MSRB
Municipal Securities
Rulemaking Board

January 14, 2014

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20540-1090

Re: Response to Comments on File No. SR-MSRB-2013-04

Dear Ms. Murphy:

On June 10, 2013, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change consisting of new Rule G-45 and Form G-45 that would require underwriters of 529 college savings plans ("529 plans" or "plans") to report certain information to the MSRB regarding the plans. The proposed rule change also includes amendments to the MSRB's books and records rules, G-8 and G-9, which would require underwriters to preserve records of the information submitted to the MSRB on Form G-45. The Commission published the proposed rule change for comment in the Federal Register on June 28, 2013,[1] and it received five comment letters.[2]

On August 9, 2013, the MSRB granted an extension of the time period for Commission action under Section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act") until September 26, 2013, and on that date, the Commission published an order instituting proceedings under Section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the proposed rule change ("Order"). The Commission then received four supplemental comment letters from prior commenters.[3] This letter responds to the comments raised in the five original and four supplemental comment letters.

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1 *See* SEC Release No. 34-69835 (June 24, 2013), 78 FR 39048 (June 28, 2013).

2 Comment letters were submitted by Investment Company Institute ("ICI"), Securities Industry and Financial Markets Association ("SIFMA"), College Savings Plans Network ("CSPN"), College Savings Foundation ("CSF"), and Sutherland Asbill & Brennan LLP ("Sutherland").

3 Supplemental comment letters were submitted by ICI, CSPN, CSF, and Sutherland.

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On January14, 2014, the MSRB filed with the SEC Amendment No. 1 ("Amendment") to File No. SR-MSRB-2013-04. The Amendment amends and restates the original proposed rule change to:

- clarify that the information that would need to be submitted by underwriters of 529 college savings plans ("plans") under the proposed rule change includes asset allocation information for the assets of each investment option;

- omit statements concerning the interpretation of the meaning of "underwriter" under the federal securities laws and the rules promulgated thereunder;

- clarify that each entity must determine, based on the facts and circumstances, whether it is an underwriter under the federal securities laws;

- clarify that an underwriter that submits Form G-45 would be obligated to submit information only for itself and those entities that identify themselves as underwriters of the plan and that aggregate their information with the submitter's information;

- clarify that the MSRB proposes that underwriters identify the percentage of each underlying investment in an investment option but not submit information regarding the assets in each underlying investment;

- clarify that, for each investment option offered by a plan, the underwriter will provide the MSRB with the name and allocation percentage of each underlying investment in each investment option as of the end of the most recent semi-annual period;

- clarify that the MSRB does not contemplate that a state sponsor of a 529 plan, as an instrumentality of the state, would be an underwriter under federal securities laws;

- explain that an underwriter would not be required to submit information it neither possesses nor has the legal right to obtain. The legal right to obtain the information for purposes of the proposed rule change is not affected, however, by a voluntary relinquishment, by contract or otherwise, of such a right;

- explain that, to the extent the information was prepared by the underwriter or, through delegation, one of its contractors or sub-contractors, and the information was inaccurate or incomplete, the underwriter would be responsible for the information and therefore be liable for such information under proposed Rule G-45. If, on the other hand, the underwriter did not prepare, or authorize others to prepare on its behalf, information submitted pursuant to proposed Rule G-45, it would not be required to verify or confirm the accuracy and completeness of the information; and

- clarify in Rule G-45 that performance data shall be reported annually.

A redline copy of the Amendment compared against the Rule 19b-4 filing of File No. SR-MSRB-2013-04 has been attached hereto.

Regulatory Value of the Submitted Information

For the first time, the proposed rule change will allow the MSRB to obtain reliable and consistent electronic data on the 529 plan market. The information will be submitted through an online form so that it may be sorted and analyzed by regulators to foster a better understanding of individual 529 plans and the market as a whole. Importantly, this segment of the municipal market has a significant retail investor component and, consistent with its mandate to protect investors and based on the MSRB's understanding of the 529 plan market, the MSRB believes that certain baseline information should be gathered from a small set of regulated brokers, dealers or municipal securities dealers ("dealers").

Seemingly understanding the importance of this initiative, all but one commenter generally support the MSRB's effort to collect information for regulatory purposes.[4] Sutherland, however, questions how the information will help the MSRB fulfill its statutory role, and urges that without such justification, the proposed rule change should be disapproved. The MSRB believes the basic information about activity in 529 plans is necessary to assist the Board in evaluating whether its regulatory scheme for 529 plans is sufficient, or whether additional rulemaking is necessary to protect investors. Understanding the size of the market, the size of individual plans and the size, cost, performance and composition of the investment options of the 529 plans are basic requirements for regulation. The MSRB intends to collate and compare the data to identify industry trends and anomalies. It is worth noting that the SEC collects similar information for registered open-end management investment companies (mutual funds).

The proposed rule change also will help the MSRB and other regulators that examine dealers prioritize their efforts with respect to 529 plans. For example, the information will enable the MSRB or other regulators to compare the asset allocation, fees and costs, and performance of similar investment options across plans and to identify trends or changes in investment options. The information then may be used to determine the nature or timing of risk-based dealer examinations. Moreover, because neither the SEC nor the MSRB have jurisdiction over the state sponsors of 529 plans, MSRB regulated parties are the only viable source for accurate, reliable information. Throughout the course of this rulemaking, in response to comments, and mindful of the burdens on dealers, the MSRB has scaled back the scope of information to be collected. The MSRB believes the proposed rule change strikes the right balance between the burden on dealers in submitting information semi-annually (or annually in the case of performance information) and the regulatory benefit from acquiring such information for analysis and market oversight. In short, the information will better enable the MSRB to protect investors and the public interest.

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4 ICI, SIFMA, CSF and CSPN generally support the MSRB's goal of collecting information on 529 plans for regulatory purposes, though these commenters take issue with various aspects of the proposed rule change as discussed below.

Regulatory Basis for the Proposed Rule Change

Section 15B(b)(2) of the Exchange Act authorizes the MSRB to adopt rules to effect the purpose of the Exchange Act concerning transactions in municipal securities effected by dealers. Interests in 529 plans are considered to be municipal securities,[5] and the MSRB categorizes the interests as municipal fund securities.[6] MSRB rules govern the activities of dealers that effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal fund security. If dealers that act as underwriters of 529 plans effect transactions in, or induce or attempt to induce the purchase or sale of, municipal fund securities, those dealers are subject to the MSRB's rulemaking authority. Accordingly, proposed Rule G-45 would require such dealers to submit basic 529 plan information to the MSRB semi-annually. The jurisdictional foundation of this requirement is the Exchange Act, and the MSRB intends for the terms in the proposed rule to be interpreted as they would be interpreted generally under the Exchange Act.

Program Managers and Others may be Dealers

Depending upon its activities, an entity involved in the administration of a 529 plan might be a "broker" under Section 3(a)(4)(A) of the Exchange Act, which defines "broker" as any person engaged in the business of effecting transactions in securities for the account of others. The MSRB understands the 529 plan administration process to be as follows: whether a plan is a direct-sold or advisor-sold plan, it is typically administered by a third-party program manager on behalf of a trustee (a college savings board or state treasurer) of a trust established by state law. Aside from a small number of state plans, state employees generally are not involved in the distribution of the municipal fund securities or in effectuating municipal securities transactions. Typically, these activities are effectuated on behalf of the trustee by third party program managers that bid for the business pursuant to a request for proposal. They, in turn, employ affiliates and contractors to distribute the municipal fund securities. For example,

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5 SEC Release No. 34-70462 at 20, (September 20, 2013), 78 FR 67468 (November 12, 2013)("Interests offered by college savings plans ("529 Savings Plans") that comply with Section 529 of the Internal Revenue Code [footnote omitted] are another type of municipal security"); *See generally* letter dated February 26, 1999 from Catherine McGuire, Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, to Diane G. Klinke, General Counsel, Municipal Securities Rulemaking Board, in response to letter dated June 2, 1998 from Diane G. Klinke to Catherine McGuire, Municipal Securities Rulemaking Board, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 330.

6 The term "municipal fund security" is defined in MSRB Rule D-12 to mean a municipal security issued by an issuer 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.

one or more of these entities typically provide administrative, marketing and promotion, and investment management services.[7]

Program managers or their designees typically market interests in 529 plans to investors, solicit transactions in 529 plans, and handle customer funds and securities. They typically market 529 plans to investors on behalf of the trustee, thereby soliciting investors actively rather than passively. One or more of these entities may have direct contact with investors through development and distribution of plan advertising, sales literature, or maintaining plan websites. Investors who learn of a plan as a result of this marketing typically complete electronic or hard copy enrollment forms (essentially, municipal securities account application forms) that are submitted to the program manager or its designee, not to a state employee. Generally, the program manager or its designee then processes the enrollment form, collects investor funds, and executes the municipal fund securities transaction by applying the funds (along with other investor funds) to the purchase of a plan investment option that invests in mutual funds or exchange traded funds. Additionally, the program manager or its designee typically establishes and staffs a call center to assist investors with the enrollment and municipal fund security purchase process. Consequently, the program manager or its designee typically markets the plans and then effects municipal fund securities transactions on behalf of investors. Trustees, on the other hand, generally hold periodic meetings with the program manager to oversee the program. At these meetings, program managers may report on sales, distributions, assets, performance and other aspects of the plan. These reports may include the same type of information sought by the MSRB in the proposed rule change.

In a no-action request on behalf of New York's direct-sold plan,[8] Sutherland[9] (also one of the commenters here) described the program manager's activities as follows:

> Pursuant to a management contract (the "Management Contract"), [the program manager] and its designated affiliates and any other entities with which it contracts to provide services with respect to the Program . . . will provide investment advisory, administration, marketing and other services related to the day-to-day operation of the Trust. Under the Management Contract . . . , [the program manager's] responsibilities will include investment management,

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7 *See, e.g.,* Maryland College Investment Plan 2012-2013 Disclosure Statement and New Account Enrollment Form, at 24, http://emma.msrb.org/EP717545-EP557187-EP958330.pdf.

