4 thereunder.[141] Accordingly, Amex has filed the MC Certificate of Incorporation and MC Bylaws with the Commission.

V. Accelerated Approval of Amendment Nos. 4 and 6

Pursuant to Section 19(b)(2) of the Act,[142] the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so finding. The Commission hereby finds good cause for approving Amendment Nos. 4 and 6 to the proposed rule change prior to the thirtieth day after publishing notice of the same in the **Federal Register** pursuant to Section 19(b)(2) of the Act.[143]

Amendment No. 4 revises the first paragraph of Section 3 of Article II of the Exchange Constitution (Powers and Duties).[144] Specifically, Amendment No. 4 clarifies that Exchange Board members, among other things, would be required to take into consideration the self-regulatory function of the Exchange and the Exchange's obligations (and their obligations) under the Act. Because Amendment No. 4 simply clarifies the intent of the proposed rule, which has been noticed for public comment, the Commission believes that accelerating the effectiveness of Amendment No. 4 is consistent with the public interest and the protection of investors, and will not impose any significant burden on competition.

Amendment No. 6 revises Section 4(a) and Section 4(d) of Article II of the Exchange Constitution (Powers and Duties) relating to the Chief Regulatory Officer and set out certain undertakings applicable to Amex.[145] By amending the proposed rule to provide that the Chief Regulatory Officer will report only to the Regulatory Oversight Committee, and not, in addition, to the Exchange Chief Executive Officer (or Chief Executive Officer's designee), Amendment No. 6 would effectively further increase the independence of the Chief Regulatory Officer. Amendment No. 6 also contains Undertakings pursuant to which Amex agrees to (1) not terminate Amex's current regulatory services agreement with NASD unless Amex has entered into an alternative arrangement for the provision of regulatory services that has been approved by the Commission, and to use its best efforts to comply with Amex's obligations under the current regulatory services agreement, (2) confer periodically with Commission staff regarding the status of Amex's regulatory program, and (3) submit certain financial information to the Commission. These proposals, which are designed to further ensure that the Exchange will be able to perform its regulatory responsibilities and to provide the Commission sufficient information to aid it in performing its regulatory oversight responsibilities, are consistent with the public interest and the protection of investors, and will not impose any significant burden on competition. Therefore, the Commission finds that good cause exists to accelerate approval of Amendment Nos. 4 and 6 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.[146]

VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[147] that the proposed rule change, including Amendment Nos. 1, 2 and 3 thereto (SR–Amex–2004–50) be, and hereby is, approved, and that Amendment Nos. 4 and 6 thereto are approved on an accelerated basis. The proposed rule change shall be effective upon the closing of the Transaction described herein.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28600 Filed 12–29–04; 8:45 am]

BILLING CODE 8010–01–P

[141] For so long as MC shall control, directly or indirectly, Amex, before any change or addition to the MC Certificate of Incorporation or MC Bylaws shall be effective, the same shall be submitted to the Board of Governors of the Exchange and if said Board shall determine that the same constitutes a ''rule of an exchange'' as such term is defined in the Act and the rules promulgated thereunder and must be filed with or filed with and approved by the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with or filed with and approved by said Commission, as the case may be. See Section 18 of the MC Certificate of Incorporation and Section 9.01 of the MC Bylaws.

[142] 15 U.S.C. 78s(b)(2).

[143] *Id.*

[144] *See supra* note 7.

[145] *See supra* note 9 and Section II.Q.

[146] 15 U.S.C. 78s(b)(2).

[147] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50919; File No. SR–MSRB–2004–09]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Advertisements of Municipal Fund Securities Under MSRB Rule G–21

December 22, 2004.

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 16, 2004, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. 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 SEC a proposed rule change amending Rule G–21, on advertising, to establish specific requirements with respect to advertisements by brokers, dealers and municipal securities dealers (''dealers'') relating to municipal fund securities. The MSRB proposes an effective date for the proposed rule change of the first calendar day of the month beginning 90 or more calendar days after SEC approval.

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

* * * * *

Rule G–21. Advertising.

(a)–(c) No change.

(d) New Issue Advertisements. In addition to the requirements of section (c), all advertisements for new issue municipal securities (*other than municipal fund securities*) shall [also] be subject to the following requirements:

(i)–(ii) No change.

(e) *Municipal Fund Security Advertisements. In addition to the requirements of section (c), all advertisements for municipal fund securities shall be subject to the following requirements:*

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

[2] 17 CFR 240.19b–4.

(i) Required disclosures. Each advertisement for municipal fund securities:

(A) must include a statement that:

(1) advises an investor to consider the investment objectives, risks, and charges and expenses associated with municipal fund securities before investing;

(2) explains that more information about municipal fund securities is available in the issuer's official statement;

(3) if the advertisement identifies a source from which an investor may obtain an official statement and the broker, dealer or municipal securities dealer that publishes the advertisement is the underwriter for one or more of the issues of municipal fund securities for which any such official statement may be supplied, states that such broker, dealer or municipal securities dealer is the underwriter for one or more issues (as appropriate) of such municipal fund securities; and

(4) states that the official statement should be read carefully before investing.

(B) that refers by name (including marketing name) to any municipal fund security, issuer of municipal fund securities, state or other governmental entity that sponsors the issuance of municipal fund securities, or to any securities held as assets of municipal fund securities or to any issuer thereof, must include the following disclosures, as applicable:

(1) unless the offer of such municipal fund securities is exempt from Exchange Act Rule 15c2–12 and the issuer thereof has not produced an official statement, a source from which an investor may obtain an official statement;

(2) if the advertisement relates to municipal fund securities issued by a qualified tuition program under Internal Revenue Code Section 529, a statement that advises an investor to consider, before investing, whether the investor's or designated beneficiary's home state offers any state tax or other benefits that are only available for investments in such state's qualified tuition program; and

(3) if the advertisement is for a municipal fund security that the issuer holds out as having the characteristics of a money market fund, statements to the effect that an investment in the security is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency (unless such guarantee is provided by or on behalf of such issuer) and, if the security is held out as maintaining a stable net asset value, that although the issuer seeks to preserve the value of the investment at $1.00 per share or such other applicable fixed share price, it is possible to lose money by investing in the security.

