INVESTMENT COMPANY INSTITUTE

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September 21, 2017

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

Re: MSRB Notice 2017-17

Dear Mr. Smith:

The Investment Company Institute[1] is writing in response to the Municipal Securities Rulemaking Board's request for comment on amendments to MSRB Form G-45.[2] The MSRB is considering revising how a 529 plan underwriter reports the plan's program management fee on Form G-45. It is also considering revising the form to require underwriters to: (1) identify and annually report the weighted value of each index that comprises the benchmark that the plan uses to benchmark the total returns for investment options within the plan; (2) submit data about how each asset class within an investment option is performing for the annual reporting period ending December 31; and (3) provide information during each semi-annual reporting period about whether an investment option was open to existing investors but closed to new investors or terminated during the reporting period.

The Institute does not oppose requiring underwriters to report whether an investment option has closed to new investors. We do, however, have serious concerns with the remainder of the proposal, which will be costly and burdensome to implement. Moreover,

[1] The 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 $20.4 trillion in the United States, serving more than 95 million US shareholders.

[2] *See Request for Comment on Draft Amendments to MSRB Form G-45 under Rule G-45, on Reporting of Information on Municipal Fund Securities,* MSRB Notice No. 2017-17 (August 22, 2017) (the "MSRB Notice").

the additional information the MSRB seeks would not appear to be within the scope of an underwriter's responsibilities; nor would it appear to facilitate the MSRB's regulation of municipal securities dealers that offer and sell 529 plans. In addition to commenting on the MSRB's proposed revisions, the Institute recommends that the MSRB eliminate 3-year performance information from Form G-45. Each of these issues is discussed in detail below following a review of, and comments on the MSRB's economic analysis of the proposal.

I. THE MSRB'S DISCUSSION OF THE PROPOSED REVISIONS

A. MSRB Form G-45

Since mid-2015, the MSRB has required underwriters to 529 plans to file Form G-45. Form G-45 requires the disclosure of a variety of information concerning the plan including, but not limited to, investment options, fees, performance, contributions, redemptions, and assets under management. According to the MSRB Notice, the SEC and FINRA "use the data submitted under Rule G-45 to analyze 529 plans . . ., monitor their growth rate, size and investment options, and compare plans based on fees and costs and performance." This data also "enhances the MSRB's understanding of 529 plans . . . as well as informs the MSRB about the potential risks associated with 529 plans and . . . [it] provides appropriate regulatory authorities with additional information to monitor the market for wrongful conduct."[3]

B. The Benefits of the Proposal According to the MSRB's Economic Analysis

According to the MSRB's Economic Analysis of its proposal, the MSRB believes that revising Form G-45 is necessary "to ensure effective regulation of dealers that sell interests in and underwriters to 529 plans."[4] Such revisions would enable the MSRB to "remove the burdens on submitters of unnecessary follow-ups and/or referrals for what is in reality accurate albeit incomplete data."[5] The benefits of the revisions would be "many" and "on-going." These include that information on the form would: (1) "better enable the MSRB to carry out its regulatory responsibilities and fulfill its mission to ensure fairness and efficiency in the markets" for 529 plans; (2) "enhance regulatory oversight of underwriters to 529 plans . . . and dealers that sell interests in them;" (3) "assist the MSRB in better understanding the 529 plan . . . market, including popular investment strategies and portfolios, thereby enabling the MSRB and other regulators to focus their regulatory

[3] MSRB Notice at p. 3.

[4] MSRB Notice at p. 6. Because Form G-45 must be filed twice a year, there have been 4 reporting periods since the MSRB adopted Rule G-45. It is on the basis of these four filings that the MSRB had determined it is necessary to revise the form.