8 Teachers Personal Investors Services, Inc., TIAA-CREF Individual and Institutional Services, Inc., SEC No-Action Letter, 1998 SEC No-Act. LEXIS 872 at *5. The parent company of Sutherland's clients was the program manager of New York's direct-sold 529 plan.

9 *Id.* at *6.

> marketing, providing individual Account maintenance and other accounting functions, collecting payments, processing withdrawals, providing customer service and sales, and additional administrative services related to the Trust.[10]

The MSRB, based on its expertise and experience, believes that Sutherland's description typifies the activities of program managers, which, importantly, extend beyond investment management to other administrative activities.

Program Managers and Others may also be Underwriters

The predominant objection to the proposed rule change is that the universe of firms that are brokers or dealers, as well as underwriters, is very limited and that these few firms possess little information regarding the plans. The potential pool of brokers or dealers is not necessarily limited to existing registrants but would encompass all firms that should be registered as such. Further, such firms also may be acting as underwriters under the federal securities laws. Some commenters attempt to limit the term underwriter to a narrow subset of dealers known in the industry as primary distributors. They would further point out that primary distributors have limited information about the plans and therefore the proposed rule would have little utility. The MSRB does not agree that 529 plan underwriters are limited to primary distributors. Rather, the determination of whether a firm is an underwriter turns on the facts and circumstances, including the activities the firm performs to assist in the distribution of municipal securities, rather than the firm's status or common industry labels.

A program manager or its affiliate or contractor could, depending on the facts and circumstances, be an underwriter under proposed Rule G-45, which incorporates and should be interpreted in the same manner as the definition of underwriter in SEC Rule 15c2-12(f)(8).[11] This rule provides, in part, that any person who "offers or sells for an issuer of municipal securities in connection with the offering of any municipal security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking" is an underwriter.[12] In short, if an entity is a dealer and underwriter as defined by the Exchange Act, it would be required to submit the information on Form G-45.

ICI and other concurring commenters[13] urge the MSRB to clarify that the term "underwriter," as used in proposed Rule G-45 and Form G-45, does not include a plan's program

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10 *Id.* at *24.

11 17 CFR 240.15c2-12(f)(8).

12 *Id.*

13 SIFMA, CSPN, and CSF concur with ICI's entire comment letter dated July 16, 2013, so comments attributed to ICI should also be attributed to those three entities.

manager, investment manager, record keeper or custodian, if the entity is providing services to the plan, on behalf of the plan or its state sponsor, and not as a dealer. ICI asserts that these entities are neither brokers nor dealers. Alternatively, it contends that, even if an entity were a broker or dealer and technically fell within the definition of underwriter, it should not be considered an underwriter for purposes of proposed Rule G-45, if it is not acting in the capacity of underwriter regarding the plan at issue. Finally, ICI suggests that 529 plans typically have a single underwriter that mainly enters into selling agreements with financial professionals that offer and sell the plans to retail investors. ICI seems to suggest that the coverage of the term underwriter be limited to those entities that are primary distributors.

The MSRB believes that, while primary distributors may be underwriters, other entities such as program managers or their affiliates or contractors may also be 529 plan underwriters, and it would be inappropriate for the MSRB – without the authority to interpret SEC rules – to make blanket exceptions. To the extent one or more of these entities is acting as a broker and 529 plan underwriter, the MSRB has authority to require the submission of information as provided in proposed Rule G-45 and Form G-45.

MSRB Rules Apply to Underwriters of Direct-Sold Plans

MSRB rules apply to dealers in their municipal fund securities activities, including their underwriting activities, regardless of the business model or marketing strategy involved. Sutherland comments that the MSRB's definition of "direct-sold" 529 plans "clearly denotes 529 Plans that are sold without the involvement of broker-dealers," suggesting that there is no broker or dealer or underwriter (as defined in the Exchange Act) involved at any stage in the distribution.[14] The MSRB disagrees with the commenter's characterization of direct-sold plans. As explained above, each entity must evaluate the facts and circumstances surrounding its own activities and determine if it meets the Exchange Act definitions of broker or dealer and underwriter. MSRB Rule G-3 is clear that municipal securities activities may include underwriting, trading, sales, research or other activities. The fact that a firm is providing municipal securities underwriting services but not advice to customers, as with an "advisor-sold" plan, in no way limits the MSRB's rulemaking authority.

In a 1998 no-action relief letter on behalf of Teachers Personal Investors Services, Inc. ("TPIS"), and TIAA-CREF Individual and Institutional Services, Inc. ("Services"), in connection with the New York State College Choice Tuition Savings Program, Sutherland explained to Commission staff that its broker-dealer clients "seek to comply with Rule 15c2-12(b)(5) under the 1934 Act, which requires underwriters to reasonably determine that there exists a written agreement from the issuer or obligated person to provide annual financial information and notice of certain events to the appropriate depositories, by their parent company, as Program Manager,

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[14] Sutherland letter dated July 19, 2013 at 11.

executing a continuing disclosure certificate for the benefit of owners of Agreements and Trust Interests . . . under Rule 15c2-12(b)(5)."[15]

Sutherland continued by stating that "[t]he manner in which the Program will be implemented is atypical of the circumstances under which municipal securities are offered and sold, and thus compliance with the literal terms of Rule 15c2-12(b)(5) is impracticable. As discussed above, virtually all day-to-day management and administrative responsibilities for the Trust have been delegated to TIAA as Program Manager. As a result, TIAA and TIAA alone is in the best position to undertake to provide the information required by the rule."[16] Sutherland went further and offered that its clients, broker-dealer subsidiaries of the program manager, would satisfy their underwriting duties under Rule 15c2-12 by reasonably determining that their parent, as program manager, would step into the shoes of the issuer and provide continuing disclosure information as provided by the rule. At least in this instance, Sutherland's description demonstrates the true level of control of the program manager and its affiliates and contractors over the plan.

Based on its expertise and experience regulating in this area, the MSRB believes that the structure of other 529 plans is similar to the structure of the New York plan described above, in that a program manager contracts with the trustee of the plan to provide administrative, marketing, and other services on behalf of the plan. The entities hired by the trustee, either directly or indirectly through the program manager, are essential to the undertaking, which includes soliciting municipal fund securities transactions, and handling customer funds and municipal fund securities.

Selling Dealers Would Not be Required to Report Information and State Sponsors Are Not Considered Underwriters

The MSRB does not seek to impose reporting requirements on state sponsors or selling dealers. SIFMA opposes any 529 plan data-reporting requirements that would be imposed on dealers that are not underwriters but that instead have entered into contracts with a plan's underwriter to sell plan shares to retail investors. The proposed rule change is clear that no such obligation would be imposed on so-called advisor-sold plan selling dealers that are not underwriters.

CSPN and CSF question whether a state sponsor may be treated as an underwriter for purposes of proposed Rule G-45, given the statement in the proposed rule change that one or more entities (which included the program manager, record keeper, investment manager, custodian and state sponsor) could be an underwriter. The MSRB does not contemplate that a state sponsor of a 529 plan, as an instrumentality of a state, would be an underwriter under Rule 15c2-12, given the plain language of the rule.

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15 New York State College Choice Tuition Savings Program, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 872 at *6.

16 *Id.* at *35

Underwriter Reporting Obligation

The proposed rule change would require an underwriter of a 529 plan to submit only information it possesses or has a legal right to obtain. Various commenters (ICI, Sutherland, SIFMA, CSPN, and CSF) urge the MSRB to clarify that when an underwriter, in its normal course of business, does not create, own, control or possess the required information, including information on accounts underlying an omnibus accounting arrangement, it would not be required to obtain the information to submit it to the MSRB. Sutherland also questions the public policy rationale for the proposed rule change and requests a confirmation that, if an underwriter is prohibited by contract from sharing the information required by the proposed rule change, it would have no reporting obligation under proposed Rule G-45.

An underwriter would not be required to submit information it neither possesses nor has the legal right to obtain, and the proposed rule change imposes no such duty on an underwriter. The legal right to obtain the information for purposes of the proposed rule change is not affected, however, by a voluntary relinquishment, by contract or otherwise, of such a right. Thus, a 529 plan underwriter might designate an affiliate or contractor to perform activities in its stead in connection with the underwriting. But that underwriter is nevertheless properly viewed as having a legal right to obtain all information that is related to such activities and required to be submitted by proposed Rule G-45 and Form G-45.

ICI and Sutherland request that the MSRB revise proposed Rule G-45 to provide that an underwriter is not required to verify, confirm, or vouch for the accuracy and completeness of information before including it on Form G-45. The MSRB understands that an underwriter that receives information from a third party may have concerns about the accuracy and completeness of the information. Nevertheless, to the extent the information was prepared by the underwriter or, through delegation, one of its contractors or sub-contractors, and the information was inaccurate or incomplete, the underwriter would be responsible for the information and therefore be liable for such information under proposed Rule G-45. If, on the other hand, the underwriter did not prepare, or authorize others to prepare on its behalf, information submitted pursuant to proposed Rule G-45, it would not be required to verify or confirm the accuracy and completeness of the information.

The MSRB Will Not Publish Any of the Collected Information Without Separate Approval of the Commission

The primary purpose for the collection of the information is to evaluate the information for oversight of the municipal securities market for the protection of investors. The MSRB believes that some information collected, such as fees and performance, may be relevant to investors and appropriate for further dissemination. The MSRB has stated that it would disseminate such information only after the approval of a proposed rule change by the SEC.