(C) that includes performance data must include:

(1) a legend disclosing that the performance data included in the advertisement represents past performance; that past performance does not guarantee future results; that the investment return and the value of the investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost (provided that the disclosure with respect to investment value fluctuation is not required for municipal fund securities that the issuer holds out as having the characteristics of a money market fund and as maintaining a stable net asset value); and that current performance may be lower or higher than the performance data included in the advertisement; and

(2) if a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee and, if the sales load or fee is not reflected in the performance data included in the advertisement, a statement that the performance data does not reflect the deduction of the sales load or fee and that the performance data would be lower if such load or fee were included.

(D) must present the statements required by clauses (A), (B) and (C) of this paragraph, when in a print advertisement, in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement, provided that when performance data is presented in a type size smaller than that of the major portion of the advertisement, the statements required by clause (C) of this paragraph may appear in a type size no smaller than that of the performance data. If an advertisement is delivered through an electronic medium, the legibility requirements for the statements required by clauses (A), (B) and (C) of this paragraph relating to type size and style may be satisfied by presenting the statements in any manner reasonably calculated to draw investor attention to them. In a radio or television advertisement, the statements required by clauses (A), (B) and (C) of this paragraph must be given emphasis equal to that used in the major portion of the advertisement. The statements required by clause (C) of this paragraph must be presented in close proximity to the performance data and, in a print advertisement, must be presented in the body of the advertisement and not in a footnote unless the performance data appears only in such footnote.

(ii) Performance data. Each advertisement that includes performance data relating to municipal fund securities must present performance data in the format, and calculated pursuant to the methods, prescribed in paragraph (d) of Securities Act Rule 482 (or, in the case of a municipal fund security that the issuer holds out as having the characteristics of a money market fund, paragraph (e) of Securities Act Rule 482), provided that:

(A) to the extent that information necessary to calculate performance data is not available from an applicable balance sheet included in a registration statement, or from a prospectus, the broker, dealer or municipal securities dealer shall use information derived from the issuer's official statement, otherwise made available by the issuer or its agents, or (when unavailable from the official statement, the issuer or the issuer's agents) derived from such other sources which the broker, dealer or municipal securities dealer reasonably believes are reliable;

(B) if the issuer first began issuing the municipal fund securities fewer than one, five, or ten years prior to the date of the submission of the advertisement for publication, such shorter period shall be substituted for any otherwise prescribed longer period in connection with the calculation of average annual total return or any similar returns;

(C) performance data shall be calculated as of the most recent calendar quarter ended prior to the submission of the advertisement for publication for which such performance data, or all information required for the calculation of such performance data, is available to the broker, dealer or municipal securities dealer as described in clause (A) of this paragraph;

(D) where such calculation is required to include expenses accrued under a plan adopted under Investment Company Act Rule 12b–1, the broker, dealer or municipal securities dealer shall include all such expenses as well as any expenses having the same characteristics as expenses under such a plan where such a plan is not required to be adopted under said Rule 12b–1 as a result of Section 2(b) of the Investment Company Act of 1940;

(E) in calculating tax-equivalent yields or after-tax returns, the broker, dealer or municipal securities dealer shall assume that any unreinvested distributions are used in the manner intended with respect to such municipal fund securities in order to qualify for any federal tax-exemption or other

federally tax-advantaged treatment with respect to such distributions, provided that:

(1) the advertisement must also provide a general description of how federal law intends that such distributions be used and disclose that such yield or return would be lower if distributions are not used in this manner; and

(2) if the then-effective federal income tax treatment upon which such yield or return was based is subject to lapse or other adverse change without extension or change of federal law, the advertisement must disclose this fact and that such yield or return would be lower if the then-effective federal income tax treatment is not extended or otherwise changed.

(F) notwithstanding any of the foregoing, this paragraph shall apply solely to the calculation of performance relating to municipal fund securities and does not apply to, or limit the applicability of any rule of the Commission, NASD or any other regulatory body relating to, the calculation of performance for any security held as an underlying asset of the municipal fund securities.

(iii) Nature of issuer and security. An advertisement for a specific municipal fund security must provide sufficient information to identify such specific security in a manner that is not false or misleading. An advertisement that identifies a specific municipal fund security must include the name of the issuer (or the issuer's marketing name for its issuance of municipal fund securities, together with the state of the issuer), presented in a manner no less prominent than any other entity identified in the advertisement, and must not imply that a different entity is the issuer of the municipal fund security. An advertisement must not raise an inference that, because municipal fund securities are issued under a government-sponsored plan, investors are guaranteed against investment losses if no such guarantee exists. If an advertisement concerns a specific class or category of an issuer's municipal fund securities (e.g., A shares versus B shares; direct sale shares versus advisor shares; in-state shares versus national shares; etc.), this must clearly be disclosed in a manner no less prominent than the information provided with respect to such class or category.

(iv) Capacity of dealer and other parties. An advertisement that relates to or describes services provided with respect to municipal fund securities must clearly indicate the entity providing those services. If any person or entity other than the broker, dealer or municipal securities dealer is named in the advertisement, the advertisement must reflect any relationship between the broker, dealer or municipal securities dealer and such other person or entity. An advertisement soliciting purchases of municipal fund securities that would be effected by a broker, dealer or municipal securities dealer or any other entity other than the broker, dealer or municipal securities dealer that publishes the advertisement must identify which entity would effect the transaction, provided that the advertisement may identify one or more such entities in general descriptive terms but must specifically name any such other entity if it is the issuer, an affiliate of the issuer, or an affiliate of the broker, dealer or municipal securities dealer that publishes the advertisement.

(v) Tax consequences and other features. Any discussion of tax implications or other benefits or features of investments in municipal fund securities included in an advertisement must not be false or misleading. In the case of an advertisement that includes statements regarding tax or other benefits offered in connection with such municipal fund securities or otherwise offered under state or federal law, the advertisement also must state that the availability of such tax or other benefits may be conditioned on meeting certain requirements. If the advertisement describes the nature of specific benefits, such advertisement must also briefly name the factors that may materially limit the availability of such benefits (such as residency, purpose for or timing of distributions, or other factors, as applicable). Such statements of conditions or limitations must be presented in close proximity to, and in a manner no less prominent than, the description of such benefits.

