MSRB
Municipal Securities Rulemaking Board

September 14, 2017

Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20540-1090

Re: **Response to Comments on File No. SR-MSRB-2017-05**

Dear Secretary:

On July 19, 2017, the Municipal Securities Rulemaking Board (the "MSRB") filed with the U.S. Securities and Exchange Commission (the "SEC" or "Commission"), a proposed rule change for immediate effectiveness consisting of an amendment to MSRB Rule A-13, on underwriting and transaction assessments for brokers, dealers and municipal securities dealers (collectively "dealers"), to assess an underwriting fee on dealers that are underwriters to plans, as the terms "underwriter" and "plan" are defined under MSRB Rule G-45, on reporting of information on municipal fund securities (the "proposed rule change" or "underwriting fee"). The underwriting fee would be assessed at a rate of .0005% ($.005 per $1,000) of the total aggregate assets for the plan underwritten as of December 31 each year, as reported on MSRB Form G-45, reporting of information on municipal fund securities. The MSRB believes the underwriting fee is reasonable as well as necessary and appropriate to help defray the costs of operating and administering the MSRB. The underwriting fee also would allow the MSRB to allocate the cost of regulation directly to those entities being regulated. The Commission published the proposed rule change for comment in the Federal Register on August 4, 2017,[1] and it received nine comment letters.[2] This letter responds to the comments raised in those comment letters.[3]

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1 See Exchange Act Release No. 81264 (Jul. 31, 2017), 82 FR 36472 (Aug. 4, 2017).

2 Comment letters were submitted by Michael J. Downer, Senior Counsel, American Funds Distributors, Inc., dated Aug. 25, 2017 ("American Funds"); Sandra Madden, General Counsel, Ascensus College Savings, dated Aug. 23, 2017 ("Ascensus"); Richard J. Polimeni, Chair, College Savings Foundation ("CSF") and Young Boozer, Chair, College Savings Plans Network ("CSPN") dated Aug. 25, 2017; Stephen C. Wade, Chairman, First National Capital Markets, Inc., dated Aug. 21, 2017 ("First National"); Emily Swenson Brock, Director, Federal Liaison Center, Government Finance Officers Association, dated Aug. 25, 2017 ("GFOA"); Tamara K. Salmon, Associate General Counsel, Investment Company Institute, dated Aug. 25, 2017 ("ICI"); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Aug. 25, 2017 ("SIFMA"); Mary G. Morris, Chief Executive Officer, Virginia529 & ABLEnow, dated Aug. 25, 2017 ("Virginia529"); and James DiUlio, Director, Wisconsin 529 College Savings Program, dated Aug. 25, 2017 ("Wisconsin 529") (collectively, "commenters").

3 The MSRB is submitting under separate cover to the SEC with a request for confidential treatment to the Commission's Secretary, pursuant to Rule 24b-2 under the Securities Exchange

I. Background

The MSRB's regulation of dealers that sell interests in and dealers that are underwriters to plans began over 18 years ago. In 1998, after certain states created 529 college savings plans,[4] the MSRB contacted the SEC to determine whether plan investments were securities and, further, whether they were municipal securities under the federal securities laws.[5] In early 1999, in response to the MSRB's inquiry, SEC staff informed the Board that "at least some interests in ... higher education trusts may be, depending on the facts and circumstances, 'municipal securities' for purposes of the Exchange Act."[6] Based on that guidance, the MSRB began its regulation of dealer and underwriter activity in plans and local government investment pools,[7] collectively known as municipal fund securities under Rule D-12, "municipal fund security." Further, the MSRB expanded its mission to include, among other things, the protection of investors in plans and the public interest by promoting a fair and efficient market for interests in those plans.

Act of 1934, as amended (the "Exchange Act"), (17 CFR 240.24b-2), additional information to support its proposed rule change and its responses to this letter.

4 The MSRB defines a 529 college savings plan under Rule G-45(d)(ix). Under Rule 45(d)(ix), a 529 college savings plan is defined as a "plan." The MSRB uses the term "plan" throughout this letter.

5 Section 529(b)(1) of the Internal Revenue Code of 1986, as amended (the "Code") provides, in part, that a 529 college savings plan is a "program established and maintained by a State or agency or instrumentality thereof." 26 U.S.C. 529(b)(1).