ICI believes that the data the MSRB collects on Form G-45 should be used to inform the MSRB's regulatory initiatives and priorities and not to compete with other more mature, robust,

and comprehensive public sources of information on 529 plans. Further, ICI urges the MSRB not to disseminate publicly information reported on Form G-45 that is proprietary and reported to facilitate the MSRB's regulatory efforts. SIFMA suggests that the Commission's approval order include a regulatory limitation on the MSRB's use of the data and require an additional rule filing should the MSRB move forward with public dissemination of any of the collected information.

At this time, the MSRB does not intend to disseminate through its EMMA® [17] website the information collected under the proposed rule change though it does have a goal of disseminating more information on 529 plans that would benefit investors. The information collected on Form G-45 would not be displayed on EMMA and would be used for regulatory purposes only, until such time as the MSRB might file, and the Commission approves, a rule change amending the EMMA or other facilities to disseminate the information publicly. Hence, any limitation in the approval order would be unnecessary.

Confidentiality of Submitted Information

Two commenters (CSPN and CSF) suggest that proposed Rule G-45 should provide a means to designate and treat submitted information as confidential. Otherwise, the MSRB could receive a Freedom of Information Act ("FOIA") request for information that a submitter deems confidential, and the submitter would have no opportunity to object to its production.

The MSRB is not a federal agency subject to FOIA. The MSRB contemplates that the information would be shared, as needed, with the regulators charged with examining dealers for compliance with MSRB rules, including the Commission, which is subject to FOIA. Other than such dissemination, the MSRB intends to maintain the confidentiality of the information submitted pursuant to proposed Rule G-45, just as it does with other information submitted for regulatory purposes by dealers.

Publication of the Form G-45 Manual

As with other MSRB rules, the MSRB proposes to assist parties in complying with the technical specifications of data submission by publishing a Form G-45 Manual ("Manual"). The content of this Manual is dependent on the system architecture, which in turn is dependent on the scope of the proposed rule change. To require a submission manual to be proposed alongside a rule would unreasonably retard systems development. Moreover, once prepared, the Manual will be technical in nature and not subject to filing.

Under SEC Rule 19b-4(c), a self-regulatory organization need not file regulatory material that is reasonably and fairly implied by an existing rule.[18] Because the Manual will only contain

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17 EMMA (an acronym for Electronic Municipal Market Access System) is a registered trademark of the MSRB.

18 17 CFR 240.19b-4(c).

specifications for submitting the information called for by (Commission approved) Form G-45, the Manual will simply provide technical requirements to facilitate the submission of information required by proposed Rule G-45 and Form G-45. For example, the Manual most likely will include both instructions on how to upload bulk data to the MSRB's system and instructions on data entry through the MSRB's interface, including field-validation rules for the data elements of Form G-45. The MSRB believes that industry participants benefit from technical specification Manuals, but the feasibility and utility of such manuals may be unduly compromised if they become part of the formal rulemaking process.

This approach is supported by the precedent of the analogous EMMA Dataport Manual for Primary Market Submissions ("EMMA Manual"), which is published by the MSRB. MSRB Rule G-32 and Form G-32 require underwriters of primary offerings for municipal securities other than municipal fund securities to submit certain primary offering information. When the Commission approved Rule G-32 and related Form G-32, the MSRB did not include in the proposed rule change – and the Commission did not require the MSRB to include – the EMMA Dataport Manual for Primary Market Submissions.[19] Similarly here, the data elements required to be submitted by 529 plan underwriters are specified in the proposed rule change and need not be the subject of an additional, separate filing. The Manual, which will be posted to the MSRB's website, will, like the EMMA Manual, contain the specifications as to how the required data elements must be reported.

ICI and SIFMA urge that the one-year implementation period should commence only after the Manual has been approved as a rule change. For the reasons stated above, the MSRB does not believe the Form G-45 Manual need be filed with the SEC. The MSRB proposed an implementation date for the proposed rule change that is not earlier than one year from the date of Commission approval, and the MSRB believes such a period is sufficient for market participants to prepare to comply.

Clarity and Specificity of Form G-45

ICI believes the MSRB should revise Form G-45 to clarify how certain assets are to be reported, and how to report on an investment option that is used for multiple purposes. The MSRB believes that Form G-45 as proposed is clear and specific. If an investment option invests in five mutual funds, the submitter would report that the investment option consists of those five mutual funds and would report, among other data, the allocation percentage of each mutual fund in the investment option. To the extent another investment option invested in the same mutual funds, the underwriter would identify the mutual fund assets held by each investment option. Each investment option would report its underlying investments separately.[20] The MSRB

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19 *See* SEC Release No. 34-59966 (May 21, 2009), 74 FR 25790 (May 29, 2009) and SEC Release No. 34-59636 (March 27, 2009), 74 FR 15190 (April 2, 2009).

20 ICI states in its letter dated July 16, 2013 that it is uncertain "how to report on an investment option that is used for multiple purposes (*e.g.*, a fund may be the vehicle for

understands that plans routinely track investments at both the underlying investment and investment option level and therefore should have little difficulty in reporting this information.[21] As previously mentioned, the MSRB will publish on its website the Form G-45 Manual that will provide dealers with instructions on how to complete and submit the information required by Form G-45 as well as graphical representations of the form. It will not, however, contain any substantive requirements not contained in MSRB rules or fairly and reasonably implied from those rules.

Sutherland questions how underwriters would report asset class and asset class percentages. This information is readily available and already presented in certain plan documents. ICI questions how underwriters would report fee and expense and performance information for an investment option that is a mutual fund with multiple share classes. Form G-45 includes fields for fees and charges related to each share class. ICI also questions how underwriters would report investment performance, excluding and including sales charges. Form G-45 provides fields for reporting performance including and excluding sales charges.[22] ICI also requests that the MSRB clarify that fees that are not specific to any particular investment option (*e.g.*, annual account fees) are not required to be included in the performance calculation. Proposed Rule G-45 defines performance to mean total returns of the investment option

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an age group under an 'Age Based' option and available as a 'Static' investment option)." It wonders whether the assets are to be aggregated for an investment option that is used in multiple portfolios and, if aggregate reporting is required, how the underwriter would report those assets invested in only a stand-alone portfolio when the stand-alone portfolio is also used as part of other portfolios. Form G-45 requires disclosure at the investment option level only. A fund that is both an underlying investment and a stand-alone investment option would not be aggregated. An underwriter would report data for each investment option, including an investment option that is a fund, separately.

21 ICI believes a discrepancy exists between Form G-45's requirement to report performance for the most recent calendar year and its requirement to disclose each investment option's 1-, 3-, 5-, and 10-year performance as well as the option's performance since inception. No discrepancy exists. Performance data must only be updated annually. Submitters must disclose each investment option's 1-, 3-, 5-, and 10-year performance as well as the option's performance since inception, as of the annual update.

22 ICI states in its letter dated July 16, 2013 there is a discrepancy between the definition of "performance" in Rule G-45 (defined as "total returns of the investment option expressed as a percentage net of all generally applicable fees and costs") and Form G-45's requirement that performance be reported both including sales charges and excluding sales charges. Form G-45 is consistent with CSPN's Disclosure Principles Statement No. 5, which suggests that performance data should be disclosed net of all generally applicable fees and costs and that, for advisor sold plans, total returns should be calculated both including and excluding sales charges.

expressed as a percentage, net of all generally applicable fees and costs. Fees that are not specific to any particular investment option would not be applicable.

ICI also requests that the MSRB revise Form G-45 to include two investment performance comment boxes, one under performance (excluding sales charge) and one under performance (including sales charge) to avoid confusion as to whether the comments relate to performance excluding or including a sales charge. The MSRB believes a second comment box is unnecessary because use of a single comment box for all comments will not likely result in the confusion contemplated by ICI. ICI also requests that the asset allocation information reported under investment option information be reported in ranges rather than precise amounts where appropriate. The MSRB believes that precision is needed regarding asset allocations and that this information is readily available to underwriters. Finally, ICI requests that, if the MSRB elects not to use ranges, it should consider requiring an update to previously reported information only when there has been more than a *de minimis* change to the information. The MSRB does not believe this type of requirement is feasible because defining *de minimis* is problematic especially because a small change to the information could be material.

Regarding benchmark performance, ICI recommends that the MSRB clarify that an underwriter is only required to report benchmark information if the 529 plan at issue uses a benchmark. To accommodate those plans that do not use a benchmark, ICI believes Form G-45 should either have a "not applicable" box that the filer can check or the Form G-45 Manual should instruct a filer to leave the section of the form blank. An underwriter of a 529 plan that does not use a benchmark will not be required to report benchmark performance. In such case, the Manual will instruct a filer to leave that section of the form blank.

ICI and SIFMA urge the MSRB to remove the underlying investments section of Form G-45 because they believe it requires the reporting of portfolio data that is subsumed within an investment option. ICI adds that it would place additional burdens on filers and is of questionable regulatory value because it requires disclosure of information beyond plan investment options. Sutherland also questions the legal authority of the MSRB to mandate the filing of information regarding mutual funds and other securities and financial instruments that are not municipal securities.

Form G-45 only requires the name of the investment product (typically a mutual fund) in which investment option assets are invested and the allocation percentage of the investment product in the investment option. For example, if an emerging growth fund represented 10 percent of the assets of an investment option, the underwriter would fill in the name of the fund and indicate that it was 10 percent of the investment option. The MSRB believes this information is easily obtainable by underwriters, as it is often disclosed in 529 plan offering documents. For example, the Texas direct-sold plan's offering document contains information about that plan's underlying investments. [23]

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[23] *See* Plan Description and Savings Trust Agreement, at 9 (July 29, 2011), http://emma.msrb.org/EA535143-EA362215-EA758270.pdf.

It is important that the MSRB have a complete understanding of each investment option. These investment options acquire underlying investments that are typically mutual funds or exchange traded funds. The MSRB seeks to collect information regarding the percentage of each underlying investment in each investment option, in order to better understand each investment option and to compare plan investment options.

