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September 12, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-MSRB-2013-06

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide supplemental comments to those which were previously submitted on August 14, 2013 to the Securities and Exchange Commission ("SEC" or "Commission") in connection with SR-MSRB-2013-06 – Proposed Rule Change Consisting of Amendments to MSRB Rule A-3, on Membership on the Board, to Modify the Standard of Independence for Public Board Members (the "Notice").

Background

As cited by NAIPFA previously, Section 15B(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Municipal Securities Rulemaking Board ("MSRB") to be comprised of a majority of members who are "independent of any municipal securities broker, municipal securities dealer, or municipal advisor," otherwise referred to as "public members".

The MSRB, charged with establishing requirements for the term "independent" as it is used within the phrase "independent of any municipal securities broker, municipal securities dealer, or municipal advisor," determined that "independent" required individuals to have "no material business relationship" with any municipal securities broker, municipal securities dealer, or municipal advisor" (collectively, "Regulated Entities").[1] In turn, the phrase "no material relationship" was defined by the MSRB to mean, in part, that

> at a minimum, the individual is not and, within the last two years, was not associated with a municipal securities broker, municipal securities dealer, or municipal advisor and that the individual does not have a relationship with any municipal securities broker, municipal securities dealer, or municipal advisor, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the individual.[2]

[1] Securities and Exchange Commission, Release No. 34-63025; File No. SR-MSRB-2010-08, (Sept. 30, 2010), at 5.
[2] *Id.*, at 5-6.

Amendments to Rule A-3 Are Inconsistent With Exchange Act

For reasons discussed in our prior comments, the SEC accepted the MSRB's above-referenced definitions. However, the Exchange Act's requirement that public members be independent of Regulated Entities remains. Thus, although the MSRB now wishes to "balance" the Exchange Act's requirement that Board Members be knowledgeable of matters related to the municipal securities market with the requirement that such individuals be "independent",[3] these requirements are themselves independent of one another in that the Exchange Act does not permit the dilution of one requirement simply to satisfy the other. Arguably, however, this may be permissible if the MSRB were to demonstrate that such requirements could not coexist, such as if the MSRB were to receive an insufficient number of applications from eligible and qualified candidates.

However, at this time there is no evidence to suggest that these two requirements cannot be satisfied under current Rule A-3, particularly in light of the number of applications the MSRB received during its most recent election cycle from eligible and qualified candidates.[4] Therefore, with respect to the MSRB's proposed amendments to Rule A-3 (the "Amendments"), the SEC must determine whether the Amendments are consistent with the Exchange Act's mandate that public members be independent of Regulated Entities, without regard to the other requirement that such members possess knowledge of matters related to the municipal securities market.

Accordingly, the SEC's undertakings relative to determining whether the Amendments are consistent with the Exchange Act must be based upon its interpretation of the applicable statutes. In this regard, the United States Supreme Court has consistently stated that terms that are not statutorily defined are to be given their ordinary or natural meaning, which is often derived from a dictionary.[5] In this instance, no definition of "independent" is contained within the Exchange Act that is applicable to Section 15B. Furthermore, there is no legislative record to indicate what Congress intended when it utilized the phrase "independent of any municipal securities broker, municipal securities dealer, or municipal advisor."

With respect to legislative intent, and by way of background, the original version of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), as passed by the House of Representatives, contained the following language: the MSRB shall be comprised of a "majority of independent public representatives." Thereafter, the Senate passed its version of the Act, which contained the following language: the MSRB shall be comprised of a majority of "individuals who are not associated with any broker, dealer, municipal securities dealer, or municipal advisor (other than by reason of being under common control with, or indirectly controlling, any broker or dealer which is not a municipal securities broker or municipal securities dealer)". These two versions of the Act were then reconciled in a bicameral

[3] MSRB Comment Letter to SEC regarding SR-MSRB-2013-06 (September 6, 2013), at 2.
[4] NAIPFA Comment Letter to SEC regarding SR-MSRB-2013-06 (August 14, 2013), Exhibit A; *See* MSRB Comment Letter, at 7.
[5] *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *See Commissioner v. Soliman*, 506 U.S. 168, 174 (1993).

conference committee which incorporated the House's "independent" language, but then further specified that individuals must be "independent of any municipal securities broker, municipal securities dealer, or municipal advisor." However, the fact that the Senate's language was not maintained in the final version of the Act does not carry any particular significance in this instance because of the lack of applicable congressional documentation regarding what Congress intended by excluding this language from the applicable provisions.

