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

The purpose of this rule proposal is to establish procedures and rules regarding the need to make prior arrangements to borrow stock, warrants, or other securities that trade subject to Chapter 30 of the Exchange's rules, or to otherwise ensure availability of the subject securities before engaging in short sales. The change involves the adoption of Interpretation .04 to Rule 30.20, *''Long'' and ''Short'' Sales.* Interpretation .04 is similar to rules of other securities exchanges [2] and would require that member organizations who effect short sales for their own account or for the accounts of customers to make an affirmative determination that delivery of the subject securities can be made on settlement date. The purpose for this rule proposal is to ensure that borrowings and short sales do not outpace the supply of deliverable stock, thus, leading to potential systematic problems. In the case of the short selling of members' proprietary positions, the proposal is intended to address unnecessary speculation in connection with the short selling of broker-dealers' proprietary positions caused by the members' ability to go short without securities to cover the short position. The proposed amendment, as with the rules of the other securities exchanges, would not apply to bona fide market making transactions by a member in securities in which it is a registered market-maker. This market-maker exemption recognizes that many short selling transactions are engaged in by market-makers to enhance market liquidity, which is beneficial to the market and thus should not be unduly restricted.

Interpretation .04 also describes the type of ''affirmative determinations'' that must be obtained by the member or person associated with the member to ensure that the securities will be available. The member or person associated with the member is obligated to keep a written record of each ''affirmative determination.'' If a customer assures delivery, the written affirmative determination must record the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the member within three business days.[3] If the member or person associated with a member locates the stock, the affirmative determination must record the identity of the individual and firm contacted who offer assurance that the shares would be delivered or that were available for borrowing by settlement date and the number of shares needed to cover the short sale. The requirement to keep a written record of each affirmative determination serves two purposes: first, the written record allows the Exchange to audit compliance with the Rule, and second, the written record provides the member firm with evidence to pursue its own resolution in the event of a default.

By ensuring that securities are available for borrowing and for delivery, the Exchange believes the rule proposal will help to prevent situations where there is a shortage of deliverable stock as well as failures to deliver. By facilitating short sales and decreasing the likelihood of a fail, the Exchange believes the rule proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) in particular by providing rules that facilitate transactions in securities, remove impediments to a free and open market and protect investors and the public interest.

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

The Exchange does not believe the proposed rule change will impose any inappropriate burden on competition.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; (3) was provided to the Commission for its review at least five business days prior to the filing date; and (4) does not become operative for 30 days from October 31, 1995, the rule change proposal has become effective pursuant to Section 19 (b)(3)(A) of the Act and Rule 19b–4(e)(6) thereunder. In particular, the Commission believes the proposal qualifies as a ''noncontroversial filing'' in that the proposed amendments do not significantly affect the protection of investors or the public interest and do not impose any significant burden on competition. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–95–59 and should be submitted by December 26, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–29511 Filed 12–4–95; 8:45 am]

BILLING CODE 8010–01–M

[2] *See e.g.,* New York Stock Exchange (''NYSE'') Rule 440C (and NYSE Information Memo 91–10, *Deliveries Against Short Sales,* (Oct. 18, 1991)) and Interpretation of the Board of Governors of the National Association of Securities Dealers, Inc. (''NASD''), *Prompt Receipt and Delivery of Securities,* under Article III, Section 1 of the NASD Rules of Fair Practice.

[3] *See* Amendment No. 1. This reduction from five days to three days complies with the normal settlement schedule for equity securities.

[4] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–36522; File No. SR–MSRB–95–15]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Consultants

November 28, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on September 28, 1995,[1] the Municipal Securities Rulemaking Board (MSRB'' or ''Board'') 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 the MSRB. The Board has requested that the Commission delay the effective date of the proposed rule change until sixty (60) days after the Commission's approval thereof. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Board proposes to amend rules G–8[2] and G–9,[3] on recordkeeping and record retention, rule G–27,[4] on political contributions and prohibitions on municipal securities business, and add a new rule G–38 regarding consultants. The Board also proposes to amend its Form G–37, and redesignate it as Form G–37/G–38.

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Rule G–8. Books and Records To Be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made.

* * * * *

(xvi) Records Concerning Political Contributions and Prohibitions on Municipal Securities Business Pursuant to Rule G–37, Records reflecting: * * *

(D) a listing of the issuers with which the broker, dealer or municipal securities dealer has engaged in municipal securities business, along with the type of municipal securities business engaged in, during the current year and separate listings for each of the previous two calendar years[. Where applicable, a listing of the name, company, role and compensation arrangement of any person employed by the broker, dealer or municipal securities dealer to obtain or detain municipal securities business with such issuers also shall be made]; * * *

(xvii) Records Concerning Consultants Pursuant to Rule G–38. Each broker, dealer and municipal securities dealer shall maintain: (i) A listing of the name, company, role and compensation arrangement of each consultant; (ii) a copy of each Consultant Agreement referred to in rule G–38(b); (iii) a listing of the compensation paid in connection with each such Consultant Agreement; (iv) where applicable, a listing of the municipal securities business obtained or retained through the activities of each consultant; (v) a listing of issuers and a record of disclosures made to such issuers, pursuant to rule G–38(c), concerning each consultant used by the broker, dealer or municipal securities dealer to obtain or retain municipal securities business with each such issuer; and (vi) the date of termination of any consultant arrangement

* * * * *

(f) Compliance with Rule 17a–3. Brokers, dealers and municipal securities dealers other than bank dealers which are in compliance with rule 17a–3 of the Commission will be deemed to be in compliance with the requirements of this rule, provided that the information required by subparagraph (a)(iv)(D) of this rule as it relates to uncompleted transactions involving customers; paragraph (a)(viii); paragraph (a)(xi); paragraph (a)(xii); paragraph (a)(xiii); paragraph (a)(xiv); paragraph (a)(xv); paragraph (a)(xvi); [and] paragraph (a)(xvii)*; and paragraph (a)(xviii)* shall in any event be maintained.

Rule G–9. Preservation of Records

(a) Records to be Preserved for Six Years. Every broker, dealer and municipal securities dealer shall preserve the following records for a period of not less than six years. * * *

(x) the records required to be maintained pursuant to rule G–8(a)(xviii).

* * * * *

Rule G–37. Political Contributions and Prohibitions on Municipal Securities Business

* * * * *

(e)(i) Each broker, dealer or municipal securities dealer shall submit to the Board, by certified or registered mail, or some other equally prompt means that provides a record of sending, and the Board shall make public, reports on contributions to officials of issuers and on payments to political parties of states and political subdivisions that are required to be recorded pursuant to rule G–8(a)(xvi). Such reports shall include information concerning the amount of contributions to officials of issuers and payments to political parties of states and political subdivisions *and an indication of the contributor category of each contribution or payment* made by: * * *

Such reports also shall include information on municipal securities business engaged in and certain other information specified in this section (e), as well as other identifying information as may be determined by the Board from time to time [in accordance with Board rule G–37 filing procedures].

