

MICHAEL B. KOFFLER

DIRECT LINE: [REDACTED]

E-mail: [REDACTED]

November 18, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090

Re: File Number SR-MSRB-2013-04
Order Instituting Proceedings to Determine Whether to Disapprove Proposed
Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information
on Municipal Fund Securities

Dear Ms. Murphy:

We are submitting this Comment Letter in response to the Securities and Exchange Commission's Order Instituting Proceedings to Determine Whether to Disapprove Rule G-45 proposed by the Municipal Securities Rulemaking Board (the "**MSRB**")¹ because of our firm's representation of a number of primary distributors of state-sponsored 529 college savings plans ("**529 Plans**"). We appreciate the MSRB's continuing efforts to improve the regulatory scheme governing brokers, dealers and municipal security dealers (collectively "**broker-dealers**") distributing 529 Plans and believe that the MSRB's efforts have enabled it to effectively and efficiently regulate the brokerage industry's distribution of 529 Plans. However, as discussed below, we share the concerns expressed in the Order regarding the Proposal and believe that it should not be approved.

I. BACKGROUND – SHORTCOMINGS OF THE PROPOSAL

In response to the Proposal, we submitted a comment letter ("**Comment Letter**") to the Securities and Exchange Commission ("**Commission**").² The Comment Letter

¹ See *Self-Regulatory Organizations; MSRB; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information on Municipal Fund Securities*, Securities Exchange Act Release No. 70531 (Sept. 26, 2013) ("**Order**"). The Order was issued in response to a proposed rule change that was published in the Federal Register on June 28, 2013 (*Notice of Filing of a Proposed Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information on Municipal Fund Securities*, Securities Exchange Act Release No. 69835 (June 24, 2013) (the "**Proposal**")) and the comments received in connection therewith.

² See Comment Letter from Michael B. Koffler in Response to the Proposal (July 19, 2013), available at <http://www.sec.gov/comments/sr-msrb-2013-04/msrb201304-5.pdf>. We also submitted comment letters to

touched on a number of points, including the following:

- *Limited Value of Requested Information.* The Proposal fails to provide a rationale as to how the information requested by the MSRB under the Proposal (“*Requested Information*”) would be useful to the MSRB, the Commission or the Financial Industry Regulatory Authority (“*FINRA*”) given (i) the nature of the Requested Information (which focuses on 529 Plans and their investment options and thus seems incapable of aiding the regulatory efforts of regulators charged with regulating broker-dealers), (ii) the limited reach of the Proposal (*i.e.*, because proposed Rule G-45 would only cover broker-dealers, the MSRB likely would not receive information concerning 529 Plans that are sold directly by State issuers, which represent over half of the 529 Plan marketplace), and (iii) the comprehensive regulatory system already in place for broker-dealers distributing 529 Plans.
- *The MSRB Cannot Not Regulate 529 Plans.* The MSRB’s regulatory authority is limited to regulating broker-dealers selling and distributing municipal securities, including 529 Plans. It does not have authority to regulate 529 Plans or the 529 Plan market. The MSRB’s regulatory functions thus would not be enhanced by receiving the Requested Information, which focuses on 529 Plans and their investment options. In this respect, the MSRB fails to draw a connection between the additional information it seeks and its regulatory functions. In other words, the Proposal fails to articulate how such information would enable it to improve how it carries out its regulatory obligations.³
- *Requested Information Often is Not within the Possession or Control of the Primary Distributor.* In many 529 Plans, the primary distributors do not possess or have access to the Requested Information as most of the Requested Information is divorced from the sales process and the activities of a primary distributor. Whether primary distributors have possession or control of information or the legal right to obtain it is a facts and circumstances analysis that is largely driven by their role and contractual relationship vis-à-vis the State instrumentality issuing the 529 Plan and/or the 529 Plan recordkeeper. In those cases where a