What is more, the language that was ultimately incorporated into the Act is arguably more expansive than that which was contained within the Senate's version for, as discussed more fully below, the term "independent" encompasses the notion that an individual not be "associated with" an entity or be under the control or influence of another. Therefore, the SEC must either disregard the above-referenced changes to the Act and rely solely upon the terms of the Exchange Act or, alternatively, take note of the fact that the current language relative to the term "independent" encompasses and expands upon the language contained within the Senate's version of the Act. In either instance, the SEC must find that the Amendments are inconsistent with the Act's current language. Notwithstanding the foregoing, the fact remains that the MSRB was given the authority to establish "*requirements* of independence," but was not granted authority to develop rules that obviated its mandate to maintain an "independent" majority.

Therefore, for purposes of interpreting the language of the Exchange Act, and for the reasons discussed above, the SEC should look to the ordinary or natural meaning of the term "independent" for purposes of determining whether the MSRB's established "requirements" are consistent with the Exchange Act's mandate that such members be "independent." Consequently, Black's Law Dictionary, generally accepted as an authoritative source, defines the term "independent" as: (1) not subject to the control or influence of another; (2) not associated with another (often larger) entity; and (3) not dependent or contingent on something else.[6]

The Amendments are, therefore, inconsistent with the Exchange Act as they are inconsistent with the ordinary and natural meaning of the term "independent"; the Amendments would allow public board member positions to be filled by individuals who are subject to the control or influence of another by virtue of their association with Regulated Entities, and whose decision making will depend upon or be contingent upon how their decisions will impact their Regulated Entity affiliate. The Amendments are therefore inconsistent with each of the generally accepted understandings of independence and, therefore, the Exchange Act. However, the inconsistencies with respect to definition (3) are less clear than with regard to definitions (1) and (2), and require additional comment. In this regard, regardless of any attempt by the MSRB or others to assert claims to the contrary, public board members who are employed by, for example, subsidiaries of Regulated Entities, can reasonably be expected to base their decision making upon the interests of those Regulated Entity affiliates, not upon the interests of issuers and investors, those with whom the Act clearly protects. This fact is inescapable and it is counterintuitive to conclude

[6] Similarly, Merriam-Webster Dictionary defines the term "independent" to mean: (1) not subject to control by others; (2) not affiliated with a larger controlling unit; (3) not requiring or relying on something else: not contingent; (4) not looking to others for one's opinions or for guidance in conduct.

otherwise.

To further illustrate the inconsistency that the Amendments present with respect to definition (3), the SEC should consider that individuals who are currently employed by affiliates of Regulated Entities can reasonably be expected to exhibit rational economic behavior as MSRB Board Members, and can be susceptible to influence resulting from incentives and/or penalties for acting in a particular manner with respect to their position on the Board. In addition, because of these individuals' affiliations, they are also subject to influence from their employers, or, if they are principals of their companies, by their fiduciary duties to their companies' shareholders (which may include themselves). For example, it is often the case in parent-subsidiary corporate structures that management will overlap in that Directors or Officers of a parent company will commonly also serve as Directors or Officers of subsidiaries. As such, because of the impact that public members may have on Regulated Entities, the managers of their corporate affiliates can reasonably be expected to influence the decision making of employees serving on the MSRB Board, for an individual's fear of retaliation from their managers or companies' shareholders as a result of a failure to act in a certain manner can be significant.

