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

Within 45 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 or disapprove 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 may be submitted by using the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*), or send an e-mail to *rule-comment@sec.gov*. Please include File No. SR–OCC–2010–19 on the subject line.
- Paper comments should be sent in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File No. SR–OCC–2010–19. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, 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 OCC's principal office and OCC's Web site (*http://www.theocc.com/about/publications/bylaws.jsp*). 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 submission should refer to File No. SR–OCC–2010–19 and should be submitted within January 26, 2011 days after the date of publication.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–33304 Filed 1–4–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63621; File No. SR–MSRB–2010–10]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change Consisting of Amendments to Rule A–13 To Increase Transaction Assessments for Certain Municipal Securities Transactions Reported to the Board and to Institute a New Technology Fee on Reported Sales Transactions

December 29, 2010.

I. Introduction

On September 30, 2010, the Municipal Securities Rulemaking Board ("MSRB" or "Board"), filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change which consists of amendments to Rule A–13 to increase transaction assessments for certain municipal securities transactions reported to the Board and to institute a new technology fee on reported sales transactions. The proposed rule change was published for comment in the **Federal Register** on October 19, 2010.[3] The Commission received fifteen comment letters regarding the proposed rule change, the MSRB's response, and a supplemental response to the MSRB's response.[4]

This order approves the proposed rule change.

II. Background and Description of Proposal

A. Current Sources of MSRB Revenue

Section 15B(b)(2)(J) of the Exchange Act states that the MSRB's rules should "provide that each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board."[5] The MSRB currently levies four types of fees that are generally applicable to dealers pursuant to three separate rules.

MSRB Rule A–12 provides for a $100 fee paid once by a dealer when it first begins to engage in municipal securities activities. MSRB Rule A–13 provides for a) an underwriting fee of $.03 per $1000 par value of municipal securities purchased in a primary offering (with specified exceptions), and b) a transaction fee (the "transaction fee") of $.005 per $1000 par value of sale transactions of municipal securities (with specified exceptions). Finally, MSRB Rule A–14 provides for an annual fee of $500 from each dealer who conducts municipal securities activities. In addition, since this proposed rule was filed, the MSRB has amended Rule A–12 to establish an initial fee of $100

[9] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–63095 (October 13, 2010), 75 FR 64372 (the "Commission's Notice").

[4] *See* e-mail from Coastal Securities, Inc., dated November 8, 2010 ("Coastal Securities Letter"); letter from Bond Dealers of America, dated November 9, 2010 ("BDA Letter I"); letter from Hartfield Titus & Donnelly, LLC, dated November 9, 2010 ("HTD Letter"); letter from the Securities Industry and Financial Markets Association, dated November 9, 2010 ("SIFMA Letter I"); e-mail from RW Smith Associates, Inc., dated November 9, 2010 ("RW Smith Letter"); letter from Southwest Securities, Inc., dated November 9, 2010 ("Southwest Securities Letter"); letter from the Government Finance Officers Association, dated November 9, 2010 ("GFOA Letter"); letter from TD Ameritrade Holding Corporation, dated November 9, 2010 ("TD Ameritrade Letter"); letter from Edward Jones, dated November 9, 2010 ("Edward Jones Letter I"); letter from BMO Capital Markets, dated November 9, 2010 ("BMO Letter"); letter from Morgan Stanley Smith Barney LLC, dated November 10, 2010 ("Morgan Stanley Letter"); letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, dated November 19, 2010 ("MSRB Response Letter"); letter from Jeffries & Company, Inc., dated November 29, 2010 ("Jeffries Letter"); letter from the Securities Industry and Financial Markets Association, dated December 2, 2010 ("SIFMA Letter II"), letter from Bond Dealers of America, dated December 14, 2010 ("BDA Letter II"); letter from Edward Jones, dated December 14, 2010 ("Edward Jones Letter II"); and letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, dated December 28, 2010 ("Supplemental MSRB Response Letter").