the MSRB in response to their requests for comment in connection with this proposed rulemaking. *See* Comment Letter from Michael B. Koffler in Response to MSRB Notice 2011-33, Request for Comment on Plan to Collect Information on 529 College Savings Plans (Aug. 31, 2011), available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/~media/Files/RFC/2011/2011-33/Sutherland.ashx>; Comment Letter from Michael B. Koffler in Response to MSRB Notice 2012-40, Request for Comment on Draft Proposal to Collect 529 College Savings Plan Data (Sept. 14, 2012), available at <http://www.msrb.org/RFC/2012-40/Sutherland-Asbill-&-Brennan.pdf>. This letter responds to the specific concerns and questions in the Order and does not attempt to restate the content of these earlier letters. However, we request that the Commission consider their content as part of our comments on the Order.

³ While the MSRB concludes in the Proposal that the Requested Information will “better position the MSRB to protect investors and the public interest,” as discussed below the MSRB neglects to articulate why or how this is the case.

primary distributor is able to obtain information from a third party, the primary distributor typically will not be in a position to verify the accuracy or completeness of the information and therefore cannot fairly be held responsible for such information.

- *Costs vs. Benefits.* The MSRB did not collect or provide any data supportive of its contention that the benefits of the proposal will outweigh the costs that will be incurred by primary distributors of 529 Plans. The MSRB concludes in the Proposal that the benefits will outweigh the costs without ever seeking to quantify either the benefits or the costs. It is difficult to see how the Proposal would achieve investor protection benefits since there is such a fundamental disconnect between the nature of the Requested Information and the regulatory roles played by the MSRB, the Commission and FINRA in regulating broker-dealers. Until such time as the MSRB clearly identifies the issues to be addressed by the Proposal and explains, in detail, how obtaining information about 529 Plan fund flows will aid broker-dealer regulation, the Proposal should not be approved.⁴
- *The Scope of the Proposal is Not Clear.* The Proposal acknowledges at various points that it would apply (like all MSRB rules) only to broker-dealers. However, the Proposal also indicates that other service providers to 529 Plans, such as program managers, record-keepers, investment managers, and custodians may be subject to the rule. The MSRB adds in the Proposal that it “believes that, in most cases, the record-keeper will be an underwriter” However, under proposed MSRB G-45(d)(xiv), “[t]he term “underwriter” shall mean a broker, dealer or municipal securities dealer that is an underwriter” (emphasis added). Thus, under the MSRB’s definition, the term underwriter can only include “a broker, dealer or municipal security dealer” and therefore does not include any other entity, such as a record-keeper. The Proposal also states, without support, that the distinction between “advisor-sold” plans and “direct-sold” plans is a marketing distinction that has no bearing on the jurisdiction of the MSRB. This conclusion is not consistent with the MSRB’s own definitions of these terms.⁵
- *Specific Information Requested in the Proposal.* We had a number of comments relating to specific items in the Proposal, including the following:
 - Various items on proposed Form G-45 are ambiguous; it is therefore unclear how these proposed items are to be completed;

⁴ We also note that some of the data already available in the public domain covers both broker-sold 529 Plans and direct-sold 529 Plans, which means this data is, in many ways, more comprehensive than the information the MSRB seeks in the Proposal. In addition, the Requested Information is, by itself, of little value because there is no context provided in which to analyze the information. In this respect, the Requested Information is divorced from the terms and characteristics of 529 Plans and merely reflects the movement of funds.

⁵ Proposed Rule G-45 would define “advisor-sold” as the sale of 529 Plans “through a broker, dealer or municipal securities dealer that has a selling agreement with an underwriter” and would define “direct-sold” as the sale of 529 Plans “through a website, or toll-free telephone number or other direct means.”

- Some of the descriptions of 529 Plans and their investment options (as well as proposed terms and definitions) are not accurate;
- Some of the proposed items on Form G-45 request information about underlying securities (which are separate from a 529 Plan and are not municipal securities);
- Form G-45 should not seek disclosure of information that has applicability only with respect to 529 Plans that do not have a broker-dealer involved in the offering; and
- Certain proposed items on Form G-45 should be eliminated since they do not relate to the primary distributor or retail broker-dealers distributing and selling 529 Plans.