(ii) *Two copies of the* [R]reports referred to in paragraph (i) of this section (e) must be submitted to the Board on Form G–37/*G–38* [in accordance with Board rule G–37 filing procedures, quarterly with due dates determined by the Board,] *within thirty (30) calendar days after the end of each calendar quarter (these dates correspond to January 31, April 30, July 31 and October 31),* and must include, in the prescribed format, by state, the following information on contributions to each official of an issuer and payments to each political party of a state or political subdivision made and municipal securities business engaged in during the reporting period: (A) name and title (including any city/county/state or political subdivision) of each official of an issuer and political party receiving contributions or payments; (B) [total number and dollar amount of contributions or payments made by] *contribution or payment amount made and the contributor category of* the persons and entities described in paragraph (i) of this section (e); and (C) such other identifying information required by Form G–37/*G–38*. Such reports also must include a list of issuers with which the broker, dealer or municipal securities dealer has engaged in municipal securities business, along with the type of municipal securities business [and the name, company, role and compensation arrangement of any person, other than a municipal finance

[1] On November 15, 1995, the MSRB filed Amendment No. 1 with the Commission. Amendment No. 1 was a minor technical amendment, the text of which may be examined in the Commission's Public Reference Room, *See* Letter from Jill C. Finder, Assistant General Counsel, MSRB, to Ethan D. Corey, Senior Counsel, Division of Market Regulation, Commission, dated November 15, 1995.

[2] *MSRB Manual,* General Rules, G–8 (CCH) ¶ 3536.

[3] *MSRB Manual,* General Rules, G–9 (CCH) ¶ 3541.

[4] *MSRB Manual,* General Rules, G–37 (CCH) ¶ 3681.

professional, employed by the broker, dealer or municipal securities dealer to obtain or retain municipal securities business with such issuers].

(f) The Board will accept additional information related to contributions made to officials of issuers and payments to political parties of states and political subdivisions voluntarily submitted by brokers, dealers, or municipal securities dealers or others provided that such information is submitted in accordance with [Board rule G–37 filing procedures] *section (e) of this rule.*

* * * * *

[Rule G–37 Filing Procedures. Each dealer is required to file two copies of Form G–37. Each dealer is required to file Form G–37 within thirty (30) calendar days after the end of each calendar quarter. (These dates correspond to January 31, April 30, July 31, and October 31).]

Rule G–38. Consultants

(a) Definitions.

(i) The term ''consultant'' means any person used by a broker, dealer or municipal securities dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on behalf of such broker, dealer or municipal securities dealer where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the broker, dealer or municipal securities dealer or any other person; provided, however, that the following persons shall not be considered consultants for purposes of this rule: (A) a municipal finance professional of the broker, dealer or municipal securities dealer; and (B) any person whose sole basis of compensation from the broker, dealer or municipal securities dealer is the actual provision of legal, accounting or engineering advice, services or assistance in connection with the municipal securities business that the broker, dealer or municipal securities dealer is seeking to obtain or retain.

(ii) The term ''issuer'' shall have the same meaning as in rule G–37(g)(ii).

(iii) The term ''municipal finance professional'' shall have the same meaning as in rule G–37(g)(iv).

(iv) The term ''municipal securities business'' shall have the same meaning as in rule G–37(g)(vii).

(v) The term ''payment'' shall have the same meaning as in rule G–37(g)(viii).

(b) Written Agreement. Each broker, dealer or municipal securities dealer that uses a consultant shall evidence the consulting arrangement by a writing setting forth, at a minimum, the name, company, role and compensation arrangement of each such consultant (''Consultant Agreement''). Such Consultant Agreement must be entered into before the consultant engages in any direct or indirect communication with an issuer on behalf of the broker, dealer or municipal securities dealer.

(c) Disclosure to Issuers. Each broker, dealer or municipal securities dealer shall submit in writing to each issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business, information on consulting arrangements relating to such issuer, which information shall include the name, company, role and compensation arrangement of any consultant used, directly or indirectly, by the broker, dealer or municipal securities dealer to attempt to obtain or retain municipal securities business with each such issuer. Such information shall be submitted to the issuer prior to the selection of any broker, dealer or municipal securities dealer in connection with such municipal securities business.

(d) Disclosure to Board. Each broker, dealer or municipal securities dealer shall submit to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending, and the Board shall make public, reports of all consultants used by the broker, dealer or municipal securities dealer during each calendar quarter. Two copies of the reports must be submitted to the Board on Form G–37/G–38 within thirty (30) calendar days after the end of each calendar quarter (these dates correspond to January 31, April 30, July 31, and October 31). Such reports shall include, for each consultant, in the prescribed format, the consultant's name, company, role and compensation arrangement. In addition, such reports shall indicate the dollar amount of payments made to each consultant during the report period and, if any such payments are related to the consultant's efforts on behalf of the broker, dealer or municipal securities dealer which resulted in particular municipal securities business, then that business and the related dollar amount of the payment must be separately identified.

* * * * *

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

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

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

Over the last few years, the Board has been concerned about abuses associated with the awarding of municipal securities business. Rule G–37, which became effective in April 1994, prohibits a dealer from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by the dealer, any municipal finance professional associated with the dealer, or any political action committee controlled by the dealer or any municipal finance professional.[5] The rule also prohibits a dealer from doing anything indirectly which would result in a violation of the rule if done directly by the dealer. For example, a violation would result if a dealer engages in municipal securities business with an issuer after directing third parties (such as consultants) to make contributions to that issuer. In addition to recording and disclosing political contributions, rule G–37 currently requires dealers to record and disclose on Form G–37 those issuers with which the dealer has engaged in municipal securities business and, where applicable, the name, company, role and compensation arrangement of any person employed by the dealer to obtain or retain business with such issuers.

Rule G–20, on gifts and gratuities, prohibits dealers from, directly or indirectly, giving or permitting to be given any thing or service of value in excess of $100 per year to any person, other than an employee or partner of the dealer, in relation to the municipal securities activities of the person's employer. All gifts given by the dealer and its associated persons, or by consultants at the direction of the dealer, are used to compute the $100 limitation and this limitation applies to gifts and gratuities to customers, individuals associated with issuers, and employees of other dealers.[6]

[5] Rule G–37(b) contains *de minimis* exception for certain contributions made by municipal finance professionals.

[6] Rule G–20(b) exempts ''normal business dealings'' from the $100 annual limit. These payments are defined as occasional gifts of meals

The Board believes that rules G–37 and G–20, along with rule G–17, on fair dealing,[7] set appropriate standards for dealer conduct in the municipal securities industry. However, the Board is concerned about dealers' increasing use of consultants to obtain or retain municipal securities business. While the Board believes that in many instances the use of consultants is appropriate, it also believes that, in a number of instances, the use of consultants may be in response to limitations placed on dealer activities by rule G–37 and rule G–20.[8] While both of these rules prohibit dealers from doing indirectly what they are precluded from doing directly, indirect activities often are difficult to prove. The Board recognizes that vigorous enforcement of its rules, as well as the antifraud provisions of the federal securities laws, will be effective in uncovering improper conduct, as well as deterring further violations, in connection with municipal securities business. Notwithstanding such efforts, or the current rule G–37 requirement that dealers disclose certain information about consultant arrangements, the Board believes that additional information about such arrangements should be made available to issuers and the public. Currently, the limited amount of information regarding consulting arrangements and the role of consultants in helping dealers obtain or retain municipal securities business makes it difficult to determine the extent to which payments to consultants influence the issuer's selection process in connection with municipal securities business, as well as the extent to which such payments increase the cost of bringing municipal securities issues to market. The Board believes that disclosure of consulting arrangements (even those that would not result in any rule violations) is necessary. Furthermore, the Board believes that disclosure requirements regarding consultants should be embodied in a separate rule in order to highlight the importance of this information and to facilitate its disclosure to, and accessibility by, the municipal securities market and the public. Accordingly, the Board is proposing new rule G–38, on consultants. At this time, the board is not proposing any substantive restrictions on arrangements between dealers and consultants. If, at a later date, the Board learns of specific dealer practices regarding the use of consultants that it believes should be addressed, then the Board may proceed with additional rulemaking in this area.