[5] 15 U.S.C. 78*o*-4(b)(2)(J).

payable by municipal advisors prior to engaging in municipal advisory activities and amended Rule A–14 to establish an annual fee of $500 for municipal advisors.[6]

According to the MSRB, the transaction fee was last modified in 2000 when the Board commenced assessments on customer sale transactions reported by dealers. The transaction fee has not been increased since that date. The MSRB stated in its proposal that approximately 90% of its revenue is generated through its underwriting and transaction fees. According to the MSRB, in fiscal year 2009, approximately 55% of its revenue was generated by underwriting fees and approximately 36% of its revenue was generated by transaction fees. The MSRB also stated that the underwriting and transaction fees assessed pursuant to Rule A–13 are generally proportionate to a dealer's activity within the industry, as based on the par value amount of underwriting and customer and inter-dealer transactions during the year.

B. Proposal

The MSRB proposes to increase the amount of the transaction fee assessed on the par value of inter-dealer and customer sale transactions reported to the MSRB by dealers under MSRB Rule G–14(b), except for transactions currently exempted from the transaction fee as provided in MSRB Rule A–13(c)(iii), from $.005 per $1000 par value to $.01 per $1000 par value of such sale transactions. Transactions exempted from the transaction fee consist of sale transactions in municipal securities that have a final stated maturity of nine months or less or that, at the time of trade, may be tendered at the option of the holder to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent. The MSRB expects that its proposed increase in the transaction fee would generate an estimated $7 million in revenue annually.

In addition, the MSRB proposes to impose a technology fee, assessed at $1.00 per transaction for each sale transaction reported to the MSRB by dealers, under MSRB Rule G–14(b) (the "technology fee"). The exemptions from the transaction fee, as described above, would not apply to the technology fee. The MSRB expects that the new technology fee would generate an estimated $10 million in revenue annually. The technology fee would be transitional in nature and would be reviewed by the MSRB annually to determine whether it should continue to be assessed.[7] The MSRB proposes to use the technology fee to establish a technology renewal fund, which would be segregated for accounting purposes.

C. Purpose of the Proposed Rule

1. Transaction Fee

In the proposal, the MSRB stated that the purpose of the proposed increase in the transaction fee is to assess reasonable fees necessary to defray the costs and expenses of operating and administering the MSRB.[8] Specifically, the MSRB stated that the expenses of the MSRB are increasing and additional revenue is necessary to meet projected expenses associated with ongoing operations. The MSRB indicated that several factors have contributed to the recent, large increase in operating expenses. First, over the last two years, the MSRB has significantly improved transparency in the municipal securities market by developing and implementing market information transparency systems including the Short-Term Obligation Rate Transparency ("SHORT") system for interest rate resets and the Electronic Municipal Market Access ("EMMA") system for display of disclosures and trade data. Second, effective October 1, 2010, amendments to Section 15B of the Exchange Act contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act[9] (the "Dodd-Frank Act') expanded the MSRB's mission to include regulation of municipal advisors and the protection of municipal entities. Third, pursuant to the Dodd-Frank Act, the MSRB has also been given additional responsibilities in connection with providing enforcement and examination support to the Commission, the Financial Industry Regulatory Authority ("FINRA"), and the Federal bank regulators.

2. Technology Fee

In its proposal, the MSRB stated that it intends to use the technology renewal fund to fund replacement of aging and outdated technology systems and to fund new technology initiatives. In particular, the MSRB stated that funding is needed to ensure the operational integrity of the MSRB's information systems, retire and update computer hardware and software, and conduct ongoing risk management including business continuity activities and system maintenance.

In the proposal, the MSRB stated that it will continue to review its assessments on the market participants it regulates to ensure that costs of rulemaking are appropriately allocated among the entities it regulates. Although the MSRB recognizes that an appropriate allocation of such regulatory costs may not be feasible during the transition of the MSRB to its broader mission, it stated that it expects to revisit the manner in which its activities are funded in the coming years, as appropriate. The MSRB also restated its commitment to ensure that its assessments are balanced based in large measure on the level of activity of all of its regulated entities.

A more complete description of the proposal is contained in the Commission's Notice.[10]

The MSRB has requested an effective date for the proposed rule change of January 1, 2011.

