SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52948; File No. SR-MSRB-2005-11)

December 13, 2005

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Definition of Solicitation under MSRB Rules G-37 and G-38

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 June 10, 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. On December 7, 2005, the MSRB 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

The MSRB has filed with the Commission a proposal consisting of an interpretive notice relating to the definition of solicitation for purposes of Rules G-37 and G-38. The text of the proposed rule change, as amended, is available on the MSRB's Web site

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

2 17 CFR 240.19b-4.

3 Amendment No. 1 clarifies that the central element in determining whether a communication is a solicitation is whether the communication occurs with the purpose of obtaining or retaining municipal securities business, and makes certain other changes.

(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 has recently amended Rule G-38, on solicitation of municipal securities business, to prohibit brokers, dealers and municipal securities dealers ("dealers") from making direct or indirect payments to any persons who are not affiliated persons[4] of the dealers for solicitations of municipal securities business[5] on behalf of the dealers. The proposed rule change provides interpretive guidance on the definition of "solicitation" as used in Rule G-38 and in Rule G-37, on political contributions and prohibitions of municipal securities business. This definition is important for purposes of

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4 Rule G-38(b)(ii) generally defines an affiliated person of a dealer as an employee or other personnel of the dealer or of an affiliated company of the dealer.

5 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.

determining whether dealer payments to non-affiliated persons of the dealer would be prohibited under Rule G-38. In addition, the definition is central to determining whether communications by dealer personnel would result in such personnel being considered municipal finance professionals of the dealer for purposes of Rule G-37.

The proposed rule change makes clear that the central element in determining whether a communication is a solicitation is whether the communication occurs with the purpose of obtaining or retaining municipal securities business. As a general proposition, the proposed rule change provides that a communication made under circumstances reasonably calculated to obtain or retain municipal securities business could be considered a solicitation unless the circumstances indicate otherwise. The proposed rule change provides numerous examples of circumstances where a communication may or may not be considered a solicitation, including guidance on communications with issuer representatives, promotional communications, work-related communications, communications with conduit borrowers, and communications by non-affiliated professionals.

2. Statutory Basis

The MSRB believes that the proposed rule change, as amended, is consistent with Section 15B(b)(2)(C) of the Act,[6] 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

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6 15 U.S.C. 78o-4(b)(2)(C).

municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change, as amended, is consistent with the Act because it will further investor protection and the public interest by ensuring that dealers understand their obligations under MSRB rules designed to maintain 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, as amended, will result in any burden on competition that is 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")[7] and September 29, 2004 (the "September 2004 Notice").[8] 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, and also provided certain guidance on the definition of solicitation. The MSRB received comments from 28 commentators, eight of which

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7 See MSRB Notice 2004-11 (April 5, 2004).

8 See MSRB Notice 2004-32 (September 29, 2004), as modified by MSRB Notice 2004-33 (October 12, 2004).

provided comments on the definition of solicitation.[9] The September 2004 Notice sought comments on revised draft amendments to Rule G-38 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 September 2004 Notice also provided more detailed guidance on the definition of solicitation. The MSRB received comments from 19 commentators, five of which provided comments on the definition of solicitation.[10] The comments received on the April and September 2004 Notices relating to the definition of solicitation are discussed below.[11]

Communications with Conduit Borrowers

In the April 2004 Notice, the MSRB asked whether a communication with a

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9 Letters commenting on the definition of solicitation consisted of letters from Jerry L. Chapman ("Mr. Chapman"), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated April 22, 2004; Maud Daudon, Managing Director, Investment Banking, and John Rose, President & CEO, Seattle-Northwest Securities Corporation ("Seattle-Northwest") to Christopher A. Taylor, MSRB Executive Director, dated May 19, 2004; Gordon Reis III, Managing Principal, Seasongood & Mayer, LLC ("Seasongood") to Mr. Taylor, dated May 20, 2004; Bruce Moland, Vice President & Assistant General Counsel, Wells Fargo & Company ("Wells Fargo"), to Mr. Lanza dated June 2, 2004; Sarah A. Miller, General Counsel, ABA Securities Association ("ABASA"), 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; Robyn A. Huffman, Vice President and Associate General Counsel, Goldman Sachs & Co. ("Goldman"), to Mr. Lanza dated June 4, 2004; and James S. Keller, Chief Regulatory Counsel, PNC Capital Markets, Inc. ("PNC"), to Mr. Lanza dated June 4, 2004.