Background

In April 1995, the Board published for comment draft rule G–38 (''April 1995 Draft Rule'').[9] The April 1995 Draft Rule would have required dealers to have written agreements with consultants and to disclose such arrangements to issuers and to the public through disclosure to the Board. It defined the term ''consultant'' very broadly, and included, among others, persons that acted as ''finders'' for municipal securities business or that lobbied state and local government officials. The term also included persons who engaged in legal, accounting or financial advisory services if such persons were engaged, even in part, because they could assist a dealer in efforts to obtain or retain municipal securities business with an issuer, and included persons engaged by a dealer at the request or direction of the issuer (*e.g.*, underwriter's counsel).

While most of the commenters responding to the April 1995 Draft Rule supported the Board's goal of making additional information on consultants available to the market, many expressed concern that the definition of consultant was too broad and included a number of categories of persons who did not perform ''traditional'' consulting roles or services.[10] The Board carefully considered these and other concerns and suggestions expressed by the commenters, and adopted the proposed rule change. Proposed rule G–38 differs in certain respects from the April 1995 Draft Rule, particularly with regard to the definition of consultant. By making such changes, the Board believes that the proposed rule effectively addresses concerns raised by the commenters without sacrificing the Board's goal of making information about consultants available to issuers and the public.

Summary of Proposed Rule G–38

Definition of Consultant

Proposed rule G–38 defines consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on the dealer's behalf where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the dealer or any other person.[11] The definition specifically excludes ''municipal finance professionals,'' as that term is defined in rule G–37(g)(iv), because such individuals are covered by the requirements of rule G–37. The definition also excludes any person whose sold basis of compensation from the dealer is the actual provision of legal advice, accounting or engineering assistance in connection with the municipal securities business that the dealer is seeking to obtain or retain. The exclusion would apply, for example, to a lawyer retained to conduct a legal analysis on a particular transaction contemplated by the dealer, or to review local regulations; an accountant retained to conduct a tax analysis or to scrutinize financial reports; or an engineer retained to perform a technical review or feasibility study. The exemption is intended to ensure that professionals who are engaged by the dealer solely to perform substantive work in connection with municipal securities business are not brought within the definition of consultant as long as their compensation is in consideration of only those professional services actually

or tickets to theatrical, sporting, and other entertainments, as well as the sponsoring of legitimate business functions that are recognized by the IRS as deductible business expenses, and gifts of reminder advertising. However, the rule also provides that such gifts can not be so frequent or so expensive as to raise a suggestion of unethical conduct.

[7] Rule G–17 provides that, in the conduct of its municipal securities business, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.

[8] For example, the Commission has charged that kickbacks and conflicts of interest have occurred in connection with municipal securities offerings. In one instance, the Commission alleged that dealer personnel paid a large kickback to the issuer's financial advisor and inflated the underwriters' discount to fund the kickback. *See* SEC Litigation Release No. 14421 (February 23, 1995) regarding *SEC v. Nicholas A. Rudi, Joseph C. Salema, Public Capital Advisors, Inc. (formerly known as Consolidated Financial Management, Inc.), George L. Tuttle, Jr. and Alexander S. Williams.* In another instance, the SEC alleged that dealer personnel provided loans and direct payments to an employee of an issuer that had an important role in selecting the underwriter. *See* SEC Litigation Release No. 14397 (January 23, 1995) regarding *SEC v. Terry D. Busbee and Preston C. Bynum.*

[9] *MSRB Reports*, Vol. 15, No. 1 (April 1995) at 3–10.

[10] A summary of these comments is discussed *infra* Section II.C.

[11] ''Person'' is defined in Section 3(a)(9) of the Securities Exchange Act of 1934 as ''a natural person, company, government, or political subdivision, agency, or instrumentality of a government.''

''Municipal securities business'' has the same meaning as in rule G–37(g)(vii), *i.e.*, (A) the purchase of a primary offering (as defined in rule A–13(d)) of municipal securities from the issuer on other than a competitive bid basis (*i.e.*, negotiated underwriting); (B) the offer or sale of a primary offering of municipal securities on behalf of any issuer (*i.e.*, private placement); (C) the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities on other than a competitive basis; or (D) the provision of remarketing agent services to or on behalf of an issuer with respect to a primary offering of municipal securities on other than a competitive bid basis.

''Payment'' has the same meaning as in rule G–37(g)(viii), *i.e.*, any gift, subscription, loan, advance, or deposit of money or anything of value.

provided in connection with such municipal securities business. However, any attorney or other professional used by the dealer as a ''finder'' for municipal securities business would be considered a consultant under the proposed rule.

Written Agreement

Proposed rule G–38 requires dealers who use consultants to evidence the consulting arrangement in writing (referred to as a ''Consultant Agreement''), and that, at a minimum, the writing must include the name, company, role and compensation arrangement of each consultant used by the dealer. Such written agreements must be entered into before the consultant engages in any direct or indirect communication with an issuer on the dealer's behalf.

Disclosure to Issuers

Proposed rule G–38 requires each dealer to disclose to an issuer with which it is engaging or seeking to engage in municipal securities business, in writing, information on consulting arrangements relating to that issuer. The written disclosure must include, at a minimum, the name, company, role and compensation arrangements with the consultant or consultants. Dealers are required to make such written disclosures prior to the issuer's selection of any dealer in connection with the municipal securities business sought, regardless of whether the dealer making the disclosure ultimately is the one to obtain or retain that business. Thus, while dealers have an obligation to disclose their consulting arrangements to all issuers from which they are seeking municipal securities business, they have more leeway in the timing of their disclosures as long as the disclosure is made before the issuer selects a dealer for the municipal securities business sought.

Disclosure to the Board

Proposed rule G–38 requires dealers to submit to the Board, on a quarterly basis, reports of all consultants used by the dealer. For each consultant, dealers must report, in the prescribed format, the consultant's name, company, role and compensation arrangement, as well as the dollar amount of any payment made to the consultant during the quarterly reporting period. If any payment made during the reporting period is related to the consultant's efforts on the dealer's behalf which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment. In addition, as long as the dealer continues to use the consultant to obtain or retain municipal securities business (*i.e.*, has a continuing arrangement with the consultant), the dealer must report information concerning such consultant every quarter, whether or not compensation is paid to the consultant during the reporting period. The Board believes that the reporting of these continuing consulting arrangements each quarter will assist enforcement agencies and the public in their review of such arrangements.