III. Discussion of Comments and MSRB's Response

The Commission received fifteen comment letters and two responses from the MSRB to the comment letters.[11] The comment letters and the MSRB's responses are discussed in greater detail below.

A. Comments Requesting More Transparency in the Budget Process and Additional Justification for the Size and Timing of Revenue Increase.

Several commenters asked for more transparency in the MSRB's budget process and noted that the fee increases were sought without industry input prior to the filing of the proposed rule change and that additional dialogue with industry participants should have been undertaken before determining the appropriate funding levels and manner of assessing fees.[12]In the MSRB Response Letter, the MSRB noted that "a number" of the technology systems creating the need for additional operating revenue and the technology fee "are well known to the municipal securities industry through the MSRB's prior notice and comment process and its filings with the Commission."[13] The MSRB further explained in the MSRB Response Letter that "externally facing technology initiatives normally must be undertaken through the normal MSRB rulemaking process, which includes

[6] *See* Securities Exchange Act Release No. 63313 (File No. SR–MSRB–2010–14) (November 12, 2010).

[7] *See* Supplemental MSRB Response Letter.

[8] *See* Commission's Notice, *supra* note 3.

[9] Public Law 111–203, 124 Stat. 1376 (2010).

[10] *See supra* note 3.

[11] *See supra* note 4.

[12] *See* GFOA Letter, HTD Letter, Morgan Stanley Letter, RW Smith Letter, SIFMA Letter I, Jeffries Letter and Southwest Securities Letter.

[13] *See* MSRB Response Letter.

extensive opportunity for public comment. The MSRB believes that this is the appropriate process for receiving input from industry participants with regard to its regulatory and information system initiatives, rather than through a process whereby industry participants could seek to influence which initiatives the MSRB pursues by attempting to limit the resources available to it."[14]

Commenters also stated that the MSRB did not provide sufficient justification for the size of the proposed transaction fee increase and the imposition of the technology fee,[15] with several commenters stating that the MSRB should have provided details on matters such as projections of operational costs, plans for demonstrating controlling such costs, expected revenue in future years, projected budgets, financial forecasts, and planned technology initiatives in requesting the increased transaction fee and the new technology fee.[16] Several commenters stated that the MSRB should be required to give more detail on the magnitude of its planned technology upgrade.[17]

Although the MSRB did not provide detailed revenue or budget projections, the MSRB noted in the proposal and in the MSRB Response Letter that, "the MSRB's 2009 audited financial statement reflected an increase in expenses from $18.6 million for the fiscal year ended September 30, 2008 to $21.3 million for the fiscal year ended September 30, 2009, representing an increase of 14.5%."[18] The MSRB further noted that it "expects that expenses for [fiscal year 2010] to be approximately $23.1 million, representing an additional increase of 8.5% over the previous year, including an increase in market information transparency program expenses of 13%."[19] From fiscal year 2008 to fiscal year 2010 the operating expenses of the MSRB have increased approximately 25%.[20] Furthermore, the MSRB "forecasts total operating expenses to increase to approximately $29.2 million in fiscal year 2011, which would be a 26% increase in expenses over 2010, and approximately $31.8 million in fiscal year 2012, which would be a 38% increase in expenses over fiscal year 2010."[21] According to the MSRB, this increase in expenses "reflects the many recent MSRB initiatives in support of the MSRB's investor protection mandate, including the development and launch of the primary market disclosure electronic library, the collection of secondary market disclosures, establishment of our [SHORT] system for interest rate resets, the [EMMA] system for display of disclosures and trade data, and other enhancements to our information systems."[22] The MSRB also stated that it needs additional funding "to satisfy its obligations under the [Dodd-Frank Act], which requires the MSRB to draft rules regarding the activities of municipal advisors as well as rules for the protection of municipal entities and obligated persons."[23]

In addition, in discussing the need for the technology fee, the MSRB asserted that "[m]aintaining the EMMA and SHORT systems, together with the Real-Time Transaction Reporting System ("RTRS"), ensuring their operational stability, and employing sound risk management practices, including adequate redundancies, must be a priority."[24] The MSRB further noted that the technology fee is needed because "[i]n undertaking its various information systems, the MSRB has not previously set aside reserves for replacement of these systems, instead relying on its general operating reserves to fund all development and any systems upgrades and replacements. Certain of the existing public information systems operated by the MSRB, including RTRS and the public access system for Forms G–37 under Rule G–37, on political contributions and prohibitions on municipal securities business, now rely on dated technology and can be expected to need comprehensive re-engineering in the coming years."[25]

Commenters[26] also noted that the MSRB has not fully explained why the proposed fees must become effective on January 1, 2011, given the lack of justification for the fee increases and the size of the MSRB surplus.

