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August 25, 2017

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: MSRB Rule A-13 Amendments;
File No. SR-MSRB-2017-05

Dear Mr. Fields:

The Investment Company Institute¹ is writing to express our strong opposition to the Municipal Securities Rulemaking Board revising MSRB Rule A-13 to impose a new fee on underwriters of 529 plan securities.² The proposed rule became effective upon filing with the Commission under Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (“Exchange Act”). While the MSRB’s fee has gone effective immediately, we do not believe that the MSRB has fulfilled its obligation to ensure that the rule change imposing this fee meets the regulatory standards imposed on all of the MSRB’s rulemaking

¹ The Investment Company Institute is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, unit investment trusts, and 529 plans in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$20.0 trillion in the United States, serving more than 95 million US shareholders.

² 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”). On August 1, 2017, the SEC published the MSRB’s proposal for comment. See *Self-Regulatory Organizations: Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Assess an Underwriting Fee on Dealers that are Underwriters of Primary Offerings of Plans*, SEC Release No. 34-81264; File No. SR-MSRB-2017-05.

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activities – including this fee – under Section 15B(b)(2)(C) of the Securities Exchange Act of 1934 (“Exchange Act”).³

Indeed, if the Commission had to approve this fee, we doubt it reasonably could determine that the fee is not discriminatory and will not impose unnecessary and inappropriate burdens on competition, as required by the Exchange Act. Under the recent holding of *Susquehanna International Group et al. v. SEC*,⁴ the Commission itself must make this finding, and – as we describe in detail below – the MSRB’s summary statements regarding the fee and its justification for levying it simply do not meet the standards the MSRB must satisfy under the Exchange Act to promulgate rules or impose fees. To the contrary, the new fee is discriminatory and will impose unnecessary and gratuitous burdens on competition. It seems inappropriate, merely because a fee change can legally take effect immediately, that it can bypass the Commission’s critical review of its fairness and its consistency with the Exchange Act’s requirements. Because there has not yet been a thorough review of the adverse impact this fee will have on investors, municipal entities, and municipal securities dealers and its consistency with the Exchange Act, we strongly recommend that the Commission either abrogate the revisions to the rule that impose this fee or summarily temporarily suspend them and institute disapproval proceedings.⁵ We believe the discussion below provides ample evidence of the fee’s discriminatory impact and the anti-competitive burdens it will impose on investors, municipal entities, and municipal securities dealers to justify the Commission taking such action.

I. OVERVIEW OF CONCERNS WITH THE MSRB’S NEW FEE

As noted above, Section 15B(b)(2)(C) of the Exchange Act⁶ prohibits the MSRB from adopting any rule – including a rule imposing a fee – that is “designed to permit unfair discrimination among customers, municipal entities, obligated persons, municipal securities brokers, municipal securities dealers, or municipal advisors . . . or to impose any burden on competition not necessary or appropriate in furtherance of [the Exchange Act].” A conclusion by the MSRB or Commission that a fee is consistent with the MSRB’s rulemaking authority necessitates a thorough analysis of the fee’s impact on

³ This provision expressly precludes the MSRB from assessing any fee that will “permit unfair discrimination,” or that will “impose any burden on competition not necessary or appropriate in furtherance of [the Securities Exchange Act].”

⁴ See *Susquehanna International Group, LLP et al. v. SEC*, No. 16-1601(DC Cir. Aug. 8, 2017) (“*Susquehanna*”).

⁵ While we realize that the MSRB has stated that the fee has become effective immediately upon filing with the Commission, the MSRB will not levy the fee until 2018. We recommend, pursuant to its oversight of MSRB rulemaking under Securities Exchange Act Sections 3(f), 19(b)(3)(C), and 19(c), that the Commission suspend or abrogate this fee prior to its levy.

⁶ For simplicity, this letter refers to Section 15B(b)(2)(C) as the “MSRB’s rulemaking authority” or “rulemaking authority” unless the context otherwise requires.

customers, municipal entities, and municipal securities dealers to ensure that it is not discriminatory and will not unduly burden competition.

A. An Economic Impact is Necessary to Assess the Fee's Impact

As a preliminary matter, we note that, prior to determining to assess this new annual fee, the MSRB elected not to conduct a thorough economic analysis of the fee or its impact on customers, municipal entities, or municipal securities dealers, including 529 plan underwriters. The MSRB's decision is consistent with its *Policy on the Use of Economic Analysis in MSRB Rulemaking*, which the Board adopted in September 2013. The MSRB's Policy expressly excludes from analysis "a proposed rule change that the MSRB reasonably believes would qualify for immediate effectiveness under Section 19(b)(3)(A)"⁷ – which includes the new 529 plan underwriting fee. In our view, however, the fact that a new fee qualifies for immediate effectiveness should not obviate the need for conducting a thorough economic analysis to determine its impact. It is only through such analysis that the MSRB could be certain that the fee is consistent with its rulemaking authority. Because the MSRB chose not to undertake this analysis, we encourage the Commission either to abrogate or suspend the fee while it conducts its own analysis to affirmatively determine whether the fee is necessary or appropriate in the public interest, for the protection of investors, or is otherwise in furtherance of the purposes of the Exchange Act.

B. Factors the Commission Should Consider in Analyzing the Fee

As the Commission considers whether the fee is consistent with the MSRB's rulemaking authority and whether suspending or abrogating the fee is necessary or appropriate, we encourage it to consider the issues discussed in this letter. In our view, they demonstrate that the fee is discriminatory and will unduly burden competition and is, as a result, not consistent with the MSRB's rulemaking authority under the Exchange Act. This is because the fee:

- (1) Will only impact advisor-sold plans, thereby putting such plans at a competitive disadvantage to direct-sold plans;
- (2) Does not consider the limited role of a 529 plan underwriter in the 529 plan marketplace and will put underwriters at a competitive disadvantage to municipal securities dealers selling the plan;
- (3) Will not impact all underwriters equally due to the manner in which the fee is assessed and the formula used to calculate it, which results in the fee being discriminatory;

⁷ MSRB Submission at fn. 22. Section 19(b)(3)(A) of the Securities Exchange Act of 1934 provides that a self-regulatory organization's proposed rule change establishing fees shall take effect upon filing with the Commission.

- (4) Will not be reasonably related to an underwriter's activities or the MSRB's regulatory oversight of such persons;
- (5) Will not be *de minimis*, and, as a result, will adversely impact the competitive burdens imposed on the plans and their plan's underwriter; and
- (6) The formula used to calculate the fee will compound the fee's unfairness because it will be assessed on the same plan assets year after year until all 529 assets are totally redeemed.

In addition, we request the Commission consider, as part of its analysis, our concerns with the provision in Rule A-13 that prohibits an underwriter from passing on this fee to an issuer. This provision will unduly burden 529 plan underwriters due to the economic realities of the 529 plan marketplace and arrangements between municipal entities and such underwriters. We also note that the MSRB Submission cites various MSRB activities relating to the regulation of 529 plans to justify this fee.⁸ We believe that, on closer inspection, such activities do not provide a basis for imposing the new fee. Each of these issues are discussed in detail in this letter.