[5] MSRB Notice at p. 7.

resource on issues relating to the sale of interests in 529 plans . . (such as suitability[6]), and issues concerning the strategies and portfolios with the highest risks and impact on the market." Finally:

> With the public knowledge of greater regulatory oversight of underwriters to 529 plans. . and dealers that sell interests in those plans . . ., there could be an increased interest on the part of new and existing investors in choosing these investment options if investors believe they would be better protected by regulation.[7]

C. The Costs of the Proposal According to the MSRB's Economic Analysis

With respect to the costs associated with the revisions, the MSRB Notice acknowledges that they "would impose certain burdens and costs" on 529 plan underwriters, some of which "may lead underwriters to hire third-party consultants to calculate and validate the data," which could result in "significant up-front costs associated with hiring vendors to complete the calculations as well as periodic on-going costs associated with updating the numbers on an annual basis. In addition, in-house staff time would be required to make the semi-annual or annual submission to the MSRB, though the incremental time and cost of data should be *de minimis*." In considering these costs against the proposal's benefits, "the MSRB believes the long-term accrued benefits of the [revisions], including the anticipated use of the information by the MSRB and other regulators for the protection of investors outweigh the burdens that would be imposed on underwriters."[8] Also, while the proposed revisions "would provide a range of benefits, including reducing regulatory blind spots and facilitating efficient and effective regulatory oversight of relevant underwriters and dealers," they "may impose some costs on underwriters and/or require them to revise certain business practices and spend additional resources."[9]

D. The Institute's Comments on the MSRB's Economic Analysis

1. The Proposal Would Not Benefit Investors or Regulation of the Industry

The MSRB's interest in revising the information reported on Form G-45 must be read in the context of its authority under the Securities Exchange Act of 1934 and its mission to protect

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[6] With respect to "suitability," we note that suitability only comes into play when a municipal securities dealer makes a recommendation to a customer regarding investing in a particular 529 plan or investment. The revised data the MSRB seeks through Form G-45 could not be used to assess the suitability of a dealer's recommendation to a customer. Nor would it be relevant to any other issues relating to suitability.

[7] MSRB Notice at pp. 8-9.

[8] MSRB Notice at p. 10.

[9] MSRB Notice at pp. 10-11.

investors by promoting a fair and efficient market. As noted in a letter the Institute filed last month with the Securities and Exchange Commission in response to an MSRB proposal to impose a fee on 529 plan underwriters, "[g]enerally speaking, the MSRB's authority over the 529 plan industry is limited to drafting rules to govern the offer and sale of 529 plans by municipal securities dealers."[10] These rules, in large part, impose professional qualifications and fair dealing requirements on municipal securities dealers. Considering the MSRB's proposal in light of the MSB's mission and its rulemaking authority, it seems that, even if the revisions to Form G-45 would, in fact, produce the benefits described above, *none of them relate to the MSRB's mission or its regulation of the conduct of municipal securities dealers selling 529 plans*.[11] The fact that data submitted on Form G-45 indicates that some plans may grow faster than others; some investment options may be more popular than others; some plans may have different fees or costs than others; some plans may have better performance than others; some plans may have riskier investment options than others; and some may have more popular "strategies" or "portfolios" than others would not appear to provide the MSRB a basis for regulating the municipal securities dealers selling such plans. As such, we do not believe the benefits the MSRB expects to flow from revising Form G-45 can be justified under the MSRB's regulatory authority or its expected use of the data. This is particularly true when one considers the "significant" costs of the proposal.

As noted above, the MSRB is interested in revising Form G-45 "to enhance its ability to analyze the data" submitted on the form to better understand the 529 plan marketplace. However, under the best of circumstances, the MSRB will never be able to rely on the data from Form G-45 to inform it about the 529 plan marketplace. This is because only a portion of the 529 plan marketplace – advisor-sold plans – are required to file the form, so it only represents that segment of the market. Moreover, assets in advisor-sold plans account for less than half of 529 plan assets.[12] If the MSRB ever published information on the 529 plan marketplace based on the data it analyzed from Form G-45, such analysis

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[10] *See* Letter from the undersigned to Mr. Brent J. Fields, Secretary, U.S. Securities Exchange Commission, dated August 25, 2017 (the "Institute's August 2017 comment letter"). The Institute's letter was in response to the SEC's request for comments on the MSRB's proposal to revise MSRB Rule A-13 to impose an annual fee on underwriters of 529 plans. The Institute's letter opposed such fee as inconsistent with the MSRB's rulemaking authority under Section 15B(b)(2)(C) of the Exchange Act.

