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SECURITIES AND EXCHANGE COMMISSION  
[Release No. 34-89092; File No. SR-MSRB-2020-04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Amendments to MSRB Rules A-3 and A-6 that are Designed to Improve Board Governance

June 18, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 5, 2020, the Municipal Securities Rulemaking Board (“MSRB” or “Board”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The MSRB filed with the Commission a proposed rule change consisting of amendments to MSRB Rules A-3 and A-6 (the “proposed rule change”) that are designed to improve Board governance. As described below, the draft amendments 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 representative to the Board;

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

- 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 be municipal advisors with a requirement that the 15-member Board include at least two municipal advisors;
- Impose a six-year limit on Board service;
- 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 effective date for the proposed rule change will be October 1, 2020. The current versions of MSRB Rules A-3 and A-6 would remain applicable in the interim period between SEC approval and the effective date.

The Board previously issued a Request for Comment on potential changes to MSRB Rule A-3 (the “RFC”).<sup>3</sup> The proposed rule change reflects the Board’s consideration of the comments it received, which are discussed below, along with the Board’s responses.

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<sup>3</sup> 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>. The proposed rule change includes certain reorganizational and technical changes that were not included in the RFC, as described herein.

The text of the proposed rule change is available on the MSRB's website at [www.msrb.org/Rules-and-Interpretations/SEC-Filings/2020-Filings.aspx](http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2020-Filings.aspx), at the MSRB's principal office, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

Background

The Exchange Act establishes basic requirements for the Board's size and composition and requires the Board to adopt rules that establish "fair procedures for the nomination and election of members of the Board and assure fair representation in such nominations and elections."<sup>4</sup> As amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the Exchange Act categorizes Board members in two broad groups: individuals who must be independent of any dealer<sup>5</sup> or municipal advisor ("public representatives") and individuals who must be associated with a dealer or municipal advisor

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<sup>4</sup> Exchange Act Section 15B(b)(2)(B), 15 U.S.C. 78o-4(b)(2)(B).

<sup>5</sup> As used herein, the term "dealer" refers to a broker, dealer, or municipal securities dealer.

(“regulated representatives”).<sup>6</sup> The Exchange Act requires the Board to establish by rule requirements regarding the independence of public representatives and provides that all Board members – whether public or regulated representatives – must be “knowledgeable of matters related to the municipal securities markets.”<sup>7</sup>

Within the public representative category, at least one Board member must be representative of institutional or retail investors in municipal securities, at least one must be representative of municipal entities, and at least one must be a member of the public with knowledge of or experience in the municipal industry. Within the regulated representative category, at least one Board member must be associated with a dealer that is a bank, at least one must be associated with a dealer that is not a bank, and at least one must be associated with a municipal advisor.<sup>8</sup>

The Exchange Act, as amended by the Dodd-Frank Act, recognizes the benefits that a Board composed of both public and regulated representatives brings to regulation of the municipal securities market in the public interest and the protection of investors, municipal entities, and obligated persons. Although regulated representatives may bring specialized expertise to the regulation of a market with features and functions that are markedly different from those of other financial markets, public representatives may bring a broader perspective of the public interest and the protection of investors, municipal entities, and obligated persons. Striking the balance between the two perspectives – public and regulated – in the Dodd-Frank

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<sup>6</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1).

<sup>7</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1); Exchange Act Section 15B(b)(2)(B)(iv), 15 U.S.C. 78o-4(b)(2)(B)(iv).

<sup>8</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1).

Act, Congress specified that the Board at all times must be majority public but that it also must be as evenly divided between public and regulated representatives as possible.<sup>9</sup>

Since the enactment of the Dodd-Frank Act, the Board has elected public representatives with a range of backgrounds and experience. In addition to the statutorily specified municipal entity and investor representatives, they have included individuals with prior municipal securities regulated industry experience, academics and individuals with rating agency experience. In most years, municipal entity representation on the Board has exceeded the statutory minimum. The Board has also required, either by rule or by policy, that committees responsible for nominations, governance and audit be chaired by a public representative.

The Exchange Act sets the number of Board members at 15 but provides that the rules of the Board “may increase the number of members which shall constitute the whole Board, provided that such number is an odd number.”<sup>10</sup> In response to the enactment of the Dodd-Frank Act, which established a new registration requirement and regulatory framework for municipal advisors, the Board increased the size of the Board to 21 members (11 public and 10 regulated) in October 2010. At the same time, the Board also provided for municipal advisor membership on the Board that was greater than the statutory minimum, requiring that at least 30% of the regulated representatives be associated with municipal advisors.<sup>11</sup> These changes were designed to ensure the Board could achieve appropriately balanced representation and would have sufficient knowledge and expertise to implement the new municipal advisor regulatory

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<sup>9</sup> See Exchange Act Section 15B(b)(2)(B)(i), 15 U.S.C. 78o-4(b)(2)(B)(i).

<sup>10</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1); Exchange Act Section 15B(b)(2)(B)(iii), 15 U.S.C. 78o-4(b)(2)(B)(iii).

<sup>11</sup> MSRB Rule A-3 provides that these municipal advisors may not be associated with dealers.

framework without detracting from its ability to continue fulfilling its existing rulemaking responsibilities with respect to dealer activity.<sup>12</sup>

Although its expanded duties with regard to the protection of municipal entities and obligated persons and the regulation of municipal advisors are ongoing, the Board has completed the rulemaking activity associated with implementation of the Dodd-Frank Act, including establishment of the core municipal advisor regulatory regime. In recent years, the Board has been conducting a retrospective review of its existing rules and related interpretations designed to ensure that they continue to serve their intended purposes and reflect the current state of the municipal securities market.<sup>13</sup>

In September 2019, the Board announced the formation of a special committee to examine all aspects of the Board's governance.<sup>14</sup> In January 2020, the Board published the RFC to solicit comment on changes to MSRB Rule A-3,<sup>15</sup> and the proposed rule change reflects the Board's consideration of the comments it received. These comments are discussed in the Board's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others ("Statement on Comments Received") below, along with the Board's responses.

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<sup>12</sup> See Exchange Act Release No. 65158 (Aug. 18, 2011), 76 FR 61407, 61408 (Oct. 4, 2011); Exchange Act Release No. 63025 (Sept. 30, 2010), 75 FR 61806, 61809 (Oct. 6, 2010).

<sup>13</sup> See, e.g., MSRB Notice 2019-04 (Feb. 5, 2019).

<sup>14</sup> MSRB, "MSRB to Begin FY 2020 With a Focus on Governance" (Sept. 23, 2019), available at <http://www.msrb.org/News-and-Events/Press-Releases/2019/MSRB-to-Begin-FY-2020-with-Focus-on-Governance.aspx>.

<sup>15</sup> After the Board issued the RFC, the special committee focused on, among other things, reorganizational and technical changes to the Board's administrative rules that would improve interested persons' ability to locate and understand MSRB requirements. These reorganizational and technical amendments are included in the proposed rule change, as described herein.

### Independence Standard

As noted above, the Exchange Act requires the Board to establish by rule “requirements regarding the independence of public representatives.”<sup>16</sup> In 2010, the Board amended MSRB Rule A-3 to define the term “independent of any municipal securities broker, municipal securities dealer, or municipal advisor” to mean that an individual has “no material business relationship with” such an entity. The Board defined 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;<sup>17</sup> 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 includes an amendment to MSRB Rule A-3 that would increase the two-year separation period in the definition of “no material business relationship” to five years. 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.

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<sup>16</sup> Exchange Act Section 15B(b)(2)(B)(iv), 15 U.S.C. 78o-4(b)(2)(B)(iv).

<sup>17</sup> The Board further provided, in a policy revision in fiscal year 2019, that an individual who has been employed by a regulated entity within the prior three years does not qualify as a public representative due to a “material business relationship.” Once the amendment to MSRB Rule A-3 extending the separation period to five years is effective, this policy will be eliminated.