II. THE MSRB'S FEE SUMMARY CONCLUSIONS ABOUT THE FEE ARE INCORRECT

As noted above, prior to imposing this new annual fee, the MSRB elected not to conduct a thorough analysis of its impact on investors, municipal entities, or municipal securities dealers. As a result, it appears not to have considered the fee's impact on investors, municipal entities, and municipal securities dealers, including 529 plan underwriters. Notwithstanding the fact that the MSRB did not conduct an economic analysis of the fee,⁹ its Submission includes the following summary conclusions:

The MSRB expects the impact of the proposed rule change to be small¹⁰ and unlikely to negatively impact the competitiveness of the underwriters or underwriting markets for 529 college savings plans.

⁸ As discussed in more detail in Section VI of this letter, in addition to its rulemaking activities, the MSRB cites its activities relating to market transparency initiatives, its educational and market outreach activities, its market leadership activities, and its support for other regulatory agencies as a basis for imposing this fee.

⁹ According to the MSRB Submission, the new fee is the result of the MSRB looking for additional sources of revenue to address its concerns with its anticipated flat revenue stream.

¹⁰ Though the MSRB has the data (from Form G-45 filings) to determine how this fee will impact each of the underwriters that file the form and that will be subject to the fee, the MSRB Submission contains no detailed information regarding such impact. Instead, it merely describes the impact as "small."

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In addition, the MSRB does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act since it will apply equally to all underwriters engaged in a primary offering¹¹ of interests in plans required to submit data to the MSRB on Form G-45.¹²

For the reasons discussed below, we disagree with the MSRB's summary conclusions about the fee. The fee will impose burdens on competition and it will not impact all underwriters equally. Had the MSRB conducted a thorough analysis of the fee and its impact, we believe it would have determined the fallacy of its conclusions and, instead, concluded it did not have the authority to impose the fee.

III. THE FEE WILL UNNECESSARILY AND INAPPROPRIATELY BURDEN COMPETITION

A. The Fee Will Impact Only One Type of 529 Plan

The MSRB's conclusion that the fee will not be anti-competitive appears to be based on the fact that the fee will apply "to all underwriters . . . required to submit data to the MSRB on Form G-45." We understand that the fee will be universally applied to all underwriters that file Form G-45. This statement, however, wholly overlooks the fact that *not all plans have underwriters that are required to submit Form G-45*.

While the MSRB has long imposed a fee on municipal securities dealers that underwrite municipal securities,¹³ the current rulemaking will impose an underwriting fee on those municipal securities dealers that underwrite municipal *fund* securities – *i.e.*, 529 plans.¹⁴ Because of the very fundamental differences between how 529 plan securities and municipal securities are sold, imposing this fee on 529

¹¹ Unlike offerings of municipal securities, which include both primary and secondary offerings, the concept of a "primary offering" does not apply to 529 plan. As noted previously, like mutual funds, 529 shares are issued on an ongoing basis in response to consumer demand. There is no secondary market for such shares.

¹² MSRB Submission at p. 13.

¹³ All underwriters regulated by the MSRB are registered and regulated as municipal securities dealers. Those municipal securities dealers that effect transactions in municipal securities are subject to the underwriting fee of MSRB Rule A-13. As used in this letter, the term "municipal securities" refers to offerings of state or local government bonds. "Municipal fund securities" refers to 529 college savings plans. The MSRB has been regulating municipal securities since its creation in 1975.

¹⁴ As the MSRB recognized when it adopted Rule D-12 in 2000, a municipal fund security is 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." The MSRB began regulating 529 plans around 1998, shortly after they came into existence.

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plan underwriters will result in subjecting them to undue and inappropriate competitive burdens. This, in part, is because the fee will only impact one type of 529 plan: advisor-sold plans.

As explained in an MSRB brochure, *529 Plans: Investor's Guide to 529 College Savings Plans*:

Under a 529 college savings plan, you (the 'account owner') purchase units in an account for your designated beneficiary, generally your child, grandchild or a member of your family, to pay for his or her qualified higher education expenses. *This type of 529 plan may be sold one of two ways.* It may be 'direct sold,' that is, *sold directly through the 529 college savings plan's website or through the mail*, or the 529 college savings plan may be 'advisor sold,' that is, sold through a broker-dealer that has entered into a selling agreement with that 529 college savings plan's primary distributor.¹⁵

Though not expressly stated in this excerpt, self-distributed (direct-sold) plans have no underwriter, nor are they sold through a broker-dealer or municipal securities dealer. As such, direct-sold plans fall outside of the MSRB's jurisdiction.¹⁶ This new underwriting fee will not reach them; the fee will apply only to those 529 plans that are advisor sold.¹⁷ And yet, direct-sold plans compete side-by-side with advisor-sold plans as an investment vehicle used to save for college. Because of this, the new underwriting fee absolutely will impose a burden on competition and it will put advisor-sold plans at a competitive disadvantage to direct-sold plans. Said another way, the fee will increase the regulatory costs only of advisor-sold plans, thereby creating an un-level playing field between the two types of plans and putting advisor-sold plans at a competitive disadvantage to direct-sold plans. Indeed, those states that only offer investors a direct-sold plan are likely to have a competitive advantage over the states that offer an advisor-sold plan because the new fee will increase the cost of doing business only for advisor-sold plans. Moreover, because some issuers of 529 plans offer investors a choice between a direct-sold plan and an advisor-sold plan, the state's advisor-sold plan will be at a competitive disadvantage to its direct-sold plan.

The MSRB Submission appears to disregard this concern by stating that this new fee is so *de minimis* that "underwriters of 529 college savings plans that are not subject to Rule G-45 will not have an unfair competitive advantage." This statement, which is made without offering any evidence to support it, is

¹⁵ See *529 Plans: Investor's Guide to 529 College Savings Plans* ("MSRB Brochure") at p. 4. [Emphasis added.] As used by the MSRB, the term "primary distributor" refers to the plan's underwriter.

¹⁶ To the extent the offering involves any fraudulent conduct, it would be subject to the SEC's antifraud authority under Section 10 of the Securities Exchange Act of 1934 notwithstanding the MSRB's lack of jurisdiction.

¹⁷ By contrast, the fee imposed on underwriters of municipal securities does not raise competitive concerns because essentially all offerings of municipal securities are sold through an underwriter and all such offerings are subject to the MSRB's jurisdiction.

incorrect. As discussed in more detail below, due to the small profit margins associated with 529 plans, 529 plans are particularly sensitive to *any* increase in costs. And the fact that only *some* plans will have to pay this cost, while others will not, will disadvantage those plans subject to this fee and will result in unfair discrimination among plans.

B. The Fee Will Put 529 Plan Underwriters at a Competitive Disadvantage to Distributors

In deciding to impose the fee solely on those municipal securities dealers that serve as a 529 plan's underwriter, it appears that the MSRB failed to consider the very limited role of such underwriters. We believe an underwriter's role is critical to an assessment of the impact the fee will have in the 529 plan marketplace, the discriminatory nature of this fee, and the competitive burdens that will flow from it. As discussed below, the role of 529 plan underwriters differs from that of municipal bond underwriters and retail distributors of 529 plans.

