

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63025; File No. SR-MSRB-2010-08)

September 30, 2010

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rule A-3, on Membership on the Board, to Comply with the Dodd-Frank Wall Street Reform and Consumer Protection Act

On August 27, 2010, the Municipal Securities Rulemaking Board (“Board” or “MSRB”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend MSRB Rule A-3, on membership on the Board, to comply with the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).³ The Commission published the proposed rule change for comment in the Federal Register on September 8, 2010.⁴ The Commission received ten comment letters, the MSRB’s response, and a supplemental response to the MSRB’s response.⁵ On September 30, 2010, the MSRB filed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁴ See Securities Exchange Act Release No. 62827 (September 1, 2010), 75 FR 54673.

⁵ See email from Peter Shapiro, Managing Director, Swap Financial Group, LLC, dated September 14, 2010 (“Swap Financial Letter”); email from Kevin Olson, dated September 17, 2010 (“Olson Letter”); letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated September 17, 2010 (“Bond Dealers Letter”); letter from Robert W. Doty, President, American Governmental Financial Services, dated September 21, 2010 (“AGFS Letter I”); letter from Joy A. Howard, Principal, WM Financial Strategies, dated September 21, 2010 (“WM Financial Letter”); letter from Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, dated September 22, 2010 (“NAIPFA Letter”); letter from Michael Decker, Managing Director and Co-Head, Municipal Securities Division, Securities Industry and Financial Markets Association, dated September 22, 2010 (“SIFMA Letter”); letter from Susan Gaffney, Director, Federal Liaison Center, Government Finance Officers Association, dated September 22, 2010 (“GFOA Letter”); letter from Thomas M. DeMars, Managing Principal, Fieldman, Rolapp & Associates, dated September 22, 2010 (“Fieldman Letter”);

Amendment No. 1 to the proposed rule change.⁶ This notice and order provide notice of Amendment No.1 to the proposed rule change and approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

I. Background and Description of the Proposal

A. Dodd-Frank Act

The Dodd-Frank Act, among other things, amended provisions of Section 15B of the Exchange Act governing the nomination, election and composition of members of the Board.⁷ These amendments to Section 15B of the Exchange Act will be effective on October 1, 2010.⁸

Prior to enactment of the Dodd-Frank Act, Section 15B(b)(1) of the Exchange Act provided that the Board must be composed initially of fifteen members appointed by the Commission.⁹ In addition, the Exchange Act required that the initial members of the Board must

letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, dated September 23, 2010 (“MSRB Response Letter”); email from Robert W. Doty, President, American Governmental Financial Services, dated September 27, 2010 (“AGFS Letter II”); letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, dated September 30, 2010 (“MSRB Supplemental Response Letter”).

⁶ In Amendment No. 1, to address concerns raised by commenters, MSRB proposes that advisor representatives (as defined below) shall not be associated with a broker, dealer or municipal securities dealer. In addition, in Amendment No. 1, the MSRB proposes to amend Rule A-3(i)(iv) to provide that on or after October 1, 2010 the MSRB will propose amendments to its rules that would assure that for future board elections that the Nominating Committee will be composed of a majority of public representatives and that would assure fair representation of bank representatives, broker-dealer representatives and advisor representatives (as such terms are defined below) on the Nominating Committee.

⁷ See Section 975(b) of the Dodd-Frank Act.

⁸ See Section 975(i) of the Dodd-Frank Act.

⁹ Section 15B(b)(1) of the Exchange Act also provided that “[p]rior to the expiration of the terms of office of the initial members of the Board, an election shall be held under rules adopted by the Board (pursuant to subsection (b)(2)(B) of this section) of the members to succeed such initial members.”

consist of five individuals who are public representatives,¹⁰ five individuals who are broker-dealer representatives¹¹ and five individuals who are bank representatives.¹² Consistent with the requirements of the Exchange Act, the MSRB adopted Rule A-3 regarding membership on the Board. MSRB Rule A-3, among other things, provided that the Board shall be composed of 15 members, at all times equally divided among public representatives, broker-dealer representatives and bank representatives.

