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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66454; File No. SR-FINRA-2011-073)

February 23, 2012

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to Establishing a Governmental Accounting Standards Board Accounting Support Fee

I. Introduction

On December 20, 2011, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt Section 14 to Schedule A of the FINRA By-Laws to establish an accounting support fee to adequately fund the annual budget of the Governmental Accounting Standards Board (“GASB”). The proposed rule change was published for comment in the Federal Register on January 9, 2012.³ The Commission received nine comment letters on the proposed rule change.⁴ On February 13, 2012, FINRA submitted a response letter to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 66080 (January 3, 2012), 77 FR 1119 (“Notice”).

⁴ See letters to Elizabeth M. Murphy, Secretary, Commission, from David T. Bellaire, Esq., General Counsel and Director of Government Affairs, Financial Services Institute, dated January 30, 2012 (“FSI Letter”); Eric Berman, CPA – Chair, Financial Management Standards Board, Association of Government Accountants, dated January 30, 2012 (“AGA Letter”); David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated January 30, 2012 (“SIFMA Letter”); Jeffrey L. Esser, Executive Director and Chief Executive Officer, Government Finance Officers Association, Robert O’Neill, Executive Director, International City/County Management Association, Larry E. Naake, Executive Director, National Association of Counties, Donald J. Borut, Executive Director, National League of Cities, and Tom Cochran CEO and Executive Director, United States Conference of Mayors, dated January 30, 2012 (“Associations Letter”); John T. Hicks, President,

comments.⁵ This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was signed into law by President Obama on July 21, 2010.⁶ As added by Section 978 of the Dodd-Frank Act, Section 19(g) of the Securities Act of 1933 (“Securities Act”) gives the Commission the authority to require a national securities association to establish a reasonable annual accounting support fee to adequately fund the annual budget of the GASB (“GASB Accounting Support Fee”), and rules and procedures to provide for the equitable allocation, assessment, and collection of the GASB Accounting Support Fee from the association’s members.⁷ On May 11, 2011, the Commission exercised this authority and issued an order requiring FINRA to establish (a) a reasonable annual accounting support fee to adequately fund the annual budget of the GASB; and (b) rules and procedures, in consultation with the principal

National Association of State Budget Officers, dated January 30, 2012 (“NASBO Letter”); Ronald L. Jones, President, National Association of State Auditors, Comptrollers and Treasurers, dated January 30, 2012 (“NASACT Letter”); Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated January 30, 2012 (“BDA Letter”); Martin J. Benison, Comptroller, Office of the Comptroller, Commonwealth of Massachusetts, dated January 24, 2012 (“Massachusetts Letter”); and Chris Melton, Sr., dated January 19, 2012 (“Melton Letter”).

⁵ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Brant K. Brown, Associate General Counsel, FINRA, dated February 13, 2012 (“FINRA Response Letter”).

⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁷ See 15 U.S.C. 77s(g). For purposes of the GASB Accounting Support Fee, the annual budget of the GASB is the annual budget reviewed and approved according to the internal procedures of the Financial Accounting Foundation (“FAF”). See 15 U.S.C. 77s(g)(2). FINRA stated that it anticipates that the GASB’s annual budget will include an administrative fee to FINRA. The administrative fee is intended to cover FINRA’s costs associated with calculating, assessing, and collecting the GASB Accounting Support Fee, and the amount will be negotiated with the FAF each year. For the initial year, the administrative fee will be \$50,000.

organizations representing State governors, legislators, local elected officials, and State and local finance officers, to provide for the equitable allocation, assessment, and collection of the accounting support fee from its members, and the remittance of all such accounting support fees to the FAF.⁸

In response to the Commission's order of May 11, 2011, FINRA proposed new Section 14 (Accounting Support Fee for Governmental Accounting Standards Board) to Schedule A of the FINRA By-Laws to establish the GASB Accounting Support Fee. The proposed rule change would assess the fee based on FINRA members' municipal securities trading volume reported to the Municipal Securities Rulemaking Board ("MSRB"). FINRA stated its belief that basing the GASB Accounting Support Fee on reliable and timely reporting data will ensure the accuracy of the fee and that using transaction data to apportion the fee will result in a fair and equitable assessment across FINRA members. FINRA stated, however, that because it is statutorily prohibited from collecting amounts in excess of GASB's recoverable annual budgeted expenses and because a transaction-based fee is inherently variable due to the unpredictability of transaction volume, it proposed a quarterly assessment based on GASB's annual budget.⁹ Under proposed Section 14, the GASB Accounting Support Fee would be allocated among FINRA members on a quarterly basis based on municipal securities transactions reported to the MSRB. Specifically, each calendar quarter, each FINRA member would be required to pay an assessment to FINRA of its portion of one quarter of the annual GASB Accounting Support Fee amount that reflects the member's portion of the total par value of municipal securities

⁸ See Securities Exchange Act Release No. 64462 (May 11, 2011), 76 FR 28247 (May 16, 2011).