(vi) Underlying registered securities. If an advertisement for a municipal fund security provides specific details of a security held as an underlying asset of the municipal fund security, the details included in the advertisement relating to such underlying security must be presented in a manner that would be in compliance with any Commission or NASD advertising rules that would be applicable if the advertisement related solely to such underlying security; provided that details of the underlying security must be accompanied by any further statements relating to such details as are necessary to ensure that the inclusion of such details does not cause the advertisement to be false or misleading with respect to the municipal fund securities advertised. This paragraph does not limit the applicability of any rule of the Commission, NASD or any other regulatory body relating to advertisements of securities other than municipal fund securities, including advertisements that contain information about such other securities together with information about municipal securities.

(*f*) [(e)] No change.

* * * * *

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

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

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

1. Purpose

Rule G–21, on advertising, establishes standards for dealer advertisements relating to municipal securities. The MSRB has previously provided interpretive guidance to dealers regarding the application of these standards to advertisements of municipal fund securities.[3] The proposed rule change amends Rule G–21 to establish specific standards applicable solely to dealer advertisements of municipal fund securities. In particular, the proposed rule change incorporates the advertising standards enunciated in the 2002 Notice

[3] *See* Rule G–21 Interpretation—Application of Fair Practice and Advertising Rules to Municipal Fund Securities, May 14, 2002, *reprinted in* MSRB Rule Book (the ''2002 Notice''). The 2002 Notice also confirmed previous guidance on advertisements of municipal fund securities published in 2001. *See* Rule G–30 Interpretation—Interpretive Notice on Commissions and Other Charges, Advertisements and Official Statements Relating to Municipal Fund Securities, December 19, 2001, *reprinted in* MSRB Rule Book. Municipal fund securities are municipal securities issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act of 1940, as amended (the ''Investment Company Act''), would constitute an investment company within the meaning of the Investment Company Act. The most common forms of municipal fund securities sold by dealers consist of interests in trusts established by states as qualified tuition programs under Section 529 of the Internal Revenue Code of 1986, as amended (''529 college savings plans''), and interests in local government investment pools (''LGIPs'').

into Rule G–21, with certain modifications. In addition, the proposed rule change includes specific requirements regarding the calculation and display of performance data for municipal fund securities in a manner consistent with Rule 482 adopted by the SEC under the Securities Act of 1933, as amended (the ''Securities Act''),[4] in connection with the advertisement of mutual fund performance. The proposed rule change also includes general disclosure requirements regarding municipal fund securities that are similar in most respects to generalized disclosures currently required for mutual fund advertisements under SEC rules.

General Disclosures

The proposed rule change includes in clauses (A) and (B) of Rule G–21(e)(i) disclosure provisions modeled after SEC general disclosure requirements for mutual fund advertisements, with certain modifications. The modifications recognize the difference between the prospectus required for mutual funds and the official statement indirectly required for municipal fund securities under Rule 15c2–12 adopted by the SEC under the Act,[5] as well as other differences in characteristics between municipal fund securities and mutual funds.

New section (e)(i)(A) of Rule G–21 requires that all dealer advertisements relating to municipal fund securities include generalized disclosure that: (1) Advises investors to consider the investment objectives, risks, and charges and expenses associated with municipal fund securities before investing; (2) explains that more information about municipal fund securities is available in the issuer's official statement; (3) if the advertisement identifies a source from which an investor may obtain an official statement and the dealer that publishes the advertisement is the underwriter for the municipal fund securities for which such official statement may be supplied, states that such dealer is the underwriter for such municipal fund securities; and (4) states that the official statement should be read carefully before investing. The disclosures required in clauses (1), (2), and (4) of Rule G–21(e)(i)(A) are substantially similar to the analogous disclosures required under section (b)(1)(i) of SEC Rule 482 in connection with a mutual fund advertisement that would be considered a prospectus under the Securities Act. The disclosure required in clause (3) of Rule G–21(e)(i)(A) is substantially similar to the analogous disclosure required under section (b) of Rule 135a adopted by the SEC under the Securities Act in connection with generic mutual fund advertisements.

New section (e)(i)(B) of Rule G–21 requires that all dealer advertisements that refer by name (including marketing name) to any municipal fund security, issuer of municipal fund securities, governmental entity that sponsors the issuance of municipal fund securities, or to any securities held as assets of municipal fund securities or to any issuer of such securities held as assets, must include additional disclosure that: (1) Identifies a source from which an investor may obtain an official statement; (2) if the advertisement relates to municipal fund securities issued through a 529 college savings plan, advises an investor to consider, before investing, whether the investor's or designated beneficiary's home state offers any state tax or other benefits that are only available for investments in such state's 529 college savings plan; and (3) if the advertisement is for a municipal fund security that the issuer holds out as having the characteristics of a money market fund, states that an investment in the security is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency (unless such guarantee is provided by or on behalf of such issuer) and that, if the security is held out as maintaining a stable net asset value, although the issuer seeks to preserve the value of the investment at a fixed share price, it is possible to lose money by investing in the security. The disclosure required in clause (1) of Rule G–21(e)(i)(B) is substantially similar to the analogous disclosure required under section (b)(1)(i) of SEC Rule 482. The disclosure required in clause (3) of Rule G–21(e)(i)(B) is substantially similar to the analogous disclosure required under section (b)(4) of SEC Rule 482. The disclosure required in clause (2) of Rule G–21(e)(i)(B) is not derived from SEC mutual fund advertising rules but is analogous to the point-of-sale disclosure obligation under Rule G–17 described in the 2002 Notice.[6]

New section (e)(i)(D) of Rule G–21 requires that these general disclosures be presented in the same format required under SEC Rule 482.

Historical Performance Data

The proposed rule change establishes in new section (e)(ii) of Rule G–21 specific requirements with respect to the inclusion of performance data in municipal fund security advertisements.