[11] With respect to 529 plans, the MSRB's authority is limited to regulating the offer or sale of 529 plans by municipal securities dealers. If a municipal securities dealer is not involved in the offer or sale of a 529 plan, the MSRB has no jurisdiction over such plan or its sale. Accordingly, the MSRB lacks the authority to regulate so-called "direct-sold" plans. The MSRB Brochure, *529 Plans: Investor's Guide to 529 College Savings Plans* explains how a direct-sold plan differs from an advisor-sold plan. As used in this letter, the term "direct-sold plans" refers to those plans that are not required to file Form G-45.

[12] *See What's New with 529 Plans,* Morningstar (May 25, 2017) at Exhibit 5. As noted in the text accompanying this exhibit, "Advisor-sold plans extended their streak of losing market share to direct-sold plans in 2016. Six years ago, advisor-sold plans accounted for about 51% of the industry's assets, but that figure has steadily declined and now stands at 45%."

would be incomplete and not representative of the entirety of the marketplace. And, we expect persons interested in an analysis of the 529 plan marketplace would be interested in the totality of the market, not merely a segment of it. Therefore, they likely would be interested in comparing the two market segments, direct-sold plans and advisor sold plans.[13] With its limited authority over the 529 plan marketplace, the MSRB would face considerable challenges in trying to become a source of information on the entire 529 plan marketplace.

In other words, the Institute does not believe that the additional data the MSRB seeks from advisor-sold plans through the proposal would advance the MSRB's mission of protecting investors or promoting a fair or efficient marketplace. Nor would data relating to *a plan's* growth, fees, costs, performance, risks, strategies, or portfolios appear to assist the MSRB in drafting rules regulating the conduct of municipal securities dealers.[14] Moreover, because such data only relates to advisor-sold plans, it also would not enable the MSRB to understand better the totality of the 529 plan marketplace or become a source of meaningful information about such marketplace.

2. The Proposal Would Not Appear Necessary for FINRA or the SEC

In support of the revisions, the MSRB also cites the fact that the proposed changes would enable the SEC and FINRA to use the data to analyze, monitor, and compare plans. There is no indication in the MSRB Notice that either the SEC or FINRA have requested that the MSRB revise Form G-45 as proposed. Furthermore, we note that the SEC efficiently and effectively regulates the entirety of the U.S. investment company (*i.e.,* mutual fund) industry,[15] which has assets well in excess of those held by 529 plans,[16] without requiring mutual funds to disclose or provide to the SEC the same type of information the MSRB is proposing to require of 529 plan underwriters.[17] This is significant because investment companies and 529 plans share many of the same characteristics, which would appear to

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[13] Such analysis is already available in the marketplace. *See, e.g., id.*

[14] We are uncertain as to how the MSRB could use the new data to "monitor the market for wrongful conduct."

[15] Unlike the MSRB, which regulates only the municipal dealers selling 529 plans, the SEC regulates, among other participants in the mutual fund industry, mutual funds, fund advisers, fund underwriters, and broker-dealers selling fund shares.

[16] According to the MSRB, 529 plans hold $266 billion in assets under management. *See* Form 19b-4 filed by the MSRB with the Commission on July 19, 2017, SEC File No. SR-MSRB-2017-05 (the "MSRB Submission") at p. 12. Mutual funds hold over $20 trillion in assets under management.