Two commenters stated that the MSRB should include consideration of revenues from fine sharing with FINRA in determining whether to increase the transaction fee and impose a technology fee.[27] In response, the MSRB stated that "any revenues derived from such provision [of the Dodd-Frank Act] would, of course, be taken into account as the MSRB prepares future budgets and reviews its sources of revenue and the appropriate levels of assessments in future years, although the Board would establish appropriate budgeting safeguards against allowing the prospects of realizing fine revenue from influencing its rulemaking activities."[28]

B. Comments Regarding Municipal Advisors' Share of the Cost of Regulation

Several commenters raised concerns about what they referred to as the disproportionate and inequitable cost of regulation borne by dealers, noting that the MSRB recently obtained jurisdiction over municipal advisors and that those advisors should bear not only the entire cost of their own regulation, but also part of the cost of maintaining the MSRB's information systems.[29] One commenter suggested that the MSRB should first assess fees on municipal advisors, beyond the establishment of an initial and annual fee,[30] and only afterwards consider dealer fees.[31]

In response, the MSRB stated that the "fairness of assessments on all classes of regulated entities is to be viewed on a long-term basis and not within a narrow window of time or on a per-rule basis."[32] The MSRB noted that it "firmly believes that it must be adequately funded to undertake all necessary rulemaking in the service of protecting investors, municipal entities, obligated persons and the public interest with rules applicable to dealers, municipal advisors or both without the constraint of determining whether such rulemaking bears a close relationship to the level of funding obtained from each constituency at a particular point in

[14] *Id.*

[15] *See* BDA Letter I, Coastal Securities Letter, GFOA Letter, HTD Letter, Morgan Stanley Letter, RW Smith Letter, SIFMA Letter I, Southwest Securities Letter and TD Ameritrade Letter. Some commenters calculated the size of the increase in MSRB revenues over the previous year to be approximately 80% without distinguishing between the proposed uses of the separate fees. *See* BDA Letter I, HTD Letter, RW Smith Letter, SIFMA Letter I and TD Ameritrade Letter.

[16] *See* BDA Letter I, Coastal Securities Letter, GFOA Letter, HTD Letter, RW Smith Letter, SIFMA Letter I and TD Ameritrade Letter.

[17] *See, e.g.,* HTD Letter and BDA Letter I.

[18] *See* MSRB Response Letter.

[19] *Id. See also,* Supplemental MSRB Response Letter confirming that fiscal year 2010 expenses were approximately $23.1 million.

[20] *See* Supplemental MSRB Response Letter. Expenses for market information transparency programs (EMMA, SHORT and RTRS) and operations alone increased approximately 57% from fiscal year 2008 to fiscal year 2010. *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See, e.g.,* BDA Letter I.

[27] *See* GFOA Letter and SIFMA Letter I.

[28] *See* MSRB Response Letter.

[29] *See* BDA Letter I, Coastal Securities Letter, HTD Letter, Morgan Stanley Letter, RW Smith Letter, Jeffries Letter and SIFMA Letter I.

[30] *See supra* note 6, and accompanying text.

[31] *See* RW Smith Letter.

