

July 29, 2020

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: MSRB Response to Comments on File No. SR-MSRB-2020-04

Dear Ms. Countryman:

On June 5, 2020, the Municipal Securities Rulemaking Board (“MSRB” or the “Board”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change consisting of amendments to MSRB Administrative Rules A-3 and A-6 (the “proposed rule change”) that will improve Board governance.¹ The proposed rule change would:

- Extend to five years the length of time that an individual must have been separated from employment or other association with any regulated entity to serve as a public representative² to the Board;
- Reduce the Board’s size from 21 to 15 members through a transition plan that includes an interim year in which the Board will have 17 members;
- Replace the requirement that at least one and not less than 30% of regulated members on the 21-member Board shall be associated with and representative of municipal advisors and shall not be associated with a dealer with a requirement that the 15-member Board include at least two members that shall be associated with and representative of municipal advisors and shall not be associated with a dealer;
- Impose a six-year limit on Board service;

¹ File No. SR-MSRB-2020-04. The text of the proposed rule change as filed by the MSRB is available at <http://www.msrb.org/~media/Files/SEC-Filings/2020/MSRB-2020-04.ashx?>.

² The Securities Exchange Act of 1934 (the “Exchange Act”) categorizes Board members in two broad groups: individuals who must be independent of any broker, dealer or municipal securities dealer (“dealer”) or municipal advisor (collectively, “public representatives”) and individuals who must be associated with a dealer or municipal advisor (collectively, “regulated representatives”).

- Remove overly prescriptive detail from the description of the Board’s nominations process while preserving in the rule the key substantive requirements;
- Require that any Board committee with responsibilities for nominations, governance, or audit be chaired by a public representative; and
- Make certain other reorganizational and technical changes.

The SEC published the proposed rule change for comment in the Federal Register on June 24, 2020.³ Five comment letters were submitted. Two of the comment letters urged the Commission to disapprove the proposed rule change unless certain changes are made,⁴ while the others expressed concerns about certain amendments included in the proposed rule change.⁵ After careful consideration of the comment letters, the MSRB provides the following response.

Independence Standard

The Exchange Act requires the Board to establish by rule “requirements regarding the independence of public representatives.”⁶ MSRB Rule A-3 defines the term “independent of any municipal securities broker, municipal securities dealer, or municipal advisor” to mean that

³ Exchange Act Release No. 89092 (June 18, 2020), 85 FR 37974 (June 24, 2020) (the “Notice of Proposed Rule Change”).

⁴ Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America to Vanessa Countryman, Secretary, SEC (July 15, 2020) (“BDA Letter”); Letter from Emily Swenson Brock, Director, Federal Liaison Center, Government Finance Officers Association to Vanessa Countryman, Secretary, SEC (July 15, 2020) (“GFOA Letter”).

⁵ Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors to Vanessa Countryman, Secretary, SEC (July 15, 2020) (“NAMA Letter”); Letter from Steven Apfelbacher, Rene Boicourt, Marianne Edmonds, Robert Lamb, and Noreen White to Vanessa Countryman, Secretary, SEC (July 15, 2020) (“Former Board Members Letter”); Letter from Government Finance Officers Association, American Public Power Association, International Municipal Lawyers Association, National Association of Counties, National Association of Health and Educational Facilities Finance Authorities, National Association of State Auditors, Comptrollers and Treasurers, National Association of State Treasurers, National League of Cities, and Native American Finance Officers Association to Vanessa Countryman, Secretary, SEC (July 15, 2020) (“Issuer Organizations Letter”).

⁶ Exchange Act Section 15B(b)(2)(B)(iv), 15 U.S.C. 78o-4(b)(2)(B)(iv).

an individual has “no material business relationship with” such an entity. The current rule defines the term “no material business relationship” to mean, at a minimum, that:

- The individual is not, and within the last two years was not, associated with a dealer or municipal advisor; and
- The individual does not have a relationship with any dealer or municipal advisor, compensatory or otherwise, that reasonably could affect the individual’s independent judgment or decision making.