The Board continues to believe, as it noted in the RFC, that the Board's public representatives have acted with the independence required by the Exchange Act, MSRB rules and their duties as public representatives, notwithstanding any prior affiliation with a regulated entity. At the same time, as discussed more fully in the Statement on Comments Received, after considering comments on the RFC, the Board believes that a five-year separation period would further enhance not only independence in fact but also the appearance of independence, which should, in turn, 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.<sup>18</sup>

#### Board Size

The Exchange Act establishes a 15-member Board but permits the MSRB to increase the size, provided that:

- The number of Board members is an odd number;
- A majority of the Board is composed of public representatives; and
- The Board is as closely divided in number as possible between public and regulated representatives.<sup>19</sup>

As discussed above, the Board amended MSRB Rule A-3 to expand the size of the Board to 21 members in 2010 in order to provide additional flexibility in achieving balance among its

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<sup>18</sup> See MSRB Mission Statement, available at <http://www.msrb.org/About-MSRB/About-the-MSRB/Mission-Statement.aspx>.

<sup>19</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1); Exchange Act Section 15B(b)(2)(B), 15 U.S.C. 78o-4(b)(2)(B).

members and to broaden the range of Board-member perspectives as it sought to implement the Dodd-Frank Act.

The proposed rule change includes an amendment to MSRB Rule A-3 that would return the Board's size to 15 members, the original number established by the Exchange Act.<sup>20</sup> Although the 21-member Board size was particularly valuable during the period of heightened rulemaking activity required to implement the Dodd-Frank Act, particularly the complex rulemaking necessary to establish the core regulatory framework for a new type of regulated entity—*i.e.*, municipal advisors—that rulemaking activity is now complete. Thus, the Board believes that it can now return to the statutorily prescribed Board size of 15, and the attendant efficiency and lower cost of such a smaller Board, without decreasing its ability to discharge its expanded responsibilities under the Exchange Act, as amended by the Dodd-Frank Act.

The Board believes that the 15-member Board size established by Congress will continue to allow for a broad range of viewpoints as the Board fulfills its statutory mission. As discussed further in the Statement on Comments Received, each year, through its annual nominations and elections process, the Board seeks to constitute a Board that not only meets the requirements of the Exchange Act and MSRB rules but that also provides the Board with a broad and diverse range of perspectives. Although there will be fewer Board members, the Board believes that the 15-member size contemplated by the Exchange Act allows the Board to continue to assemble a Board that reflects the wide range of backgrounds and experiences within each of the statutorily required Board member categories.

#### Board Composition

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<sup>20</sup> As required by Section 15B(b)(1) of the Exchange Act, the 15-member Board would be composed of eight public representatives and seven regulated representatives.

As discussed above, when it established the 21-member Board, the MSRB required that municipal advisor representation be greater than the statutory minimum. Specifically, the Board provided in MSRB Rule A-3:

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 municipal securities dealer.

Along with the increased Board size, the change was intended to ensure that the Board could achieve appropriately balanced representation and would have sufficient knowledge and expertise to implement the new municipal advisor regulatory framework without detracting from its ability to continue fulfilling its existing rulemaking responsibilities with respect to dealer activity.

In connection with reducing the Board's size to 15 members, the proposed rule change amends MSRB Rule A-3 to provide that at least two of the regulated representatives shall be associated with and representative of municipal advisors and shall not be associated with a broker, dealer or municipal securities dealer. As discussed further in the Statement on Comments Received, after considering comments on the RFC, the Board believes that it remains appropriate, in light of the broad range of municipal advisors subject to MSRB regulation, to require municipal advisor representation greater than the statutory minimum of one. This amendment would preserve 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. Specifically, the draft amendment to MSRB Rule A-3 would require that at least two (28.6%) of the regulated representatives on a 15-member Board be municipal advisor representatives, very close to the 30% representation currently required. Retaining the 30% requirement with the 15-member Board would require that three of the seven (or 42.9%) regulated members be municipal

advisors; although there may be times the Board chooses to have a municipal advisor contingent of that size (just as the Board routinely has representations greater than the minimum for the other statutorily specified categories), the Board does not believe imposing a minimum larger than two is in the public interest.

#### Member Qualifications

MSRB Rule A-3 tracks the Exchange Act requirement that all Board members must be knowledgeable of matters related to the municipal securities markets. In its processes for the nomination and election of new members, the Board has consistently sought candidates who meet that standard, but who also have demonstrated personal and professional integrity. In order to further convey to the public the seriousness with which the Board conducts its elections and bolster public confidence in its process, the proposed rule change includes an amendment to MSRB Rule A-3 that would add an express requirement that Board members be individuals of integrity. The Board will continue to determine whether a candidate possesses the requisite personal and professional integrity through its rigorous nominations and elections processes, which include, among other things, candidate interviews, extensive screening, and background checks.

#### Transition Plan to Reduced Board Size

The proposed change to a 15-member Board requires a transition plan, and the Board has designed a plan to effect the necessary changes expeditiously, while minimizing any risk of disruption to MSRB governance, programs and operations.

The Board sought comment in the RFC on a transition plan that would reduce the Board's size to 15 members in the next fiscal year because the 15 Board members returning after the six Board members serving in their fourth year complete their terms on September 30, 2020

will meet the Board composition requirements set out in the proposed rule change. As discussed more fully in the Statement on Comments Received, however, the Board has determined to change the transition plan described in the RFC so that as included in the proposed rule change the Board size will be 17 members for fiscal year 2021, which begins on October 1, 2020. Although the Board generally seeks to assemble a Board that includes more than one issuer representative, under the transition plan described in the RFC, the Board would have had just a single issuer representative in fiscal year 2021. The Board is persuaded by commenters that having more than one issuer representative is of particular importance next fiscal year in light of the ongoing COVID-19 pandemic and its effects on municipal entities. Reducing the Board size to 17 members in the first year of the transition will enable the Board to include a second issuer member for fiscal year 2021.

Like the transition plan included in the RFC, the plan included in the proposed rule change transitions the Board's class structure from three classes of five members and one class of six members to three classes of four members and one class of three members. Each of the new Board classes would have the same number of public and regulated representatives except for the class of three, which would have two public representatives.

Pursuant to the transition plan included in the proposed rule change, all new Board members elected during the transition, and thereafter, would be appointed to four-year terms. The Board would resume electing new members for a four-member class with terms commencing in fiscal year 2022, which begins on October 1, 2021. No new Board members would be elected for terms beginning on October 1, 2020. The transition would be completed in fiscal year 2024, which ends on September 30, 2024.

To effect the transition, the Board would grant one-year term extensions to five public representatives and three regulated representatives, as follows:

- One public representative and one regulated representative whose terms would otherwise end on September 30, 2020;
- One public representative whose term would otherwise end on September 30, 2021;
- One public representative and one regulated representative whose terms would otherwise end on September 30, 2022; and
- Two public representatives and one regulated representative whose terms would otherwise end on September 30, 2023.

Each year, members would be considered for the one-year extensions as part of the Board's annual nominations process, once that process resumes during fiscal year 2021, so that overall Board composition, resulting from existing member extensions and new member elections, can be considered holistically.

### Terms

The Exchange Act provides that Board members "shall serve as members for a term of 3 years or for such other terms as specified by the rules of the Board."<sup>21</sup> Since 2016, MSRB Rule A-3 has provided for four-year terms and prohibited a Board member from serving more than two consecutive terms. The proposed rule change includes an amendment to MSRB Rule A-3 that would impose a six-year lifetime limit on Board service. The six-year maximum service provision would effectively limit a Board member to one complete four-year term. Allowing for up to an additional two years would permit the Board to fill a vacancy that arises in the middle of a Board member's term expeditiously, as it has in the past, by re-appointing a sitting member, or

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<sup>21</sup> Exchange Act Section 15B(b)(1), 15 U.S.C 78o-4(b)(1).

electing a former Board member, to serve for the remainder of the term of the Board member whose departure created the vacancy rather than leaving the vacancy unfilled until a more exhaustive, but time-consuming, search for a new Board member can be completed.