The Dodd-Frank Act amended Section 15B(b)(1) of the Exchange Act to provide that the members of the Board shall consist of two separate groups: eight“public representatives”and seven“regulated representatives.” Section 15B(b)(1)(A) of the Exchange Act defines“public representatives”to mean individuals who are independent of any municipal securities broker, municipal securities dealer, or municipal advisor, at least one of whom shall be representative of institutional or retail municipal securities investors (“investor representative”), at least one of whom shall be representative of municipal entities (“issuer representative”), and at least one of whom shall be representative of the public with knowledge of or experience in the municipal industry (“general public representative”).¹³ Section 15B(b)(1)(B) of the Exchange Act defines

¹⁰ Section 15B(b)(1)(A) defined the term“public representatives”to mean individuals who are not associated with any broker, dealer, or municipal securities dealer (other than by reason of being under common control with, or indirectly controlling, any broker or dealer which is not a municipal broker, municipal dealer or municipal securities dealer), at least one of whom shall be representative of investors in municipal securities, and at least one of whom shall be representative of issuers of municipal securities.

¹¹ Section 15B(b)(1)(B) defined the term“broker-dealer representatives”to mean individuals who are associated with and representative of municipal securities brokers and municipal securities dealers which are not banks or subsidiaries or departments or divisions of banks.

¹² Section 15B(b)(1)(C) defined the term“bank representatives”to mean individuals who are associated with and representative of municipal securities dealers which are banks or subsidiaries or departments or divisions of banks.

¹³ See 15 U.S.C. 78o-4(b)(1)(A) (as amended by the Dodd-Frank Act).

‘regulated representatives’ to mean individuals who are associated with a broker, dealer, municipal securities dealer, or municipal advisor, including at least one individual who is associated with and representative of brokers, dealers, or municipal securities dealers that are not banks or subsidiaries or departments or divisions of banks (‘broker-dealer representative’), at least one individual who is associated with and representative of municipal securities dealers which are banks or subsidiaries or departments or divisions of banks (‘bank representative’), and at least one individual who is associated with a municipal advisor (‘advisor representative’).¹⁴ In addition, Section 15B(b)(1) of the Exchange Act provides that each member of the Board must be knowledgeable of matters related to the municipal securities markets.¹⁵

The Dodd-Frank Act also amended Section 15B(b)(2)(B) of the Exchange Act to provide that the Board shall establish fair procedures for the nomination and election of the members of the Board, and shall assure fair representation in such nominations and elections of public representatives, broker-dealer representatives, bank representatives and advisor representatives.¹⁶ Further, the Dodd-Frank Act amended Section 15B(b)(2)(B) to provide that the Board shall establish rules that: set forth requirements regarding the independence of public representatives; provide that the number of public representatives at all times exceed the number of regulated representatives; and provide that membership on the Board is at all times as evenly divided as possible between public and regulated representatives. In addition, the Dodd-Frank Act amended Section 15B(b)(2)(B) to provide that the MSRB, by rule, may increase the number of members on the Board, provided that such number is an odd number.¹⁷

¹⁴ See 15 U.S.C. 78o-4(b)(1)(B) (as amended by the Dodd-Frank Act).

¹⁵ See 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

¹⁶ See 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

¹⁷ See id.

B. Proposal

To implement the terms of the Dodd-Frank Act by the effective date of October 1, 2010, the MSRB proposes to add subsection (i) to Rule A-3 to implement, among other things, a transitional provision for the Board's fiscal year commencing October 1, 2010 that would increase the size of the Board from 15 members to 21 members (who are knowledgeable of matters related to the municipal securities markets), with 11 public representatives and 10 regulated representatives. This transitional provision would be in effect until September 30, 2012. In addition, prior to October 1, 2010, the MSRB proposes to elect 11 new Board members, of which eight would be public representatives and three would be municipal advisor representatives. The MSRB proposes that the terms of these new Board members would expire on September 30, 2012.

Of the 11 public representatives, the MSRB proposes that at least one would be an investor representative, at least one would be an issuer representative, and at least one would be a general public representative. With respect to the 10 regulated representatives, the MSRB proposes that at least one would be a broker-dealer representative, at least one would be a bank representative, and at least one (but not less than 30% of the total number of regulated representatives) would be an advisor representative, who shall not be associated with a broker, dealer or municipal securities dealer.

