

19(b)(3)(A) of the Act, which renders the proposed rule change effective upon receipt of this filing by the Commission. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR-MSRB-97-17 and should be submitted by February 12, 1998.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39545; File No. SR-MSRB-97-10]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Forms G-36(OS) and G-36(ARD) and Recordkeeping, Operative on January 1, 1998

January 13, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 26,

1997, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change (File No. SR-MSRB-97-10). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Board. 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

The Board has filed with the Commission a proposed rule change consisting of revised Forms G-36(OS) and G-36(ARD) under rule G-36 and amendments to section (a)(xv) of rule G-8, on recordkeeping. The proposed rule change becomes operative on January 1, 1998.

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

In its filing with the Commission, the Board 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 texts of these statements may be examined at the places specified in Item IV below. The Board 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

Rule G-36 requires that a broker, dealer or municipal securities dealer acting as underwriter in a primary offering of municipal securities (with certain limited exceptions) send to the Board copies of the official statement and completed Form G-36(OS). If the securities advance refund an outstanding issue of municipal securities, rule G-36 requires that the underwriter also send to the Board copies of the advance refunding document and completed Form G-36(ARD). Forms G-36(OS) and G-36(ARD) are being revised to provide greater clarity to brokers, dealers and municipal securities dealers in the process of completing the forms as well as to provide additional information that would assist the enforcement

agencies in their enforcement activities relating to rules G-36 and G-32.

The revisions to Form G-36(OS) add the following new data elements: the date materials are received from the issuer, the date materials are sent to the Board, whether materials submitted consist of more than one document, the actual or expected date of delivery of securities to underwriters, whether the securities advance refund another issue, the SEC registration number, information regarding CUSIP-6 number assignments and the fax number of the preparer. The revisions to Form G-36(ARD) add the following new data elements: the date materials are received from the issuer, the date materials are sent to the Board, whether materials submitted consist of more than one document, the date of delivery of securities to underwriters, the SEC registration number and the fax number of the preparer. In addition, the layout of both forms is reorganized.

Rule G-8(a)(xv) currently requires brokers, dealers and municipal securities dealers acting as underwriters in most primary offerings of municipal securities to maintain certain records relating to such primary offerings and the receipt and sending of materials as required under rule G-36. Rule G-8(a)(xv) is being amended to require such brokers, dealers and municipal securities dealers to record and maintain additional information regarding the date of delivery of the issue to the underwriters, as well as to retain a copy of the receipt of sending the required forms and documents to the Board and a copy of the forms and documents sent. The additional records required under the amended rule will assist the enforcement agencies in their enforcement activities relating to rule G-36.

###### 2. Basis

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the Board's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

As discussed above, the Board believes that the proposed rule change will provide greater clarity to brokers, dealers and municipal securities dealers

in completing Forms G-36(OS) and G-36(ARD) and will provide additional information to the enforcement agencies that would assist them in their enforcement activities relating to rules G-36 and G-32.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all brokers, dealers and municipal securities dealers.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

In May 1997, the Board published a notice ("Notice") that, among other things, urged brokers, dealers and municipal securities dealers to review their compliance procedures in connection with rules G-36 and G-32.<sup>1</sup> To assist the agencies charged with enforcing rules G-36 and G-32, the Board proposed in the Notice certain revisions to Forms G-36(OS) and G-36(ARD). These revisions would require underwriters to include information regarding the dates underwriters receive official statements and advance refunding documents from issuers, the date of delivery of the issue to the underwriters, whether a new issue is an advance refunding and the date the documents are sent to the Board. In addition, the Board proposed an amendment to rule G-8(a)(xv) to require underwriters to record the date of delivery of the issue to the underwriters and to retain a copy of the receipt of sending the required forms and documents to the Board, as well as a copy of the forms and documents sent.

In response to its request for comments, the Board received comment letters addressing the proposed revisions to Forms G-36(OS) and G-36(ARD) and the proposed amendments to rule G-8(a)(xv) from eight commentators.