Based on its experience, the Board believes that regularly refreshing the Board with new members benefits the Board and, in turn, the municipal market, by bringing new and diverse perspectives to the policymaking process. The six-year lifetime limit is intended to enhance these benefits by increasing the rate at which new members will join the Board.

The proposed rule change also includes an amendment to MSRB Rule A-3 that would permit a Board member filling a vacancy to serve for any part of an unexpired term, rather than requiring such a Board member to serve for the entire unexpired portion. This change is necessary to implement the six-year lifetime limit described above because a Board member may leave the Board with more than two years remaining in his or her term. In many such cases, requiring the replacement Board member to serve the remainder of the term would disqualify current and former Board members due to the six-year limit.

Finally, MSRB Rule A-3(d) provides that “[v]acancies on the Board shall be filled by vote of the members of the Board,” and states in the final sentence that the term “vacancies on the Board” includes a vacancy resulting from the resignation of a Board member prior to the commencement of his or her term. The proposed rule change deletes this final sentence to clarify that the term includes all vacancies that arise prior to conclusion of a term for any reason.<sup>22</sup>

#### Amendments to Board Nominations and Elections Provisions

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<sup>22</sup> As discussed below, the proposed rule change also includes amendments to MSRB Rule A-3 to reorganize the rule so that topics are presented in a more logical order. As reorganized, the provision on vacancies would be a subsection of section (b), which governs Board nominations and elections.

MSRB Rule A-3 includes a detailed description of the composition, responsibilities and processes of the Board’s Nominating and Governance Committee. The proposed rule change includes amendments to MSRB Rule A-3 that would preserve the key features of this important Board committee while removing overly prescriptive detail that could be provided instead, and the Board believes more appropriately, in governing documents such as committee charters and Board policies. The Board believes these amendments will enhance the Board’s flexibility to respond efficiently to changes in circumstances.

Specifically, the proposed rule change would remove references in MSRB Rule A-3 to the “Nominating and Governance Committee” and replace them with references to a committee charged with the nominating process. The proposed rule change retains the substantive requirements that the committee responsible for the nominating process be: (1) composed of a majority of public representatives, (2) chaired by a public representative, and (3) representative of the Board’s membership, but removes the more detailed requirements. The proposed rule change would also move these requirements, as amended by the proposed rule change, to MSRB Rule A-6, Committees of the Board. The Board believes that moving these requirements relating to committee composition to a more logical location will improve transparency by making Board requirements easier to find.

The proposed rule change also includes an amendment to MSRB Rule A-3 that updates the requirement for the Board to publish a notice seeking applicants for Board membership, which the Board believes has become antiquated. Specifically, the amendment would replace the requirement to publish the notice “in a financial journal having national circulation among members of the municipal securities industry and in a separate financial journal having general national circulation” with the more general requirement to publish the notice “by means

reasonably designed to provide broad dissemination to the public.” This broader and more flexible requirement recognizes that in addition to publishing the notice in financial journals as specified in MSRB Rule A-3, the Board currently uses a variety of methods to reach a broad range of potential candidates, including press releases, the MSRB website, and the Board’s social media channels. The amendment to MSRB Rule A-3 would permit the Board to continue to use these methods, as well as to determine other ways to reach a wide range of potential applicants in light of available technology and media.

#### Public Representative Committee Chairs

As discussed above, the Board believes it should retain administrative flexibility to design and from time to time change its committee structure. The proposed rule change would enable the Board to establish its committee structure through governance mechanisms such as charters and policies. The MSRB could, for example, continue to have a committee responsible for both nominations and governance, or it could establish a separate committee on governance, freeing the nominating committee to focus on identifying, recruiting and vetting new members.

The Board believes that irrespective of the committee structure the Board from time to time may establish, responsibility for both nominations and governance should continue to be in a committee or committees chaired by a public representative, as currently required by MSRB Rule A-3. Current Board policy requires that the audit committee also be chaired by a public representative. In light of the importance of public representative leadership of the audit committee to the Board’s corporate governance system, the Board believes this requirement should be included in the Board’s rules, rather than only in a Board policy. Accordingly, the proposed rule change codifies these existing rule and policy requirements in a single location in MSRB Rule A-6, Committees of the Board.

## Reorganizational and Technical Changes

### MSRB Rule A-3 Title

The proposed rule change would change the title of MSRB Rule A-3 from “Membership on the Board” to “Board Membership: Composition, Elections, Removal, Compensation.” The new title will describe all of the topics covered by the rule and should make it easier for interested persons to locate relevant MSRB rule requirements.

### MSRB Rule A-3 Organization

The proposed rule change reorganizes the content of MSRB Rule A-3 so that similar provisions are grouped together, topics are presented in a more logical sequence, and overall readability is improved. The provision on vacancies, currently section (d), would be included as a subsection of section (b), regarding nominations and elections. Similarly, the provision on Board member affiliations, currently section (f), would be included within section (a), which describes the number of Board members and the requirements for Board composition. The titles of sections (b) and (c) would be revised to more completely describe the topics covered and new subsection headers would be added to section (b) to provide a better roadmap to the section’s contents. Although none of these changes is substantive, they should make it easier for interested persons to find and understand relevant MSRB requirements.

### Board Member Changes in Employment and Other Circumstances

Board policies describe certain changes in a Board member’s circumstances, such as a change in employment, that could result in the Board member’s disqualification from continuing to serve on the Board. For example, a Board member who is a public representative at the time of his or her election may accept a position with a regulated entity during the course of his or her Board term. Assuming there are no Board vacancies at the time, such a change would result in

the Board no longer being majority public and no longer as evenly divided in number as possible between public and regulated representatives. Board policy provides that the member would be disqualified from continuing to serve because the change in employment would cause a conflict with Board composition requirements.

The proposed rule change would include the substance of this policy in MSRB Rule A-3(c), with minor updates. Specifically, new subsection (c)(ii) would provide that:

- If a member's change in employment or other circumstances results in a conflict with the Board composition requirements described in section (a) of MSRB Rule A-3, as proposed to be amended, the member shall be disqualified from serving on the Board as of the date of the change.
- If the Board determines that a member's change in employment or other circumstances does not result in disqualification pursuant to the above provision but changes the category of representative in which the Board member serves, the member will remain on the Board pending a vote of the other members of the Board, to be taken within 30 days, determining whether the member is to be retained.

Including these provisions in the Board's rules, rather than its policies, is intended to improve transparency about the Board's approach to changes in Board member circumstances, including changes that require immediate disqualification due to a conflict with Board composition requirements and changes that do not cause a conflict with those requirements but might still, in the Board's judgment, require removal because, for example, they negatively affect the balanced representation on the Board that the Board seeks to maintain.

## 2. Statutory Basis

The MSRB has adopted the proposed rule change pursuant to Sections 15B(b)(1) and (2) of the Exchange Act.

Section 15B(b)(1) of the Act<sup>23</sup> provides:

The Municipal Securities Rulemaking Board shall be composed of 15 members, or such other number of members as specified by rules of the Board pursuant to paragraph (2)(B), which shall perform the duties set forth in this section. The members of the Board shall serve as members for a term of 3 years or for such other terms as specified by rules of the Board pursuant to paragraph (2)(B), and shall consist of (A) 8 individuals who are independent of any municipal securities broker, municipal securities dealer, or municipal advisor, at least 1 of whom shall be representative of institutional or retail investors in municipal securities, at least 1 of whom shall be representative of municipal entities, and at least 1 of whom shall be a member of the public with knowledge of or experience in the municipal industry (which members are hereinafter referred to as “public representatives”); and (B) 7 individuals who are associated with a broker, dealer, municipal securities dealer, or municipal advisor, including at least 1 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 (which members are hereinafter referred to as “broker-dealer representatives”), at least 1 individual who is associated with and representative of municipal securities dealers which are banks or subsidiaries or departments or divisions of banks (which members are hereinafter referred to as “bank representatives”), and at least 1 individual who is associated with a municipal advisor (which members are hereinafter referred to as “advisor representatives” and, together with the broker-dealer representatives and the bank representatives, are referred to as “regulated representatives”). Each member of the board shall be knowledgeable of matters related to the municipal securities markets. Prior to the expiration of the terms of office of the 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 members.

