachment Page to Form G–37/G–38

December 7, 1999.

I. Introduction

On June 16, 1998, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') submitted to the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change that requires brokers, dealers, or municipal securities dealers (''dealers'') to obtain from their consultants information on the consultants' political contributions and payment to state and local political parties and to report such information to the Board on Form G–37/G–38. On August 26, 1999, the Board filed Amendment No. 1 which replaced and superseded the proposed rule change.[3]

The proposed rule change was published for comment in the **Federal Register** on October 12, 1999.[4] The Commission received one comment letter regarding the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change would require a dealer to receive and report certain contribution and payment information from: the consultant; any partner, director, officer or employee of the consultant who communicates with an issuer to obtain municipal securities business on behalf of the dealer; and, any PAC controlled by the consultant or any partner, director, officer or employee of the consultant who communicates with issuers to obtain municipal securities business on behalf of the of the dealer.[5] A dealer would be required to include within its Consultant Agreement a statement that the consultant agrees to provide the dealer each calendar quarter with a listing of reportable political contributions to an official(s) of an issuer and reportable contributions to political parties of states and political subdivisions during such quarter, or a report that no reportable political contributions or reportable political party contributions were made, as appropriate.[6]

The proposed rule change would require a dealer to obtain information from its consultants about the contributions made to issuer officials only if the consultant has had direct or indirect communication with such issuer to obtain municipal securities business on behalf of the dealer.[7] The political party payments required to be reported are limited to those made to political parties of states and political subdivisions that operate within the geographic area of the issuer with whom the consultant communicates on behalf of the dealer (*e.g.,* city, county and state parties). The date that establishes the obligation for the collection of contribution information is the date of the consultant's communication with the issuer to obtain municipal securities business on behalf of the dealer.

With respect to the collection of contribution and payment information, the proposed rule change contains a six-month ''look-back'' provision, as well as a six-month ''look-forward'' provision from the date of communication with an issuer. Thus, a consultant must disclose to the dealer the contributions and payments made by the consultant during the six months prior to the date of the consultant's communication with the issuer.[8] So too, if the consultant's communication with an issuer continues, any reportable contributions and payments would be required to be disclosed. Once communication ceases, the consultant still must disclose to the dealer contribution and payment information for six months.[9] The proposed rule change would require dealers to keep records under Rule G–8 of all reportable political contributions and all reportable political party payments.

A dealer's requirement to collect contribution and payment information from its consultants ends when a Consultant Agreement has been terminated.[10] Of course, dealers should not attempt to avoid the requirements of Rule G–38 by terminating a consultant relationship after directing or soliciting the consultant to make a political contribution to an issuer official after termination. Rule G–37(d) prohibits a dealer from doing any act indirectly which would result in a violation of Rule G–37 if done directly by the dealer. Thus, a dealer may violate Rule G–37 by engaging in municipal securities business with an issuer after directing or soliciting any person to make a contribution to an official of the issuer.

The proposed rule change would require that the information obtained by dealers concerning their consultants' contributions and payments be submitted by dealers to the Board on Form G–37/G–28.[11] The proposed rule change would require dealers to disclose on the attachment sheet for each consultant used by the dealer the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, from Ronald W. Smith, Senior Legal Associate, MSRB, dated August 26, 1999.

[4] Securities Exchange Act Release No. 41975 (October 4, 1999), 64 FR 55326.

[5] A ''consultant'' in Rule G–38 can refer to an individual or a company (*e.g.,* a bank affiliated with a bank dealer). For example, if an individual is a consultant, this individual would report to the dealer only his or her contributions and payments and the contributions of any PAC controlled by such individual. If the consultant is a company, the company would report its contributions and payments to the dealer, as well as those made by any partner, director, officer or employee of the consultant who communicates with issuers to obtain municipal securities business on behalf of the dealer, and any PAC controlled by the consultant or any partner, director, officer or employee of the consultant who communicates with issuers to obtain municipal securities business on behalf of the dealer.

