member. Under current practice, GSD issues its clearing fund deficiency notices by telephone calls typically at 8:30 a.m. eastern time, and by a facsimile containing (i) a cover letter summarizing the deficiency status and (ii) a detailed report reflecting the firm's current clearing fund requirement and collateral on deposit. Therefore, deficiency calls typically must be satisfied by approximately 10:30 a.m. eastern time.

Notwithstanding GSD's issuance of clearing fund calls, each member has the ability to access a report each day detailing its clearing fund balances and any deficiency thereof generally by 12:30 a.m. eastern time.

To further ensure the timely satisfaction of clearing fund deficiency calls and taking into account members' ready access to clearing fund deficiency information, the proposed rule change would establish a firm deadline of 10:30 a.m. eastern time for such satisfaction and eliminate current provisions which correlate the timing of the deadline to the issuance of the notice by FICC.[3] As a result, it would be incumbent upon members to access directly the appropriate report detailing their clearing fund deposit requirements so they might satisfy any deficiencies.

FICC believes the proposed rule change is consistent with the requirements of section 17A of the Act[4] and the rules and regulations thereunder applicable to FICC because it promotes timely satisfaction of clearing fund deficiency calls and reduces the amount of risk to FICC and its members. As such, FICC believes the proposed rule assures the safeguarding of securities and funds that are in the custody and control of FICC or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change will have any impact or impose any burden on competition.

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

Written comments relating to the proposed rule change have not yet been solicited or received. FICC will notify the Commission of any written comments received by FICC.

[3] Under the proposed rule, FICC may extend this deadline if operational or systems difficulties arise that reasonably prevent members from satisfying the 10:30 a.m. eastern time deadline.

[4] 15 U.S.C. 78q–1.

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

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding; or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FICC–2005–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–FICC–2005–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filings also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://www.ficc.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2005–07 and should be submitted on or before May 12, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1877 Filed 4–20–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51561; File No. SR–MSRB–2005–04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Relating to Solicitation of Municipal Securities Business Under MSRB Rule G–38

April 15, 2005.

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 March 22, 2005, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in items I, II and III below, which Items have been prepared by the MSRB. 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 MSRB has filed with the Commission a proposed rule change deleting existing Rule G–38, on consultants, and replacing it with new Rule G–38, on solicitation of municipal securities business. In addition, the proposed rule change would make related amendments to Rule G–37, on political contributions and prohibitions on municipal securities business, Rule G–8, on recordkeeping, Form G–37/G–38 and Form G–37x, as well as add new

[5] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

Form G–38t. The text of the proposed rule change, as well as proposed amended Form G–37, amended Form G–37x and new Form G–38t, are available on the MSRB's Web site (*http://www.msrb.org*), at the MSRB's principal office, and at the Commission's Public Reference Room.

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 MSRB 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. The MSRB 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

The MSRB began its current rulemaking initiative on the solicitation on behalf of brokers, dealers and municipal securities dealers (''dealers'') of municipal securities business[3] by consultants[4] early last year because of certain practices that could present challenges to maintaining the integrity of the municipal securities market.[5] These practices include, among other things, significant increases in recent years in the number of consultants being used, the amount these consultants are being paid and the level of reported political giving by consultants. The MSRB has been concerned that increases in levels of compensation paid to consultants for successfully obtaining municipal securities business may be motivating consultants, who currently are not subject to the basic standards of fair practice and professionalism embodied in MSRB rules, to use more aggressive or questionable tactics in their contacts with issuers. In addition, the MSRB has expressed concern over whether dealers are uniformly making the required disclosures to issuers and on Form G–37/G–38, and whether they are undertaking the other required duties imposed by Rule G–38, for all persons who by their actions should be considered consultants. The MSRB believes that it would be appropriate to apply the basic standards of fair practice and professionalism embodied in MSRB rules to all persons who solicit municipal securities business on behalf of dealers. The application of such standards would ensure that all solicitations are undertaken in accordance with the ethical standards that govern dealer personnel.