Calculation and Display of Performance Data. Under the proposed rule change, such advertisements must comply with the method of computing and displaying performance data for mutual funds as prescribed in section (d) or (e) of SEC Rule 482, with certain modifications described below. In effect, for municipal fund securities other than those that are held out by the issuer as having the characteristics of a money market fund, quotations of performance in an advertisement are limited to the average annual total return, current yield (but only if accompanied by average annual total return), tax-equivalent yield (but only if accompanied by average annual total return and current yield), after-tax return (but only if accompanied by average annual total return), or other non-prescribed performance measures (but only if accompanied by average annual total return and, if adjusted to reflect the effects of taxes, after-tax return), as provided in SEC Rule 482(d). In the case of municipal fund securities that are held out by the issuer as having the characteristics of a money market fund, quotations of performance in an advertisement are limited to the current yield, effective yield (but only if accompanied by current yield), tax-equivalent yield or tax-equivalent effective yield (but only if accompanied by current yield), or total return (but only if accompanied by current yield), as provided in SEC Rule 482(e).[7]

[4] 15 U.S.C. 77a *et seq.*

[5] SEC Rule 15c2–12 provides, among other things, that the underwriter for most primary offerings of municipal securities must obtain and review the issuer's near-final official statement before purchasing or offering the securities, contract with the issuer to receive copies of the final official statement within specified time frames after the final agreement to purchase or offer the securities, and distribute copies of the official statement to potential customers upon request. For purposes of the rule, a final official statement must set forth information concerning the terms of the issue; information, including financial or operating data, concerning the issuer and other entities, enterprises, funds, accounts and other persons material to an evaluation of the offering; and a description of undertakings regarding the provision of secondary market information, as well as disclosure of any failures to provide such information during the past five years. A final official statement need not contain each item of information required to be included in a prospectus under the Securities Act.

[6] The specific disclosure required in the proposed rule change is somewhat broader than that currently required under the point-of-sale disclosure obligation described in the 2002 Notice. The MSRB expects to file with the SEC in the near future a proposed rule change that expands this point-of-sale disclosure requirement under Rule G–17 to also reference the possible existence of other non-tax state benefits. *See* MSRB Notice 2004–16 (June 10, 2004).

[7] SEC Rule 482 incorporates the calculation methods set forth in Forms N–1, N–3, and N–4 for purposes of calculating the various types of quotations described in the rule. These methods are also incorporated into Rule G–21(e)(ii).

Clauses (A) through (E) of Rule G–21(e)(ii) modify the basic performance data calculation methods established for mutual funds to reflect the fact that certain items of information that exist in the mutual fund industry—such as the registration statement and the specific items of information required to be disclosed in the prospectus and statement of additional information—do not exist for municipal fund securities, as well as to reflect other differences in characteristics between municipal fund securities and mutual funds. Thus, Rule G–21(e)(ii) provides that: (A) A dealer can use information provided in the issuer's official statement, otherwise made available by the issuer, or otherwise obtained from other reliable sources to calculate performance to the extent such information is not available from a balance sheet in a registration statement or from a prospectus; (B) the life of a municipal fund securities issue should be measured from when the issuer first issues the securities; (C) performance data in advertisements must be calculated as of the most recent calendar quarter ended prior to the submission of the advertisement for publication for which such performance data, or all information required for the calculation of such performance data, is available to the dealer; [8] (D) expenses having the same characteristics as those permitted to be paid under Rule 12b–1 adopted by the SEC under the Investment Company Act but not technically accrued under a 12b–1 plan must be treated as 12b–1 expenses for purposes of calculating performance; [9] and (E) in calculating tax-equivalent yields or after-tax returns, the dealer shall assume that any unreinvested distributions are used in a manner that qualifies for any federal tax-exemption or other federally tax-advantaged treatment with respect to such distributions, provided that: (1) The advertisement also provides a general description of how federal law intends such distributions be used and discloses that such yield or return would be lower if distributions are not used in this manner; and (2) if the federal income tax treatment upon which such yield or return is based is subject to lapse or other adverse change without extension or change of federal law, the advertisement must disclose this fact and that such yield or return would be lower if the Federal income tax treatment is not extended or otherwise changed.

Performance data included in municipal fund security advertisements are required to be displayed in the manner provided in section (d) or (e) of SEC Rule 482, as appropriate, with respect to prominence and positioning of information.

Disclosures Accompanying Performance Data. New Section (e)(i)(C) of Rule G–21 requires that advertisements that include performance data for municipal fund securities also include certain related legends and disclosures modeled after those required under SEC Rule 482 for mutual funds advertisements that display performance information. These disclosures emphasize that the performance data is historical and does not guarantee future results, that the value of holdings is subject to fluctuation (except where the municipal fund security is held out as having the characteristics of a money market fund and as maintaining a stable net asset value), and that current performance may be different from the performance data included in the advertisement.[10] Advertisements containing performance data also are required to include the maximum amount of any sales load or other nonrecurring fee and, if such load or fee is not reflected in the performance data, to disclose that the load or fee is not so reflected and that performance would be lower if it had been reflected. These nonrecurring fees that are subject to disclosure include such fees imposed not only by the dealer but also by the issuer or any other party to the issuance of the municipal fund securities or the maintenance of investments therein.

New Section (e)(i)(D) requires that these legends and disclosures be presented in the same format required under SEC Rule 482.

Additional Requirements

The proposed rule change includes in new paragraphs (iii) through (vi) of Rule G–21(e) additional requirements with respect to municipal fund security advertisements, based largely on interpretive guidance provided in the 2002 Notice.

Nature of Issuer and Security. New paragraph (iii) requires that an advertisement: (1) for a specific municipal fund security provide sufficient information to identify the security in a manner that is not false or misleading; (2) that identifies a specific municipal fund security include the name of the issuer (or its marketing name, including state), presented in a manner no less prominent than any other entity identified in the advertisement, and not imply that a different entity is the issuer; (3) not raise an inference that, because municipal fund securities are issued under a government-sponsored plan, investors are guaranteed against investment losses if no such guarantee exists; and (4) that concerns a specific class or category of municipal fund securities (*e.g.*, A shares versus B shares; direct sale shares versus advisor shares; in-state shares versus national shares; etc.) clearly disclose this fact in a manner no less prominent than the information provided with respect to such class or category.

Capacity of Dealer and Other Parties. New paragraph (iv) requires an advertisement about services provided with respect to municipal fund securities to clearly indicate the entity providing such services. If any person or entity other than the dealer is named in the advertisement, it must reflect any relationship between the dealer and such other person or entity. An advertisement soliciting purchases that would be effected by any party other than the dealer that publishes the advertisement (*i.e.*, the issuer or another dealer) must identify which entity would effect the transaction, provided that it may identify one or more such entities in general descriptive terms but must specifically name any such other entity if it is the issuer, an affiliate of the issuer, or an affiliate of the dealer that publishes the advertisement.