[6] The de minimis exception for contributions to official(s) of an issuer provides that a consultant need not provide to a dealer information about contributions made by any partner, director, officer or employee of the consultant who communicates with issuers to obtain municipal securities business on behalf of the dealer to any official of an issuer for whom such individual is entitled to vote if such individual's contributions, in total, are not in excess of $250 to each official of such issuer, per election. Similarly, the de minimis exception for payments provides that a consultant need not provide to a dealer information about payments to political parties of a state or political subdivision made by any partner, director, officer or employee of the consultant who communicates with issuers to obtain municipal securities business on behalf of the dealer who is entitled to vote in such state or political subdivision if the payments by the individual, in total, are not in excess of $250 per political party, per year.

[7] A dealer must disclose contributions with respect to those issuers from which a consultant is seeking municipal securities business on behalf of the dealer, regardless of whether contributions are going to and communications are occurring with the same or different personnel within that particular issuer.

[8] Such contributions and payments become reportable in the calendar quarter in which the consultant first communicates with the issuer.

[9] Contributions and payments made simultaneously with or after the consultant's first communication with the issuer are reportable in the calendar quarter in which they are made.

[10] A dealer that terminates a Consultant Agreement would of course be obligated to obtain information regarding contributions and payments made up to the date of termination.

[11] The proposed rule change also requires dealers to report the consultant's business address on Form G–37/G–38.

contributions and payments covered by the rule or that no such contributions or payments were made for the quarter. Furthermore, a dealer must disclose if a consultant has failed to provide it with a report concerning its contributions and payments. When completing the form, a dealer must disclose, in addition to the other required information, the calendar quarter and year of any reportable political contributions and reportable political party payments that were made prior to the calendar quarter of the form being completed (*e.g.,* contributions and payments made in a prior quarter that are reportable as a result of the six-month look-back). Reportable ''look-back'' contributions and payments also must be disclosed on the Form G–37/G–38 for the quarters in which the consultant has communicated with an issuer to obtain municipal securities business on behalf of a dealer. Once a contribution or payment has been disclosed on a report, a dealer should not continue to disclose that particular contribution or payment on subsequent reports. The attachment page to Form G–37/G/38 also has been revised to require dealers to separately identify all of the municipal securities business obtained or retained by the consultant for the dealer.[12]

The proposed rule change includes a ''reasonable efforts'' provision that allows dealers to rely in good faith on information received from their consultants regarding contributions and payments. The reasonable efforts provision states that a dealer will not violate Rule G–38 if the dealer fails to receive from its consultant all required contribution and payment information and thus fails to report the information to the Board if the dealer can demonstrate that it used reasonable efforts in attempting to obtain the necessary information. However, to avail itself of the reasonable efforts provision, a dealer must:

(1) State in its Consultant Agreement that Board rules require disclosure of consultant contributions and payment;

(2) Send quarterly reminders to consultants of the deadline for their submissions to the dealer of contribution information;

(3) Include language in the Consultant Agreement to the effect that: (a) the Consultant Agreement will be terminated if, for any calendar quarter, the consultant fails to provide the dealer with information about its reportable contributions or payments, or a report noting that the consultant made no reportable contributions or payments, and the failure continues up to the date to be determined by the dealer but no later than the date by which the dealer is required to send Form G–37/G–38 to the Board with respect to the next succeeding calendar quarter, such termination to be effective upon the date the dealer must send its Form G–37/G–38 to the Board, and (b) the dealer may not make any further payments to the consultant, including payments owed for services performed prior to the date of termination, as of the date of such termination; and

(4) Enforce the Consultant Agreement provisions described above in a full and timely manner and indicate the reason for and date of the termination on its Form G–37/G–38 for the applicable quarter.

The failure by a dealer to include the termination and non-payment provisions in a Consultant Agreement or to enforce any such provisions that may be contained in the Consultant Agreement, would not, in and of itself, constitute a violation of Rule G–38 but would instead preclude the dealer from invoking the reasonable efforts provision as a defense against a possible violation for failing to disclose consultant contribution information, which the consultant may have withheld from the dealer.

