

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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-ISE-2008-101 and should be submitted on or before February 3, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59212, File No. SR-MSRB-2008-07]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change as Modified by Amendment No. 1 Relating to MSRB Rule G-34, CUSIP Numbers and New Issue Requirements, to Establish a Transparency System for Municipal Auction Rate Securities and Municipal Variable Rate Demand Obligations

January 7, 2009.

On November 18, 2008, the Municipal Securities Rulemaking Board ("MSRB"), filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to MSRB Rule G-34, CUSIP Numbers and New Issue Requirements, to establish a transparency system for municipal auction rate securities and municipal variable rate demand obligations. The proposed rule change was published for comment in the **Federal Register** on

November 28, 2008.<sup>3</sup> The Commission received three comment letters about the proposed rule change.<sup>4</sup> On January 2, 2009, the MSRB filed Amendment No. 1 to the proposed rule change.<sup>5</sup> This order approves the proposed rule change as modified by Amendment No. 1.

The proposed rule change would establish a transparency system for municipal Auction Rate Securities ("ARS") and municipal Variable Rate Demand Obligations ("VRDO"). The proposed rule change would: (i) Implement an electronic system that would collect and disseminate ARS and VRDO information (the "Short-term Obligation Rate Transparency System Proposal"); (ii) provide free public access to information disseminated from the Short-term Obligation Rate Transparency ("SHORT") System through the MSRB's Electronic Municipal Market Access (EMMA) system (the "EMMA short-term obligation rate transparency service"); and (iii) amend Rule G-34, on CUSIP numbers and new issue requirements, to require brokers, dealers and municipal securities dealers (collectively "dealers") to report, or ensure the reporting of, interest rate and descriptive information to the SHORT System about ARS and VRDO following an ARS auction or VRDO interest rate reset. A full description of the proposal is contained in the Commission's Notice.

As previously noted, the Commission received three comment letters relating to the proposed rule change.<sup>6</sup> The commenters generally supported the concept of the proposal, but raised concerns about the timing of its implementation and certain data points required to be collected. WFBS commented only with respect to the proposed effective date of the proposal.

<sup>3</sup> See Securities Exchange Act Release No. 58998 (Nov. 21, 2008), 73 FR 72540 (Nov. 28, 2008) ("Commission's Notice").

<sup>4</sup> See letter from Jeffrey A. Schuh, Vice President, Chief Compliance Officer, Wells Fargo Brokerage Services, LLC ("WFBS"), dated December 18, 2008; letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), dated December 19, 2008; and letter from Michael Decker and Mike Nicholas, Co-Chief Executive Officers, Regional Bond Dealers Association ("RBDA"), dated December 29, 2008.

<sup>5</sup> In Amendment No. 1, the MSRB responded to the three comment letters and, in response to the comment letters, postponed the effective date of the proposed amendments to Rule G-34 that relate to Variable Rate Demand Obligations from January 30, 2009 to April 1, 2009. The proposed January 30, 2009 effective date for the proposed amendments to Rule G-34 that relate to Auction Rate Securities remains unchanged. This is a technical amendment and is not subject to notice and comment.

<sup>6</sup> See *supra* note 4.

WFBS requested that the implementation date of the proposal be extended to four months from the date of publication of the final rule so that changes needed to support the SHORT proposal could be designed, thoroughly tested and implemented prior to the proposed implementation date.

SIFMA supported the concept of collection and display of auction rate reset and remarketing rate reset information, and focused its comments on the timing of implementation and certain data points proposed to be collected. SIFMA stated that its members feel strongly that January 30, 2009 is an unrealistically short timeframe for implementing the new regulatory requirement. SIFMA noted that this year has been a historic year for technological and operational issues due to the market dislocation, and that this as well as other issues have resulted in many urgent technology and operation projects queued at broker dealer firms. SIFMA requested that the proposal be delayed until the later of April 1, 2009 or 90 days after the final rule is approved by the SEC.

SIFMA also recommended that maximum and minimum VRDO rates not be required by the SHORT system. SIFMA stated that the terms of VRDO securities, by and large, have been negotiated on a bespoke basis for each transaction, that maximum rate formulas are not standardized, and that the administrative burden of calculating and reporting the maximum rate for every reset period is in excess of the theoretical benefits it provides. SIFMA also found no evidence of minimum rates in any VRDO transaction and stated that this is a superfluous field which should be eliminated.

SIFMA stated that the broker dealers regulated by the MSRB do not have control over all of the ARS data points being requested in the proposal because broker dealers merely receive the auction information from the auction agent. Therefore SIFMA believes that there should be an acknowledgement in Rule G-34(c)(i) that the broker dealer is only responsible for forwarding the information it has received from the auction agent and not be responsible for the accuracy of that data.

