

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65424, File No. SR-MSRB-2011-11]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Amendments to Rule A-3, on Membership on the Board

September 28, 2011.

I. Introduction

On August 11, 2011, the Municipal Securities Rulemaking Board ("MSRB" or "Board"), filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change consisting of amendments to Rule A-3, on membership on the Board, in order to establish a permanent Board structure of 21 Board members divided into three classes, each class being comprised of seven members who would serve three year terms. The proposed rule change was published for comment in the **Federal Register** on August 23, 2011.³ The Commission received three comment letters regarding the proposed rule change and the MSRB's response to these comment letters.⁴

This order approves the proposed rule change.

II. Background and Description of Proposal

The purpose of the proposed rule change is to make changes to MSRB Rule A-3 as are necessary and appropriate to establish a permanent Board structure of 21 Board members divided into three classes, each class being comprised of seven members who would serve three year terms. The terms would be staggered and, each year, one class would be nominated and elected to the Board of Directors.

Rule A-3 would include a transitional provision, Rule A-3(h), applicable for

the Board's fiscal years commencing October 1, 2012 and ending September 30, 2014, which would provide that Board members who were elected prior to July 2011 and whose terms end on or after September 30, 2012 may be considered for term extensions not exceeding two years, in order to facilitate the transition to three staggered classes of seven Board members per class. The transitional provision would further provide that Board members would be nominated for term extensions by a Special Nominating Committee formed pursuant to Rule A-6, on committees of the Board, and that the Board would then vote on each proposed term extension. The selection of Board members whose terms would be extended would be consistent with ensuring that the Board is in compliance with the composition requirements of revised Section (a) of Rule A-3 during such extension periods.

In an order approving changes to MSRB Rule A-3 to comply with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁵ (the "Dodd-Frank Act") requiring the Board to have a majority of independent public members and municipal advisor representation,⁶ the Commission approved a transitional provision of the rule that increased the Board from 15 to 21 members, 11 of whom would be independent public members and 10 of whom would be members representing regulated entities. Of the public members, at least one would be representative of municipal entities, at least one would be representative of institutional or retail investors, and at least one would be a member of the public with knowledge of or experience in the municipal industry. Of the regulated members, at least one would be representative of broker-dealers, at least one would be representative of bank dealers, and at least one, but not less than 30 percent of the regulated members, would be representative of municipal advisors that are not associated with broker-dealers or bank dealers.

The Commission also approved a provision in MSRB Rule A-3 that defined an independent public member as one with no material business relationship with an MSRB regulated entity, meaning that, within the last two years, the individual was not associated with a municipal securities broker,

municipal securities dealer, or municipal advisor, and that the individual has no relationship with any such entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the individual. The rule further provided that the Board, or by delegation, its Nominating and Governance Committee, could also determine that additional circumstances involving the individual could constitute a material business relationship with an MSRB regulated entity.

In finding that the proposed rule change was reasonable and consistent with the requirements of the Exchange Act, in that it provided for fair representation of public representatives and MSRB regulated entities, the Commission noted that the MSRB had committed to monitor the effectiveness of the structure of the Board to determine to what extent, if any, proposed changes might be appropriate. Additionally, in its response to comment letters to the transitional rule proposal, the MSRB suggested that, at the end of the transitional period, the MSRB would be in a better position to make long-term decisions regarding representation, size and related matters. While the transitional period has not yet concluded, the Board believes it is now in a position to establish a permanent structure. A more complete description of the proposal is provided in the Commission's Notice.

III. Discussion of Comments and MSRB's Response

The Commission received three comment letters and a response from the MSRB to the comment letters.⁷ The comment letters and the MSRB's responses are discussed in greater detail below.

A. Comments Regarding Board Size

SIFMA opposed a permanent Board of 21 members. SIFMA stated that such a Board is too big, would result in problems filling the "public" seats with qualified members, and would impose unnecessary costs. SIFMA noted that the 21-member Board exceeds the statutory minimum Board size provided in the Dodd-Frank Act, and believes any deviation from the Board size referenced in the statute should be for compelling reasons. SIFMA believes that a Board that includes 11 public representatives will create challenges in terms of recruiting candidates for Board seats with sufficient knowledge and expertise in the municipal securities market so as

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65158 (August 18, 2011), 76 FR 52724 (the "Commission's Notice").