As for the comment that submitters should not be required to disclose information regarding program managers, these entities, as described above, contract with state sponsors to, in many cases, deliver a variety of services necessary to distribute and sell municipal fund securities. They often provide, directly or through contractors or subcontractors, administrative services, marketing and advertising services, and investor support. Information about program managers is typically disclosed in offering documents and readily available to the public.

Finally, Sutherland states that its clients see no value in asking for information on the marketing channel since under the proposal only dealers could be required to provide this information and direct-sold plans do not involve dealers offering the securities. Sutherland asserts that a form designed for dealers should not require disclosure of information in situations where no dealer is involved. The MSRB believes one or more entities that provide services to direct-sold plans may be underwriters and nothing in the Exchange Act limits the MSRB's rulemaking authority to so-called advisor-sold plans.

Costs Versus Benefits of Collecting the Required Information

As discussed above, the MSRB believes the regulatory benefits outweigh the costs of the proposed rule change. As some commenters have noted, the MSRB spent a substantial amount of time evaluating industry comments and refining this proposal. Based on such comments, the proposed rule change was modified considerably. The MSRB believes the rule, as now proposed, will not impose an unjustified burden on dealers, and that the information sought by Form G-45 is readily available to dealers.

CSPN and CSF suggest that the Commission consider the addition of a waiver or sunset provision that is designed to ease the cost to underwriters that must comply with proposed Rule G-45. The MSRB believes a waiver or sunset provision is unnecessary. The MSRB issued a concept release and two requests for comment in order to obtain industry and public input regarding the proposal. It made significant changes to the proposal in order to ease the burden on submitters, including a change from quarterly to semi-annual submissions, a change permitting filers to submit Form G-45 within 60 days of the end of the reporting period rather than 30 days, and an elimination of the requirement to submit data on automatic contributions and underlying investments. Neither CSPN nor CSF provides data or other specific support for their view that the costs would be sufficiently high to justify a waiver or sunset provision. Indeed, most of the information requested is typically collected by or otherwise readily available to underwriters and, in many cases, is submitted to plan trustees or information vendors on a more frequent basis than would be required by proposed Rule G-45.

Use of CSPN Disclosure Principles

ICI is concerned that neither Form G-45 nor proposed Rule G-45 reflects the MSRB's adoption of CSPN's Disclosure Principles, and SIFMA requests that the Commission's approval order prescribe that data submitted to the MSRB in a format suggested in CSPN's Disclosure Principles is satisfactory. ICI's concern is misplaced and SIFMA's request is unnecessary because the proposed rule change incorporates the elements of CSPN's Disclosure Principles Statement No. 5 for fee and performance reporting. The data elements that comprise Form G-45 are derived from CSPN's Disclosure Principles Statement No. 5. Moreover, the MSRB will not require disclosure regarding fees and performance beyond what is called for in CSPN's Disclosure Principles.

Comments Received by the Commission After It Published the Order

Subsequent to the Order, four commenters submitted supplemental comment letters. Each of these letters references comments submitted previously by the commenter, and the MSRB refers to the discussion above in response to those comments. The MSRB addresses new comments raised by the supplemental letters below.

Statutory Basis for the Proposed Rule Change

The commenters suggest that the proposed rule change fails to meets the requirements of Section 15B(b)(2)(C) of the Exchange Act.[24] Sutherland suggests that the information to be collected would not benefit the MSRB in fulfilling its statutory mandate and questions how the information will assist the MSRB in understanding the market or the risks to investors, or assist the MSRB in protecting investors. ICI adds that the information could not be used to assist the MSRB in preventing fraud, promoting just and equitable principles of trade, fostering industry cooperation or removing market impediments.

The MSRB believes that the proposed rule change is consistent with the Exchange Act in that the information to be gathered will assist it in understanding the market for 529 plans and the investments made by retail investors in the plans. The MSRB seeks basic, reliable information regarding assets, contributions and withdrawals, investment options available to investors and the performance and fees related to those investment options, as well as the allocation of assets within such investment options. The MSRB and other regulators will then have a better understanding of which investment options are most popular and therefore have the largest impact on the market. The MSRB and other regulators will be able to analyze the asset allocation of similarly-titled investment options to determine whether the investment objectives are described accurately in disclosure documents and marketing material.

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24 *See* Sutherland letter dated November 18, 2013 and ICI letter dated November 8, 2013. The CSPN letter dated November 18, 2013 and CSF letter dated November 18, 2013 endorse ICI's November 8, 2013 letter.

Further, the information regarding the performance of, and fees associated with, the investment options will allow the MSRB and other regulators to compare performance and fees across plans and against plan disclosures and marketing material. This information will assist the MSRB in protecting investors and preventing fraudulent and misleading statements in plan disclosure documents and advertising. The information also will assist the MSRB and other regulators in promoting just and equitable principles of trade by evaluating the marketing practices of dealers in light of the information submitted by underwriters. For example, the MSRB understands that investors in 529 plans primarily select age-based investment options. The information will assist the MSRB in understanding the differences in age-based investment options based on fees, performance, and asset allocation. This information will inform the MSRB rulemaking regarding disclosures and advertising. While some of the information sought by the MSRB is, as noted by Sutherland, available publicly, it is not available in an electronic form that lends itself to analysis. Moreover, a legal requirement to produce the information will make it inherently more reliable. In short, while the MSRB cannot anticipate all of the benefits of gathering the information required in proposed Form G-45, it believes the information will provide a baseline for its rulemaking and will assist it in preventing fraud, promoting just and equitable principles of trade, and protecting investors and the public interest.

Economic Analysis of the Proposed Rule Change

Each of the commenters that submitted supplemental letters suggests that the MSRB conduct an economic analysis of the proposed rule change, citing the MSRB's recently adopted formal policy regarding economic analysis ("Policy").[25] Although the Policy is not applicable, according to its terms, to this rulemaking initiative which began prior to the Policy's adoption, the MSRB has considered the burdens and benefits of the proposed rule change throughout the rulemaking process. Consistent with the Policy, the MSRB has evaluated the need for the proposed rule and has determined that the rule as proposed will meet that need. The MSRB has also identified both baseline conditions and reasonable alternatives to the proposed rule. In addition, the MSRB has considered public comments that address the potential economic consequences of the proposed rule.

The need for the proposed rule change arises from the MSRB's oversight of dealers acting as underwriters of 529 plans. Currently, information available to the MSRB about 529 plans is supplied to EMMA by dealers and issuers. Certain information about 529 plans is also provided to information vendors voluntarily by program managers and others. The type of information available to the MSRB, whether publicly or through EMMA, is neither uniform nor complete. In addition, there is no assurance that information available publicly is reliable or that it will be supplied on a regular basis. Therefore, in order to fulfill its oversight responsibilities, the MRSB needs a consistent set of reliable information about 529 plans. Proposed Rule G-45 articulates the set of information the MSRB currently believes it needs to assist it in fulfilling its

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[25] "Policy on the Use of Economic Analysis in MSRB Rulemaking," *available at* http://www.msrb.org/About-MSRB/Financial-and-Other-Information/Financial-Policies/Economic-Analysis-Policy.aspx.

statutory responsibilities. The proposed rule change would allow the MSRB to obtain, on a regular and confidential basis, a basic set of uniform, reliable and relevant information about 529 plans.

The MSRB believes that, for many underwriters, much of the information that they will be required to supply to the MSRB is information that they already supply to plan trustees, information vendors, or EMMA. The information required under proposed Rule G-45 may differ from information produced to EMMA currently by underwriters with respect to its format, periods covered or in other ways, but the basic form of information will be the same. Hence, the MSRB regards the set of information produced currently by underwriters as a relevant baseline for these market participants against which the requirements of proposed Rule G-45 can be compared.

The MSRB Policy recommends that reasonable potential alternatives to the proposed rule should be identified and discussed. One alternative the MRSB has considered is the current regime of information disclosure, either through EMMA or other websites. For example, CSPN and other for-profit websites collect and display information about 529 plans. However, the type of information collected is not uniform or complete. In addition, the quality of the data voluntarily supplied may differ with respect to its reliability and quality.

A key benefit of proposed Rule G-45 is that it permits the MSRB to fulfill its rulemaking responsibilities with respect to dealers acting as underwriters of 529 plans by collecting a uniform and reliable set of basic information on 529 plans on a regular basis. This uniformity and completeness is achieved by the proposed rule's specification of the features of the information supplied to the MSRB on all 529 plans underwritten by dealers. A uniform and complete set of basic information will permit the MSRB to gain visibility into, and better understand, this segment of the municipal securities market. The benefit of a uniform and complete set of reliable information exceeds the benefit derived under the baseline situation in which documents supplied to EMMA or information supplied to information vendors that is not uniform, is not complete, and may not be reliable.

The main cost of the proposed rule change is likely to be the cost to underwriters of conforming to the proposed rule's requirements. These costs likely will be most pronounced in complying with the proposed rule the first time. For some underwriters, information will need to be gathered that they have not collected under the baseline case. In addition, the information, once collected will need to be supplied in a specified format that may differ from formats currently used by underwriters. These first-time compliance costs, once absorbed, will not recur. The compliance costs should diminish once underwriters adapt to the new disclosure format. Recurring costs will be incurred with each submission; however, these costs should be low relative to the initial cost of compliance.

One alternative formulation of the proposed rule would be to collect information with a greater or lesser frequency than semi-annually. The MSRB believes that there is considerable benefit to a semi-annual frequency, which is consistent with the frequency with which the SEC collects certain mutual fund information. More frequent disclosure would be of benefit to the

MSRB but would entail greater compliance costs. Less frequent disclosure could reduce potential costs associated with the proposed rule, but it would also reduce the potential benefits. The MSRB believes that semi-annual disclosure and updating of information is a frequency that strikes an appropriate balance between the benefits of disclosure and the costs associated with the disclosure. Information provided at this frequency will help the MSRB spot changes and trends in the industry without placing an undue burden on underwriters in producing the information.