[17] Nor does FINRA, which regulates broker-dealers selling mutual funds, including the suitability of recommendations made by a broker-dealer, require such broker-dealers to disclose the type of information that the MSRB seeks from 529 plan underwriters.

warrant consistent or similar regulatory oversight as the MSRB recognized when it adopted Rule D-12 in 2000.[18]

3. Imposing New Duties on Plan Underwriters is Misplaced

The duties the MSRB proposes to impose on a plan's underwriter seem misplaced. As noted in the Institute's August 2017 comment letter, the role of a 529 plan underwriter:

> typically involves executing sales agreements with retail broker-dealers and other financial intermediaries that agree to promote the plan to their clients. Under these agreements, the underwriter provides support services (including marketing materials) to the municipal securities dealers distributing the plan and oversees their activities relating to it.[19]

In other words, the enhanced performance information and calculations the MSRB proposes to require of 529 plan underwriters likely is not information they can create in their role as underwriter. Instead, producing such information likely would fall to a plan's sponsor, manager, or investment adviser. The MSRB, however, lacks authority to require such entities to produce this information because its jurisdiction is limited to regulating municipal securities dealers. Notwithstanding this, the current proposal appears to attempt to leverage the MSRB's jurisdiction over municipal securities dealers to impose requirements on persons outside of its jurisdiction.[20] We believe this is inappropriate. A 529 plan underwriter should not have a duty to report information that it does not create, possess, or maintain in its normal course of business; nor should the MSRB impose upon a plan underwriter obligations that are wholly outside of it legal obligations to the plan in its role as the plan's underwriter.

4. The Unique Requirements Will Increase Plan Costs

As noted above, the MSRB's proposal will create a disparity between the regulatory requirements the SEC imposes on mutual funds and those that MSRB Form G-45 will impose directly on plan underwriters and indirectly on 529 plans. This is because the MSRB is proposing to require 529 plans to produce and plan underwriters to provide to the MSRB information that they are not required to produce or provide to the SEC, or to any other regulator. Significantly, most, if not all, 529 plans include mutual funds as an

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[18] MSRB Rule D-12 defines a municipal fund security as a security that "but for the application of Section 2(b) of the Investment Company Act of 1940, would constitute an investment company within the meaning of Section 3 of the Investment Company Act of 1940."

[19] Letter at p. 8.

[20] This is because the plan's underwriter would be dependent upon such persons to create the information the MSRB proposes to add to Form G-45.

investment option. Because mutual funds are not required to produce the information the MSRB is seeking, this is not information that the funds will be able to provide to those 529 plans that include funds as an investment option. This means that the plan, directly or indirectly, will have to incur the costs of complying with the MSRB's interest in receiving additional information about the plan.[21] As a result, assuming that plans are willing to incur the expense to accommodate the MSRB, this disparate requirement is likely to increase the plans' costs because, in completing Form G-45, the 529 plan and its underwriter will not be able to use or leverage the performance and benchmarking information relating to the mutual funds in a plan's investment options.[22] *Any* increase in costs is of concern to plans because, as noted in the Institute's August 2017 comment letter:

> 529 plans are particularly sensitive to *any* increase in their cost of doing business. This is due in large part to the plans' low margins and the fact that an increase in any fee is likely to adversely impact the 529 plan marketplace. These low profit margins are the result of several factors including, among others, the large marketing costs associated with these plans (which the plan's underwriter typically pays), the low minimum contributions to 529 plan accounts, and the lack of automation in this space. [23]

The above expressed concerns with the fee sensitivities of 529 plans apply equally to this proposed regulatory requirement, which would increase a 529 plan's costs. And, as recognized in the MSRB Notice, the MSRB's proposal "would impose certain burdens and costs" on "529 plan underwriters," some of which may be "significant."

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[21] As noted above, however, the enhanced information the MSRB is interested in receiving would not appear necessary to fulfill its mission of protecting investors through a fair and efficient marketplace.

[22] Importantly, because only advisor-sold plans must file Form G-45, the costs associated with the proposal will only impact such plans, not the direct-sold plans with which they compete.

[23] While many financial services firms were eager to enter this market in its infancy when it seemed full of potential, for some time now and with more experience in this space, financial services firms have been reviewing the economics, growth expectations, and costs of the 529 plan business more carefully. As early as 2002, Florida decided to administer its plan in-house after it was unable to attract a service provider to handle the plan. This situation is not likely to improve. Earlier this year, Sallie Mae published its 10th annual report examining how Americans pay for college. This report found, in part, that:

> [U]se of 529 college savings plans seems to have plateaued. In the first year of this study, 529 plans, instituted in 1996, were still relatively new. That year 6 percent of families reported using funds from a 529 plan to pay for college. The usage rate increased over time as more families signed up for these plans. ***The growth, however, has stagnated. The peak usage rate, 17 percent, was in 2012-2013.*** Parents of this year's freshmen have had the opportunity to enroll in a 529 plan since their child was born, yet only 13 percent of families reported using funds from a 529 plan to pay for college this year. [Emphasis added.]