For ease of compliance and reporting, the Board has determined to delete the current reporting requirements regarding consultants from rule G–37. It also has determined to merge the reporting requirements for both rules into a single form—Form G–37/G–38. Dealers must submit two copies of such reports on proposed Form G–37/G–38.[12] The quarterly due dates are the same as the due dates currently required under the rule G–37 (*i.e.*, within 30 calendar days after the end of each calendar quarter, which corresponds to each January 31, April 30, July 31, and October 31). Finally, consistent with current rule G–37, dealers are required to submit these reports to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending.[13] The Board will then make these documents available to the public for inspection and photocopying at its Public Access Facility in Alexandria, Virginia, and for review by agencies charged with enforcement of Board rules.

Recordkeeping Requirements

To facilitate compliance with, and enforcement of, proposed rule G–38, the Board also proposes to amend existing rules G–8 and G–9, concerning recordkeeping and record retention, respectively. The proposed amendments to rule G–8 require dealers to maintain: (i) A listing of the name, company, role and compensation arrangement of each consultant; (ii) a copy of each Consultant Agreement; (iii) a listing of the compensation paid in connection with each Consultant Agreement; (iv) where applicable, a listing of the municipal securities business obtained or retained through the activities of each consultant; (v) a listing of the issuers and a record of disclosures made to such issuers concerning each consultant used by the dealer to obtain or retain municipal securities business with each such issuer; and (vi) the date of termination of any consultant arrangement. The amendment to rule G–9 requires dealers to maintain these records for a six-year period.

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

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, setting, 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.

The proposed rule change serves a number of the Board's enumerated purposes, including promoting just and equitable principles of trade, by ensuring that dealers compete for, and are awarded, municipal securities business on the basis of merit, and not political or financial influence. Such healthy competition will act to lower artificial barriers to those dealers not willing or able to hire consultants to obtain or retain municipal securities business, thereby maintaining the integrity of the municipal securities market, as well as the public trust and confidence that is essential to the long-term health and liquidity of the market.

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

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since the proposed rule change would apply equally to all brokers, dealers and municipal securities dealers. The Board believes that the proposed rule change will improve competition in the awarding of municipal securities business by ensuring that dealers compete for, and are awarded, such business on the basis of merit, not political or financial influence.

[12] Proposed Form G–37/G–38 is included in Exhibit 3 to the proposed rule change, along with instructions for filing the Form. In addition to the new rule G–38 consultant reporting requirements, Form G–37/G–38 includes revisions to the rule G–37 political contribution reporting requirements. Such revisions include, for each contribution, a required notation of the category of the contributor (*e.g.*, municipal finance professional or executive officer) and the amount of the contribution, as well as a separate section for the reporting of ''payments'' to political parties distinct from ''contributions'' to issuer officials.

[13] For ease of compliance, the Board has included the Rule G–37 Filing Procedures within the language of rule G–37, and has included the Rule G–38 Filing Procedures within the language of new rule G–38.

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

The Board received 17 comment letters in response to its April 1995 Draft Rule from the following commenters.[14]

A.G. Edwards & Sons, Inc.
American Government Financial Services Company
American Institute of Certified Public Accounts
Artemis Capital Group
Broward County, FL Finance and Administrative Services Dept.
Chapman and Cutler
Chemical Securities, Inc.
Gilmore & Bell
Goldman Sachs & Co.
Government Finance Officers Association
JP Morgan Securities Inc.
Morgan Stanley & Co., Inc.
National Association of Bond Lawyers
Public Securities Association
Seattle-Northwest Securities Corporation
Smith Barney Inc.
Willkie Farr & Gallagher

Summary and Discussion of Comments

The April 1995 Draft Rule would have required dealers (1) to have written agreements with persons who are used by a dealer for the purpose of seeking to obtain or retain municipal securities business, and (2) to disclose such arrangements with consultants directly to issuers and to the public through disclosure to the Board.

Necessity of a New Rule

Certain commenters believe that the April 1995 Draft Rule is unnecessary and should not be adopted.[15] The majority of commenters believe that the Board's goals in proposing the rule can more readily be accomplished by amending existing rule G–37, on political contributions and prohibitions on municipal securities business.[16] One commenter states that ''duplicative regulation should be avoided'' noting that rules G–37 and G–20 already address the use of consultants by dealers for impermissible purposes.[17] This commenter states that:

To the extent the market sees Rule G–38 as a rule without a needed purpose and as increasing compliance costs without any corresponding benefit, it will erode overall market support for the more important efforts to reform and improve the municipal securities markets * * *. Changes are occurring rapidly in the regulation of municipal securities, and there may be considerable merit in allowing the market to respond to Rule G–37, the [SEC's] 1994 Interpretive Release and similar efforts to see if they are effective in limiting influence peddling in the industry before additional rules are adopted.[18]

Another commenter believes that in attempting to address concerns about the possible circumvention of rules G–37 and G–20, the April 1995 Draft Rule ''is overly broad, mandating disclosure about a host of professionals whose activities and terms of engagement raise no legitimate specter of 'pay-to-play' abuses and often constitute proprietary and confidential business arrangements.'' [19]

One commenter ''strongly believes that proposed rule G–38 is not necessary'' and argues that the rule ''would seriously impair and discourage the traditional business relationships among professionals in the industry which have made the municipal securities market uniquely efficient in raising capital for states and localities.'' [20] This commenter believes that ''[i]n lieu of an additional and duplicative regulatory reporting regime'' the Board should amend rule G–37 to ''target those consulting relationships that are used for the exclusive purpose of retaining or obtaining municipal securities business.'' [21] In this regard, the commenter recommends that the Board provide a focused definition of consultant, as more fully discussed below.

One of the commenters states that, pursuant to the requirements of rule G–37, basic information is filed with the MSRB about consultants with whom a dealer has a business relationship.[22] Thus, this commenter questions the need for the April 1995 Draft Rule, ''which will impose significant new compliance burdens that will increase issuer borrower costs.'' [23] The commenter suggests that the Board review rule G–37 and Form G–37 ''to determine whether they might be modified to capture additional information.'' [24] Instead of a new rule, the commenter favors vigorous enforcement of existing Board rules for deterring improper conduct in the municipal securities industry.

One commenter believes that the April 1995 Draft Rule will create confusion with existing disclosure requirements under rule G–37, and that any required disclosures relating to consultant activity should be embodied in the same rule.[25] Thus, this commenter suggests amending rule G–37 or, in the alternative, removing the consultant disclosure requirements currently under rule G–37 and incorporating them into a modified version of the April 1995 Draft Rule.

Board Response

In response to commenters' concerns, the Board has modified the April 1995 Draft Rule, particularly with regard to the definition of consultant, as more fully discussed below. In addition, the Board is proposing to delete from rule G–37 the current disclosure requirements regarding consultants and to include all such requirements under new rule G–38. The Board also is proposing to replace Form G–37 with a new Form G–37/G–38, to consolidate dealers' reporting requirements under both rules G–37 and G–38. The Board believes that, by modifying the definition of consultant and including all disclosure requirements within a single rule, the proposed rule effectively addresses concerns raised by the commenters, including those relating to the need for a new rule, without sacrificing the Board's goal of making information about consultants available to issuers and the public in order to ensure the integrity of the municipal securities market.