The proposed rule change would increase the two-year separation period in the definition of “no material business relationship” to five years. As described in the Notice of Proposed Rule Change, this amendment is intended to enhance the independence of public representatives who have prior regulated entity associations and better avoid any appearance of a conflict of interest on the part of a public representative.⁷

Of the five commenters on the proposed rule change, one reiterated its concern, expressed in its response to the Board’s earlier request for comment on most of the issues included in the proposed rule change (the “RFC”),⁸ that “five years away from the industry and the market is too long for a Board member to be effective.”⁹ This commenter stated that the Board has “provided no evidence that the current two-year required separation has created any conflicts or even the perception of conflicts” and that the only effect of an increase to five years would be to prevent qualified and knowledgeable persons from serving on the Board.¹⁰

While the five-year separation requirement may postpone the time when some otherwise qualified persons may apply for Board membership, the comment’s intimation that former regulated entity employees are the primary – or the best – source of public members is not correct. Section 15B(b)(1) of the Exchange Act provides that all Board members “shall be

⁷ See Notice of Proposed Rule Change, 85 FR at 37976.

⁸ MSRB Notice 2020-02 (Jan. 28, 2020), available at, <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2020-02.ashx??n=1>. Comments on the RFC are available on the Board’s website at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2020/2020-02.aspx?c=1>.

⁹ See BDA Letter (quoting Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, to Ronald W. Smith, Corporate Secretary, MSRB (April 29, 2020)).

¹⁰ See BDA Letter.

knowledgeable of matters related to the municipal securities markets” and that at least one of the public representatives must be a member of the public “with knowledge of or experience in the municipal industry.”¹¹ As the Board stated in the Notice of Proposed Rule Change, the Board does not view prior experience with a dealer or municipal advisor as a prerequisite for Board service as a public representative, and public representatives may gain the required knowledge in any number of ways.¹²

One commenter stated that the “‘knowledge standard’ requirement for public applicants, as written, is very subjective and, in the past, has been too narrowly interpreted by the MSRB Board and Committees” and suggested that the Board “should ensure that individuals with broad knowledge of the public interest be considered in addition to those who have specialized industry expertise and have traditionally been appointed to these seats.”¹³ The Board continues to believe, as it noted in the RFC, that “while regulated representatives may bring specialized expertise to the regulation of a market with features and functions that are vastly different from those of other financial markets, public representatives may bring a broader perspective of the public interest.”¹⁴ Through its nominations and elections process, the Board will continue to seek qualified public representatives who can bring that perspective to bear on Board decision-making.

The Board determined to amend MSRB Rule A-3 to require a five-year separation period after considering comments on the RFC. As the Board stated in the Notice of Proposed Rule Change, those comments suggested to the Board that while some stakeholders perceive – accurately, in the Board’s view – that the Board’s public representatives are independent of the entities that the Board regulates, that perception is not universally held.¹⁵ Accordingly, as the Board noted in

¹¹ 15 U.S.C. 78o-4(b)(1).

¹² See Notice of Proposed Rule Change, 85 FR at 37982.

¹³ See NAMA Letter.

¹⁴ See RFC, at 3.

¹⁵ See Notice of Proposed Rule Change, 85 FR at 37982. While the BDA letter correctly notes that the comment process is not a vote, it incorrectly asserts that the “vote” on the RFC was five commenters opposed to the five-year period and two in favor of it. In fact, as noted in the Notice of Proposed Rule Change, while five commenters opposed the change, three commenters supported the increase to five years and another believed some increase to the separation period was appropriate but did not specify a length. See *id.* at 37981.

the Notice of Proposed Rule Change, increasing the length of the separation period is intended in part to address the perception held by some stakeholders that public representatives are not sufficiently independent.¹⁶ The Board continues to believe that enhancing the appearance of independence of public representatives will provide additional assurance that the Board's decisions are made in furtherance of its mission to protect investors, municipal entities, obligated persons and the public interest and to promote a fair and efficient municipal securities market.¹⁷

Board Composition

The proposed rule change would reduce the size of the Board from 21 members to 15 members and, as a result, includes an amendment to the Board composition requirements in MSRB Rule A-3 that the Board believes is necessary in light of the smaller Board size.¹⁸ Specifically, the proposed rule change would replace the current requirement that at least one and not less than 30 percent of the total number of regulated representatives shall be associated with and representative of municipal advisors and shall not be associated with a dealer with a requirement that at least two of the regulated representatives shall be associated with and representative of municipal advisors and shall not be associated with a dealer.

Comments on Municipal Advisor Representation

In the Notice of Proposed Rule Change, the Board explained that in light of the broad range of municipal advisors subject to MSRB regulation, it believes that it remains appropriate to require municipal advisor representation greater than the statutory minimum of one.¹⁹ The amendment included in the proposed rule change thus preserves as closely as possible the current percentage of municipal advisors on the Board as the Board moves from a 21-member Board to a 15-member Board. The amendment requires that at least two (28.6%) of the regulated representatives on a 15-member Board shall be associated with and representative of municipal advisors and shall not be associated with a dealer, very close to the representation currently required. Retaining the current requirement of not less than 30% with the 15-member

¹⁶ See *id.* at 37976.

