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August 31, 2011

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

Re: Notice 2011-33, Request for Comment on Plan to Collect Information on 529 College Savings Plans

Dear Mr. Smith:

This comment letter, which responds to MSRB Notice 2011-33, *Request for Comment on Plan to Collect Information on 529 College Savings Plans* (the "Notice"), is submitted on behalf of a number of Sutherland clients that are primary distributors. Our clients appreciate the Municipal Securities Rulemaking Board's (the "MSRB") continuing efforts to improve the regulatory scheme governing broker-dealers distributing 529 college savings plans ("529 Plans"). The MSRB's efforts have enabled it to effectively and efficiently regulate the brokerage industry's distribution of 529 Plans. However, as discussed below, our clients strongly question the value of using the MSRB's Electronic Municipal Market Access ("EMMA") system to collect and disseminate market data regarding 529 Plans. While this type of system provides tremendous value to both the MSRB and to market participants in the context of municipal bonds, there are a number of reasons to question its value in the context of 529 Plans.

Nature of the Information Collected Will Not Aid Investors

The MSRB's plan would require brokers, dealers, and municipal securities dealers ("broker-dealers"), acting in the capacity of underwriters ("primary distributors") of 529 Plans, to submit to the MSRB on a quarterly basis certain market information about the 529 Plans they distribute. The information would include total plan assets, quarterly contributions and withdrawals, total number of active accounts, and total rollover distributions. In addition, primary distributors would submit aggregate information regarding the assets in the underlying investment portfolios. The Notice states that the "MSRB would utilize this information to better understand the market for 529 plans and monitor the growth rate, composition, and size of individual plans and the industry as a whole, to inform our activities as the regulator of dealers in this market."

The foregoing indicates that one of the primary purposes of requiring the submission of market data is for the MSRB to better understand the market for 529 Plans and to monitor individual plans and the industry as a whole. However, the Notice fails to provide a compelling rationale as to why such

information should be disseminated to any party other than the MSRB. The MSRB asserts, without support, that:

The MSRB believes that it is important to collect additional information about 529 plans both to improve meaningful free public access to such information and to assist the MSRB in better understanding the market for 529 plans, in order to inform our activities. The MSRB also believes that it is important to collect such information in a manner that allows for an efficient and effective search for such information on EMMA and on a schedule that assures that such information reflects current activities.

Our clients reject the notion that the information sought to be collected and disseminated would be of any real value to investors contemplating a 529 Plan purchase or sale. In pointing to the difference in the current collection and dissemination of market data between municipal bonds and 529 Plans, the MSRB overlooks a fundamental and crucial difference between the two: the prices of municipal bonds are set by the market, which means investors benefit from increased access to real time market data. In contrast, the prices of 529 Plans are based, in the case of portfolios that invest in mutual funds, on the net asset value of the underlying mutual funds. Where a 529 Plan portfolio invests in other instruments, such as bank certificates of deposit or guaranteed investment contracts, the value of the 529 Plan portfolio is dependent upon the terms and conditions of the corresponding instrument. The Notice thus fails to recognize that there simply is no market data that is comparable to the market data currently available on EMMA for municipal bonds (e.g., maturity schedules, interest rates, and initial offering price, trade price information, interest rate reset information, information about liquidity providers, key liquidity documents for variable rate demand obligations, auction results, order information, and key documentation concerning the auction process for auction rate securities). In the case of municipal bonds, any of the foregoing data points can have a material impact on the value of a given bond and the value of a customer's investment. This is because the prices of the bonds are set by the market and impacted by market events. As a result, the information on EMMA can be of tremendous importance to bond investors.

In contrast, in the case of 529 Plans, none of the data points proposed to be filed with and disseminated by the MSRB (e.g., total aggregate assets held in 529 plans, total assets held in each 529 plan, reported on a quarterly basis, types of underlying investment portfolios available in each 529 plan and total assets invested in each such portfolio, total quarterly contributions in dollars to each 529 plan and to each underlying investment portfolio, total quarterly withdrawals in dollars from each 529 plan and from each underlying investment portfolio) can ever impact the value of an underlying mutual fund, bank certificate of deposit, guaranteed investment contract or any other instrument. The appearance of such data on the MSRB website would suggest to investors that this information is material to their investment decisions. In fact, our clients believe that none of this data should materially influence an investor's investment decision.