When a government entity decides to issue a bond or another municipal security, it is dependent upon the services of an underwriter. This is because, to our knowledge, no state or municipal government is in the business of selling municipal securities directly to the public.¹⁸ Instead, such securities are sold through underwriters¹⁹ that are hired to manage an offering of municipal securities. As explained on the MSRB's website:

Municipal bonds typically are brought to market through an underwriting process. As part of this process, one or more municipal securities dealers – also known as underwriters – purchase newly issued securities from the issuer and sell the securities to investors.²⁰

With respect to 529 plans, as noted above, states are not dependent upon the services of an underwriter – they can sell plan shares directly to the public. Moreover, when a state decides to rely on the services of an underwriter to sell its 529 plan, the role of the underwriter is not comparable to that described above. For example, a municipal securities dealer that serves as an underwriter for a 529 plan does not

¹⁸ In limited circumstances, a municipal securities issuer may sell a municipal security directly to a bank or other institutional investor without the use of a broker-dealer intermediary. Also, on extremely rare occasions, municipal securities issuers have sold municipal securities directly to non-institutional customers in so-called “mini-bond” or similar direct offerings. Such offerings represent an increasingly small total of the municipal securities new-issue market.

¹⁹ In some cases, municipal securities issuers may engage a broker-dealer to act as a placement agent for a private placement of securities. MSRB rules generally treat placement agents the same as underwriters.

²⁰ See *The Underwriting Process*, which can be found on the MSRB's website at: <http://www.msrb.org/EducationCenter/Municipal-Market/Lifecycle/Primary/Underwriting-Process.aspx>. We were unable to find on the MSRB's website information regarding the underwriting of 529 plan securities.

purchase the plan's shares from the issuer. Instead, its role 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.

The role of a plan underwriter also differs significantly from that of a municipal securities underwriter with respect to how securities are sold to investors. Plan shares sold by a plan's distributors do not flow from the underwriter to the distributor. Instead, the shares the distributor sells to an investor flow directly from the plan's issuer to the investor's account held at the distributor without involvement of the plan's underwriter. As such, the underwriter may not be aware of or have access to information relating to the distributors' sales and the amount of assets they hold in 529 plan accounts. Also, the plan's underwriter likely does not carry any customer accounts, provide retail brokerage services, or maintain the plan's shareholder records.²¹ It is the municipal securities dealers that serve as retail distributors of the plan that are responsible for these activities, as well as for complying with all regulatory requirements associated with an investor's account.²² The 529 plan compensates the distributors for these services either directly or indirectly.

While the MSRB regulates both the plan's underwriter and distributors solely in their capacity as municipal securities dealers, the MSRB has determined to impose this fee only on those dealers that serve as the plan's underwriter. The fee will not apply to those dealers that are actively involved in selling the plan's shares to investors and accumulating plan assets in investors' accounts. This appears to put those municipal securities dealers serving as underwriters at a competitive disadvantage to those entities that can sell the plan's shares and are compensated for maintaining shareholder accounts without being subject to this new fee. This seems inequitable and unfair.

C. The Fee Is Discriminatory and Will Not Impact All Underwriters Equally

According to the MSRB Submission, the MSRB has concluded that this new fee will apply "equally to all underwriters." We disagree. The amount of the fee paid by a fund's underwriter will be in direct proportion to two factors. The first is the amount of sales by the plan's distributors. As discussed above, Rule G-45 requires a 529 plan underwriter to file a Form G-45 on each 529 plan for which they serve as underwriter. It is the plan's cumulative assets as reported on the form that the MSRB will use

²¹ The exception to this would be if the 529 plan underwriter, in addition to serving as the plan's underwriter, also is involved in offering and selling shares to the public as a municipal securities dealer. In such instances, the underwriter, in its capacity as a distributor of 529 plan shares, would be required to satisfy all regulatory requirements applicable to a municipal securities dealer that offers and sells securities to the public.

²² These activities include, among others, ensuring compliance with the USA PATRIOT Act (*e.g.*, anti-money laundering (AML) screenings), sending confirmations, delivering official statements, and maintaining required account records.

to calculate this new underwriting fee even though it is the plan's distributors – not its underwriter – that are holding the assets on which the fee is calculated.²³ As a result, the more successful the plan's retail distributors are in selling the plan, the greater the fee and the competitive burdens imposed on the plan's underwriter.

The second factor that precludes this fee from impacting all plan underwriters equally is the completeness of the asset information they receive from the plan's distributors for purposes of filing Form G-45. When the MSRB proposed Rule G-45, the Institute filed a comment letter that, in part, sought to highlight our concerns with the underwriter's access to complete information about the plan's total assets for purposes of filing Form G-45. Our concerns were based on the underwriter's limited access to information regarding the plan's assets. This is because, as previously mentioned, it is the municipal securities dealers that sell the plan's shares that maintain the investors' accounts containing plan assets, and those dealers have no obligation under Rule G-45 to provide the plan's underwriter the information required by Form G-45.²⁴ As a result, the information flow between plan underwriters and their distributors is not equal and the fee based on the amount of assets reported will not be equal. In other words, underwriters that are more successful in getting complete information from their distributors and must, therefore, pay a higher fee will be at a competitive disadvantage to those that are less successful in obtaining complete asset information and that, therefore, will pay a lower underwriting fee.

²³ Assessing the fee on but one participant in the 529 plan market and using the information on Form G-45 to assess the new fee has the advantage of being relatively easy to administer. However, the resulting inequities and competitive disadvantages to the underwriter vis-a-vis the plan's distributors and other plan underwriters would appear to outweigh the fee's ease of administration.

²⁴ This excerpt from the Institute's letter commenting on proposed Rule G-45 highlighted these concerns relating to completing Form G-45:

Closely related to the issue of who has a duty to file Form G-45 is whether the entity charged with filing the Form has access to the information necessary to complete it. . . . This issue is very important to our members because, in many instances, the primary distributor [*i.e.* the underwriter] will *not* have possession, custody, or control of the required information. The primary distributor of a 529 plan is but one of many service providers to the plan. Depending upon its arrangement with the 529 plan sponsor or the program manager, a primary distributor to a plan may either be charged with 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. The role a primary distributor plays will have a significant impact on the information it possesses about the plan, including the plan's assets, contributions, and distributions. Indeed, those primary distributors that are not directly engaged in selling the plan to retail investors likely have little, if any, information regarding contributions and distributions as those transactions may flow directly from the selling dealer to the plan's recordkeeper without involving the primary distributor.

See Letter from the undersigned to Ronald W. Smith, Corporate Secretary, MSRB, dated September 14, 2012 at p. 3. This letter was in response to MSRB Notice 2012-40, which sought comment on proposed Rule G-45 and Form G-45.