The foregoing considerations suggest that the Proposal would provide only marginal benefit to the MSRB. The Commission similarly wrote in the Order that:

In particular, the comments raise concerns that the proposed rule change is unclear as to whom the obligations of the rule apply and is being interpreted in a manner that is potentially inconsistent with statutory and Commission rule definitions of “underwriters” and “broker dealers.” This uncertainty could result in noncompliance or needless compliance by entities and/or unnecessary duplicative reporting. Further, respondents may not be able to ascertain the scope of their obligations to provide the requested information under the proposed rule, including the extent to which they are responsible for providing, and verifying the accuracy of, information not in their possession. In light of the confusion related to whom the proposed rule applies, questions are raised as to whether the disclosure obligations are sufficiently balanced to support the MSRB’s statutory obligation to protect both investors and municipal entities without being overly burdensome.

Our clients believe that the Proposal, as it currently exists, does not satisfy the criteria in Section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as amended (“*Exchange Act*”) because, in their view, the benefits will be modest and the burdens substantial. In this respect, they believe the data that would be reported under the Proposal will be incomplete or incorrectly reported given the lack of clarity as to how Proposed Form G-45 should be completed. They believe the confusion surrounding the form requirements will cause primary distributors to interpret these requirements inconsistently and that the information provided will, therefore, be unreliable. In addition, for the reasons discussed in the Comment Letter and below, we believe the data provided to the MSRB will not materially impact the MSRB’s ability to realize its statutory mandate. At the same time, the confusion associated with the Proposal will impose substantial burdens on primary distributors trying to complete Form G-45; the uncertainty caused by the items on the form will force primary distributors to unnecessarily expend resources to try to interpret

these items and obtain, review, and report the Requested Information. Accordingly, we believe that the Proposal is overly burdensome.⁶

II. THE DISCONNECT BETWEEN THE PROPOSAL AND THE EXCHANGE ACT

After summarizing many of the concerns raised by commenters in letters submitted to the Commission following publication of proposed Rule G-45 and Form G-45 in the Federal Register, the Order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act to determine whether to disapprove the proposed rule change. The Commission asserted in the Order that institution of such proceedings appears appropriate in view of the legal and policy issues raised by the Proposal. In this respect, the Commission noted that Section 15B(b)(2)(C) of the Exchange Act requires, among other things, that the rules of the MSRB be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

Our clients believe that the Proposal suffers from two types of shortcomings. First, as noted in our Comment Letter and as discussed above, a fair number of the items in the Proposal are unclear, internally inconsistent or rest on faulty assumptions. Second, and more fundamentally, the Proposal fails to satisfy the requirements of Section 15B(b)(2)(C) of the Exchange Act. In particular, the Proposal does not explain how it would:

1. prevent fraudulent and manipulative acts and practices;
2. promote just and equitable principles of trade;
3. foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products;
4. remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products; or
5. protect investors, municipal entities, obligated persons, or the public interest.

⁶ We also note that the Proposal would require primary distributors to “maintain the information required to be reported on Form G-45.” Since the information would be filed on EMMA under the Proposal, our clients question why there is a regulatory need to impose an independent recordkeeping obligation on primary distributors.

In explaining its rationale for the Proposal, the MSRB does not assert that it would satisfy any of the goals in numbers 1 through 4 above. With respect to number 5, the MSRB's justification is limited to the following:

By collecting this information, the MSRB will enhance its understanding of the 529 plan market, the growth of plans and their investment options, and the differences among plans. Such information may inform the MSRB of the risks and impact of each plan and investment option and provide the MSRB and other regulators with additional information to monitor the market for wrongful conduct.

....