Tax Consequences and Other Features. New paragraph (v) requires that any discussion of tax implications or other benefits or features of investments in municipal fund securities included in an advertisement not be false or misleading. If an advertisement includes statements regarding tax or other benefits offered in connection with such municipal fund securities or otherwise offered under state or federal law, it must also state that the availability of such tax or other benefits may be conditioned on meeting certain requirements. If the advertisement describes the nature of specific benefits, such advertisement must also briefly name the factors that may materially limit the availability of

[8] As noted in footnote 17 and accompanying text, *infra,* the MSRB is publishing for comment concurrent with this filing a draft amendment that would modify this clause (C).

[9] Thus, asset-based charges paid to the program manager or investment advisor, to the issuer or its agents, or to any other party generally are to be treated as 12b–1 expenses for purposes of calculating performance even if any such charges may not technically be paid under a formal 12b–1 plan. In addition, any 12b–1 expenses incurred in connection with underlying assets of the municipal fund securities also must be treated as 12b–1 expenses of the municipal fund securities to the extent that such expenses are not waived or not included within the asset-based charges described in the preceding sentence.

[10] As noted in footnote 17 and accompanying text, *infra*, the MSRB is publishing for comment concurrent with this filing a draft amendment that would modify this provision.

such benefits (such as residency, purpose for or timing of distributions, or other factors, as applicable).[11] Such statements of conditions or limitations must be presented in close proximity to, and in a manner no less prominent than, the description of such benefits.

Underlying Registered Securities. New paragraph (vi) requires that, if an advertisement for a municipal fund security provides specific details of a security held as an underlying asset of the municipal fund security, the details included in the advertisement relating to such underlying security be presented in a manner that would be in compliance with any SEC or NASD advertising rules that would be applicable if the advertisement related solely to such underlying security. Details of the underlying security included in the advertisement must be accompanied by any further statements necessary to ensure that the inclusion of such details does not cause the advertisement to be false or misleading with respect to the municipal fund securities advertised. This provision does not limit the applicability of any rule of the SEC, NASD or any other regulatory body relating to advertisements of securities other than municipal fund securities, including advertisements that contain information about such other securities together with information about municipal fund securities.

Exemption From New Issue Price/Yield Requirement

The proposed rule change exempts municipal fund security advertisements from the provision of Rule G–21(d) relating to advertisements of initial reoffering prices or yields of new issue municipal securities. This provision is designed for advertisements by underwriting syndicates for municipal debt offerings and does not deal with matters relevant to municipal fund securities.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with section 15B(b)(2)(C) of the Act,[12] which requires that the rules of the MSRB 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* * *.[13]

The MSRB believes that the proposed rule change is consistent with the Act because it will further investor protection by raising the standards for advertisements of municipal fund securities and by making information provided in such advertisements comparable for different municipal fund securities investments and between municipal fund securities and registered mutual funds.

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

The MSRB 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 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 10, 2004, the MSRB published for comment draft rule changes to Rule G–21 with respect to advertisements of municipal fund securities.[14] The MSRB received eight comment letters.[15] After reviewing these comments, the MSRB approved the draft amendments, with certain modifications, for filing with the SEC. The comments and modifications to the draft amendments are discussed below.

General Disclosures

Summary of Draft Amendment. Draft Rule G–21(e)(i)(A) would require dealer advertisements of municipal fund securities to include generalized disclosure to the effect that investors should consider the securities' investment objectives, risks and charges before investing; that more information about the securities is available in the issuer's official statement; identifies where an official statement can be obtained; and states that the official statement should be read carefully before investing. Advertisements of 529 college savings plans also must advise investors to consider whether their home states offer state tax or other benefits only available for investments in the in-state plans. Further, advertisements for municipal fund securities that are marketed as money market securities would be required to disclose that investments are not insured and, if marketed as maintaining a stable net asset value, it is still possible to lose money. These disclosures would be required to be given emphasis equal to that used in the major portion of the advertisement. In addition, the MSRB sought comment on whether the rule should require that dealers that advertise 529 college savings plans include in their generalized disclosure language the URL of an MSRB-maintained Web site where investors can obtain general information about the 529 college savings plan market.

Discussion of Comments. Commentators generally supported the proposed general disclosures, with several providing suggested changes.

• *State tax and other benefits*—Three commentators representative of, or generally acting on behalf of, state issuers suggested modifications to the language relating to the potential benefits of investing in an in-state plan. CSPN and FAME stated that the proposed language should reflect that some benefits may be dependent on the designated beneficiary's home state (rather than or in addition to the home state of the investor). Hawkins suggested that if a state's 529 college savings plan is offered solely within that state and an advertisement of such plan is

[11] For example, if an advertisement notes that investors in a particular 529 college savings plan may qualify for scholarships or matching grants, it may also need to state that such scholarships or matching grants are available only for attendance at in-state colleges or to in-state investors, if that is in fact the case.

[12] 15 U.S.C. 78o–4(b)(2)(C).

[13] *Id.*

[14] *See* MSRB Notice 2004–16 (June 10, 2004).

[15] Letter from Kenneth B. Roberts, Hawkins Delafield & Wood LLP (''Hawkins''), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated August 20, 2004; letter from Mary L. Schapiro, Vice Chairman, NASD, and President, Regulatory Policy and Oversight, to Ernesto A. Lanza, dated September 9, 2004; letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (''ICI''), to Ernesto A. Lanza, dated September 10, 2004; letter from David J. Pearlman, College Savings Foundation (''CSF''), to Ernesto A. Lanza, dated September 13, 2004; letter from Elizabeth L. Bordowitz, General Counsel, Finance Authority of Maine (''FAME''), to Ernesto A. Lanza, dated September 13, 2004; letter from Diana F. Cantor, Chair, College Savings Plan Network (''CSPN''), and Executive Director, Virginia College Savings Plan, to Ernesto A. Lanza, dated September 15, 2004; letter from Elizabeth Varley and Michael D. Udoff, Co-Staff Advisers, Securities Industry Association (''SIA'') Ad Hoc 529 Plans Committee, to Ernesto A. Lanza, dated September 15, 2004; and letter from Raquel Alexander, PhD, Assistant Professor, and LeAnn Luna, PhD, Assistant Professor, University of North Carolina at Wilmington, to Ernesto A. Lanza, dated September 15, 2004. Most commentators also provided comments on the proposed modification to the MSRB's existing point-of-sale disclosure obligation relating to sales of out-of-state 529 college savings plans, as described in the June notice. The MSRB expects to file with the SEC in the near future a proposed rule change that expands this point-of-sale disclosure requirement under Rule G–17 to also reference the possible existence of other non-tax state benefits. The MSRB will address comments on this subject at that time.

distributed solely within such state, the advertisement should be exempted from the proposed disclosure regarding potential benefits of investing in an in-state plan.