⁹ Section 19(g)(4) of the Securities Act prohibits FINRA from collecting GASB Accounting Support Fees for a fiscal year in excess of GASB's recoverable annual budgeted expenses. See 15 U.S.C. 77s(g)(4).

transactions reported by FINRA members to the MSRB under MSRB Rule G-14(b)¹⁰ in the previous calendar quarter. For example, if GASB's recoverable annual budgeted expenses for a given year were \$10 million, FINRA would collect \$2.5 million from its members each quarter. Each member's fee would be based on the member's proportion of municipal securities transactions (based on the par value of reported transactions, not their price) reported by all FINRA members to the MSRB in the previous calendar quarter.¹¹ Thus, for example, if a member reported transactions to the MSRB in a given quarter that accounted for 10% of the total par value amount of transactions reported by all FINRA members during the quarter, the member's assessment would be 10% of one quarter of GASB's annual budget (in the above example, the member's quarterly assessment would be \$250,000 (*i.e.*, 10% of \$2.5 million)).

To exclude members with de minimis transactions in municipal securities in a given quarter from being assessed the fee, FINRA proposed that members with a quarterly assessment of less than \$25 would not be charged the fee for that quarter. Any amounts originally assessed to those members would be reallocated among the members with an assessment that quarter of \$25 or more based on each member's portion of the total par value of municipal securities transactions reported by FINRA members to the MSRB.

As required by Section 19(g) of the Securities Act, any GASB Accounting Support Fees collected by FINRA would be remitted to the FAF¹² and used to support the efforts of the GASB to establish standards of financial accounting and reporting applicable to state and local

¹⁰ MSRB Rule G-14(b) sets out municipal securities transaction reporting requirements.

¹¹ If a member does not engage in reportable municipal securities transactions during a particular calendar quarter, the member would not be subject to the GASB Accounting Support Fee for that quarter.

¹² See 15 U.S.C. 77s(g)(1).

governments.¹³ In accordance with Section 19(g)(5)(B) of the Securities Act, collection of the GASB Accounting Support Fee shall not be construed to provide the Commission or FINRA direct or indirect oversight of the budget or technical agenda of the GASB or to affect the setting of generally accepted accounting principles by the GASB.¹⁴

Because some firms may seek to pass the GASB Accounting Support Fee onto customers engaged in municipal securities transactions, FINRA proposed to publish a Regulatory Notice each year disclosing the total annual GASB Accounting Support Fee that FINRA would collect for that year. In this annual Regulatory Notice, FINRA also anticipates setting out an estimated fee rate (per \$1,000 par value) based on the GASB recoverable annual budgeted expenses reported to FINRA for that year and historical municipal security trade reporting volumes so that firms would have some basis on which to establish a fee should they choose to do so. FINRA's Regulatory Notice would also remind any firms choosing to pass along the fee of the need for proper disclosure of the GASB Accounting Support Fee, including, if applicable, the fact that the fee is an estimate and that the firm ultimately may pay more or less than the fee charged to the customer. In addition, any disclosure used by the firm cannot be misleading and must comport with FINRA rules, including just and equitable principles of trade, as well as any applicable MSRB rules.

As proposed, the effective date of the proposed rule change would be the date of Commission approval. The initial fees assessed on members would be based on trading activity

¹³ See 15 U.S.C. 77s(g)(3). Specifically, FINRA stated that it anticipates establishing a separate bank account specifically for the GASB Accounting Support Fee and would coordinate with the FAF to establish a process by which FINRA would wire the funds into the FAF account for the GASB Accounting Support Fee. Further, given the separate bank account, FINRA would provide monthly account reconciliations and accounts receivable aging reports, which would be reviewed by FINRA management each month and would be available for review by FAF and GASB management upon request.