¹⁷ See MSRB Mission Statement, available at, <http://www.msrb.org/About-MSRB/About-the-MSRB/Mission-Statement.aspx>.

¹⁸ None of the commenters addressed the amendment in the proposed rule change that would reduce the size of the Board.

¹⁹ See Notice of Proposed Rule Change, 85 FR at 37976, 37984.

Board, on the other hand, would require that three of the seven (or 42.9%) regulated members be associated with and representative of municipal advisors and not be associated with dealers.²⁰

One commenter believed that only a minimum of one municipal advisor representative should be required,²¹ while two commenters believed that a minimum of three municipal advisor representatives should be required.²² The commenter that believed that only one municipal advisor representative should be required stated that requiring only the statutory minimum of one municipal advisor would provide the Board with the maximum flexibility to determine municipal advisor representation based on its anticipated agenda. Noting that dealers pay more in fees to the MSRB than non-dealer municipal advisors, this commenter “call[ed] on the MSRB to set the ratio of board seats between dealers and MAs based on each constituency’s relative financial contribution to the organization, subject to statutory requirements.”²³

The commenters that believed at least three municipal advisor representatives should be required noted that municipal advisor regulation remains a significant focus of the Board.²⁴

²⁰ See Notice of Proposed Rule Change, 85 FR at 37983.

²¹ See BDA Letter.

²² See NAMA Letter; Former Board Members Letter.

²³ See BDA Letter. The BDA Letter also states, in support of its position that only one municipal advisor should be required, that five commenters on the RFC opposed the Board’s proposal to require at least two municipal advisors while only two agreed with it. As noted in the Notice of Proposed Rule Change, two commenters (one of which was BDA) believed that one municipal advisor should be required, two believed that two municipal advisors should be required, and three believed that three municipal advisors should be required. See Notice of Proposed Rule Change, 85 FR at 37983.

²⁴ See NAMA Letter; Former Board Members Letter. Both commenters characterized statements in the Notice of Proposed Rule Change that the Board had completed the rulemaking associated with implementation of the Dodd-Frank Act, including the establishment of the core municipal advisor regulatory regime, *see* Notice of Proposed Rule Change at 37975, 37976, as minimizing the continued significance of rulemaking involving municipal advisors. These commenters noted that municipal advisor regulation will continue to present the Board with challenges going forward. The Board agrees, as it noted in the Notice of Proposed Rule Change, that “its expanded duties with regard to the protection of municipal entities and obligated persons and the regulation of municipal advisors are ongoing.” See Notice of Proposed Rule Change, 85 FR at 37975.

These commenters suggested that at least three municipal advisors are necessary to represent the diverse range of that profession as well as the issuer clients it serves.²⁵ One believed that it would be difficult for two municipal advisors “to make their voices heard” on a Board with five dealer representatives and stated that just as MSRB Rule A-3 recognizes the difference between bank and non-bank dealers, “the broad and different nature of our MA businesses [should] also be considered.”²⁶ This commenter also disagreed that representation on the Board should be proportionate to fees paid.²⁷

After considering these comments, the Board continues to believe that while municipal advisor representation on the Board should be greater than the statutory minimum of one, requiring at least three of seven regulated representatives (or 42.9%) to be municipal advisors would not be appropriate. As an initial matter, the Board notes that Rule A-3 sets the minimum number of Board members within each regulated category and that once those minimums are met the Board seeks to balance the Board each year with the mix of members it believes will best serve its mission to protect investors, municipal entities, obligated persons and the public interest and to promote a fair and efficient municipal securities market.²⁸ While that mix may, in a particular year, include three municipal advisors, the proposed rule change reflects the Board’s view that it should always include at least two Board members that are associated with and representative of municipal advisors and are not associated with dealers.

As described in the Notice of Proposed Rule Change, the Board reached that position for some of the reasons described by commenters. Specifically, the Board agrees that municipal advisor representation greater than the statutory minimum continues to be appropriate in light of the broad range of municipal advisors subject to MSRB regulation, though it disagrees, based on its experience with the current Board composition, that a proportional increase in municipal advisor representation is warranted.²⁹

The Board also disagrees with the comment that the Board should “set the ratio of board seats between dealers and MAs based on each constituency’s relative financial contribution to the

²⁵ See Former Board Members Letter; NAMA Letter.

²⁶ See Former Board Members Letter.

