INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

August 26, 2019

Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: MSRB Rule G-17 Guidance
File No. SR-MSRB-2019-10

Dear Ms. Countryman:

The Investment Company Institute (ICI)[1] appreciates the opportunity to comment on the proposal of the Municipal Securities Rulemaking Board (MSRB) to revise its Interpretive Notice ("Notice") providing guidance concerning underwriters' fair dealing duties under MSRB Rule G-17.[2] In large part, the MSRB proposal will update its 2012 Interpretive Notice on this topic "in light of its implementation in the market since its first adoption and current market practices."[3] This revision also, however, will fulfill the MSRB's duty under the Dodd-Frank Wall Street Reform and Consumer Protection Act to "protect municipal entities."[4]

---

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, unit investment trusts (UITs), and 529 plans in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$23.3 trillion in the United States, serving more than 100 million US shareholders, and US$6.9 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] *See Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to Amend and Restate the MSRB's August 2, 2012 Interpretive Notice Concerning the Application of Rule G-17 to Underwriters of Municipal Securities,* SEC Release No. 34-86572; File No. SR-MSRB-2019-19 (August 5, 2019)("Release").

[3] Release at p. 1.

[4] Release at p. 341.

The Institute supports the MSRB's proposal. We also commend the MSRB for working with market participants to develop its contents. Prior to filing this proposed Notice, the MSRB conducted a retrospective review of the MSRB's 2012 notice and, based on the comments received, published this revision. While the Institute supports adoption of the Notice, we recommend a few changes to clarify its application to underwritings involving municipal fund securities, *i.e.,* 529 college savings plans and ABLE Act programs.[5] These recommended changes, which are detailed below, do not appear to have been previously raised or addressed in the MSRB's review of its 2012 notice.

MUNICIPAL FUND SECURITIES UNDERWRITINGS

When the MSRB adopted a definition of "municipal fund security" in 2001, it did so to recognize the fact that 529 plan offerings are significantly different from bond underwritings. Indeed, but for the fact that the issuer of a 529 plan is a government entity, such offering would be treated as a publicly offered fund under the Federal securities law (*e.g.,* as a mutual fund) and regulated by the SEC rather than by the MSRB.[6] This is relevant to the MSRB's proposed Notice because 529 plan offerings differ from bond offerings in their underwritings. Like a mutual fund, a 529 plan typically has a single underwriter. Depending upon its arrangement with the 529 plan, the plan's underwriter may be charged with selling the plan to investors or entering into sales distribution arrangements with retail distributors (*i.e.,* municipal securities dealers) to do so. Or, there may be a combination of these two options. Also, like mutual funds, offerings of municipal fund securities are (1) continuous and not for a fixed amount as in a bond offering; and (2) priced based on the plan's net asset value and not on what the issuer and underwriter believe to be a "fair and reasonable" price.

The proposed Notice includes an "Applicability" section. In part, this section will clarify that the Notice will apply "to a dealer serving as a primary distributor (but not to dealers serving solely as selling dealers) in a continuous offering of municipal fund securities, such as interests in 529 plans and [ABLE Act] programs." We concur with the need for this statement to ensure that there is no doubt that the Notice applies to such underwritings. Nevertheless, in addition to this statement, the Notice should provide additional guidance regarding its application to underwriters of 529 plans. This is necessary because, while a great deal of the MSRB's proposal is applicable to all underwriters subject to the

[5] As defined in MSRB Rule D-12, "municipal fund security" means "a municipal security 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." The most common municipal fund securities are the states' 529 college savings plans and their Achieving a Better Life Experience (ABLE) Act programs. As used in this letter, the reference to 529 plans as municipal fund securities is intended to include underwritings involving ABLE Act programs.

[6] *See* SEC Release No. 34-43066; File No. SR-MSRB-00-06 (July 21, 2000).

MSRB's jurisdiction, this is not the case with many of the required disclosures, which do not appear applicable to or suitable for 529 plans due to the nature of their underwritings.

Examples of such disclosures that would not be relevant, and in fact would be confusing, include, but are not limited to, provisions in the Notice that would require an underwriter to disclose that: the underwriter's primary role "is to purchase securities;" the underwriter "has a duty to purchase securities from the issuer at a fair and reasonable price;" and the underwriter's compensation "is contingent on the closing of the transaction." Other disclosure in the Notice that also would be irrelevant to 529 plans include those that relate to credit default swaps and complex municipal securities financing. We recommend the MSRB revise the Notice as indicated below to clarify the inapplicability of certain "required disclosures" to underwriters of 529 plans. Absent such changes, there will be uncertainty regarding appropriate disclosures under the Notice for underwriters of 529 plans and ABLE Act programs.

RECOMMENDED REVISIONS TO THE PROPOSED NOTICE

As noted above, the "Applicability of the Notice" section will expressly state that it applies to 529 plans. We support generally subjecting 529 plan underwriters to the Notice. However, the MSRB should add additional disclosure to the Notice to distinguish the disclosure required of 529 underwriters from those required of bond offering underwriters. In particular, we recommend the following revisions to the Notice:[7]

- **Disclosures Concerning the Underwriter's Role.** We recommend that this section of the Notice be revised as follows:

  > The sole underwriter or the syndicate manager must<u>, to the extent applicable to the nature of the relationship with the issuer,</u> disclose to the issuer that:

  We believe adding this phrase to the disclosure section will provide 529 plan underwriters the flexibility they need to more accurately tailor their disclosure while ensuring that appropriate disclosures are provided to issuers. The Notice also should clarify that 529 plan underwriters are not required to disclose information that, though applicable to an offering of bonds, is not applicable to an offering involving a 529 plan or ABLE Act program.

- **Required Disclosures to Issuers.** This section of the Notice will govern disclosures relating to non-routine complex municipal securities financing structures. Because the "required disclosures" in this section of the Notice would not appear applicable to offerings of 529 plans,

[7] In the following recommendations, <u>underscored</u> language indicates language we recommend be added to the Notice. Overstricken language indicates language we recommend be deleted.

which do not have the complex financial structures described in this section, the heading to this section should be revised to indicate that it applies only to certain underwriters:

> **Required Disclosures ~~to Issuers~~ Relating to Underwritings Involving Complex Financing Structures**

This revision should help underwriters, such as 529 plan underwriters, understand that they are not required to provide the "required disclosures" if the offering does not involve complex financing structures.

- **Fair Pricing.** This section of the Notice relates to the disclosures required in connection with the "implied representation" of Rule G-17 "that the price an underwriter pays to an issuer is fair and reasonable." As such, it would not fit the "pricing" of 529 plan offerings, which are calculated based on net asset value. Accordingly, we recommend that the first sentence of this section of the Notice be revised to read:

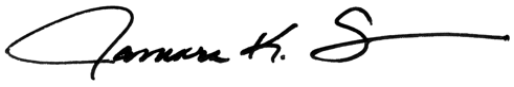
> The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer in connection with an offering that does not involve municipal funds securities is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.

This amendment is intended to acknowledge that the fair pricing obligation applicable to bond offerings is not applicable to offerings of 529 plans due to the manner in which the securities from such plans are priced.

◆ ◆ ◆ ◆

The Institute appreciates the opportunity to provide these comments to the Commission on the MSRB's proposed Notice. If you have any questions concerning our comments or recommendations, please do not hesitate to contact the undersigned by email ([redacted]) or phone ([redacted]).

Sincerely,



Tamara K. Salmon
Associate General Counsel