Although Congress amended the Code to add Section 529 in 1996, the market for 529 college savings plans did not grow significantly until after the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). EGTRRA made several improvements, such as permitting distributions to be withdrawn free of federal income tax, if the distributions were used for qualified higher education expenses.

6 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.

7 Local government investment pools ("LGIPs") are established by state or local governmental entities as trusts that serve as vehicles for the pooled investment of public moneys of participating governmental entities. Although most LGIPs are fully administered by governmental personnel or non-dealer contractors, a limited number of LGIPs involve dealers undertaking transaction-based activities. Such dealers are subject to the MSRB's rules regarding municipal fund securities.

Since the MSRB's regulation of underwriters to and dealers that sell interest in plans began, the 529 college industry has grown significantly. For the period ending June 30, 2017, there was $276 billion in assets in plans.[8] As discussed in the proposed rule change, as the industry has grown, so too has the MSRB's regulation of underwriters and dealers that sell interests in plans. Not only do approximately one third of the MSRB's general rules specifically address plans, the MSRB has engaged in educational and market leadership activities that protect investors.

II. Discussion

A. The proposed rule change fairly assesses underwriters to plans.

As discussed in more detail below, the proposed rule change fairly assesses underwriters to plans. It simply is unfair for other MSRB regulated entities to indefinitely and unreasonably subsidize the MSRB's activities relating to plans while underwriters to plans only minimally contribute towards the cost of their regulation. Further, the amount of the underwriting fee is fair and reasonable, and the fee will be assessed on all underwriters to plans.

i. It is unfair to other MSRB regulated entities to indefinitely and unreasonably subsidize the MSRB's activities relating to plans.

As noted above and in the proposed rule change, the MSRB has long been engaged with dealers that sell interests in and dealers that underwrite plans. Since their infancy in 1998, the MSRB has sought and received guidance from the SEC staff about the status of interests in plans under the federal securities laws, developed a fulsome regulatory structure relating to the offer and sale of interests in those plans, engaged in educational and market outreach activities relating to plans, and provided examination and enforcement support to other regulatory agencies.

In sum, the MSRB has fully integrated the regulation of dealers that sell interests in and/or are underwriters to plans into the MSRB's regulatory structure, mission, and activities. The MSRB engaged in these activities as a responsible regulator, mindful of its mission to, among other things, protect investors and the public interest by promoting a fair and efficient municipal market. Further, the MSRB undertook such activities without receiving anything more than minimal financial support from such dealers/underwriters to plans. Moreover, those dealers and underwriters, as well as investors, have benefited from MSRB's regulation.

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[8] 529 College Savings & ABLE 2Q 2017 529 Data Highlights, Strategic Insight, available at http://529insiders.com/uploadedFiles/529-Insider/News/2017/January/2Q%202017%20Strategic%20Insight%20529%20Data%20Quarterly%20Highlights.pdf.

Exercising caution, the MSRB determined not to proceed with a draft underwriting assessment in 1999 to provide the MSRB with the opportunity to learn more about plan industry, and in response to industry concerns, to provide the industry with the opportunity to grow.[9] The MSRB expected, that at some future time, dealers/underwriters to plans would contribute to defray the costs of operating and administering the MSRB. In the meantime, the contribution of the dealers and underwriters that engage in transactions relating to plans through their annual MSRB registration fees (the only source of monetary contributions by dealers to plans paid to the MSRB) exclusively amounted to less than 0.05% of MSRB total revenue for fiscal year 2016.

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(J) of the Exchange Act[10] which requires, in part, that the MSRB's rules shall provide that each municipal securities broker, municipal securities dealer, and municipal advisor shall pay to the Board such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the Board and that such rules shall specify the amount of such fees and charges. It has been over 18 years since the MSRB determined not to proceed with the underwriting fee, and it is now appropriate for the MSRB to assess the underwriting fee. Furthermore, SIFMA has suggested that the dealer community is burdened with regulatory fees and urged the MSRB to reduce fees on dealers in light of the underwriting fee.[11] The underwriting fee represents a further step towards an equitable and fair allocation of fees across regulated entities. Those other regulated entities should not have to indefinitely and unreasonably subsidize the MSRB's activities relating to the offer and sale of interests in plans and the protection of investors in those plans.

