

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61155; File No. SR-MSRB-2009-18)

December 11, 2009

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Consisting of Amendments to Rule G-37 (Political Contributions and Prohibitions on Municipal Securities Business) and Rule G-8 (Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers)

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 December 4, 2009, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The MSRB has filed with the Commission a proposed rule change consisting of proposed amendments to Rule G-37 (political contributions and prohibitions on municipal securities business) and Rule G-8 (books and records to be made by brokers, dealers and municipal securities dealers). The MSRB requested that the proposed rule change become effective on, and would apply solely to contributions made on or after, the first business Monday at least five business days after Commission approval.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the MSRB's Web site (<http://www.msrb.org/msrb1/sec.asp>), 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. 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 proposed amendments to Rule G-37 would require the public disclosure of contributions to bond ballot campaigns made by dealers, municipal finance professionals ("MFPs"), their political action committees ("PACs") and non-MFP executive officers on MSRB Form G-37. Dealers would be required to report on revised Form G-37 the official name of each bond ballot campaign receiving contributions during such calendar quarter, the jurisdiction (including city/county/state or political subdivision) by or for which municipal securities, if approved, would be issued, the contribution amount made and the category of contributor. The proposal would provide a de minimis exception from the reporting of contributions on Form G-37 made by an MFP or non-MFP executive officer to a bond ballot campaign for a ballot initiative with respect to which such person is entitled to vote if all contributions by such person to such bond ballot

campaign, in total, do not exceed \$250 per ballot initiative. The amendments would parallel the existing disclosure requirements for contributions to issuer officials and state and local political parties. Such amendments would not, however, provide for a ban on municipal securities business as a result of contributions to bond ballot campaigns.

The proposed amendments to Rule G-8 would require dealers to create and maintain records of the non-de minimis contributions to bond ballot campaigns that would be required to be disclosed on Form G-37 under the proposed amendments to Rule G-37.

2. Statutory Basis

The MSRB has adopted the proposed rule change pursuant to Section 15B(b)(2)(C) of the Act,³ which provides that the MSRB's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act because it will protect investors and the public interest and will assist with preventing fraudulent and manipulative acts and practices by allowing the public and regulators to monitor

³ 15 U.S.C. 78o-4(b)(2)(C).

dealer contributions to bond ballot campaigns, thereby further reducing the opportunity for pay-to-play practices in the municipal securities market.

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

The MSRB does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all dealers.

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

On June 22, 2009, the MSRB published a notice requesting comment on draft amendments to Rule G-37.⁴ The MSRB received comments from seven commentators.⁵ Three of the seven commentators were generally supportive of the proposed change, with certain exceptions detailed below.⁶ Two of the seven commentators were against the

⁴ See MSRB Notice 2009-35 (June 22, 2009).

⁵ See letters from Robert J. Stracks, Counsel, BMO Capital Markets (“BMO”) to Leslie Carey, dated August 7, 2009; Robert K. Dalton, Vice Chairman, George K. Baum & Company (“Baum”) to Leslie Carey, dated July 30, 2009, along with supplemental letter from Kent J. Lund, Executive Vice-President, Chief Compliance Officer to Leslie Carey, dated August 7, 2009; Stratford Shields, Managing Director, Morgan Stanley (“Morgan Stanley”) to Leslie Carey, dated July 30, 2009; Frank Fairman, Managing Director and Rebecca Lawrence, Assistant General Counsel, Piper Jaffray (“Piper”) to Leslie Carey, dated August 7, 2009; Michael Decker, Co-Chief Executive Officer and Mike Nichols, Co-Chief Executive Officer, Regional Bond Dealers Association (“RBDA”) to Leslie Carey, dated August 7, 2009; Leslie Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”) to Leslie Carey, dated August 7, 2009; and Kenneth E. Williams, President, Chief Executive Officer, Stone & Youngberg (“Stone & Youngberg”) to Leslie Carey dated August 13, 2009.

⁶ See letters from Morgan Stanley, Piper and SIFMA.

proposed change.⁷ Two other commentators did not express an opinion regarding whether they supported the proposed change.⁸

General. Morgan Stanley supported the proposed change but requested that the MSRB consider having bond ballot campaign contributions result in a ban on municipal securities business. SIFMA also supported the proposed change and noted that “there are no uniform disclosure methodologies or transparency vehicles for bond ballot measure campaign contributions across the various state and local jurisdictions that may have bond ballot measures.” SIFMA further stated “the transparency this rule change will create would reap benefits that outweigh any additional compliance burdens and costs for the municipal securities dealer community.”

Piper supported the disclosure of contributions to bond election campaigns but not those by individual MFPs and executive officers. Piper noted it is not aware that contributions to bond ballot measures by individuals are prevalent and stated that such contributions are likely subject to state and local reporting requirements. Stone & Youngberg stated that the proposed change may seem a way “to keep in check the appearance of impropriety in the municipal marketplace” but that, unless the MSRB requires disclosures or bans with respect to all contributions of time or money that are given by any employee at banks and dealer firms to entities that issue municipal bonds, the rules will continue to favor certain participants in the municipal finance business. BMO stated that it was not sure of the rationale for disclosure of dealer contributions to bond ballot campaigns.

⁷ See letters from Baum and RDBA.

⁸ See letters from BMO and Stone & Youngberg.

