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December 20, 2012

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

Re: **MSRB Notice 2012-59;**
Proposed Rule and Form G-45

Dear Mr. Smith:

The Investment Company Institute ("ICI") appreciates the opportunity to provide comments to the Municipal Securities Rulemaking Board on the most recent version of the MSRB's proposal to adopt a new Rule G-45 and Form G-45.¹ We commend the MSRB for giving thoughtful consideration to the comments it received on the original version of the proposed rule and form and for its willingness to revise them to address commenters' concerns. We also commend the MSRB for seeking public comment on the revised proposal before finalizing it.

The Institute is pleased that the current proposal addresses many of the concerns we raised in our comment letters.² Among other things, these revisions include: reducing the reporting frequency from quarterly to semi-annually;³ providing filers a 60-day lag time to report the semi-annual information; providing filers an implementation period of at least one year; revising operative terms and definitions of terms; and affirming that the information submitted to the MSRB on Form G-45 will remain confidential. In addition, we support the MSRB's plans to enable filers to update, via the

¹ See *Second Request for Comment on Draft Rule Requiring Underwriters to Submit 529 College Savings Plan Information to the MSRB* (MSRB Notice 2012-59), dated November 23, 2012 (the "2012 Notice").

² See letters from Tamara K. Salmon, Senior Associate Counsel, ICI, to Ronald W. Smith, Corporate Secretary, MSRB, dated September 14, 2012 (commenting on MSRB Notice 2012-40 ("ICI Letter")) and August 31, 2011 (commenting on *MSRB Seeks Comment on Proposal to Collect and Disseminate 529 College Savings Plan Data* (July 19, 2011)).

³ In proposing the semi-annual reporting cycle, the Notice states that the MSRB has "a long-term goal of moving to a quarterly reporting cycle." The Institute continues to oppose a more frequent reporting cycle for all the reasons set forth in our previous letter. See ICI Letter at pp. 4-6. We similarly oppose the MSRB's reconsidering at some point in the future public dissemination of the information reported on Form G-45.

MSRB's EMMA system, only that information on Form G-45 that requires updating, rather than requiring filers to submit an entirely new Form for each reporting period.

While most of our major concerns have been addressed, we recommend a few additional changes to the proposal to clarify the requirements of proposed Rule G-45 and Form G-45 and facilitate compliance. In particular, among other things, we recommend that the MSRB:

- Clarify issues relating to underwriters' reporting responsibilities;
- Expressly incorporate relevant provisions from the Disclosure Principles of the College Savings Plan Network into Rule G-45 or the Form G-45 Manual; and
- Make minor revisions to Form G-45 to address issues relating to the plan's descriptive information, aggregate plan information, and investment options.

Each of these recommendations is discussed in more detail below.

UNDERWRITERS' REPORTING RESPONSIBILITIES

The Institute continues to support placing the responsibility to file Form G-45 on a plan's underwriter (primary distributor) as this will ensure that the MSRB receives aggregate information for the plan and avoid the burdens associated with each municipal dealer that sells the plan having to file information on their activities on behalf of the plan. That said, we are concerned with language in the 2012 Notice regarding the scope of the underwriter's responsibilities. The 2012 Notice states that "to the extent an underwriter has delegated duties to a service provider, the MSRB would expect the underwriter to have access to such information. The MSRB seeks a complete data set from each plan, whether submitted by one or more underwriters." The Institute concurs that it is appropriate to require a plan's underwriter to report information it owns or controls even if the underwriter has delegated responsibility for collecting or maintaining the information to another entity. We strongly oppose, however, imposition of an explicit or implicit duty upon an underwriter to obtain information to populate Form G-45 that, in the normal course of business, the underwriter would not create, own, or control. Not only do underwriters have no legal right to this information but such a requirement would have the effect of expanding the MSRB's regulatory reach to persons outside of its lawful jurisdiction.