Thus, the MSRB has determined to file the proposed rule change with the Commission.

Summary of Proposed Amendments to Rule G–38

Prohibited Payments. Existing Rule G–38, on consultants, is replaced in its entirety by new Rule G–38, on solicitation of municipal securities business. The new rule prohibits dealers from making any direct or indirect payment to any person who is not an affiliated person of the dealer for a solicitation of municipal securities business on behalf of the dealer.

Definitions of Affiliated Person and Affiliated Company. An affiliated person of a dealer is defined as any partner, director, officer or employee of the dealer or of an affiliated company. An affiliated company of a dealer is an entity that controls, is controlled by or is under common control with the dealer and whose activities are not limited solely to the solicitation of municipal securities business. Thus, a dealer affiliate whose activities consist only of soliciting municipal securities business and that undertakes no other *bona fide* activities with respect to the dealer or with respect to any other affiliated company of the dealer does not qualify as an affiliated company for purposes of new Rule G–38.[6]

Definition of Solicitation. Solicitation is defined as a direct or indirect communication with an issuer for the purpose of obtaining or retaining municipal securities business.

Transitional Payments and New Form G–38t. Notwithstanding the foregoing, dealers are permitted to make payments to non-affiliated persons for solicitations of municipal securities business if such payments are made with respect solely to solicitation activities undertaken by such persons on or prior to the date of Commission approval of the amendments. Such payments are permitted only if (A) the dealer had been selected by the issuer on or prior to the approval date of the proposed amendments to engage in such municipal securities business; [7] (B) the consultant has not solicited municipal securities business from any issuer on behalf of the dealer at any time after the approval date; and (C) the dealer submits to the MSRB, by the last day of the month following the end of each calendar quarter during which payments to the consultant are made or remain pending, new Form G–38t.[8] The dealer must provide on Form G–38t the same types of disclosures currently required to be made with respect to consultants under existing Rule G–38.[9] The MSRB will make public copies of all Forms G–38t it receives on its Web site at *http://www.msrb.org.* The use of Form G–37/G–38 will be discontinued on the date of Commission approval of the amendments. All information submitted to the MSRB with respect to consultants on or after the date of Commission approval must be submitted on Form G–38t rather than old Form G–37/G–38, even if a payment required to be reported to the MSRB has

[3] Municipal securities business is defined in Rule G–37 as the purchase of a primary offering from the issuer on other than a competitive bid basis (*e.g.*, negotiated underwriting), the offer or sale of a primary offering on behalf of an issuer (*e.g.*, private placement or offering of municipal fund securities), and the provision of financial advisory, consultant or remarketing agent services to an issuer for a primary offering in which the dealer was chosen on other than a competitive bid basis.

[4] Current Rule G–38 defines consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication with an issuer on behalf of the dealer where such communication is undertaken in exchange for payment from the dealer or any other person.

[5] *See* footnotes 14 and 15 *infra* and accompanying text.

[6] This provision is not intended to exclude from the definition of affiliated company any entity that is a legitimate member of a dealer's corporate family, so long as such entity's sole *bona fide* purpose is not to solicit municipal securities business for the dealer or for any of the dealer's other affiliated companies. In the case of a dealer organized as a separately identifiable department or division of a bank (''SID'') under Rule G–1, those portions of the bank outside of the SID would be treated as an affiliated company of the dealer.

[7] A dealer must be able to provide documentation from the issuer or other third party of its selection on or prior to the Commission approval date for the amendments.

[8] Since it is expected that Form G–38t will be used during only a short period of time, as discussed below, the MSRB has elected not to develop an electronic submission system for such form. Thus, dealers submitting Forms G–38t to the MSRB must send two copies of the form to the MSRB by certified or registered mail, or some other equally prompt means that provides a record of sending.