After reviewing the comments, the MSRB is filing the proposed rule change to require the public disclosure of dealer contributions to bond ballot campaigns. The MSRB believes, as noted by SIFMA, that the proposed rule change would create a uniform disclosure regime to track and make available to public scrutiny bond ballot campaign contributions by dealers in the municipal securities market, thereby increasing available information to municipal securities market participants and the general public. The MSRB does not believe that a ban on municipal securities business as a result of a contribution to a bond ballot campaign is warranted at this time but notes that the disclosures provided for under the proposed rule change will assist in determining, in the future, whether it would be appropriate to consider further action in this area.

The MSRB does not agree with Piper's comments that the proposed rule change should not require the disclosure of contributions by individual MFPs and executive officers since the MSRB does not believe that a satisfactory basis for providing different disclosure requirements for bond ballot contributions as compared to other political contributions or payments as is currently required under Rule G-37 has been established. The MSRB notes that patterns and practices observed through the disclosures that would be required under the proposed rule change could serve as a basis for making such differentiation in connection with any further regulatory action in this area in the future, if appropriate.

In-Kind Contributions. SIFMA stated that the use of in-house resources should not be reported because the valuation of such services may be difficult to ascertain. BMO also noted that, if the proposed amendments are approved, they "should either only require reporting of cash contributions or require much more general information as to in-

kind services as opposed to cash contributions” because the requirement to value and report in-kind contributions is “fraught with impossible practical difficulties.” The RBDA similarly stated, “it would be extraordinarily difficult in many cases for dealers to segregate in-kind services for bond ballot campaigns from other services provided in the context of underwriting bond issues and to value those services accurately.” Baum requested that in-kind services be treated differently from cash contributions because “measurement of in-kind contributions may represent a real challenge....”

The existing definition of contribution in Rule G-37 is not limited to cash payments and generally would cover anything of value, including in-kind contributions.⁹ The MSRB has determined not to amend the term contribution and dealers would be required to report such contributions to bond ballot campaigns just as they are currently required to report such non-cash contributions under Rule G-37 with respect to political contributions to issuer officials.¹⁰ The MSRB believes the public disclosure of such contributions, including cash and in-kind services, will allow public scrutiny of such

⁹ Contribution is defined in Rule G-37(g) as any gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office; (B) for payment of debt incurred in connection with any such election; or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office.

¹⁰ The MSRB has previously provided guidance regarding the treatment of contributions as the use of dealer resources or the incurrence of expenses by dealers in connection with a political campaign. The MSRB has made clear that Rule G-37 does not prohibit or limit individuals from providing volunteer services in support of an issuer official so long as dealer resources were not used, and has also noted that certain incidental expenses incurred by such individual would generally not be treated as a contribution. See Rule G-37 Question and Answers II.18 (May 24, 1994) and II.19 (August 18, 1994). These principles would apply equally to individuals providing volunteer services in connection with a bond ballot campaign.

contributions and the potential connection between such contributions and the awarding of municipal securities business.

Constitutionality. Baum and the RBDA did not support the proposed change that would require disclosure of bond ballot campaign contributions and noted that such contributions do not have an element of pay-to-play that may exist for contributions to campaigns for political office because, for bond ballot measures, no individual politician benefits directly from the outcome of a bond ballot election. They also asserted that bond ballot campaign contributions are subject to strict scrutiny for possible violations of the First Amendment, citing Dallman et al. v. Ritter et al.¹¹

Dallman concerned the constitutionality of an amendment to Colorado's constitution, passed by voter election in Colorado in November 2008, which prohibits contributions to promote or influence a bond ballot issue election by a person wishing to qualify for a sole source government contract relating to the ballot issue. Plaintiffs claimed that the amendment violated their First Amendment rights to free speech and association. The court stated that, "the part of Amendment 54 that bans those subject to it from contributing to ballot measure campaigns is subject to strict scrutiny. A vote for or against a ballot measure is an exercise of free speech, and an economic contribution to a committee designed to support or oppose a ballot measure is similarly of constitutional magnitude."¹² The court then determined that the amendment to prohibit bond ballot

¹¹ Findings of Fact, Conclusions of Law and Order Entering Preliminary Injunction issued in Dallman et al. v. William Ritter and Rich L. Gonzales and Daniel Ritchie et al. v. Bill Ritter and Rich Gonzales (Case No. 09CV1188 consolidated with 09CV1200), (D. Colo. 2009) [hereinafter Dallman].

¹² Dallman, p. 19.

measure contributions was not narrowly tailored to advance a compelling state interest and was unconstitutional.

The MSRB believes that the requirement to provide public disclosure of contributions to bond ballot campaigns does not hamper or interfere with an individual's ability to be involved with and/or support issues related to bond ballot campaigns. The MSRB does not believe the proposed rule change will impinge upon the First Amendment rights of individuals and/or firms that will be responsible for providing disclosure of bond ballot measure contributions¹³ because the proposed rule change would only require disclosure and would not prohibit contributions, as was at issue in Dallman. Disclosure obligations do not present the same constitutional issues as do direct or indirect prohibitions or limitations on contributions.

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.

¹³ In Blount v. Securities and Exchange Commission, 61 F.3d 938, 948 (D.C. Cir. 1995), the District Court determined that existing Rule G-37 advanced a compelling governmental interest to protect investors that did not abridge First Amendment rights and stated that "municipal finance professionals are not in any way restricted from engaging in the vast majority of political activities, including making direct expenditures for the expression of their views."

IV. SOLICITATION OF COMMENTS

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2009-18 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2009-18. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and

3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. 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-2009-18 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).