The information will allow the MSRB to assess the impact of each plan on the market, evaluate trends and differences, and gain an understanding of the aggregate risk taken by investors by the allocation of assets in each investment option. Having this information will better position the MSRB to protect investors and the public interest.

We believe it is important to assess each of these assertions in turn. First, the MSRB asserts that the Proposal would better position the MSRB to protect investors and the public interest because the Requested Information would enhance its understanding of the 529 Plan market, the growth of plans and their investment options, and the differences among plans. This assertion raises several questions: Is it consistent with Section 15B(b)(2)(C) of the Exchange Act for the MSRB to impose a burden on certain broker-dealers in order for the MSRB to obtain information not about such broker-dealers, but rather about the 529 Plan market? How would such information enable the MSRB to better achieve its regulatory mandate of overseeing broker-dealers? What differences would the MSRB be able to evaluate from the information sought under the Proposal?

The next assertion is that the Requested Information may inform the MSRB of the risks and impact of each plan and investment option and provide the MSRB and other regulators with additional information to monitor the market for wrongful conduct. We fundamentally disagree. Given the nature of the Requested Information, neither we nor our clients see how such information could inform the MSRB of the risks and impact of each plan and investment option. In this respect, the Requested Information does not relate to the risks or impacts of 529 Plans or their investment options. Moreover, no context is provided in which to analyze the information, which relates mostly to the movement of funds. Similarly, the basis for the assertion that the Requested Information will provide regulators with additional information to monitor the market for wrongful conduct is not apparent or explained. Most of the data sought by the MSRB is descriptive in nature or provides information regarding fund flows. It does not indicate, in any sense, the risks or impact of any plan or investment option on investors or provide information about wrongful conduct. As noted in our Comment Letter, it also is not clear

⁷ In this respect, we again note that much of the data sought under the Proposal represents fund flows.

how the MSRB defines “risk.” We do not understand, and the MSRB does not indicate in the Proposal, how the type of information sought under the Proposal will enable securities regulators to make meaningful and useful assessments regarding risk, the impact of plans and investment options or wrongful conduct.

Finally, the MSRB asserts that the Requested Information will allow the MSRB to assess the impact of each plan on the market, evaluate trends and differences, and gain an understanding of the aggregate risk taken by investors by the allocation of assets in each investment option. Having this information will, according to the MSRB, better position the MSRB to protect investors and the public interest. These assertions raise additional questions: Which market? The market for 529 Plans? How does the MSRB plan to measure the impact of a 529 Plan on the market? How will obtaining any of the Requested Information permit the MSRB to measure a 529 Plan’s impact on the market? Even if the MSRB were able to measure such impact, since the MSRB’s jurisdiction is limited to broker-dealers, how would this information enable to the MSRB (or other securities regulators) to better protect investors? How will the Requested Information help the MSRB to understand differences in 529 Plans (beyond that which is already disclosed in the Official Statement or other public sources)? How is information about trends and differences relevant to the MSRB’s mandate of crafting rules governing broker-dealers distributing and selling 529 Plans? How will understanding the allocation of assets in investment options enable the MSRB to understand the “aggregate risk” taken by investors when none of the Requested Information relates to risk?⁸

None of the fundamental questions above are addressed in the Proposal (or in the regulatory notices leading up to the Proposal). We submit that the Proposal should not be approved unless these questions are satisfactorily addressed. In this respect, our clients continue to believe that the Proposal fails to explain how the Requested Information will help the MSRB fulfill its core responsibility of crafting rules governing broker-dealers’ sale and distribution of municipal securities.⁹

III. THE BENEFITS VS. THE COSTS

According to the Order, the comments received on the Proposal “raise questions as to whether the MSRB’s proposal is consistent with the requirements [of] Section 15(b)(2)(C) of the [Exchange] Act.” Based on the issues raised above, we and our clients believe that the MSRB has failed to satisfy the criteria in Section 15(b)(2)(C). Before proceeding with its efforts to adopt Rule G-45 and Form G-45, the MSRB should undertake a rigorous analysis of the issues raised in the Comment Letter and the Order, including the costs and benefits associated with the Proposal. Such an analysis would be

⁸ To the extent the MSRB believes investors take on more risk simply because an investment option has more assets (or that investors take on less risk simply because an investment option has less assets), our clients fundamentally disagree with this conclusion. However, because the MSRB fails to explain how it measures “risk” or how the Requested Information relates to such risk, we are unsure whether we understand the MSRB’s assumptions or thought process underlying the Proposal.

