



Municipal Securities Rulemaking Board

November 7, 2019

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

**Re: Response to Comments on SR-MSRB-2019-11**

Dear Ms. Countryman:

On September 11, 2019, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend MSRB Rule A-11, on assessments for municipal advisor professionals, to increase the annual professional fee over a two-year phase-in period from \$500 to \$1,000 (the “Revised Professional Fee”) for each person associated with the municipal advisor who is qualified as a municipal advisor representative in accordance with MSRB Rule G-3 and for whom the municipal advisor has a Form MA-I on file with the Commission (each a “covered representative”) and to make other technical changes (the “proposed rule change”).<sup>1</sup> As proposed, the rule change adjusts the annual professional fee assessed on municipal advisor firms to better defray the costs and expenses of operating and administering the MSRB, including, among other anticipated outcomes, by continuing to adjust the MSRB’s revenue concentration resulting from dealer-paid market activity fees. After carefully considering various alternatives, the Board filed the proposed rule change to implement the Revised Professional Fee as necessary and appropriate to achieve (1) a more equitable allocation of fees among its regulated entities and (2) a fairer distribution of the total expenses of its regulatory activities, systems development, and other operational activities.

The proposed rule change was published for comment in the Federal Register on September 30, 2019.<sup>2</sup> Two written comment letters were filed with the Commission.<sup>3</sup> This letter

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<sup>1</sup> The proposed rule change is available at <http://www.msrb.org/~media/Files/SEC-Filings/2019/MSRB-2019-11.ashx>. Except as otherwise expressly defined herein, the defined terms used in this letter shall have the meanings as defined in the proposed rule change.

<sup>2</sup> See Exchange Act Release No. 87075 (Sept. 24, 2019), 84 FR 51698 (Sept. 30, 2019) (SR-MSRB-2019-11) (“Notice of Proposed Rule Change”).

<sup>3</sup> See letter from Tamara K. Salmon, Associate General Counsel, Investment Company Institute (“ICI”) (Oct. 21, 2019) (the “ICI Comment Letter”) and letter from Andrea Fierstein, Managing Director, AKF Consulting Group (“AKF Consulting”) (Oct. 21, 2019) (the “AKF Comment Letter”).

responds to the two comment letters received by the SEC in response to the Notice of Proposed Rule Change. As more fully discussed below, the two commenters generally oppose the Revised Professional Fees,<sup>4</sup> and each recommend that the SEC not approve the proposed rule change. The MSRB appreciates the participation of each commenter in the rulemaking process.

After carefully considering the comments, the MSRB believes that the comments raised were generally addressed by the MSRB in the filing of the proposed rule change, which is incorporated here by reference. The MSRB is submitting this letter in support of the proposed rule change and to provide the following responses. The MSRB continues to believe that the Revised Professional Fee is reasonable and that the proposed rule change is necessary and appropriate to better defray the costs and expenses of operating and administering the MSRB, including, among other anticipated outcomes, by continuing to adjust the MSRB's revenue concentration resulting from dealer-paid market activity fees.<sup>5</sup>

As discussed in the proposed rule change, expenses associated with the MSRB's market regulation and professional qualification activities amounted to more than \$6,400,000 in fiscal Year 2018. In 2018, approximately 30% of the MSRB's proposed rule filings made to the SEC were related to municipal advisory activities.<sup>6</sup> In addition, the majority of compliance resources published by the MSRB in 2018 were developed to support municipal advisors' understanding of, and compliance with, MSRB Rules.<sup>7</sup> In addition, the MSRB's professional qualification activities in recent years were predominantly related to the development of professional qualification examinations for municipal advisors, including the Municipal Advisor Principal

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<sup>4</sup> The AKF Comment Letter endorses in full the ICI Comment Letter. AKF Comment Letter, at p. 2 ("In writing, I [(i.e., Andrea K. Fierstein)] am endorsing in full the comment submitted to you today by Tamara K. Salmon, Associate Counsel (sic) to the Investment Company Institute ('ICI')." While recognizing AKF's endorsement, this response to comments will, for ease of reference, attribute ICI as the primary author for comments common to both ICI and AKF Consulting.