For purposes of determining whether an individual is a "public representative," the MSRB proposes to add Rule A-3(h), among other things, to define the term "independent of any municipal securities broker, municipal securities dealer, or municipal advisor" to mean the individual has "no material business relationship" with any municipal securities broker, municipal securities dealer, or municipal advisor. The term "no material business relationship," in turn,

would mean 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. The Board, or by delegation, its Nominating Committee, could also determine that additional circumstances involving the individual could constitute a “material business relationship” with a municipal securities broker, municipal securities dealer, or municipal advisor.

To help ensure a fair nomination process, the MSRB also proposes, in its transitional provision under MSRB Rule A-3(i), to allow the Nominating Committee to solicit nominations for municipal advisor representatives by publishing a notice in a financial journal having general national circulation among members of the municipal securities industry on or after enactment of the Dodd-Frank Act. The proposal provides that the Nominating Committee shall accept recommendations for 14 days following the date of publication of such notice and shall make the names publicly available.¹⁸

The proposal also provides that prior to the formation of the Nominating Committee for purposes of nominating potential new members to the Board with terms commencing on October 1, 2011, the Board shall amend the provisions of subsection (c) of Rule A-3 relating to the composition and procedures of the Nominating Committee to reflect the composition of the Board as provided under the Dodd-Frank Act, to assure that the Nominating Committee shall be composed of a majority of public representatives and to assure fair representation of bank

¹⁸ The Dodd-Frank Act was signed into law on July 21, 2010. The MSRB published a notice on July 22, 2010, pursuant to which it received a number of additional recommendations for persons to serve as municipal advisor representatives on the Board. See MSRB Notice 2010-22 (July 22, 2010).

representatives, broker-dealer representatives and advisor representatives, and “to reflect such other considerations consistent with the provisions of the Act and the Dodd-Frank Act as the Board shall determine are appropriate.”

II. Discussion of Comments and MSRB’s Response

The Commission received ten comment letters and the MSRB’s responses.¹⁹ The MSRB provided two responses to the comments.²⁰ The comments and the MSRB’s responses are discussed in greater detail below.

1. Comments regarding Requirements relating to Independence of Public Representatives

Some commenters disagreed with the MSRB’s proposed definition of the term “independent of any municipal securities broker, municipal securities dealer, or municipal advisor.”²¹ In particular, these commenters did not agree with the proposed definition of “no material business relationship” and the requirement that an individual is not and, within the last two years, has not been, associated with a municipal securities broker, municipal securities dealer, or municipal advisor.²² One commenter suggested that a five-year “cooling off” period would be more appropriate.²³ Another commenter stated that under the proposed definition of the term “independent of any municipal securities broker, municipal securities dealer, or municipal advisor,” it is unclear whether any independent municipal advisor would be appointed to the Board because potentially 100% of the Board members could be, or could have been,

¹⁹ See supra note 5.

²⁰ See MSRB Response Letter; see also MSRB Supplemental Response Letter

²¹ See AGFS Letter I; WM Financial Letter.

²² See id.

²³ See AGFS Letter I.

associated with, or employed by, a municipal securities broker or dealer.²⁴ This commenter stated that it believes that an individual who has been affiliated with, or employed by, a municipal securities broker, dealer, or municipal advisor cannot be truly independent, regardless of when the affiliation or employment ended.²⁵ Thus, the commenter recommended that public representatives of the Board should consist solely of individuals “who have never been associated with, employed by and do not otherwise possess a material business relationship with a [sic] municipal securities brokers, municipal securities dealers, or municipal advisors.”²⁶

In response to these comments, the MSRB stated that it believes that “the two-year cooling off period is appropriate as a standard for independence” and referenced the one year cooling-off period imposed by other self-regulatory organizations (“SROs”) in determining the independence of public members.²⁷ Further, the MSRB noted that the Board or the Nominating Committee could determine whether other circumstances involving the individual would constitute a “material business relationship” that would result in the person not being viewed as independent.²⁸

The Commission understands commenters’ concerns regarding whether a public representative would be “independent of any municipal securities broker, municipal securities dealer, or municipal advisor” if the public representative previously has been associated with a municipal securities broker, municipal securities dealer, or municipal advisor, even where such association occurred at least two years prior to membership on the Board. Under Section

²⁴ See WM Financial Letter.