D. The Fee Will Not Be Reasonably Related to an Underwriter's Activities

The MSRB concludes that “the total fee charged to each underwriter will bear a reasonable relationship to the level of underwriting activities that are undertaken by the underwriter.”²⁵ We disagree. In our view, the amount of plan assets reported on Form G-45 likely bears *no* relationship to the underwriting activities of the plan's underwriter. Instead, this amount is solely reflective of how successful the plan's *distributors* are in marketing and selling the plan. Moreover, the new underwriting fee will bear no relationship to the MSRB's regulatory oversight of the underwriter because, with respect to its regulatory obligations under the MSRB's rule, the underwriter's obligation is largely limited to filing Form G-45 and ensuring that the plan's sales literature that will be used by distributors complies with the MSRB's rules. The level of plan assets would not appear to impact the MSRB's regulation of these activities²⁶ nor the MSRB's cost of regulation.

Also, the fee will be assessed on underwriters based solely on the assets the plan's distributors hold and not based on any annual transactional activities involving the plan. For example, several different 529 plans may have no net change in assets, yet one such 529 plan may have a large amount of evenly matched inflows and outflows during the year, another may have a modest amount of such evenly matched asset flows, and another may have little or no such flows. Yet, those different scenarios would have no impact on the annual fee imposed on the underwriter. Thus, rather than the fee having a rational relationship to the level of municipal securities activities that are the subject of the MSRB's regulatory jurisdiction, or the MSRB's cost in regulating underwriters, the fee instead would be related solely to the holding of assets – an activity that does not, without more, give rise to the MSRB's regulatory authority.

E. The Fee Will Not Be *De Minimis*

The MSRB also concludes that the anti-competitive nature of this fee is outweighed by its *de minimis* amount. We disagree. This statement overlooks the fact that 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

²⁵ MSRB Submission at p. 13.

²⁶ The amount of plan assets included under Aggregate Plan Information on Form G-45 is just that – the amount of assets the *plan* holds – not the plan's underwriter. The amount of plan assets indicated on Form G-45 have no impact on the MSRB's costs in processing the form.

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plan accounts, and the lack of automation in this space.²⁷ Accordingly, there is no *de minimis* fee when it comes to 529 plans. Moreover, we do not agree that a fee that can be demonstrated *prima facie* to be discriminatory and anti-competitive can satisfy the standards of the MSRB's rulemaking authority by being *de minimis*.²⁸

IV. THE FORMULA USED TO CALCULATE THE FEE COMPOUNDS ITS UNFAIRNESS

According to the MSRB Submission:

To recognize the continuous nature of offerings in [529] plans, the MSRB will assess the proposed fee in a manner *that will be similar to how the SEC assesses registration fees on mutual funds pursuant to Rule 24f-2 under the Investment Company Act of 1940*, as amended. The MSRB will assess the proposed rule change *on the plan's total aggregate assets* as of December 31 each year, as reported by an underwriter on Form G-45. Thus, the proposed rule change will account for the redemption of units in plans.²⁹

Contrary to these statements, the 529 plan underwriter fee will not be assessed in a manner comparable to how the Commission assesses mutual fund registration fees. Rule 24f-2 under the Investment Company Act of 1940 governs the registration of mutual fund shares under the Securities Act of 1933. Among other things, it requires mutual funds, which, like 529 plans, issue an indefinite amount of securities, to file Form 24F-2 with the Commission annually and pay a registration fee based on *net*

²⁷ 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).

Notwithstanding the stagnation, because the MSRB proposes to impose on underwriting fee on *all* plan assets, the amount of revenue the MSRB will generate from this fee is expected to increase each year until the 529 plan accounts are redeemed in significant amounts.

²⁸ We also disagree with the MSRB's characterization of this fee as "*de minimus*" (sic) for all underwriters.

²⁹ MSRB Submission at p. 11. [Emphasis added.]

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sales of the fund for the year.³⁰ In other words, unlike the MSRB's new fee, Rule 24f-2 *does not require a mutual fund to pay a fee on the same shares year after year*. While the MSRB's underwriting fee will be paid on assets net of redemptions, the "assets" in the MSRB's formula are *all* plan assets and not just net sales for the year in which the fee is assessed as under Rule 24f-2.³¹ Accordingly, unlike the Commission's formula, the MSRB's will require the underwriter to continue to pay the fee on all assets under management each year.

The impact of this new fee also will differ significantly from the underwriting fee long imposed on underwriters of municipal securities pursuant to MSRB Rule A-13. This is because, as discussed above, underwriters of municipal securities contract with an issuer to purchase and sell a finite number of securities in a discrete offering. As such, the underwriting fees they pay pursuant to Rule A-13 are limited and end as soon as the offering is sold out. A 529 plan offering, however, involves an unlimited number of shares; it never is sold out. As more purchasers want to buy shares, more shares are created. And, once such shares are sold, MSRB Rule G-45 requires the underwriter to report on Form G-45 their cumulative value since the plan's inception.³² As noted above, it is this cumulative valuation that will be used to determine the underwriter's annual fee. In other words, Rule A-13 will require 529 plan underwriters to pay the underwriting fee year after year *on the same assets*. Moreover, given that the vast majority of plan assets being held at the time the new fee becomes effective will have been acquired over many years prior to the effectiveness of the rule, the fee would have the effect of assessing underwriters for transactions that occurred far into the past, well before the rule was put into effect. It seems patently unfair to apply a fee retroactively.

The unfairness of the MSRB's fee structure vis-a-vis the Commission's fee structure under Rule 24f-2 and the fee currently imposed on underwriters of municipal securities pursuant to Rule A-13 is compounded further when one considers the long-term nature of college savings plans. Issuers of these plans and the financial professionals that market them encourage investors to open a 529 plan account

³⁰ According to Section 5 of Form 24F-2, the annual registration fee is calculated by determining the net sales of the fund for the year and multiplying that number by the current fee. Federal law requires the SEC to adjust the rate of this fee each year to levels that the Commission projects will generate collections equal to the annual statutory target amounts. For fiscal year 2017, the rate is \$115.90 per million dollars.

³¹ If a fund sold no shares in a given year, the Commission would not assess any registration fees for that year. *Cf.* the MSRB's new underwriting fee where, if a plan sold no shares in a given year, the MSRB would still assess a fee on the plan's total assets.

³² As discussed in the Institute's comment letter on Rule G-45, because plan underwriters do not hold plan assets and have no access to distributors' shareholder records, they are dependent upon the plan's distributors to voluntarily provide them information on the assets held in investors' 529 plan accounts. Those underwriters that receive full cooperation from the plan's distributors will be reporting more assets on Form G-45 and paying a higher fee than those underwriters that receive limited information from their distributors. This is yet another concern associated with fairness of this new fee. *See* the Institute's letter cited in fn. 23, above.

as early as possible in a beneficiary's life to maximize the account assets available to pay higher educational expenses in the future. If we assume a parent follows this advice and opens an account shortly after a child is born, it is likely that the owner of the account will not begin to redeem some account assets to pay for qualified higher education for at least 18 years. The MSRB's new fee will require the underwriter to pay the fee on all assets held in the account *each year between the time the account is opened and the time it is fully redeemed*.³³ This formula is guaranteed to increase significantly the unfairness of this fee and the competitive burdens associated with it.