See 2017 How America Pays for College, Sallie Mae's 10th national study of college students and parents, Sallie Mae (2017).

While the MSRB believes that the 529 plan underwriters will bear these costs, ultimately the *plan* and its investors will bear them.

Indeed, to the extent obtaining the information and designing the systems necessary to report the information also imposes costs on the plan's underwriter, the underwriter is likely to treat such costs as a cost of doing business that is passed back to the plan and its investors.[24] As noted in the Institute's August 2017 comment letter,

> [T]he underwriter to a 529 plan enters into an agreement with the issuer and, pursuant to this agreement, the underwriter agrees to provide underwriting services to the plan in return for compensation . . .. In negotiating the fees that will be paid under these agreements, *the underwriter's ongoing costs are a material consideration.* It is indisputable that an underwriter's costs will increase as a result of this new annual underwriting fee. It is also indisputable that this new fee will be a factor for the underwriter to consider when calculating its costs of doing business and determining the compensation it must receive from the issuer to cover its expenses.

Although this comment related to the MSRB's new underwriting fee, it holds true for any new MSRB regulatory requirement that will increase the underwriter's costs. Moreover, as with the underwriting fee, the costs associated with the MSRB's proposal only will impact advisor-sold plans – not direct-sold plans. This would be another instance in which an MSRB rule puts advisor-sold plans at yet another competitive disadvantage to direct-sold plans.[25] In sum, we are concerned with the impact these "significant" costs will have on advisor-sold plans, the competitive burdens they will impose on such plans vis-à-vis direct-sold plans, and the increased costs they will impose on the 529 plan investors who ultimately pay them.

5. The Proposal Will Not Incentivize Investors to Purchase Plans

We do not agree with the MSRB's conclusion that the proposed revisions to Form G-45 will result in "increased interest on the part of new and existing investors" in those advisor-sold plans that are required to file the form. We are aware of no evidence, and the MSRB Notice provides none, to support its conclusion regarding a nexus between 529 plan investors (and potential investors) and the MSRB's regulation of municipal securities dealers. If investors indeed considered the

[24] As noted in the MSRB Notice producing this data could result "in significant up-front costs associated with hiring vendors to complete the calculations as well as periodic on-going costs associated with updating the numbers on an annual basis." Underwriters will not have the data necessary to "complete the calculations." Such data will reside with the plan.

[25] The Institute's August 2017 comment letter discussed in detail how, as the regulatory costs borne by advisor-sold plans increase, it puts such plans at a competitive disadvantage to direct-sold plans.

MSRB's regulation of municipal securities dealers when deciding whether to invest in a 529 plan, then, logically, they would avoid investing in a direct-sold plan because such plans are not subject to *any* regulation by the SEC or MSRB.[26] This, however, is not the case and, in fact, investors invest *more assets* in direct-sold plans than advisor-sold plans.[27]

6. The Costs Associated with the Proposal Exceed Any Benefits

For all the reasons discussed above, we do not believe the additional information the MSRB would receive from revising Form G-45 will further its mission of protecting investors and promoting a fair and efficient marketplace. Nor would it appear to enable the MSRB to promulgate rules regulating municipal securities dealers based on a plan's growth; popularity of investment options, strategies, or investment options; fees or costs; performance; or the riskiness of the plan's investment options. We also do not believe that it is appropriate for the MSRB to use its regulatory authority over 529 plan underwriters to impose regulatory obligations on a plan; nor should the MSRB impose duties on the plan's underwriter that are wholly inconsistent with the underwriter's role in the 529 plan marketplace. Moreover, considering the costs associated with the proposal and its anti-competitive impact on advisor-sold plans, we believe that any benefits associated with it will be outweighed by such costs, which the MSRB has indicated may be "significant."

