SUTHERLAND

SUTHERLAND ASBILL & BRENNAN LLP
Grace Building
1114 Avenue of the Americas
40th Floor
New York, NY 10036-7703
212.389.5000 Fax 212.389.5099
www.sutherland.com

MICHAEL B. KOFFLER
DIRECT LINE: 212.389.5014
E-mail: michael.koffler@sutherland.com

February 19, 2013

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

Re: *Notice 2012-63 – Request for Comment on MSRB Rules and Interpretive Guidance*

Dear Mr. Smith:

We are submitting this comment letter in response to MSRB Notice 2012-63, *Request for Comment on MSRB Rules and Interpretive Guidance* (the "***Notice***"), because of our firm's representation of a number of distributors of state-sponsored 529 college savings plans ("***529 Plans***"). Our clients appreciate the Municipal Securities Rulemaking Board's (the "***MSRB***") efforts over the years to improve the regulatory scheme governing broker-dealers distributing interests in 529 Plans. These efforts have enabled the MSRB to effectively and efficiently regulate the brokerage industry's distribution of interests in 529 Plans. However, as discussed below, our clients believe there are additional steps the MSRB can take to further improve its regulatory regime governing broker-dealers distributing interests in 529 Plans.

I. ENSURE PROPOSED RULES SATISFY RELEVANT STANDARDS

A. The Challenge

The MSRB must ensure that each rulemaking initiative is consistent with the statutory mandates in the Securities Exchange Act of 1934, as amended ("***Exchange Act***") and addresses clearly defined regulatory issues. Section 15B(b)(2)(C) of the Exchange Act provides, among other things, that the MSRB's rules must "not be designed to . . . impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." This statutory

provision therefore prevents the MSRB from promulgating rules that impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The MSRB's proposal relating to Rule G-45 and proposed Form G-45 is not necessary or appropriate in furtherance of the purposes of the Exchange Act and thus not in accord with section 15B(b)(2)(C). In particular, this proposal does not, in our clients' view, address clearly defined regulatory issues or provide a solution to such issues. The rationale provided by the MSRB[1] for the proposed rulemaking does not explain why the information would be useful to the MSRB, given its limited jurisdiction, or what it would do with such information. The MSRB's vague assertions (*e.g.*, "Such information may better inform the MSRB with regard to disclosure guidance or other rulemaking") do not detail how the information would enable the MSRB fulfill its statutory mandate. Based on the lack of detailed rationale for the proposed rulemaking initiative, our clients believe the MSRB has failed to satisfy the requirements of Section 15B(b)(2)(C) of the Exchange Act.

Over the past 13 years, the MSRB has designed and implemented a comprehensive and extremely effective regulatory regime governing the offer, distribution and sale of 529 Plan securities by broker-dealers. And it did this without any of the data it is seeking via its rulemaking initiative relating to Rule G-45 and Form G-45. Having already implemented a comprehensive system governing the offer and sale by broker-dealers of interests in 529 Plans that has proven to be highly effective, it is difficult to understand why the MSRB's proposed Rule G-45 and Form G-45 are needed or what would be done with the information given the MSRB's limited regulatory authority under the Exchange Act.[2] In this respect, the MSRB does not identify any sales-related problems that the requested information would help address.

Our clients note that the data sought by the MSRB has limited value as a regulatory tool as it would not be able, by itself, to indicate anything of value. Without a substantive context in which to analyze the data, it would be reckless to reach conclusions merely by reviewing the data itself. Our clients therefore question the value of the data when it is completely divorced from the terms and characteristics of 529 Plans and merely reflects movement of funds. Given the MSRB's limited authority to adopt rules and the fact that it has already instituted a comprehensive system regulating

---

[1] "[T]he following information will assist the MSRB in better understanding the 529 plan market, including popular investment strategies and portfolios, thereby enabling the MSRB to focus its rulemaking on the strategies and portfolios with the highest risk and impact on the market. Over time, this information would also assist the Financial Industry Regulatory Authority ("FINRA"), which conducts examinations of 529 plan dealers, and other regulators in their examination and enforcement activities." *See* MSRB Notice 2012-40 (Aug. 6, 2012).