Several commentators state that they supported<sup>2</sup> or did not oppose<sup>3</sup> the proposed changes to Forms G-36(OS) and G-36(ARD) and the related change to rule G-8. One commentator<sup>4</sup>

supported the collection and retention of the additional information as a deterrent to issuers for the untimely provision of official statements to underwriters and as a source of information about the frequency and severity of any problem in the municipal market with the delivery of official statements and advance refunding documents. Another commentator<sup>5</sup> stated that the proposal would evidence any late delivery by the issuer of official statements to underwriters.

NASD Regulation, Inc. suggested additional changes to the forms. It suggested that the forms include a clarifying statement which indicates whether the "date of delivery" is synonymous with "settlement or closing date"; that a glossary or definition of terms be included as part of the forms, or alternatively, that the forms contain a reference to the appropriate rule or interpretation which provides appropriate definitions; that, in addition to the managing underwriter, the forms identify each syndicate member and percent participation, when applicable, to be used in compliance activities under rule G-37; and that when firms are identified by name on the forms they also be identified by their broker-dealer number or SEC-8 number. The Board has incorporated most of these suggestions in the revised forms. Information regarding syndicate members and participants was not included since this information would in several respects not be compatible with the type of information mandated by rule G-37 and would require that the forms be enlarged to three pages to add data elements that are entirely unrelated to rule G-36.

Although another commentator<sup>6</sup> did not specifically oppose the changes in the forms, it expressed some concern regarding the revisions by stating that the "undisguised purpose" of the proposed revisions to Forms G-36(OS) and G-36(ARD) was to require brokers, dealers and municipal securities dealers to advise the Board whenever a filing is late under rule G-36. The Board acknowledges that one of the stated purposes of the revisions to Forms G-36(OS) and G-36(ARD) is to assist the enforcement agencies in their enforcement activities.

One commentator<sup>7</sup> opposed the proposed amendments to rule G-8(a)(xv), stating that it would increase the burden on brokers, dealers and

municipal securities dealers without solving the underlying problem. The Board believes that the proposed amendments to rule G-8(a)(xv) will at most constitute a negligible compliance burden while providing significant assistance to the enforcement agencies in their enforcement activities relating to rule G-36.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; (iii) was provided to the Commission for its review at least five business days prior to the filing date; and (iv) does not become operative for at least thirty (30) days from the date of its filing, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(e)(6) thereunder and become operative on January 1, 1998. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR-MSRB-97-10 and should be submitted by February 12, 1998.

<sup>1</sup> "Board Review of Underwriting Process," *MSRB Reports*, Vol. 17, No. 2 (June 1997) at 3-16.

<sup>2</sup> Goldman, Sachs & Co., Government Finance Officers Association ("GFOA"), Newman & Associates, Inc. and Rauscher Pierce Refsnes, Inc. ("Rauscher Pierce").

<sup>3</sup> Lehman Brothers Inc.

<sup>4</sup> GFOA.

<sup>5</sup> Rauscher Pierce.

<sup>6</sup> Smith Barney Inc.

<sup>7</sup> Wachovia Bank, N.A.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39551; File No. SR-NASD-97-94]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Extending the Pilot Program of the NASD's Short Sale Rule and the Amendment to the Definition of "Legal" Short Sale

January 14, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on December 23, 1997, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

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

The NASD is proposing to extend until April 15, 1998, the pilot program of the NASD's short sale rule ("Rule") and the recently-approved amendment to the definition of "legal" short sale.<sup>3</sup> Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

<sup>1</sup> 15 U.S.C. § 78s(b)(1) (1994).

<sup>2</sup> 17 CFR 240.19b-4 (1997).

<sup>3</sup> The NASD has requested permanent approval of its short sale rule. Securities Exchange Act Release No. 38979 (Aug. 26, 1997), 62 FR 46537 (Sept. 3, 1997) [File No. SR-NASD-97-58]. In response to its solicitation of comments on the filing (SR-NASD-97-58), the Commission has received 352 comment letters to date, which will be considered in connection with the Commission's determination on SR-NASD-97-58.

#### NASD Rule 3350

(1) This section shall be in effect until April 15, 1998 [January 15, 1998].