[32] *See* MSRB Response Letter.

time." [33] The MSRB further noted that it "expects to continuously review its fee structure to ensure that, over the long-run, there is a reasonable relationship between the amounts assessed to a specific constituency and the level of rulemaking, system development and operational activities undertaken by the MSRB in connection with such constituency, to the extent consistent with the Dodd-Frank Act." [34]

C. Comments Regarding the Effect on Retail Dealers, Retail Clients, Brokers' Brokers and Issuers

Several of the commenters expressed concern that the burden of the proposed rule change and, in particular, the technology fee, will be borne disproportionately by retail firms and their customers since the technology fee of $1 applies to all sales transactions, regardless of size.[35] One commenter estimated that the combination of the proposed transaction fee and proposed technology fee assessed on retail trades of $25,000 would represent an increase of 900% over the current transaction fee,[36] while another commenter stated that its total MSRB fees for orders it processes for its clients would increase by over 11,000% per month.[37] The MSRB responded that "the combination of increasing the existing transaction fee based on par value of trades and imposing the new technology fee on individual transactions, regardless of trade size, provides for a mix of assessment measurements that in general further reduces the MSRB's reliance on a circumscribed group of regulated entities for the bulk of its revenues." [38] The MSRB further noted with respect to the technology fee that "[w]hile the proposed technology fee would, as a percentage of the entire transaction, be larger for retail-size transactions, the MSRB observes that the large percentage increases for small transactions noted by some commenters, if assumed to be accurate, fail to take into account that, under the current formula based solely on trade size, the actual amount of the assessment is extremely small and will continue to be small and likely would have only a negligible effect on overall transaction costs for retail investors even after such increases. Further, every transaction, regardless of size, draws equally on MSRB information systems and, therefore, it is appropriate that at least a portion of the MSRB's revenues reflect this universal usage of such resources." [39]

One commenter noted that the proposed rule change, if approved, would mean a fundamental shift in the cost of operating the MSRB from being largely borne by primary market participants to secondary market participants.[40] Two commenters stated that broker's brokers would be disproportionately affected because their activities typically involve a large number of retail-sized transactions.[41] Another commenter stated that affiliate-to-affiliate transfers used to fill some customer orders would result in duplicative assessments.[42] One commenter suggested further raising the existing transaction fee or basing the technology fee on par value as potential alternatives to the $1.00 per transaction technology fee included in the proposed rule change.[43] In its response, the MSRB stated that it "specifically intended that the proposed rule change would shift the source of its dealer-based revenues toward market participants engaged in sales and trading of municipal securities. As among dealers, the MSRB views this shift as broadening the universe of dealers that share the burden of funding MSRB activities since the underwriting fee is assessed against a significantly narrower group of dealers—that is, those that act as underwriters of new issues—than the group of dealers that engage in sales and trading of municipal securities, which includes firms active in both the secondary and primary market." [44]

Several commenters [45] expressed concern regarding the imposition of transaction-based assessments on situations where multiple separate transactions may occur to effect a movement of a position in a security. In its response, the MSRB noted that such situations are reflective of the existing structure of the transaction fee and do not arise anew as a result of the proposed rule change. The MSRB further stated that the "rule proposal is more equitable to market participants in that the transaction fee exemptions that apply to short-term securities would not apply to the technology fee, thereby broadening the base on which such fee is assessed." In addition, the MSRB acknowledged that the proposed rules shift the cost burden more towards the broader sales and trading market, and that firms engaging solely or primarily in sales and trading activities, and not in underwriting activities, may view this shift as having a greater affect on such firms. As noted above, however, the MSRB stated that it specifically intended such a shift and believes that any such shift is appropriate as it would broaden the universe of market participants that share the burden of funding MSRB activities.[46]

Another commenter urged the MSRB to ensure that fees assessed on dealers are not passed, directly or indirectly, to issuers, stating that some issuers see MSRB fees as line items on their transactions.[47] In its response, the MSRB noted that MSRB Rule A–13(e) provides that no dealer shall charge or otherwise pass through the fee required under the rule to an issuer of municipal securities, but also that Rule A–13(e) would most logically apply to the underwriting assessment imposed under such rule, which is not the subject of the current rule filing.[48] The MSRB urged any issuer of municipal securities that believes a dealer is violating this rule provision to contact the appropriate enforcement agency with any relevant information regarding such potential rule violation.[49]

D. Comments Regarding use of MSRB's Existing Surplus

Some commenters stated that they believe the MSRB has an excessively large surplus that should be utilized to fund projects, regulation, and technology renewal prior to implementation of any fee increases or new fees.[50] Two commenters suggested that non-profit organizations only need 25% or three months of reserve to cover expenses.[51]

In its response, the MSRB noted that other "non-profit organizations active in the municipal securities market as well as other self-regulatory organizations have reserves of comparable relative size." [52] The MSRB also responded that

[33] *Id.*

[34] *Id.*

[35] *See* BDA Letter I, Coastal Securities Letter, Morgan Stanley Letter, SIFMA Letter I, Southwest Securities Letter and TD Ameritrade Letter.