II. THE INSTITUTE'S COMMENTS ON EACH OF THE PROPOSED REVISIONS

A. Revisions Related to the Program Management Fee

The MSRB requests comment on revising how an underwriter discloses the program management fee on Form G-45. According to the MSRB Notice, "because there is a variance among 529 plans in how the program management fee is assessed, it is more difficult for the MSRB to analyze the program management fee from one 529 plan to another."[28] To address this, the MSRB proposes to "require an underwriter to report the amount of the program management fee separately if such fee is assessed by the underlying mutual fund

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[26] Direct-sold plans would, however, be subject to the SEC's anti-fraud authority.

[27] *See* fn. 12, above. In explaining the trend of advisor-sold plan assets declining, the article notes that "[s]everal factors explain this shift, including lower fees charged by direct-sold plans." Indeed, the fact that direct-sold plans are not subject to the regulatory costs associated with advisor-sold plans, which costs increase an advisor-sold plan's expenses and is a drag on its investment returns, may make direct-sold plans a more attractive plan option for investors.

[28] MSRB Notice at p. 4.

in which the investment option invests rather than by the 529 plan."[29] In discussing this proposal with our members, we understand that, when the MSRB first implemented the filing of Form G-45, those members that contacted the MSRB staff regarding how the staff wanted them to report the program management fee were told *not* to report it separately. They programmed their systems accordingly. While our members can change how they report the program management fee to report it separately, to do so they must incur increased expenses to redesign their current reporting systems. In addition, however, members are concerned that reporting this fee separately may result in the MSRB double counting any program manager fee that is included in the reported underlying fund expenses. Because the MSRB does not and cannot regulate the offer and sale of 529 plans based on program management fees or how they are reported on Form G-45, because the costs to make this change would exceed any benefit to the MSRB, the plan, or the plan's investors, and because of our concerns with double counting, we do not support it.

B. Revisions Related to the Benchmark Return Percent

The MSRB is seeking comment on requiring a 529 plan underwriter to "identify and provide annually the weighted value of each index that comprises the benchmark used in determining benchmark total return percent for an investment option."[30] According to the MSRB Notice, the MSRB is proposing this change because:

> [The MSRB] has observed that when an investment option uses a custom or blended index to benchmark its performance, the resulting performance data may be not as accurate or easy to compare among investment options as it otherwise could be. This is because Form G-45 does not require an underwriter to identify and provide the weighted value of each of the component parts of a custom or blended index.[31]

In the MSRB's view, this change would "facilitate accuracy and comparability of performance data against the relevant benchmark" and "result in a more accurate report of the benchmark performance."[32] As recognized by the MSRB Notice, however, the on-going costs associated with such calculations and reporting may be "significant."

As a preliminary matter, our members do not clearly understand what "weighted value" the MSRB is referring to.[33] For example, assume that an investment option is a target date fund

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[29] *Id.* For purposes of Form G-45, "investment option" means "an option, as described in a plan disclosure document or supplement thereto, available to account owners in a plan to which funds may be allocated."

[30] MSRB Notice at p. 5.

[31] MSRB Notice at pp. 4-5.

[32] MSRB Notice at p. 5. We are uncertain as to what "report" is referenced in this excerpt because we have not seen the MSRB publish any reports relating to 529 plans or derived from data reported on Form G-45.