In response to comments, the MSRB reduced the underwriters' proposed obligations by changing the proposed reporting frequency from quarterly to semi-annually. The MSRB also reduced the potential cost to underwriters by extending the reporting deadline from thirty days to sixty days after the end of the reporting period, eliminating the requirement to report detailed information about underlying investments, eliminating the reporting of the percentage of plan contributions derived from automatic contributions, and conforming the reporting format for fees and performance to an industry standard.

The MSRB sought information from market participants about the potential costs of the proposed rule change and, based on responses, modified the proposed rule change substantially. On the other hand, commenters have provided little evidence of the potential burden of the proposed rule change. Sutherland acknowledges in its supplemental letter that some of the information sought by the MSRB is already available publicly and is "in many ways, more comprehensive than the information the MSRB seeks in the Proposal." To the extent underwriters are already in possession of some of the information required by the proposed rule and produce it publicly, they would realize only an incremental burden in producing it to the MSRB. Further, the proposed rule change would impose an obligation solely on those entities that are underwriters of 529 plans. There are over 1600 MSRB registered dealers but only approximately one hundred 529 plans and even fewer underwriters, as certain firms act as underwriters for multiple plans. Consequently, only a limited number of dealers would be obligated to submit information to the MSRB.

Finally, Sutherland comments that proposed Form G-45 is unclear and that it will be a source of confusion. Therefore, it suggests the information will be unreliable. The MSRB believes the form is straightforward and understandable. To the extent the MSRB seeks information regarding performance and fees, the form is consistent with CSPN's Disclosure Principles Statement No. 5. The MSRB believes that underwriters will have little difficulty completing the form, which need be submitted only twice per year.

Conclusion

In summary, the burdens of the proposed rule change are modest while the benefits, on the other hand, are substantial. Requiring a segment of dealers to submit information, on a relatively infrequent basis, that such dealers already compile, or have access to, will enable the MSRB or other regulators to compare the asset allocation, fees and costs, and performance of similar investment options across 529 plans and identify trends or changes. Such information also may be used to determine the nature or timing of risk-based dealer examinations. Having

access to this reliable information regarding individual 529 plans and their investment options will assist the MSRB in fulfilling its statutory responsibility of protecting investors and the public interest. As the MSRB currently has no requirement that regulated entities provide information regarding 529 plans, other than certain disclosure documents and continuing disclosures that do not lend themselves to comparison or analysis, the MSRB believes it is necessary to establish, through proposed Rule G-45, the obligation of underwriters to provide this important information.

If you have any questions, please feel free to contact me.

Sincerely,

Lawrence P. Sandor
Deputy General Counsel

The Municipal Securities Rulemaking Board ("MSRB" or "Board") is hereby filing with the Securities and Exchange Commission ("SEC" or "Commission") this Amendment No. 1 ("Amendment") to File No. SR-MSRB-2013-04, which was filed on June 10, 2013 ("original proposed rule change"). The Amendment amends and restates the original proposed rule change consisting of new Rule G-45, on reporting of information on municipal fund securities; new Form G-45; and amendments to Rules G-8, on books and records, and G-9, on preservation of records (as amended, the "proposed rule change").

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1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] the Municipal Securities Rulemaking Board is filing with the Securities and Exchange Commission a proposed rule change consisting of new Rule G-45, on reporting of information on municipal fund securities, and Form G-45, and amendments to Rules G-8, on books and records, and G-9, on preservation of records (the "proposed rule change"). The MSRB will designate an implementation date for the proposed rule change that is not earlier than one year from the date of SEC approval.

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(a) The text of the proposed rule change is attached as Exhibit 5. Text proposed to be added is underlined and text to be deleted is in brackets. Proposed Form G-45 is attached as Exhibit 3.[3]

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the MSRB at its January 23-25, 2013 meeting. Questions concerning this filing may be directed to Lawrence P. Sandor, Deputy General Counsel, at (703) 797-6600.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Inasmuch as proposed Form G-45 is a pre-production depiction of an electronic form, the final appearance may vary; however, any substantive changes to Form G-45 will be treated as a rule change under the provisions of Section 19(b)(1) of the Act and Rule 19b-4 thereunder.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

Summary of Amendment No. 1

The MSRB separately submitted a letter to the Commission in which it responds to comment letters received by the Commission in response to the notice for comment on the original proposed rule change published in the Federal Register[4] and the order instituting proceedings to determine whether to disapprove the proposed rule change[5] (the "MSRB Response Letter").

The Amendment amends and restates the original proposed rule change to:

- clarify that the information that would need to be submitted by underwriters of 529 college savings plans ("529 plans" or "plans") under the proposed rule change includes asset allocation information for the assets of each investment option;
- omit statements concerning the interpretation of the meaning of "underwriter" under the federal securities laws and the rules promulgated thereunder;
- clarify that each entity must determine, based on the facts and circumstances, whether it is an underwriter under the federal securities laws;
- clarify that an underwriter that submits Form G-45 would be obligated to submit information only for itself and those entities that identify themselves as underwriters of the plan and that aggregate their information with the submitter's information;
- clarify that the MSRB proposes that underwriters identify the percentage of each underlying investment in an investment option but not submit information regarding the assets in each underlying investment;
- clarify that, for each investment option offered by a plan, the underwriter will provide the MSRB with the name and allocation percentage of each underlying investment in each investment option as of the end of the most recent semi-annual period;

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4 See SEC Release No. 34-69835 (June 24, 2013), 78 FR 39048 (June 28, 2013).

5 See SEC Release No. 34-70531 (Sept. 26, 2013), 78 FR 60985 (Oct. 2, 2013).

- clarify that the MSRB does not contemplate that a state sponsor of a 529 plan, as an instrumentality of the state, would be an underwriter under federal securities laws;

- explain that an underwriter would not be required to submit information it neither possesses nor has the legal right to obtain. The legal right to obtain the information for purposes of the proposed rule change would not be affected, however, by a voluntary relinquishment, by contract or otherwise, of such a right;

- explain that, to the extent the information was prepared by the underwriter or, through delegation, one of its contractors or sub-contractors, and the information was inaccurate or incomplete, the underwriter would be responsible for the information and therefore be liable for such information under proposed Rule G-45. If, on the other hand, the underwriter did not prepare, or authorize others to prepare on its behalf, information submitted pursuant to proposed Rule G-45, it would not be required to verify or confirm the accuracy and completeness of the information;

- clarify, in Rule G-45, that performance data shall be reported annually.

Because the Amendment alters the text of the proposed rule change as it appeared in the original filing, the Amendment includes, as Exhibit 4, the entire text of proposed Rule G-45, marked to show additions to the version of the rule included in the original filing. Underlining indicates additions made by the Amendment to the original proposed rule change; brackets indicate deletions made by the Amendment from the original proposed rule change.

Purpose of the Proposed Rule Change

The proposed rule change will, for the first time, provide the MSRB with more comprehensive information regarding 529 plans underwritten by brokers, dealers or municipal securities dealers ("dealers") by gathering data directly from such dealers. The MSRB regulates dealers that act in the capacity of underwriters of 529 plans, as well as dealers that sell interests in 529 plans and municipal advisors to such plans. Interests in 529 plans have been deemed to be municipal securities by the Commission,[6] and the MSRB has categorized such interests as

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[6] SEC Release No. 34-70462 at 20, (September 20, 2013), 78 FR 67468 (Nov. 12, 2013) ("Interests offered by college savings plans ("529 Savings Plans") that comply with Section 529 of the Internal Revenue Code [footnote omitted] are another type of municipal security"); See generally letter dated February 26, 1999 from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, to Diane G. Klinke, General Counsel of the Board, in response to letter dated June 2, 1998 from Diane G. Klinke to Catherine McGuire, published as Municipal Securities Rulemaking Board, SEC No-Action Letter, Wash. Serv. Bur. (CCH) File No. 032299033 (Feb. 26, 1999).

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municipal fund securities.[7] MSRB rules govern the activities of dealers who transact business in municipal fund securities, and it is important that the MSRB have accurate, reliable and complete information about 529 plans underwritten by dealers in order to carry out its rulemaking responsibilities.

CURRENT MSRB REQUIREMENTS

Today, the MSRB collects certain information regarding 529 plans from underwriters and issuers. Just as it does for municipal securities that are not municipal fund securities, the MSRB's Electronic Municipal Market Access ("EMMA®")[8] system serves as a centralized venue for the submission by underwriters of 529 plan primary offering disclosure documents ("plan disclosure documents") and continuing disclosures, such as annual financial reports submitted to EMMA by issuers or their agents. However, the MSRB does not currently receive detailed underwriting or transaction information, as it does for other types of municipal securities.

The proposed rule change would require dealers acting in the capacity of underwriters to submit to the MSRB, for the 529 plans they underwrite, on a semi-annual or, in the case of performance data, annual basis, certain information.[9] The information includes plan descriptive information, assets, asset allocation information for the assets of each investment option, contributions, withdrawals, fee and cost structure, performance data, and other information. While some of the information, such as fees and costs, may be provided in plan disclosure documents submitted to EMMA, the information is not submitted in a manner that allows for analysis or comparison, since it is imbedded in static documents submitted in portable document format (PDF). The proposed rule change would require the information to be submitted electronically through new Form G-45, which is discussed in more detail below. The MSRB, and other regulatory authorities that are charged by statute with examining dealers for compliance with, and enforcing, MSRB rules, including the SEC and the Financial Industry Regulatory Authority ("FINRA"), would be able to utilize this information to analyze 529 plans, monitor their growth rate, size and investment options, and compare plans based on fees and costs and performance. By collecting this information, the MSRB would enhance its understanding of the 529 plan market, the growth of plans and their investment options, and the differences among

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7 The term municipal fund security is defined in MSRB Rule D-12 to mean a municipal security issued by an issuer 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.

