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February 19, 2013

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2012-63
Comments on MSRB Rules

Dear Mr. Smith:

The Investment Company Institute¹ appreciates the opportunity to respond to the request of the Municipal Securities Rulemaking Board (MSRB) for comments on whether any of the MSRB's rules or guidance should be revised.² According to the Notice, the MSRB is soliciting this information in connection with conducting a review of its rules and related interpretive guidance. The Institute commends the MSRB for undertaking this review. Periodically conducting such a review helps ensure that, as markets and practices evolve, regulation keeps pace. It also should help ensure that the MSRB's rules and guidance protect investors and the market without unduly burdening MSRB registrants.

The Notice is in keeping with the MSRB's history of wanting to hear from market participants regarding its regulations and market activities. Over the years, the Institute and its members have welcomed the opportunity to meet with the MSRB staff on numerous occasions to discuss issues of mutual concern. These meetings have afforded the MSRB's staff and registrants the opportunity to become better informed regarding industry and regulatory issues. Indeed, the MSRB and the industry have a long-standing record of working together to develop practical solutions for these issues. This ongoing dialogue has enabled the MSRB to quickly understand and address issues as they arise, thereby enhancing its effectiveness and efficiency as a regulator.

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$14.2 trillion and serve over 90 million shareholders.

² See *Request for Comment on MSRB Rules and Interpretive Guidance*, MSRB Notice 2012-63 (December 18, 2012) (the "Notice").

Notwithstanding the open dialogue between the industry and the MSRB, we would like to respond to the Notice by offering some recommendations regarding MSRB rulemaking. These recommendations relate to the offer or sale of those municipal *fund* securities that are interests in a 529 college savings plan.³ In summary, we recommend that the MSRB:

- (1) Take steps to clarify the scope and application of the MSRB's substantive rules and guidance;
- (2) Enable municipal securities dealers to rely on an "access equals delivery" model for delivering 529 plan disclosure documents to investors;
- (3) Maintain EMMA as originally designed and not expand it to be a robust public source of information for 529 plan investors; and
- (4) Proceed with care in adopting rules relating to municipal advisors.

Each of our recommendations is discussed in more detail below.⁴

I. SCOPE AND APPLICATION OF THE MSRB'S RULES

Distinguishing Between Primary Distributors and Underwriters

Generally speaking, there are two types of securities sold by municipal securities dealers subject to the MSRB's jurisdiction – *i.e.*, traditional municipal bonds (municipal securities) and 529 plan securities (municipal fund securities). Unlike traditional municipal bond offerings, offerings of 529 plan securities are not conducted through underwriters or syndicates of underwriters, nor are there any "underwriters" involved in bringing 529 plan securities to market. In lieu of underwriters, 529 plans utilize primary distributors to distribute the plan's shares. Depending upon its arrangement with the 529 plan sponsor or the program manager for the 529 plan, the plan's primary distributor may be charged with either selling the plan to investors, entering into sales distribution arrangements on behalf of the plan with retail distributors (*i.e.*, municipal securities dealers) that will sell the plan to investors, or both.

³ As regards the MSRB's request for feedback on its rules and guidance relating to municipal securities, our members that are investors in municipal securities reviewed the MSRB's Notice and offered no recommendations at this time for revising such rules and guidance.

⁴ With the exception of (1), we have previously made each of these recommendations to the MSRB in comment letters on various MSRB proposals.

While various notices issued by the MSRB have recognized that 529 plans utilize primary distributors instead of underwriters,⁵ the MSRB's existing and proposed rules continue to impose duties upon "underwriters" of municipal fund securities.⁶ We find continued use of this term to be confusing, particularly when the MSRB's notices use the term "primary distributor" to describe rules that, by their express language, apply to an "underwriter." To avoid such confusion and conform the language of the notices to the rules they are describing, we strongly recommend that the MSRB (1) adopt a definition of the term "primary distributor"⁷ to apply in the 529 plan context and (2) where appropriate, expressly state within the MSRB's existing and future rules whether they apply solely to underwriters of municipal securities (other than municipal fund securities), solely to primary distributors of municipal fund securities, or to both underwriters and primary distributors.