[9] These disclosures include the name, business address and role of the consultant, the compensation arrangement, any municipal securities business obtained or retained by the consultant for which payment is made or is pending and dollar amounts paid to the consultant in such quarter for each such item of business, the total dollar amount paid to each consultant in such calendar quarter, and the reportable political contributions and reportable political party payments of the consultant. Each item of municipal securities business for which payment remains pending must be listed on the quarterly reports until such quarter in which payment is finally made, at which time the amount paid must be listed. If no further payments are to be made to a consultant, such consultant need not be listed on Form G–38t for subsequent quarters.

been made to the consultant prior to such date of approval.

The MSRB expects that dealers will terminate their contractual obligations with and remit final payments to consultants promptly following approval of the amendments by the Commission. The MSRB will ask the applicable enforcement agencies to review Forms G–38t and the circumstances of continuing payments to consultants in order to ensure that such payments are not being made in an attempt to circumvent the intent of the new rule provisions.

Summary of Proposed Amendments to Rule G–37 and Forms G–37/G–38 and G–37x

Rule G–37 is amended to (i) delete references and provisions relating to consultant information provided under Rule G–38, (ii) reflect that those associated persons who solicit municipal securities business and thereby are municipal finance professionals include affiliated persons under Rule G–38, (iii) add a reference to the definition of solicitation under new Rule G–38, (iv) reflect the renaming of Form G–37/G–38 as Form G–37, and (v) make section headings consistent throughout the rule. Form G–37/G–38 is renamed as Form G–37, and Section IV and the consultant attachment to the form are deleted.[10] In addition, Form G–37x is amended to delete references to the reporting of consultant information.

Summary of Proposed Amendments to Rule G–8

Rule G–8, on recordkeeping, is amended to require dealers to retain copies of any submitted Forms G–38t and records of their submission to the MSRB, as well as to reflect the historical nature of the records that dealers must retain with respect to the deleted consultant provisions of existing Rule G–38.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with section 15B(b)(2)(C) of the Act,[11] which provides that the MSRB'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 * * *.'' [12]

The MSRB believes that the proposed rule change is consistent with the Act because it will further investor protection and the public interest by ensuring that solicitations of municipal securities business are undertaken in a manner consistent with standards of fair practice and professionalism, thereby helping to maintain public trust and confidence in the integrity of the municipal securities market.

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

The MSRB 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 dealers.

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

The MSRB published notices for comment on draft amendments to Rule G–38 on April 5, 2004 (the ''April 2004 Notice'') [13] and September 29, 2004 (the ''September 2004 Notice'').[14] The April 2004 notice sought comments on draft amendments limiting payments by a dealer for the solicitation of municipal securities business on its behalf solely to its associated persons (the ''original draft amendments''). The MSRB received comments from 28 commentators.[15]

The September 2004 notice sought comments on revised draft amendments to Rule G–38 (the ''revised draft amendments'') prohibiting a dealer from making payments for the solicitation of municipal securities business on its behalf to any person who is not an associated person of the dealer. The revised draft amendments would have imposed additional obligations on dealers with respect to any solicitor who is not a partner, director, officer or employee. These obligations would have included the entering into of a contractual agreement, the subjecting of such solicitors to MSRB rules (including but not limited to Rule G–37) with respect to their solicitation activities, and the disclosure of arrangements relating to such solicitors. The MSRB received comments from 19 commentators.[16]

[10] The form also is amended to reflect the previous renaming of ''executive officers'' as ''non-MFP executive officers'' under Rule G–37 and to rename the municipal securities business category designation of ''private placement'' to ''agency offering'' to more accurately reflect the nature of this category. The substance of Section IV and the consultant attachment deleted from the form have been included in new Form G–38t.

[11] 15 U.S.C. 78o–4(b)(2)(C).

[12] *Id.*

[13] *See* MSRB Notice 2004–11 (April 5, 2004).

[14] *See* MSRB Notice 2004–32 (September 29, 2004), as modified by MSRB Notice 2004–33 (October 12, 2004).