RBDA stated in its letter that they support the implementation of the proposal as early as is practical, but believe the intended effective date of January 30, 2009 will not give market participants sufficient time to implement and thoroughly test automated systems that will facilitate compliance with rules associated with the new system. RBDA requested that the effective date for full

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

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

implementation of the proposal be moved to April 1, 2009.

In Amendment No. 1, the MSRB responded to the three comment letters and, in response to the comment letters, postponed the effective date of the proposed amendments to Rule G-34 that relate to Variable Rate Demand Obligations from January 30, 2009 to April 1, 2009. The proposed January 30, 2009 effective date for the proposed amendments to Rule G-34 that relate to Auction Rate Securities remains unchanged.

The MSRB noted in response to the comments from SIFMA with respect to the data points to be collected that the SHORT System has been designed to accept reports of VRDO in which the minimum rate is unspecified by allowing a dealer to not include a value for the minimum rate. SIFMA also stated that some VRDO maximum rates are not stated in official documents for the VRDO or are set pursuant to a formula for which some VRDO maximum rates are not able to be calculated on the day that an interest rate reset occurs. The MSRB stated that the purpose of the requirement in the proposed amendments to Rule G-34 to report the current maximum rate is to improve the availability of important characteristics of a VRDO that have been set by drafters of official documents for VRDO. Therefore, dealers would be required to report under the proposed amendments to Rule G-34 VRDO maximum rates that are stated in official documents either as absolute values or that are able to be calculated pursuant to formulas on the day of an interest rate reset. For VRDO maximum rates that are not able to be calculated on the day an interest rate reset occurs, the SHORT System has been designed to accept a value of "not calculable." In addition, the SHORT System also has been designed to accept reports of VRDO in which the maximum rate is unspecified by allowing a dealer to not include a value for the maximum rate.

The MSRB acknowledged that many of the items of information about ARS that would be required to be reported to the MSRB under the proposed amendments to Rule G-34 are produced by ARS auction agents and that dealers may not always be able to verify the accuracy of such information. Accordingly, the MSRB stated that it has designed the SHORT System to accept submissions of information directly from ARS auction agents and has incorporated into the proposed amendments to Rule G-34 that dealers "may rely on the accuracy of such information if the [dealer] makes a good faith and reasonable effort to cause the

Auction Agent to correct any inaccuracies known to the [dealer]." In the event that an ARS auction agent does not submit information directly to the SHORT System but instead a dealer reports to the SHORT System information it receives from the ARS auction agent, the reporting dealer would have a similar responsibility for correcting any inaccuracies known to the dealer in the data provided to it by an ARS auction agent. Therefore, so long as the dealer reports the information about the auction as provided by the ARS auction agent and fulfills its responsibility to correct known inaccuracies, and the dealer does not itself introduce any inaccuracies to the data submitted, the dealer would be entitled to the same reliance as in the case of a direct submission to the SHORT System by the ARS auction agent. The Commission believes that the MSRB has adequately addressed the concerns raised by SIFMA about the collection of data points for VRDO and ARS.

The MSRB filed Amendment No. 1 in response to concerns raised by all three commenters about the effective date of the proposal. The proposed January 30, 2009 effective date for the proposed amendments to Rule G-34 that relate to Auction Rate Securities remains unchanged. While the MSRB acknowledged that some dealers may need additional time to perform and test system changes to report data to the MSRB using an automated system, the MSRB believes that dealers will be able to report information about ARS to the MSRB manually using the SHORT System Web User Interface if those system changes are not able to be fully implemented by January 30, 2009, particularly since the number of ARS issues is relatively small. In addition, since ARS are primarily a retail product, the MSRB believes it is important to provide transparency of ARS as early as practicable. Accordingly, the MSRB does not believe that a change to the proposed January 30, 2009 effective date for ARS is warranted. The Commission agrees that a change to the proposed January 30, 2009 effective date for ARS is not warranted because the dislocations in the ARS market necessitate the improvement of price transparency for ARS as soon as possible.

Amendment No. 1 postpones the effective date of the proposed amendments to Rule G-34 that relate to Variable Rate Demand Obligations from January 30, 2009 to April 1, 2009. While the SHORT System allows data to be reported manually using the SHORT System Web User Interface, the MSRB

agrees with commenters that manual submission of data for VRDO would be impractical in many cases due to the high number of VRDO securities and the frequency with which VRDO interest rates reset. Therefore, the MSRB believes that a revised effective date of April 1, 2009 would allow additional time for dealers to implement automated systems to submit data about VRDO to the SHORT System and should address commenters concerns. The Commission believes that this extension provides a reasonable accommodation to dealers.

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's response to the comment letters and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB<sup>7</sup> and, in particular, the requirements of Section 15B(b)(2)(C) of the Act<sup>8</sup> and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB's rules 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.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with the Act because it would serve as an additional mechanism by which the MSRB works toward removing impediments to and helping to perfect the mechanisms of a free and open market in municipal securities by providing a centralized venue for free public access to information about ARS and VRDO. The proposed rule change would provide greater access to information about ARS and VRDO to all participants in the municipal securities market on an equal basis thereby removing potential barriers to obtaining such information and will allow the municipal securities industry to produce more accurate trade reporting and transparency. These factors serve to promote the statutory

<sup>7</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78o-4(b)(2)(C).