In addition, we do not oppose requiring the underwriter to include on Form G-45 information that has been provided to it by an entity not within the MSRB's jurisdiction (*e.g.*, the program manager or state partner) and that it, therefore, possesses. We do not, however, support the MSRB requiring underwriters to verify, confirm, or vouch for the accuracy of such information before including it on Form G-45 to the extent such duty is outside the underwriter's legal and contractual obligations to the provider of such information. Both of these issues were discussed in our comment letter on the previous proposal:

... in many instances, the primary distributor 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.⁴

Contrary to the implication in the 2012 Notice, not all information the MSRB proposes to require on Form G-45 is held by one or more underwriters of the plan. Like a mutual fund, a 529 plan typically has a single underwriter. As noted above, the underwriter's role, in large part, is to enter into selling agreements with dealers and other financial professionals that act as intermediaries between the plan and investors. Many other entities are involved in operating and maintaining the plan – including, among others, the plan's program manager, recordkeeper, investment manager, custodian, and state partner – but none of these would qualify as an “underwriter” for the purposes of Rule G-45. Nor would the plan's underwriter necessarily have access to any of the plan records or information these other entities create or maintain – which may include information required by Form G-45. As a result, it is entirely possible that the plan's underwriter might lack access to some of the information required by the Form. In instances where another entity voluntarily provides such information to the underwriter in the normal course of business, the underwriter likely does not assume liability for verifying the accuracy or completeness of such information.

Accordingly, we reiterate the recommendation from our previous letter that the MSRB clarify in Rule G-45, Form G-45, or the Form G-45 Manual that, to the extent the plan's underwriter (*i.e.*, its primary distributor) does not obtain, in its normal course of business on behalf of the plan, information that is required to be disclosed by Form G-45, Rule G-45 does not impose upon the underwriter a duty to seek out such information in order to include it on the Form.⁵ The MSRB should also clarify that: (1) Form G-45 does not require the underwriter to impose upon selling dealers – that are not

⁴ ICI Letter at p. 3.

⁵ We note that the contents of the Manual have not been published for public comment. Given that much of the detail regarding the contents of Form G-45 and underwriters' responsibilities may be set forth in the Manual, rather than in Rule G-45 or Form G-45, we recommend that the MSRB publish such Manual for public comment prior to finalizing its contents. If the MSRB elects not to do so, we strongly advise it to exercise great care in drafting the Manual's provisions so as to avoid imposing upon any underwriter any substantive duty on which the public has not had the opportunity to comment.

underwriters to the plan – a duty to provide the plan’s underwriter information required to be reported; and (2) the underwriter is not required to report information in the possession, custody, or control of another service provider to the plan, including those that are affiliates of the underwriter, if the underwriter does not, in its normal course of business, have possession, custody, or control of the information.

In addition, and as discussed in our previous letter, we again strongly recommend that, in instances where the underwriter possesses information that it did not create or compile (*i.e.*, information voluntarily provided to it by another service provider to the 529 plan), Rule G-45, Form G-45, or the Form G-45 Manual should either expressly: (1) relieve the underwriter from reporting such information; or (2) absolve the underwriter from any regulatory liability associated with including such information on Form G-45.

CONSISTENCY WITH THE CSPN DISCLOSURE PRINCIPLES

Incorporation of the Disclosure Principles in Rule G-45

The 2012 Notice indicates that the MSRB seeks, for the sake of consistency and uniformity, to have underwriters calculate and report their performance and fee and expense information on Form G-45 as recommended in the CSPN’s Disclosure Principles, Statement No. 5. While the Institute does not oppose this approach, we strongly recommend that either the Rule, the Form, or the Form G-45 Manual expressly incorporate the substance of the relevant provisions or instructions from the Disclosure Principles. This is important because the Disclosure Principles and related Exhibits provide a good deal of helpful guidance on how information should be calculated or reflected for purposes of disclosing it in the Official Statement. Performance information for age-based investment options, which is discussed below, provides a good example. Without an express reference to the Disclosure Principles in Rule G-45, Form G-45, or the Rule G-45 Manual there likely will be confusion regarding how certain information is to be calculated and reported.

In addition, we note that the Disclosure Principles are written broadly to accommodate the variety of features that different types of 529 plans offer. While we appreciate the MSRB’s interest in receiving uniform data from 529 plans, the MSRB should retain the flexibility afforded to plans by the Disclosure Principles. For example, as discussed in more detail below, the Exhibits to the Disclosure Principles present a variety of formats for reporting fee and performance information depending upon the structure and features of the plan. The MSRB should ensure that Rule G-45, Form G-45, and the Form G-45 Manual accommodate the variety of disclosure options the Disclosure Principles provide to plans.