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9 Request for Comments (March 17, 1999). As discussed in the proposed rule change, the draft underwriting fee applicable to underwriters of plans would have been assessed at the same level as the underwriting fee then assessed on underwriters of municipal bonds, but based on the purchase price the investor paid for the interests in the plan, exclusive of any commission. In addition, the draft underwriting fee would not have accounted for the redemption of interests in plans. The Board, however, did not proceed with that draft amendment to Rule A-13. The Board stated that:

> Based on the . . . continuous nature of offerings in municipal fund securities, the programmatic nature of most customer investments and the heightened potential that underwriting assessments could create significant financial burdens on issuers to their customers' detriment justify caution in imposing the underwriting assessment.

See File No. SR-MSRB-00-06.

10 15 U.S.C. 78o-4(b)(2)(J).

11 SIFMA letter at 3.

Further, the MSRB strives to diversify its funding sources among regulated entities in a manner that ensures the MSRB's long-term sustainability,[12] and the MSRB believes that its rules provide for reasonable dues, fees, and other charges among regulated entities. The MSRB submits that the proposed rule change is necessary and appropriate to fund the operation and administration of the Board and satisfies the requirements of Section 15B(b)(2)(J),[13] achieving a more equitable balance of fees among regulated entities and a fairer allocation of the expenses of the regulatory activities, system development, and operational activities undertaken by the MSRB. This goal, in part, is particularly heightened given an industry with $276 billion in assets[14] that only minimally contributes to the MSRB's funding. The MSRB believes that the underwriting fee imposed by the proposed rule change of one-half cent per $1,000 in plan assets is proportionately small given the depth of regulation, educational and market outreach, and market leadership activities that the MSRB provides relating to the offer and sale of interests in plans and investors in those plans.

ii. The amount of the underwriting fee is fair and reasonable

Commenters opined that the amount of the underwriting fee was not reasonable either because the metric that the MSRB would use to determine the amount of the underwriting fee was inappropriate or because the amount of the fee would not be de minimis.[15] The MSRB disagrees.

The MSRB strives to achieve a fair balance among regulated entities of the MSRB's fees and a fair allocation among those regulated entities of expenses. To help achieve this goal, the MSRB uses a variety of metrics as a basis for MSRB fees.

The metric that the MSRB uses as a basis for a fee depends, in part, on what would be representative of the activity for the market being assessed as well as what data is readily available. Metrics used by the MSRB include assessments per firm (the annual fee and initial

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12 See Sources and Uses of Funding available at http://msrb.org/About-MSRB/Financial-and-Other-Information /Sources-and-Uses-of-Funding.aspx.

13 See note 10, supra.

14 See note 8, supra.

15 Commenters addressed the metric that the MSRB would use to calculate the fee. In particular, commenters stated that the metric would result in a fee that would be unfair either because the fee would be too large or would be assessed on the same amount of assets annually. See, e.g., CSPN and CSF letter at 1-2 and ICI letter at 3. The MSRB notes that Wisconsin 529 and GFOA support the joint letter from CSPN and CSF.

registration fee), assessments per individual (municipal advisor fee and professional qualifications examination fee), par value (the underwriting fee currently assessed on underwriters of municipal securities other than municipal fund securities and commercial paper and the transaction fee), and per transaction count (technology fee).

Consistent with other MSRB fees, important to the MSRB's considerations when it developed the underwriting fee was the use of a metric that was representative of the activity for the market being assessed, that was readily available, and that could be easily understood by underwriters to plans. The MSRB determined that the use of total aggregate plan assets submitted by underwriters to plans would be an appropriate metric. However, given the nature of the metric, the MSRB adjusted the rate used for underwriting assessments on other types of municipal securities to reflect the continuous nature of the plan offerings, the nature of the metric – i.e., the nature of the assets and that some of the assets may remain in the plan for years, and size of assets. Based in part on that metric, the MSRB determined a fee rate that would reflect the scale of the metric. The MSRB believes that it achieved its goals with the proposed rule change.