[2] The prices of 529 Plans are based, in the case of investment options that invest in mutual funds, on the net asset value of the mutual funds in which they invest. Accordingly, the value of the 529 Plan investment options primarily are determined by the performance of the underlying mutual funds, which are beyond the regulatory authority of the MSRB. In this respect, both the Securities and Exchange Commission and the MSRB previously have observed that the securities in which 529 Plans invest, such as mutual funds, are not part of the municipal fund securities. Accordingly, our clients question the authority of the MSRB to mandate the filing of information regarding mutual funds and other securities and financial instruments that are not municipal securities.

the offer, sale and distribution of interests in 529 Plans by broker-dealers, our clients believe that the MSRB's recent proposals relating to 529 Plans lack a compelling justification.

B. Solution

While the MSRB currently provides explanations in its rule filings as to why it believes its rulemaking initiatives satisfy the statutory standards in the Exchange Act, such explanations often merely contain boilerplate language and rest on vague and unsupported assumptions. There should be a *direct* correlation between every proposed rule and the standards contained in Section 15B(b)(2)(C) of the Exchange Act, and not merely a chance of such standards being satisfied. In addition, the MSRB should explain, in detail, in each rulemaking proposal, specifically how the standard in Section 15B(b)(2)(C) is satisfied. Finally, the MSRB should only propose rules if there is a reasonable, supported and verifiable basis to conclude that the standards in Section 15B(b)(2)(C) of the Exchange Act will be achieved by the proposed rulemaking.

In order to increase transparency and efficacy in its rulemaking efforts, our clients believe the MSRB should conduct thorough cost-benefit analyses with respect to each rulemaking initiative. At a time when the MSRB is implementing rules and interpretive guidance that substantially increase the level of disclosure and transparency in the municipal securities industry, our clients believe it is appropriate for the MSRB to be subject to comparable standards itself. Accordingly, our clients believe that the MSRB should spell out the assumptions and hypotheses underlying its rule proposals and avoid rules where the costs outweigh the benefits. By tabulating the costs and the benefits of its proposed rules, the MSRB necessarily will consider the implications and consequences of its proposals, which will increase the quality and efficacy of its rules. In this respect, the MSRB has offered no data supportive of the notion that the benefits to the MSRB or to the public outweigh the systems collection and dissemination costs that will be incurred by primary distributors of interests in 529 Plans under its proposed Rule G-45 and Form G-45. While a thorough cost-benefit analysis is not legally required, our clients question the wisdom of imposing regulatory burdens if this standard cannot be met or if the relevant assumptions and hypotheses underlying the MSRB's proposed rules are not set forth in a transparent manner.

II. NEED FOR CLARIFICATION REGARDING SCOPE OF RULES

When the MSRB seeks to adopt a rule targeted for the municipal bond industry the intended scope of the rule typically is relatively clear. However, that is not always the case. For instance, one recent notice (Notice 12-41) caused significant confusion in the 529 Plan industry, as broker-dealers whose only municipal securities activity involved the sale of interests in 529 Plans were unsure as to whether they were covered by the concept proposal set forth in the notice. Given the significant differences in the structure, terms, and characteristics of municipal bonds and interests in 529 Plans and the ways these different securities are distributed to the public, the MSRB should clearly specify which regulatory provisions and interpretive positions apply to the sale and distribution of: traditional municipal bonds only; interests in 529 Plans (and other municipal fund

securities) only; or to both traditional municipal bonds and interests in 529 Plans (and other municipal fund securities). When a given rule or interpretive position applies to both traditional municipal bonds and interests in 529 Plans (and other municipal fund securities) the MSRB should provide separate guidance as to how the provisions at issue apply with respect to the sale and distribution of each due to the significant differences between the two types of securities.