<sup>5</sup> The fees that generated this revenue are distributed differently among various dealer activities. For example, the MSRB's 529 Savings Plan Underwriting Fees amounted to less than 3% of the MSRB's total fee revenue generated in Fiscal Year 2018, as compared to the nearly 28% generated by other Underwriting Fees paid during the same time period. See <http://www.msrb.org/~media/Files/Resources/MSRB-2018-Annual-Report.ashx?la=en>

<sup>6</sup> See <http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2018-Filings.aspx>

<sup>7</sup> See <http://www.msrb.org/~media/Files/Resources/MSRB-Progress-Report-On-Expanded-Compliance-Support.ashx?>

Qualification Examination in 2018.<sup>8</sup> Limiting the attribution of expenses solely to these activities, and excluding any expenses attributable to other activities that municipal advisors benefit from or are impacted by – such as outreach and education; administration of the board of directors; executive, financial, and risk management; and market structure, transparency, and operations – the revenue generated from the Revised Professional Fee municipal advisor professional fee would have offset less than 25% of these MSRB’s market regulation and professional qualification expenses in 2018. There is no evidence to suggest that in fulfilling its mission to protect investors, municipal entities, obligated persons and the public interest by promoting a fair and efficient municipal securities market, the MSRB’s expenses associated with market regulation and professional qualification activities related to regulating municipal advisors will decrease below 25%, nor is there evidence to suggest that municipal advisors will receive less benefit in the future from other MSRB activities such as outreach and education; administration of the board of directors; executive, financial, and risk management; and market structure, transparency, and operations.

Currently, the proportion of the MSRB operations funded by contributions from dealers is above the costs of MSRB activities related to dealers, and some portion of dealer-paid fees are effectively subsidizing the MSRB’s regulatory activities associated with municipal advisors. ICI’s comment that the filing is “upsetting the balance of fees” paid by dealers and municipal advisors is misguided in its presumption.<sup>9</sup> The Board continues to believe the proposed fee increase on municipal advisors will help the organization provide for assessments that are more fairly and equitably apportioned among all MSRB regulated entities by further diversifying the MSRB’s revenue base away from its strong dependency on dealer-paid market activity fees.

As noted above and discussed in the proposed rule change, the MSRB conducted an economic analysis on the proposed rule change gauging its overall economic impact and assessing its burden on competition.<sup>10</sup> The ICI Comment Letter does not challenge any specific fact or conclusion of the economic analysis;<sup>11</sup> instead, the ICI Comment Letter erroneously states

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<sup>8</sup> See Exchange Act Release No. 34-84926 (Dec. 21, 2018), 83 FR 67772 (Dec. 31, 2018) (SR-MSRB-2018-10).

<sup>9</sup> See ICI Comment Letter, at p. 5.

<sup>10</sup> See 84 FR 51702 - 51704 (“The Board has conducted an economic analysis on the proposed rule change to gauge its overall economic impact and assess its burden on competition.”).

<sup>11</sup> The ICI Comment Letter references the MSRB’s *Policy on the Use of Economic Analysis in MSRB Rulemaking* (the “Economic Analysis Policy”) noting that it permits the MSRB to omit a full analysis otherwise applicable under the policy when the Board’s rulemaking activities meet certain limited exceptions. However, the MSRB may opt to conduct an economic analysis in its rulemaking even if it is not specifically required to so by its policy. See *Policy on the Use of Economic Analysis in MSRB Rulemaking*,

that, “[t]he MSRB has failed to publish an economic analysis supporting the fee increase” and “. . . the MSRB publishes no economic analysis of such fees.”<sup>12</sup> Based on this presumption, ICI asserts that the proposed rule change fails to justify the fee increase.<sup>13</sup> The MSRB continues to assert that the economic analysis it provided does support the Board’s determination that the Revised Professional Fee is consistent with the Act.