⁴ See letter from Colette J. Irwin-Knott, President, National Association of Independent Public Finance Advisors ("NAIPFA"), dated September 12, 2011; letter from Michael Decker, Managing Director and Co-Head of Municipal Securities, Securities Industry and Financial Markets Association ("SIFMA"), dated September 13, 2011; letter from Susan Gaffney, Director, Federal Liaison Center, Government Finance Officers Association ("GFOA"), dated September 16, 2011; and letter from Lawrence P. Sandor, Senior Associate General Counsel, MSRB, dated September 19, 2011.

⁵ Public Law 111-203, 124 Stat. 1376 (2010).

⁶ See Securities Exchange Act Release No. 63025 (September 30, 2010), 75 FR 61806 (October 6, 2010) (File No. SR-MSRB-2010-08) ("Transitional Board Approval").

⁷ See *supra* note 4.

to contribute effectively in the Board's discussions. SIFMA also stated that the MSRB's resources would be better directed to key initiatives to improve the functioning of the market than to maintaining a larger Board with higher costs attributable to travel and related expenses for Board meetings and other events. SIFMA urged the MSRB to restore the Board to 15 members in the future.

The MSRB responded that it provided a strong justification for a 21-member Board in its proposed rule change. In the proposal, the MSRB stated that, given the diversity of municipal entities, broker-dealers, bank dealers, and municipal advisors, a Board of 21 members provides more flexibility to provide representation from various sectors of the markets. The MSRB also stated that, at a 21-member level, the Board would be similar in size to its counterpart, the Board of Governors of the Financial Industry Regulatory Authority, and that a Board of 21 members is appropriate and consistent with industry norms. The MSRB does not agree with SIFMA's comment concerning the difficulty of filling the "public" seats with individuals with sufficient knowledge and expertise in the municipal securities market. The MSRB stated that the municipal securities market is replete with individuals who, while satisfying Rule A-3's definition of "independent," are very knowledgeable about the workings of the municipal securities market and have devoted a considerable amount of their time to the improvement of that market, and that previous MSRB searches for public Board members have elicited strong responses from such public servants.

The MSRB also stated that the additional costs associated with a larger Board were not substantial, and estimated the incremental cost of the larger Board at approximately one percent of its budget. The Board further stated that it does not consider such additional costs to be an impediment to the fulfillment of its key initiatives, and that the larger Board contributes significantly to those initiatives.

The Commission finds that the 21-member Board size is not inconsistent with the Exchange Act. Section 15B(b)(2)(B)(iii) of the Exchange Act provides that the rules of the Board may increase the number of Board members over the default 15-member Board structure set forth in the Exchange Act,⁸ provided that such number is an odd

number.⁹ Although a 21-member Board would entail higher costs than a smaller Board, the larger Board would allow greater representation of the interests of the various sectors of the municipal securities market, and, as stated by the MSRB, the larger Board size is not inconsistent with industry norms. The MSRB also believes the 21-member Board has worked efficiently and effectively during the transition period.¹⁰

B. Comments Regarding Board Composition

All three commenters raised concerns about the Board's composition. NAIPFA agreed with the rule's requirement that there be at least one municipal advisor representative who is not associated with a broker-dealer in each elected class of board members, but commented that the Board's composition of seven broker-dealer and bank dealer members compared to three municipal advisor members did not constitute "fair representation" of municipal advisors as was called for by the Dodd-Frank Act.

SIFMA opposed the proposal's mandate that at least 30 percent of "regulated" members of the Board be representatives of municipal advisor firms that are not broker-dealers or bank dealers. SIFMA indicated that there is no comparable minimum for representatives of broker-dealers or bank dealers, noted that the 30 percent minimum representation for municipal advisors exceeds the statutory minimum, and stated that the MSRB offered no justification for this provision.

GFOA stated that the MSRB should ensure that there is adequate issuer representation on its Board in light of the MSRB's new mission to protect municipal entities and obligated persons in addition to investors. GFOA acknowledged that the Dodd-Frank Act states that the Board must be comprised of "at least" one issuer and "at least" one investor, but recommended that, if the Board remains at 21 members, the Board should include four issuers, four investors, and three general public members. GFOA also stated that the issuer positions should be filled by qualified and long-standing representatives of various-sized state and local governments so that there would be a balanced representation of the issuer community. GFOA further stated that these issuer representatives should generally come from general purpose governments that issue the

most often used types of debt (e.g., general obligation bonds, revenue bonds, etc.).