Distinguishing Between Municipal Securities and Municipal Fund Securities

Along these same lines, confusion also results when the MSRB fails to state clearly whether a rule (or rule proposal) applies solely to municipal fund securities, solely to municipal securities other than municipal fund securities, or to both. The MSRB long ago adopted a definition of "municipal fund security" to distinguish such securities from traditional municipal securities. Under that definition, however, a "municipal fund security" is a type of "municipal security." Thus, as a technical matter, the term "municipal security" includes *both* municipal fund securities and other municipal securities. Indeed, persons selling municipal fund securities are required to abide by all rules applicable to municipal securities as well as all rules applicable solely to municipal fund securities. (By contrast, persons selling municipal securities are only required to comply with rules relating to municipal securities.) We strongly recommend that the MSRB (1) adopt a definition of the term "municipal security" (or a similar term) that refers exclusively to non-municipal fund securities and (2) clarify within each of its current and future rules and guidance whether such rule or guidance applies solely to municipal fund securities, solely to municipal securities other than municipal fund securities, or to both.

Should the MSRB elect not to revise its definitions as we recommend above, we strongly recommend that, when proposing any new rules or rule revisions, or publishing any guidance for registrants, the MSRB *expressly* state whether such rule or guidance is intended to apply to both types of

⁵ See, e.g., *Request for Comment on Plan to Collect Information on 529 College Savings Plans*, MSRB Notice 2011-33 (July 11, 2011), *Request for Comment on Draft Proposal to Collect 529 College Savings Plan Data*, MSRB Notice 2012-40 (August 6, 2012), and *Second Request for Comment on Draft Rule Requiring Underwriters to Submit 529 College Savings Plan Information to the MSRB*, MSRB Notice 2012-59 (November 23, 2012).

⁶ See, e.g., proposed Rule G-45, which would require underwriters of municipal fund securities to file Form G-45 with the MSRB.

⁷ In addition to adopting a definition of "primary distributor," the MSRB should clarify that use of the term "underwriter" (or "syndicate") in its rules does not include a "primary distributor."

products and, to the extent the proposal is intended to apply to both products but would impact them differently, the MSRB notice expressly discuss and explain these differences.⁸ We believe this recommendation will go a long way toward addressing the current confusion that arises when trying to determine the intended scope and impact on 529 plan offerings of the MSRB's rules governing municipal securities.

II. ACCESS EQUALS DELIVERY

The MSRB first raised the prospect of adopting an "access equals delivery" model for delivery of municipal securities disclosure in July 2006.⁹ In response to the MSRB's request for comment on that proposal, the Institute filed a comment letter supporting adoption of this delivery model and encouraging the MSRB to pursue it for official statements relating to 529 plan securities.¹⁰ In January 2007, the MSRB sought comment on a proposed rule change to establish such an electronic delivery system for municipal securities other than municipal fund securities. In May 2009, the MSRB announced that it had received approval from the U.S. Securities and Exchange Commission to amend MSRB Rule G-32, relating to disclosures in connection with primary offerings, to permit dealers to utilize an "access equals delivery" model for offerings of municipal securities other than municipal fund securities.

More recently, in July 2011, the MSRB again sought comment on whether it should extend its "access equals delivery" model to disclosure documents for 529 plan securities. The Institute again filed a comment letter with the MSRB supporting adoption of this model for delivery of disclosure documents relating to 529 plan securities.¹¹ As noted in our 2011 comment letter, in the intervening years since the MSRB's 2006 proposal, "there has been more widespread acceptance by Federal

⁸ For example, most recently MSRB Notice 2012-14 (August 9, 2012) sought comment on whether to strengthen the account opening and supervisory practices of "electronic brokerages" by requiring such brokerages to deliver educational materials to investors. Nowhere within this Notice does the MSRB discuss how this proposal would impact dealers based upon whether the dealer is selling a 529 plan security or a traditional municipal bond, even though fourteen of the sixteen disclosure items that would have to be included in the document would have no relevance to a 529 plan investor (*e.g.*, special features of municipal securities such as floating-rate and variable-rate bonds, callable bonds, defeased and refunded bonds, zero coupon bonds, and put bonds).