[15] Letters from Sam Conner, Senior Vice President and Manager of Public Finance, J.J.B. Hilliard, W.L. Lyons, Inc. (''JJB Hilliard''), to Kit Taylor, Executive Director, MSRB, dated April 14, 2004; Jerry L. Chapman (''Mr. Chapman''), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated April 22, 2004; Joe Jolly, Jr., Joe Jolly & Co., Inc. (''Joe Jolly''), to William J. Jester, Jr., Chairman, MSRB, dated April 26, 2004; Peter J. Hill, Managing Director, Public Finance Department, JP Morgan (''JP Morgan''), to Mr. Taylor dated April 26, 2004; R. Steven Crowley, President, Nevis Securities, LLC (''Nevis''), to Mr. Lanza dated April 29, 2004; Dennis G. Ciocca, Senior Managing Director, Sutter Securities Incorporated (''Sutter'') to Mr. Taylor, dated May 17, 2004; Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO, Seattle-Northwest Securities Corporation (''Seattle-Northwest'') to Mr. Taylor, dated May 19, 2004; Gordon Reis III, Managing Principal, Seasongood & Mayer, LLC (''Seasongood'') to Mr. Taylor, dated May 20, 2004; Hill A. Feinberg, Chairman & Chief Executive Officer, First Southwest Company (''First Southwest'') to Mr. Lanza, dated May 26, 2004; James C. Cervantes, Managing Director & Head of the Public and Non-Profit Finance Group, and Scott C. Sollers, Managing Director, Stone & Youngberg (''S&Y'') to Mr. Lanza, dated June 2, 2004; Bruce Moland, Vice President & Assistant General Counsel, Wells Fargo & Company (''Wells Fargo''), to Mr. Lanza dated June 2, 2004; Amelia A.J. Bond, Director of Public Finance, A.G. Edwards & Sons, Inc. (''AG Edwards''), to Mr. Lanza dated June 3, 2004; Pfilip G. Hunt, Jr., President, Gardnyr Michael Capital, Inc. (''Gardnyr Michael''), to Mr. Taylor dated June 3, 2004; G. Douglas Edwards, President & CEO, Morgan Keegan & Company, Inc. (''Morgan Keegan''), to Mr. Lanza dated June 3, 2004; Thomas E. Lanctot, Principal and Head of the Public and Non-Profit Finance Group, William Blair & Company (''William Blair''), to Mr. Lanza dated June 3, 2004; Sarah A. Miller, General Counsel, ABA Securities Association (''ABA''), to Mr. Lanza dated June 4, 2004; Daniel L. Keating, Senior Managing Director, Bear Stearns & Co., Inc. (''Bear Stearns''), to Mr. Lanza dated June 4, 2004; Lynette Kelly Hotchkiss, Senior Vice President and Associate General Counsel, Bond Market Association (''BMA''), to Mr. Lanza dated June 4, 2004; Martin Cabrera, Jr., President, Cabrera Capital Markets, Inc. (''Cabrera''), to Mr. Lanza dated June 4, 2004; Robyn A. Huffman, Vice President and Associate General Counsel, Goldman Sachs & Co. (''Goldman''), to Mr. Lanza dated June 4, 2004; Samuel C. Doyle, Executive Vice President, Kirkpatrick, Pettis, Smith, Polian Inc. (''Kirkpatrick''), to Mr. Jester dated June 4, 2004; Mike Dunn, Merchant Capital LLC (''Merchant''), to the MSRB dated June 4, 2004; John J. Lawlor, Managing Director, Municipal Markets, Merrill Lynch (''Merrill''), to Mr. Lanza dated June 4, 2004; Andrew Garvey, Managing Director, Morgan Stanley & Co. Incorporated (''Morgan Stanley''), to Mr. Lanza dated June 4, 2004; Bernard Beal, Chief Executive Officer, M.R. Beal & Company (''MR Beal''), to Mr. Lanza dated June 4, 2004; James S. Keller, Chief Regulatory Counsel, PNC Capital Markets, Inc. (''PNC''), to Mr. Lanza dated June 4, 2004; Terry L. Atkinson, Managing Director & Director, Municipal Securities Group, UBS Financial Services Inc., to Mr. Lanza dated June 4, 2004 (''UBS''); and Frank Y. Chin, Managing Director, Public Finance Department, Municipal Securities Division, Citigroup Global Markets, Inc. (''Citigroup''), to Mr. Lanza dated June 7, 2004.