The MSRB agrees that the general disclosure language in Rule G–21(e)(i)(B)(2) should be modified to include reference to the designated beneficiary when discussing the benefits of in-state investments. However, the MSRB does not believe that the additional changes suggested by the commentators should be made. The MSRB believes that disclosure of potential in-state benefits should apply to all 529 college savings plan advertisements, even if the advertisement for a 529 college savings plan offered solely within a particular state is distributed solely within that state, as this would ensure uniform practices and avoid sometimes difficult factual determinations.

• *Advertisements with limited information*—Several commentators (CSF, CSPN, FAME and SIA) suggested that the proposed amendments permit an abbreviated form of the general disclosures for purposes of radio and television advertisements in view of the limited amount of time available in such advertisements to provide all required information. SIA argued that the requirement that equal prominence be given to the general disclosures would result in the advertisement's intended message being lost. CSF stated that the practical consequence of this requirement would quite possibly be that there would be no more radio or television advertisements of 529 college savings plans by dealers. CSF and SIA suggested that a broadcast advertisement that merely presents the dealer's name and address, the name of the 529 college savings plan and the name of the sponsoring state be permitted to substitute an abbreviated reference to the official statement for further information. SIA further suggested that such a broadcast advertisement urge the investor to read the official statement carefully before investing and state how an investor may obtain the official statement.

The MSRB notes that SEC Rule 135a effectively permits the use of certain types of mutual fund advertisements containing very limited information without including the disclosures required under SEC Rule 482. SEC Rule 135a covers advertisements that include no more than explanatory information relating to mutual funds generally and/or to specific categories of mutual funds, as well as an invitation to inquire for further information. Such advertisements must contain the name and address of the dealer sponsoring the advertisement and whether the dealer is the principal underwriter of any mutual fund with respect to which information will be sent to any investor who asks for more information. However, such advertisements must not specifically refer by name to any mutual fund or fund family.

The suggestion of CSF and SIA would provide for including the name of the 529 college savings plan and its sponsoring state, unlike under SEC Rule 135a. However, their proposal would provide for retaining certain of the general disclosures of the proposal that are not otherwise required under SEC Rule 135a. The MSRB believes that the general disclosure provision should be modified to permit more abbreviated general disclosures, set forth in Rule G–21(e)(i)(A), where an advertisement does not refer by name (including marketing name) to any specific municipal fund security, issuer of municipal fund securities or state or other governmental entity that sponsors the issuance of municipal fund securities, or to any securities held as assets of municipal fund securities or to any issuer of such securities held as assets. Such disclosures would be limited to statements advising investors to consider the investment objectives, risks and charges of municipal fund securities before investing; that more information about municipal fund securities is available in the issuer's official statement; and that the official statement should be read carefully before investing. Because these disclosures would be considerably shorter than otherwise required, the MSRB does not believe that the equal prominence requirement for such statements should be changed. Further, the MSRB does not believe that dealers should be permitted to identify a specific product in advertisements where only these more abbreviated general disclosures are provided. Any advertisement that specifically identifies a product must also include the general disclosures set forth in Rule G–21(e)(i)(B), as applicable.

• *Reference to MSRB Web site*—Most commentators stated that the MSRB should not require that 529 college savings plan advertisements include reference to an MSRB-maintained Web site on 529 college savings plans, and no commentator supported such a requirement. The MSRB will take no further action with respect to such proposal at this time. However, the MSRB will continue to maintain and update its existing Web pages, at *http://www.msrb.org/msrb1/mfs*, that provide generalized information about municipal fund securities.

• *Applicability to LGIPs*—Hawkins suggested that the general disclosure provisions be made inapplicable to advertisements of LGIPs, arguing that the required references to the official statement are inappropriate because official statements are not typically prepared for LGIPs. The MSRB understands that most LGIPs do in fact prepare official statements (often referred to as information statements), and dealers marketing LGIPs generally are subject to SEC Rule 15c2–12. Therefore, the MSRB has not exempted dealer advertisements of LGIPs from the rule requirements.

Performance Data

Summary of Proposal. Draft Rule G–21(e)(ii) would require advertisements that include performance data to comply with the method of computing and displaying mutual fund performance data provided under SEC Rule 482, with certain modifications. Among other things, the draft amendment would require that performance data shown in an advertisement be calculated as of the most recent calendar quarter for which such data, or all information required to calculate such performance data, is reasonably available to the dealer. SEC Rule 482 requires that such data be shown in mutual fund advertisements as of the most recent calendar quarter but does not make the determination of which calendar quarter is the most recent dependent upon the availability of such data.

In addition, draft Rule G–21(e)(i) would require certain related disclosures for municipal fund securities advertisements that contain performance data. The disclosures emphasize that the performance information is historical and does not guarantee future results, the value of holdings is subject to fluctuation, and current performance may be lower or higher than the performance quoted. Advertisements containing performance data also would be required to include basic information about sales loads and other nonrecurring fees and note the impact of such loads or fees on performance as shown. The disclosures must be given emphasis equal to that of the performance data itself. These disclosures are required under SEC Rule 482 in mutual funds advertisements that display performance information.

Discussion of Comments. Commentators generally supported the proposed performance data calculation methods and related legends and

disclosures, with several providing suggested changes.

• *Most recent quarterly performance data*—NASD stated that the difference in the language regarding the timing of quarterly data used in Rule G–21 as compared to the language used in SEC Rule 482 ''appears to give dealers latitude'' that ''may undermine the ability of investors to compare different municipal fund securities programs, or even the same program offered by different dealers who impose varying end dates for their performance calculation. At a minimum, the disparity between the language in Rule 482 and the MSRB's proposal would create confusion for broker-dealers that must comply with both provisions.''