Section 15B(b)(2)(B) of the Act<sup>24</sup> provides that the MSRB’s rules 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. Such rules —

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<sup>23</sup> 15 U.S.C. 78o-4(b)(1).

<sup>24</sup> 15 U.S.C. 78o-4(b)(2)(B).

(i) shall provide that the number of public representatives of the Board shall at all times exceed the total number of regulated representatives and that the membership shall at all times be as evenly divided in number as possible between public representatives and regulated representatives;

(ii) shall specify the length or lengths of terms members shall serve;

(iii) may increase the number of members which shall constitute the whole Board, provided that such number is an odd number; and

(iv) shall establish requirements regarding the independence of public representatives.

Section 15B(b)(2)(I) of the Exchange Act<sup>25</sup> provides that the MSRB's rules shall:

provide for the operation and administration of the Board, including the selection of a Chairman from among the members of the Board, the compensation of the members of the Board, and the appointment and compensation of such employees, attorneys, and consultants as may be necessary or appropriate to carry out the Board's functions under this section.

#### Statutory Basis for Amendments Related to Independence Standard

The proposed amendments to MSRB Rule A-3 that would increase the two-year separation period in the definition of “no material business relationship” to five years are consistent with Section 15B(b)(2)(B)(iv) of the Act,<sup>26</sup> which requires the Board to “establish requirements regarding the independence of public representatives.” As discussed above, MSRB Rule A-3 defines a public representative as independent if the public representative has “no material business relationship” with a regulated entity. An individual has no material business relationship with a regulated entity, under MSRB Rule A-3, if the individual has not been associated with a regulated entity for a two-year period. For the reasons described above and in the Statement on Comments Received below, the Board has determined to increase this period of

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<sup>25</sup> 15 U.S.C. 78o-4(b)(2)(I).

<sup>26</sup> 15 U.S.C. 78o-4(b)(2)(B)(iv).

time to five years, in order to further enhance the independence of public representatives. For these reasons, the amendments are “requirements regarding the independence of public representatives” and therefore consistent with Section 15B(b)(2)(B)(iv) of the Exchange Act.<sup>27</sup>

#### Statutory Basis for Amendments Related to Board Size

The proposed amendments to MSRB Rule A-3 that would return the Board to its original size of 15 members are consistent with Section 15B(b)(1) of the Exchange Act,<sup>28</sup> which provides that the Board “shall be composed of 15 members, or such other number of members as specified by rules of the Board pursuant to paragraph (2)(B). . . .” and consist of eight public representatives and seven regulated representatives. As described above, the Board increased its size, in accordance with Section 15B(b)(2)(B) of the Exchange Act,<sup>29</sup> after the enactment of the Dodd-Frank Act. For the reasons described above, the Board believes it is now appropriate for the Board to return to the size specified in the Exchange Act. The 15-member Board would, as required by the Section 15B(b)(1) of the Exchange Act,<sup>30</sup> consist of eight public representatives and seven regulated representatives.

#### Statutory Basis for Amendments Related to Board Composition

The amendments relating to Board composition are consistent with Section 15B(b)(2)(B) of the Exchange Act,<sup>31</sup> which requires MSRB Rules to “establish fair procedures for the nomination and election of members of the Board and assure fair representation in such

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<sup>27</sup> Id.

<sup>28</sup> 15 U.S.C. 78o-4(b)(1).

<sup>29</sup> 15 U.S.C. 78o-4(b)(2)(B).

<sup>30</sup> 15 U.S.C. 78o-4(b)(1).

<sup>31</sup> 15 U.S.C. 78o-4(b)(2)(B).

nominations and elections of public representatives, broker dealer representatives, bank representatives, and advisor representatives.” As discussed above, the proposed rule change would maintain, as closely as possible on a 15-member Board, the existing balance of representation among regulated representatives and includes no changes relating to the representation of public representatives. 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 MAs subject to MSRB regulation. Accordingly, the Board believes that the amendments related to Board composition are consistent with Section 15B(b)(2)(B) of the Exchange Act.<sup>32</sup>

#### Statutory Basis for Amendments Related to Member Qualifications

The amendment that would add an explicit requirement that Board members be “individuals of integrity” is consistent with Section 15B(b)(2)(B) of the Exchange Act,<sup>33</sup> which requires the Board to “establish fair procedures for the nomination and election of members of the Board.” Although the Board has always sought individuals of integrity in nominating and electing Board members, the Board believes, as described above, that adding this provision to the rules it has adopted for nominating and electing Board members is appropriate to further convey to the public the seriousness with which the Board takes those responsibilities.

#### Statutory Basis for Amendments Related to Transition Plan

The amendments that would provide for a transition plan that includes an interim year with a 17-member Board and extend a limited number of terms for Board members to change the structure of the Board’s member classes are consistent with Sections 15B(b)(2)(B) and (I) of the

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<sup>32</sup> Id.

<sup>33</sup> Id.

Exchange Act.<sup>34</sup> The amendment establishing the 17-member Board is consistent with Section 15B(b)(2)(B)(iii) of the Exchange Act,<sup>35</sup> which permits the Board to increase the statutorily specified 15-member Board, provided that the number of members is an odd number. It is also consistent with Section 15B(b)(2)(B)(i) of the Exchange Act,<sup>36</sup> which requires the number of public representatives to at all times exceed the number of regulated representatives and the membership to at all times be as evenly divided in number as possible between public representatives and regulated representatives. In accordance with those requirements, the amendments provide that a 17-member Board would include nine public representatives and eight regulated representatives.

The amendments that provide for a limited number of term extensions for Board members are consistent with Section 15B(b)(2)(B)(ii) of the Exchange Act,<sup>37</sup> which requires the Board to “specify the length or lengths of terms members shall serve.” Providing in the transition plan that a limited number of Board members’ terms will include a fifth year serves the purpose of specifying the length or lengths of Board members’ terms.

Finally, the transition plan is also consistent with Section 15B(b)(2)(I) of the Exchange Act,<sup>38</sup> which requires MSRB rules to “provide for the operation and administration of the Board.” The primary purpose of the transition plan is administrative in nature. Specifically,

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<sup>34</sup> 15 U.S.C. 78o-4(b)(2)(B), (I).

<sup>35</sup> 15 U.S.C. 78o-4(b)(2)(B)(iii).

<sup>36</sup> 15 U.S.C. 78o-4(b)(2)(B)(i).

<sup>37</sup> 15 U.S.C. 78o-4(b)(2)(B)(ii).

<sup>38</sup> 15 U.S.C. 78o-4(b)(2)(I).

the plan is intended to transition the Board from 21 members to 15 members in an orderly manner that minimizes any risk of disruption to MSRB governance, programs and operations.