Definition of ''Consultant''

The April 1995 Draft Rule defined ''consultant'' as any person, other than an employee or partner of a dealer, who is used by a dealer for the purpose of seeking to obtain or retain municipal securities business, including any person performing services for such dealer at the request or direction of an issuer. Fifteen of the 17 commenters expressed concern over this definition.[26] In general, the commenters are opposed to extending the definition to the following:

Professional service providers who are not actively engaged in assisting the underwriter to obtain or retain municipal securities business (*e.g.*, an accounting firm retained to conduct a tax analysis; a certified public

[14] *MSRB Reports*, Vol. 15, No. 1 (April 1995) at 3–10. Copies of the Notice Requesting Comment and the comment letters received are included in Exhibit 2.

[15] Gilmore & Bell; Goldman Sachs.

[16] A.G. Edwards; Artemis; Broward County; Chemical; GFOA; Gilmore & Bell; JP Morgan; PSA; and Smith Barney.

[17] Gilmore & Bell.

[18] *Id.*

[19] Goldman Sachs.

[20] PSA.

[21] *Id.*

[22] GFOA.

[23] *Id.*

[24] *Id.*

[25] A.G. Edwards.

[26] A.G. Edwards; AICPA; Artemis; Broward County; Chapman & Cutler; Chemical; GFOA; Gilmore & Bell; Goldman Sachs; JP Morgan; Morgan Stanley; NABL; PSA; Seattle-Northwest; and Smith Barney.

accountant retained to provide audit and attestation services; and a law firm retained to conduct a legal analysis on a particular transaction contemplated).[27]

Professionals designated by an issuer to provide services to the dealer (*e.g.*, underwriter's counsel).[28]

Professional from whom a dealer seeks substantive or technical advice in connection with an issuer presentation with no intention of seeking their intercession with the issuer (*e.g.*, engineers who perform technical reviews or feasibility studies; lawyers who review local regulations; and accountants who scrutinize financial reports).[29]

Any individual retained as a consultant but treated by a dealer as a municipal finance professional (*e.g.*, a limited partner or other retired employee of the dealer).[30]

Lobbyists who are not acting to obtain or retain business (*e.g.*, a lobbyist employed to keep the dealer apprised of legislation that could impact the dealer or its issuer clients).[31]

PSA recommends the following definition of consultant:

Any person, other than a municipal finance professional, who is employed by the broker, dealer or municipal securities dealer on an exclusive basis with respect to either an issuer or a particular transaction to obtain or retain municipal securities business, provided that such employment (A) includes any direct or indirect communication with the issuer by such person which is made on behalf of the broker, dealer or municipal securities dealer to obtain or retain such municipal securities business, and (B) is undertaken with the understanding of receiving compensation from such broker, dealer or municipal securities dealer.

Another commenter is concerned about the Board's definition of consultant because ''any third party with whom a dealer discusses any issue which might bear on the firm's decision to seek business could qualify as a consultant. After all, since firms are in business to do business, they have little reason to talk to anyone unless it is to help get business.'' [32] This commenter endorses PSA's definition of consultant, and believes that at least two factors are relevant to the creation of a consulting relationship: (1) The person will actively promote the underwriter—and only that underwriter—to an issuer; and (2) the person will be compensated in some way by the underwriter. Two other commenters also endorse PSA's proposed definition of consultant, and believe that it should be incorporated into rule G-37.[33] Another commenter, without criticizing the commenter's proposed definition, recommends a modified version thereof.[34] On the other hand, Morgan Stanley is critical of certain elements of PSA's definition.[35] With respect to the definition proposed in the April 1995 Draft Rule, this commenter argues that that definition inappropriately applies to three groups of professionals: (1) Professionals designated by an issuer to provide services to the dealer; (2) professionals from whom a dealer seeks substantive or technical advice in connection with an issuer presentation with no intention of seeking their intercession with the issuer; and (3) ''professionals who may in fact recommend a broker-dealer to an issuer—on the basis of substantive professional familiarity and respect and not on the expectation or promise of *quid pro quo* recompense.'' Morgan Stanley is concerned that the Board's definition could ''cause disruptions in an industry currently undergoing contraction * * * [and] may lead larger firms, with other sources of revenue, finally to conclude that the burden of ensuring municipal market compliance outweights the benefit of what, frankly, is currently a marginal business for many of them.'' Morgan Stanley believes the definition of consultant ''should be restored to its common-sense meaning in the context of the municipal securities business. * * * [and] should reflect * * * the two essential elements of disclosable consulting relationships in the municipal securities business: compensation and the proposed intercession with an issuer by the consultant in exchange for such compensation.'' [36] The commenter notes that its proposed definition incorporates ''not only direct but also indirect consultant use and issuer intercession and * * * [alludes] to the possibility of compensation from persons other than the dealer.'' Thus, Morgan Stanley recommends the following definition of consultant:

Any person or entity used, directly or indirectly, by a broker, dealer or municipal securities dealer to obtain or retain municipal securities business through direct or indirect intercession by such person or entity with the relevant municipal issuer on behalf of such broker, dealer or municipal securities dealer where such intercession is undertaken by such person or entity in exchange for, or with the understanding of receiving, payment (as defined in rule G–37) from such broker, dealer or municipal securities dealer or any other person.

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[27] A.G. Edwards; PSA. PSA does not believe that ''persons or firms which offer other professional services commonly employed in a municipal securities transaction should be treated as consultants merely because a . . . dealer engages in conversations or discussions with such persons or firms about concepts or ideas which might be offered to an issuer to achieve or encourage a particular financing.'' PSA argues that the definition ''is so broad as to interfere with traditional and appropriate methods of developing new business opportunities.''

[28] Artemis; GFOA; Gilmore & Bell; JP Morgan; Morgan Stanley; and NABL. NABL believes that the rule ''should make clear that providers of substantive professional advice and services are not 'consultants' . . . and that a law firm which is selected as counsel to the underwriter, even if 'designated' as such by the issuer, does not become a 'consultant' to the underwriter. . . .'' The GFOA states that ''there are many instances where issuers make designations using merit-based criteria and it would not be appropriate to assume that such 'designated' persons should be treated as if they were used by a dealer to obtain or retain business . . .'' and that the April 1995 Draft Rule should distinguish between ''merit-based and nonmerit-based designations.'' Broward County shares this position. Gilmore & Bell is ''not comfortable with the entire concept of calling issuer-designated persons 'consultants' to the dealer. . . .'' They believe that the ''whole concept of a consultant under the Rule is someone who assists the dealer in obtaining or retaining municipal securities business. In no sense is an issuer-designated representative of the dealer a person who helped the dealer get the business; rather, that issuer-designated person or firm is imposed on the dealer as a condition to participating in the offering.'' Morgan Stanley does not believe that issuer-designated professionals should be defined as consultants. ''Far from helping dealers to solicit or win business, issuer-designated professionals are all too often imposed on dealers * * *.'' Morgan Stanley supports the disclosure of such relationships, and suggests removing such persons from the scope of the definition and adding a disclosure requirement to a separate section of the draft rule. JP Morgan also supports the disclosure of such relationships ''once an underwriting has been won, * * * but that in no way should these * * * professionals be deemed to be 'consultants' to the dealer.'' A.G. Edwards, on the other hand, believes that even those persons who may be engaged by the dealer as a ''precondition'' to obtaining an issuer's business (*e.g.*, underwriter's counsel designated by the issuer), ''are the type of 'consultants' to which the disclosure rule should apply.''