More specifically, with regard to commenters' questioning of why the MSRB would assess the 0.0005% underwriting fee based on the total aggregate plan assets annually, as opposed to the alternative where the MSRB assesses a fee based on net sales only, the MSRB believes the proposed fee structure is more suitable for MSRB's regulatory functions in this area. To target the same level of revenue collection, using the alternative approach, the MSRB instead would have to assess a fee on annual net sales of interests in the plans based on a rate that would have been higher than the 0.0005% currently included in the proposed rule change. The MSRB believes this approach would create a more volatile revenue stream from one year to another, when compared to the proposed rule change, as the level of fees would be contingent upon the annual net sale of interests in the plans, which could fluctuate dramatically from one year to another. Given that the MSRB's regulatory activities (including rulemaking, education, and enforcement and examination support) as related to plans are more evenly spread out over time, the MSRB believes the fee structure is much more in line with the pace of MSRB's regulatory activities.

Nonetheless and depending on the year, even with the addition of the underwriting fee, the fees would only defray a small portion of the MSRB's overall costs of operating and administering the MSRB. The MSRB has estimated that the underwriting fee would generate approximately 3% of fiscal year 2018 revenue.[16]

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[16] The MSRB has announced that it will be releasing its budget for fiscal year 2018. See MSRB Monthly Update (September 2017) available at https://content.govdelivery.com/accounts/VAORGMSRB/bulletins/1b497b6.

Commenters have suggested that there is little need for the underwriting fee either because the MSRB's current revenue streams are sufficient or because the MSRB has excessive reserves. In particular, SIFMA asserted that the underwriting fee is not necessary because the MSRB has a "reliable revenue stream that consists of a number of ever-increasing mandatory fees on market participants."[17]

The MSRB has three primary fees related to dealer activities – the underwriting fee (assessed on underwriters of municipal securities other than municipal fund securities and commercial paper), the transaction fee, and the technology fee. Those fees generate approximately 80% of the MSRB's revenue for fiscal year 2018 and are not projected as "ever-increasing fees." The primary fees are directly related to market activity, and thus would increase or decrease only relative to fluctuations in market activity. The MSRB has budgeted for municipal bond volume to be flat for fiscal years 2018 through 2020, but has budgeted for increased trading volume for fiscal year 2018, which is then expected to remain at that volume for fiscal years 2019 and 2020. The MSRB's remaining revenue is based on the number of firms, the number of municipal advisors, the number of professional qualification exams taken, the number of data subscriptions, and fines. The underwriting fee would be based on plan assets, and to the extent those assets increase, the fee would correspondingly generate more revenue.

In addition, SIFMA suggests that "the MSRB currently has excessive levels of reserve funds due to overtaxing its regulated constituents, and has repeatedly urged the MSRB to review and reduce its reserve levels."[18] As previously noted, the MSRB has three primary fees – the underwriting fee, the transaction fee, and the technology fee – all of which are directly driven by market activity. Those fees increase or decrease based on that activity. Any MSRB excess reserves is a result of several factors, including (i) market activity exceeding the MSRB's assumptions, (ii) the occurrence of expense savings, and (iii) the receipt of unbudgeted variable fine revenue, that the MSRB has received for six years since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[19] SIFMA suggests that as a matter of practice, the MSRB "systematically overcharge[s] the entities it regulates and then rebate [sic] back the excess."[20] Once again, this simply is not the case given the direct relationship of MSRB fees to market activity.

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17 SIFMA letter at 3.

18 Id.

19 Pub. Law No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

20 SIFMA letter at 4.

The MSRB has worked to mitigate excessive reserves by including less conservative assumptions about trading revenue in its fiscal year 2018 budget and has provided the following rebates:

- A $3.6 million technology fee rebate in fiscal year 2014; and
- A $5.5 million rebate in the underwriting fee, transaction fee, and technology fee in fiscal year 2016.

In addition, the MSRB budget for fiscal year 2018 has a deficit, as does the pro forma budgets for fiscal years 2019 – 2020. The MSRB anticipates that in the future, based on assumptions reviewed and agreed upon by the MSRB, that excess reserves will be eroded by fiscal year 2020. Further, the MSRB's budget for fiscal year 2018 anticipates that the MSRB will strategically spend some of its reserves.

iii. The underwriting fee would be assessed on all underwriters to plans

a. The MSRB has jurisdiction over all underwriters to plans

It has long been settled that the MSRB has jurisdiction over underwriters to plans, regardless of the marketing channel through which such plans are sold (whether sold with the advice of a dealer, i.e., "advisor-sold," or without the advice of a dealer, i.e., "direct-sold").[21] Nevertheless, commenters opine that the underwriting fee would be unfair because the MSRB's jurisdiction is limited to underwriters to advisor-sold plans.