GFOA also stated that having adequate independent financial advisors on the Board is essential and that the number of such independent financial advisor representatives should be no less than the number of those representing banks and broker-dealers; GFOA further recommended allowing only those financial advisors who are unaffiliated with broker-dealers and banks to serve as the municipal advisor representatives on the Board.

In addition, GFOA said that, in order for a public Board member to be considered "independent" from a regulated entity, such member should have had no material business relationship with a regulated entity for the past five years, rather than the two years provided for in Rule A-3. GFOA said that this two-year bar is set too low to guarantee that a public board member has true independence, and that other criteria may also be needed to ensure that any particular independent board position be filled by a professional that has significant experience in the particular community for which he or she serves on the Board.

The MSRB stated that it has carefully considered the interests of municipal advisors, broker-dealers, and bank dealers as regulated entities, the MSRB's obligation to write rules that protect investors and municipal entities, and the statutory mandate that there be fair representation on the Board of broker-dealers, bank dealers, municipal advisors, and the public. The MSRB indicated that while the statute requires that there be at least one municipal advisor representative on the Board, it is the view of the Board that no less than 30 percent of the members representing regulated entities should be municipal advisors that are not associated with broker-dealers or bank dealers. The MSRB did not agree with SIFMA's comment that the level of representation of municipal advisors is disproportionately large, noting that the development of rules for municipal advisors is not complete and that it is essential that municipal advisors participate in the development of rules that affect them. The MSRB also did not agree with NAIPFA's comment that this level of representation of municipal advisors is disproportionately small, in relation to the representation of broker-dealers and bank dealers, stating that because many broker-dealers and bank dealers engage in municipal advisory activities, it is inappropriate to assume that the interests of the municipal advisor Board representatives and the

⁸ See 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

⁹ See 15 U.S.C. 78o-4(b)(2)(B)(iii) (as amended by the Dodd-Frank Act).

¹⁰ See Commission's Notice.

broker-dealer and bank dealer Board representatives are adverse.

The MSRB believes that the proposal adequately addresses GFOA's concerns about the adequacy of issuer representation on the Board and its proposed independence standards. The MSRB does not believe that Rule A-3 should be amended to provide for a greater minimum number of municipal entity representatives than that mandated by the Exchange Act, and noted that they have a mandate to protect all municipal entities. The MSRB also noted that the proposed rule language already addresses GFOA's concern that municipal advisor representatives not be broker-dealers or bank dealers. Further, the MSRB believes that no change to the definition of "independent" in Rule A-3 is warranted because the definition is already more stringent than the definition used by other self-regulatory organizations ("SROs"), and because the definition strikes the right conservative balance of ensuring sufficient independence while not permanently restricting knowledgeable individuals.

The Commission finds that the proposed Board composition is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to the MSRB, including the fair representation requirements of the Exchange Act. Section 15B(b)(2)(B) of the Exchange Act requires, among other things, that the rules of the Board establish fair procedures for the nomination and election of members of the Board and assure fair representation in such nominations and elections of public representatives, broker-dealer representatives, bank representatives, and advisor representatives.¹¹ Section 15B(b)(2)(B)(i) of the Exchange Act provides that the number of public representatives of the Board must at all times exceed the total number of regulated representatives.¹²

The MSRB proposes that the permanent Board, like the current Board operating under the transitional rule for the Board's fiscal years commencing October 1, 2010 and ending September 30, 2012, consist of 11 public representatives and 10 regulated representatives. Of those 10 regulated representatives, the MSRB proposes that at least one, and not less than 30 percent shall be advisor representatives (*i.e.*, three out of 10).

As noted in the Transitional Board Approval,¹³ previously, the Commission has considered whether the proposed governance rules of an SRO are consistent with the Exchange Act's requirements under Sections 6 and 15A for fair representation of SRO members generally.¹⁴ For example, the Commission has approved an SRO's governance rules that require that the SRO's members as a whole be able to select at least 20 percent of the total number of directors of the exchange's or association's board.¹⁵ In addition, the Commission has previously found SRO rules that provide sub-categories of regulated persons with the right to select a specified number of directors to be consistent with the Exchange Act.¹⁶

Under the MSRB proposal, of the 10 regulated representatives, at least one would be a broker-dealer representative,

¹³ See *supra*, note 6.