#### Statutory Basis for Amendments Related to Terms

The amendments that would impose a six-year limit on Board service are consistent with Section 15B(b)(2)(B) of the Exchange Act,<sup>39</sup> which requires the Board to establish fair procedures for the nomination and election of members of the Board and “specify the length or lengths of terms members shall serve.” As discussed above, the six-year limit is intended to increase the rate at which new members will join the Board, thereby more regularly refreshing the perspectives the Board may draw upon in carrying out its mission. Accordingly, the limit is a fair procedure for the nomination and election of Board members. The limit also serves the purpose of specifying “the length or lengths of terms members shall serve,” as required by Section 15B(b)(2)(B)(ii) of the Exchange Act.<sup>40</sup>

#### Statutory Basis for Amendments to Board Nominations and Elections Provisions

The amendments that remove overly-prescriptive detail from the Board’s rule regarding nominations and elections, while preserving the key features of the process, are consistent with Exchange Act Sections 15B(b)(2)(B) and (I),<sup>41</sup> which require the Board’s rules to establish fair procedures for the nomination and election of members and provide for the operation and administration of the Board. As discussed above, the amendments would remove references in MSRB rules to a “Nominating and Governance Committee” and replace them with references to a committee charged with the nominating process. The proposed rule change retains the

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<sup>39</sup> 15 U.S.C. 78o-4(b)(2)(B).

<sup>40</sup> 15 U.S.C. 78o-4(b)(2)(B)(ii).

<sup>41</sup> 15 U.S.C. 78o-4(b)(2)(B), (I).

substantive requirements that the committee responsible for the nominating process be: (1) composed of a majority of public representatives, (2) chaired by a public representative, and (3) representative of the Board's membership, but removes the more detailed requirements.

Accordingly, these provisions, as amended, will remain fair procedures for the nomination and election of members. The amendments to these provisions also provide for the operation and administration of the Board because they permit the Board additional flexibility to determine its committee structure through Board charters and policies, and to determine the most appropriate methods of providing notice that the Board is soliciting applicants for membership in light of available technology and media.

#### Statutory Basis for Amendments Requiring Public Representative Committee Chairs

The amendments that would codify in MSRB Rule A-6 existing MSRB rule and policy requirements that the chairs of Board committees with responsibilities for nominations, governance, and audit must be public representatives is consistent with Section 15B(2)(I) of the Exchange Act,<sup>42</sup> which requires MSRB rules to provide for the operation and administration of the Board. As an administrative and operational matter, the Board has established a number of standing committees as well as special committees when appropriate. Determining the appropriate leadership and composition of these committees is the type of activity contemplated by Section 15B(2)(I) of the Exchange Act,<sup>43</sup> which recognizes that the Board will establish internal operational and administrative requirements and, in some instances, will do so by rule.

#### Statutory Basis for Reorganizational and Technical Amendments

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<sup>42</sup> 15 U.S.C. 78o-4(b)(2)(I).

<sup>43</sup> Id.

As discussed above, the proposed rule change includes certain organizational and technical changes to MSRB Rule A-3. The amendments that change the rule's title and reorganize the content to present the topics in a more logical order are consistent with Section 15B(b)(2) of the Exchange Act,<sup>44</sup> which requires the Board 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.” MSRB Rule A-3 establishes the Board's fair procedures for, and assures fair representation in, the nomination and election of Board members. The organizational and technical amendments make no substantive changes to these fair procedures but merely improve the rule's readability. Accordingly, these amendments are consistent with Exchange Act Section 15B(b)(2).<sup>45</sup>

The amendment that includes in MSRB Rule A-3 the substance of the Board's policy on Board member changes of employment or other circumstances is consistent with Exchange Act Section 15B(b)(1),<sup>46</sup> which imposes certain Board composition requirements, and Exchange Act Section 15B(b)(2)(B),<sup>47</sup> which, as discussed above, requires the Board's rules to assure fair representation in the nomination and election of Board members. As discussed above, this amendment would provide that a Board member is disqualified from further service if his or her change in employment or other circumstances would result in the Board's noncompliance with

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<sup>44</sup> 15 U.S.C. 78o-4(b)(2).

<sup>45</sup> Id.

<sup>46</sup> 15 U.S.C. 78o-4(b)(1).

<sup>47</sup> 15 U.S.C. 78o-4(b)(2)(B).

the requirements in Exchange Act Section 15B(b)(1)<sup>48</sup> for Board composition, including the requirements that the majority of the Board be public representatives and that the Board be as evenly divided in number as possible between public and regulated representatives. Accordingly, this amendment is consistent with Exchange Act Section 15B(b)(1).<sup>49</sup> Additionally, this amendment would provide that if the Board determines that a member's change in employment or other circumstances does not result in disqualification pursuant to the above provision but changes the category of representative in which the Board member serves, the member will remain on the Board pending a vote of the other members of the Board, to be taken within 30 days, determining whether the member is to be retained. This provision allows the Board to preserve the balance of Board categories on the Board that it carefully establishes each year when it elects new members. Accordingly, the amendment is designed to assure fair representation in Board nominations and elections and is consistent with Exchange Act Section 15B(b)(2)(B).<sup>50</sup>

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

Section 15B(b)(2)(C) of the Exchange Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.<sup>51</sup> The proposed rule change relates only to the administration of the Board and would not impose requirements on dealers, municipal advisors or others. Accordingly, the

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<sup>48</sup> 15 U.S.C. 78o-4(b)(1).

<sup>49</sup> Id.

<sup>50</sup> 15 U.S.C. 78o-4(b)(2)(B).

<sup>51</sup> 15 U.S.C. 78o-4(b)(2)(C).

MSRB does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

On January 28, 2020, the Board issued the RFC, which sought comment on the matters included in the proposed rule change, other than the reorganizational and technical changes described above, for a period of 60 days. On March 23, 2020, the Board extended the comment period for an additional 30 days in light of the impact of the COVID-19 pandemic and in response to requests from market participants. The Board received 11 comment letters. These comments, along with the Board’s responses, are discussed below.

Independence Standard

In the RFC, the Board sought comment on draft amendments that would increase the separation period for public representatives to five years. Of the nine commenters that expressed a view, three supported the increase to five years.<sup>52</sup> Two of these commenters believed that the

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<sup>52</sup> See Letter from Susan Gaffney, Executive Director, National Association of Municipal Advisors to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“NAMA Letter”); Letter from Emily Swenson Brock, Director, Federal Liaison Center, Government Finance Officers Association to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“GFOA Letter”); Letter from Americans for Financial Reform Education Fund to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“AFR Letter”). One commenter supported an increase to the separation period but did not suggest how long the period should be. See Letter from Steve Apfelbacher, Renee Boicourt, Marianne Edmonds, Robert Lamb, Nathaniel Singer, and Noreen White to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“Former Board Members Letter”). Another supported an increase to the separation period but believed five years was excessive and recommended three years. See Letter from Beth Pearce, President, National Association of State Auditors, Comptrollers and Treasurers to Ronald Smith, Corporate Secretary, MSRB (Apr. 30, 2020) (“NASACT Letter”).

Board should enhance what one described as the “broad public interest perspective”<sup>53</sup> that public representatives bring to the Board. Another expressed concern that individuals who have spent most of their careers working for regulated entities could become public representatives after only a two year break, and stated that Board members representing issuers should have spent the vast majority of their careers as issuers.<sup>54</sup> Two commenters also believed that the Board is not applying the requirement for public members to have “no material business relationship” with a regulated entity strictly enough and that some public members are employed in positions in which, as one described it, “a vast majority of their work is spent interacting and doing business directly with regulated parties.”<sup>55</sup>

Commenters that supported increasing the separation period to five years generally believed that doing so would not decrease the pool of individuals qualified to serve as public representatives. One suggested that the Board currently interprets the statutory requirement that one public representative be a “member of the public with knowledge of or experience in the municipal industry”<sup>56</sup> too narrowly, and that the standard should include “those persons who have a depth of knowledge about the ways in which municipal issuers or investors interact with regulated entities in practice as well as persons that have expertise representing the public interest in any market or governmental finance context.”<sup>57</sup> Another believed that the Board

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<sup>53</sup> See NAMA Letter; see also AFR Letter (stating that the change to a five-year separation period “would make a difference in shifting Board membership to more effectively represent the public interest and we strongly support it”).

<sup>54</sup> See GFOA Letter.

<sup>55</sup> See *id.*; see also AFR Letter (stating that an employee of a bond insurer, for example, should be viewed as having a material business relationship with regulated entities).