The presentation of this information to investors and potential investors has a significant chance of actually misleading investors. For example, significant inflows might lead investors to believe a given 529 Plan is a good investment. In contrast, outflows might lead investors to believe that a particular 529 Plan is not a good investment simply because it has significant outflows. However, there may be a number of reasons for inflows and outflows of money into and out of a 529 Plan. For instance, inflows could be the result of significant marketing campaigns that many 529 Plans operate in the last

quarter of the year or around April 15th of each year. Similarly, outflows could be the result of the need to pay for college tuition. Without a substantive context in which to analyze this data, this information may well mislead investors. And even if it does not, our clients do not believe that this information is the type of information that ought to be considered by a reasonable investor as it is completely divorced from the terms and characteristics of 529 Plans and merely reflects movement of funds.

Similarly, some of the data would not be very meaningful to the MSRB. For instance, the MSRB itself would be unable to determine, from aggregate withdrawal data, the basis for a withdrawal — *i.e.*, whether assets were withdrawn to cover qualified higher educational expenses, for non-qualified purposes, or rolled-over to another plan or portfolio. If an investor is in an age-based plan or a plan that periodically reallocates the investor's 529 plan assets, this would result in a withdrawal from one plan or portfolio and a contribution to another. Accordingly, it is not clear how receiving aggregate information regarding withdrawals would provide the MSRB any information that could be useful in its regulatory efforts.

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

The Data Collected Will Be Incomplete

There is another very significant difference between the municipal bond market and 529 Plans, which significantly decreases the value of the information sought to be obtained under the Notice (for both the MSRB and investors). Unlike the municipal bonds market, many 529 Plans are not offered and sold through broker-dealers, and therefore not subject to the jurisdiction of the MSRB. This difference is very important in the context of the data sought to be collected and disseminated by the MSRB in the Notice; because the data filed with the MSRB will not include direct-sold 529 Plans, the data will be substantially incomplete. In fact, as of the end of the first quarter of 2011, only 51% of 529 Plan assets were held in broker-sold accounts, according to Financial Research Corp., and this percentage has been decreasing in recent years.¹

Accordingly, the data obtained by the MSRB will only represent approximately half of the assets in the 529 Plan industry. Any policy decisions made by the MSRB that relies on this data, then, would run the risk of being ineffective, or worse, detrimental to the investing public. In addition, if the information were disseminated to the public, investors understandably would be confused by the MSRB

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

website reporting different figures than that reported by other websites, such as College Savings Plan Network ("CSPN"). This could cause investors to question the reliability of the data provided by the MSRB, since it may not be nearly as accurate as the information collected by CSPN. Our clients also note that there is a significant amount of data regarding 529 Plans currently available in the marketplace, such as through CSPN's website, CollegeSavings.org, Savingforcollege.com and websites for each State's 529 Plan(s). Relevant, meaningful 529 Plan level data currently is publicly available on 529 Plan websites, in offering materials, and on other publicly available websites. This data may include assets under management, total number of account owners, available investment options, fees, investment performance and tax considerations. Thus, our clients believe there already is ample, detailed and credible information on 529 Plans available to the marketplace.

In addition, since the requirements for disclosure of information to the public are generally determined at a State level, each 529 Plan treats its portfolio level data differently. Accordingly, significant and costly systems modifications may be required to provide the requested data in a uniform manner. In this respect, the MSRB has offered no data supportive of the notion that the benefits to the MSRB or to the public outweigh the systems collection and dissemination costs that will be incurred by primary distributors of 529 Plans. And while a cost-benefit analysis may not be required, our clients question the wisdom of any regulatory burden that cannot satisfy this burden.