Similarly, if a Regulated Entity were instead the subsidiary and the public member were, for example, an employee, Director or Officer of the parent company, this public member would have an incentive to favor MSRB rules which benefit the subsidiary. Again, the decision making of these individuals would be dependent or contingent upon the impact that such decisions would have on their interests in the subsidiary, and these individuals would not be reasonably expected to act independently of their employment affiliation.

Yet, even if we assume that no such influence will be exerted over employees by employers or shareholders, the question remains: How can it be said that the decision making of individuals with these kinds of affiliations is not dependent or contingent upon their employers' interests? NAIPFA believes that individuals with these kinds of associations cannot act independent of their companies' profit making endeavors and that the Amendments will only exacerbate this problem. The MSRB has sought to allay these concerns by relying upon the second prong of their independence standard, that is, "that the applicant[s] have no relationship with a regulated entity, compensatory or otherwise, that could reasonably affect the independent judgment or decision making of the individual."[7] However, to date, NAIPFA is unaware of any instances in which the MSRB has utilized this prong to eliminate any otherwise eligible candidates from appointment. Therefore, to the extent that this second prong is operative, the threshold established is believed to be at such a high level that it is, in fact, inconsequential within the context of disqualifying candidates. As such, NAIPFA finds no comfort that this second prong will eliminate individuals who otherwise would fall within the MSRB's amended definition of "independent".

What is more, the MSRB's attempt to square the Amendments with its fair dealing rules' definition of "associated person" fails, because as the MSRB notes, "the *statutory* definitions of

[7] MSRB Comment Letter, at 2.

associated person include individuals and organizations in a control relationship with the securities professional, the context of the fair practice rules indicates that such rules will ordinarily not apply to persons who are associated with securities firms and bank dealers solely by reason of a control relationship." Here, we are dealing with *statutory* language, the term "independent," and whether the MSRB's "requirements of independence" are consistent with the Exchange Act; we are not, however, discussing whether the MSRB's "requirements of independence" are consistent with its own non-statutory rules. Accordingly, the statutory language of the Exchange Act controls and cannot be subordinated to MSRB rules.

Finally, NAIPFA would like to note, again, that it is our understanding that there are currently no retail investors serving as MSRB Board Members. Although we appreciate that there may be difficulty in terms of locating non-affiliated institutional investors, these Amendments go well beyond merely addressing this issue by instead providing a means by which every member of the Board could be affiliated or employed by a Regulated Entity. If the MSRB's goal were to increase *investor* representation, the MSRB has provided no evidence of any barriers that exist with respect to the appointment of *retail* investors. Further, there is no basis for concluding that this proposal will increase retail investor membership when the MSRB itself indicates that this rule change is designed primarily to benefit institutional investors who "are well positioned to identify fraudulent or abusive practices in the municipal securities market, as well as enhancements that will improve the municipal securities market." Although NAIPFA believes in general that institutional investors may be well positioned to do this, those institutional investors (or others) that are associated with Regulated Entities will be unable to act independent of their associations and will instead be dependent upon how their actions impact those with whom they are affiliated.

In light of the foregoing, it is clear that the MSRB's determination to allow current employees of companies associated with Regulated Entities to serve as public board members is in direct contravention of the Exchange Act's requirement that public members be independent of any Regulated Entity. Equally clear is that the Act's use of the term "independent" was meant to encompass those provisions within the Senate's version of the Act specifying that MSRB Board Members not be associated with, or under common control with, those individuals and entities that possess an economic interest in the regulation of municipal securities brokers, municipal securities dealers and municipal advisors. For these reasons the Amendments should be rejected.

Again, we appreciate this opportunity to submit supplemental comments to the Commission in connection with this matter and remain available to address any questions the Commission or the MSRB may have relative to these comments.

Sincerely,

Jeanine Rodgers Caruso

Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary Jo White, Chairman
The Honorable Kara Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael Piwowar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board