<sup>56</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1).

currently interprets the statutory standard that all Board members be “knowledgeable of matters related to the municipal securities markets”<sup>58</sup> too narrowly and that the standard should include academics, employees of issuers who have never worked for banks, community and labor activists, and others.<sup>59</sup>

Five commenters opposed increasing the separation period to five years.<sup>60</sup> These commenters generally believed that doing so would decrease the pool of candidates with the requisite knowledge of matters related to the municipal securities market<sup>61</sup> and was unnecessary. Commenters believed that five years away from the industry was too long given the complexity of, and rapid pace of changes to, the municipal market for an individual to serve effectively as a “member of the public with knowledge of or experience in the municipal industry,”<sup>62</sup> one of the

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<sup>57</sup> See NAMA Letter.

<sup>58</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1).

<sup>59</sup> See AFR Letter.

<sup>60</sup> See Letter from Nicole Byrd, Chair, National Federation of Municipal Analysts to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“NFMA Letter”); Letter from Dorothy Donohue, Deputy General Counsel – Securities Regulation, Investment Company Institute to Ronald Smith, Corporate Secretary, MSRB (Apr. 15, 2020) (“ICI Letter”); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, and Bernard V. Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“SIFMA Letter”); NASACT Letter (stating that some increase to the separation period is necessary but that five years is too long and recommending a three-year period); Letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“BDA Letter”).

<sup>61</sup> In addition, one commenter that viewed addressing public perceptions of a lack of independence as sufficiently important to justify increasing the separation period (but did not specify an optimal length) also believed that it would reduce the pool of qualified applicants. See Former Board Members Letter.

<sup>62</sup> Exchange Act Section 15B(b)(1), 15 U.S.C. 78o-4(b)(1).

three required categories of public representatives.<sup>63</sup> Commenters also noted that the current two-year separation period is longer than those applicable to public members of other SROs<sup>64</sup> and the post-employment restrictions for former federal government officials.<sup>65</sup>

Some commenters also took issue with the rationale the Board provided in the RFC for extending the separation period to five years and believed that the Board had not adequately supported the need for the increase.<sup>66</sup> One disagreed with the Board’s assertion in the RFC that a longer separation period could better avoid any appearance of a conflict of interest,<sup>67</sup> while another stated that a longer separation period would fail to satisfy those who believe that there is a revolving door between the MSRB and the industry but would reduce the Board’s access to eligible candidates.<sup>68</sup>

After considering these comments, the Board determined to include an amendment to MSRB Rule A-3 in the proposed rule change that would extend the separation period to five

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<sup>63</sup> See, e.g., NASACT Letter (stating that “[w]ith almost continual changes in the municipal securities market, an extended absence from the industry may prevent continuity of the appropriate level of knowledge for effective service on a regulatory board”).

<sup>64</sup> See BDA Letter; SIFMA Letter.

<sup>65</sup> See ICI Letter.

<sup>66</sup> See, e.g., id. (stating that “[o]ther than a vague comment that ‘some commentators have questioned whether a two-year separation period is sufficiently long,’ the MSRB has offered no explanation for extending the period beyond two years”). In the RFC, the Board explained that it was “considering whether a longer separation period would enhance the independence of public representatives who have prior regulated entity associations and better avoid any appearance of a conflict of interest without significantly decreasing the pool of individuals with sufficient municipal market knowledge to serve effectively as public representatives.” RFC, at 6.

<sup>67</sup> See BDA Letter.

<sup>68</sup> See SIFMA Letter.

years. Although the Board continues to believe, as it stated in the RFC, that the Board’s public representatives have acted with the independence required by the Exchange Act, MSRB rules and their duties as public representatives, notwithstanding any prior affiliation with a regulated entity, the Board also believes that a five-year separation period would further enhance not only independence in fact but also the appearance of independence. This should, in turn, 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.

Comments on the RFC suggested to the Board that although 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. The Board believes that increasing the length of the separation period should address the perception held by some stakeholders that public representatives are not sufficiently independent. Although the Board understands concerns expressed by commenters that the longer separation period would decrease the pool of qualified public representatives, the Board’s experience seeking and electing new Board members each year suggests that there is a sufficient number of qualified potential Board members that would meet this standard. The Board notes that although prior experience working for a regulated entity is permitted by the Exchange Act for public members, it is explicitly not required.<sup>69</sup> Contrary to the suggestion of some commenters, the Board does not view experience working for a regulated entity as a prerequisite for Board membership and

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<sup>69</sup> In addition to requiring one public member who is an issuer representative and one who is an investor representative, the Exchange Act requires that one public member must have “knowledge of or experience in the municipal industry” (emphasis added). The Exchange Act is silent with regard to industry experience as a qualification for the other public members.

public representatives may gain the required municipal market knowledge in any number of ways.

The Board also does not agree with commenters who suggested that the independence of the Board’s public representatives has, in fact, been compromised, nor does it believe that it has incorrectly applied the requirement in MSRB Rule A-3 that public representatives have “no material business relationship” with a regulated entity. In particular, the Board has had many years of experience applying this standard and disagrees that the routine business interactions of a Board member’s employer with other market participants, without more, would constitute a material business relationship within the meaning of MSRB Rule A-3. Indeed, the Board’s issuer representatives – a statutorily required category of public representative – would be disqualified under such a reading of the requirement.

#### Board Size

The RFC sought comment on whether the Board should reduce its size to 15 members, the number specified in the Exchange Act.<sup>70</sup> Two commenters supported the reduction and one opposed it, while others expressed some concerns or offered recommendations should the Board move forward with it. Commenters that supported the change believed that 21 members is too large,<sup>71</sup> that a smaller Board would be more manageable,<sup>72</sup> and that the larger Board size, implemented after the Dodd-Frank Act, was no longer necessary now that significant Dodd-

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<sup>70</sup> See Section 15B(b) of the Exchange Act, 15 U.S.C. 78o-4(b) (providing that the Board “shall be composed of 15 members, or such other number of members as specified by rules of the Board”).

<sup>71</sup> See BDA Letter.

<sup>72</sup> See SIFMA Letter.

Frank Act related rulemaking has been completed.<sup>73</sup> One commenter that supported the change to a 15-member Board expressed concern that the necessary rule changes would not be completed by October and suggested the Board wait until fiscal year 2022, beginning on October 1, 2021, to implement the change, in light of the COVID-19 pandemic, and begin recruiting new Board members for fiscal year 2021 immediately.<sup>74</sup>

One commenter opposed reducing the Board’s size to 15 members, particularly in light of other draft amendments in the RFC that would impose a term limit and lifetime service cap.<sup>75</sup> This commenter believed that the reduction would narrow the range of perspectives available to the Board, making it less effective.<sup>76</sup> Other commenters acknowledged that a smaller Board would be easier to manage,<sup>77</sup> and may reduce costs,<sup>78</sup> but expressed concerns that the Board would lose expertise or limit the range of viewpoints represented.<sup>79</sup>

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<sup>73</sup> See id.

<sup>74</sup> See BDA Letter. In addition, one commenter stated that the Board should wait to make the changes described in the RFC until a new CEO is selected rather than presenting the new CEO with “a fait accompli.” See NFMA Letter. Because the CEO reports to the Board, the Board does not agree that waiting to make changes until a new CEO is selected is necessary or would be appropriate.

<sup>75</sup> See NFMA Letter.

<sup>76</sup> See id.

<sup>77</sup> See NAMA Letter.

<sup>78</sup> See NASACT Letter.

