

COMMENT LETTER

November 8, 2013

ICI Files Letter with SEC Recommending that the SEC Disapprove MSRB Rule G-45 due to continuing Concerns with Proposal (pdf)

November 8, 2013 Elizabeth M. Murphy, Secretary Securities and Exchange Commission
100 F Street, N.E. Washington, D.C. 20549-1090 Re: File No. SR-MSRB-2013-04; MSRB
Proposed Rule G-45 Dear Ms. Murphy: The Investment Company Institute (the “Institute”)¹ appreciates the opportunity to provide comments 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 (“MSRB”).² As proposed by the MSRB, Rule G-45 and related Form G-45 would require primary underwriters of 529 college savings plans to file with the MSRB’s Electronic Municipal Market Access (“EMMA”) system on an ongoing basis detailed data regarding such plans. The Institute’s members have a strong interest in this issue as they serve as program managers and service providers – including primary distributors – to 529 college savings plans. Based on this interest, we have been actively engaged with the MSRB on its data collection initiative since it first publicly proposed this idea.³ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$15.2 trillion and serve more than 90 million shareholders.⁴ See Securities and Exchange Commission Self-Regulatory Organizations; Municipal Securities Rulemaking Board; 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, SEC Release No. 34-70531 (Sept. 26, 2013) (“Order”). Elizabeth M. Murphy, Secretary November 8, 2013 Page 2 in 2011.⁵ For the reasons discussed below, until the MSRB’s proposal is significantly amended to address the fundamental concerns discussed in the Order, we strongly recommend that the Commission disapprove it. THE ORDER As discussed in more detail below, the Order discusses the variety of continuing concerns raised by the ICI and others in letters submitted to the Commission when it published proposed Rule G-45 and Form G-45 for comment.⁶ According to the Order, the Commission believes that the comments it received on the proposal “raise questions as to whether the MSRB’s proposal is consistent” with the requirements imposed on the MSRB’s rulemaking by Section 15(b)(2)(C) of the Securities Exchange Act of 1934 (“Section 15(b)(2)(C)").⁷ The Order also notes that, due to confusion with the proposal’s requirements, it “could result in

noncompliance or needless compliance.”⁶ Moreover, “[i]n light of the confusion related to whom the proposed rule applies, questions are raised as to whether the [proposed] disclosure obligations are sufficiently balanced to support the MSRB’s statutory obligation to protect investors and municipal entities without being overly burdensome.”⁷ We share the Commission’s concerns and strongly commend it for its careful study of the proposal and its serious consideration of the issues raised by commenters. As noted in the Commission’s Order, the ICI’s July 2013 Letter expressed the following concerns with the MSRB’s proposal: ⁸ 3 See Request for Comment on Plan to Collect Information on 529 College Savings Plans, MSRB Notice 2011-33 (July 19, 2011), which is available at: <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-33.aspx?n=1> and Letter from the undersigned to Ronald W. Smith, Corporate Secretary, MSRB, dated Aug. 31, 2011 (“ICI’s August 2011 Letter”). 4 See Letter from the undersigned to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, dated July 16, 2013 commenting on SEC Release No. 34-69835 (“ICI’s July 2013 Letter”), which was filed in response to Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information on Municipal Fund Securities, SEC Release No. 34-69835 (June 24, 2013). 5 Order at p. 21. 6 Ibid. 7 Ibid. 8 These concerns, which were discussed in detail in ICI’s July 2013 Letter, are presented in the order they appear in the Commission’s Order. Rather than repeating the contents of ICI’s July 2013 Letter in its entirety, we have attached the ICI’s Letter and would like the Commission to again consider its contents as part of our comments on the Order. Elizabeth M. Murphy, Secretary November 8, 2013 Page 3

□ Definition of “Underwriter” – The proposed definition, which is fundamental to determining who has responsibility for filing Form G-45, is so broad that it could be read to include persons that have nothing to do with underwriting 529 plan securities (e.g., a plan’s program manager, investment manager, recordkeeper, or custodian). □ Underwriter Reporting Obligations – Because of the manner in which 529 plans are structured and operate, a plan’s primary distributor does not have unfettered access to all records and information that is held by the plan’s other service providers and that would be necessary to complete Form G-45; the proposal fails to address how an underwriter with limited information is to complete Form G-45.⁹ □ Publication of the Form G-45 Manual – Much of the detail regarding how Form G-45 is to be completed by filers is expected to be set forth in the G-45 Manual, which has not been published for comment. As such, much of the substantive responsibilities that will be imposed on filers is unknown and will remain unknown until the Manual is published. At the present time, however, the MSRB has indicated that it does not intend to publish the Manual for public comment prior to its adoption and implementation – thereby denying filers the opportunity to fully comment on how Form G-45 will impact them. □ Publication of the G-45 Data – Inasmuch as the impetus for the MSRB’s proposal is to provide it with industry data to inform its regulatory activities, we question the necessity of the MSRB giving future consideration to making the data it receives on Form G-45 publicly available. □ Contents of Form G-45 – To fully understand how Form G-45 is to be completed, additional clarification is needed regarding certain items on the Form including the reporting of: investment option information; performance information; and underlying investments.¹⁰ Until such time as each of these substantive concerns is satisfactorily addressed, we have concerns with the SEC approving the MSRB’s proposal. 9 The Commission’s Order discusses the variety of issues raised by the ICI and others related to these concerns. Order at pp. 8-10. Moreover, even if the MSRB narrows the definition of “underwriter” to a plan’s primary distributor as we recommend, such narrowing does not address the issues related to the primary distributor’s limited access to information that is necessary to complete the Form. 10 While the MSRB may intend to provide this detail in the G-45 Manual, if the Manual is not published for public comment,