¹⁴ See 15 U.S.C. 77s(g)(5)(B).

reported in the calendar quarter during which the Commission approves the proposed rule change. As a result, the proposed GASB Accounting Support Fee may only cover a portion of the 2012 GASB budget.

III. Comment Letters

As noted above, the Commission received nine comment letters on the proposed rule change.¹⁵ Four commenters generally supported the proposed rule change.¹⁶ Three commenters expressed objections to the proposed rule change and urged the Commission to disapprove it.¹⁷ Five commenters, including three commenters who supported the proposed rule change, expressed concerns regarding various aspects of the proposal.¹⁸ Also, as noted above, FINRA submitted a response letter to the comments.¹⁹

As noted above, four commenters generally supported the proposed rule change.²⁰ One commenter stated that it strongly supports the proposal, and that the proposed rule change represents a very positive and long overdue step to provide the GASB, in its role as an independent standards setting body, with reliable funding.²¹ While this commenter pointed out several potential concerns with the proposed rule change, the commenter stated that “any concerns regarding the proposal were outweighed by the positive effects of FINRA’s

¹⁵ See supra note 4.

¹⁶ See AGA Letter; NASBO Letter; NASACT Letter; and Massachusetts Letter.

¹⁷ See SIFMA Letter; BDA Letter; and Melton Letter.

¹⁸ See FSI Letter; AGA Letter; Associations Letter; NASBO Letter; and NASACT Letter.

¹⁹ See supra note 5. Prior to filing this proposed rule change, FINRA issued Regulatory Notice 11-28 requesting comment on the proposal. See FINRA Regulatory Notice 11-28 (June 2011). In the Notice, FINRA addressed the comments it received in response to the Regulatory Notice.

²⁰ See supra note 16.

²¹ See AGA Letter at 1.

proposal.”²² This commenter further stated that the proposed rule change is consistent with the Dodd-Frank Act, and will “provide GASB with a stable funding source for its work,” “strengthen GASB’s independence,” “eliminate the risk that financial support could be lost if an unpopular course of action is pursued by GASB,” and “allow GASB to better plan its research work on important topics.”²³

Another commenter who supported the proposal urged the Commission to approve it, stating that the proposed rule change “represents the best compromise identified through a deliberative open process and represents a long-term solution to GASB funding needs.”²⁴ Another commenter stated that “allocating the support fee among FINRA member firms based on municipal securities transactions appears to be a reasonable way to provide GASB with a steady source of independent funding” and that “[t]he methodology seems fair and equitable.”²⁵ The final commenter that generally supported the proposal stated that it agreed with most of the proposed changes, but was concerned the proposal did not specifically state that the GASB Accounting Support Fee could not be passed on to issuers of municipal debt.²⁶

Several commenters who opposed the proposed rule change expressed the belief that the proposed GASB Accounting Support Fee is not equitable because it is imposed only on broker-dealers.²⁷ One commenter stated that charges to the broker-dealer community should be restricted “to those items that are directly connected to broker-dealers,” and that “the connection

²² Id. at 2.

²³ Id.

²⁴ Massachusetts Letter.

²⁵ NASACT Letter.

²⁶ See NASBO Letter at 1.

²⁷ See Melton Letter; BDA Letter; and SIFMA Letter.

to the broker-dealer community in this case is tenuous.”²⁸ One commenter stated that GASB’s activities benefit many participants in the municipal market other than broker-dealers, so the fee should be shared broadly by those who benefit.²⁹ Another commenter stated that the proposed rule change is an “unfair tax” on broker-dealers.³⁰ This commenter stated that the true beneficiaries of GASB’s work are state and local governments, investors, rating agencies, and auditors, and they should directly fund GASB’s operations.³¹ Further, this commenter stated that, under the proposed rule, many diverse end users of GASB’s accounting and financial reporting standards would get a “free ride.”³² In addition, this commenter stated that numerous state and local governments and other municipal bond obligors do not follow GASB standards, so there is “no reasonable basis, nexus, or justification for the bondholders of these entities (or even the entities themselves) to financially support the activities of GASB,” and that “[i]f dealers are required to fund GASB, they should enjoy some certainty that GASB’s work product will be adhered to.”³³ This commenter also stated that bank dealers are not subject to FINRA regulation, so they would not be covered under the proposed rule change.³⁴ Further, this commenter stated that each broker-dealer counterparty to a trade reports the trade under MSRB Rule G-14(b), resulting in a multiple assessment for a single purchase and sale.³⁵ Lastly, this commenter

²⁸ Melton Letter (stating that “[r]egistered broker-dealers are neither governmental entities nor accountants”).