Commenters to the MSRB's rulemaking relating to Rule G-45, on reporting of information on municipal fund securities, raised similar erroneous arguments relating to the MSRB's jurisdiction being limited to underwriters to plans that are advisor sold.[22] However, as the MSRB has previously discussed[23] and as the SEC agreed, the MSRB's jurisdiction extends to

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21 See, e.g., Exchange Act Release No. 71598 (Feb. 21, 2014), 79 FR 11161 (Feb. 27, 2014), File No. SR-MSRB-2013-04.

22 See File No. SR-MSRB-2013-04. For example, Financial Research Corporation suggested that the MSRB only has authority over "advisor-sold" plans and should only collect information regarding those plans.

23 The MSRB has stated that:

> The distinction between "advisor-sold" plans and "direct-sold" plans is a marketing distinction that has no bearing on the jurisdiction of the MSRB. The MSRB's jurisdiction extends to dealers or municipal advisors with respect to all their municipal fund securities and municipal advisory activities. Consequently, underwriters of "direct-sold"

dealers with respect to their municipal fund securities activities. The SEC, in its order approving Rule G-45 stated:

> The Commission believes that the MSRB, in its response letter, has adequately addressed issues raised by commenters. Namely, with regard to questions regarding the MSRB's jurisdiction, the Commission agrees that Section 15B(b)(2) of the Act authorizes the MSRB to adopt rules to effect the purpose of the Act concerning transactions in municipal securities effected by dealers. As the MSRB noted in its response letter, the Commission has previously stated that interests in 529 plans are considered to be municipal securities. [footnotes omitted]. [24]

As the Commission agreed, each entity must make its own determination as to whether its activity would qualify as "underwriting" activity as that term is defined in Rule 15c2-12(f)(8) under the Exchange Act.[25]

b. Program managers and others may be dealers and underwriters to plans

The MSRB has made clear that program managers and other contractors may be dealers and underwriters and thus required to file under Rule G-45. In its previous discussions about the application of Rule G-45 to dealers, the MSRB has stated that the activities of an entity may cause that entity to be within the definition of dealer and/or underwriter set forth in the Act or rules thereunder and thus subject to Rule G-45. For example, in its letter responding to comments received relating to Rule G-45, the MSRB stated that:

> Depending on its activities, an entity involved in the administration of a 529 plan might be a "broker" under Section 3(a)(4) of the Exchange Act, which defines a "broker" as any person engaged in the business of effecting transactions for others.[26]

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and "advisor-sold" plans must submit information required by the proposed rule change to the MSRB.

See File No. SR-MSRB-2013-14 (June 10, 2013).

24 See note 21, supra.

25 See note 21, supra (the "Commission agrees with the MSRB that whether a firm is an underwriter will require an individual analysis of the particular facts").

26 Letter to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission from Lawrence P. Sandor, Deputy General Counsel, Municipal Securities Rulemaking Board, dated Jan. 14, 2014 (the "January letter").

The MSRB continued to explain in that letter that program managers or their designees typically market interests in plans to investors, solicit transactions in plans, and handle customer funds and securities.[27] The MSRB noted that 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, including processing enrollment funds.[28]

The MSRB has explained on numerous occasions that a program manager or its affiliate or contractor could, depending on the facts and circumstances, be an underwriter under Rule G-45,[29] which incorporates and should be interpreted in the same manner as the definition of an underwriter under Rule 15c2-12(f)(8) pursuant to the Exchange Act.[30] Consequently, if an entity is a dealer and underwriter as defined by the Exchange Act, it is required to submit data under Rule G-45.

c. Underwriters are complying with their obligations under Rule G-45

The MSRB began to collect data under Rule G-45 beginning with the semi-annual reporting period ending June 30, 2015. The MSRB has received submissions from underwriters for five reporting periods, and has every reason to believe that there is widespread compliance by underwriters with their reporting obligations under Rule G-45.

d. The underwriting fee would not burden competition as it would be assessed on all underwriters to plans.