²⁵ See id.

²⁶ See id.

²⁷ See MSRB Response Letter; see also infra note 30.

²⁸ See MSRB Response Letter.

15B(b)(2)(B)(iv) of the Exchange Act,²⁹ the MSRB must have rules establishing requirements regarding the independence of public representatives. The Commission believes the proposed requirements in Rule A-3(h) are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB. In particular, as noted by the MSRB in the MSRB Response Letter, the proposal is consistent with and indeed, stricter than, cooling-off periods required by other SROs in determining whether public members are independent.³⁰ Further, the proposed two-year cooling off period is a minimum requirement and, as noted by the MSRB in the MSRB Response Letter, the proposal would allow the Board, or by delegation, its Nominating Committee, to determine additional circumstances involving the individual that would constitute a “material business relationship” with a municipal securities broker, municipal securities dealer, or municipal advisor.

2. Comments regarding Composition of the Board

Several commenters expressed concerns that the representation of municipal advisors on the proposed Board is inadequate.³¹ For example, one commenter noted that during the transitional period (from October 1, 2010 to September 30, 2012), advisor representatives would constitute less than 15% of the entire Board and consequently may be outnumbered by broker-dealer representatives and bank representatives on the Board.³² This commenter suggested that four out of the ten regulated representatives should be advisor representatives and that these four

²⁹ 15 U.S.C. 78o-4(b)(2)(B)(iv) (as amended by the Dodd-Frank Act).

³⁰ See Independence Policy of the NYSE Euronext Board of Directors (stating a “Director is not independent if he or she is, or within the last year was, or has an immediate family member who is, or within the last year was a Member, allied member or allied person or approved person”).

³¹ See NAIPFA Letter; Swap Financial Group Letter; AGFS Letter I; AGFS Letter II; WM Financial Letter; see also GFOA Letter.

³² See Swap Financial Group Letter.

advisor representatives should represent a variety of advisors.³³ Another commenter recommended that five out of the ten regulated representatives should be advisor representatives, four of whom would be independent municipal advisors who are not, and have not been, associated with, or employed by, a municipal securities broker, dealer, bank or underwriter.³⁴ This commenter, however, noted that even with this increase in the number of municipal advisor representatives, such representatives would constitute only 19% of the entire Board.³⁵ Another commenter suggested that the number of independent advisor representatives on the Board should be equal to the number of bank and broker-dealer representatives on the Board.³⁶ One commenter stated that due to the different services offered by municipal advisors, a strict limitation on the number of advisor representatives could not adequately represent this diversity.³⁷ Five commenters stated that advisor representatives should be independent of bank and broker-dealer representatives because bank dealers and broker-dealers are already represented on the Board.³⁸

³³ See id. The commenter suggested that the four advisor representatives should represent each of the following categories: (1) general financial advisory firm with a national scope; (2) regional financial advisory firm whose client base is principally governmental entities; (3) financial advisory firm whose client base is obligors who borrow through tax-exempt conduit agencies; and (4) swap or financial products advisor.

³⁴ See WM Financial Letter.

³⁵ See id.

³⁶ See GFOA Letter; see also AGFS Letter II (stating that independent advisor representatives should be equal in numbers to broker-dealer representatives and bank representatives as municipal securities dealers are in an adverse role in relation to municipal issuers, while municipal advisors represent only the municipal issuers).

³⁷ See AGFS Letter I.

³⁸ See WM Financials Letter; NAIPFA Letter; GFOA Letter; Fieldman letter; AGFS Letter II.

