

in a given quarter. The new credit is delineated in Exhibit A.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general, and furthers the objectives of Section 6(b)(5) in particular in that it is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. It is also consistent with Section 6(b)(4) in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members by crediting members on a pro rata basis.<sup>3</sup>

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

The CSE does not believe that 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

No written comments were solicited in connection with the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and subparagraph (e)(2) of Rule 19b-4 thereunder because it constitutes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such 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 in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filings will also be available for inspection and copying at the principal office of the CSE. All submissions should refer to File No. SR-CSE-97-12 and should be submitted by December 31, 1997.

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority.<sup>4</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

## Exhibit A

### Proposed Rule Change

*The Cincinnati Stock Exchange, Incorporated*  
Additions are italicized

Rule 11.10 National Securities Trading System Fees

A. Trading Fees.

a.—(1) No Change.

(j) Tape "B" Transactions. The CSE will not impose a transaction fee on Consolidated Tape "B" securities. *In addition, Members will receive a pro rata transaction credit based on the following schedule:*

Average quarterly exchange Tape B transaction market share	Percentage of Tape B revenue credited
1-2.99% .....	10
3-4.99% .....	25
5-6.99% .....	30
7% and greater .....	40

(k)—(n) No Change.

B. Membership Fees.  
No Change.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39391; File No. SR-MSRB-97-8]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Interpretation of Rule G-38 on Consultants

December 3, 1997.

On November 13, 1997, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change (File No. SR-MSRB-97-8), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder. The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the board. The Board has designated this proposal as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Board under Section 19(b)(3)(A) of the Act, which renders the proposal effective upon receipt of this filing by the Commission. 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 is filing herewith a notice of interpretation concerning Rule G-38 on consultants (hereafter referred to as "the proposed rule change"). The proposed rule change is as follows:

#### Rule G-38 Questions and Answers

##### Bank Affiliates and Definition of Payment

**Q:** A bank and its employees communicate with an issuer on behalf of an affiliated dealer to obtain municipal securities business for that dealer. In return, the bank and its employees receive certain "credits" from the dealer. These credits, which do not involve any direct or indirect cash payments from the dealer to the bank or its employees, are used for internal purposes to identify the source of business referrals. Are the credits considered a "payment" under rule G-38 thereby requiring the dealer to designate the bank or its employees as consultants and comply with the requirements of rule G-38?

**A:** Rule G-38 defines a 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 behalf of the dealer where the communication is undertaken by the

<sup>3</sup> The Commission notes that the filing may raise questions concerning payment for order flow. To the extent that it does raise such issues, exchange members should consider any associated disclosure obligations, namely pursuant to Rules 10b-10 and 11Ac1-3 under the Act, 17 CFR 240.10b-10 and 17 CFR 240.11Ac1-3, respectively.

<sup>4</sup> 17 CFR 200.30-3(a)(12).

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

person in exchange for, or with the understanding of receiving, **payment** from the dealer or any other person.<sup>2</sup> The term payment, as used in rule G-38, means any gift, subscription, loan, advance, or deposit of money or **anything of value**. The absence of an immediate transfer of funds or anything of value to an affiliate or individual employed by the affiliate would not exclude the credits from the definition of payment if such credits eventually (e.g., at the end of the fiscal year) result in compensation to the affiliate or individual employed by the affiliate for referring municipal securities business to the dealer. In this regard, the compensation may be in the form of cash (e.g., a bonus) or non-cash. In either case, if the dealer or any other person<sup>3</sup> eventually gives anything of value (i.e., make a "payment") to the affiliate or individual based, even in part, on the referral, then the affiliate or individual is a consultant for purposes of rule G-38 and the dealer must comply with the various requirements of the rule. For additional guidance in this area, you may wish to review Q&A number 6 and 7 (dated February 28, 1996) in the MSRB Manual following Rule G-38, as well as Q&A number 4 (dated December 7, 1994) in the MSRB Manual following Rule G-37.

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## 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 purposed of and basis for the propose rule change and discussed any comments it received on the proposed rule change. The texts 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

On January 17, 1996, the Commission approved Board Rule G-38 on consultants.<sup>4</sup> The Board adopted the rule because it was concerned about dealers' increasing use of consultants to

obtain or retain municipal securities business, notwithstanding the requirements of Rule G-37<sup>5</sup> on political contributions and prohibitions on municipal securities business, Rule G-20<sup>6</sup> on gifts and gratuities, and Rule G-17<sup>7</sup> on fair dealing. Rule G-38 requires dealers to disclose information about their consultant arrangements to issuers and the public. Recently, the Board has received inquiries from market participants concerning the definition of payment, as used in Rule G-38, and whether bank affiliates and their employees may, under certain circumstances, be deemed consultants for purposes of the rule. In order to assist the municipal securities industry and, in particular, brokers, dealers and municipal securities dealers in understanding and complying with Rule G-38, the Board has determined to publish this third notice of interpretation which sets forth, in question-and-answer format, general guidance on Rule G-38.<sup>8</sup> The Board will continue to monitor the application of Rule G-38, and, from time to time, will publish additional notices of interpretations, as necessary.

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act.<sup>9</sup>

### 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, because it would apply equally to all brokers, dealers and municipal securities dealers.

<sup>5</sup> MSRB Manual, General Rules, Rule G-37 (CCH) ¶ 3681.

<sup>6</sup> MSRB Manual, General Rules, Rule G-20 (CCH) ¶ 3596.

<sup>7</sup> MSRB Manual, General Rules, Rule G-17 (CCH) ¶ 3581.

<sup>8</sup> See Securities Exchange Act Release No. 36950 (March 11, 1996); 61 FR 10828 (March 15, 1996) and Securities Exchange Act Release No. 37997 (Nov. 29, 1996); 61 FR 64781 (Dec. 6, 1996).

See also MSRB Reports Vol. 16, No. 2 (June 1996) at 3-5; and Vol. 17, No. 1 (Jan. 1997) at 15.

<sup>9</sup> Section 15B(b)(2)(C) states in pertinent part that the rules of the Board "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."

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

Written comments were neither solicited nor received.

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

The Board has designated this proposal as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Board under Section 19(b)(3)(A) of the Act and Rule 19b-4(e) thereunder, which renders the proposal effective upon receipt of this filing by the Commission.<sup>10</sup>

At any time within sixty days of the filing of this 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 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 that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of 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-97-8 and should be submitted by December 31, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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<sup>2</sup> Municipal finance professionals and any person whose sole basis of compensation is the actual provision of legal, accounting or engineering advice services or assistance are expected from the definition of consultant.

<sup>3</sup> The Securities Exchange Act of 1934 (the "Act") defines the term "person" as a "natural person, company, government, or political subdivision, agency, or instrumentality of a government." Board rule D-1 provides that unless the context otherwise specifically requires, the terms used in Board rules shall have the same meanings as set forth in the Act.

<sup>4</sup> Securities Exchange Act Release No. 36727 (Jan. 17, 1996); 61 FR 1955 (Jan. 24, 1996). The rule became effective on March 18, 1996. See also MSRB Manual, General Rules, Rule G-38 (CCH) ¶ 3686.

<sup>10</sup> 17 CFR 240.19b-4(e)(1).

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