Finally, it should be noted that, were a plan to close and cease offering shares, the plan's underwriter *still would be required to pay this underwriting fee until all plan assets have been redeemed* – which could be years after the plan closes. This, too, is patently unfair and inappropriate. Once a plan ceases offering its shares to the public through municipal securities dealers, the MSRB's jurisdiction over that plan has effectively ceased, and the MSRB should not be permitted to continue to generate revenue from a plan that is no longer subject to its jurisdiction.

V. THE RULE'S PROHIBITION AGAINST PASSING ON THE FEE IS UNREALISTIC FOR 529 PLANS

In addition to our concerns with the anti-competitive and discriminatory nature of the fee as discussed above, we are also concerned with the provision in Rule A-13 that expressly provides that no broker, dealer, or municipal securities dealer “shall charge or otherwise pass through the fee . . . to an issuer of municipal securities.” We are concerned that this prohibition will heighten the competitive burdens associated with the new fee because it fails to recognize the economic realities governing agreements between 529 plans and their underwriters.

As noted above, the 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. Unlike agreements between an underwriter and an issuer of municipal securities, the underwriting agreements relating to 529 plans are multi-year agreements that impose ongoing responsibilities on the plan's underwriter – not merely the sale of a discrete amount of bonds on a one-time basis. 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.

This fee also can be expected to impact investors in advisor-sold 529 plans. This is because, as the compensation the issuer pays to the underwriter increases to cover the costs associated with this new fee, it is likely that the issuer, in turn, will pass its increased costs on to investors in the plan – thereby

³³ Cf. an underwriting of municipal securities where the fee would only be paid once – on the primary offering.

reducing their return on investment. As noted in the MSRB Brochure for 529 plan investors, “It is important that you understand the fees and charges associated with 529 plans . . . *they will lower your investment return.*”³⁴ Such increased costs only would apply, however, to an issuer’s advisor-sold plans and its investors, not to its direct-sold plans, which are not subject to the fee.

If the Commission declines to suspend or abrogate the MSRB’s new fee, at a minimum, we recommend that it or the MSRB address our concerns with this prohibition in Rule A-13. In particular, the Commission and the MSRB should recognize that prohibiting a 529 plan underwriter from passing this new fee on to issuers is not consistent with the economic realities of the relationship between the underwriter and the issuer. If the MSRB does not exclude 529 plan underwriters from the prohibition, it should make explicit that the new underwriting fee may be considered as an “overhead expense.” This would permit a 529 plan underwriter to consider the underwriting fee as an expense when negotiating a contract with a 529 plan so long as such fee is not listed as a separate line item in the agreement between the underwriter and the issuer.

VI. THE MSRB’S ACTIVITIES RELATING TO 529 PLANS DO NOT WARRANT THE FEE

According to the MSRB Submission, “the proposed rule change will defray the costs of the Board’s *significant* rulemaking, market transparency, educational and market outreach initiatives, market leadership, and inspections/enforcement support *relating to underwriters to [529] plans*, an industry with approximately \$266 billion in assets as of December 31, 2016 . . .”³⁵ As the Commission considers this new fee, we recommend that it take into account both the MSRB’s limited jurisdiction over the 529 plan market and those regulatory activities the MSRB cites in its Submission in support of assessing the fee. For the reasons discussed below, we do not believe that these considerations warrant imposing a fee on 529 plan underwriters.

A. The MSRB Has Limited Jurisdiction over the 529 Plan Market

Generally 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.³⁶ The MSRB has no jurisdiction over those persons that manage 529 plan assets, the plan’s transfer agents, the plan’s administrator, or

³⁴ MSRB Brochure at p. 5. [Emphasis added.]

³⁵ MSRB Submission at p. 12. [Emphasis added.] As a preliminary matter, the size of the 529 plan industry is not relevant to the MSRB’s costs associated with regulating 529 plan underwriters.

³⁶ As previously noted, 529 plan underwriters are municipal securities dealers and are subject to the MSRB’s rules regulating the conduct of such dealers.

the plan's custodian.³⁷ Also, it is FINRA, not the MSRB, that conducts inspections and compliance examinations of municipal securities dealers to determine whether they are acting in compliance with the MSRB's rules.³⁸ The MSRB's limited role over the 529 plan industry would not appear to support imposing this new and continuous underwriting fee.

B. The MSRB Has Engaged in Limited Rulemaking Relating to 529 Plans

1. Most of the MSRB's Rulemaking Related to 529 Plans Occurred from 2000-2007

According to the MSRB Submission, approximately one third of the MSRB's general rules specifically address municipal fund securities. Also, since 2001, "the Board has issued over 60 regulatory notices pertaining to plans. Many of those notices provided guidance to dealers regarding the application of existing MSRB rules to [529] plans." Most recently, the MSRB filed with the Commission "a proposed rule change relating to municipal fund security product advertisements."³⁹

A review of the public regulatory notices the MSRB has published since 2000, which are available on the MSRB's website, indicates that it has published approximately 732 notices during this time. Of those, approximately 45 (or approximately 6%) related to municipal fund securities. The vast majority of the notices relating to municipal fund securities (35 or a little over 75%) were published between 2000 and 2007.⁴⁰ This was a time when 529 plans were in their infancy and the MSRB was adopting new rules and conforming existing rules to address them. In the past ten years, the MSRB has published a total of 10 notices. Five of these related to the MSRB's interest in collecting 529 plan data through proposed Rule G-45 and Form G-45; three related to EMMA filing requirements;⁴¹ one reminded registrants of a 2008 compliance seminar the MSRB was sponsoring; and one sought

³⁷ With the exception of the plan's custodian, the SEC is the exclusive regulator of such persons. The plan's custodian is likely a Federal banking institution.

³⁸ We understand that the MSRB does not compensate FINRA or the Commission for overseeing and inspecting the activities of, and taking enforcement actions against, municipal securities dealers – including underwriters. Instead, as discussed below, the Exchange Act requires the Commission and FINRA to share any fines they assess based on a violation of the MSRB's rules with the MSRB. *See* fn. 64, below.

³⁹ This rulemaking will revise MSRB Rule G-21(e) to incorporate revisions adopted in July 2014 to the Commission's advertising regulation applicable to mutual fund (Regulation 482). It additionally will reflect that the National Association of Securities Dealers (NASD) changed its name to the Financial Industry Regulatory Authority, Inc. (FINRA). This name change occurred in 2007.

⁴⁰ Because the MSRB has already revised its rules to accommodate municipal fund securities, presumably its future rulemaking activities relating to 529 plans will be minimal and not require the expenditure of material resources.

⁴¹ EMMA is discussed in more detail below under Section VI.C. of this letter.

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comment on the MSRB adopting an “access equals delivery” rule for 529 plans.⁴² During this ten-year period, there were three years (*i.e.*, 2013, 2016, and 2017) in which the MSRB issued *no* notices relating to 529 plan securities or municipal fund securities.