Reporting of Performance Information

Exhibits B and C to the Disclosure Principles are one example of where the Disclosure Principles provide additional detail and flexibility by enabling plans to tailor their performance information based on whether the plan is “direct-sold” [Exhibit B] or “advisor-sold” [Exhibit C]. While both Exhibits B and C require disclosure of the plan’s investment options’ annualized returns for one, three, five, and ten year periods, as well as since inception, Exhibit C additionally requires that these returns be reported both including and excluding sales charges.

The provisions in the Disclosure Principles relating to performance also provide additional detail regarding age-based investment options:

Age-based investment options include structures in which (i) amounts invested on behalf of a beneficiary remain in a single investment option for the life of the investment (with the underlying investments and allocation percentages changing as the beneficiary ages) or (ii) amounts invested on behalf of a beneficiary are transferred through a progression of different portfolios at periodic intervals as the beneficiary ages. *It is anticipated that performance charts relating to investment options described in clause (ii) will show the historic performance of each portfolio in the progression for the applicable period.* [Emphasis added.]⁶

By contrast to the above distinctions made in the Disclosure Principles, Rule G-45 merely defines “performance” in very general terms and Form G-45 (iii)(G) requires disclosure of such “performance.” There is nothing in the current version of the Rule or Form that provides a level of detail to underwriters comparable to the Disclosure Principles. To address this omission, while preserving the MSRB’s interest in having underwriters uniformly report information, we recommend that Rule G-45, Form G-45, or the Form G-45 Manual expressly include or reference the instructions from Exhibits B and C to the Disclosure Principles.⁷

⁶ See “Instructions to Program,” Exhibits B and C, CSPN Disclosure Principles. Related to the issue of an investment option’s performance is the performance data for the investment option’s benchmark. While the Disclosure Principles are silent with respect to the use of benchmarks, we understand that, for age-based investment options, some plans aggregate single asset class benchmarks based on the plan’s glide path in order to calculate a composite benchmark for the investment option. We recommend that Rule G-45, Form G-45, and the Rule G-45 Manual accommodate this approach to benchmarking.

⁷ We note that, to the extent the *underwriter* either does not calculate performance or possess the information to calculate or report performance as required by Form G-45, it would not be required to include such information on Forms G-45.

Reporting of Fee and Expense Information

Similar issues arise under the proposal with respect to the reporting of fee and expense information. Exhibit A to the Disclosure Principles includes four different formats for disclosing 529 plan fee and expense information in the Official Statement. The choice of which format to use depends upon whether the plan is advisor-sold (Fee Structure Charts A, B and C) or direct-sold (Fee Structure Chart D) and, for advisor-sold plans, whether the investment option includes an up-front sales charge (Fee Structure Chart A) or deferred sales charges (Fee Structure Charts B and C).⁸ As with the reporting of performance information, the Disclosure Principles provide additional instructions regarding the reporting of fee and expense information. Section 3.C. of the Disclosure Principles instructs as follows:

... If a Savings Plan includes fees and costs in categories that differ from the categories included in Exhibit A, then a different tabular presentation that is at least as specific as the tables attached as Exhibit A should be used. State Issuers are encouraged to add an introductory paragraph to such tables, explaining principles followed and assumptions made by the State Issuer in preparing the tables. State Issuers are also encouraged to add explanatory footnotes to the fee and cost tables in order to make such tables clear and understandable.

Exhibit A itself includes instructions that provide additional detail regarding the disclosure of fee information (including, where appropriate, the duration of a fee) in footnotes accompanying the charts.

By contrast, the MSRB's proposal does not contain such instructions or detail, raising concerns about (1) the degree of consistency between the information required on Form G-45 and the information currently disclosed pursuant to the Disclosure Principles and (2) whether Rule G-45 will afford underwriters the same ability as the Disclosure Principles to tailor the information they provide based on the specific features of a 529 plan. To ensure accuracy of the information disclosed and consistency in the manner in which it is disclosed between the Disclosure Principles and Form G-45, we recommend that either Rule G-45, Form G-45, or the Form G-45 Manual expressly incorporate the instructions and flexibility of the Disclosure Principles.⁹ In addition, consistent with the guidance provided by the Disclosure Principles, to the extent the plan does not separately compute and disclose

⁸ The charts in Exhibit A of the Disclosure Principles for "Fee Structure B" and "Fee Structure C" differ depending upon the duration of the deferred sales charge.