[36] *See* SIFMA Letter I.

[37] *See* TD Ameritrade Letter.

[38] *Id.*

[39] *Id.*

[40] *See* HTD Letter.

[41] *See* HTD Letter and RW Smith Letter. These commenters also suggest that transactions routed through broker's brokers tend to involve a chain of two or more sales transactions that would result in multiple assessments on the various professionals involved in moving bonds from one investor to another.

[42] *See* Morgan Stanley Letter.

[43] *See* Edward Jones Letter I.

[44] *See* MSRB Response Letter.

[45] *See, e.g.,* BDA Letter I, Coastal Securities Letter, Edward Jones Letter I, SIFMA Letter I, Southwest Securities Letter and TD Ameritrade Letter.

[46] *See supra* note 44, and accompanying text.

[47] *See* GFOA Letter.

[48] *See* MSRB Response Letter.

[49] *Id.*

[50] *See* HTD Letter, RW Smith Letter, SIFMA Letter I and Southwest Securities Letter.

[51] *See* RW Smith Letter and SIFMA Letter I.

[52] *See* MSRB Response Letter. Specifically, the MSRB noted that the National Futures Association,

Continued

its "cash and liquid reserves are projected to decrease significantly over the next three years, if additional funding is not approved and underwriting and transaction activity remains level." [53]

E. Comments Regarding Alternative Revenue Models

Two commenters suggested that the MSRB consider an entirely new revenue model, where firms are assessed based on their gross income from municipal securities activities, including underwriting, trading, sales, and advisory services.[54] Another commenter noted, however, that there is not industry consensus for this approach and further analysis would be needed.[55]

In response, the MSRB stated that "any such change could not realistically be effected in a sufficiently timely manner to ensure that the MSRB could continue to operate effectively given its current resource base and operational commitments, as well as its statutory mandate." [56] The MSRB further noted that "[u]nlike FINRA, which has jurisdiction over its members that encompasses (with limited exceptions) their entire scope of activities, the MSRB's regulatory jurisdiction is limited to the [activities] specified in Section 15B of the Exchange Act. Thus, in imposing its revenue-based assessment, FINRA does not face some of the same constraints and need for clearly defining the extent of activities subject to such an assessment as would the MSRB." [57] The MSRB explained that "[f]or dealers, sales and trading transactions and underwriting activities are the key types of activities from which they derive revenues that are clearly tied to the MSRB's statutory mandate. The other type of activity * * * that is clearly tied to the MSRB's statutory mandate is * * * municipal advisory activities." [58] The MSRB asserted that "assessments based on the MSRB's current model [of assessing sales and trading activities and underwriting activities], together with an appropriate assessment to be developed on municipal advisory activities, serve as a reasonable approximation of the type of assessments that would ultimately be imposed under a revenue-based system." [59]

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's responses to the comment letters and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB [60] and, in particular, the requirements of Section 15B(b)(2)(J) of the Exchange Act [61] and the rules and regulations thereunder. Section 15B(b)(2)(J) of the Exchange Act requires, among other things, that the MSRB's rules be designed to provide that each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board.[62]

The Commission believes that the proposed rule change is consistent with the Exchange Act because the proposed increase in the transaction fee and the imposition of the new technology fee will help defray the costs and expenses of administering the Board. In particular, the increase in the transaction fee will help offset the MSRB's expected increase in expenses due to, among other things, the additional regulatory requirements imposed on it by the Dodd-Frank Act.[63] Similarly, the new technology fee will help offset expenses the MSRB expects to incur due to the MSRB's expanding technology requirements and the need to replace and update existing technology, including the MSRB's EMMA and SHORT systems, the RTRS, as well as other enhancements to its disclosure and information systems. The need for an increase of the transaction fee and imposition of the technology fee is further supported by the substantial increases in the costs incurred by the Board in fiscal years 2009 and 2010—aggregating approximately 25% over a two year period [64]—and the MSRB's expectation that its costs will continue to increase due to its amplified responsibilities and need to fund the replacement of aging and outdated technology systems and new technology initiatives.