<sup>79</sup> See id.; NAMA Letter. In addition, one commenter stated that reducing the size of the Board “would result in one Board seat available to an active issuer, thus diminishing and diluting critical issuer voices on the Board.” See Letter from Shaun Snyder, Executive Director, National Association of State Treasurers to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“NAST Letter”); see also GFOA Letter (expressing concern that next year’s Board would include only one issuer representative); NAMA Letter

After considering these comments, the Board continues to believe that returning to the original size of 15 members set in the Exchange Act is appropriate and will enable the Board to more efficiently carry out its mission to protect investors, municipal entities, obligated persons and the public interest, and to promote a fair and efficient municipal securities market. As some commenters noted, a smaller Board size should result in management efficiencies. A smaller Board may also be able to respond more quickly and flexibly to market developments requiring an immediate response. Although Board member compensation and expenses do not account for a substantial portion of the overall MSRB budget, a Board with fewer members will result in some reduction of costs as well.

At the same time, the Board is cognizant of the risk raised by some commenters who expressed concern that a reduction in Board size could limit the range of viewpoints represented. The Board takes great care through its annual nominations and elections process to constitute a Board that not only meets the requirements of the Exchange Act and MSRB rules but that also provides the Board with a broad and diverse range of viewpoints and perspectives. Through this process, the Board will continue to seek and elect candidates that reflect the wide range of backgrounds and experiences within each of the statutorily required Board member categories.

The Board also believes that fiscal year 2021, which begins on October 1, 2020, is the most appropriate year to effect the reduction in Board size, notwithstanding the ongoing pandemic. Rather, delaying the reduction for a year and instead seeking to fill six Board vacancies for fiscal year 2021 with appropriately qualified candidates would be more disruptive to MSRB governance, operations and programs in light of the travel and other logistical difficulties presented by the ongoing pandemic. As discussed more fully below, however, the

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(expressing concern that there would be a reduction in Board members from the issuer side of a transaction).

Board agrees with commenters who expressed concern that an immediate reduction to 15 members would leave the Board with only one issuer representative in fiscal year 2021. Although the Board always strives to exceed the minimum required number of issuer representatives, it will be of particular importance in fiscal year 2021 in light of the ongoing effects of the pandemic on municipalities and the municipal securities market more generally. Accordingly, the Board has revised the transition plan proposed in the RFC to provide for an interim transition year with 17 members in fiscal year 2021, which will enable the Board to include a second issuer representative.

#### Board Composition

In the RFC, the Board sought comment on whether, if the Board's size were reduced, the Board should replace the requirement that 30% of regulated members be municipal advisor representatives with a requirement that the Board include at least two municipal advisor representatives. In addition, the Board sought comment on whether it should permit – but not require – one municipal advisor representative to be associated with a dealer, provided that the dealer does not engage in underwriting the public distribution of municipal securities.<sup>80</sup> MSRB Rule A-3 currently provides that the required municipal advisor representatives may not be associated with a dealer.

With respect to the number of municipal advisor representatives, two commenters generally supported requiring at least two municipal advisor representatives, with one suggesting

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<sup>80</sup> Although some commenters stated that they would not object to permitting one municipal advisor representative to be associated with a dealer that does not engage in underwriting the public distribution of municipal securities under certain conditions not contemplated in the RFC, no commenter supported it as described in the RFC. As discussed below, the Board has determined to maintain, as closely as possible, the status quo with respect to Board composition on a 15-member Board and, accordingly, has not included this provision in the proposed rule change.

that two municipal advisor representatives “among the seven regulated representatives should provide appropriate knowledge and representation to the Board.”<sup>81</sup> Two commenters believed that the rule should require only the statutory minimum of one municipal advisor.<sup>82</sup> One noted that the Exchange Act requires only at least one municipal advisor representative and stated that reserving additional slots for municipal advisor representatives is unnecessary now that municipal advisors have been regulated for nearly 10 years.<sup>83</sup> The other commented that reserving two seats for municipal advisor representatives would give municipal advisors disproportionate representation on the Board because the number of licensed municipal advisors and those that support them is “a mere fraction” of the “tens of thousands of [dealer employees] who are licensed to transact in municipal securities.”<sup>84</sup> This commenter also noted “that dealers are also subject to the whole gambit of the MSRB’s rulebook for the broad range of activities they engage in and they pay the majority of the MSRB’s fees.”<sup>85</sup>

Three commenters believed that at least three municipal advisor representatives should be required.<sup>86</sup> These commenters generally believed that due to the diverse nature of the municipal advisor community, at least three municipal advisor representatives are necessary to assure sufficient representation, particularly in light of current policy discussions that affect municipal

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<sup>81</sup> See NASACT Letter.

<sup>82</sup> See SIFMA Letter; BDA Letter.

<sup>83</sup> See BDA Letter.

<sup>84</sup> See SIFMA Letter.

<sup>85</sup> See id.

<sup>86</sup> See Letter from Kim M. Whelan and Noreen P. White, Co-Presidents, Acacia Financial Group, Inc. to Ronald Smith, Corporate Secretary, MSRB (Apr. 29, 2020) (“Acacia Letter”); Former Board Members Letter; NAMA Letter.

advisors. Two cited an MSRB letter from 2011,<sup>87</sup> in which the Board explained the need for the 30% requirement in the context of a 21-member board by stating that while the Board had made progress in developing rules for municipal advisors, its work was not complete and that “over the years, it will continue to write rules that govern the conduct of municipal advisors and provide interpretive guidance on those rules, just as it has over the years for broker-dealers since it was created by Congress in 1975.”<sup>88</sup> Another stated that since municipal advisors have a fiduciary duty to their issuer clients, sufficient municipal advisor representation is necessary in light of what it perceived to be a reduction in representation of those on the issuer side of a transaction.<sup>89</sup>

After considering the comments on the municipal advisor composition requirement, the Board determined to include in the proposed rule change an amendment to MSRB Rule A-3 that would require that at least two regulated representatives be associated with and representative of municipal advisors and not be associated with dealers. This requirement will preserve, as closely as possible, the *status quo* regarding Board composition as the Board moves to a 15-member Board. Specifically, two municipal advisor representatives among seven regulated representatives will constitute 28.6% of the regulated representatives, as compared to the 30% that is currently required. Three municipal advisors, which the Board believes is too many, would constitute 42.9%.

In determining to require at least two municipal advisor representatives, the Board carefully considered the comments of those who believed that only at least one should be

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<sup>87</sup> See Letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, to Elizabeth Murphy, Secretary, SEC (Sept. 19, 2011), available at <https://www.sec.gov/comments/sr-msrb-2011-11/msrb201111-4.pdf>.

<sup>88</sup> See Former Board Members Letter; Acacia Letter.

<sup>89</sup> See NAMA Letter.

required and those who believed that at least three should be required. The Board continues to believe, as it noted in the RFC, that, in light of the broad range of municipal advisors subject to MSRB regulation, it will serve the MSRB's regulatory mission to require municipal advisor representation greater than the statutory minimum. At the same time, a blanket requirement that at least three of seven regulated members must be municipal advisor representatives would be disproportionate to the required number of dealer and bank dealer representatives. The Board notes that two municipal advisor representatives is a minimum number and not a limit.

Finally, although the Board did not seek comment on changes to board composition requirements other than those described above related to municipal advisors, some commenters noted their continued support for issuer representation on the Board that is greater than the one required position. One commenter acknowledged that in recent years the Board had incorporated its suggestion for issuer representation beyond the one required position, but expressed concern that in the first fiscal year after a reduction in size there will be only one issuer representative.<sup>90</sup> Another urged the Board to consider changing its rules or policies to specify a minimum number of seats for issuer representatives and reserving one for a small issuer representative and another for a representative of a state 529 plan.<sup>91</sup>

Although the proposed rule change does not include amendments that would change the number of required issuer representatives on the Board, the Board agrees with commenters that

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<sup>90</sup> See GFOA Letter (suggesting that the public representatives on a 15-member Board should consist of three issuer representatives, three investor representatives, and two members of the public with knowledge of or experience in the municipal industry).