The language used in the draft amendment was not designed to give dealers latitude in deciding which timeframes to include in advertisements, nor would it normally lead to a different result under the draft rule as compared to SEC Rule 482.[16] Rather, the language reflects the MSRB's recognition that its rulemaking should not be used to indirectly regulate state issuers in structuring their programs and that a state's structure might result in making compliance with the specific language of Rule 482 impossible without forcing a change in the structure. However, to mitigate the possibility of unintended ambiguity and possible inconsistent application of the rule between different dealers, the MSRB has modified the language of Rule G–21(e)(ii)(C) to provide that calculations must be made as of the most recent quarter for which necessary information is available, rather than when such information is *reasonably* available. Dealers wishing to advertise performance would be tasked with taking all appropriate actions necessary to obtain information that is in fact available for purposes of such calculation.

• *Most recent month-end performance data*—ICI and NASD suggested that the MSRB add a requirement that dealers include in municipal fund security advertisements that contain performance data a phone number or Web address where investors may obtain performance data current to the most recent month-end. They stated that this would make the MSRB's advertising rule consistent with the similar requirement established under SEC Rule 482. Rule 482 requires that mutual fund advertisements that show performance data also include a phone number or Web site address at which performance data may be obtained that is current to the most recent month, available no later than seven business days after the end of the month. This requirement was not included in draft Rule G–21(e). Concurrent with the filing of this proposed rule change, the MSRB is publishing for industry comment a draft amendment to Rule G–21 that would require inclusion in dealer advertisements that contain performance data for municipal fund securities of a phone number or Web address where investors may obtain performance data current to the most recent month-end.[17]

• *Affect of federal tax treatment of 529 plans*—The MSRB sought comment on whether the methods of calculating performance provided under SEC Rule 482, as modified by the draft amendments, were appropriate for municipal fund securities. ICI stated that ''the proposed modifications satisfactorily address any disparities that should be taken into account in incorporating the provisions of Rule 482 into Rule G–21.'' CSPN and FAME strongly supported the effort to develop a uniform method of calculating performance. They suggested that the MSRB establish basic assumptions that 529 college savings plan distributions will be used in a manner that would preserve their tax-exempt nature (with a footnote to the effect that after-tax returns would differ if current law sunsets). In addition, they suggested that after-tax returns should not be required to be shown for 529 college savings plan advertisements since such investments are intended to be tax-exempt.

The MSRB does not believe that such assumptions about the tax-exempt nature of 529 college savings plan investments should apply for all purposes of calculating performance. Thus, the baseline total return calculation would continue to ignore all tax effects. However, in calculating tax-equivalent yields or after-tax returns, the MSRB believes it is appropriate to assume that unreinvested distributions are used for purposes that would maintain any intended federal tax benefit, as set forth in Rule G–21(e)(ii)(E). Such assumption would require that the advertisement include a general description of how federal law intends that such distributions be used to maintain the favorable tax treatment and a disclosure that the tax-equivalent yield or after-tax return would be lower if distributions are not used in such manner. In addition, if the favorable tax treatment is subject to lapse or other adverse change without extension or other change of law, the advertisement must disclose this fact and that such yield or return would be lower if the favorable tax treatment is not extended or otherwise changed.

Further, the MSRB does not believe that the provision requiring the inclusion of after tax-return should be eliminated. The only circumstance in which a dealer would be required to show after-tax return is if the advertisement also includes a performance measure that is adjusted to reflect the effect of taxes (*e.g.*, a tax equivalent return intended to show how the tax benefits of investing in 529 college savings plans compares to other fully taxable investments). Under this circumstance, it is appropriate that the advertisement also include performance that does not include such adjustment.

Additional Requirements

Draft Rule G–21 would incorporate, with certain modifications, several existing interpretive positions from the 2002 Notice. Commentators generally supported the incorporation of these positions into the rule, with several providing suggested changes.

• *Nature of Issuer and Security*—Draft Rule 21(e)(iii) would require, among other things, that an advertisement that identifies a specific municipal fund security include the name of the issuer presented in a manner no less prominent than any other entity identified in the advertisement.

CSF argued that, in some cases, providing the name of the legal issuer in connection with 529 college savings plan securities may not help consumers understand the nature of the issuer and may result in confusion since the legal issuer may be an obscure state trust. CSF suggested that it would be more helpful to identify the 529 college savings plan by marketing name, together with the name of the state that establishes and maintains the plan. CSF also suggested that dealers be permitted to include the marketing logo, rather than a logo of the legal issuer, in advertisements, which logo should appear at least as prominently as the dealer's logo. SIA stated that the requirement that the issuer's name be given equal prominence to that of the dealer is unnecessary and subject to second guessing. SIA argued that the policy objective of the proposed rule, which is to prevent investor confusion

[16] The MSRB notes that SEC Rule 482(g) provides a basic timeliness standard based on the ''most recent practicable date considering the type of investment company and the media through which data will be conveyed'' that also could be viewed as giving some latitude in deciding which timeframes to include in advertisements.

[17] *See* MSRB Notice 2004–43 (December 16, 2004).

as to who the issuer of the security is, is satisfied by the other requirements set forth in this section that the issuer be identified and that the advertisement not imply that another entity is the issuer of the security.

The MSRB believes that it is appropriate to permit dealers to use the marketing name and state of a 529 college savings plan in substitution for the legal name of the issuer. However, the MSRB does not agree that such issuer information should be permitted to be presented in a manner that is less prominent than any other entity identified in the advertisement. This provision would also permit the use of the 529 college savings plans logo, so long as such logo is presented in a manner no less prominent than any other entity's logo included in the advertisement.

• *Capacity of Dealer and Other Parties*—Draft Rule 21(e)(iv) would require an advertisement that relates to or describes services provided with respect to municipal fund securities to clearly indicate the entity providing such services. In addition, an advertisement soliciting purchases of municipal fund securities that would be effected by any party other than the dealer that publishes the advertisement (*i.e.*, the issuer or another dealer) must clearly state which entity would effect the transaction.

CSF and SIA argued that many 529 college savings plans are marketed through hundreds of dealers and it would be extremely difficult if not impossible for a primary distributor to list in its advertisement all such dealers. CSF suggested that only dealers that are affiliates of the dealer publishing the advertisement and, if applicable, the issuer itself be required to be identified by name in such advertisements. NASD stated that this provision resembles, but is not identical to, NASD Rule 2210(d)(2)(C), which generally requires that all sales material prominently disclose the name of the member and, if it includes other names, reflect which products or services are being offered by the member.