[16] Letters from Mr. Ciocca (''Mr. Ciocca'') to Mr. Lanza dated December 8, 2004; Mr. Hunt, Gardnyr

The comments received on the April and September 2004 Notices are discussed below.

Need for Regulatory Action on Solicitation of Municipal Securities Business

Comments Received. Many commentators believe that consultants are beneficial and allow dealers, especially smaller regional dealers, to maximize their limited resources and compete with larger national dealers.[17] Some of these commentators express concern that the amendments would negatively impact such dealers, with the BMA stating that the proposal may practically eliminate an entire segment of the municipal securities industry. The BMA and Sen. Santorum state that the use of consultants increases competition and provides issuers with greater choice, thereby resulting in ''better service at lower rates.'' In addition, they argue that consultants that have a local presence ''have unique knowledge regarding the local issuer's needs and requirements,'' thereby improving the effectiveness of the dealer at servicing the issuer. Merrill Lynch notes that ''the municipal marketplace is uniquely fragmented, covering myriad issuers in diverse locations.'' It argues that consultants are necessary to providing quality service to such a diverse market. UBS states that disclosure of consultant practices is better than a prohibition on using consultants.

Other commentators believe that there is a significant problem with the use of consultants that is appropriately addressed by requiring that solicitation activity be undertaken only by persons subject to MSRB rules.[18] JP Morgan agrees ''that eliminating the use of consultants who are not associated persons will advance the * * * standards of fair practice and professionalism embodied in the Board's rules and in the rules and regulations that govern all activities of brokers, dealers and municipal securities dealers and their associated persons.'' It views the original draft amendments as ''a sensible regulatory response to the increasing and evolving use of third parties to solicit municipal securities business.'' Seattle-Northwest states that ''removing the opportunity for improper conduct by consultants would result overall in an improved environment for issuance of municipal securities.'' Wells Fargo believes that the original draft amendments have ''the benefit of removing the ability of a dealer to indirectly evade the 'pay to play' prohibitions * * * through the use of consultants.''

The BMA contends that the amendments are not warranted, stating that the MSRB relies on possible abusive practices and speculative risks that have not been shown to exist. It questions whether there has been a significant increase in contributions by consultants and further states that, ''regardless of the level of the contributions being made, there is no indication whatsoever that Consultant contributions are being used to influence decisions regarding municipal securities business.'' The BMA states that coupling Rule G–37(d), on indirect violations, with the existing disclosure requirements of Rule G–38 provides an effective means for addressing the MSRB's concerns.

With regard to compensation, the BMA argues that the increase in payments to consultants ''does not in any way indicate or imply that Consultants are engaging in pay-to-play or that there is added pressure on Consultants to engage in aggressive or abusive practices. Rather, the recent increase in compensation appears to be attributable to the significant increase in the volume and size of municipal securities deals.'' On the other hand, AG Edwards, Citigroup, Goldman, Merrill and William Blair state that they would support a prohibition on contingent compensation arrangements or ''success'' fees paid to consultants. However, S&Y opposes the imposition of restrictions on the type and amount of compensation paid to consultants.