Finally, the proposed rule change contains a clarifying amendment to Rule G–38(b)(i)(B), and a technical amendment to Rule G–37(e)(I)(D) to conform to the amendments to Rule G–38.

III. Summary of Comments

The Commission received one comment letter from the Bond Market Association (''TBMA''),[13] generally opposing the proposed rule change but supporting the ''reasonable efforts'' provision. In its letter, TBMA questioned the need for an additional layer of regulatory bureaucracy under the proposed changes to Rule G–38, arguing that Rule G–37 already prohibits the use of consultants, as a conduit, to make contributions that are inappropriate payments to secure municipal business. For the same reason, TBMA also stated that the proposed rule change unduly interferes with commercial contractual arrangements and is an example of excessive regulatory micromanagement. If the proposed rule change is adopted, TBMA stated that the ''reasonable efforts'' provision must be included in its broadest form, and further suggested that the provision should be modified into a non-exclusive safe harbor, thereby allowing dealers to present facts and circumstances evidence of ''reasonable efforts'' even though the specific requirements presented in the proposed rule change have not been satisfied.

The Commission disagrees with TBMA's suggested modification of the ''reasonable efforts'' provision. The Commission believes an interpretation of this provision which focuses primarily on facts and circumstances evidence could lead to irregular compliance and inconsistent enforcement of the rules. The Commission recognizes that, ultimately, the responsibility for disclosure reporting lies with the dealers. The Commission notes, however, that these dealers benefit from their relationships with and the activities of their consultants. Thus, the burden should be on the dealers to ensure that their consultants provide the requisite information in the time specified by the rules. Therefore, the Commission supports the proposed rule change, as amended, because it removes the possibility of collusion between dealers and consultants and requires dealers to act affirmatively to ensure that the required information is disclosed.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.[14] In particular, the Commission believes the proposed rule change in consistent with the requirements of Section 15B(b)(2)(C) of the Act[15] because the proposed rule change is 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. The Commission believes the proposed rule change is consistent with the Act because the public will be able to monitor whether there is a connection

[12] The existing version of the form requires dealers to list only the municipal securities business obtained or retained by the consultant in which the consultant was paid a specific dollar amount for the particular municipal securities business.

[13] *See* letter from Paul Saltzman, Executive Vice President and General Counsel, TBMA, to Jonathan Katz, Secretary, SEC, dated November 5, 1999.

[14] In reviewing this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78f(b)(7).

[15] 15 U.S.C. 78o–4(b)(2)(C).

between contributions given to an issuer by consultants and the business they obtained for the dealers that hired them.

the Commission notes that Rule G–38 requires that dealers record and report certain information about their consultants every quarter; the amendments merely add items of information that must be recorded and reported. While the additional information may be a burden on dealers, the Commission believes it is important that dealers obtain and report the information so that consultants' political contributions can be reviewed to determine whether these contributions influenced the awarding of municipal securities business. Accordingly, to establish a complete record of information, the Commission finds it reasonable that the proposed rule change requires dealers to receive quarterly reports from their consultants listing all reportable contributions, stating that the consultants made no reportable contributions, or disclosing that the consultants failed to provide a report to their dealer.

The proposed rule change also mandates that dealers include a statement in their Consultant Agreements describing this quarterly reporting requirement so the consultant is informed of his reporting responsibilities. The Commission believes that if it should be determined later that a consultant did in fact make a reportable contribution after reporting that no reportable contributions were made, the dealer will have a record to demonstrate that the consultant hid the contribution information from the dealer.