<sup>91</sup> See BDA Letter; see also NAST Letter (stating that “the MSRB should continue to prioritize the inclusion of a State Treasurer on the Board at all times, but should also include additional active issuers, including those from local governments and other issuer entities”).

issuer representation beyond the statutory minimum is important to achieving a balanced Board and, in most years, the Board has included more than one issuer representative. As noted above, if the Board were to transition to 15 members in the next fiscal year, the Board would be left with only one issuer representative for that year. Although circumstances may arise that require the Board to operate with only one issuer representative in a given year, the Board agrees with commenters that this 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. Accordingly, as discussed above, 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.

#### Board Member Qualifications

In the RFC, the Board stated that in order to further convey to the public the seriousness with which the Board conducts its elections and bolster public confidence in its processes, it believed codifying in its rules the requirement that members be individuals of integrity was appropriate. One commenter supported this proposal and asked the Board to provide details on how it would determine that a prospective Board member possessed the necessary integrity.<sup>92</sup>

The Board continues to believe that adding the express requirement is appropriate and has included this amendment to MSRB Rule A-3 in the proposed rule change. As explained in the RFC, the Board has consistently sought candidates of demonstrated personal and professional integrity. The purpose of the amendment is to further convey to the public the seriousness with which the Board conducts its elections and bolster public confidence in its process. The Board will continue to determine whether a candidate possesses the requisite personal and professional

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<sup>92</sup> See BDA Letter.

integrity through its rigorous nominations and elections processes, which include, among other things, candidate interviews, extensive screening, and background checks.

### Transition Plan

The RFC sought comment on a transition plan that would involve granting one-year term extensions to four public representatives and two regulated representatives over a three-year period. The four commenters who commented on the plan generally believed the plan was appropriate.<sup>93</sup> One commenter stated that transparency should be a priority in implementing the transition plan.<sup>94</sup>

As discussed above, the proposed rule change includes the transition plan described in the RFC, but adjusted to provide that in the first transition year the Board will have 17 members. That adjustment will be achieved by granting one-year extensions to an additional public representative and an additional regulated representative, in order to comply with the requirements that the Board size be an odd number and that the Board be as evenly divided in number as possible between public and regulated representatives.

The Board agrees that transparency in connection with the transition plan is an important consideration and has included the details of the plan above for that reason. As noted above, the Board will determine extensions pursuant to the plan each year in conjunction with its annual nominations and elections process, when that process resumes in fiscal year 2021, so that candidates for extensions and new candidates may be considered holistically. Candidates for the one-year extensions will have already been evaluated by the Board once before, when they were first nominated for a Board term.

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<sup>93</sup> See SIFMA Letter; BDA Letter; NAMA Letter; NASACT Letter.

<sup>94</sup> See NASACT Letter.

## Terms

In the RFC, the Board sought comment on draft amendments that would remove the current maximum of two consecutive terms, provide that a Board member could serve for a total of no more than six years, and prohibit a Board member who had reached the six-year limit from returning to the Board, even after a period away. In response, the Board received four comments supporting the six-year limit described in the RFC.<sup>95</sup> These commenters generally agreed that the limit would serve to refresh the perspectives available to the Board. One commenter opposed replacing the two consecutive term limit with a six-year cap and stated that, in light of the proposal to extend the separation period, “there needs to be a level of comfort that the caliber and quantity of historical applications will continue in the future.”<sup>96</sup> Some commenters requested further clarification about when a Board member would receive an additional two years.<sup>97</sup>

Two commenters specifically agreed with the proposal to impose a lifetime limit on Board service, and generally believed that there is a wide range and large number of applicants that could be considered for Board service.<sup>98</sup> In contrast, two commenters opposed the lifetime cap. One believed that a former Board member might be the best candidate among applicants and that it would be disadvantageous to disqualify him or her “because of an arbitrary lifetime service limit.”<sup>99</sup> This commenter suggested that an alternative to the lifetime service limit could be to establish a separation period before a former Board member could return. Another

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<sup>95</sup> See BDA Letter; GFOA Letter; NAMA Letter; NASACT Letter.

<sup>96</sup> See NFMA Letter.

<sup>97</sup> See NAMA Letter; NFMA Letter.

<sup>98</sup> See NAMA Letter; GFOA Letter.

<sup>99</sup> See NFMA Letter.

commenter who opposed the lifetime limit suggested that an “alternative to achieve the MSRB’s stated goals might be to prohibit a Board member from serving in the same class as his or her previous term.”<sup>100</sup>

After considering these comments, the Board determined to include the six-year service limit in the proposed rule change. The Board agrees that there is a wide range of potential candidates for Board service and that regularly refreshing the perspectives available to the Board assists the Board in carrying out its mission to protect investors, municipal entities, obligated persons and the public interest, and to promote a fair and efficient municipal securities market.

As described above, although one four-year term would be the norm under the proposed rule change, Board members would be eligible to serve for an additional two years as necessary for the Board to fill expeditiously a vacancy that arises in the middle of a Board member’s term. In such circumstances, the Board sometimes chooses to fill such a vacancy for a short period of time by re-appointing a sitting Board member to serve for the remainder of the term of the Board member whose departure created the vacancy or electing a recently departed former Board member who has already been through the extensive nominations and elections process and will be familiar with matters then before the Board, rather than leaving the vacancy unfilled until a more exhaustive, but time-consuming, search for a new Board member can be completed. The proposed rule change would permit the Board to continue to do so, provided that no Board member’s total time on the Board exceeds six years.

#### Amendments to Board Nominations and Elections Process

The RFC sought comment on amendments to MSRB Rule A-3 that would preserve the essential features of the nominations and elections process but remove overly prescriptive detail,

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<sup>100</sup> See SIFMA Letter.

such as the specific requirement for a “nominations and governance committee.” One commenter agreed that allowing for flexibility to determine such matters by policy rather than rulemaking would be more effective and resilient.<sup>101</sup> One commenter did not believe there was a need to reduce the detailed requirements in the rule but stated that it would not object if key issues were addressed in policies, provided the policies were publicly available.<sup>102</sup> Another similarly stated that it did not object to the Board preserving flexibility to determine committee structure through policies and charters, but that to preserve transparency the reasons for any changes should be available on the Board’s website.<sup>103</sup>

After considering these comments, the Board determined to remove the prescriptive detail in MSRB Rule A-3, as described in the RFC. As noted in the RFC, the substantive provisions, such as the requirements that the committee responsible for nominations have a public representative majority and be chaired by a public representative, would remain in the Board’s rules.<sup>104</sup> The Board also notes that key policies of interest to stakeholders, including the Code of Ethics and Business Conduct, the Conflicts of Interest Policy, and the Whistleblower

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<sup>101</sup> See NASACT Letter.

<sup>102</sup> See NAMA Letter (also suggesting that the Board consider reviewing and potentially revising policies on term extensions and conflicts of interest and the code of ethics as part of a public process).

<sup>103</sup> See NFMA Letter.

<sup>104</sup> In the RFC, the Board noted that it was reconsidering, and sought commenters’ views on, the requirement that the Board make available on its website the names of all applicants who agreed to be considered by the nominations committee. Four commenters believed this requirement should be retained for purposes of transparency, while one supported not publishing the names but making them available to individuals upon request, also in the interest of transparency. The Board did not include any change to the existing requirement in the proposed rule change.

Policy and Complaint Handling Procedures, are all available to the public on the Board's website.<sup>105</sup>

#### Committee Public Representative Chairs

The RFC sought comment on whether the Board should include in MSRB rules a requirement that a public representative chair the Board committees responsible for governance, nominations, and audit. One commenter wrote in support of these provisions and the proposed rule change includes an amendment to MSRB Rule A-6 that incorporates them.<sup>106</sup>

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

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<sup>105</sup> These policies and procedures are available at <http://www.msrb.org/About-MSRB/Governance.aspx>.

<sup>106</sup> See NFMA Letter.

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2020-04 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-MSRB-2020-04. This file number should be included on the subject line if email 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 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2020-04 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.<sup>107</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>107</sup> 17 CFR 200.30-3(a)(12).

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