The MSRB conducted an economic analysis of the Revised Professional Fee to gauge its overall economic impact and assess its burden on competition.<sup>14</sup> The MSRB made and published a series of determinations based on that economic analysis in the proposed rule change, including the following.<sup>15</sup>

- The Board determined that the proposed rule change was necessary and appropriate because the proportion of revenue generated by fees from municipal advisors is significantly below the costs of MSRB activities related to municipal advisors.<sup>16</sup> As a result, the proportion of the MSRB operations funded by contributions from dealers is above the costs of MSRB activities related to

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available at <http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx> To the extent that ICI is commenting on the Economic Analysis Policy generally, the comments are outside the scope of the proposed rule change, but the MSRB will bear the comments in mind during the Board’s annual review of the Economic Analysis Policy.

<sup>12</sup> ICI Comment Letter, at p. 2.

<sup>13</sup> *Id.* (“ . . . we strongly recommend that the SEC disallow this fee until the MSRB publishes a sound economic analysis that justifies a 100% increase in the fee imposed on municipal advisory registrants.”).

<sup>14</sup> See 84 FR 51702–51704.

<sup>15</sup> Despite not being required to perform an economic analysis under the applicable terms of the MSRB’s Economic Analysis Policy, the MSRB notes that its determinations meet the key elements of the Economic Analysis Policy identified by ICI in its comment letter, as further discussed in the bullets above. See ICI Comment Letter, at p. 2 (restating the “key elements” of the MSRB’s Economic Analysis Policy, including (1) identifying the need for a proposed rule and explaining how the rule would meet that need; (2) articulating a baseline against which to measure the likely economic impact of the proposed rule; (3) identifying and evaluating alternative regulatory approaches; and (4) assessing the benefits and costs, both quantitative and qualitative, of the proposed rule and the main reasonable alternative regulatory approach).

<sup>16</sup> 84 FR 51703.

dealers, and some portion of dealer-paid fees are effectively subsidizing the MSRB's regulatory activities associated with municipal advisors.<sup>17</sup>

- The Board determined that the proposed rule change would increase the proportion of revenue generated by fees from municipal advisors and, thereby, determined that the proposed rule change was necessary and appropriate to ensure that municipal advisors more equitably contribute to defraying the costs and expenses of administering the MSRB.<sup>18</sup>
- The Board evaluated the proposed rule change against the baseline of existing municipal advisor fees and determined that the total amount of the assessment payable by each municipal advisor firm will be dependent on the number of covered representatives employed by the firm, and, therefore, the proposed rule change bears a reasonable relationship to the level of regulated municipal advisor activities undertaken by a municipal advisor firm and will result in lower assessments for smaller firms with less covered representatives.<sup>19</sup>
- The Board identified and evaluated a number of alternative regulatory approaches and determined that the proposed rule change is superior to these alternatives, particularly in light of the costs and benefits of the proposed rule change as compared to the baseline alternative of not amending the current fee structure for municipal advisor firms or developing a new fee.<sup>20</sup>

While ICI contends that the Revised Professional Fee is not justified, it does not specifically address why it deems the MSRB's determinations may be flawed. Consequently, the MSRB continues to believe that the economic analysis is sound and justifies that the Revised Professional Fee is consistent with the Act.

ICI and AKF Consulting take issue with the number of fee amendments that have resulted from this incremental approach. The AKF Comment Letter states the firm's belief that the municipal advisor community, ". . . has been the target of repeated, unreasonable increases over a very short period of time."<sup>21</sup> The ICI Comment Letter similarly encourages the Commission to, ". . . seriously consider whether such fee increase, the third in five years, is truly

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<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id at 51704.

<sup>21</sup> AKF Comment Letter.

warranted in light of the history of this fee – i.e., the \$300 established by the MSRB when it was granted the authority to require the registration and regulation of municipal advisory professionals and the 67% increase in this fee (from \$300 to \$500) in 2017.”