In fact, our clients believe it would be very helpful for the MSRB to review all of its current rules and interpretations and determine which rules and interpretations apply at all in the context of the sale and distribution of interests in 529 Plans, which apply differently in the context of the sale and distribution of traditional municipal bonds as compared to interests in 529 Plans (and other municipal fund securities), and to then provide appropriate guidance that is tailored to these different securities. Taking these steps will reduce confusion in the 529 Plan industry as to the intended scope and impact of the MSRB's rules on broker-dealers selling interests in 529 Plans. In this respect, certain rules or interpretations may be appropriate or necessary in the context of selling and distributing traditional municipal bonds but not in the context of interests in 529 Plans (and other municipal fund securities), and vice versa. Similarly, certain regulatory concepts and principles may apply very differently with respect to these securities given the significant differences in their structure, terms, and characteristics and the manner in which they are distributed and sold. For instance, many requirements imposed on underwriters under the MSRB's rules only apply in the context of traditional municipal bond distributions that are sold on a firm-commitment, dealer basis.

Finally, the MSRB also should clarify that its proposals to require underwriters to submit 529 Plan information to the MSRB are inapplicable to "direct-sold" 529 Plans that do not involve distribution through a broker-dealer or other financial intermediary.

III. ACCESS EQUALS DELIVERY

It has been almost seven years since the MSRB discussed adopting an "access equals delivery" model for delivering official statements. Several years ago, the MSRB amended Rule G-32 to permit broker-dealers to utilize an "access equals delivery" model in connection with offerings of municipal securities (other than municipal fund securities). Absent a compelling reason to the contrary, our clients encourage the MSRB to conform its delivery model for 529 Plans to that used for all other municipal securities. Given the growth and development of the Internet in the intervening years, aligning the delivery requirements for 529 Plans with the delivery requirements of other municipal securities will reduce administrative burdens and costs while preserving, and in some respects enhancing, investor protection. The MSRB can and should implement safeguards designed to ensure that investors receive substantially the same level of protection whether they receive information and documents electronically or via paper. For instance, because certain investors do not use the Internet to receive information and documents, broker-dealers should be required to deliver official statements via paper if investors decide they want to receive documents in that manner.

An access equals delivery model will result in benefits for both broker-dealers and investors, improve investor access to information and allow investors to focus on those parts of documents that are most relevant and important to them. In this respect, electronic versions of official statements are searchable, available 24/7 from any place in the world, current and printable only when needed. In addition, electronic delivery can reduce printing and mailing costs, which might otherwise ultimately be passed on to investors. In recent years, Internet access and use (including the use of emails) has proliferated with the advent of mobile technology, which provides investors with access to the Internet and their account(s) when and where they choose.

Adoption of a default e-delivery standard is consistent with the requirements of Executive Order 13563 ("Order") which, while not applicable to the MSRB, should guide its regulatory practices, just as it does federal agencies.[3] The Order mandates in pertinent part that federal agencies:

- "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. [Our regulatory system] must take into account benefits and costs…It must ensure that regulations are accessible…"
- "tailor its regulations to impose the least burden on society…"
- "select in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental [benefits]…"[4]

A default e-delivery standard meets each of these requirements—it is innovative, less burdensome, cost-effective, easily accessible and almost has no effect on the environment. The Order itself further highlights the ubiquity of the Internet, specifically referencing the Internet as a powerful medium for federal agencies to use when discussing proposed regulations with the public. Our clients believe the Order's acceptance of the Internet as a mainstream communication tool is equally well founded for delivering financial information.

For the foregoing reasons, our clients believe the MSRB should cease discriminating against broker-dealers selling interests in 529 Plans and amend Rule G-32 to make the disclosure delivery obligations under the rule consistent for all broker-dealers. The time to implement an access equals delivery mechanism for the "broker-sold" (a.k.a. "advisor-sold") 529 Plan marketplace is long overdue. A broker-dealer's official statement delivery requirements should be able to be satisfied via postings on the 529 Plan's website and/or EMMA.

[3] Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011).
[4] Order, 76 Fed. Reg. at 3821.

IV. USE OF EMMA TO DISCLOSE 529 PLAN DATA

Since June 1, 2009, primary distributors have been required to submit 529 Plan official statements to the MSRB through EMMA pursuant to MSRB Rule G-32. In July 2011, the MSRB published for comment a proposal to require primary distributors of interests in 529 Plans to file additional detailed information with EMMA.[5] Among other issues, the MSRB's proposal sought comment on whether information provided to the MSRB in connection with this initiative should be for the MSRB's use only and not publicly displayed on EMMA.