¹⁴ Section 6(b)(3) of the Exchange Act provides that: "An exchange shall not be registered as a national securities exchange unless the Commission determines that * * * (3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer." 15 U.S.C. 78f(b)(3). Section 15A(b)(4) of the Exchange Act contains an identical requirement with respect to the rules of a national securities association. See 15 U.S.C. 78o-3(b)(4).

¹⁵ See, *e.g.*, Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (stating that "the requirement under BSE By-Laws that at least 20% of the BSE Directors represent members * * * [is] designed to ensure the fair representation of BSE members on the BSE Board"); Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (stating that "the requirement in [Nasdaq's] By-Laws that twenty percent of the directors be 'Member Representative Directors' * * * provides for the fair representation of members in the selection of directors * * * consistent with the requirement in section 6(b)(3) of the Exchange Act"); Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (stating that the amended Constitution of the New York Stock Exchange, which gives Exchange members the ability to nominate no less than 20% of the directors on the Board, satisfies the Section 6(b)(3) fair representation requirement); see also Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (stating that "[c]onsistent with the fair representation requirement, the [Commission's] proposed [SRO] governance rules would require that the Nominating Committee administer a fair process that provides members with the opportunity to select at least 20% of the total number of directors 'member candidates') * * * This '20% standard' for member candidates comports with previously-approved SRO rule changes that raised the issue of fair representation").

¹⁶ See, *e.g.*, Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007) (approving the composition of the FINRA (f/k/a NASD) Board of Governors to include three small firm Governors, one mid-size firm Governor, and three large firm Governors, elected by members of FINRA according to their classification as a small firm, mid-size firm, or large firm).

at least one would be a bank representative, and at least one, and not less than 30 percent of the total regulated representatives (*i.e.*, three out of 10), would be an advisor representative. Section 15B(b)(2)(B)(i) of the Exchange Act requires the Board to consist of a majority of public representatives, leaving a minority of the Board available to achieve "fair representation" of the three sub-categories of regulated representatives.¹⁷ Accordingly, "fair representation" of each of the sub-categories must necessarily mean something less than the 20 percent standard, in relation to an entire board, previously approved by the Commission for SRO members generally under Sections 6 and 15A of the Exchange Act.

The Commission also notes that Section 15B(b)(1) of the Exchange Act sets forth minimum representation requirements for bank, broker-dealer and advisor representatives.¹⁸ It does not mandate the specific number of any class of representatives that should serve on the Board, nor does it set forth maximum Board composition or representation requirements.¹⁹ Thus, as with the interpretation of "fair representation" with respect to other SROs, the Commission has flexibility in determining what constitutes "fair representation" for purposes of the Board's composition under Section 15B of the Exchange Act. Based on the constraints of Section 15B(b)(2)(B)(i) noted above, and the Commission's consideration of "fair representation" in other contexts, the Commission believes that the MSRB's proposal to ensure that representatives of municipal advisors (that are not associated with a broker, dealer or municipal securities dealer), which first became subject to MSRB rulemaking in the Dodd-Frank Act,²⁰ would constitute at least 30 percent of the directors that may be representative of the three sub-categories of regulated representatives, is reasonable, and consistent with Section 15B(b)(2)(B) of the Exchange Act.²¹

¹⁷ See 15 U.S.C. 78o-4(b)(2)(B)(i) (as amended by the Dodd-Frank Act).

¹⁸ See 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

¹⁹ See *id.*

²⁰ See 15 U.S.C. 78o-4(b)(2) (as amended by the Dodd-Frank Act). In addition, the Dodd-Frank Act amended Section 15B of the Exchange Act to require municipal advisors to register with the Commission as of October 1, 2010. See Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) (adopting interim final temporary Rule 15Ba2-6T under the Exchange Act to require the temporary registration of municipal advisors on Form MA-T).

²¹ See 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

¹¹ See 15 U.S.C. 78o-4(b)(2)(B) (as amended by the Dodd-Frank Act).

¹² See 15 U.S.C. 78o-4(b)(2)(B)(i) (as amended by the Dodd-Frank Act).