⁹ At a minimum, the MSRB should clarify that, in calculating performance, the underwriter may exclude sales charges, account maintenance fees, and other fees or charges that are not imposed by the plan on all account holders owning the investment option for which the disclosure is being made.

one or more of the fees listed in the charts in Exhibit A (*e.g.*, a program manager fee), Rule G-45 should not require the plan to artificially create such fee(s) solely for purposes of Form G-45.¹⁰

COMMENTS ON THE CONTENTS OF FORM G-45

Instructions to the Form

As discussed above, we recommend that the instructions to Form G-45 clarify that underwriters are only required to include on Form G-45 any information that they own or control, regardless of where or with whom such information resides or is maintained. In those cases where the underwriter serves as a conduit for reporting information owned, created, or controlled by another service provider to the plan, the instructions should expressly provide that the underwriter is not responsible for ensuring or verifying the accuracy of such information. The instructions should also expressly affirm that an underwriter may omit any information that is not within its ownership, control, or possession in the normal course of business. Finally, the instructions should expressly reference or incorporate the instructions or relevant guidance set forth in CSPN's Disclosure Principles.

Section(i), Plan Descriptive Information

The Institute again recommends that the information regarding a plan's "marketing channel," be captured through a check-the-box format to both facilitate reporting this information and ensure consistency in its reporting from plan to plan.

Section (ii), Aggregate Plan Information

As previously discussed, the Institute strongly recommends that the MSRB incorporate in Rule G-45, Form G-45, or the Form G-45 Manual the instructions from the CSPN Disclosure Principles to ensure consistency between the information the MSRB is seeking and the Disclosure Principles. This is particularly important with respect to reporting performance and fee and expense information. As regards fee and expense information, the Institute also recommends that Form G-45 capture such information in Section (iii) rather than in Section (ii). This approach both provides greater consistency

¹⁰ The charts in Exhibit A to the Disclosure Principles include the following fees associated with each of the plan's investment options: Estimated Fund Underlying Expenses; Program Manager Fee; State Fee; Misc. Fees; Annual Distribution Fee; Total Annual Asset-Based Fees; Sales Charges; and Annual Account Maintenance Fees. As noted above, instructions to Exhibit A recommend that certain information disclosed in the chart be accompanied by explanatory footnotes. Because it is unclear how Form G-45 will address the supplemental information the Disclosure Principles recommends be placed in footnotes, we recommend that Rule G-45, Form G-45, or the Form G-45 Manual expressly incorporate the relevant instructions from the Disclosure Principles.

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between Form G-45 and the CSPN Disclosure Principles and enables the underwriter to align the fees and expenses with the particular investment option to which they apply.

Section (iii), Information Regarding Each Investment Option

The Institute supports consolidating the reporting of information regarding a plan's investment options into one section of the Form.¹¹ We again recommend, however, that the Form require information about asset allocations (Items E and F) be reported in ranges rather than precise amounts. As noted in our previous letter, the use of ranges would relieve underwriters of having to revise previously reported information whenever there is a *de minimis* change to such information. The use of ranges should also facilitate the MSRB's analysis of data by making it easier to group the information reported on the Form into pre-assigned ranges.

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The Institute appreciates the opportunity to share these comments with the MSRB. We very much appreciate the willingness of the MSRB and its staff to give thoughtful consideration to the comments made by those members of the industry that will be charged with completing and filing Form G-45. We believe that the recommendations set forth above will both facilitate compliance with the requirements of Rule G-45 and accommodate the MSRB's interest in receiving meaningful data in a consistent format from underwriters on an ongoing basis. If you have any questions concerning our comments or require additional information regarding any of our recommendations, please do not hesitate to contact the undersigned by phone (202-326-5825) or email (tamara@ici.org).

Sincerely,

/s/

Tamara K. Salmon

Senior Associate Counsel

¹¹ As discussed above, we also recommend that the fee and expense information required by Section (ii) of the Form be moved to Section (iii).