The predominant objection of commenters is that the underwriting fee would present an unfair burden on competition because it only would be assessed on underwriters to advisor-sold plans.[31] This simply is not the case as the fee would apply to all underwriters to plans.

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27 January letter at 5-6.

28 Id.

29 See, e.g., January letter; MSRB Notice 2012-59 (Nov. 23, 2012).

30 Rule 15c2-12(f)(8) provides, in part, that "any person who has purchased from an issuer of municipal securities with a view to, or 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.

31 A variation on this argument is that to the extent a state offers both an advisor-sold plan and a direct-sold plan, the advisor-sold plan would be disadvantaged by the underwriting fee. See ICI letter at 6.

As discussed previously, the MSRB's jurisdiction extends to all underwriters to plans, regardless of the marketing channel through which interests in such plans are distributed. To the extent that an entity is within the definition of an underwriter set forth in Rule 15c2-12(f)(8) under the Exchange Act, that entity must submit data to the MSRB under Rule G-45. The MSRB believes that underwriters are complying with their reporting obligations under Rule G-45, and thus the fee would affect all underwriters to plans.[32]

B. Susequehanna can be distinguished from this rulemaking

Commenters submit that, if the SEC does not abrogate or disapprove the underwriting fee, the SEC should issue its order consistent with the findings of the United States Court of Appeals in Susquehanna International Group, LLP, et al. v. SEC.[33] However, unlike in Susquehanna where the SEC approved the rulemaking pursuant to the approval process set forth in Section 19(b)(a)(2) of the Exchange Act,[34] the proposed rule change, as establishing a fee imposed by a self-regulatory organization on any person, was specifically excepted from that approval process pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[35] and paragraph (f)(2) of Rule 19b-4 thereunder.[36]

In Susquehanna, the court held that the SEC must undertake its own reasoned analysis of a self-regulatory organization's rulemaking proposal to determine whether the proposal satisfies the reasoned decision making required by the Exchange Act and the Administrative Procedures Act. However, consistent with the Exchange Act, the rulemaking relating to the underwriting fee was effective immediately, without the making of any particular finding by the SEC.

The MSRB sets forth below various additional comments the SEC received and the MSRB's response to those comments.

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32 Further, as commenters correctly noted, the MSRB's Policy on the Use of Economic Analysis in MSRB Rulemaking, available at http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx, does not apply to rulemaking for which the MSRB seeks immediate effectiveness. Nevertheless, for those rulemaking, the MSRB usually focuses exclusively its examination on the burden of competition on regulated entities. As discussed above, the de minimis underwriting fee would be assessed on all underwriters to plans and would not burden competition.

33 Susquehanna International Group, LLP, et al. v. SEC, No. 16-1601 (D.C. Cir. 2017) ("Susquehanna").

34 15 U.S.C. 78s(a)(2).

35 15 U.S.C. 78s(b)(3)(A)(ii).

36 17 CFR 240.19b-4(f)(2).

Comment: Section 15B(b)(2)(C) of the Exchange Act prohibits the MSRB from adopting any rule that is designed to permit unfair discrimination among customers, municipal entities, obligated persons, municipal securities brokers, municipal securities dealers or municipal advisors . . . or to impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act. Therefore, to determine that a fee is consistent with the MSRB's rulemaking authority, a thorough economic analysis of the fee or its impact must be undertaken.[37]

Response: Commenter is incorrect. The statutory basis for the underwriting fee is Section 15B(b)(2)(J) of the Exchange Act.[38] Section 15B(b)(2)(J)[39] requires, in part, that the MSRB's rules shall provide that each dealer shall pay to the MSRB such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the MSRB and that such rules shall specify the amount of such fees and charges. As described in more detail in the proposed rule change and above,[40] the MSRB believes that the underwriting fee is necessary and appropriate to fund the operation and administration of the MSRB and would achieve a more equitable balance among regulated entities and a fairer allocation of the expenses of the regulatory activities, system development, and operation activities undertaken by the MSRB.

In addition, the MSRB's Policy on the Use of Economic Analysis in MSRB Rulemaking does not apply to rulemaking for which the MSRB seeks immediate effectiveness. Nevertheless, as noted in the proposed rule change, the MSRB conducted a limited economic analysis of the proposed rule change. The MSRB submits that a thorough economic analysis is not warranted. Rule A-13 prohibits underwriters from passing through the underwriting fee to issuers and the amount of the underwriting fee is de minimis.