8 EMMA is a registered trademark of the MSRB.

9 The MSRB does not contemplate that a state sponsor of a 529 plan, as an instrumentality of a state, would be an underwriter under Rule 15c2-12, given the plain language of the rule; 17 CFR 240.15c2-12.

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.

At present, there is no central, reliable source for this information. While information vendors and an issuer-related association collect information regarding 529 plans, even assuming it would be the same information needed by the MSRB, the information submitted to these entities is done so voluntarily by 529 plan program managers or their affiliates or contractors. Consequently, it is not possible to confirm that all 529 plans will continue to submit information to these organizations or that all information requested will be provided. Further, it is not possible to test or otherwise confirm the accuracy of the information provided to these organizations. In short, the voluntary collection of limited 529 plan information by private organizations is not a substitute for actual data submitted by regulated dealers.

Since the creation of the earliest 529 plans, the MSRB has issued interpretive guidance regarding dealer obligations in connection with transactions in interests in 529 plans. On March 31, 2006, the MSRB filed with the Commission an interpretation on customer protection obligations relating to the marketing of interests in 529 plans (the "2006 Notice").[10] The 2006 Notice addressed the basic customer protection obligations of dealers, including their disclosure obligations under MSRB Rule G-17. In the 2006 Notice, the MSRB noted that various organizations, including the College Savings Plans Network ("CSPN"), an affiliate of the National Association of State Treasurers, and certain private entities had established websites devoted to 529 plans.[11]

At that time, the MSRB urged market participants to develop a more comprehensive and user-friendly system of established industry sources for the 529 plan market. An established industry source is considered by the MSRB to be one which provides a broad variety of information that professionals can and do use to obtain material information about municipal securities.[12] The MSRB stressed the importance of disclosure of material information regarding 529 plans and commented that it had long been an advocate for the best possible disclosure practices by 529 plan market participants, though it lacked the authority to mandate specific disclosures by issuers. Over the years, the MSRB has worked with CSPN and individual states on, among other issues, disclosure principles and best practices, in order to better inform and protect investors.[13] The disclosure principles cover a variety of topics that might be considered

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10 MSRB Notice 2006-07 (March 31, 2006).

11 CSPN's website is located at www.collegesavings.org.

12 See MSRB Notice 2006-07, note 10 (March 31, 2006).

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13 CSPN published its Disclosure Principles Statement No. 5 ("Disclosure Principles No. 5") on May 3, 2011 (www.collegesavings.org/legislativeInitiative.aspx), which assists

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material to investors in making an informed investment decision, including the discussion of investment options, possible federal and state tax benefits, program management, investment management, risk factors, fees and costs, and investment performance.

Given the complexity of 529 plans and their unique characteristics, such as individual state tax treatment, the MSRB urged market professionals to develop more comprehensive websites with features that would assist the general public in understanding the key terms and features of 529 plans.[14] In the 2006 Notice, the MSRB noted that it would monitor the 529 plan market closely and consider whether further rulemaking regarding disclosures would be appropriate.

EMMA

On June 1, 2009, the MSRB implemented an electronic system for free public access to primary market disclosure documents through EMMA.[15] Thereafter, 529 plan underwriters have been obligated to submit plan disclosure documents to EMMA, pursuant to MSRB Rule G-32.[16] On July 1, 2009, the MSRB implemented the continuing disclosure service of EMMA.[17] Since that date, 529 plan issuers or their agents have been submitting continuing disclosures regarding 529 plans to EMMA, such as audited financial statements, based on continuing disclosure agreements entered into pursuant to SEC Rule 15c2-12 ("Rule 15c2-12"), promulgated under the Act. Underwriters of 529 plans generally are obligated to determine that continuing disclosure agreements have been entered into in connection with the plans.[18]

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states in improving the quality of disclosure to investors about their 529 plans. Based on comments to draft Rule G-45, the MSRB has modified certain reporting requirements to be consistent with Disclosure Principles No. 5, as more fully described below.

14 In this regard, CSPN, for example, developed a website that aggregates information regarding 529 plans and enables investors to compare plans by state and by feature. The MSRB views these established industry sources as helpful in providing investors and investment professionals who transact business in 529 plans with material information necessary for investors to make informed investment decisions.

15 MSRB Notice 2009-22 (May 22, 2009).

16 Since May 2011, for 529 plans not underwritten by dealers, states have been permitted to voluntarily submit plan disclosure documents for public dissemination through EMMA.

17 MSRB Notice 2008-47 (December 8, 2008).

18 See Interpretation Relating to Sales of Municipal Fund Securities in the Primary Market, http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/Definitional/Rule-D-

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The proposed rule change would assist the MSRB and other regulators that, pursuant to Section 15B of the Act, perform examinations and other oversight activities of dealers and municipal advisors, by providing them with important information regarding 529 plans underwritten by dealers. For example, the information would enable the MSRB 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 also may be used to determine the nature or timing of risk-based dealer examinations.

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The information would be submitted to EMMA and retained in a database for regulatory use and will not, at this time, be disseminated publicly, though the MSRB's goal is to disseminate through EMMA the information that would be of benefit to investors. For example, the MSRB may display fee and expense or performance information on EMMA. Prior to such a public dissemination, the MSRB would file a proposed change to the EMMA or other facility with the SEC, and provide market participants with an opportunity to comment publicly on the proposal.

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PROPOSED RULE G-45

The proposed rule change would require each underwriter of a primary offering of municipal fund securities that are not interests in local government investment pools to report to the MSRB the information relating to such offering required by Form G-45 by no later than 60 days following the end of each semi-annual reporting period ending on June 30 and December 31 each year and in the manner prescribed in the Form G-45 procedures and as set forth in the Form G-45 Manual.[19] Performance data, however, would be submitted annually by no later than 60 days following the end of the reporting period ending on December 31. Interests in 529 plans are the only type of municipal fund security that will be covered by the proposed rule change. Such interests are sold through a continuous primary offering. Under the proposed rule, brokers, dealers or municipal securities dealers that are underwriters under Rule 15c2-12(f)(8)[20] would be required to submit the required information to the MSRB. The MSRB recognizes that, just as with municipal bonds, there may be more than one underwriter of a particular primary offering. Consequently, the MSRB would deem the obligation to submit the required information fulfilled if any one of the underwriters submitted the required information. In this regard, on proposed

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12.aspx?tab=2, (January 18, 2001).

19 The Form G-45 Manual will be a new item created to assist persons in the submission of the information required under Rule G-45 and is not part of the proposed rule change.

20 17 CFR 240.15c2-12(f)(8).

Form G-45, each submitter would indicate the identity of each underwriter that has identified itself as such and on whose behalf the information is submitted. The underwriter would be obligated to submit information only for itself and those entities that identify themselves as underwriters of the plan and agree to aggregate their information with the information of the submitter.

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As discussed in the MSRB Response letter, under the proposed rule change, an underwriter would not be required to submit information it neither possesses nor has the legal right to obtain, and the proposed rule change would impose no such duty on an underwriter. The legal right to obtain the information for purposes of the proposed rule change would not be affected, however, by a voluntary relinquishment, by contract or otherwise, of such a right. Thus, a 529 plan underwriter might designate an affiliate or contractor to perform activities in its stead in connection with the underwriting. But that underwriter would nevertheless be properly viewed as having a legal right to obtain all such information that is related to such activities and would therefore be required to submit such information to the MSRB under proposed Rule G-45 and Form G-45.[21]

The MSRB understands that an underwriter that receives information that would be required to be submitted to the MSRB under the proposed rule change from a third party may have concerns about the accuracy and completeness of such information. Nevertheless, under the proposed rule changes, to the extent the information was prepared by the underwriter or, through delegation, one of its contractors or sub-contractors, and the information was inaccurate or incomplete, the underwriter would be responsible for the information and therefore be liable for such information under proposed Rule G-45. If, on the other hand, the underwriter did not prepare, or authorize others to prepare on its behalf, information submitted pursuant to proposed Rule G-45, it would not be required to verify or confirm the accuracy and completeness of the information.[22]

Originally, the MSRB proposed that the information be submitted within 30 days of the end of the reporting period.[23] Commenter's raised concerns about the deadline and, in response, the MSRB revised the proposal and extended the deadline to 60 days from the end of the reporting period to address the burdens on dealers in gathering and validating the information.[24] Similarly, in the August Notice the MSRB initially proposed that underwriters report the required information quarterly. In response to comments to the August Notice, the MSRB in the November Notice changed the reporting period from quarterly to semi-annually to address the

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21 See MSRB Response Letter.

22 Id.

23 MSRB Notice 2012-40 (August 6, 2012) (the "August Notice").

24 MSRB Notice 2012-59 (November 23, 2012) (the "November Notice").

burdens of more frequent filings. Moreover, underwriters would only be required to submit performance data annually instead of quarterly or semi-annually. This change was also in response to concerns raised about the burden of quarterly submissions. In the November Notice, the MSRB also revised the proposal to eliminate the requirement to submit information on the percentage of plan contributions derived from automatic contributions, such as through ACH (Automated Clearing House) debit transfers from an account owner's bank account. The MSRB believes that the burden on dealers to submit this information outweighs its regulatory benefit. Finally, in the August Notice the MSRB initially proposed to collect information regarding the underlying portfolio investments in which each investment option invests. Based on comments to the initial proposal and in recognition of the additional burdens associated with supplying the individual portfolio data that is subsumed within an investment option, in the November Notice, the MSRB eliminated this requirement from the proposed rule change. The MSRB proposes that underwriters identify the percentage of each underlying investment in an investment option but not submit information regarding the assets in each underlying investment.

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RULES G-8 AND G-9

The proposed rule change includes amendments to the MSRB's books and records rules to require underwriters obligated to submit information to the MSRB under proposed Rule G-45 to maintain the information required to be reported on Form G-45 for six years.