One commenter stated that the Board should not require that at least 30% of regulated representatives be advisor representatives.³⁹ This commenter stated that the proposal goes beyond the requirements of the Dodd-Frank Act and effectively increases the minimum number of advisor representatives.⁴⁰ This commenter further stated that advisors who work for dealers should be eligible as advisor representatives.⁴¹ Another commenter generally supported the proposed amendments to Rule A-3, but suggested that after the transitional period, the Board should consider reducing its size back to 15 members and, at that time, reduce the number of advisor representatives on the Board to less than 30% of the regulated representatives.⁴² This commenter further noted that the Board should not establish, as a matter of policy, that advisors make up at least 30% of regulated representatives, especially because the Board has not established a minimum number of dealer or bank representatives.⁴³ This commenter also stated that it believes that the requirement that at least one member of the Board be an advisor representative can be satisfied by representatives of “independent” municipal advisors or of dealers or banks whose firms also provide municipal advisory services.⁴⁴

One commenter suggested that the proposed MSRB Board does not provide adequate issuer representation.⁴⁵ This commenter recommended that the public representatives on the

³⁹ See BDA Letter.

⁴⁰ See id.

⁴¹ See id.

⁴² See SIFMA Letter.

⁴³ See id.

⁴⁴ See id.

⁴⁵ See GFOA Letter; see also NAIPFA Letter (stating that “fair representation also means that the issuers of municipal securities are appropriately represented”).

Board be comprised of four issuers, four investors, and three general public members.⁴⁶ The commenter believes that the issuer members should represent various-sized state and local governments.⁴⁷ This commenter also recommended that “[a]s the MSRB determines the composition of future boards, these numbers—as a percentage of the total number of board members—should not be altered.”⁴⁸ Another commenter stated that the Board should be comprised of five investor representatives, five issuer representatives, and five vendor representatives.⁴⁹

In its response, the MSRB stated that it believes that, during the transitional period, 30% regulatory representation on the Board for municipal advisors is appropriate because it will ensure fair representation of such entities, will assist the Board in its rulemaking process with respect to municipal advisors and “will inform the Board’s decisions regarding other municipal advisory activities while not detracting from the Board’s ability to continue its existing rulemaking duties with respect to broker-dealer and bank activity in the municipal securities markets.”⁵⁰ The MSRB also noted that, during the transitional period, the three municipal advisors on the Board are expected to be “advisors that are not affiliated with broker-dealers or banks.”⁵¹

At the same time, the MSRB noted that it does not believe that setting the minimum advisor representation at 30% of regulated representatives is too low.⁵² In support, the MSRB noted the processes it has, or will have, in place, to maximize municipal advisor participation in

⁴⁶ See GFOA Letter.

⁴⁷ See id.

⁴⁸ See id.

⁴⁹ See Olson Letter.

⁵⁰ See MSRB Response Letter.

⁵¹ See id.

⁵² See id.

the rulemaking process.⁵³ The MSRB also stated that, having reviewed the composition requirements of other SROs, “it is comfortable that the proposed size and composition of the MSRB represents best practices in SRO governance and will be effective in meeting the full range of obligations that the MSRB will be undertaking beginning on October 1, 2010.”⁵⁴

With respect to comments regarding the composition of public representatives on the Board, the MSRB stated that “it is comfortable that the expanded number of public representatives will provide ample opportunity for municipal entity representation on the Board at levels above those that have historically occurred under the prior Board composition formulation that limited public representation to only five members.”⁵⁵ In addition, with respect to the one commenter that suggested that the Board should be comprised of five investor representatives, five issuer representatives, and five vendor representatives,⁵⁶ the MSRB noted that such composition formulation would not comply with the Dodd-Frank Act, which requires that of the public representatives, at least one must be an investor representative, at least one must be an issuer representative, and at least one must be a general public representative.

The MSRB noted that the Board is aware that municipal advisors are not homogeneous and is committed to seeking out all categories of members based on various criteria.⁵⁷ In addition, the MSRB stated that the proposal would establish the Board composition for a two

⁵³ See id. (noting, for example, the establishment of a new advisory council to help address municipal advisor issues).

⁵⁴ See id.

⁵⁵ See MSRB Response Letter.

⁵⁶ See Olson Letter.

⁵⁷ See MSRB Response Letter.

year transitional period only and, at the end of the transitional period, the MSRB will be in a better position to make “long-term decisions” regarding representation, size and related matters.⁵⁸

The Commission believes that the proposal is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to the MSRB, including the fair representation requirements of the Exchange Act. Section 15B(b)(2)(B) of the Exchange Act requires, among other things, that the rules of the Board 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.⁵⁹ Section 15B(b)(2)(B)(i) of the Exchange Act provides that the number of public representatives of the Board must at all times exceed the total number of regulated representatives.⁶⁰ The MSRB proposes that the Board consist of 11 public representatives and 10 regulated representatives. Of those 10 regulated representatives, the MSRB proposes that at least one, and not less than 30%, shall be advisor representatives.