⁹ We reiterate that it is not the MSRB’s role to monitor or regulate the 529 Plan market; its role under the Exchange Act is limited to regulating broker-dealers that distribute and sell municipal securities.

consistent with the MSRB's recently announced *Policy on the Use of Economic Analysis in MSRB Rulemaking* (the "**Policy**") and would help ensure that any rule's costs and burdens are balanced with its expected benefits.¹⁰ While the Proposal predates the Policy, our clients believe that, under the circumstances, the Proposal should be subject to the standards set forth in the Policy. We note that the Policy establishes four elements of a proper regulatory economic analysis:

1. Identifying the need for a proposed rule and explaining how the rule will meet that need
2. Articulating a baseline against which to measure the likely economic impact of the proposed rule
3. Identifying and evaluating alternative regulatory approaches
4. Assessing the benefits and costs, both quantitative and qualitative, of the proposed rule and the main reasonable alternative regulatory approaches

In connection with the first element, the Policy states, in relevant part, that:

A starting point in the initiation of any MSRB rulemaking action should be a justification for the rule that includes a description of the intended purpose and the motivation of the proposed rulemaking. The rulemaking team should explain the problem that is being addressed, describe the policy and economic rationale for the proposed rule, and describe the anticipated consequences of the rule in addressing the problem. This description should also address how the rule would work within the existing regulatory framework, or how the rule would change that framework.

We note that the Proposal does not purport to specify what problem is being addressed or why or how the Proposal would solve the problem. In our clients' view, this is a fundamental flaw of the Proposal that, by itself, should prevent the Proposal from being approved.

IV. CONCLUSION

Given the fundamental issues raised in previous letters, the Comment Letter, the Order and by other commenters, we continue to believe the Commission should disapprove the Proposal. We note that if the Commission were to approve the Proposal, it would set in motion a scenario under which: primary distributors would not know what information is required of them or how to fill out certain items on Form G-45;

¹⁰ See *MSRB Adopts Policy for Integrating Economic Analysis into Rulemaking Process*, MSRB Press Release (Sept. 26, 2013) (announcing the MSRB's new *Policy on the Use of Economic Analysis in MSRB Rulemaking* (the "**MSRB's Economic Policy**") which is available at: <http://www.msrb.org/About-MSRB/Financial-and-Other-Information/Financial-Policies/Economic-Analysis-Policy.aspx>.)

Elizabeth M. Murphy, Secretary

November 18, 2013

Page 9 of 9

inconsistent data would be provided to the MSRB; the MSRB would not be able to make significant use of the data provided; the data would not materially enhance the MSRB's ability to carry out its rulemaking functions under the Exchange Act; and primary distributors would expend substantial resources trying to comply with the form requirements. We submit that such a scenario is not consistent with the requirements of Section 15B(b)(2)(C) of the Exchange Act and that the Proposal, therefore, must be disapproved.

For fourteen years we have strongly supported the MSRB's regulatory efforts relating to 529 Plans and believe it has done an admirable job in crafting rules for broker-dealers distributing and selling 529 Plans. We remain committed to working with the MSRB to ensure it continues to craft smart, workable rules for broker-dealers selling 529 Plans and hope that it will continue its historical practice of fostering an open dialogue with the industry.

I would be pleased to provide additional information or discuss these comments at your convenience.

Very truly yours,

Michael Koffler 

Michael Koffler