Additionally, the Commission believes that the proposed rule change is a measured response to the Act's requirement to prevent fraudulent and manipulative acts and practices. The proposed rule change does not require a dealer to obtain information about all political contributions made by its consultants. A dealer must obtain information from its consultants about the contributions made to issuer officials only if the consultant has communicated directly or indirectly with the issuer to obtain municipal securities business on behalf of the dealer. The political party payments required to be reported are limited to those made to political parties of states and political subdivisions that operate within the geographic area of the issuer with whom the consultant communicates on behalf of the dealer. Furthermore, the proposed rule change only requires dealers to record and report information about certain political contributions and payments to state and local political parties made by their consultants.[16]

The date that establishes the obligation for the collection of contribution information is the date of the consultant's communication with the issuer to obtain municipal securities business on behalf of the dealer. The proposed rule change provides for a six-month look-back and a six-month look-forward reporting provision from this date of communication with an issuer.[17] The Commission finds these provisions are necessary to ensure that this information is provided for a minimum period of one-year, absent termination of a Consultant Agreement, about any consultant contributions to officials of an issuer with whom the consultant communicated on behalf of a dealer to obtain municipal securities business. This requirement also should help to identify any situations in which contributions could have influenced the awarding of municipal securities business.

The Commission also finds that the ''reasonable efforts'' provision is consistent with the Act. The provision allows a dealer to rely in good faith on information received from its consultants regarding contributions and payments if the dealer: (1) Demonstrates that it used reasonable efforts in attempting to obtain the necessary information; (2) follows certain disclosure requirements regarding the Consultant Agreement; and (3) terminates the Consultant Agreement if the information is not provided by the second calendar quarter. These requirements should help ensure that all required information on contributions is obtained from the consultants. The Commission believes that these requirements emphasize the Board's stated intention that a dealer should vigorously enforce its contract with a consultant if the dealer becomes aware that the consultant is not providing it with materially complete or accurate information concerning contributions on a timely basis. Moreover, the Commission finds the proposed time period for reporting a consultant's contribution and payment information, or lack thereof, is appropriate and reasonable. Under the proposed rule change, a dealer has in excess of two calendar quarters (*i.e.,* no later than the date by which the dealer is required to send Form G–37/G–38 to the Board with respect to the next succeeding calendar quarter) to report this information. If a dealer fails to report this information by the end of this extended period, then the dealer must terminate the Consultant Agreement.

The Commission carefully considered the concerns expressed by TBMA in its letter opposing the amendment. The Commission was not persuaded by TBMA's contention that Rule G–37 already addresses the concerns for which the proposed rule change is designed. As previously discussed, the Commission believes that the reporting requirements outlined in the proposed rule change, which make it possible to review consultants' political contributions, are an important mechanism for preventing fraudulent and manipulative acts and practices. Moreover, the Commission believes that the proposed limitations on the ''reasonable efforts'' defense are necessary to ensure that dealers exercise diligence in monitoring the disclosure and receipt of reportable information.

Moreover, the Commission believes two calendar quarters constitute an appropriate and reasonable time period for a dealer to comply with the reporting requirements. Two calendar quarters should provide a diligent dealer with enough time to gather and report the information currently required by the Board's rules as well as the information required by the proposed rule change. Accordingly, the Commission believes that a facts and circumstance review, as suggested by TBMA, is unnecessary because of the extended reporting period provided by the proposed rule change. Furthermore, the Commission believes such a review is antithetical to the purpose of the proposed rule change which is to encourage accurate and timely reporting by dealers. Indeed, the Commission believes that a facts and circumstance review in combination with the ''reasonable efforts'' provision would permit dealers to circumvent the rule, rather than encourage timely and thorough reporting by them.

The proposed rule change provides that the reporting information is sent to the Board which then posts the Forms G–37/G–38 on its web site. This requirement includes those instances in which a Consultant Agreement has been terminated because the consultant did not provide the required information concerning contributions made. The Commission finds that this procedure is consistent with the Act because it

[16] The Commission notes that the proposed rule change does not prohibit political contributions or payments to political parties. Contributions and payments are allowed within the *de minimis* exemption. the Commission also notes that the proposed rule change does not prevent dealers or their employees from demonstrating support for local and state officials in other ways, such as volunteer political campaign activity. *See* Securities Exchange Act Release No. 33868 (April 7, 1994), 59 FR 17621 (April 13, 1994).