The Commission recognizes the concerns raised by some commenters that the increase in transaction fees and the new technology fee will be used to subsidize municipal advisor regulation. As noted above, however, the MSRB has already taken a first step to assess fees on municipal advisors to account for a portion of the costs of needed regulatory activity.[65] The MSRB also stated that it expects to assess other fees on municipal advisors as is appropriate.[66] Furthermore, the MSRB has proposed to account for technology fee collections in a separate technology renewal fund, which should help to ensure that such funds are used only for the replacement and renewal of outdated technology systems and to fund new technology initiatives.

The Commission also notes that all fees assessed by the MSRB are reviewed by the Board on an on-going basis to help ensure that they continue to be appropriately assessed, meet the resource needs of the MSRB, and are appropriate from the standpoint of the fair allocation of burdens for supporting MSRB activities.[67] In addition, with respect to the new technology fee in particular, the MSRB stated that it will annually review whether this fee should continue to be assessed and, if so, at what level and indicated that "[s]uch review will take into consideration, among other things * * *, issues of equity among regulated entities." [68]

Further, the Commission believes that the broadening of the MSRB's proposed fees to all types of dealers—in order to more equitably assess all entities regulated by the MSRB—is consistent with the MSRB's pledge to continue to review all of its fees to ensure that their impact is reasonable and appropriate among its different types of regulated entities.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[69] that the proposed rule change (SR–

a "self-regulatory organization similar in size and structure to the MSRB * * * [also] maintains cash and liquid reserves equivalent to approximately one year's expenses." *See* Supplemental MSRB Response Letter.

[53] *Id.*

[54] *See* HTD Letter and SIFMA Letter I. SIFMA Letter I also included a suggestion that the Commission consider imposing a fee on mutual funds and Commission registered investment advisers with municipal market clients and remit the revenue from such fees to the MSRB.

[55] *See* Morgan Stanley Letter.

[56] *See* MSRB Response Letter.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] 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).

[61] 15 U.S.C. 78*o*–4(b)(2)(J).

[62] Effective October 1, 2010, pursuant to the Dodd-Frank Act, the applicability of Section 15B(b)(2)(J) of the Exchange Act was extended to municipal advisors.

[63] *See supra* note 9, and accompanying text.

[64] *See supra* note 20, and accompanying text.

[65] *See supra* note 6, and accompanying text.

[66] *See* MSRB Response Letter.

[67] *Id.*

[68] *Id.*

[69] 15 U.S.C. 78s(b)(2).

MSRB–2010–10), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[70]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–33269 Filed 1–4–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63613; File No. SR–NYSEAmex–2010–121]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Making Permanent NYSE Amex Equities Rule 123C(9)(a)(1) and Amending Rule 123C(9)(a)(1)(iii)

December 29, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 20, 2010, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Exchange proposes to make permanent NYSE Amex Equities Rule 123C(9)(a)(1), which currently operates on a pilot basis. The Exchange also proposes to amend Rule 123C(9)(a)(1)(iii) to eliminate the requirement that only Floor brokers can represent interest after 4 p.m. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, *www.sec.gov,* and *http://www.nyse.com.*

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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to make permanent NYSE Amex Equities Rule 123C(9)(a)(1),[4] which has operated on a pilot basis and allows the Exchange to temporarily suspend certain rule requirements at the close when extreme order imbalances may cause significant dislocation to the closing price ("Extreme Order Imbalances Pilot" or "Pilot").[5] The Pilot has recently been extended to June 1, 2011. In addition, in connection with proposing to make the rule permanent, the Exchange proposes to amend Rule 123C(9)(a)(1)(iii) to eliminate the requirement that only Floor brokers can represent interest after 4:00 p.m. and to make technical amendments related to the obligations of member firms entering interest pursuant to Rule 123C(9)(a)(1).[6]