It was not the intent of the original proposal to require that a primary distributor list its many hundreds of selling dealers used in the 529 college savings plan's distribution channels. The MSRB has modified this provision so that the only parties effecting transactions in municipal fund securities that must be specifically named in an advertisement are the dealer publishing the advertisement, any other dealer affiliated with such dealer and the issuer, as applicable. In addition, the rule language has been revised to more closely track the NASD requirement that, if any parties other than the dealer is named in a municipal fund securities advertisement, the products or services offered by such parties in connection with such municipal fund securities must be stated.

• *Tax Consequences and Other Features*—Draft Rule 21(e)(v) would require, among other things, that an advertisement that includes statements regarding tax or other benefits offered under state or federal law must make clear the nature of such benefits and that the availability of such benefits may be materially limited based upon residency, purpose for or timing of share redemptions, or other factors, as applicable. These limitations would be required to be described in the advertisement in close proximity to, and in a manner no less prominent than, the description of such benefits.

CSF argued that state tax treatment of 529 college savings plans is extremely complex and that not all variations in state treatment will be a benefit to in-state investors. It suggested that the reference in the rule language to ''state tax or other benefits'' should be changed to ''different state tax or other consequences.'' CSF also expressed concern over the proposal's requirement that an advertisement that includes information about tax or other state benefits must ''make clear the nature of such benefits.'' CSF stated:

> If all that would be required is a general statement that tax and other benefits may be available only through the home-state program, the guidance should so state. . . . If a laundry list of all potential aspects of differing treatment is required, we are concerned that such a list could not practically be updated to account for all new state laws, and that even if it could, space limitations would make it impractical or impossible to achieve compliance.

CSPN and Hawkins stated that only general statements of limitation are appropriate where an advertisement contains only general statements of benefits, so long as the investor is directed to the official statement for additional information. Hawkins suggested that the proposed rule language appears to require dealer advertisements that refer in any manner to tax or other benefits to include a detailed description of the nature of, and of limitations applicable to receipt of, such benefits. Hawkins argued that it may be impractical to include such a detailed description within most advertisements without resulting in potentially misleading or incomplete statements.

FAME suggested certain changes to terminology in this provision, stating that references to ''shares'' are not appropriate for many 529 college savings plans. In addition, CSPN and FAME stated that some state benefits may not be specifically provided for under state law but are created by state entities under general grants of authority.

The MSRB has modified the rule language to more narrowly focus the types of disclosures that would be required to be made in an advertisement that includes descriptions of tax or other beneficial features offered under state or federal law in connection with an investment in municipal fund securities. Thus, the modified language would make clear that general statements regarding the existence of beneficial features would not require an extensive listing of all such features but would require general disclosure that such features may be subject to limitations. However, as the information about tax matters becomes more detailed, the rule would require comparably detailed discussion of potential limitations. However, the reference to ''benefits'' has not been eliminated from the rule. The rule already addresses the broader concept of ''tax implications'' but is also specifically aimed at ensuring that the ''hyping'' of beneficial treatment is tempered by an equally prominent discussion of potential limitations. Further, certain limited modifications have been made to the rule language to address the concerns regarding use of the term ''shares'' and reference to benefits provided under state law.

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

The MSRB proposes an effective date for the proposed rule change of the first calendar day of the month beginning 90 or more calendar days after SEC approval. Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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–2004–09 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–MSRB–2004–09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the MSRB's principal office. 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–2004–09 and should be submitted on or before January 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28581 Filed 12–29–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50916; File No. SR–NASD–2004–188]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Performance Leveraged Upside Securities Based on the Value of the Index

December 22, 2004.

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 21, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

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

The Nasdaq proposed to list notes, know as Performance Leveraged Upside Securities℠ (''Notes'') issued by Morgan Stanley (''Morgan Stanley''), the performance of which is linked to the Nasdaq–100 (''Nasdaq–100'' or ''Index'').

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 Nasdaq 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 III below. The Nasdaq 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

Nasdaq proposes to list and trade Performance Leveraged Upside Securities (''PLUS''), the return on which is based upon the Nasdaq–100 Index (the ''Index'').[3]

Under NASD Rule 4420(f), Nasdaq may approve for listing and trading innovative securities which cannot be readily categorized under traditional listing guidelines.[4] Nasdaq proposes to

[18] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] The Index is a modified capitalization-weighted index of 100 of the largest non-financial companies listed on The Nasdaq National Market tier of The Nasdaq Stock Market. The Index constitutes a broadly diversified segment of the largest securities listed on The Nasdaq Stock Market and includes companies across a variety of major industry groups. The securities in the Index must, among other things, have an average daily trading volume on Nasdaq of at least 200,000 shares.

In order to ensure that there is no domination of the Index by a few large stocks, the Index is calculated under a ''modified capitalization-weighted'' methodology, which is a hybrid between equal weighting and conventional capitalization weighting. Under the methodology employed, on a quarterly basis coinciding with Nasdaq's quarterly scheduled weight adjustment procedures, the Index Securities are categorized as either ''Large Stocks'' or ''Small Stocks'' depending on whether their current percentage weights (after taking into account such scheduled weight adjustments due to stock repurchases, secondary offerings, or other corporate actions) are greater than, or less than or equal to, the average percentage weight in the Index (*i.e.*, as a 100-stock index, the average percentage weight in the Index is 1.0%). Such quarterly examination will result in an Index rebalancing if either one or both of the following two weight distribution requirements are not met: (1) The current weight of the single largest market capitalization Index component security must be less than or equal to 24.0%, and (2) the ''collective weight'' of those Index component securities whose individual current weights are in excess of 4.5%, when added together, must be less than or equal to 48.0%.

Index securities are ranked by market value and are evaluated annually to determine which securities will be included in the Index. Moreover, if at any time during the year an Index security is no longer trading on the Nasdaq Stock Market, or is otherwise determined by Nasdaq to become ineligible for continued inclusion in the Index, the security will be replaced with the largest market capitalization security not currently in the Index that meets the Index eligibility criteria.

For a detailed description of the Index, *see* the prospectus supplement that will be filed by Morgan Stanley with the Commission prior to the issuance of the Notes. The Index is widely disseminated at Bloomberg, Reuters and Thomson Financial, where its value is updated every 15 seconds during normal trading hours. In the event that the calculation and this type of dissemination of the Index is discontinued, Nasdaq will delist the notes.

[4] *See* Securities Exchange Act Release No. 32988 (September 29, 1993), 58 FR 52124 (October 6, 1993).