²⁹ See BDA Letter at 1 (stating that activities of GASB benefit issuers, financial advisors, investors, and citizens).

³⁰ See SIFMA Letter at 3.

³¹ See id. at 3-4.

³² See id. at 4.

³³ Id.

³⁴ See id. at 6.

³⁵ See id.

suggested structuring the fee as an underwriting assessment on all municipal securities (or potentially just on bonds with GASB reporting obligors) purchased by a dealer from an issuer as part of a primary offering.³⁶

One of the commenters who supported the proposed rule change also noted that there could be a potential “unintended negative effect from assessing GASB’s costs across only a portion of the stakeholders that benefit from GASB’s work,” and that relying on a single constituency could have an unintended negative consequence.³⁷ This commenter also stated, however, that it believes that the proposed rule change could create a “healthy segregation” for organizations that currently both collect sums from states and local governments for the funding of GASB and also participate heavily in commenting on the policy decisions developed by the GASB, by eliminating any potential conflicts between these two interests.³⁸

In response to comments regarding who should be required to pay the GASB Accounting Support Fee, FINRA reaffirmed its statements in the Notice that Section 19(g) of the Securities Act substantially limited the parameters of the GASB Accounting Support Fee and that FINRA has no authority to collect the fee from non-FINRA members.³⁹ In the Notice, FINRA also stated that because the goal of the assessment is to equitably allocate the GASB Accounting Support Fee among participants in the municipal securities market, it is appropriate that both brokers in a broker-to-broker transaction be considered as participating in that market with

³⁶ See id. at 7.

³⁷ See AGA Letter at 1-2. The commenter also pointed out that state and local governments vary as to how often and to what extent they enter the municipal securities market, but stated that, even considering the current GASB funding mechanism, it is unaware of any link between a state or local government’s decision to allocate funds to support GASB and its subsequent decision to follow GASB standards. See id.

³⁸ See id. at 2.

³⁹ See FINRA Response Letter at 3 and Notice, 77 FR at 1122.

respect to the transaction, rather than using only one side of the trade in calculating the fee.⁴⁰

FINRA further stated its belief that the proposed fee would accurately reflect firms' participation in the municipal securities markets, whether those firms act as underwriters, brokers' brokers, or simply as buyers or sellers of municipal securities.⁴¹ Lastly, in the Notice, FINRA declined to distinguish between issues depending on whether the obligor has followed Financial Accounting Standards Board ("FASB") standards, GASB standards, or neither.⁴² FINRA stated that this information is not required to be reported to the MSRB, is not available on an automated basis, and that it would be impractical for FINRA to attempt to maintain a comprehensive and accurate list of issues where the obligor has followed GASB standards.⁴³ In its response letter, FINRA also stated its belief that the issue of who should pay the GASB Accounting Support Fee is more properly resolved by the Commission, and that unless the Commission rescinds its order, FINRA must proceed with the rulemaking pursuant to Section 19(g) and the Commission's order.⁴⁴

Several commenters representative of state and local officials stated that the proposed rule change would allow FINRA members to pass the GASB Accounting Support Fee on to the members' customers, which would be inconsistent with the Dodd-Frank Act.⁴⁵ One commenter who stated that the proposed fee is a reasonable way to provide GASB with a steady source of

⁴⁰ See Notice, 77 FR at 1123.

⁴¹ See id. FINRA also noted that basing the GASB Accounting Support Fee on underwriting, rather than transactions, would increase the burden on lead underwriters and would disproportionately affect market participants engaged in underwriting activities rather than in trading in the secondary market. Further, FINRA stated that basing the fee on underwriting would wholly exempt secondary market participants from paying the fee and the fee would be assessed only on future municipal issues and would "grandfather" in previous issues. See id. at note 42.

⁴² See id. at 1123.

⁴³ See id.

⁴⁴ See FINRA Response Letter at 5.