The Board considered the potential negative impacts of an incremental approach to fee increases and the resulting number of amendments to Rule A-11 in its deliberations regarding the Revised Professional Fee. As discussed in the proposed rule change, the Board ultimately chose to structure the proposed rule change with a two-step, phase-in period, in part, to give municipal advisor firms time to implement the Revised Professional Fee.<sup>22</sup> The Board continues to believe that this incremental approach is superior to alternatives that could result in fewer total amendments to Rule A-11 but more accelerated increases in the amount of the fee in each such amendment.<sup>23</sup> Given the Board’s determination that some portion of dealer-paid fees are effectively subsidizing the MSRB’s regulatory activities associated with municipal advisors,<sup>24</sup> the Board has determined that the Revised Professional Fee is necessary and appropriate and that the benefits of a gradual increase to the annual municipal advisor professional fee under Rule A-11 – as compared to a larger fee increases that would more fully align the MSRB’s municipal

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<sup>22</sup> See 84 FR 51703 (“While further increases may be necessary and appropriate in the future, the Board has determined that an incremental, phase-in approach is superior to possible alternatives, particularly less incremental alternatives that would not allow municipal advisors the same amount of time to adjust to the increased amount of the Revised Professional Fee. Among other benefits, the incremental approach of the proposed rule change will give a municipal advisor firm a period to implement the Revised Professional Fee.”).

<sup>23</sup> The MSRB also emphasized in the proposed rule change that future revisions to the fee amount may be necessary. 84 FR 51703 (“The Board has determined that the proportion of revenue generated by fees from municipal advisors is significantly below the costs of MSRB activities related to municipal advisors. As a result, the proportion of the MSRB operations funded by contributions from dealers is above the costs of MSRB activities related to dealers, and some portion of dealer-paid fees are effectively subsidizing the MSRB’s regulatory activities associated with municipal advisors. The Board believes the Revised Professional Fee is necessary and appropriate to ensure that municipal advisors more equitably contribute to defraying the costs and expenses of operating and administering the MSRB.”).

<sup>24</sup> 84 FR 51703, at fn. 43. On a related matter, the ICI Comment Letter notes that, “. . . while the MSRB’s proposal attempts to justify this fee increase by discussing a variety of activities, including the adoption of rules more than five years ago and its outreach activities, including the publication of information and resources, there is not indication in the proposal of the costs associated with these activities.” ICI Comment Letter, p. 7. The MSRB refers the ICI to this citation and related discussion in the proposed rule change.

advisor fee revenue with the current costs of the MSRB's regulatory activities associated with municipal advisors – outweigh the burdens of implementing any future amendments to Rule A-11 that may be necessary and/or appropriate.<sup>25</sup>

The ICI Comment Letter encourages the SEC to, “. . . consider the reasonableness of the [Revised Professional Fee] vis-à-vis the fees imposed on registrants by other securities regulators.”<sup>26</sup> More specifically, the ICI compares the Revised Professional Fee to various registration fees charged by state regulatory agencies on persons who are required to register as investment advisors in order to conduct certain activities in those states.<sup>27</sup> ICI also compares the Revised Professional Fee to certain FINRA registration fees. The MSRB appreciates these comments from ICI but is concerned that ICI is drawing a false analogy by comparing the MSRB to state regulatory agencies and certain state-level registration requirements for investment advisors, while also potentially mischaracterizing the role of the MSRB in the municipal securities market and the role of FINRA in regulating municipal advisors.<sup>28</sup> As a self-regulatory organization, the MSRB primarily operates from the fees assessed on dealers and municipal advisors in accordance with its statutory mandate under the Exchange Act and does not receive taxpayer dollars, as compared to state regulatory agencies cited by ICI that may receive taxpayer support. The ICI Comment Letter states that “FINRA charges representatives an initial registration fee of \$100 and an annual fee of \$45...far below the fees the MSRB is proposing.”<sup>29</sup>