In finding that the transitional Board was reasonable and consistent with the requirements of the Exchange Act, the Commission noted that the MSRB had committed to monitor the effectiveness of the structure of the Board to determine to what extent, if any, proposed changes in representation might be appropriate.²² Based on its experience during the transitional period, the MSRB has determined that the current transitional Board composition is working effectively and efficiently.²³ Accordingly, the Commission believes that the proposed Board composition, like the transitional Board composition, complies with the Exchange Act.²⁴ The Commission also agrees that allotting at least 30 percent of the regulated entity positions to municipal advisors that are not associated with broker-dealers or bank dealers, which is higher than the minimum representation of municipal advisors required by the Dodd-Frank Act,²⁵ will assist the Board in its rulemaking process with respect to municipal advisors, and will help inform the Board's decisions regarding other municipal advisory activities while not detracting from the Board's ability to continue its existing rulemaking duties with respect to broker-dealer and bank activity in the municipal securities market. The Commission also agrees with the MSRB that the existing definition of "independent of any municipal securities broker, municipal securities dealer or municipal advisor" in Rule A-3, which was not changed by the proposed rule change, strikes a reasonable balance of ensuring sufficient independence while not permanently restricting knowledgeable individuals. In approving the independence definition in Rule A-3, the Commission noted that the two-year cooling off period is a minimum requirement and would allow the Board, or by delegation, its Nominating Committee, to determine additional circumstances involving the individual that would constitute a "material business relationship" with a municipal securities broker, municipal securities dealer, or municipal advisor.²⁶

C. Comments Regarding Transparency of Board Processes

NAIPFA and GFOA expressed concerns about the transparency of

various Board processes. NAIPFA requested that the MSRB's Board member selection and leadership processes become more transparent in order to ensure that the public interest is being served. The MSRB responded by noting that the Board recently made the application process for Board members more transparent by establishing a policy of publishing the names of all applicants on the Board's website within one week of the publication of the names of the new Board members. NAIPFA also expressed concern that the Board members who are to serve on the Special Nominating Committee to be established as part of the proposed rule have already been selected, and expressed concerns regarding the process by which the Special Nominating Committee members were selected. The MSRB responded to the concerns about the Special Nominating Committee by stating that the selection complied with MSRB Rule A-6(a), which permits the Board to establish special committees by resolution, and noting that the members who were selected for the Special Nominating Committee for term extensions were the only Board members who met their criteria of being "disinterested" in the selection process because of their ineligibility for a term extension.

NAIPFA also requested that the MSRB utilize a more transparent process with regard to future rulemaking by giving member firms more information about the rules the MSRB addresses at particular Board meetings and providing the timeline with which the MSRB anticipates rule releases. NAIPFA suggested that the MSRB post meeting agendas at least 48 hours in advance of a meeting date, and allow for public attendance at Board meetings and public participation in Board conference calls. In addition, NAIPFA requested that the MSRB act to ensure that statements made by leadership are consistent with the actions of the Board.

GFOA also stated that there is a need for greater transparency with Board practices. GFOA suggested that the Board hold their meetings in public and allow for outside participation. GFOA also suggested that Board meeting agendas be made available well before the scheduled meetings, and that the meeting minutes be published within 10 business days of each meeting.

The MSRB responded that it believes its rulemaking process provides considerable opportunities for full public involvement and comment on regulatory initiatives, and that the Board is careful to consider all feedback regarding potential improvements to its

governance processes. The Board does not believe that there have been inconsistencies between statements made by MSRB leadership and actions of the Board. The MSRB stated that its Board meetings are closed to the public in order to promote free and frank discussion on all topics and to promote an environment in which impartial judgment may be exercised. However, the Board indicated that it is exploring other alternatives to promote transparency, as transparency is an important priority of the Board.

Although the provisions of the proposed rule change do not directly relate to the transparency of Board processes, the Commission notes that the Board has indicated that it is exploring alternatives to promote transparency.

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's response to the comment letters and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.²⁷ In particular, the proposed rule change is consistent with Section 15B(b)(1) of the Act,²⁸ which requires, among other things, that the Board shall consist of at least eight public representatives (with at least one investor representative, at least one issuer representative, and at least one general public representative) and seven regulated representatives (with at least one broker-dealer representative, at least one bank representative, and at least one advisor representative).

The proposed rule change is also consistent with Section 15B(b)(2)(B) of the Act,²⁹ which 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—

(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;

²⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²⁸ 15 U.S.C. 78o-4(b)(1).