PROPOSED FORM G-45

The information required by Form G-45 would be submitted electronically by underwriters, either through automated upload or through a web portal, at the discretion of the underwriter. In order to minimize the burden on underwriters, once the information is initially submitted, future submissions would be pre-populated with certain basic information on the electronic form. Form G-45 would require the submission of the following information:

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- **Plan descriptive information:** the underwriter would provide the MSRB with the name of the state, name of the plan, name of the underwriter and contact information, name of other underwriters on whose behalf the underwriter is submitting information, name of the program manager and contact information, plan website address and type of marketing channel (whether sold with or without the advice of a broker-dealer). This information would be pre-populated and would likely change infrequently.

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- **Aggregate plan information**: the underwriter would provide the MSRB with total plan assets, as of the end of each semi-annual reporting period, total contributions for the most recent semi-annual reporting period, and total distributions for the most recent semi-annual reporting period.

- **Investment option information:** For each investment option offered by the plan, the underwriter would provide the MSRB with the name and type of investment option[25] (such as an age-based, conservative), the inception date of the investment option, total assets in the investment option as of the end of the most recent semi-annual period, the asset classes in the investment option, the actual asset class allocation of the investment option as of the end of the most recent semi-annual period, the name and allocation percentage of each underlying investment in each investment option as of the end of the most recent semi-annual period, the investment option's performance[26] for the most recent calendar year (as well as any benchmark and its performance for the most recent calendar year),[27] total contributions to and distributions from the investment option for the most recent semi-annual reporting period and the fee and expense[28] structure in effect as of the end of the most recent semi-annual reporting period. In order to ease the burden on underwriters submitting the information, the MSRB modified the proposal to permit the performance and fee and expense information to be submitted in a format consistent with Disclosure Principles No. 5, which commenters inform the MSRB is the industry norm for reporting such information.

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25 Form G-45 would require disclosure at the investment option level only. A fund that is both an underlying investment and a stand-alone investment option would not be aggregated. An underwriter would report data for each investment option, including an investment option that is a fund, separately. For example, if an investment option invests in five mutual funds, the submitter would report that the investment option consists of those five mutual funds and would report, among other data, the allocation percentage of each mutual fund in the investment option. To the extent another investment option invested in the same mutual funds, the underwriter would identify the mutual fund assets held by each investment option. Each investment option would report its underlying investments separately.

26 Proposed Rule G-45 defines performance to mean total returns of the investment option expressed as a percentage, net of all generally applicable fees and costs. Fees that are not specific to any particular investment option would not be applicable to this disclosure requirement. Form G-45 is consistent with Disclosure Principles No. 5, which suggests that performance data be disclosed net of all generally applicable fees and costs and that, for advisor sold plans, total returns should be calculated both including and excluding sales charges.

27 Performance data must only be updated annually. Submitters must disclose each investment option's 1-, 3-, 5-, and 10-year performance as well as the option's performance since inception, as of the annual update.

28 See supra note 25.

(b) Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[29] which provides that the MSRB's rules shall:

> 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 engaged in regulating, clearing, settling, processing information with respect to, and 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.

The statute requires the MSRB to protect both investors and municipal entities. In fulfilling its responsibility, the MSRB must understand the market and possess basic, reliable information regarding individual 529 plans and their investment options. The proposed rule change would provide the MSRB with such information. The information would 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 would better position the MSRB to protect investors and the public interest.

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Additionally, the MSRB has a statutory obligation to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade. Typically, underwriters of 529 plans draft or participate in drafting the plan disclosure documents, as well as marketing material for 529 plans. The MSRB or other regulators may use the information submitted on Form G-45 to, among other things, determine if the disclosure documents or marketing material prepared or reviewed by underwriters are consistent with the data submitted to the MSRB.

Finally, while commenters have suggested that underlying investments in 529 plans are typically registered investment companies regulated by the SEC and therefore oversight by the MSRB would be duplicative, the investment options are unique to 529 plans and are not regulated as registered investment companies by the SEC. It is therefore important that the MSRB collect information about 529 plan investment options.

4. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, since it would

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[29] 15 U.S.C. 78o-4(b)(2)(C).

provide information necessary for the MSRB to carry out its regulatory responsibilities under the Act and would apply equally to all dealers that serve as underwriters of 529 plans. Moreover, the MSRB believes that such underwriters collect and retain the information required by the proposed rule change and utilize it for a variety of purposes, including reporting to issuers and other market participants. The information that the proposed rule change would require underwriters to submit to EMMA would be required to be submitted on an equal and non-discriminatory basis. As described above, the MSRB would realize substantial benefits in obtaining reliable, accurate information about 529 plans, promoting greater regulatory oversight and investor protection. In addition, the proposed rule change would not impose any burden on dealers that sell interests in 529 plans, as the obligation to submit information semi-annually to the MSRB would only be imposed on underwriters. On balance, the MSRB believes that the benefits of the proposed rule change would greatly exceed any potential increased burden it imposes on dealers.

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In the November Notice requesting comment on the proposed rule change, the MSRB explained that, in order to ease the burden on dealers, the proposed rule change "eliminate[d] the requirement to submit information on underlying investments and the requirement to submit the percentage of plan contributions derived from automatic contributions, based on comments that some plans do not track such information." The November Notice also provided that "in order to facilitate the submission of information, the MSRB will take steps to pre-populate certain data fields on Form G-45, subsequent to the initial filing by underwriters." As explained earlier, the MSRB made other substantive changes to the proposal to ease the burden on dealers, such as changing the reporting period from quarterly to semi-annually (except for performance, which would be reported annually), extending the reporting deadline from 30 days after the end of the reporting period to 60 days after the end of the reporting period, and conforming the reporting format for fees and performance to the Disclosure Principles No. 5. The MSRB believes these changes, taken together, would reduce the reporting burden significantly.

Among the suggested alternatives to the proposed rule change are (a) a manual review of information in plan disclosure documents submitted to EMMA or on plan websites; or (b) a review of data supplied by information vendors voluntarily. Neither of these alternatives would satisfy the regulatory needs of the MSRB. A manual review of information would be insufficient because some of the information sought by the MSRB is not disclosed in public documents. For example, plans may not publish information on their assets, contributions, distributions, performance or benchmark performance at the investment option level. Moreover, monitoring EMMA and other websites for the publication of new information would be time consuming and inefficient. While information supplied by dealers to information vendors may be of interest, it is unreliable from a regulatory standpoint. Additionally, the MSRB would be relying on such information vendors for important regulatory information. On balance, the MSRB believes that semi-annual reporting of limited information, which is readily available to underwriters, would not pose an unreasonable burden on dealers.

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5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others.

On November 23, 2012, the MSRB issued a request for comment on a draft rule requiring underwriters to submit 529 plan data to the MSRB.[30] The November Notice outlined the requirements of draft MSRB Rule G-45 and Form G-45, including the requirement that underwriters submit information required by Form G-45 semi-annually, except for performance information which would be submitted annually, a 60 day deadline to report the information after the end of the reporting period, and an implementation period of at least one year following approval of the rule change by the Commission.[31]

PUBLICATION OF COLLECTED INFORMATION

In response to the November Notice, the MSRB received eight letters that comment on the proposed rule change.[32] A number of commenter's raise concerns about the possibility of public dissemination of the data collected on the EMMA website.[33] The concerns are that investors may be confused if information is displayed out of context and that some of the information may be proprietary.[34] The MSRB stated in the November Notice that the information would be collected for regulatory purposes and that no information collected under proposed Rule G-45 would be displayed on EMMA without a subsequent rule filing. The MSRB intends to collect and analyze the information before making any determinations regarding the dissemination of any of the data through EMMA. UESP further notes that, although the MSRB indicated that the information would be used for regulatory purposes, the draft rule contains no such assurance. This commenter requests that the MSRB further address the issue before the

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30 See supra note 19.

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31 The November Notice described revisions to a draft rule that was first proposed in the August Notice.

32 Comment letters were received from the College Savings Foundation ("CSF"), College Savings Plans Network ("CSPN"), College Savings Plans of Maryland ("CSPM"), Financial Research Corporation ("FRC"), Investment Company Institute ("ICI"), Securities Industry and Financial Markets Association ("SIFMA"), Utah Educational Savings Plan ("UESP") and Coalition of Mutual Fund Investors ("CMFI") (this letter raises concerns with fees associated with omnibus accounting of 529 plans and does not directly address the proposed rule change).

33 See comments from CSF, CSPN, CSPM, SIFMA and UESP.

34 See, e.g., comment from CSPM.

draft rule is finalized. As noted above, the MSRB does not intend to disseminate through EMMA the information to be collected under the proposed rule change, though it does have a goal of disseminating more information on 529 plans, where it would benefit investors. The MSRB is mindful of the concerns raised by commenters that information out of context might be confusing or misleading to investors. Consequently, it would study the data collected and consider these concerns before filing a proposal to disseminate any of the information collected.

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IMPLEMENTATION PERIOD AND REPORTING DEADLINE

In terms of the implementation period and lag time for reporting information, two commenters suggest that the one year implementation period is too short and that 18 to 24 months is needed.[35] For example, FRC suggests that two years is more appropriate, given the need for dealer system changes and to ensure data integrity. It draws its perspective from its role as an information vendor that analyzes information submitted voluntarily by 529 plan intermediaries. While the MSRB is sensitive to the burdens and systems implications of the proposed rule change, its experience in developing similar systems in the past suggests that a one year implementation period is more appropriate. The dealer community has been on notice for many months of these proposed rule change, and should begin preliminary preparations for extracting the necessary data. In the November Notice, the MSRB proposed a one year implementation period based on comments to the August Notice from ICI, SIFMA and CSPM suggesting that one year would be an appropriate time frame to allow underwriters to modify their systems to comply with a mandatory reporting regime. It is important that the MSRB begin collecting the information as soon as possible, as there is no authoritative, reliable source for this information, as discussed above, and the MSRB agrees with such commenters that one year should be sufficient to prepare for the submissions.