<sup>9</sup> *Id.*

mandate of the MSRB to protect investors and the public interest.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-MSRB-2008-07), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59203; File No. SR-NASDAQ-2008-084]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Require Limited Partnerships to Obtain Shareholder Approval for the Use of Equity Compensation and Make Other Clarifying Changes to the Listing Requirements for Limited Partnerships

January 6, 2009.

#### I. Introduction

On November 18, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to require limited partnerships to obtain shareholder approval for the use of equity compensation and to make other clarifying changes to the listing requirements for limited partnerships. The proposed rule change was published for comment in the **Federal Register** on December 2, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

Nasdaq’s current listing requirements provide that issuers must obtain shareholder approval for a variety of corporate actions, including the issuance of equity compensation.<sup>4</sup> However, these requirements do not currently apply to Limited Partnerships

(“LPs”).<sup>5</sup> Nasdaq is proposing to expand the requirement to obtain shareholder approval for equity compensation to entities that are LPs. As such, the proposed rule would provide that each issuer that is a limited partnership must obtain shareholder approval when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement is to be made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants, as would be required under Nasdaq Rule 4350(i)(1)(A) and IM-43540-5.<sup>6</sup>

In addition, Nasdaq proposes to make two other changes to the listing requirements for LPs. Specifically, the Exchange proposes to amend the rules applicable to LPs to require that: (1) the auditor of a listed LP must be registered as a public accounting firm with the Public Company Accounting Oversight Board (“PCAOB”), as provided for in the Sarbanes-Oxley Act of 2002;<sup>7</sup> and (2) an LP must notify Nasdaq of any material non-compliance with the qualitative listing requirements for LPs in Rule 4360. Nasdaq states that when it adopted these requirements for other companies in 2003 in response to requirements imposed by the Sarbanes-Oxley Act, Nasdaq inadvertently excluded LPs from these requirements. The Exchange notes, however, that these requirements are already applicable to LPs. Specifically, with respect to the proposed auditor registration requirement, it is unlawful for an auditor to participate in the preparation or issuance of an audit report with respect to any listed company, including an LP, unless it is registered with the PCAOB.<sup>8</sup> With respect to the proposed notification requirement, each listed company is required to sign a listing agreement prior to listing on Nasdaq in which the company has agreed to promptly notify Nasdaq in writing of any corporate action or other event which will cause the company to cease to be in compliance with Nasdaq listing requirements.<sup>9</sup> As such, Nasdaq asserts that these changes are simply clarifying changes designed to highlight the requirements and facilitate understanding and compliance of the rules by LPs.

#### III. Discussion and Commission Findings

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 applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between issuers.<sup>11</sup>

The Commission notes the importance of shareholder approval rules, as such rules provide shareholders with a voice in transactions that are material to, and may have an effect on, their respective investments. With respect to equity compensation plans, shareholder approval rules also help to protect investors against the potential dilutive effect of such plans. The Commission acknowledges that treating LPs differently with respect to certain limited types of shareholder approval rules may be appropriate given the structure and use of LPs and the expectations of investors in such entities.<sup>12</sup> However, as the Commission has indicated previously, it believes that the rationale for treating an LP differently from other types of issuers with respect to shareholder input on equity compensation is less compelling.<sup>13</sup> Accordingly, the Commission believes that it is consistent with the protection of investors and the public interest to require LPs to obtain shareholder approval for the issuance of equity compensation, as it will ensure that investors in LP securities have a check on the potential dilution that may result from the issuance of equity-based awards. Further, by requiring LPs to obtain shareholder approval for stock

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>12</sup> For a detailed discussion of the reasons that LPs differ from other issuers and may be appropriately excluded from certain shareholder approval rules, see Securities Exchange Act Release No. 55796 (May 22, 2007), 72 FR 29566 (SR-NYSE-2007-28) (approving NYSE’s proposal to exempt LPs from certain of its shareholder approval rules, excluding its equity compensation requirement).

<sup>13</sup> See *id.*, 72 FR at 29567.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 59014 (November 25, 2008), 73 FR 73358.

<sup>4</sup> See Nasdaq Rule 4350(i)(1)(A).

<sup>5</sup> See Nasdaq Rules 4350(i)(1)(A) and 4360.

<sup>6</sup> See proposed Nasdaq Rule 4360(k).

<sup>7</sup> Section 102 of the Sarbanes Oxley Act, 15 U.S.C. 7212.

<sup>8</sup> *Id.*

<sup>9</sup> See [http://www.nasdaq.com/about/Listing\\_Agreement.pdf](http://www.nasdaq.com/about/Listing_Agreement.pdf).