10 Letters commenting on the definition of solicitation consisted of letters from Ms. Daudon and Mr. Rose, Seattle-Northwest, to Mr. Lanza dated December 13, 2004; Mr. Moland, Wells Fargo, 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; and Ms. Miller, ABASA, to Mr. Lanza dated December 17, 2004.

11 The remaining comments received on the April and September 2004 Notices were discussed in SR-MSRB-2005-04. See Exchange Act Release No. 51561, 70 FR 20782 (April 21, 2005).

conduit borrower to hire a dealer as an underwriter for a private activity bond issue where the issuer ultimately must approve the underwriter for the issue should be considered an indirect communication with the issuer. In the September 2004 Notice, the MSRB stated that, from a literal perspective, any communication by a dealer with a conduit borrower intended to cause the borrower to select the dealer to serve as underwriter for a conduit issue could be considered a solicitation of municipal securities business. This is because the conduit borrower eventually communicates its selection of the dealer to the conduit issuer for approval, with the result that this series of communications becomes an indirect communication by the dealer through the conduit borrower to the conduit issuer with the intent of obtaining municipal securities business. However, if the dealer can establish that no reasonable nexus could exist between the making of contributions to officials of the conduit issuer and the selection of the underwriter for such conduit financing, then a communication with the borrower would be deemed not to be a solicitation for purposes of Rule G-38. For example, if a conduit issuer historically defers to its conduit borrowers' selections of underwriters without influencing the selection, communications with the conduit borrower to obtain the underwriting assignment would not be treated as a solicitation, even if that communication is relayed by the conduit borrower to the conduit issuer.

Comments Received. Several commentators stated that communications with conduit borrowers should not be considered solicitations, or that the circumstances under which they are so considered should be narrowly drawn. ABASA, BMA, PNC and Wells Fargo stated that communications with conduit borrowers generally should not be considered solicitations, whereas Mr. Chapman stated that communications should be

treated as solicitations. The ABA noted that, in conduit financings, typically a complete package (including the underwriter) is presented to the selected conduit issuer, with the issuer either accepting or rejecting the package. BMA stated that in a conduit deal, if an employee is only communicating with a private obligor and not with the issuer, then there is no possibility that a contribution made by that employee to an official of such issuer would influence the underwriter selection process. ABASA and Wells Fargo asked, in the alternative, that the MSRB provide more specific guidance on what would cause a communication to be a solicitation.

ABASA and BMA characterized the MSRB's guidance in the September 2004 Notice as creating a presumption that a communication with a conduit borrower is a solicitation which can be rebutted only under narrowly drawn circumstances. They also observed that many communications with conduit borrowers occur before the identity of the issuer has been determined. As a result, they suggested that a dealer often cannot know if a communication with a conduit borrower might later be considered a solicitation since the dealer does not know if the issuer ultimately used will meet the requirements for rebutting the presumption that a communication with the borrower is a solicitation.

MSRB Response. The MSRB believes that ABASA and BMA incorrectly implied that the only way for a dealer to rebut the presumption that a communication with a conduit borrower is a solicitation is by establishing that a conduit issuer historically defers to its conduit borrowers' selections of underwriters. The September 2004 Notice provided that a communication would not be considered a solicitation if there is no reasonable nexus between the making of contributions to officials of a conduit issuer and the selection of the underwriter for a conduit financing. The method

mentioned by ABASA and BMA was simply one example of how a dealer could establish that there was no such reasonable nexus.

Nonetheless, the MSRB agrees that a dealer's communication with a conduit borrower generally should not be deemed an indirect solicitation of the issuer unless a reasonable nexus can be established between the making of contributions to officials of the conduit issuer within the meaning of Rule G-37 and the selection of the underwriter for such conduit financing. A determination of whether such a reasonable nexus could exist depends on the specific facts and circumstances. The proposed rule change reflects this position.