⁴⁵ See Associations Letter; NASBO Letter; and NASACT Letter.

independent funding and that the methodology is fair and equitable expressed concern that the fee could be passed along to customers, particularly municipal issuers.⁴⁶ This commenter stated that the Dodd-Frank Act specifically provides that the fee is to be paid by members of a national securities association.⁴⁷ Another commenter stated that “[t]he proposed rule does not adhere to the statutory language because it does not specify that the Fee must be paid by the members of the association, and in fact leaves open the possibility that the Fee may be passed along to customers, which might include state and local governments who issue municipal securities.”⁴⁸ This commenter also stated that, without language that would prevent FINRA members from passing the fee to issuers of municipal securities, “there will be nothing to ensure that the law is correctly implemented, and that state and local governments – and ultimately tax payers – will not be unnecessarily burdened with additional fees.”⁴⁹ One more commenter expressed concern that the proposed rule change is inconsistent with the statutory language of the Dodd-Frank Act “because it does not specify that the fee be paid by the members of the association, and leaves open the possibility that the fee may be passed along to customers which includes state and local governments who issue municipal securities.”⁵⁰

On the other hand, commenters representing broker-dealers stated that the proposal should allow broker-dealers to pass on the GASB Accounting Support Fee to customers engaged in municipal securities transactions.⁵¹ One commenter stated that dealers should be allowed to pass the fee to municipal issuers instead of or in addition to investors, and that this would more

⁴⁶ See NASACT Letter.

⁴⁷ See id.

⁴⁸ Associations Letter at 1.

⁴⁹ Id. at 2.

⁵⁰ NASBO Letter at 1-2.

⁵¹ See SIFMA Letter and BDA Letter.

closely follow how FASB is funded.⁵² Another commenter suggested that broker-dealers should be allowed to share the burden of the fee and pass through the fee.⁵³

In response to comments regarding whether FINRA members could pass through the GASB Accounting Support Fee, FINRA reaffirmed its views as expressed in the Notice,⁵⁴ and responded that Section 19(g) of the Securities Act “does not, in fact, require that the fee be ‘paid’ by FINRA members, much less ‘specifically state’ such a requirement.”⁵⁵ FINRA stated that the proposed rule change “does precisely what the statute and the SEC GASB Order require: it proposes a rule to allocate, assess, and collect the GASB Accounting Support Fee from FINRA members, and only from FINRA members.”⁵⁶ FINRA further stated that the manner by which its members choose to recoup the expenditure is not addressed by Section 19(g) of the Securities Act, the Commission’s order, or FINRA’s proposed rule.⁵⁷

Two commenters expressed concerns with respect to the proposed de minimis exemption for FINRA members whose GASB Accounting Support Fee assessment is less than \$25 per

⁵² See SIFMA Letter at 6. This commenter further stated that the proposed fee unfairly burdens certain dealers because many transactions reported to the MSRB pursuant to Rule G-14(b) do not involve customers, which means some dealers cannot pass through the fee to customers. See id. at 5.

⁵³ See BDA Letter at 2.

⁵⁴ See Notice, 77 FR at 1124. FINRA stated that it “has long recognized that members pass fees through to the customers whose transactions generate those fees, and FINRA rules generally do not address the commercial allocation of fees between members and their customers, provided such fees are fair, reasonable, and disclosed.” Id. FINRA also declined to give a blanket exemption for issuers of municipal securities, and noted that transactions from a municipal securities issuer to an underwriter are not reported to the MSRB and would not generally be counted toward a member’s quarterly assessment. See id.

⁵⁵ FINRA Response Letter at 4.

⁵⁶ Id.

⁵⁷ See id. at note 16. FINRA also stated that it has no rule dictating how its member firms cover expenditures, and does not believe that any such provision is required by Section 19(g) or the Commission’s order. See id.

quarter.⁵⁸ One commenter urged FINRA to increase the threshold for the exemption to \$250 because “it would provide relief to a greater number of member firms with de minimis involvement in municipal trading” and “would appropriately place the burden of supporting the annual budget of the GASB primarily on those firms that are substantially involved in municipal trading.”⁵⁹ In the alternative, this commenter urged FINRA to “provide clarification as to why alternative threshold levels between \$25 and \$1000 were not considered or discussed in the Proposed Rule.”⁶⁰ Another commenter stated that the exemption threshold should be increased to \$1000 because of the concentration of trading and because of problems passing through the fee.⁶¹ This commenter stated that there are problems with passing the fee through because a firm would not know its liability until after the close of the quarter and, therefore, it cannot determine the amount allocable to a given trade at the time of the trade.⁶² As such, any attempt to pass on the fee would “necessarily be an estimate, and one that would surely be either too much or too little.”⁶³ Because “[s]etting up a system to track these charges would disproportionately burden smaller firms, as would the alternative of the broker-dealer accepting the entire burden of the GASB fee,” the commenter requested that the exemption threshold be increased to \$1000.⁶⁴ This commenter also stated that a threshold of \$1000 would capture “90 percent of the par volume,” and that “[b]ecause of the concentration of trading, we believe the focus should not be on the

⁵⁸ See FSI Letter and BDA Letter.

