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April 15, 2020

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW, Suite 1000
Washington, DC 20005

Re: Request for Comment on Draft Amendments to MSRB Rule A-3 on Membership on the Board (2020-02)

Dear Mr. Smith:

The Investment Company Institute¹ opposes the Municipal Securities Rulemaking Board's draft amendments to MSRB Rule A-3 that would change the criteria for Board membership.² The amendments would tighten the independence standard required of public representatives. As discussed below, we believe the proposal is unnecessarily restrictive, inconsistent with the post-employment rules and restrictions for former federal government officials, and could severely decrease the opportunity for former employees of investment advisers, including advisers to registered investment companies ("fund advisers"), to serve on the Board.³

Additionally, the MSRB is seeking comments on whether it should expand the definition of the Board's municipal advisor category. We would support permitting a municipal advisor associated with a dealer

¹The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$24.1 trillion in the United States, serving more than 100 million US shareholders, and US\$7.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² MSRB Regulatory Notice 2020-02 (January 28, 2020) ("Notice"), available at <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2020-02.ashx??n=1>.

³ Fund advisers are active participants in the \$3.9 trillion municipal securities markets, providing the means through which many retail and institutional investors participate in these markets. Of the \$3.9 trillion outstanding in the municipal securities markets as of year-end 2019, mutual funds and other registered investment companies held 29 percent.

to sit on the Board, *provided* the same opportunity is extended to the Board's investor representative, as discussed below.

Independence Standard

Background

Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended Section 15B(b)(1) of the Securities Exchange Act of 1934 ("Securities Exchange Act") to require that a majority of MSRB Board members be independent ("public representatives"), while the remainder be associated with a broker, dealer, municipal securities dealer, or municipal advisor ("regulated representatives"). The Securities 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 market."

In 2010, the MSRB amended Rule A-3 to define a public representative as an individual who has "no material business relationship" with any municipal securities broker, municipal securities dealer, or municipal advisor ("regulated entity"). The MSRB defined "no material business relationship" to mean the individual is not or was not "associated with" a regulated entity within the last two years. In addition, the individual must not have a relationship with any regulated entity that reasonably could affect his or her independent judgment or decision making.

In the decade since the MSRB adopted the independence standard, the Board has elected public representatives that meet both the independence standard in Rule A-3 and the statutory standard of "knowledgeable of matters related to the municipal securities market," including public representatives who gained the requisite market knowledge through prior affiliations with regulated entities that ended, at least two years before their service on the Board began.

According to the Notice, the MSRB has found that the Board's public representatives have played an invaluable role, and the Board believes they have acted with the independence required by the Exchange Act, MSRB Rules, and their duties as public representatives, notwithstanding any such prior affiliation.⁴

Indeed, on at least two occasions, the MSRB has expressed concern that the existing test for evaluating materiality of a business relationship has precluded consideration of otherwise viable candidates. In

⁴ Notice at 6.

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2013⁵ and again in 2015,⁶ the MSRB proposed amendments that would permit it to consider candidates for the Board who have the relevant municipal market knowledge and expertise to represent investors, but who technically may have some association or corporate affiliation with a regulated entity.

MSRB's Proposal

Despite the invaluable role the public representatives have served and the MSRB's previous attempts to enhance the representation of investors on its Board, the MSRB is now seeking comment on whether extending the separation period to five years (from two) would enhance the independence of public representatives who have prior regulated entity associations. It also is considering whether the longer separation period is necessary to 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. But the only justification proffered for this proposed change and apparent new concern over the independence of public representatives is that "some commentators have questioned whether a two-year separation period is sufficiently long."⁷

We have serious concerns with this proposal. First and foremost, we strongly believe it will unnecessarily impede the MSRB's ability to identify and select individuals who represent investors and have significant knowledge of the municipal securities market to serve on the Board.

⁵ In July 2013, the MSRB proposed to amend MSRB Rule A-3 to provide a more function-oriented approach to defining independence for all public representatives. *See* Exchange Act Release No. 70004 (July 18, 2013). After some commenters expressed concern with the 2013 proposal, the MSRB withdrew the filing with plans to further increase its efforts to identify well-qualified applicants to serve on the MSRB Board, and gain additional experience operating under the existing standard. Commenters opposing the 2013 proposed amendments suggested that the amendments were not consistent with the Securities Exchange Act's mandate that public representatives be independent of regulated entities. In contrast, ICI submitted a letter expressing support for the 2013 proposal, noting that the proposed amendments would improve the quality of representation for both institutional and retail investors on the MSRB Board. *See* Letter from Dorothy Donohue, Deputy General Counsel-Securities Regulation, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (September 18, 2013), *available at* <https://www.iciglobal.org/pdf/27584.pdf>.