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<sup>25</sup> 84 FR 51702 (“However, even with the proposed rule change’s fee increase, the Revised Professional Fee will only defray a small portion of the costs and expenses of operating and administering the MSRB – generating an estimated 5.7% of fiscal year 2020 budgeted revenue and 7.0% of fiscal year 2021 budgeted revenue. Thus, the Board believes the proposed rule change is necessary and appropriate because it is a measured, incremental approach that moves towards a more equitable balance of fees among regulated entities and a fairer allocation of the expenses of the regulatory activities, systems development, and operational activities undertaken by the organization, while not overly burdening municipal advisors with more accelerated fee increases at this time.”)

<sup>26</sup> ICI Comment Letter, p. 6.

<sup>27</sup> Id. (“The states’ registration fees range from a low \$25 (Indiana) to a high of \$250 (Georgia).”).

<sup>28</sup> For example, ICI states that “FINRA does not regulate the conduct of municipal advisory representatives.” ICI Comment Letter, p. 6. This is incorrect. The MSRB notes that FINRA has been designated authority by the SEC to examine FINRA member municipal advisors. See Registration of Municipal Advisors, Release No. 34-70462 (Sept. 20, 2013), 78 FR 67467 (November 12, 2013), at 67581.

<sup>29</sup> ICI Comment Letter, p. 7.

ICI's claim is misguided as it fails to recognize that the initial registration fee of \$100 supplements FINRA's initial registration fee charged to each firm of between \$7500 - \$55,000 depending on the number of persons associated with the FINRA-member.<sup>30</sup> Similarly, the annual registration fee of \$45 per registered associated person is in addition to FINRA's annual assessment on a member firm's gross income.<sup>31</sup> As previously stated, the MSRB conducted an analysis on the proposed rule change and determined that the Revised Professional Fee is appropriate to fund the operation and administration of the Board and otherwise satisfies the requirements of the Exchange Act.<sup>32</sup> The ICI Comment Letter's comparisons to FINRA and the state-level registration fees of investment advisor representatives do not alter the MSRB's determinations in this regard.

The AKF Comment Letter notes the potential burden on small municipal advisor firms created by the Revised Professional Fee. More specifically, AKF Consulting notes that, ". . . firms like mine that serve the municipal issuer community have found themselves under an increasingly burdensome and costly regulatory structure."<sup>33</sup> The MSRB appreciates AKF Consulting's comments on this topic. The MSRB specifically considered the regulatory burden on small municipal advisors in developing the proposed rule change.<sup>34</sup> Under the proposed rule change, the total amount of the assessment payable by each municipal advisor will be dependent on the number of covered representatives employed by the firm and, therefore, will result in lower assessments for smaller firms with less covered representatives. In this way, the MSRB believes that the annual professional fee will bear a reasonable relationship to the level of regulated municipal advisory activities that are undertaken by the firm, in that the MSRB believes that firms with more covered representatives generally will engage in more regulated municipal advisory activities. Consequently, the Board believes that the Revised Professional Fee is consistent with this provision of the Act, because it will not impose an unnecessary or inappropriate regulatory burden on small municipal advisors. Although the MSRB is sensitive to the concerns raised by the AKF Comment Letter, AKF Consulting's comments do not change the MSRB's conclusions in this regard.

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<sup>30</sup> See FINRA By-Laws of the Corporation, Schedule A.

<sup>31</sup> Id.

<sup>32</sup> 84 FR 51702 ("The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(J) of the Act, which states that the MSRB's rules shall provide . . . 'each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board.'").

<sup>33</sup> AKF Comment Letter, p. 1.

<sup>34</sup> 84 FR 51703.



Securities and Exchange Commission

November 7, 2019

Page 9

If you have any questions, please feel free to contact me or David Hodapp, Assistant General Counsel, at 202-838-1500.

Sincerely,

A handwritten signature in blue ink that reads "Gail Marshall". The signature is written in a cursive style with a large initial "G" and a long, sweeping underline.

Gail Marshall  
Chief Compliance Officer