With respect to MSRB rulemakings in particular, since 2007, the MSRB has been involved in two rulemakings impacting 529 plans. The first of these involved the promulgation of Rule G-45 and the other was the MSRB’s pending “proposed rule change relating to municipal security product advertisements” discussed above. It does not appear that the MSRB regularly engages in any significant rulemaking activity involving municipal fund securities that would warrant imposing a new and continuous fee on 529 plan underwriters to compensate it for its rulemaking initiatives. Nor does the number of notices the MSRB has issued since 2000 relating to 529 plans appear to justify imposing this new fee.

2. The MSRB’s Series 50 Exam Does Not Address 529 Plans

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act gave the MSRB regulatory jurisdiction over municipal advisors.⁴³ In response to this new authority, the MSRB began drafting rules to govern the conduct of this new class of registrants. These rules included a new Series 50 qualification examination that individuals associated with a municipal advisor must pass in order to provide advice to governmental units on their municipal securities offerings, whether those securities were bonds or 529 plans.

The Institute supported the MSRB adopting a qualification examination for municipal advisors. We believed, consistent with the purpose of such exam, that it should test an individual’s familiarity with the products and markets on which it would render advice. As we noted in a December 2014 letter that we filed with the SEC on the MSRB’s proposed exam:

[T]he knowledge and competencies of an advisor may vary significantly depending upon the type of advice it renders. For example, providing advice on municipal securities likely requires a representative to be knowledgeable about issues such as negotiated prices, debt limits and ratios, underwriting periods, agreements, par values, etc. – *none of which would be relevant for a municipal advisor whose advisory business is limited to*

⁴² Though the 529 plan industry has long encouraged the MSRB to adopt a rule permitting an access-equals-delivery standard for 529 plans, the MSRB has yet to do so.

⁴³ Under section 15B(e)(4)(A) of the Investment Advisers Act, the term municipal advisor “means a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or an obligated person.”

providing advice relating to a municipal fund security such as a 529 education savings plan. Expecting a municipal advisory representative whose work relates exclusively to municipal fund securities to pass an examination that would qualify such persons to advise municipal clients on bond underwritings and the terms and conditions of bonds would be the equivalent of requiring a broker-dealer representative whose business is limited to the offer and sale of mutual funds to qualify for that position by passing an examination designed for representatives selling fixed income securities. These are not fungible business lines in the brokerage world and they should not be treated as fungible in the investment advisory business.⁴⁴ [Emphasis in original.]

Based on these concerns, we recommended that the MSRB develop two qualification examinations: one for persons rendering advice on government bonds and one for persons rendering advice on 529 plan securities.

Notwithstanding our expressed concerns and our recommendation, the MSRB determined not to develop two qualification examinations. Instead it developed a single examination for all registrants. Unfortunately, this single examination was designed to assess the competence and knowledge of those persons who render advice to government units related to the issuance of bonds. Indeed, according to the MSRB's outline for this new examination, *88% of the examination tests competencies related to fixed income products and markets* – not to 529 plans.⁴⁵ In our view, the MSRB's design of the Series 50 examination provided it an opportunity to exercise its registration authority over advisors to 529 plans in a way that would benefit the issuers of these plans. Had it done so, it could cite the examination as a regulatory initiative the MSRB engaged in relating to 529 plans. Instead, the examination is geared towards advisors rendering advice solely related to municipal securities (*i.e.*, bonds). While a person rendering advice to 529 plans must pass the examination to render such advice, the exam's contents does not test the competencies that are relevant to rendering such advice.

⁴⁴ See Letter from the undersigned to Secretary, U.S. Securities and Exchange Commission, commenting on *Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to MSRB Rule G-1, on Separately Identifiable Department or Division of a Bank; G-2, on Standards of Professional Qualification; G-3, on Professional Qualification Requirements; and D-13, on Municipal Advisory Activities*. SEC Release No. 34-73708 (Dec. 1, 2014). This letter also noted that it would be equally inappropriate for the MSRB to require a representative whose business is limited to municipal securities to demonstrate competency to provide municipal advice through an examination overwhelmingly tailored to advice relating to municipal fund securities.

⁴⁵ The remaining 12% of questions related to general knowledge regarding understanding the Commission's and MSRB's regulation of municipal advisors – something we concur that all registrants should be familiar with.

C. The MSRB's Market Transparency Initiatives Are Limited

With respect to market transparency initiatives, the MSRB Submission notes that the MSRB (1) developed a filing portal on EMMA to receive official statements from 529 plans and (2) “to assist an investor with finding the program disclosure booklet for a plan of interest, the MSRB developed an interactive website with a 50-state map that allows the investor to more quickly and easily access that information.”

1. EMMA Was Designed for Municipal Securities

With respect to (1), the EMMA portal was rolled out in 2008 as “the official repository for information *on virtually all municipal bonds*, providing free access to official disclosures, trade data, and other information about the municipal securities markets.”⁴⁶ The primary driver for the initial establishment of the EMMA system was the MSRB’s adoption of the access-equals-delivery standard for disseminating official statements for municipal bonds. In addition to serving as the portal for filing official statements relating to municipal securities, EMMA also is the portal used for filing official statements on 529 plans with the MSRB.⁴⁷

EMMA continues to be a valuable source for information about municipal securities. This same is not true for information about municipal fund securities and EMMA functions primarily as a filing portal for 529 plans’ official statements. The changes the MSRB implemented to EMMA to enable its use as a portal for 529 plans’ official statements occurred almost ten years ago. As such, EMMA would not appear to provide a sufficient basis for the MSRB today to begin charging plan underwriters a new underwriting fee. As noted above, the Institute supports the application of the access-equals-delivery standard for 529 plans, and we recognize that the EMMA portal likely would be an important element in making such standard work for 529 plans. Should the MSRB pursue rulemaking to adopt this standard for 529 plans, such initiative might warrant revisiting whether the revenue the MSRB receives from plan underwriters or distributors is adequate to support it. We are not aware, however, of the MSRB pursuing such a standard for 529 plan offerings.

2. The MSRB's 50-State Map Contains Incomplete Information

With respect to the MSRB’s “50-state map,” it does not enable investors to find “the program disclosure booklet for a plan of interest” because it does not provide comprehensive information for all of the states’ 529 plans. Indeed, investors interested in learning about all states’ plans cannot do so through the MSRB’s map. This is because the MSRB’s map only links to the official statements for

⁴⁶ See <https://emma.msrb.org/>. [Emphasis added.] 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. Pursuant to SEC rule changes, EMMA has become the centralized source for municipal securities disclosure information.