Comment: The underwriting fee is discriminatory and will unduly burden competition and, as a result, is not consistent with the MSRB's rulemaking authority under the Exchange Act because it will not be de minimis.[41] There are no de minimis fees when it comes to 529 plans because of their low profit margins.

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37 See ICI letter at 2-3. The MSRB notes that commenters, except for SIFMA, generally agreed with all or some of the main concepts of the comments submitted by the ICI. Citations, however, are to the ICI letter as the primary author of the comment.

38 15 U.S.C. 78o-4(b)(2)(J).

39 Id.

40 See File No. SR-MSRB-2017-05 (Jul. 19, 2017) and Section II, A. above.

41 See ICI letter at 2-3 and 10.

Response: The MSRB disagrees. The underwriting fee is de minimis. See Section II, A., above. Further, commenter states that there are low profit margins associated with 529 plans, but commenter does not explain for which of the numerous entities typically associated with 529 plans the low profit margins apply. In addition, the MSRB considers it to be inherently unfair that other MSRB regulated entities should indefinitely and unreasonably subsidize the cost of the MSRB's activities relating to dealers to plans and the protection of investors in those plans while underwriters to plans only minimally contribute to the operating and administrating of the MSRB.

Comment: Rule A-13 will unduly burden underwriters to plans because they cannot pass the amount of that fee onto issuers.[42]

Response: The MSRB disagrees. Any fee, even a fee of one-half cent per $1,000 of plan assets, will increase an underwriter's costs. Nevertheless, the underwriting fee is de minimis and will not unduly burden underwriters. See Section II, A., above. Further, Rule A-13 has long prohibited dealers from charging and passing through the fees required by the rule to an issuer of municipal securities, and the SEC has approved fees, such as the transaction and technology assessments, under Rule A-13 that are subject to that prohibition.[43] Therefore, the application of Rule A-13(f) is consistent with MSRB rules and with Commission precedent.

Comment: The MSRB's activities cited in its proposed rule change do not provide a basis for imposing the new fee.[44]

Response: Commenter appears to argue that the MSRB's past activities need to justify the proposed rule change to adopt a prospective fee, and that each area of past activity alone must

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[42] Id. at 4 and 13-14.

[43] See, e.g., Exchange Act Release No. 63621 (December 29, 2010) (File No. SR-MSRB-2010-10) (order approving technology fee on inter-dealer sales and customer sales).

As noted in the proposed rule change, for over twenty years, the MSRB has stated that:

> the fees paid to the Board under rule A-13 should be characterized by dealers to issuers no differently than the annual fees paid to the Board . . . [under Rule A-12] and any other "overhead" expenses that are incurred by virtue of the dealer engaging in municipal securities business.

Exchange Act Release No. 34601 (Aug. 25, 1994), 59 FR 169 (Sept. 1, 1994) (File No. SR-MSRB-94-12).

[44] ICI letter at 4 and 13-14.

justify the proposed rule change. The MSRB has engaged in the activities with respect to plans for which it has been charged under the Exchange Act and to fulfill its mission, and has been doing so since 1999. However, past activities are not needed to justify the reasonableness of a solely prospective fee. See Section II, A., above.

Comment: The underwriting fee will not be assessed in a manner that is comparable to how the Commission assesses mutual fund registration fees.[45]

Response: Commenter appears to not fully understand the context of the MSRB's statement in the proposed rule change. The MSRB statement related to how the underwriting fee, like Rule 24f-2 fees, would be calculated and paid in arrears rather than upfront; the MSRB's statement was not intended to compare the substance and nature of the two fees. A fee to register securities, by its very nature, differs from an underwriting fee. An underwriting fee is not a fee used to register mutual fund shares, or shares of any security, and thus, the amount and manner in which the underwriting fee is assessed differs from a registration fee. See Section II, A., above.

Comment: The MSRB's Series 50 exam does not address 529 plans.[46]

Response: The MSRB disagrees. Section 2.2.3. of Series 50 outline entitled "Municipal Fund Securities (Local Government Investment Pools (LGIP) and 529 College Savings Plans)" addresses plans.