Previously, the Commission has considered whether an SRO’s proposed governance rules are consistent with the Exchange Act’s requirements under Sections 6 and 15A for fair representation of SRO members generally.⁶¹ For example, the Commission has approved an SRO’s governance rules that require that the SRO’s members as a whole be able to select at least

⁵⁸ See id.

⁵⁹ See 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

⁶⁰ See 15 U.S.C. 78o-4(b)(2)(B)(i) (as amended by the Dodd-Frank Act).

⁶¹ Section 6(b)(3) of the Exchange Act provides that: “An exchange may not be registered as a national securities exchange unless the Commission determines that . . . (3) The rules of the exchange assure fair representation of its members in its selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.” 15 U.S.C. 78f(b)(3). Section 15A(b)(4) of the Exchange Act contains an identical requirement with respect to the rules of a national securities association. See 15 U.S.C. 78o-3(b)(4).

20% of the total number of directors of the exchange's or association's board.⁶² In addition, the Commission has previously found SRO rules that provide sub-categories of regulated persons with the right to select a specified number of directors to be consistent with the Exchange Act.⁶³

Under the MSRB proposal, of the 10 regulated representatives, at least one would be a broker-dealer representative, at least one would be a bank representative, and at least one, and not less than 30% of the total regulated representatives (i.e. three out of 10), would be an advisor representative. Section 15B(b)(2)(B)(i) of the Exchange Act requires the Board to consist of a majority of public representatives, leaving a minority of the Board available to achieve "fair representation" of the three sub-categories of regulated representatives.⁶⁴ Accordingly, "fair representation" of each of the sub-categories must necessarily mean something less than the 20%

⁶² See, e.g., Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (stating that "the requirement under BSE By-Laws that at least 20% of the BSE Directors represent members. [is] designed to ensure the fair representation of BSE members on the BSE Board"); Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (stating that "the requirement in [Nasdaq's] By-Laws that twenty percent of the directors be 'Member Representative Directors' provides for the fair representation of members in the election of directors . . . consistent with the requirement in Section 6(b)(3) of the Exchange Act"); Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (stating that the amended Constitution of the New York Stock Exchange, which gives Exchange members the ability to nominate no less than 20% of the directors on the Board, satisfies the Section 6(b)(3) fair representation requirement); see also Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (stating that "[c]onsistent with the fair representation requirement, the [Commission's] proposed [SRO] governance rules would require that the Nominating Committee administer a fair process that provides members with the opportunity to elect at least 20% of the total number of directors ('member candidates')..This 20% standard for member candidates comports with previously-approved SRO rule changes that raised the issue of fair representation").

⁶³ See, e.g., Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007) (approving the composition of the FINRA (f/k/a NASD) Board of Governors to include three small firm Governors, one mid-size firm Governor, and three large-firm Governors, elected by members of FINRA according to their classification as a small firm, mid-size firm, or large firm).

⁶⁴ See 15 U.S.C. 78o-4(b)(2)(B)(i) (as amended by the Dodd-Frank Act).

standard, in relation to an entire board, previously approved by the Commission for SRO members generally under Sections 6 and 15A of the Exchange Act.

The Commission also notes that Section 15B(b)(1) of the Exchange Act sets forth minimum representation requirements for bank, broker-dealer and advisor representatives.⁶⁵ It does not mandate the specific number of any class of representative that should serve on the Board, nor does it set forth maximum Board composition or representation requirements.⁶⁶ Thus, as with the interpretation of ‘fair representation’ with respect to other SROs, the Commission has flexibility in determining what constitutes ‘fair representation’ for purposes of the Board’s composition under Section 15B of the Exchange Act. Based on the constraints of Section 15B(b)(2)(B)(i) noted above, and the Commission’s consideration of ‘fair representation’ in other contexts, the Commission believes that the MSRB’s proposal to ensure that representatives of municipal advisors (that are not associated with a broker, dealer or municipal securities dealer), which, for the first time will be subject to MSRB rulemaking,⁶⁷ would constitute at least 30% of the directors that may be representatives of the three sub-categories of regulated representatives, is reasonable, and consistent with Section 15B(b)(2)(B) of the Exchange Act.⁶⁸

3. Other Comments

⁶⁵ See 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

⁶⁶ See id.