In proposing amendments to its proposal in August 2012, the MSRB stated that it appreciated the concerns raised by commenters about the publication of certain information on EMMA and is mindful of concerns about whether the general public would understand it and whether some of the information might be considered proprietary.[6] The MSRB therefore only proposed to collect and use the data for regulatory purposes and not display it on EMMA. The amended proposal also stated that the MSRB had no plans at the time to display any of the information described in the proposed Rule G-45 on EMMA. When the MSRB published a revised version of Rule G-45 for public comment in November 2012, it again affirmed that "[t]he information sought by the proposal is not intended for public distribution at this time, and any future proposal to release the information would be conducted in a separate rulemaking proceeding."[7]

Our clients reiterate their views that such information, if collected at all (*see* Section I of this letter), should not be shared with the public on EMMA and that the MSRB should maintain the confidentiality of information it obtains through proposed Rule G-45. In this respect we note the following interview in which the Executive Director of the MSRB is quoted as having said the following:

> It is true that it is difficult to compare different college savings plans. About a year and a half ago, we proposed to start collecting data and create a database. The MSRB will vote later this month on whether to create such a database. Collecting such a large amount of information is complicated, requiring an information-technology component, and we need to give the industry some time to get their systems aligned with our systems in order to be able to provide the information. Once we start receiving it, the first step is to understand the data, make sure it is correct, and then we want to make the important elements of that data available to the market . . .
>
> One of the goals of this database would be to allow retail investors to compare. We need to make sure the data we receive from the plan operators provide us with information based on common definitions, so investors can make valid comparisons. The database, once it's

[5] *See* MSRB Notice 2011-33 (July 19, 2011).
[6] *See* MSRB Notice 2012-40 (Aug. 6, 2012).
[7] MSRB Notice 2012-59 (Nov. 23, 2012).

> created, would make information immediately available to the retail public. Information on 529 plans does exist today. Our EMMA website has basic information . . . .[8]

These comments clearly contradict the MSRB's previous assurances that any information collected pursuant to proposed Rule G-45 would not be shared with the public.

We note that in the case of 529 Plans none of the data points proposed to be filed with and disseminated by the MSRB can impact the value of an underlying mutual fund, bank certificate of deposit, guaranteed investment contract or any other instrument in which the 529 Plan invests. The appearance of such data on the MSRB website would suggest to investors that this information is material to their investment decisions. In fact, our clients believe that none of the data requested under the MSRB's proposal should materially influence an investor's investment decision.

The presentation of this information to investors and potential investors may end up misleading investors. For example, significant contributions into a 529 Plan or an investment option might lead investors to believe a given 529 Plan is a good investment. In contrast, distributions from a 529 Plan or an investment option might lead investors to believe the 529 Plan or investment option is not a good choice simply because it has significant distributions. However, there may be a number of reasons for contributions and distributions. For instance, contributions could be the result of significant marketing campaigns that many 529 Plans operate in the last quarter of the year or around April 15th of each year. Similarly, distributions could be the result of the need to pay for college tuition. Without a substantive context in which to analyze this data, this information may well mislead investors. And even if it does not, our clients do not believe that this information is the type of information that ought to be considered by a reasonable investor as it is completely divorced from the terms and characteristics of 529 Plans and merely reflects movement of funds.

In addition, with respect to broker-sold 529 Plans, in the vast majority of cases, customers rely on their registered representatives for information about the 529 Plans and investment options. Customers who pay a commission to receive advice and recommendations on 529 Plans, and who rely on such advice and recommendations, generally will not also conduct their own extensive research on 529 Plans on EMMA (or even know of EMMA). The notion that customers buying broker-sold 529 Plans are going to benefit from data available on EMMA is inconsistent with the purchasing habits of most consumers; if a given consumer was inclined to do his or her own extensive due diligence on EMMA, then they would likely purchase direct-sold 529 Plans and not utilize a broker-dealer in the first place. According to our clients, it would be uncommon for a customer who relies on the advice and recommendations of a registered representative and who pays for such advice and recommendations to conduct their own due diligence on 529 Plans by comparing information on 529 Plans on a website such as EMMA.