⁵⁹ FSI Letter at 3.

⁶⁰ Id.

⁶¹ See BDA Letter at 2.

⁶² See id.

⁶³ Id.

⁶⁴ Id.

number of dealers included or excluded, but on the proportion of the par value of the market included or excluded.”⁶⁵

In response to comments regarding the threshold for the de minimis exemption, FINRA stated that it considered other dollar levels before proposing the \$25 threshold.⁶⁶ In the FINRA Response Letter, FINRA reaffirmed its statements in the Notice, and stressed that any amount that one member is not assessed because of the de minimis exemption must be assessed to another member, so it believes that the threshold should be relatively low to avoid the cumulative effect that the exemption would have on those members above the threshold in a given quarter.⁶⁷ Further, FINRA stated that any concern about proportionality is addressed in the fee assessment itself because firms with a higher proportional volume of reported sales will pay more than members with a smaller volume, and that the exemption was intended to exempt members with truly de minimis trading activity in a given quarter.⁶⁸

Several commenters expressed concern that there would be no oversight of the amount of GASB Accounting Support Fees to be collected, and that the Commission and FINRA do not have the authority to oversee the amount of the fees or the uses of the fees.⁶⁹ One commenter stated that “[s]eparating the authority to spend the money from the responsibility for collecting it

⁶⁵ Id.

⁶⁶ See FINRA Response Letter at 6. In the Notice, FINRA stated that a de minimis threshold of \$25 per quarter would exempt approximately 55% of the firms per quarter, and raising the threshold to \$1000 would exempt approximately 90% of the firms. See Notice, 77 FR at 1124.

⁶⁷ See FINRA Response Letter at 5. See also Notice, 77 FR at 1124. FINRA further stressed that it estimates that a \$25 threshold would exempt over half of its members reporting trades to the MSRB in a given quarter. See FINRA Response Letter at 6.

⁶⁸ See FINRA Response Letter at 6.

⁶⁹ See BDA Letter; SIFMA Letter; and AGA Letter.

– and accountability to those who pay it – is extremely bad public policy.”⁷⁰ Another commenter pointed out that neither the proposed rule change nor the Commission’s order directing funding for GASB contains a provision for independent direct or indirect oversight of GASB’s budget, and that this is inconsistent with the Commission’s oversight and review of FASB’s annual budget.⁷¹ This commenter requested that some independent oversight be implemented to encourage transparency and fiscal discipline.⁷²

Another commenter noted that it initially had been concerned that there appeared to be no constraints on GASB’s budget and/or limit on costs.⁷³ However, during its discussion with a FAF Board member, the commenter was informed that there are control mechanisms in place, including reviews by the Finance Committee of the FAF, and the commenter stated that it trusts that these mechanisms will remain in place and continue as a meaningful review and restraint on GASB’s budget and costs.⁷⁴

In response to comments regarding oversight of the amounts and uses of the GASB Accounting Support Fee, FINRA reaffirmed its statements in the Notice that Section 19(g)(5)(B)(i) of the Securities Act provides that the collection of the GASB Accounting Support Fee does not provide FINRA with any direct or indirect oversight of the budget or technical agenda of the GASB.⁷⁵ In its response letter, FINRA stated that the issue is more properly

⁷⁰ BDA Letter at 2.

⁷¹ See SIFMA Letter at 5.

⁷² See *id.*

⁷³ See AGA Letter at 2.