[33] Our members also note that the MSRB's proposal is predicated on all investment options having benchmarks that could be weighted, which is not the case.

with a portfolio comprised of 25% of bond funds and 75% of equities. Is the MSRB expecting the underwriter to calculate the portion of a blended benchmark that is applicable to 25% of the target date fund's bond assets as well as that applicable to the 75% of the investment options equity assets and report such information? Is the MSRB looking for a statement of the weights given to the component benchmarks? For example, disclosure that Blended Benchmark X is comprised of Index 1 (X%), Index 2 (X%), and Index 3 (X%), or something more complex?[34] Or, instead, is the MSRB expecting a more complicated weighting of the respective benchmarks applicable to asset classes within the portfolio? Regardless of the approach the MSRB is contemplating, this proposal is of concern because 529 plans are accustomed to reporting performance and benchmarking data on their investment options in a manner that is consistent with the SEC's requirements applicable to mutual funds. And, the MSRB's proposed weighting is not consistent with the SEC's requirements. As a result, a 529 plan will be unable to leverage the work that their advisers or managers perform to comply with the SEC's requirements. Producing and reporting the unique information the MSRB seeks will increase plan costs without providing any concomitant benefit to the plan or its investors. We do not understand why the MSRB believes this weighting, which the SEC does not require to regulate mutual funds, is necessary for the MSRB's regulatory efforts and its analysis of the investment options offered by 529 plans. We do not support the MSRB requiring 529 plans to incur the costs and burdens associated with creating, vetting, and filing this more detailed performance information.

C. Revisions Related to Performance Data by Asset Class

The MSRB requests comment on requiring a 529 plan underwriter "to submit data about how each asset class within an investment option is performing for the annual reporting period ending December 31."[35] According to the MSRB Notice, while Form G-45 requires underwriters to disclose asset classes in each investment option, the "Investment Performance" portion of the form does not require underwriters to disclose information about how asset classes within an investment option are performing. As a result, "it is more difficult for the MSRB to determine how a particular asset class is performing on an annual basis."[36] To address this, the MSRB seeks disclosure regarding the performance of asset classes within an investment option.

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[34] In other words, we wonder whether the MSRB is expecting disclosure that the Blended Benchmark X is comprised of 50% of the S&P Index, which had the following returns . . . and 25% of the MSCI EAFE index, which had returns of . . ., or some other information.

[35] MSRB Notice at p. 5. "Asset class" is defined for purposes of Form G-45 to mean "domestic equities, international equities, fixed income products, commodities, insurance products, bank products, cash or cash equivalents, or other product types."

[36] *Id.*

According to our members, it would be an incredibly complex and expensive undertaking to determine the performance of each asset class within each investment option. For example, assume than an investment option of a plan is a mutual fund comprised of both global and domestic equities as well as cash and cash equivalents. It appears that the MSRB is proposing to require a 529 plan to disclose how each of the equity components, cash, and cash equivalents *within* this investment option are performing. As with the benchmark returns discussed above, this is not anything the SEC requires a mutual fund to do. Instead, consistent with their regulatory requirements under the Federal securities law, mutual funds only report performance at the fund level. In addition, however, assuming such calculation is possible, it would necessitate having to program multiple systems at considerable costs. Also, due to the complexities that would be involved in reporting performance on each asset class, the resulting information would not result in an apples-to-apples comparison among asset classes. This is because of the various factors, inputs, and securities that would be required to determine performance and attributions for the various asset classes within an investment option, not to mention different methodologies used for different attribution systems, which would differ from asset class to asset class and from plan-to-plan. Also, to calculate returns at an asset-class level most likely would result in plans having the use multiple performance and attribution systems to derive this data, along with the possibility of coding and mapping to these systems, which could prove extremely costly to automate. And yet, notwithstanding these burdens and costs, the output would not result in meaningful data that would enable the MSRB to assess how one asset class is performing vis-a-vis another asset class both within a 529 plan's investment options and among the various 529 plans' investment options.

Because the SEC does not find it necessary for funds to calculate performance except at the fund level, we question why the MSRB needs more detailed performance information to regulate municipal securities dealers selling 529 plans. We oppose such a costly requirement.