Comment: It seems unfair to charge a fee on the amount of plan assets reported on Form G-45, when that amount may bear no relationship to the underwriting activities undertaken by the dealer underwriter.[47]

Response: The MSRB strives to use metrics in developing its fees that would be fair and reasonable. See Section II, A., above. The title of the "underwriting fee" is a convenient short-hand, in that it is a fee imposed on underwriters, while the more relevant matters are the purpose of that fee, i.e., to defray the costs of operating and administering the MSRB, and the de minimis amount of the underwriting fee.

Comment: Larger plans do not necessitate larger fees.[48]

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45 Id. at 11-12.

46 Id. at 16-17.

47 SIFMA letter at 2.

48 Id. at 3; First National letter at 2.

Response: The MSRB strives to use metrics in developing its fees that would be fair and reasonable. Thus, the MSRB adjusted the rate used to assess the fee to apply equally relative to plan assets. The MSRB believes that an underwriter to a larger plan as well as the investors in that plan, benefit proportionally from MSRB regulation. See Section II, A., above.

Comment: The MSRB is urged to engage in fiscal prudence to reduce its fees on broker dealers in light of any new fee on 529 plan underwriters.[49]

Response: The MSRB appreciates commenter's concerns, and will consider commenter's concerns in its ongoing analysis of the MSRB's sources of funding.

Comment: The MSRB's Economic Analysis Policy should not exempt the MSRB from conducting a full economic analysis for rules that qualify for immediate effectiveness.[50]

Response: As noted in the proposed rule change, the MSRB did conduct a limited economic analysis about the underwriting fee. See response to the first comment, above. Nevertheless, the MSRB appreciates commenter's concerns, and will consider those concerns in the future as the MSRB refines its Policy on the Use of Economic Analysis in MSRB Rulemaking.

Comment: We do not believe that the MSRB's revised mission (i.e., the MSRB's mission post Dodd-Frank) should interfere with or directly and unduly influence matters of state and local governments. The proposed fee on 529 plan municipal fund securities is an example of such interference and undue influence, particularly in this proposal where questionable opportunity was provided to state governments to review and comment on the fee before it was adopted.[51]

Response: The MSRB fully recognizes and respects the roles of state and local governments.

The MSRB's statutory mandate includes the protection of municipal entities and obligated persons. However, the MSRB has no regulatory authority over municipal entities and obligated persons. Rather, as discussed in Section II, A., above, the MSRB has jurisdiction over brokers, dealers, municipal securities dealers and municipal advisors in relation to their municipal securities and municipal advisory activities.

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49 SIFMA letter at 3.

50 Id. at 4.

51 GFOA letter at 1.

The underwriting fee would be assessed on dealers that are underwriters to plans, not municipal entities or on interests in the plans themselves, and the MSRB believes that the underwriting fee is necessary and appropriate to fund the operation and administration of the MSRB and that the underwriting fee satisfies the requirements of Section 15B(b)(2)(J) of the Exchange Act.[52] See Section II, A., above.

Comment: Service providers, like all businesses, incorporate regulatory compliance costs into their compliance costs, and ultimately into their service fees.

Response: As noted in the responses above and in the proposed rule change, similar to the other fees currently assessed under Rule A-13 **(**i.e., the underwriting fee, the transaction fee, and the technology fee) an underwriter is prohibited from passing through the underwriting fee to the plan issuer. Furthermore, the amount of the underwriting fee is de minimis.

Comment: The proposal also includes a transaction fee, and commenter trusts that the Commission will recognize that 529 plans encourage periodic savings, as both an affordable and prudent practice.

Response: The MSRB appreciates the comments provided and recognizes the important public policies that led to the creation of plans under the Code. There is no transaction fee included in the proposed rule change.

III. Conclusion

In summary, the proposed rule change would impose a de minimis fee on underwriters to plans to defray the costs of operating and administering the MSRB, as well as to allocate the costs associated with MSRB regulation directly to those entities being regulated rather than having other regulated entities indefinitely and unreasonably subsidize the MSRB's activities relating to the plan industry, an industry that has $276 billion in assets.[53]

If you have any questions, please feel free to contact me at 202.838.1500.

Sincerely,

Pamela K. Ellis /fs

Pamela K. Ellis
Associate General Counsel

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52 15 U.S.C. 78o-4(b)(2)(J).

53 See note 8, supra.