[29] Morgan Stanley; PSA; and Smith Barney.

[30] Goldman Sachs. Presumably the dealer has deemed the person to be subject to rules G–37 and G–20, and is recording information on political contributions and gifts and gratuities, as required by those rules.

[31] Seattle-Northwest.

[32] Smith Barney.

[33] Chemical Securities; JP Morgan.

[34] Artemis recommends a version that would not include the elements of exclusivity or indirect communication with the issuer.

[35] Morgan Stanley opposes PSA's requirement for ''exclusivity'' which ''is intended to disqualify a relationship under the definition if a putative consultant has also been retained to solicit the same business on behalf of another firm.'' Morgan Stanley does not understand ''why exclusivity makes any difference. * * * [and is concerned that] the phrase could be read to disqualify a consultant who is soliciting business from more than one issuer and a consultant hired by two dealers to solicit the same piece of business on their joint behalf.'' Morgan Stanley also is concerned that PSA's proposal, which would limit the definition of consultant to persons hired ''with respect to either an issuer or a particular transaction,'' will ''inappropriately limit the number of consultants required to be disclosed * * * [for example,] by excluding consultants who are hired not with respect to particular issuers and transactions but according to other organizing principles: by type of transaction (*e.g.*, student loan deals), by type of issuer, by geographic area * * *.''

[36] Morgan Stanley further suggests defining ''compensation'' to mirror the definition of ''payment'' under rule G–37.

Several other commenters share Morgan Stanley's view that compensation is a relevant factor in determining the existence of a consulting relationship. For example, one of the commenters does not believe the draft rule should apply to ''persons who are merely engaged by a dealer *in connection with* municipal securities business * * * [but rather] should apply only to persons engaged by a dealer with the expectation of receiving compensation for seeking to obtain or retain municipal securities business.'' [37] Another commenter believes that ''a dealer may 'use' a person in a broad sense (and in a perfectly permissible sense) without that person being a consultant to the dealer in any common sense meaning of the word.'' [38] But if a dealer compensates a person for services in obtaining or retaining municipal securities business, ''then obviously such person is working for the dealer and a 'consulting' relationship exists. * * *'' [39] In this regard, the commenter argues that, at a minimum, the definition of consultant should include any person who is paid or compensated (rather than ''used'') by a dealer for the purpose of seeking to obtain or retain municipal securities business. Another commenter notes that such compensation ''can take various forms, such as payment of a finder's fee, a percentage of revenues or fees earned on the transaction, a fee for services in excess of the industry standard for such services, and political contributions.'' [40]

One of the commenters believes the definition should extend to private entities that construct or develop facilities from the proceeds of municipal financings, including nursing home and retirement center projects, housing issues, and land-based development financings.[41] This commenter believes that ''it is quite common for such private parties, after making large political contributions, to bring their own finance teams, including underwriters, onto the scene and to pressure issuers to use those teams. * * * [t]hus, the private parties can be viewed as acting on behalf of the underwriters. * * *''

Board Response

In response to the commenters' concerns over the definition of consultant in the April 1995 Draft Rule, the proposed rule now defines consultant as any person used by a dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on the dealer's behalf where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the dealer or any other person. The definition specifically excludes ''municipal finance professionals,'' as that term is defined in rule G–37(g)(iv), because such individuals are covered by the requirements of rule G–37. The definition also excludes any person whose sole basis of compensation from the dealer is the actual provision of legal advice, accounting or engineering assistance in connection with the municipal securities business that the dealer is seeking to obtain or retain. The exclusion would apply, for example, to a lawyer retained to conduct a legal analysis on a particular transaction contemplated by the dealer, or to review local regulations; an accountant retained to conduct a tax analysis or to scrutinize financial reports; or an engineer retained to perform a technical review or feasibility study. The exemption is intended to ensure that professionals who are engaged by the dealer solely to perform substantive work in connection with municipal securities business are not brought within the definition of consultant as long as their compensation is in consideration of only those professional services actually provided in connection with such municipal securities business. However, any attorney or other professional used by the dealer as a ''finder'' for municipal securities business would be considered a consultant under the proposed rule.

Also, in response to certain commenters' concerns, the Board has eliminated ''issuer-designated'' professionals from the definition of consultant. The Board agrees with these commenters that persons who are engaged by a dealer at the request or direction of the issuer (*e.g.*, underwriter's counsel) are not, in fact, consultants because they do not assist the dealer in obtaining or retaining municipal securities business. However, the Board continues to believe that the subject of issuer involvement in the underwriting process merits review, and will address this subject, including the question of requiring disclosure of issuer-designated persons, at a future time.

Requirement of a Written Agreement

The April 1995 Draft Rule would have required dealers to have written agreements with their consultants before the consultants could provide any services on their behalf. The April 1995 Draft Rule would have provided that the ''Consultant Agreement'' must indicate the role to be performed by the consultant and the compensation arrangement. One of the commenters opposes the requirement of a written agreement, arguing that it could ''hinder the effective and timely rendering of legal services due to the proposed rule's prohibition of services until the execution of a contract. The prospect of depriving a client of substantive legal advice for any reason, and even for a modest timeframe, is by itself troubling.'' [42] Another commenter also opposes this requirement, arguing that whether or not a consultant and a dealer enter into a written agreement ''is a business decision best left to the interested parties.'' [43] One commenter, while not opposed to memorializing traditional consultant agreements, believes that the content of such agreements ''is best left to private negotiation between the parties, and not subject to any specific regulatory strictures.'' [44] Another commenter shares this view.[45]

A number of commenters are concerned about the timing of the requirement of a written agreement. One commenter ''strongly objects'' to the requirement that a written agreement be in place before using the services of professional service providers, such as lawyers, accountants, and printers, and believes that such a requirement ''will disrupt traditional and legitimate business relationships and impede the ability of dealers to respond to issuer's needs, particularly in the case of ad-hoc inquiries from issuers in response to which dealers routinely make use of professional providers such as lawyers or accountants.'' [46] Another commenter states that ''it would be a legal and logistical nightmare if every firm was required to enter into a contract with the entire universe of persons and entities who provide information to underwriters in the normal course of business. It would be much less burdensome—though still in our view an unnecessary intrusion into business relationships—to limit the requirement of a written agreement to those situations in which the firm is retaining a third party to promote the firm to an issuer for a fee or other compensation.'' [47]

[37] A.G. Edwards.
[38] Gilmore & Bell.
[39] *Id.*
[40] Artemis.
[41] American Government Financial Services.
[42] Goldman Sachs.
[43] PSA.
[44] A.G. Edwards.
[45] Chemical Securities.
[46] A.G. Edwards.
[47] Smith Barney.