⁹ See MSRB Notice 2006-19 (July 27, 2006). An "access equals delivery" model would permit municipal securities dealers to satisfy their regulatory requirement to deliver an official statement to a customer by advising the customer that the document was available for free electronically (through EMMA or another electronic source) and a printed version would be provided to the customer upon request.

¹⁰ See Letter from Elizabeth Krentzman, General Counsel, ICI, to Mr. Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated September 14, 2006. We are not aware of any opposition to this proposal.

¹¹ See Letter from Tamara K. Salmon, Senior Associate Counsel, to Ronald W. Smith, Corporate Secretary, MSRB, dated August 31, 2011 ("August 2011 Letter").

regulators of electronic delivery of documents to investors.” As evidence of the growing acceptance of electronic delivery, our letter cited a detailed analysis of the advantages to investors of electronic delivery in connection with retirement plan documents.¹² Subsequent to this most recent request for comment on this model, the MSRB determined, for unexplained reasons, not to pursue an “access equals delivery” model for 529 plan disclosure documents. We are disappointed with the MSRB’s decision and again strongly encourage it to pursue amendments to Rule G-32 that would make the disclosure delivery obligations of municipal securities dealers consistent, whether the product the investor purchased is a municipal bond or a 529 plan. This approach would be in the best interest of investors in that it would let each individual investor determine his or her preferred medium (hardcopy or electronic copy) for disclosure documents.

III. EMMA AS A PUBLIC REPOSITORY OF 529 PLAN DATA

Since June 1, 2009, “primary distributors” that market 529 plans through municipal securities dealers have been required to submit 529 plan disclosure documents and supplements to the MSRB through EMMA pursuant to MSRB Rule G-32.¹³ In July 2011, the MSRB published for comment a proposal to require “primary distributors” of 529 plans to file with EMMA information concerning such plans that is far more detailed than that currently contained in the plan’s official statement.¹⁴ Such information would include, among other things, total aggregate assets, underlying investment portfolio information, and total quarterly contributions and withdrawals. According to the MSRB’s proposal, “[t]he MSRB believes that it is important to collect additional information about 529 plans both to improve meaningful free public access to such information and to assist the MSRB in better understanding the market for 529 plans, in order to inform [its] activities.” Among other issues, the MSRB’s Notice sought comment on whether information provided to the MSRB in connection with this initiative should be for the MSRB’s use only and not publicly displayed on EMMA.

In August 2011, the Institute filed a comment letter on the MSRB’s proposal. Along with other commenters, the Institute opposed the MSRB publicly disseminating any information relating to plan or portfolio assets that is reported to the MSRB.¹⁵ Our letter discussed in detail the history of

¹² See “*Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*,” Peter P. Swire and Kenesa Ahmed (June 2011), which is available at: http://www.ici.org/pdf/ppt_11_disclosure_dc.pdf.

¹³ See MSRB Notice 2009-22 (May 22, 2009).

¹⁴ See MSRB Notice 2011-33 (July 19, 2011).

¹⁵ The letter explained our concern that “a potential investor who sees a significant diminution in a plan’s assets might be disinclined to invest in the plan even though such a diminution may be wholly unrelated to the quality of the plan. Similarly, a massive inflow of assets to a plan might influence an investor to invest in the plan even though such flow may be unrelated to the quality of the plan.” The letter also noted that we “would not . . . object to the MSRB disseminating aggregate industry information so long as the public could not determine each plan’s or portfolio’s assets from such aggregate information.” See August 2011 Letter at p. 5.