⁴⁷ Only advisor-sold plans are required to file official statements with the MSRB.

those states that offer advisor-sold plans; it does not include any information on the states' direct-sold plans.⁴⁸ In addition to being incomplete, the information available from the MSRB's map may be somewhat misleading. For example, if one were to click on the state of Washington on the MSRB's map, a pop-up box would appear stating "No disclosure documents submitted to the MSRB." This information may lead a person to believe that Washington either has no plan or is delinquent in an MSRB filing obligation, neither of which is true.⁴⁹

When the MSRB created its interactive 50-state map,⁵⁰ it was aware of the 50-state map CSPN had created on its website and the comprehensive nature of the information available through it. This is evidenced by a notice the MSRB published in 2007, years prior to creating its own 50-state map:

New Centralized Access Facility for 529 College Savings Plan Information

. . . The College Savings Plans Network ("CSPN") has recently upgraded its existing website, located at www.collegesavings.org, to create a centralized web-based utility that seeks to provide a comprehensive view of the entire 529 college savings plan market. This CSPN utility provides a combination of on-site and hyperlinked resources, including summary information allowing side-by-side comparisons of many important features of different 529 college savings plans, together with direct links to more complete information provided in the program disclosure document or other relevant sources for all 529 college savings plans.⁵¹

* * *

. . .]T]he MSRB believes that improved disclosures can only be effective if investment professionals and potential investors actually access such disclosures with sufficient time to make use of the information in coming to an investment decision. *The MSRB urges dealers and other participants in the 529 college savings plan market to provide the*

⁴⁸ By contrast, the map on the website of the College Savings Plans Network (CSPN) that was in existence long before the MSRB implemented its own represents *all* state plans and includes information on all state plans. As such, it is a more comprehensive resource for persons interested in learning about such plans.

⁴⁹ A person who clicks on Washington on the CSPN map would be taken directly to that State's dynamic and colorful webpage about their 529 plans. The State's webpage includes – in addition to the plan's disclosure documents – pictures, videos, investors' reviews, college planning tools, contact information for the plan, information about upcoming community events, and a variety of other information that may be of interest to persons interested in Washington's 529 plan.

⁵⁰ We are uncertain as to when the MSRB created its map. However, we note that, in discussing its accomplishments for 2012, the MSRB's annual report for that year noted its "new" map. See fn. 66 and related textual discussion, below.

⁵¹ The MSRB's map includes none of this functionality or information.

investing public with easy access to, and to affirmatively encourage the use of, the CSPN utility and other similar resources.⁵²

We do not believe that the MSRB's 50-state map provides a sufficient basis to impose an ongoing underwriting fee on 529 plan securities.

D. The MSRB's Educational and Market Outreach Activities Do Not Involve 529 Plans

With respect to its educational and outreach activities, the MSRB Submission notes that this activity includes conducting regional seminars for dealers, participating in industry conferences, and "the development and distribution of multiple educational pieces to assist dealers and investors in 529 college savings plans."⁵³ As regards the MSRB's regional seminars for "dealers," while it regularly holds seminars relating to municipal securities,⁵⁴ the last time it conducted a compliance seminar relating to 529 plan securities was in May 2008 – over nine years ago.⁵⁵

Regarding the "multiple" educational pieces the MSRB has distributed, in addition to the MSRB Brochure, these pieces appear to consist of 5 pages of texts on the MSRB's website with one page on each of the following topics: Questions to Ask Before Investing in a 529 Plan; 529 Basics; Investing in a 529 Plan; Tax and Legal Considerations in a 529 Plan; and Related Resources about 529 College Savings Plans. The website also has a link to the MSRB Brochure, which is a 20-page document, containing basic information on 529 plans.⁵⁶ As regards the educational pieces that the MSRB publishes "to assist dealers," we are uncertain as to what those are.

The MSRB's efforts relating to educational and market outreach, therefore, would not appear to provide a sufficient basis to justify the MSRB's new underwriting fee.

⁵² See *529 College Savings Plans Pending Advertisement Rule Filing and Improved Access to Plan Disclosure Materials*, MSRB Notice 2007-15 (May 17, 2007). [Emphasis added.] This is one of the 45 notices that the MSRB has published since 2000 relating to 529 plans securities and one of the two MSRB rulemaking initiatives since 2007.

⁵³ MSRB Submission at p. 6.

⁵⁴ According to the MSRB's most recent annual report, during its last fiscal year, the MSRB participated in 92 "industry events to an audience of 13,000 market participants." See *Supporting the Municipal Market*, MSRB Annual Report (2016) at p. 7.

⁵⁵ The MSRB Notice announcing this seminar described it as a "one-day market outreach and educational session, where members of the MSRB legal staff, securities regulators, plan issuers, and other industry participants will focus on compliance matters, recent MSRB initiatives, legislative and emerging issues relevant to the marketing of 529 college savings plans." See *Reminder Notice: MSRB 529 Compliance Seminars*, MSRB Notice 2008-01 (April 24, 2008).

⁵⁶ The basic 529 plan information in this brochure is substantially similar to a brochure that CSPN, the North American Securities Administrators Association, and the Institute first published jointly in 2002.

E. The MSRB Has Not Recently Engaged in 529-Plan Market Leadership Activities

The MSRB Submission provides as follows relating to the MSRB's Market Leadership Activities:

[The MSRB's market leadership activities relating to 529 plans], among other things, have resulted in Congressional testimony and in the development of voluntary industry disclosure standards for 529 college savings plan disclosure booklets. For example, MSRB staff testified at a 2004 Senate subcommittee oversight hearing on sales and disclosure practices in the 529 college savings plan market. In addition, the MSRB encouraged the College Savings Plans Network to promulgate more comprehensive voluntary disclosure standards and to establish a central information clearinghouse on 529 college savings plans. Further, in 2009, the MSRB submitted a comment letter on the use of 529 college savings plans in advance of the Report on 529 College Savings Plans prepared by the U.S. Department of the Treasury on behalf of the White House Task Force on the Middle Class.⁵⁷

In summary, the Market Leadership Activities the MSRB cites in support of imposing the new underwriting fee consist of: (1) testimony provided to Congress 13 years ago; (2) CSPN's voluntary disclosure standards; and (3) a comment letter the MSRB filed 8 years ago as part of a White House Task Force. These activities, whether considered individually or collectively, do not appear to provide a sufficient basis to warrant imposing the new fee.

1. CSPN Developed the Voluntary Disclosure Principles

The MSRB's description of its engagement with CSPN on voluntary disclosure principles is more limited than indicated in the MSRB Submission. CSPN's Disclosure Principles date back to around 2003, when members of CSPN determined that it would benefit 529 plans and their investors if the structure and content of the 529 plan disclosure documents provided to investors were uniform. A working group of CSPN's members – which included state administrators of plans as well as their private sector partners – agreed to draft a set of Disclosure Principles that would provide a template for 529 plan disclosures that all states could use voluntarily. CSPN's membership adopted the first draft of the Disclosure Principles on December 2, 2003. The MSRB played no role in this process. Nor had it encouraged CSPN to undertake an initiative to develop comprehensive voluntary disclosure standards. Instead, after CSPN's membership adopted the original Disclosure Principles, CSPN shared them with the MSRB and the MSRB supported CSPN's work. Since the adoption of the original Disclosure Principles in 2004, CSPN has continued to review and revise the Principles as necessary to make sure they remain current. The MSRB has played no role in the various revisions made to the Disclosure

⁵⁷ MSRB Submission at pp. 6-7.

Principles since their original adoption in 2003.⁵⁸ The MSRB's involvement with CSPN on its Disclosure Principles therefore would not appear to support the new underwriting fee.