⁶⁷ See 15 U.S.C. 78o-4(b)(2) (as amended by the Dodd-Frank Act). In addition, the Dodd-Frank Act amended Section 15B of the Exchange Act to require municipal advisors to register with the Commission as of October 1, 2010. See Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) (adopting interim final temporary Rule 15Ba2-6T under the Exchange Act to require the temporary registration of municipal advisors on Form MA-T).

⁶⁸ See 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

Four commenters discussed the MSRB's process for determining the Board's leadership for the next year.⁶⁹ Three commenters made statements expressing concern about a lack of transparency to this leadership selection process, and stated their belief that the Board's action was contrary to the goals of the Dodd-Frank Act and disenfranchises the new Board.⁷⁰ Another commenter also expressed concern with the "secrecy around the election of officers during this past summer."⁷¹ One commenter recommended "reversing the July election and allowing the reconstituted public majority Board to determine its leadership."⁷² Two commenters suggested that there be substantially more transparency with regard to Board action.⁷³

Although the provisions of the proposed rule change do not directly relate to these matters, the Commission notes that with respect to comments regarding the Board's election of its officers for the 2011 fiscal year, in its initial response, the MSRB noted that officer elections are governed by MSRB Rule A-5(b), and that the MSRB followed the process set out in that rule.⁷⁴ In addition, in a supplemental response, the MSRB has agreed to hold a ratification vote with respect to the prior election of the MSRB officers by the newly constituted Board at its first

⁶⁹ See NAIPFA Letter; GFOA Letter; Fieldman Letter; AGFS Letter II.

⁷⁰ See NAIPFA Letter; Fieldman Letter; AGFS Letter II.

⁷¹ See AGFS Letter I. The commenter suggested that the Board release all staff and Board member analyses and communications relating to: (1) the selection of the new officers and Board members, and the composition and structure of committees and advisory groups; (2) the need for regulation of municipal advisors; or (3) contacts with members of Congress and congressional staff members regarding municipal advisor regulation and the composition of the new independent Board. The commenter also opposed the manner in which the Board considers and takes actions with regard to its rules. See also AGFS Letter II (calling for the MSRB to hold open meetings on all rulemaking actions and selection of Board members and officers).

⁷² See Fieldman Letter. See also GFOA Letter.

⁷³ See AGFS Letter I; Fieldman Letter; AGFS Letter II.

⁷⁴ See MSRB Response Letter.

meeting in October.⁷⁵ In addition, as noted above, the proposal provides that prior to the formation of the Nominating Committee for purposes of nominating potential new members to the Board with terms commencing on October 1, 2011, the Board shall amend the provisions of subsection (c) of Rule A-3 relating to the composition and procedures of the Nominating Committee to reflect, among other things, the composition of the Board as provided under the Dodd-Frank Act and to assure that the Nominating Committee shall be composed of a majority of public representatives and to assure fair representation of bank representatives, broker-dealer representatives and advisor representatives.

With respect to the comments regarding transparency of the Board's governance process, the MSRB stated that it believes that these processes are transparent.⁷⁶ The MSRB stated, however, that it would take the comments regarding these processes under advisement as its new Board is seated on October 1, 2010.⁷⁷

III. Discussion and Commission's Findings

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's responses to the comment letters and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.⁷⁸ In particular, the proposed rule change is consistent with Section 15B(b)(1) of the Act, which requires, among other things, that the Board shall consist of at least eight public representatives (with at least one investor representative, at least one issuer

⁷⁵ See MSRB Supplemental Response Letter.

⁷⁶ See MSRB Response Letter; see also MSRB Supplemental Response Letter

⁷⁷ See id.