EMMA and the inappropriateness of developing EMMA as a public source of information for investors interested in learning more about 529 plans:

EMMA was originally developed to provide an Internet-based system for free, real-time public access to primary market, secondary market and trade price data for municipal securities. In particular, it was designed to replace the former system of multiple nationally recognized municipal securities information repositories, or NRMSIRs, and state information depositories. Pursuant to SEC rule changes, EMMA has become the centralized source for municipal securities disclosure information. EMMA is a valuable source of information about municipal securities for the public. The Institute was, and continues to be a strong supporter of EMMA.

By contrast, the information on municipal *fund* securities that would be submitted to EMMA is likely already available through other centralized sources, which would make EMMA a redundant repository of such information. For example, the website of the College Savings Plan Network (CSPN), contains much of the information the MSRB is seeking about these plans and their investment options. Importantly, because CSPN's membership consists of state officials from the states offering 529 plans, CSPN has access to information on all states' plans. EMMA, on the other hand, would only receive information from those plans offered by municipal securities dealers that are within the MSRB's jurisdiction. In addition to the CSPN website, reports published by CSPN and others (*e.g.*, Financial Research Corporation, Savingforcollege.com), provide meaningful industry statistics such as industry assets, the average account size, the percentage of accounts with activity, and the total number of 529 plan accounts. Such information is routinely relied upon by investors, Congress, and others. Because of the availability of this information, it would not appear necessary for the MSRB to require its filing in order to have access to it or to provide investors or others access to it. And yet, those plans subject to the requirement would have to expend additional resources to compile, reconcile, submit, and maintain the information filed with the MSRB.

The Institute was pleased that, in August 2012, when the MSRB proposed new Rule G-45 and Form G-45 to collect the information contemplated in its August 2011 proposal, its notice expressly stated that the MSRB:

... appreciated the concerns raised by commenters about the publication of certain information on EMMA and is mindful of concerns about whether the general public would understand it and whether some of the information might be considered proprietary. The MSRB only proposes to collect and use the data for regulatory purposes and not display it on EMMA at this time.¹⁶

¹⁶ See MSRB Notice 2012-40 (August 6, 2012).

The Notice additionally stated that “[a]t this time, the MSRB has no plan to display any of the information described [in the proposed Rule G-45] on EMMA, and would do so only after issuing a new Request for Comment on amendments to the EMMA facility, in order to solicit comments regarding the benefit of displaying the information on EMMA.” The Institute’s letter supported this approach and our comment letter again expressed support for the MSRB’s maintaining the confidentiality of such information.¹⁷ When the MSRB published a revised version of Rule G-45 for public comment in November 2012,¹⁸ it reaffirmed that “[t]he information sought by the proposal is not intended for public distribution at this time, and any future proposal to release the information would be conducted in a separate rulemaking proceeding.” The Institute’s comment letter on this version of the proposal again expressed our support for maintaining the confidentiality of such information and expressly stated our opposition to the MSRB reconsidering, at some point in the future, the public dissemination of information filed on Form G-45.¹⁹

As the MSRB continues to consider the comments it received on revised Rule G-45 and Form G-45, we would like to take this opportunity to reiterate our support for the MSRB to maintain the confidentiality of information it obtains through Rule G-45. We also would like to reemphasize our opposition to the MSRB reconsidering, at some point in the future, public dissemination of individual filer’s information. We believe this emphasis is necessary in light of a January 2013 press article in which senior staff of the MSRB was quoted as stating that the MSRB wanted to make the data collected via Rule G-45 “available to the market” and noted that:

... one of the goals of [this new Rule G-45] database would be to allow retail investors to compare [529 plans]. [The MSRB needs] to make sure the data [it] receives from the plan operators provides [the MSRB] with information based on common definitions, so investors can make valid comparisons. ***The database, once it’s created, would make information immediately available to the retail public.*** [Emphasis added.]²⁰

These comments directly contradict the MSRB’s notices governing proposed Rule G-45 and are of great concern to our members. Adding to our concern is the MSRB’s January 2013 “Monthly Update,” which promoted the “529 College Saving Plan Display” on EMMA. As explained in the Update, “[a]n interactive map accessible from the primary navigation bar on every page in EMMA allows individuals interested in learning about 529 college savings plan to quickly and easily access information about

¹⁷ See Letter from Tamara K. Salmon, Senior Associate Counsel, ICI, to Ronald W. Smith, Corporate Secretary, MSRB, dated September 14, 2012.