⁷⁴ See *id.*

⁷⁵ See Notice, 77 FR at 1122.

resolved by the Commission, and that unless the Commission rescinds its order, FINRA must proceed with the rulemaking pursuant to Section 19(g) and the Commission’s order.⁷⁶

Lastly, one commenter stated that the proposed \$50,000 fee for FINRA to administer the GASB Accounting Support Fee is unwarranted because FINRA could easily amend its process for collecting its Trading Activity Fee (“TAF”) to include the GASB Accounting Support Fee.⁷⁷ Alternatively, this commenter suggested that if FINRA moves forward with a fee based on an underwriting assessment or trades submitted to the MSRB, the MSRB could administer the fee for minimal costs because it already has the staffing and information to calculate, assess, and collect underwriting assessments, as well as transaction and technology assessments pursuant to MSRB Rule A-13.⁷⁸

While FINRA did not provide any additional response to the comment regarding the administrative fee in its response letter, FINRA stated in the Notice that it disagrees that the fee is unwarranted.⁷⁹ In the Notice, FINRA stated that use of a self-reporting model like the TAF is inappropriate for the GASB Accounting Support Fee because the transaction information available through the MSRB would be a more timely and reliable source of transaction information than self-reported data.⁸⁰ FINRA also stated that self-reporting could increase costs for firms and FINRA⁸¹ and that the exceptions from the TAF should not apply to the assessment

⁷⁶ See FINRA Response Letter at 5.

⁷⁷ See SIFMA Letter at 6.

⁷⁸ See *id.*

⁷⁹ See Notice, 77 FR at 1122.

⁸⁰ See *id.* at 1122-23.

⁸¹ See *id.* at 1123. FINRA stated that under a self-reporting model, FINRA would need to audit its members to ensure that their self-reporting was accurate and timely, and that Section 19(g) requires FINRA to collect exact amounts, thus creating an inability to

of the GASB Accounting Support Fee.⁸² Further, in the Notice, FINRA stated that the amount of the administrative fee was negotiated with the FAF and based on estimated costs to FINRA, and that it anticipates that the administrative fee will be reviewed and evaluated each year by FINRA and FAF in light of FINRA's experience in assessing and collecting the GASB Accounting Support Fee and the actual costs incurred by FINRA.⁸³

IV. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with Section 19(g) of the Securities Act⁸⁴ and the Commission order directing funding for the GASB,⁸⁵ as well as Section 15A(b)(5) of the Exchange Act.⁸⁶ Specifically, the Commission finds that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among FINRA members. Further, the Commission finds that proposed Section 14 to Schedule A of the FINRA By-Laws establishes a reasonable annual accounting support fee to adequately fund the annual budget of the GASB, as well as rules and procedures that provide for the equitable allocation, assessment, and collection of the accounting support fee from FINRA members, and the remittance of all such accounting support fees to the FAF.⁸⁷

remedy potential over- or under-payments by members that self-report erroneous data. See id.

⁸² See id. For example, FINRA noted that the TAF is currently only charged to the sell side of a transaction. See id.

⁸³ See id.

⁸⁴ 15 U.S.C. 77s(g).

⁸⁵ See supra note 8.

⁸⁶ 15 U.S.C. 78o-3(b)(5).

⁸⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

The Commission finds that the proposed GASB Accounting Support Fee is reasonable because it is based on the annual GASB budget, which is reviewed and approved according to the internal procedures of the FAF.⁸⁸ In addition, pursuant to Section 19(g)(4) of the Securities Act, the GASB Accounting Support Fee collected for a fiscal year may not exceed the recoverable annual budgeted expenses of the GASB.⁸⁹ The Commission finds that the proposed GASB Accounting Support Fee is equitable because the fee will be proportionally distributed among FINRA members based on a member's portion of the total par value of municipal securities transactions reported by FINRA members to the MSRB under MSRB Rule G-14(b) in the previous calendar quarter.⁹⁰ As such, FINRA members who are active participants in the municipal securities markets will be assessed a proportionately higher fee than those who are less active. The Commission also believes that the transaction information reported to the MSRB will serve as an objective, timely, and reliable source of transaction information. Further, the Commission believes that the de minimis exemption for FINRA members whose assessment is less than \$25 in a quarter is consistent with the equitable allocation of the fee because it will exempt firms who engage in a truly de minimis amount of transactions in municipal securities, and will not impose an undue

⁸⁸ See 15 U.S.C. 77s(g)(2).

⁸⁹ See 15 U.S.C. 77s(g)(4).