⁷⁸ 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).

representative, and at least one general public representative) and seven regulated representatives (with at least one broker-dealer representative, at least one bank representative, and at least one advisor representative). The proposed rule change is also consistent with Section 15B(b)(2)(B) of the Act,⁷⁹ which requires, among other things, that the rules of the Board shall 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.⁸⁰

In the Commission's view, the proposed composition of the Board is consistent with the requirements of the Exchange Act that there is fair representation on the Board of public representatives, broker-dealer representatives, bank representatives and advisor representatives. In addition, the composition of the Board with respect to advisor representatives will help assure that municipal advisors will have appropriate representation on the Board during this period of transition when, for the first time, municipal advisors will be subject to MSRB rulemaking. The Commission further believes that the proposed two-year "cooling-off" period for public representatives is appropriate because it is a minimum requirement for establishing independence and it is consistent with other SRO requirements for establishing independence of board members.

The Commission notes that the proposed rule change with respect to the composition of the Board is being implemented as a transitional provision that will be effective for two years, until September 30, 2012. During this period, the MSRB will be able to monitor the effectiveness of the structure of the Board to determine to what extent, if any, proposed changes might be appropriate. The Commission is sensitive to commenters' concerns regarding fair

⁷⁹ 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

⁸⁰ See id.

representation. The Commission notes that the proposal by the MSRB for the establishment of a permanent Board structure must be filed with, and considered by, the Commission pursuant to Section 19(b) of the Exchange Act⁸¹ before the proposal can be effective, as would rules the MSRB seeks to implement with respect to oversight of municipal advisors.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is consistent with the Exchange 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-2010-08 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2010-08. 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 website (<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

⁸¹ See 15 U.S.C. 78s(b).

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, 100 F Street, NE, Washington DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. 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-2010-08 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, before the 30th day after the date of publication in the Federal Register. The Commission notes that the proposal was published for notice and comment, and the Commission received ten comment letters, which comments have been discussed in detail above. Amendment No. 1 proposes to amend proposed Rule A-3(i)(i)(B)(3) to explicitly provide that, of the regulated representatives on the Board, "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 broker, dealer or a municipal securities dealer." The Commission notes that in the MSRB's Response Letter, the MSRB expressed its expectation that the advisor representatives would be "advisors that are not affiliated with broker-dealers or banks."⁸² Amendment No. 1 provides additional clarification that the advisor representatives on

⁸² See MSRB Response Letter.

the Board during the transitional period will be independent advisors not associated with brokers, dealers or municipal securities dealers.

In addition, Amendment No. 1 proposes that, with respect to the formation of the Nominating Committee for purposes of nominating potential new members of the Board with terms commencing on October 1, 2011, the Board shall amend the provisions of section (c) of Rule A-3 relating to the composition and procedures of the Nominating Committee, among other things, to assure that the Nominating Committee shall be composed of a majority of public representatives and to assure fair representation of bank representatives, broker-dealer representatives and advisor representatives. Section 15B(b)(2)(B) of the Exchange Act provides that the MSRB's rules must, at a minimum, "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."⁸³ In addition, as discussed above, Section 15B(b)(2)(B)(i) of the Exchange Act provides that the MSRB's rules shall provide that the number of public representatives of the Board shall at all times exceed the total number of regulated representatives. Amendment No. 1 proposes that the Nominating Committee would reflect the new composition of the Board with a majority public representation and with fair representation of bank representatives, broker-dealer representatives and advisor representatives.

The Commission believes that Amendment No.1 is consistent with the requirements of the Exchange Act and finds good cause, consistent with Section 19(b)(2) of the Act,⁸⁴ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

⁸³ 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

⁸⁴ 15 U.S.C. 78s(b)(2).

VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB, and in particular, Sections 15B(b)(1)⁸⁵ and 15B(b)(2)⁸⁶ of the Exchange Act.

IT IS THEREFORE ORDERED THAT, pursuant to Section 19(b)(2) of the Exchange Act,⁸⁷ the proposed rule change (SR-MSRB-2010-08), as modified by Amendment No. 1 be, and it hereby is, approved on an accelerated basis.

By the Commission.

Florence E. Harmon
Deputy Secretary

⁸⁵ 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

⁸⁶ 15 U.S.C. 78o-4(b)(2) (as amended by the Dodd-Frank Act).

⁸⁷ 15 U.S.C. 78s(b)(2).