MSRB Response. After a careful and thorough review of industry comments on the April and September 2004 Notices, the MSRB has concluded that regulatory action in this area is warranted, based on the concerns previously expressed by the MSRB in such notices and continuing revelations of questionable activities involving issuer personnel, dealers, other financial services organizations, and third-party intermediaries. Such activities have the potential to severely undermine public confidence in the municipal securities market. The existing consultant disclosure requirements under current Rule G–38 have assisted the MSRB in determining that action is necessary in this area but cannot serve as a substitute for such action. The MSRB believes that the proposed rule change represents a meaningful step toward further ensuring the continued integrity of the municipal securities market. The MSRB also believes that the benefits to the municipal securities market resulting from the proposed rule change outweigh the benefits that would accrue to permitting consultants to continue soliciting municipal securities business on behalf of dealers. Furthermore, the MSRB received comments both in favor of and in opposition to the original draft amendments from large national firms and small or regional firms. Taken as a whole, the comments do not provide persuasive evidence that the proposed rule change would have a disparate effect on different types of dealers.

Other Unregulated Municipal Securities Industry Participants

Comments Received. Many commentators are concerned that, although the problems associated with pay-to-play in the municipal securities industry are not limited to dealers, only dealers are subject to regulation in this area.[19] First Southwest and Kirkpatrick observe that any problem that may exist requires a broader response than restrictions applicable only to dealers. Several commentators also believe that current MSRB rules may permit dealers with affiliated banks to use these banks to circumvent MSRB rules.[20] They urge the MSRB to coordinate efforts with the Commission, NASD and others to apply pay-to-play limits to financial advisors,

Michael, to Mr. Taylor dated December 10, 2004; Ms. Daudon and Mr. Rose, Seattle-Northwest, to Mr. Lanza dated December 13, 2004; Mr. Feinberg, First Southwest, to Mr. Lanza dated December 14, 2004; Mr. Moland, Wells Fargo, to Mr. Lanza dated December 15, 2004; Robert A. Estrada, Chairman & CEO, Estrada Hinojosa & Company, Inc. (''Estrada''), to Mr. Lanza dated December 15, 2004; Ms. Hotchkiss, BMA, to Mr. Lanza dated December 15, 2004; Ms. Huffman, Goldman, to Mr. Lanza dated December 15, 2004; Mr. Garvey, Morgan Stanley, to Mr. Lanza dated December 15, 2004; Mr. Atkinson, UBS, to Mr. Lanza dated December 15, 2004; Glenn Green, Vice President—Municipal Compliance, Wachovia Securities (''Wachovia''), to Mr. Lanza dated December 15, 2004; Mr. Lanctot, William Blair, to Mr. Lanza dated December 15 and December 16, 2004; Ronald J. Dieckman, Senior Vice President & Director, Municipal Bond Department, JJB Hilliard, to Mr. Lanza; Lawrence C. Holtz, President, Fixed Income Group, RBC Dain Rauscher (''Dain Rauscher''), to Mr. Lanza; Ms. Miller, ABA, to Mr. Lanza dated December 17, 2004; Mr. Doyle, Kirkpatrick, to Mr. Taylor dated December 17, 2004; Mr. Keating, Bear Stearns, to Mr. Lanza dated December 20, 2004; Mr. Lawlor, Merrill, to Mr. Lanza dated January 20, 2005; and the Honorable Rick Santorum, United States Senate (''Sen. Santorum''), to Mr. Lanza dated February 16, 2005.

[17] *See* comments of Bear Stearns, BMA, Cabrera, Citigroup, Gardnyr Michael, Goldman Sachs, JJB Hilliard, Merrill Lynch, Morgan Stanley, MR Beal, Nevis, PNC, Sen. Santorum, Sutter, UBS and William Blair.

[18] *See* comments of ABA, Mr. Chapman, Mr. Ciocca, Joe Jolly, JP Morgan, Kirkpatrick, Morgan Keegan, Seasongood, Seattle-Northwest and Wells Fargo.

[19] *See* comments of Mr. Chapman, First Southwest, Kirkpatrick, Merrill and Morgan Keegan.

[20] *See* comments of Goldman, Merchant, Morgan Stanley and William Blair.

derivatives advisors, bond lawyers and other market participants.