Background

Pursuant to NYSE Amex Equities Rule 123C(9)(a)(1), the Exchange may suspend NYSE Amex Equities Rule 52 (Hours of Operation) to resolve an extreme order imbalance that may result in a price dislocation at the close as a result of an order entered into Exchange systems, or represented to a Designated Market Maker ("DMM") orally at or near the close. NYSE Amex Equities Rule 123C(9)(a)(1) was intended to be and has been invoked to attract offsetting interest in rare circumstances where there exists an extreme imbalance at the close such that a DMM is unable to close the security without significantly dislocating the price.

As a condition of the approval to operate the Pilot, the Exchange committed to provide the Commission with information regarding: (i) How often an NYSE Amex Equities Rule 52 temporary suspension pursuant to the Pilot was invoked during the six months following its approval; and (ii) the Exchange's determination as to how to proceed with technical modifications to reconfigure Exchange systems to accept orders electronically after 4 p.m. As the Exchange has previously noted in filings with the Commission, the Pilot has been invoked only twice in NYSE Amex-listed securities.[7]

Proposal To Make Permanent the Operation of the Extreme Order Imbalance Rule

The Exchange has completed and tested the system modifications necessary to accept orders electronically after 4 p.m. The Exchange therefore proposes to make Rule 123C(9)(a)(1), as amended, permanent beginning on January 3, 2011.

Because the Exchange can now accept orders electronically after 4 p.m., the Exchange proposes to amend Rule 123C(9)(a)(iii) to eliminate the restriction that only Floor brokers can represent offsetting interest in response to a solicitation of interest pursuant to the Rule. The Exchange further proposes to make technical changes to Rule 123C(9)(a)(1)(iii) to identify what interest may be entered in response to a solicitation, *i.e.,* it must be offsetting interest, a limit order priced no worse than the last sale, and irrevocable. Market participants sending in interest electronically in response to a solicitation after 4 p.m. are responsible for assuring compliance with all provisions of subsection (iii), including that such interest must be on the opposite side of the imbalance, must be limit priced no worse than the last sale, and must be irrevocable. Failure to abide by these requirements could subject a market participant to regulatory review and possible disciplinary action.[8]

The Exchange also proposes to amend Rule 123C(9)(a)(iv) to make clear that all

[70] 17 CFR 200.30–3(a)(12).

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC. *See* SR–NYSE–2010–84.

[5] *See* Securities Exchange Act Release Nos. 59755 (April 13, 2009), 74 FR 18009 (April 20, 2009) (SR–NYSEAltr–2009–15) (order granting approval of the Pilot); 60808 (October 9, 2009), 74 FR 53539 (October 19, 2009) (SR–NYSEAmex–2009–70) (extending the operation of the Pilot to December 31, 2009); 61265 (December 31, 2009), 75 FR 1094 (January 8, 2010) (SR–NYSEAmex–2009–96) (extending the operation of the Pilot from December 31, 2009 to March 1, 2010); 61611 (March 1, 2010), 75 FR 10530 (March 8, 2010) (SR–NYSEAmex–2010–15) (extending the operation of the Pilot from March 1, 2010 to June 1, 2010); 62293 (June 15, 2010), 75 FR 35862 (June 23, 2010) (SR–NYSEAmex–2010–50) (extending the operation of the Pilot from June 1, 2010 to December 1, 2010); and SR–NYSEAmex–2010–113 (filed November 30, 2010) (extending the operation of the Pilot from December 1, 2010 to June 1, 2011).

[6] In addition, the Exchange proposes to make a technical change to the text of Rule 123C(9)(a)(1)(v).

[7] *See* SR–NYSEAmex–2010–113 (filed November 30, 2010) (extending the operation of the Pilot from December 1, 2010 to June 1, 2011).

[8] Prior to implementation of this rule change, the Exchange will issue guidance in the form of an Information Memo that member organizations entering interest will be responsible for complying with Rule 123C(9)(a)(1)(iii).