²⁷ See *id.*

²⁸ See MSRB Mission Statement, available at, <http://www.msrb.org/About-MSRB/About-the-MSRB/Mission-Statement.aspx>.

²⁹ See Notice of Proposed Rule Change, 85 FR at 37976.

organization, subject to statutory requirements.”³⁰ Nothing in the Exchange Act suggests that fees paid to the Board should be tied to Board composition and, in fact, the Act treats the two topics in separate provisions. As described in the Notice of Proposed Rule Change, Exchange Act Section 15B(b)(2)(B) requires MSRB Rules to “establish fair procedures for the nomination and election of members of the Board and assure fair representation in such nominations and elections of public representatives, broker dealer representatives, bank representatives, and advisor representatives.”³¹ In the Notice of Proposed Rule Change, and above, the Board explained that the proposed rule change would maintain, as closely as possible on a 15-member Board, the existing balance of representation among regulated representatives and that the Board believes that requiring municipal advisor representation greater than the statutory minimum continues to assure fair representation in light of the broad range of municipal advisors subject to MSRB regulation.³² For these reasons, the Board believes that the amendments related to Board composition are consistent with the Exchange Act.

Separately, Section 15B(b)(2)(J) of the Exchange Act requires dealers and municipal advisors to pay “such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board.”³³ As such, comments on the MSRB fee structure are outside the scope of this proposed rule change.

Issuer Representation

Although the proposed rule change includes no amendments related to Board composition other than as it relates to municipal advisors, three commenters urged the Board to increase the required number of issuer representatives.³⁴ One such commenter stated that a Board with eight public members should include three issuers, three investors, and two “general public members” and asked the Commission not to approve the proposed rule change without increasing the number of issuers.³⁵ This commenter believed that a single issuer representative is insufficient to represent the broad spectrum of issuers in the municipal market, and stated

³⁰ See BDA Letter.

³¹ 15 U.S.C. 78o-4(b)(2)(B).

³² See Notice of Proposed Rule Change, 85 FR at 37979.

³³ 15 U.S.C. 78o-4(b)(2)(J).

³⁴ See GFOA Letter; Issuer Organizations Letter; NAMA Letter.

³⁵ See GFOA Letter

that “[w]ithout issuers, none of the other parties would exist, and because of this, the voice of the issuer community is essential to ensure robust capital formation within the parameters of the MSRB’s regulatory regime.”³⁶

In the Notice of Proposed Rule Change, in response to similar comments on the RFC, the Board noted that although the proposed rule change does not include amendments that would change the number of required issuer representatives on the Board, the Board modified the plan described in the RFC for transitioning immediately to a 15-member Board in the next fiscal year in order to avoid being left with only one issuer representative for that year.³⁷ The Board did so because it agreed with commenters on the RFC that operating with only one issuer is a particularly undesirable result in fiscal year 2021 in light of the effects of the COVID-19 pandemic on municipalities and the municipal securities market more generally.³⁸ Accordingly, the Board determined to specify an interim Board size of 17 members in the first year of its transition to the reduced Board size of 15 members, which will allow the Board the benefit of a second issuer representative in fiscal year 2021.³⁹ At the same time, based on its experience with the current Board composition requirements, the Board continues to believe that maintaining the *status quo* as it relates to Board composition as closely as possible with the smaller Board size remains appropriate and will continue to assure fair representation.

Conclusion

The Board appreciates commenters’ review of the proposed rule change as well as their review of the RFC that preceded it. After carefully considering the comments on the proposed rule change, the Board believes that they do not raise new issues but, instead, revisit the issues raised in comments responding to the RFC, which the Board considered and addressed in the proposed rule change. The Board continues to believe that the proposed rule change will

³⁶ See *id.*; see also NAMA Letter (stating that “the issuer community is extremely diverse and should be well and better represented on the Board to allow for the different ways that issuers approach the capital markets”); Issuer Organizations Letter (describing the diverse range of issuers and urging the Board to require at least two issuer representatives to “ensure that issuer voices are heard and utilized by the MSRB in its rulemaking, management of the EMMA system, and municipal market educational efforts”).

³⁷ See Notice of Proposed Rule Change, 85 FR at 37984.

³⁸ See *id.*

³⁹ See *id.*

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improve Board governance and is consistent with the requirements of the Exchange Act, and the Board respectfully requests that the Commission approve it.

Please feel free to contact me at (202) 838-1500 with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Jacob N. Lesser / RS". The signature is written in a cursive, flowing style.

Jacob N. Lesser
Associate General Counsel