we will not be provided the opportunity to comment on these important details. Elizabeth M. Murphy, Secretary November 8, 2013 Page 4 THE REQUIREMENTS OF SECTION 15B(b)(2)(C) The Commission's Order raises the issue of whether the MSRB's proposal satisfies the requirements imposed on the MSRB's rules by Section 15B(b)(2)(C). As noted in the Order, Section 15B(b)(2)(C) requires that, at a minimum, the rules of the MSRB be designed to: (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; and, in general, (5) Protect investors, municipal entities, obligated persons, and the public interest. While we continue generally to support the MSRB collecting the information it needs to fulfill its regulatory functions, we share the Commission's concerns with whether the proposal satisfies the standards set forth in Section 15B(b)(2)(C).¹¹ We therefore believe that the Commission should disapprove the proposal unless and until these standards are satisfied and the MSRB adequately addresses the concerns expressed by the Commission, the Institute, and other commenters. In addition to assessing the MSRB's proposal against the above five factors, we note that the Commission's Order states that "questions are raised as to whether the disclosure obligations are sufficiently balanced to support the MSRB's statutory obligation to protect investors and municipal entities without being overly burdensome."¹² We appreciate the Commission's sensitivity to this issue and share its concern. Indeed, when the MSRB first published a proposal relating to it collecting 529 college savings plan data,¹³ the Institute filed a comment letter supporting the MSRB's goal of having 11 It would not appear that the data the MSRB plans to collect on Form G-45 could be fairly said to be data that could be used to prevent fraud, promote just and equitable principles of trade, foster industry cooperation, or remove market impediments in the 529 plan market. As regards the fifth standard listed above, according to the Order, "In the MSRB's view, the information about activity in 529 plans is necessary to assist the MSRB in evaluating whether its current regulatory scheme for 529 plans is sufficient or whether additional rulemaking is necessary to protect investors and the public interest." Order at p. 20. According to the "Purpose" section of the Form 19b-4 that the MSRB initially filed with the Commission on this proposal, the information the MSRB would collect from Form G-45 "will enable [it] or other regulators to, on a comprehensive basis, compare the asset allocation, fees and costs, and performance of similar investment options across plans and identify trends or changes. Such information may also be used to determine the nature or timing of risk-based dealer examinations." See Form 19b-4 dated June 10, 2013 in SEC File No. 2013-04 at p. 24. ¹² Order at p. 21. ¹³ See fn. 3, above. Elizabeth M. Murphy, Secretary November 8, 2013 Page 5 the data necessary to regulate the 529 plan market, but questioning "whether the MSRB's proposal [was] an effective or efficient way to achieve" its goal. As stated in that letter: [W]e recommend that, before proceeding with its proposal, the MSRB determine the following to appropriately narrow the scope of the information it seeks: • The information of interest to the MSRB that is not currently publicly available; • The utility or value to the MSRB of collecting such information . . . ; • The intended use or audience for such information; and • The costs to the industry associated with any new filing requirements. Such information would enable the MSRB to tailor its request to: obtain only the information that is both necessary and currently available; ensure the value and utility of any information it obtains; and make sure that the cost to the industry associated with the filing are appropriately balanced with the benefits to the MSRB from receiving such information.¹⁴ The Institute continues to believe that, before pursuing adoption of Rule G-45 and Form G-45, the MSRB should undertake a rigorous analysis of the issues raised in the Order and in ICI's August 2011 Letter, including the costs and benefits associated with

the proposal. Such analysis would both seem consistent with the MSRB's recently announced Policy on the Use of Economic Analysis in MSRB Rulemaking¹⁵ and better enable the MSRB to tailor any resulting rule to ensure that its costs and burdens are balanced with its expected benefits.¹⁶ ■ ■ ■ ■ In summary, we recommend that, due to the fundamental concerns that have yet to be resolved with the current version of the MSRB proposal and the lack of sufficient economic analysis supporting its adoption, the Commission disapprove it. We support the work of the MSRB and remain 14 ICI's August 2011 Letter at p. 3. 15 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>. While the MSRB's new policy, by its express terms, does not apply to any ongoing rulemaking of the MSRB, we believe that, because there is no urgency warranting the MSRB's rapid adoption of Rule G-45 and there remain significant concerns with its adoption, it would be prudent for the MSRB to undertake the analysis set forth in the MSRB's Economic Policy prior to seeking adoption of the rule. 16 Such determinations would be consistent with the "Key Elements of Economic Analysis" set forth in the MSRB's Economic Policy. Elizabeth M. Murphy, Secretary November 8, 2013 Page 6 committed to working with it and the Commission on these issues to ensure that the MSRB has the data it needs to fulfill its regulatory responsibilities and protect investors, the public, and the 529 plan marketplace. We appreciate the opportunity to provide these comments and the Commission's consideration of them. If you have any questions, please contact the undersigned at (202)326-5825. Sincerely, /s/ Tamara K. Salmon Senior Associate Counsel Attachment