⁶ After gaining additional experience applying the current standard and finding that the existing test for evaluating materiality of a business relationship was overly restrictive, in 2015 the MSRB proposed an alternative definition of "no material business relationship" to determine whether the public Board member representing institutional or retail investors in municipal securities ("investor representative") is independent. This modified standard of independence would have applied to just one investor representative. The MSRB explained that the proposed amendments were tailored to allow employees and other representatives of investment advisers—who serve the interests of the adviser's clients, rather than the regulated entities—to serve as the MSRB investor representative. The MSRB received 15 comment letters on this proposal. Nine commenters, including ICI and four former MSRB Board members, submitted letters expressing support for the 2015 proposal. *See e.g.*, Letter from Dorothy Donohue, Deputy General Counsel-Securities Regulation, Investment Company Institute, to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board (July 13, 2015).

⁷ Notice at 6.

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The MSRB Board members are charged with the significant responsibility of protecting municipal entities, investors, and the public interest. Each representative should bring to the table experience and expertise to effectively serve the interests of their constituents. As a starting point, there is only one required investor representative position on the MSRB Board—for both retail and institutional investors. The pool of applicants is further narrowed by the “associated with” language within the public representative definition, as described above.

As we stated in our 2015 comment letter, the MSRB’s rulemaking mandate increasingly requires the MSRB to engage in deliberations regarding highly complex issues relating to the structure and operation of the market, including how municipal securities are priced and transacted. As representatives of underlying fund retail and institutional investors, fund advisers invest in the municipal securities market on behalf of fund investors and interact with a variety of market participants. This provides a distinct and at times contrasting view of the municipal market and its structure compared to representatives or employees of regulated entities or other public representatives who represent other market participants, such as municipal issuers and insurers. In fact, in the 2015 Notice, the MSRB acknowledged that investment advisers with “buy-side” expertise and representative of investors (*e.g.*, fund portfolio managers) could help the MSRB be as informed as possible on all aspects of the municipal securities markets, particularly with respect to current and future market structure initiatives. Indeed, we maintain it is essential that institutional buy-side firms, such as fund advisers, be represented on the MSRB Board and that the regulations that limit that participation be removed.

Extending the separation period to five years will simply make it more challenging to find qualified candidates who continue to maintain sufficient municipal market knowledge to serve effectively as the investor representative position on the MSRB Board. Other 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.

A five-year separation period also is inconsistent with the post-employment rules and restrictions for former federal government officials. For example, former executive branch employees and officials may not “switch sides” for two years in relation to a “particular matter” involving “specific parties” if the matter was under the employee or official’s official responsibility. Former SEC employees are generally subject to these same executive branch post-employment restrictions. Members of the US House of Representatives are prohibited from lobbying or making advocacy communications to either House of Congress or any legislative branch employee for one year after the individual leaves the House. Members of the US Senate are prohibited from lobbying or making advocacy communications to either House of Congress or any legislative branch employee, for two years after the individual leaves the Senate.

For all of these reasons, we strongly oppose the proposed amendments to MSRB Rule A-3 that would extend the separation period to five years.

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Municipal Advisor Definition

The MSRB also is considering a limited expansion of its definition of the municipal advisor category. As noted above, 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.

Currently, Rule A-3 provides that the required municipal advisor members must not be associated with dealers. Accordingly, individuals associated with municipal advisor firms that have a dealer affiliate to facilitate their advisory businesses do not qualify for the required municipal advisor member positions. The board is considering permitting—but not requiring—one municipal advisor representative to be associated with a broker, dealer, or municipal securities dealer, provided that such entity does not engage in underwriting the public distribution of municipal securities. The MSRB believes that such a requirement could facilitate their efforts to obtain the perspectives of the full range of municipal advisor firms.

As noted above, we strongly supported the MSRB's 2013 and 2015 proposals that would have allowed it to consider candidates who have the relevant municipal market knowledge and expertise to represent investors, but who technically have some association or corporate affiliation with a regulated entity, such as a broker-dealer. We therefore would support permitting a municipal advisor associated with a dealer to sit on the Board, *provided* the same consideration is extended to the Board's investor representative.

* * * *

We look forward to working with the MSRB as it continues to examine these critical issues. In the meantime, if you have any questions, please feel free to contact me directly at (202) 218-3563 or Jane Heinrichs, Associate General Counsel, at (202) 371-5410.

Sincerely,

/s/ Dorothy Donohue

Dorothy Donohue
Deputy General Counsel—Securities Regulation

cc: Nanette D. Lawson, Interim CEO, CFO, and Treasurer
Municipal Securities Rulemaking Board

Rebecca Olsen, Director
Office of Municipal Securities
Securities and Exchange Commission