MSRB Response. The MSRB recognizes that other participants in the municipal securities industry face the same types of challenges as does the dealer community. Given the limited jurisdictional reach of MSRB rules, however, a more complete response to concerns in this area requires voluntary action on the part of the unregulated parties in the municipal securities market. The MSRB strongly encourages other industry participants—including but not limited to financial advisers, lawyers and swap participants—to take affirmative steps to ensure the integrity of their portion of the marketplace and toward severing the connection of political contributions and other payments that benefit public officials and their surrogates from the awarding of contracts relating to the municipal securities, derivative products and other financial activities of issuers. The MSRB observes that the failure of such other parties to take meaningful steps to deter potential conflicts of interests and other possibly abusive practices may merit further consideration by the Commission or Congress.

Effect of Becoming an Associated Person

Comments Received. Many commentators note that the associated person concept used in the draft amendments triggers requirements under the Exchange Act and rules of other self-regulatory organizations, and can also raise state tax and labor law issues.[21] They argue that these non-MSRB requirements may be practically impossible to apply to many solicitors. Several commentators also state that there is no guidance as to how solicitors serving multiple dealers are to be supervised.

MSRB Response. The MSRB recognizes the concerns over the associated person concept. The MSRB's intent in using the associated person concept in the draft amendments was to ensure that outside solicitors were fully subject to MSRB rules and did not extend to making other legal requirements applicable to such solicitors. The MSRB has therefore abandoned the associated person concept in the proposed rule change. The MSRB believes that, as formulated, the proposed rule change does not raise the concerns expressed by these commentators.

Apply Only G–37 to Consultants

Comments Received. Many commentators suggest that the applicability of MSRB rules to solicitors be limited to Rule G–37 itself, or that the MSRB draft new provisions having varying degrees of similarity to those of Rule G–37.[22]

MSRB Response. The MSRB disagrees that only Rule G–37, and not the other rules of the MSRB, should apply to the activities of solicitors. As noted above, one of the principal purposes of this proposal was to make the process of soliciting municipal securities business subject to the standards of fair practice and professionalism that apply to the other municipal securities activities of dealers. Imposition solely of Rule G–37 would fall short of this objective.

Suggested Alternative

Comments Received. The BMA suggests that, as an alternative means of subjecting consultants to fair practice and professionalism standards, the MSRB require that such standards be embodied in a dealer's agreement with its consultant. It suggests that the consultant agreement include provisions that would impose by contract the requirements of certain MSRB rules, such as Rules G–17, G–20 and G–37, as well as assurances of compliance with state and local ethics, conflicts of interest, and lobbying disclosures laws. The alternative proposal would, however, limit the application of Rule G–37 so as to impose prohibitions on certain contributions by consultants, rather than imposing a ban on municipal securities business on the dealer as a result of such contributions. In addition, failure by consultants to comply with their contractual obligations would result in termination of such contracts and a prohibition on dealers engaging consultants who have previously violated their consultant contracts. Dealers would not be subject to rule violations as a result of a consultant's violation of its contractual obligation. Bear Stearns, Dain Rauscher, Goldman, JJB Hilliard, Merrill, Morgan Stanley, UBS, and William Blair support this approach, particularly with respect to the more limited application of Rule G–37 to contributions made by consultants.

MSRB Response. Although the suggested contractual alternative to the revised draft amendments might provide some incremental improvement in the regulation of solicitation of municipal securities business over the existing rule, the MSRB believes that its concerns dictate that the MSRB take significantly more decisive action that ensures that dealers are fully responsible for solicitation activities undertaken for their benefit.

Definition of Solicitation

Comments Received. The BMA states that the term solicitation should be limited to ''activity aimed at an issuer'' out of concern that any communication with a third party regarding a municipal securities issue could potentially become a solicitation of an issuer if the third party passes such communication on to the issuer. Many commentators are concerned with specific scenarios where they believe that certain types of communications should not be considered solicitations, particularly where communications are directed at conduit borrowers or where small payments are made in exchange for a communications.