[17] The dealer's reporting requirement ends when a Consultant Agreement is terminated.

allows the public to access and monitor the information disclosed by consultants thereby removing impediments to and perfecting the mechanism of a free and open market in municipal securities.

Date of Effectiveness

As requested by the Board, the proposed rule change will become effective on April 1, 2000, beginning with the reports for the second quarter of 2000 (*i.e.,* reports required to be sent to the Board by July 31, 2000). Dealers will be required to disclose their consultants' reportable political contributions and reportable political party payments for the second quarter of 2000 and include, pursuant to the six-month look-back, reportable political contributions and reportable political party payments since October 1, 1999, where appropriate.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–MSRB–98–08), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Jonathan G. Katz,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42207; File No. SR–NASD–99–70]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish a Fee for Historical Research and Administrative Reports Provided Through Nasdaq's Web Sites

December 8, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 24, 1999, the National Association of Securities Dealers (''NASD'' or ''Association''), through its wholly owned subsidiary, Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 7010 to establish a fee for historical research and administrative reports provided through Nasdaq's web sites. Below is the text of the proposed rule change. Proposed new language is in italics.

Rule 7010 System Services

(a)–(p) No changes

(q) Historical Research and Administrative Reports

The charge to be paid by the purchaser of separate Historical Research and Administrative Reports, shall be as follows:

(1) *Daily Detailed Reports—$7 per day, per security and/or market participant for reports containing 15 fields or less. $15 per day, per security and/or market participant for reports exceeding 15 fields.*

(2) *Summary Level Activity Reports—$25 per report.*

(3) *Administrative Reports—$25 per user, per month.*

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Historical Research Reports. Nasdaq proposes to establish a fee which it will charge to investors who request historical research reports pertaining to Nasdaq, Over-the-Counter Bulletin Board (''OTCBB'') or other Over-the-Counter (''OTC'') issues. Nasdaq has provided such reports on an ad hoc basis to customers requesting this information by telephone. Investors would contact a member of Nasdaq's staff via telephone, describe the type of customized report desired, and arrange for an appropriate billing and delivery method before having the Nasdaq staff member compile the report. Charges for these reports were based on hourly rates relative to the time required for compilation and delivery of the reports. Nasdaq believes the system was an inefficient and time consuming arrangement that was both burdensome to Nasdaq and an impediment to the accessibility of the information for the investor.

As the number of individual investors in today's market directing their own investment decisions has increased significantly, the volume of requests for this information also has increased. To alleviate the demand upon staff resources and increase the quality, speed and availability of the information, Nasdaq has developed an automated request and delivery system that will facilitate the delivery of these reports in a timely and systematic manner at a fixed price, based on a standardized pricing methodology. Investors will be able to access the reports through the Internet on the NasdaqTrader.com (for Nasdaq issues) and OTCBB.com (for OTCBB and other OTC issues) web sites (or their successor sites), by directing an Internet browser to the appropriate web site. Once at the proper location within the web site, investors would choose from a list of standardized reports, input the necessary information pertaining to the desired security or market participant, and provide credit card information for payment.[3] Once completed, the report would be sent via e-mail directly to the investor.

Nasdaq proposes to provide historical research reports that fall into two categories: ''Daily Detailed Reports'' and ''Summary Level Activity Reports.'' Examples of Daily Detailed Reports include a Market Maker Price Movement Report (displays all market maker quote changes and the best bid and offer throughout a chosen day for a selected security), and a Time and Sales Report (provides a record of media-reported trades in the selected security, indicating the reported time, price and share volume). Summary Level Activity Reports would provide trade and/or quote information over a monthly or quarterly period.

Fees for the Daily Detailed Reports would be sent on a two-tiered basis to reflect the amount of information provided. Nasdaq proposes to assess a fee of $7 for reports with 15 or fewer

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[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Credit card information will be provided utilizing a secure web site connection.