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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, the NASD 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 V 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. Background and Description of the NASD's Short Sale Rule

On June 29, 1994, the SEC approved the rule applicable to short sales<sup>4</sup> in Nasdaq National Market ("NNM") securities on an eighteen-month pilot basis through March 5, 1996.<sup>5</sup> The termination date for the pilot program for the Rule was subsequently extended until January 15, 1998.<sup>6</sup>

The Rule prohibits member firms from effecting short sales at or below the current inside bid as disseminated by Nasdaq whenever that bid is lower than the previous inside bid.<sup>7</sup> The Rule is in

<sup>4</sup> A short sale is a sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller. To determine whether a sale is a short sale, members must adhere to the definition of a "short sale" contained in Rule 3b-3 of the Act, which rule is incorporated into Nasdaq's Rule by NASD Rule 3350(k)(1).

<sup>5</sup> Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994) [File No. SR-NASD-92-12] ("Short Sale Rule Approval Order").

<sup>6</sup> The Rule was extended on several occasions. See Securities Exchange Act Release No. 39140 (Sept. 26, 1997), 62 FR 52170 (Oct. 6, 1997) [File No. SR-NASD-97-65]; Securities Exchange Act Release No. 37917 (Nov. 1, 1996), 61 FR 57934 (Nov. 8, 1996) [File No. SR-NASD-96-41]; Securities Exchange Act Release No. 36171 (Aug. 30, 1995), 60 FR 46651 (Sept. 7, 1995) [File No. SR-NASD-95-35]. The most recent extension of the pilot program through January 15, 1998, was to allow Nasdaq and the NASD to develop more meaningful primary market maker standards.

<sup>7</sup> Nasdaq calculates the inside bid or best bid from all market makers in the security (including bids on behalf of exchanges trading Nasdaq securities on an unlisted trading privileges basis) and disseminates symbols to denote whether the current inside bid is an "up bid" or a "down bid." Specifically, an "up bid" is denoted by a green "up" arrow and a "down bid" is denoted by a red "down" arrow. To

effect during normal domestic market hours (9:30 a.m. to 4:00 p.m., Eastern Time). To ensure that market maker activities that provide liquidity and continuity to the market are not adversely constrained when the Rule is invoked, the Rule provides an exemption to "qualified" Nasdaq market makers (*i.e.*, those market makers that meet the Primary Market Maker ("PMM") standards). Even if a market maker is able to avail itself of the qualified market maker exemption, it can only utilize the exemption from the Rule for transactions that are made in connection with bona fide market making activity. If a market maker does not satisfy the requirements to be a qualified market maker, it can remain a market maker in the Nasdaq system, although it can not take advantage of the exemption from the Rule.

Since the Rule has been in effect, there have been three methods used to determine whether a market maker is eligible for the market maker exemption. Specifically, from September 4, 1994 through February 1, 1996, Nasdaq market makers who maintained a quotation in a particular NNM security for 20 consecutive business days without interruption were exempt from the Rule for short sales in that security, provided that short sales were made in connection with bona fide market making activity (the "20-day" test). From February 1, 1996 until February 14, 1997, the "20-day" test was replaced with a four-part quantitative test known as the Nasdaq PMM Standards.<sup>8</sup> On February 14, 1997, the PMM standards were waived for all NNM securities due to the effects of the SEC's Order Handling Rules and corresponding NASD rule change and system modifications on the operation of the

effect a "legal" short sale on a down bid, the short sale must be executed at a price at least a 1/16th of a point above the current inside bid. Conversely, if the security's symbol has a green "up" arrow next to it, members can effect short sales in the security without any restrictions.

<sup>8</sup> Under the PMM Standards, a market maker was required to satisfy at least two of the following four criteria each month to be eligible for an exemption from the Rule: (1) the market maker must be at the best bid or best offer as shown on Nasdaq no less than 35 percent of the time; (2) the market maker must maintain a spread no greater than 102 percent of the average dealer spread; (3) no more than 50 percent of the market maker's quotation updates may occur without being accompanied by a trade execution of at least one unit of trading; or (4) the market maker executes 1 1/2 times its "proportionate" volume in the stock. If a PMM did not satisfy the threshold standards after a particular review period, the market maker lost its designation as a PMM (*i.e.*, the "P" next to its market maker identification was removed). Market makers could requalify for designation as a PMM by satisfying the threshold standards in the next review period.