Other commenters support the requirement of a written agreement.[48] One of these commenters believes such a requirement represents a way of discouraging the hiring of consultants solely for their personal or political influence with issuers.[49] However, this commenter conditions its support on the Board limiting the definition of consultant.[50]

Board Response

The requirement of a written agreement embodied in proposed rule G–38 is similar to the April 1995 Draft Rule, and requires dealers who use consultants to evidence the consulting arrangement in writing (referred to as a ''Consultant Agreement''). At a minimum, the writing must include the name, company, role and compensation arrangement of each consultant used by the dealer. Such written agreements must be entered into before the consultant engages in any direct or indirect communication with an issuer on the dealer's behalf. Although certain commenters were opposed to the requirement of a written agreement, the Board believes that this requirement is necessary to ensure that dealers are aware of arrangements that their branch offices or local personnel may have with consultants. The requirement also will assist dealers in developing mechanisms to monitor such arrangements, and will assist enforcement agencies to inspect for compliance with rule G–38. With regard to commenters' concern over the timing of this requirement (*i.e.*, that a written agreement must be entered into before the consultant provides any services on behalf of the dealer), the Board believes that by limiting the scope of the definition of consultant (as discussed above) and by revising the timing of the agreement (*i.e.*, before any communication by the consultant with an issuer on the dealer's behalf), it has ameliorated many, if not all, of these concerns.

Disclosure of Consulting Arrangements to Issuers

The April 1995 Draft Rule would have required dealers to disclose to issuers in writing all consultants with which they have entered into a Consultant Agreement in connection with an effort to obtain or retain municipal securities business with that issuer, along with the basic terms of the Consultant Agreement. The April 1995 Draft Rule required dealers to make such disclosures when they become involved in the issuer's process for selecting a dealer for municipal securities business, whether or not the issuer requests such information in a Request for Proposal.

Most commenters agree that disclosure to issuers of consulting arrangements is appropriate. However, one of these commenters believes that the timing of the disclosure requires clarification.[51] This commenter notes that financing ideas frequently are discussed informally prior to the beginning of ''the issuer's selection process,'' and that it would be ''imprudent to stifle'' such discussion.[52] Similarly, another commenter supports disclosure to issuers, but is concerned that the timing of such disclosures ''is too vague.''[53] This commenter believes that ''it is sufficient to require that the disclosure be made at least prior to a dealer's acceptance of business from an issuer, on the theory that at that time the issuer is still in a position to rescind the award of business if the disclosed facts are sufficiently unpalatable.''[54] The commenter also believes that ''[l]imiting the disclosure obligation to consultants with whom the dealer has already entered into an agreement * * * would seem to create unnecessary timing issues as well as unnecessary opportunities for manipulation.''[55] Accordingly, the commenter proposes extending the disclosure requirement to all consultants used by the dealer in connection with the relevant issuer or the relevant securities offering, regardless of the status of the written agreement between them.

One of the commenters believes that the disclosure of consultant relationships should only be made upon the request of the issuer, and notes that issuers can include a request for such information in their Request for Proposal and that if the issuer wants additional information, it can simply ask the dealer for further details.[56] The commenter also believes that ''a specific description of a consultant's role is difficult to set forth at the onset of a relationship'' and therefore disclosure of a consultant relationship should include only a general description of the role to be performed by the consultant.[57] Furthermore, the commenter believes that certain information, such as the details of the compensation arrangement, should remain confidential.

Another commenter believes that disclosure to the public is of greater importance than disclosure to issuers; ''[i]ssuers are aware of the activities of consultants; the public often is not. The most powerful tool for preserving the integrity of the market is the public disclosure by the MSRB of the consulting relationships reported to it.''[58] However, the commenter believes that consultants hired on the dealer's initiative should be disclosed to an issuer and the Board ''only when (i) the issuer is engaged in a formal process of either reviewing its underwriting relationships or placing a specific piece of debt and (ii) the dealer is actually selected for the program or the specific underwriting.''[59] The commenter states that ''this two-part test will result in meaningful information regarding the actual involvement of consultants in completed municipal finance transactions being made available.''[60] Another commenter also is concerned about disclosure reaching the public domain, and states that any disclosure to issuers should be made to their governing bodies ''for inclusion in the publicly available records thereof'' otherwise the goal of public disclosure of consultant relationship can easily be frustrated.[61]

Board Response

In response to commenters' concerns, particularly over timing, the Board has modified the proposed rule's requirement concerning disclosure of consulting arrangements to issuers. Proposed rule G–38 now requires each dealer to disclose to an issuer with which it is engaging or seeking to engage in municipal securities business, in writing, information on consulting arrangements relating to such issuer. The written disclosure must include, at a minimum, the name, company, role and compensation arrangement with the consultant or consultants. Dealers are required to make such written disclosures no later than the issuer's selection of any dealer in connection with the municipal securities business sought, regardless of whether the dealer making the disclosure ultimately is the one to obtain or retain that business.

[48] Artemis; Morgan Stanley.

[49] Morgan Stanley.

[50] In its Request for Comments, the Board asked whether it should require that all written agreements with consultants be approved by the head of the dealer's municipal finance group and the general counsel's office. Morgan Stanley supports such a requirement, while Chemical ''believes it is not beneficial or necessary. . . .'' Artemis supports a requirement that the agreement be approved by the head of the municipal finance group.

[51] PSA. Artemis shares this view.

[52] PSA.

[53] Morgan Stanley.

[54] *Id.*

[55] *Id.*

[56] Chemical Securities.

[57] *Id.*

[58] JP Morgan.

[59] *Id.*

[60] *Id.*

[61] Willkie Farr.

Thus, while dealers have an obligation to disclose their consulting arrangements to all issuers from which they are seeking municipal securities business, they have more leeway in the timing of their disclosures as long as the disclosure is made before the issuer selects a dealer for the municipal securities business sought. However, the Board cautions dealers that the time period set forth in the proposed rule represents the last possible opportunity to comply with the disclosure requirement, and therefore strongly recommends that dealers make such disclosures as early as possible. For example, a dealer seeking certain municipal securities business may not be aware of the issuer's selection of another dealer for that business. So too, an issuer may select a pool or group of dealers from which the issuer intends to choose underwriters for particular issues over the next few years. If a dealer has used a consultant to help secure any of this business, the Board believes that dealers should make their required disclosures to issuers as soon as possible to ensure that the disclosure is received by the issuer prior to the selection of any dealer for the municipal securities business.

Disclosure of Consulting Arrangements to the Public Through Disclosure to the Board

The April 1995 Draft Rule would have required a dealer to submit reports to the Board of all consultants with which the dealer entered into Consultant Agreements, not just those consultants that are connected with particular municipal securities business awarded during the reporting period (*i.e.*, as currently required under rule G–37). These reports would have been submitted on Form G–38 on a quarterly basis, within one month after the end of each calendar quarter. Form G–38 would have required dealers to list the names of all consultants and complete for each consultant an Attachment to Form G–38 that provides in the prescribed format the consultant's company, the role to be performed by the consultant, and the compensation arrangement. Dealers also would have been required to report all dollar amounts paid to each consultant during the reporting period and, if any amounts paid were connected with particular municipal securities business, such issue and the amount paid would have been separately identified.