2. CSPN Established a Robust Clearinghouse for 529 Plans

The MSRB Submission notes that the MSRB encouraged CSPN “to establish a central information clearinghouse on 529 college savings plans.” This “clearinghouse” is CSPN’s 50-state map, discussed above. The decision to create this clearinghouse was solely CSPN’s. Its purpose was to provide investors a single source where they could learn about every state’s 529 plan.⁵⁹ As noted above, when CSPN informed the MSRB that it intended to provide this resource, the MSRB welcomed and supported its creation. It also informally provided some suggestions to CSPN for structuring its website and some of the data available on it. The MSRB’s role in this process, which was over 10 years ago, was limited and would not appear to support the MSRB’s new underwriting fee.

3. The MSRB Had Limited Involvement with the White House Task Force

The MSRB also cites its involvement with the White House Task Force on the Middle Class as an example of its “Market Leadership Activities” that would justify imposing this new fee. Among other issues, this Task Force, which President Obama created in 2009 and Vice President Joe Biden chaired,⁶⁰ considered ways to make college more affordable for middle-class working families. In April 2009, the Task Force held a meeting dedicated to this topic. Following the meeting, the U.S. Department of the Treasury published a notice seeking public comment relating to Section 529 college savings plans to assist the Task Force in its work.⁶¹ The MSRB filed a letter in response to this request for comment.⁶² Its letter appears to be the MSRB’s sole engagement with the Task Force.⁶³ It would not appear that a

⁵⁸ The Disclosure Principles were revised earlier this year (*i.e.*, Disclosure Principle Statement No. 6) and they have been submitted to CSPN’s membership for approval.

⁵⁹ As mentioned above, the MSRB could not provide a comparable resource because it did not, and still does not, have regulatory authority over all state plans.

⁶⁰ The White House press release announcing this Task Force is available at: <https://obamawhitehouse.archives.gov/blog/2009/01/30/press-release-vice-president-biden-announces-middle-class-task-force>.

⁶¹ See *Report on Section 529 College Savings Plans, Notice and request for comments*, Department of the Treasury, Billing Code No. 4810-25-P (July 28, 2009).

⁶² Comments were due by August 17, 2009. In addition to the MSRB, among others, the Institute, CSPN, and the College Savings Foundation submitted letters to the Treasury Department.

⁶³ By contrast, in addition to filing its comment letter, senior leadership of the CSPN board met in person with Vice President Biden’s staff who were assigned to the Task Force to discuss 529 plans with them in more detail. The report the

comment letter the MSRB filed with the Department of the Treasury in 2009 in response to a request for public comment would provide a sufficient basis to justify the MSRB's new underwriting fee.

F. The MSRB's Support for Other Regulatory Agencies Does Not Justify the Fee

The MSRB Submission also points to the MSRB's "support to the regulatory agencies that enforce the MSRB's rules" to justify the new fee. In response, we note that the regulatory agencies that are charged with enforcing the MSRB's rules *provide compensation to the MSRB*. In particular, pursuant to Section 15B(c)(9) of the Exchange Act, FINRA and the Commission are required to share with the MSRB a portion of any fines they levy for violations of MSRB rules.⁶⁴ As such, the support the MSRB provides to FINRA and the Commission would not appear to justify imposing a fee on 529 plan underwriters.

G. The MSRB's Publications Evidence its Limited Activities Relating to 529 Plans

As it reviews the totality of the MSRB's regulatory activities relating to 529 plans and whether such activities provide a sufficient basis to justify the new underwriting fee, the Commission also should consider those MSRB's publications that discuss its activities. A review of the MSRB's public documents regarding the totality of its regulatory activities would seem to indicate that it does not appear to be – and has not for some time been – expending an appreciable amount of time or resources on 529 plan issues. It is rare to find 529 plans mentioned in the MSRB's Priorities, Strategic Goals, or in the agendas for the Board's quarterly meetings, which the MSRB routinely publishes. It also is unusual to find any mention of 529 plans and the MSRB's activities relating to them in the MSRB's annual reports.

The MSRB's website includes links for the nine annual reports it has published since 2008. Of these, which range in length from 13-28 pages, four include no mention of 529 plans.⁶⁵ Of the five that mention such plans:

- The discussion in two reports (2008 and 2010) consists of only two sentences;
- One report (2013) mentions 529 plans in a single bullet; and
- One report (2016), which discusses the MSRB's authority over ABLE Act (529A) plans, only mentions 529 plans by analogy to 529A plans.

Task Force published, *An Analysis of Section 529 College Savings and Prepaid Tuition Plans* (Sept. 9, 2009), expressly mentioned CSPN's "extensive database" on Section 529 plans.

⁶⁴ Section 15B(c)(9)(A) of the Exchange Act requires the Commission to split with the MSRB any fines it collects based on a violation of the MSRB's rules on a 50-50 basis. Section 15B(c)(9)(B) requires FINRA to pay the MSRB 1/3 of any fines it collects based on a violation of the MSRB's rules.

⁶⁵ These are the annual reports for 2009, 2011, 2014, and 2015.

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The fifth report mentioning such plans, which also is the only significant discussion of 529 plans in the MSRB's annual reports, was in 2012. This report devoted one-half of a page of the twenty-page report to discussing the MSRB "Improving Access to Information about 529 College Savings Plans" and highlighting its "new interactive map accessible from EMMA's homepage." This is the same 50-state map discussed previously in this letter.⁶⁶

VII. THE MSRB'S NEW UNDERWRITING FEE IS INCONSISTENT WITH SECTION 15B(B)(2)(C)

For all the reasons discussed above, we recommend that the Commission either abrogate the MSRB's rulemaking or suspend it and institute disapproval proceedings. We believe that the above discussion evidences that the fee is neither reasonable nor equitable. It also evidences that the fee is unfairly discriminatory and will impose an undue or inappropriate burden on competition. As such, it does not appear to meet the standards in Section 15B(b)(C)(2) that is imposed on the MSRB's rulemaking authority. As discussed above, because there has not yet been a thorough review of the adverse impact this fee will have on investors, municipal entities, and municipal securities dealers and its consistency with the Exchange Act, we strongly recommend that the Commission either abrogate the revisions to the rule or summarily temporarily suspend them and institute disapproval proceedings. Such action would better ensure that there is a thorough economic analysis conducted of the fee to determine that the fee is consistent with the MSRB's rulemaking authority and will, in fact, will "promote just and equitable principles of trade" and not "permit unfair discrimination," or "impose any burden on competition not necessary or appropriate in furtherance of [the Securities Exchange Act]."

Sincerely,

/S/

Tamara K. Salmon
Associate General Counsel

⁶⁶ See *Safeguarding the Municipal Securities Market*, MSRB Annual Report (2012) at p. 2012. The discussion of 529 plans in the annual report also notes that "The MSRB has proposed collecting additional information and performance data on 529 college savings plans with the goal of enhancing its oversight of the size, growth, characteristics and risks of specific 529 plans and the market as a whole." This reference is to the MSRB's adoption of Rule G-45 and Form G-45, which the MSRB proposes to use to assess the new underwriting fee. However, because the MSRB can only regulate advisor-sold plans, it will never be able to be a source of information on "the market as a whole."