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FRC also suggests that, based on its experience as an information vendor, the 60 day reporting deadline should be extended to 120 days. Interestingly, FRC collects 529 plan information quarterly and requests that its survey participants submit information within 30 days from the end of the quarter. Based on input from underwriters and other commenters, the MSRB believes that a 60 day deadline is appropriate. For example, SIFMA and ICI support a 60 day reporting deadline, as does CSPM for performance data, although it believes 30 days is sufficient for assets, contributions and distributions, according to comment letters submitted in response to the August Notice. Moreover, the Commission requires registered investment companies to file portfolio holding information within 60 days of the end of the reporting period on Form N-Q. Consequently, the MSRB believes the 60 day deadline is appropriate.

DUPLICATION OF EFFORT

FRC recommends that the MSRB not collect information at all, or at least not at the investment option level, because it sends the data to the MSRB and some of the information is

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[35] See comments from CSF and FRC.

contained in plan disclosure documents submitted by underwriters to EMMA. While the MSRB appreciates the cooperation of this commenter in producing its reports voluntarily to the MSRB, the reports are no substitute for data mandated by rule, which can be validated through regulatory examination. Further, the receipt of information in a disclosure document is not equivalent to its receipt in electronic data fields. Finally, FRC suggests that the proposed rule change would raise the expenses of 529 plans and burden investors unnecessarily. It comments that the requirement for underwriters to submit data will entail additional costs, which may be passed onto the 529 plans, and indirectly, investors. The MSRB believes that the additional burden on underwriters of submitting readily available information semi-annually will be modest, compared with the benefit of obtaining reliable, accurate information to assist with its regulatory activities.

SCOPE OF MSRB RULEMAKING AUTHORITY

FRC suggests that the MSRB only has authority over "advisor-sold" plans and should only collect information regarding these plans. The distinction between "advisor-sold" plans and "direct-sold" plans is a marketing distinction that has no bearing on the jurisdiction of the MSRB. The MSRB's jurisdiction extends to dealers and municipal advisors with respect to all their municipal fund securities and municipal advisory activities. Consequently, underwriters of "direct-sold" and "advisor-sold" plans must submit information required by the proposed rule change to the MSRB.

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USE OF CSPN DISCLOSURE PRINCIPLES

Commenter's[36] generally support the MSRB's proposed use of the reporting format in Disclosure Principles No. 5 for reporting 529 plan fees and performance. CSF suggests that the use of Disclosure Principles No. 5 will make the transition to the reporting process less cumbersome and more efficient. Nevertheless, several commenter's suggest that, for clarification and flexibility, the MSRB adopt certain relevant provisions in Disclosure Principles No. 5, allow for explanatory text and footnotes to the reporting tables on fees and performance, and permit different tabular presentations that are at least as specific as those examples provided in Disclosure Principles No. 5.[37] The MSRB has adopted these recommendations in the proposed rule change and would permit submitters to add explanatory text and footnotes to the reporting tables on fees and performance, as well as different tabular presentations that are at least as specific as those examples provided in Disclosure Principles No. 5. The specifications for reporting would be contained in the G-45 Manual, which would be published on www.msrb.org, sufficiently in advance of the effective date to provide submitters with adequate notice and time to comply.

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36 See comments from CSF, CSPN, ICI and SIFMA.

37 See comments from CSF, CSPN, ICI and SIFMA.

CSF also requests that plans be able to report fees as of the most recent offering document, since most plans issue offering documents once per year and proposed Rule G-45 would require semi-annual reporting. As CSF correctly notes, the proposed rule change would require semi-annual reporting of the fee and cost table. If the fees and costs have not changed since the most recent offering document, underwriters would simply insert the information from that offering document. If the fees and costs have changed, however, underwriters would be required to update the table to reflect those changes. In order to make it as easy as possible to submit information, the MSRB intends to pre-populate the electronic Form G-45 with certain information submitted previously by underwriters. For example, basic plan descriptive information would be pre-populated. Additionally, the fee and cost tables would be pre-populated. If there are no changes to the fee and cost table from the prior filing, underwriters would not need to make changes to the table.

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ICI also requests that the MSRB make clear that, to the extent a plan does not separately compute and disclose one or more fees listed in the fee and cost tables, it should not require underwriters to artificially create such fees solely for purposes of Form G-45. The proposed rule change would not require underwriters to calculate and artificially segment fees for purposes of completing Form G-45. Rather, underwriters would simply report fees and costs as they are calculated and reported to account holders.

REQUIRED SUBMITTERS

Several commenters state that only the underwriter or primary distributor should be required to file proposed Form G-45.[38] The MSRB acknowledges the efficiencies in having a complete set of Form G-45 data submitted by a single party, and believes that where such a submission provides a complete set of data on a 529 Plan, no additional submissions should be required. However, the MSRB also is concerned that limiting the filing requirement solely to the primary distributor may leave gaps in the information reported. In principle, the MSRB supports filing by a single party, but only to the extent such party aggregates the data from all persons that have identified themselves to the submitter as underwriters and have agreed to such aggregation. Under the proposed rule change, each underwriter would have a separate obligation to submit information required on Form G-45; provided, however, that the obligation would be deemed satisfied if the information is submitted by another party that identifies itself as an underwriter.

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ICI notes that 529 plans have only one underwriter, the primary distributor, and that many other entities are involved in operating and maintaining a plan, such as the plan's program manager, record-keeper, investment manager, custodian and state sponsor. ICI suggests that none of these entities would qualify as an underwriter under the proposed rule. Each entity must determine, based on the facts and circumstances, whether it falls within the definition of underwriter under the federal securities laws. Nevertheless, if a program manager, for example,

Deleted: MSRB disagrees. Under SEC Rule 15c2-12(f)(8),39 an

Deleted: is defined broadly and may include one or more of the entities identified by ICI.

38 See comments from CSPN, ICI and SIFMA.

concludes that it is an underwriter pursuant to SEC rules, its obligation to submit information would be deemed satisfied if another party that identifies itself as an underwriter submitted all of the information required by proposed Rule G-45 on its behalf.

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CSPN also notes that underwriters may not have the legal right to information transmitted by selling dealers to a plan's record-keeper because they are not, in some instances, acting as the plan's record-keeper and therefore do not have access to or control such information. In essence, CSPN contends that these underwriters serve a very limited function and do not receive information from selling dealers about transactions in 529 plan accounts. The proposed rule change would only require underwriters to produce information that they possess or have a legal right to obtain, such as information in the possession of an underwriter's subcontractor.

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ICI acknowledges that it would be appropriate to require production of such information: "[ICI] 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." Although selling dealers would have no obligation to submit information to the MSRB under the proposed rule change, those selling dealers that enter into omnibus accounting arrangements with program managers or others would transmit information to underwriters or their subcontractors that must be included in the information submitted to the MSRB. Depository Trust & Clearing Corporation ("DTCC") and its affiliate, National Securities Clearing Corporation ("NSCC") worked with an industry group to modify the 529 plan aggregation file produced by NSCC to include 529 plan daily activity and position changes, so that a nightly file may be transferred to the program manager or others showing all activity and positions in 529 plan accounts for which the selling dealer performs accounting services. In an omnibus accounting arrangement, the selling dealer places purchase and sale orders in an aggregated fashion on behalf of the dealer and maintains records of individual account holder purchases and sales through subaccounts. Through this arrangement, orders are placed in an omnibus manner and do not identify the underlying account owners or beneficiaries.

Deleted: The MSRB believes that, in most cases, the record-keeper will be an underwriter or a subcontractor of an underwriter.

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Nevertheless, the MSRB believes that underwriters have possession or the legal right to the 529 aggregation files and, therefore, have information regarding all activity and positions in the 529 plans they underwrite. The MSRB further understands that DTCC/NSCC created the 529 aggregation files at the request of the program managers and state sponsors because they must have information regarding each customer subaccount in order to monitor the contributions and withdrawals so that no beneficiary accumulates more funds in an account than is permitted by the Internal Revenue Service under the Internal Revenue Code. Consequently, the MSRB understands that underwriters have information as to customer activity and positions, notwithstanding the omnibus accounting arrangements entered into by certain selling dealers.

DEFINITIONS AND FORMAT

Finally, commenters[40] suggest slight definitional and formatting changes that have been incorporated into the proposed rule change. For example, pursuant to the suggestion of CSPN, the MSRB has changed the definition of "marketing channel," "reallocation," and "underlying investment." The MSRB would also permit submitters to identify the "marketing channel" of each plan by a drop down menu on the electronic Form G-45, which would be further detailed in the G-45 Manual. Also, pursuant to a suggestion by ICI and SIFMA, the MSRB has moved Form G-45(ii)(D) on the fee and expense structure to (iii)(L). As for the ICI recommendation that information regarding asset allocation be reported in ranges rather than precise amounts, the MSRB believes that precision is needed to provide accurate information regarding the asset allocations and to distinguish one plan's investment options from another.

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SUPPLEMENTAL COMMENTS

The MSRB has separately filed a comment letter with the Commission in which it discusses the responses to comment letters received by the Commission in response to the notice for comment on the original proposed rule change published in the Federal Register.

6. Extension of Time Period of Commission Action

The MSRB declines to consent to an extension of the time period specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

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40 See comments from CSPN, ICI and SIFMA.

11. Exhibits

Exhibit 1.	Completed Notice of Proposed Rule Change for Publication in the Federal Register
Exhibit 2.	Notice Requesting Comment and Comment Letters
Exhibit 3.	Text of Proposed Form G-45
Exhibit 4.	Text of Proposed Rule Change (marked to show additions to the Proposed Rule Change that was included in the original filing)
Exhibit 5.	Text of Proposed Rule Change