A number of commenters believe that disclosures to the Board should be merged with the reporting requirements of rule G–37.[62] In the alternative, two of these commenters suggest removing the disclosure requirements from rule G–37 and incorporating them into a modified version of the April 1995 Draft Rule.[63] One such commenter believes that ''consolidation and combination is sensible not only from an administrative and compliance point of view but will help ensure * * * consistency in terminology and interpretation in this complex area.'' [64]

Another commenter notes that rule G–37 currently requires disclosure of consulting relationships if business is obtained or retained, *i.e.*, ''after the fact.'' [65] This commenter believes that the public would benefit if information were available ''before a piece of business was awarded or a transaction completed'' and thus recommends that dealers be required to report all consulting relationships entered into by (or ongoing with) firms during quarterly reporting periods, regardless of whether business is obtained during that reporting period.[66] Similarly, another commenter believes that dealers should be required to report all consultant arrangements whether or not such arrangements result in the awarding of business to the dealer.[67] And another commenter also supports disclosure of ''*all* existing business consulting arrangements * * * whether or not they have resulted in a particular transaction. * * *'' [68] This commenter further suggests that ''such 'bulk disclosure' be organized by reference to the jurisdictions (from largest to smallest) in which each consultant is directly or indirectly employed to operate and, if applicable, to the issuers with which such consultant is employed, directly or indirectly, to intercede.'' [69] Finally, the commenter supports linking particular consulting relationships with particular transactions in order to avoid ''a blizzard of accurate but general information [that] could conceal more than it reveals.'' [70]

One of the commenters suggests that dealers be required to report ''a continuing arrangement, rather than report it repeatedly, each quarter.'' [71] Another commenter ''believes that dealers should be required to list continuing arrangements each quarter and to note when any such arrangement has concluded * * *. However, if the compensation arrangements remain the same * * * [the commenter recommends] that dealers not be required to restate these terms quarterly.'' [72]

Board Response

The proposed rule's requirement concerning disclosure to the Board is similar to the April 1995 Draft Rule. The proposed rule requires dealers to submit to the Board, on a quarterly basis, reports of all consultants used by the dealer. For each consultant, dealers must report, in the prescribed format, the consultant's name, company, role and compensation arrangement, as well as the dollar amount of any payment made to the consultant during the quarterly reporting period. If any payment made during the reporting period is related to the consultant's efforts on the dealer's behalf which resulted in particular municipal securities business, whether the municipal securities business was completed during that or a prior reporting period, then the dealer must separately identify that business and the dollar amount of the payment. In addition, as long as the dealer continues to use the consultant to obtain or retain municipal securities business (*i.e.*, has a continuing arrangement with the consultant), the dealer must report information concerning such consultant every quarter, whether or not compensation is paid to the consultant during the reporting period. The Board believes that the reporting of these continuing consulting arrangements each quarter will assist enforcement agencies and the public in their review of such arrangements.

As recommended by certain commenters, the Board has determined, for ease of compliance and reporting, to delete the current reporting requirements regarding consultants from rule G–37. It also has determined to merge the reporting requirements of both rules G–37 and G–38 into a single form—Form G–37/G–38. Dealers must submit two copies of such reports on proposed Form G–37/G–38.[73] The quarterly due dates are the same as the due dates currently required under rule G–37 (*i.e.* within 30 calendar days after the end of each calendar quarter, which corresponds to each January 31, April 30, July 31, and October 31). Finally, consistent with current rule G–37,

[62] A.G. Edwards; Artemis; Chemical; GFOA; PSA; and Smith Barney.

[63] A.G. Edwards; Morgan Stanley.

[64] Morgan Stanley.

[65] Smith Barney.

[66] *Id.*

[67] Chemical Securities.

[68] Morgan Stanley.

[69] *Id.*

[70] *Id.*

[71] Chemical Securities.

[72] Artemis.

[73] Proposed Form G–37/G–38 is included in Exhibit 3 to the proposed rule change, along with instructions for filing the Form.

dealers are required to submit these reports to the Board by certified or registered mail, or some other equally prompt means that provides a record of sending.[74] The Board will then make these documents available to the public for inspection and photocopying at its Public Access Facility in Alexandria, Virginia, and for review by agencies charged with enforcement of Board rules.

Recordkeeping Requirements

To facilitate compliance with, and enforcement of, proposed rule G–38, the Board also proposes to amend existing rules G–8 and G–9, concerning recordkeeping and record retention, respectively. The proposed amendments to rule G–8 require dealers to maintain: (i) A listing of the name, company, role and compensation arrangement of each consultant; (ii) a copy of each Consultant Agreement; (iii) a listing of the compensation paid in connection with each Consultant Agreement; (iv) where applicable, a listing of the municipal securities business obtained or retained in connection with each Consultant Agreement; (v) a listing of the issuers and a record of disclosures made to such issuers concerning consultants used by the dealer to obtain or retain municipal securities business with each such issuer; and (vi) the date of termination of any consultant arrangement. The amendment to rule G–9 requires dealers to maintain these records for a six-year period.

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. The Commission requests that, in addition to any general comments concerning whether the proposed rule change is consistent with Section 15(b)(2)(C) of the Act, commentators address whether the proposed definition of consultant needs to be amended to encompass instances in which third parties initiate contact with prospective underwriters to offer their services in obtaining or retaining municipal securities business through direct or indirect communications by such person with an issuer official. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submissions, 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 they may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–95–15 and should be submitted by December 26, 1995.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 U.S.C. 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–29513 Filed 12–4–95; 8:45 am]

BILLING CODE 8010–01–M

[74] For ease of compliance, the Board has included the Rule G–37 Filing Procedures within the language of rule G–37, and has included the Rule G–38 Filing Procedures within the language of new rule G–38.

[File No. 1–3779]

Issuer Delisting; Notice of Application to Withdraw From Listing and Registration; San Diego Gas & Electric Company, (5.0% Cumulative Preferred, $20 Per Value, 4.5% Cumulative Preferred Stock, $20 Par Value, 4.4% Cumulative Preferred Stock, $20 Par Value, Cumulative Preferred Stock, $7.20 Series, No Par Value, Cumulative Preferred Stock, $1.82 Series, No Par Value)

November 28, 1995.

San Diego Gas & Electric Company (''Company'') has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified securities (''Securities'') from listing and registration on the Pacific Stock Exchange Incorporated (''PSE'').

The reasons alleged in the application for withdrawing the Securities from listing and registration include the following:

According to the Company, it cannot justify the direct and indirect costs and expenses attendant to maintaining the dual listing of the Securities on the American Stock Exchange, Inc. (''AMEX'') and on the PSE. The Company is paying $2,000.00 per year to maintain its listings on the PSE with no significant benefit to its shareholders. The Company believes that a single listing on the Amex will be sufficient to serve the needs of its shareholders.

Any interested person may, on or before December 19, 1995, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and what terms if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

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

Jonathan G. Katz,

Secretary.

[FR Doc. 95–29512 Filed 12–4–95; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2821]

Alaska; Declaration of Disaster Loan Area

Kenai Peninsula Borough and the contiguous areas of Lake and Peninsula Borough, Matanuska-Susitna Borough, the Municipality of Anchorage, the Chugach Regional Education Attendance Area and the Iditarod Regional Education Attendance Area in the State of Alaska constitute a disaster area as a result of damages caused by flooding which occurred from September 18 through September 24, 1995. Applications for loans for physical damages as a result of this disaster may be filed until the close of business on *January 29, 1996,* and for economic injury until the close of business on *August 28, 1996,* at the