---

[8] *See* Ronald D. Orol, *Regulator eyes better 529 plan info, muni quotes,* MARKET WATCH, THE WALL STREET JOURNAL, Jan. 9, 2013.

If the MSRB were to reverse its previously stated position with respect to information collected pursuant to proposed Rule G-45 and disseminate such information to the public, our clients believe that the information obtained would be of limited value and could lead to investor confusion. Unlike the municipal bond market, many 529 Plans are not offered and sold through broker-dealers. This difference is very important in the context of the data sought to be collected and disseminated by the MSRB. Because the data filed with the MSRB will not include data on direct-sold 529 Plans, the data will be substantially incomplete. In fact, as of the end of the first quarter of 2011, only 51% of 529 Plan assets were held in broker-sold 529 Plan accounts, according to Financial Research Corp., and this percentage has been decreasing in recent years.[9] Accordingly, the data obtained by the MSRB would, at best, only represent approximately half of the assets in the 529 Plan industry. We question the wisdom of following through on the MSRB's proposal when the data to be obtained from the initiative will be so incomplete. We also question the utility of this information as the MSRB does not identify any sales-related problems that the requested information would help address. Furthermore, the requested information could lead to investor confusion, as any information voluntarily provided by issuers of direct-sold 529 Plans may lead investors to believe that the distribution of such plans are subject to MSRB jurisdiction and that the MSRB's rules apply when that is not, in fact, the case. We also note that much of the data already available in the public domain covers direct-sold 529 Plans, which means this data is, in some ways, more comprehensive than the data that the MSRB seeks. These considerations suggest that the proposal would only offer marginal benefits to the MSRB and investors.[10]

While the MSRB believes that the requested information "would be useful to the MSRB and to investors," our clients disagree. As noted above, they believe that the presentation of raw data, at best, will be of little or no use to investors, and at worst, will harm investors by putting undue emphasis on data that does not afford an understanding or appreciation of the context underlying the data.

V. MUNICIPAL ADVISORS

As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act's revisions to the Investment Advisers Act of 1940, as amended (the "***Advisers Act***"), the MSRB is charged with regulating "municipal advisors." When the SEC adopts a permanent definition, our clients believe the MSRB should assess the differences between the final definition adopted by the SEC and the definition the SEC originally proposed and consider the implications of such differences in

---

[9] Jackie Noblett, *American Funds Cracks 529 Recordkeeping Puzzle*, IGNITES, July 8, 2011, http://ignites.com/c/218882/27272referrer_module=searchResults&module_order=1&q=recordkeeping+puzzle&sort_by=date.

[10] Finally, it is worth noting that the financial statements filed on EMMA often include certain of the data points proposed to be collected and disseminated. As a result, the proposal would, to a degree, be duplicative of existing practices. This too suggests that the burdens to be incurred by the industry will outweigh any public benefits that may be achieved by the proposal.

reproposing rules that the MSRB originally proposed and withdrew pending a final definition of municipal advisor from the SEC. It is very important that the MSRB not simply repropose the same rules it withdrew. To ensure an effective regulatory framework, it is essential that the MSRB first consider the implications of the changes made by the SEC to the final definition of municipal advisor. Finally, our clients strongly encourage the MSRB, to the extent practicable, to conform any of its rules governing municipal advisors to the rules of the SEC under the Advisers Act, as consistency with SEC rules governing similar conduct would ease compliance burdens on the industry.

VI. CONCLUSION

There are certain steps the MSRB can take to further improve the regulatory regime governing broker-dealers distributing interests in 529 Plans. In order to increase transparency and efficacy in its rulemaking efforts, the MSRB should conduct thorough cost-benefit analyses with respect to each rulemaking initiative, and prior to proposing rules, determine whether they are consistent with the Exchange Act's mandate that MSRB rules not impose any burden on competition that is not necessary and appropriate in furtherance of the Exchange Act. The MSRB should also clarify the scope of its rules and interpretive guidance by delineating which of them apply to broker-dealers distributing interests in 529 Plans. Furthermore, the MSRB should implement an access equals delivery mechanism for the 529 Plan marketplace.

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

Very truly yours,

Michael Koffler / IJH

Michael Koffler