¹⁸ See MSRB Notice 2012-59 (November 23, 2012).

¹⁹ See Letter from Tamara K. Salmon, Senior Associate Counsel, ICI, to Ronald W. Smith, Corporate Secretary, MSRB, dated December 20, 2012.

²⁰ See “Regulator eyes better 529 plan info, muni quotes,” Market Watch, The Wall Street Journal, Jan. 9, 2013.

plans *in each state*. EMMA provides access to 529 plan disclosure documents that describe *each plan's* investment options, fees and expenses and any state tax benefit.” [Emphasis added.] Interestingly, however, when one clicks on a state in the interactive map whose plan is *not* distributed by an MSRB registrant (*e.g.*, California), a message box pops up stating “No plan documents submitted to the MSRB,” which is inconsistent with the MSRB’s statements about EMMA containing information on “each” state’s plan. While it is not surprising that, due to limits on its regulatory authority, the MSRB lacks full and complete information on some states’ 529 plans, we are troubled by the fact that the MSRB’s website may be misleading to investors. Indeed, an investor who is “interested in learning about 529 college savings plans” and who is unfamiliar with the limits on the MSRB’s jurisdiction might be led to believe that a state like California either has no 529 plan or there is something amiss in California’s plan since “no plan documents were submitted to the MSRB” regarding the plan.

We are also concerned with the MSRB’s apparent interest in designing EMMA to compete with more mature and comprehensive sources of 529 plan data (*e.g.*, the websites of the College Savings Plan Network or Savingforcollege.com) while providing investors incomplete information regarding EMMA’s limits. Further, in light of its unequivocal statements in its notices relating to Rule G-45, we are troubled by the MSRB’s public statements regarding the future use of EMMA as a source of data “for retail investors” to compare 529 plans. We strongly encourage the MSRB to (1) revise its current public disclosure regarding the 529 plan information that is available on EMMA to explain the limits on the MSRB’s access to certain states’ 529 plan documents and recommend that investors consult the websites of those states or of CSPN to obtain such information and (2) reconsider its plans to make publicly available the information it obtains from Form G-45 that relates to an individual plan’s operations or assets.

IV. MUNICIPAL ADVISORS

Finally, as a result of amendments that the Dodd-Frank Wall Street Reform and Consumer Protection Act made to the Investment Advisers Act of 1940 (“Advisers Act”), the MSRB is charged with regulating “municipal advisors.” Until such time as the SEC adopts a permanent definition of this term, the Institute continues to recommend that the MSRB refrain from proposing any rules applicable to such persons.²¹ Once the SEC adopts a permanent definition, the Institute strongly encourages the MSRB, to the extent practicable, to conform any of its rules governing such persons to rules of the SEC under the Advisers Act. We believe municipal securities dealers that also operate as broker-dealers subject to FINRA’s regulation have benefited greatly from the consistency between rules of FINRA and the MSRB, and we believe the same will be true of municipal advisors that are affiliated with advisers subject to the Advisers Act. Such consistency facilitates compliance with a variety of regulators’ rules and reduces the costs associated with having to comply with disparate regulatory schemes.

²¹ See Letter from Tamara K. Salmon, Senior Associate Counsel, ICI, to Ronald W. Smith, Corporate Secretary, MSRB, dated July 30, 2012 on MSRB Notice 2012-28, relating to disclosure of financial incentives and conflicts of interest by municipal securities dealers and municipal advisors.