MSRB Response. The MSRB considered the comments related to the definition of solicitation included in the April 2004 Notice and provided more specific guidance with respect to this definition in the September 2004 Notice. Although such guidance in the September 2004 Notice represents the MSRB's current view regarding this definition, comments received on this topic have been taken under advisement for further consideration by the MSRB.

Constitutionality of Proposal

Comments Received. The BMA states that the draft amendments would violate the First Amendment of the U.S. Constitution by requiring consultants to become municipal finance professionals (''MFPs'') under Rule G–37. The BMA argues that the U.S. Supreme Court has equated political contributions with protected speech, and any restriction on speech must be narrowly tailored to advance a compelling governmental interest. It further asserts that, assuming for the sake of argument that pay-to-play problems exist relating to consultants, the draft amendments' restrictions ''far exceed what would be necessary to address that problem.''

MSRB Response. In upholding the constitutionality of Rule G–37 in *Blount* v. *SEC,*[23] the courts recognized that, at its core, the rule was intended to sever the connection between the making of political contributions and the awarding of municipal securities business. The rule as then written (and as found constitutional) applied to various

[21] *See* comments of BMA, Gardnyr Michael, Goldman, Morgan Stanley, PNC, UBS and William Blair.

[22] *See* comments of AG Edwards, BMA, Gardnyr Michael, Goldman, Merrill, Morgan Stanley, S&Y and William Blair.

[23] *Blount* v. *SEC,* 61 F. 3d 938 (D.C. Cir. 1995), *cert. denied,* 116 S. Ct. 1351 (1996).

categories of persons associated with dealers in addition to those who solicit municipal securities business. For example, the rule covers those persons who underwrite or trade municipal securities or who supervise such activities. Given that the act of soliciting municipal securities business more closely touches on the core purpose of Rule G–37 than do some of the other municipal securities activities that are undertaken by persons already treated as MFPs and therefore demonstrates a particularly close nexus between the actions the MSRB seeks to regulate and the purpose of its rulemaking, the MSRB continues to firmly believe that the argument that it is unconstitutional to require a person who solicits municipal securities business on behalf of a dealer to be treated as an MFP subject to Rule G–37 has no merit. The current formulation of the proposed rule change, which effectively prohibits paid outside consultants rather than requiring that such consultants become MFPs subject to Rule G–37, further negates this argument.

Effective Date

Comments Received. Several commentators express concern about existing contractual obligations if the draft amendments were to be adopted and urge the MSRB to make the effective date apply prospectively so as not to disrupt or dismantle existing contracts.[24]

MSRB Response. The proposed rule change prohibits dealers from making any payments for solicitation activities undertaken by non-affiliated persons after the date of Commission approval of the amendments. The provisions of the proposed rule change permitting certain transitional payments for solicitation activities undertaken by consultants prior to the approval of the amendments should address the commentators' concerns.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation Of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2005–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR-MSRB–2005–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* 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 such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2005–04 and should be submitted on or before June 6, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Jill M. Peterson,

Assistant Secretary.

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[24] *See* comments of BMA, Seattle-Northwest, Sutter and UBS.

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51559; File No. SR–NASD–2005–024]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Make Clear That the Underlying Index Value for Portfolio Depository Receipts and Index Fund Shares Must Be Disseminated Widely by an Appropriate Service

April 15, 2005.

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 February 9, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The 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. On April 4, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to make clear in the generic listing standards for Portfolio Depository Receipts and Index Fund Shares that the underlying index value must be disseminated widely by an appropriate service. The text of the proposed rule change, as amended, is set forth below. Proposed new language

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

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the original filing in its entirety. Amendment No. 1 revises the proposal to indicate that, among other things, the current index value must be disseminated by one or more major market data vendors during the time Portfolio Depository Receipts and Index Fund Shares trade on Nasdaq.