²⁹ 15 U.S.C. 78o-4(b)(2)(B).

²² See Transitional Board Approval, *supra* note 6.

²³ See Commission's Notice.

²⁴ See Transitional Board Approval, *supra* note 6.

²⁵ See 15 U.S.C. 78o-4(b)(1) (as amended by the Dodd-Frank Act).

²⁶ See Transitional Board Approval, *supra* note 6.

(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.

The Commission believes that the proposal provides for fair representation of public representatives, broker-dealers, bank dealers and municipal advisors consistent with the Exchange Act, and that providing a minimum number of non-dealer municipal advisor representatives—at least 30 percent of the regulated representatives—is reasonable, and consistent with the Exchange Act. The Commission notes that the proposal provides that the number of public representatives on the Board shall exceed the total number of regulated representatives by one so that the membership shall be as evenly divided as possible between public representatives and regulated representatives—11 to 10. The proposal specifies the length of terms that Board members will serve—three years—which is consistent with the length of the terms served by Board members prior to the adoption of the Dodd-Frank Act. The proposal increases the size of the Board from 15 to 21, consistent with the size of the Board during the transitional period that commenced on October 1, 2010. Finally, the proposal maintains the existing requirement regarding the independence of public representatives.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,³⁰ that the proposed rule change (SR-MSRB-2011-11) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65418; File No. SR-NYSEArca-2011-66]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .04 to Rule 6.4 in Order To Simplify the \$1 Strike Price Program

September 28, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”) ¹ and Rule 19b-4 thereunder,² notice is hereby given that, on September 26, 2011, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 Exchange proposes to amend Commentary .04 to Rule 6.4 in order to simplify the \$1 Strike Price Program. The text of the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office, on the Commission's Web site at <http://www.sec.gov>, 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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange is proposing to amend Commentary .04 to Rule 6.4 in order to

simplify the \$1 Strike Price Program (“Program”).

In 2003, the Commission issued an order permitting the Exchange to establish the Program on a pilot basis.³ At that time, the underlying stock had to close at or below \$20 on the previous trading day in order to qualify for the Program. The range of available \$1 strike price intervals was limited to a range between \$3 and \$20 and no strike price was permitted that was greater than \$5 from the underlying stock's closing price on the previous trading day. Series in \$1 strike price intervals were not permitted within \$0.50 of an existing strike. In addition, the Exchange was limited to selecting five (5) classes and reciprocal listing was permitted. Furthermore, Long-Term Equity Option Series (“LEAPS”) in \$1 strike price intervals were not permitted for classes selected to participate in the Program.

The Exchange renewed the pilot program on a yearly basis and, in 2008, the Exchange adopted the pilot program on a permanent basis.⁴ At that time, the Program was expanded to increase the upper limit of the permissible strike price range from \$20 to \$50. In addition, the number of class selections per exchange was increased from five (5) to ten (10).

Since the Program was made permanent, the number of class selections per exchange has been increased from ten (10) classes to 55 classes⁵ and subsequently increased from 55 classes to 150 classes.⁶

The most recent expansion of the Program was approved by the Commission in early 2011 and increased the number of \$1 strike price intervals permitted within the \$1 to \$50 range.⁷

Amendments To Simplify Non-LEAPS Rule Text

These numerous expansions have resulted in very lengthy rule text that the Exchange believes is complicated and difficult to understand. The Exchange believes that the proposed changes to simplify the rule text of the Program would benefit market

³ See Securities Exchange Act Release No. 48045 (June 17, 2003), 68 FR 37594 (June 24, 2003) (SR-PCX-2003-28).

⁴ See Securities Exchange Act Release No. 57130 (January 10, 2008), 73 FR 3302 (January 17, 2008) (SR-NYSEArca-2008-04).

⁵ See Securities Exchange Act Release No. 59587 (March 17, 2009), 74 FR 12414 (March 24, 2009) (SR-NYSEArca-2009-10).

⁶ See Securities Exchange Act Release No. 62450 (July 2, 2010), 75 FR 39712 (July 12, 2010) (SR-NYSEArca-2010-66).

⁷ See Securities Exchange Act Release No. 63770 (January 25, 2011), 76 FR 5627 (February 1, 2011) (SR-NYSEArca-2010-106).

³⁰ 15 U.S.C. 78s(b)(2).

³¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.