Inform and Refer

In the April 2004 Notice, the MSRB noted that, where an issuer representative asks an associated person of a dealer whether the dealer has municipal securities capabilities, a limited affirmative response by the associated person, together with the provision to the issuer representative of contact information for dealer personnel who handle municipal securities business, generally would not be presumed to be a solicitation by such associated person. In the September 2004 Notice, the MSRB provided further elaboration and additional examples, noting in particular that the associated person could have an MFP of the dealer contact the issuer representative directly in response to such an inquiry. In both notices, the MSRB stated that, if the associated person receives compensation such as a finder's or referral fee for such business, the associated person generally would be viewed as having solicited the business.

Comments Received. In response to the April 2004 Notice, ABASA stated that, in a bank holding company, bankers should be free to inform issuers that affiliated dealers have municipal securities capabilities and provide contact information without such communication being deemed a solicitation. PNC stated that the draft amendment would "negatively impact the ability of affiliated companies to conduct banking business and make referrals. It would require dealers to disassemble the structures and controls that have been created to address requirements of the rule."

ABASA appreciated the clarification of the "inform and refer" concept provided in the September 2004 Notice. However, ABASA continued to object that the MSRB viewed the receipt of a finder's fee or referral fee as causing a communication to be considered a solicitation. ABASA stated that this would significantly add to the regulatory burden of bank dealers and, at a minimum, the MSRB should exempt any referral fees permitted under the Gramm-Leach-Bliley Act. PNC stated that dealer personnel should be permitted to approach issuer representatives to inform them of the dealer's municipal securities capabilities without such communication being considered a solicitation, but Mr. Chapman disagreed.

MSRB Response. The MSRB believes that the guidance provided in the September 2004 Notice on this topic is appropriate and has not made any further changes.

Technical Experts

Comments Received. BMA, Goldman and Seattle-Northwest requested that the MSRB explicitly exempt communications by attorneys, accountants, engineers and legislative lobbyists with issuers from the definition of solicitation. They noted that such

technical experts were exempted from former Rule G-38 relating to consultants[12] and argued that such exclusion should be continued in revised Rule G-38. BMA argued that "the MSRB's broad interpretation of the meaning of solicitation means that broker-dealers would be prohibited from hiring outside persons to perform necessary services given that they would have to, as a practical matter, attend … meetings with issuers and will ultimately make the broker-dealer more appealing to the issuer by doing a good job." PNC stated that including conversations through or with secondary participants of an issue would not serve to enhance the goal of the rule. Seasongood stated that all contact by or through third parties should be considered a solicitation.

MSRB Response. The proposed rule change makes clear that, so long as non-affiliated persons providing legal, accounting, engineering or other professional services[13] are not being paid directly or indirectly for their solicitation activities,[14] they

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12 Attorneys, accountants and engineers were excluded from the definition of consultant under former Rule G-38 only so long as their sole basis of compensation from the dealer was the actual provision of legal, accounting or engineering services on the municipal securities business that the dealer is seeking. As BMA noted, the rule did not exempt legislative lobbying; rather, the MSRB had noted in a Question and Answer guidance that the activity of lobbying legislators for legislation granting an issuer authority to issue certain types of municipal securities would not, by itself, result in the lobbyist being considered a consultant. See Rule G-38 Question & Answer #5, dated February 28, 1996, published in MSRB Rule Book.

13 The proposed rule change does not enumerate all professional services that may be provided in connection with municipal securities business but makes clear that such services are not strictly limited to legal, accounting and engineering services (e.g., another dealer serving as a syndicate member).

14 The proposed rule change reminds dealers that the term "payment" under MSRB rules is broadly defined and can include, depending on the facts and circumstances, quid pro quo arrangements whereby a non-affiliated person solicits municipal securities business for the dealer in exchange for being hired by the dealer to provide other unrelated services.

would not become subject to Rule G-38. The MSRB believes that this language adequately addresses the concerns raised by the commentators.

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, as amended, 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-2005-11 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-MSRB-2005-11. 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-2005-11 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Jonathan G. Katz
Secretary

[15] 17 CFR 200.30-3(a)(12).