D. Revisions Relating to the Investment Option Closing Date

The MSRB is proposing to require underwriters to disclose on Form G-45 whether an investment option either is closed to new investors or has been terminated. According to the MSRB Notice, when a fund closes to new investors or terminates, "the investment option data submitted for that investment option on Form G-45 can be contrary to analytical expectations, and the MSRB may not be able to easily determine why such variance occurred."[37] Also, in the MSRB's view, the investment data submitted for a closed investment option "may not accurately portray the real analyzed return."[38] In order "to

[37] *Id.*

[38] MSRB Notice at p. 6. As discussed below, we do not believe closing a fund would, in fact, impact a plan's annualized returns (*i.e.,* its performance).

help clarify why there may be a variance in the investment option data," the MSRB is proposing this new disclosure on Form G-45.[39]

To the extent that the MSRB revises Form G-45 to elicit this information in an easy-to-disclose format (*e.g.,* as a "check-the-box" question), it is information that our members could easily report. Programming the necessary system changes to capture this new data point on an ongoing basis will, however, increase the underwriters' costs and these costs should not be discounted by the MSRB. Notwithstanding underwriters' ability to re-program their systems to capture this new information, we do not understand what "analytical expectations" are impacted by an investment option being closed to new investors. Nor do we understand the MSRB's contention that closing an investment option would impact the portrayal of that investment option's "real annualized returns" because closing an investment option would not impact the investment option's performance. We presume that the biggest impact to a 529 plan of closing an investment option to new investors or terminating it is the fact that, but for investment growth, the assets in that option would not increase. And, again, if this is the case, we do not understand why such information would be meaningful to the MSRB as it fulfills its mission to protect investors through a fair and efficient 529 plan marketplace.

III. RECOMMENDED REVISION TO FORM G-45

The MSRB Notice also seeks comment on whether there is other information that the MSRB should consider collecting about 529 plans on Form G-45, in addition to the items of information the MSRB proposes to collect. As a corollary to such request, the MSRB also should consider whether there is any information that the MSRB currently collects about 529 plans that it should cease collecting.

We believe that the MSRB should seriously consider eliminating all data elements seeking information regarding three-year returns on 529 plans, including annualized three-year returns (both including and excluding sales charges) for each investment option. In addition, benchmark performance information submitted to the MSRB should consist of annualized five-year, rather than three-year, returns. We note that neither MSRB Rule G-21(e)(ii), with respect to municipal fund securities product advertisements that include performance data, nor SEC Rule 482(d) with respect to investment company advertisements that include performance data, requires inclusion of three-year returns. In addition, in its Disclosure Principles Statement No. 6, which was adopted on July 1, 2017, the College Savings Plan Network has deleted the column for annualized three-year returns from its example performance charts to harmonize the most recent set of disclosure principles with the MSRB's and SEC's regulatory standards. The MSRB similarly should harmonize its Form G-45 reporting requirements. At a minimum, the MSRB should make reporting of such three-year information optional so that underwriters filing Form G-45 are

[39] MSRB Notice at p. 5.

not forced to manufacture information for the form that is not otherwise required by the SEC or the MSRB.

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In summary, the Institute would not oppose the MSRB including on Form G-45 a box for underwriters to check if they have closed an investment option to new investors or terminated an investment option. The MSRB should, however, be cognizant of the costs imposed on underwriters from this change to the form. We oppose the MSRB revising how underwriters report program management fees on Form G-45, and we oppose adding new items to the form that will leverage the MSRB's jurisdiction over 529 plan underwriters to require 529 plans to create and report performance and benchmarking information that is far more detailed than what the SEC requires of mutual funds. As discussed above, we are troubled by the fact that the MSRB seeks to leverage its authority over plan underwriters to impose requirements on plans. We are also troubled by the MSRB seeking to impose additional "significant" costs on advisor-sold 529 plans to obtain this information when such data would not appear to assist the MSRB in fulfilling its mission to protect investors or enable it to better understand the 529 plan marketplace. While we oppose the revisions the MSRB has proposed to the form, we recommend that the MSRB revise the form to eliminate any items on it relating to three-year returns.

As the MSRB considers these comments or future revisions to its rules regulating those municipal securities dealers that sell 529 plans, we welcome the MSRB's interest in engaging with industry representatives – outside of the formal rulemaking process – to discuss industry concerns and cost sensitivities and understand how regulatory proposals may impact 529 plans and their operations.

Sincerely,

/S/
Tamara K. Salmon
Senior Associate Counsel