⁹⁰ The Commission believes that allocating the GASB Accounting Support Fee to each counterparty to a trade is consistent with the equitable allocation of the fee because each FINRA member is assessed a fee based on the level of its activities in the municipal securities markets. The Commission further believes that it is equitable to allocate the fee to reflect a member's participation in the municipal securities market, regardless of whether the member acts as an underwriter, broker's broker, or a buyer or seller of municipal securities. In addition, the Commission believes that it is equitable to not make a distinction, in allocating the fee, depending on whether the obligor has followed GASB standards.

burden on other firms that will receive allocations of this exempted fee.⁹¹ The Commission notes that FINRA members that do not fall within the de minimis exemption will be equitably allocated a portion of the fee based on an objective measure of their participation in the municipal securities market.⁹²

With respect to the comments that the proposed GASB Accounting Support Fee is inequitable because it is only imposed on broker-dealers, but not others who may benefit from GASB's activities, the Commission notes that Section 19(g) of the Securities Act provides that the Commission may require a registered national securities association to establish rules and procedures to provide for the equitable allocation, assessment, and collection of the GASB Accounting Support Fee from its members.⁹³ As such, consistent with the statutory language, FINRA may only impose the GASB Accounting Support Fee on its members, even though other entities may benefit from GASB's activities.

Further, in connection with the comments regarding whether FINRA members should be allowed to pass through the GASB Accounting Support Fee, the Commission notes that how FINRA members recoup their expenditures is not the subject of Section 19(g) of the Securities Act

⁹¹ The Commission notes that FINRA stated that it had considered other dollar levels before proposing the \$25 threshold. See supra note 66 and accompanying text.

⁹² With respect to the concern that any attempt to pass through the fee would be based on estimates, and that setting up a system to track charges to customers would disproportionately burden small firms, the Commission notes that the proposed rule change does not require FINRA members to pass the fee through to their customers.

⁹³ See 15 U.S.C. 77s(g). Further, as discussed above, one commenter pointed out that, by allocating the GASB Accounting Support Fee among FINRA members, the proposed rule change could eliminate conflicts of interest for entities that collect sums from state and local governments for the funding of GASB, but that also participate in commenting on the policy decisions developed by GASB.

or FINRA's proposed rule change.⁹⁴ Consistent with Section 19(g)(1) of the Securities Act,⁹⁵ the GASB Accounting Support Fee will be allocated and assessed to, and collected from, FINRA members.⁹⁶

With respect to the concerns that there would be no oversight of the amount of the GASB Accounting Support Fee to be collected and the use of the money, the Commission notes that Section 19(g)(5)(B)(i) of the Securities Act specifically states that Section 19 does not provide the Commission or any national securities association with direct or indirect oversight of the budget or technical agenda of the GASB.⁹⁷

With respect to comments regarding the \$50,000 fee for FINRA to administer the GASB Accounting Support Fee, the Commission notes that according to FINRA, the fee was negotiated with FAF and is based on estimated costs to FINRA. Further, FINRA stated that this fee may increase or decrease, if necessary, based on yearly reviews in light of FINRA's experience in assessing and collecting the GASB Accounting Support Fee and the actual costs incurred by

⁹⁴ With respect to the comment that the proposed rule change is inconsistent with how FASB is funded, the Commission notes that the allocation, assessment, and collection of the GASB Accounting Support Fee, unlike the FASB fee, is governed by Section 19(g) of the Securities Act.

⁹⁵ See 15 U.S.C. 77s(g)(1).

⁹⁶ The Commission notes that FINRA has proposed to publish a Regulatory Notice each year disclosing the total annual GASB Accounting Support Fee that it would collect for that year and an estimated fee rate, and that the Regulatory Notice would remind any firms choosing to pass through the fee of the need for proper disclosure of the GASB Accounting Support Fee, including, if applicable, the fact that the fee is an estimate and that the firm ultimately may pay more or less than the fee charged to the customer. In addition, FINRA has stated that any disclosure used by the firm cannot be misleading and must comport with FINRA rules, including just and equitable principles of trade, as well as any applicable MSRB rules.

⁹⁷ See 15 U.S.C. 77s(g)(5)(B)(i).

FINRA. As such, the Commission believes that the \$50,000 administrative fee is not unreasonable.⁹⁸

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁹⁹ that the proposed rule change (SR-FINRA-2011-073) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁰

Kevin M. O'Neill
Deputy Secretary

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⁹⁸ Based on FINRA's response to comments in the Notice and the response letter, the Commission believes that it is reasonable for FINRA to not amend its process for collecting its TAF to include the GASB Accounting Support Fee.

⁹⁹ 15 U.S.C. 78s(b)(2).

¹⁰⁰ 17 CFR 200.30-3(a)(12).