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

Failure to Provide an Adequate Rationale for Seeking the Filing of Information

While the MSRB believes that the requested information "would be useful to the MSRB and to investors," our clients disagree. As noted above, they believe that the presentation of raw data, at best, will be of little or no use to investors, and at worse, will harm investors by putting undue emphasis on data that does not afford an understanding or appreciation of the context underlying the data. Additionally, while our clients appreciate the MSRB's desire to learn more information about the 529 Plan marketplace, there is an unsubstantiated assumption in the Notice that possessing the requested data would improve the MSRB's regulatory efforts. Our clients believe that the MSRB should, before requiring the filing of the data, first support the notion that the requested information will in fact aid it in regulating the 529 Plan industry, particularly since the data will provide a such a limited, and perhaps skewed, snapshot of the industry. Until the MSRB satisfies this burden, our clients believe it would be premature for it to impose a substantial burden on the industry to obtain, review, and report the information.

The Primary Distributor Often Does Not Have the Data

In many 529 Plans, the type of information sought to be filed with and distributed by the MSRB is deemed to be proprietary information of the State instrumentality issuing the 529 Plan. Furthermore, primary distributors of many 529 Plans do not maintain or have access to the information sought to be obtained by the MSRB; instead, this information often is maintained by the 529 Plan record keeper. The record keeper, in turn, reports some or all of the data subject to the Notice to the State instrumentality

issuing the 529 Plan. In this respect, a review of some of the data points requested in the Notice reveals that much of this data is actually divorced from the sales process and the activities of a primary distributor. For instance, total aggregate assets held in 529 Plans is impacted by performance as well as by withdrawals, which are often processed through a selling broker-dealer and/or the record keeper, but not through the primary distributor. The same is true with respect to the total assets held in each 529 plan and the total assets invested in each portfolio. Similarly, after the initial purchase of a 529 Plan, the primary distributor typically has no role in processing subsequent contributions or withdrawals.

Accordingly, many primary distributors do not have access to the information requested by the Notice and currently have no authority to obtain such information from the 529 Plan record keeper. Such record keepers are under no obligation to provide such information, and in fact, may well violate their contractual agreements if they were to provide such information to the primary distributor. Accordingly, many primary distributors would have to obtain permission from the State instrumentality issuing the 529 Plan to obtain such information from the record keeper and then the record keeper would have to be willing to provide such information. Once these steps were taken, the primary distributor likely would have to pay the 529 Plan record keeper to obtain such information, thus adding to the burden imposed on the primary distributor by the proposal under the Notice.

Our clients request that the MSRB provide guidance in cases where the primary distributor seeks permission from the State instrumentality and asks the record keeper for the requested data but the State instrumentality is not willing to grant permission or the record keeper is not willing to provide the data. In such instances, it is not clear what the primary distributor can do since it has no authority to mandate the State instrumentality to grant permission or to require the record keeper to obtain and provide the requested data. Our clients therefore submit that if the MSRB were to proceed with the proposal discussed in the Notice that primary distributors be required only to make reasonable efforts to obtain such information if they do not maintain such information themselves. Any rulemaking adopted by the MSRB following the Proposal should explicitly note that primary distributors will not be subject to regulatory action for failing to obtain the requested data if they make reasonable efforts to obtain the data when such data is maintained by a third party.

Frequency of Filing the Information

The information the MSRB seeks is intended, in large part, to better inform the MSRB's regulatory efforts. Accordingly, if the MSRB were inclined to proceed with the proposal discussed in the Notice, we suggest that the information be obtained no more frequently than semi-annually. The new regulatory filing requirement will result in filers incurring increased costs to obtain, produce, review, and file the required information. More frequent filing is not warranted given the nature of the information that will be provided; unlike the data reported on EMMA related to municipal bonds, it is not market moving information or information that otherwise warrants more frequent submission. In addition, to provide filers ample time to gather, review, and report the information to EMMA, we recommend that the MSRB provide filers 75 days after the end of the semi-annual reporting period to submit the information to EMMA. This lag would appropriately accommodate primary distributors' operational and filing processes without adversely impacting the MSRB or the public.

Comparability of 529 Plans' Fee Information

Showing fees, without context, could mislead investors. A comparison of fees alone, without the additional detail included in the fee tables presented in current 529 Plan disclosure materials could mislead investors and places an undue emphasis on fees to the exclusion of other important investment metrics. And, as noted above, in the broker-sold market, it would be unusual for a customer relying on a registered representative for advice to review and analyze information on EMMA comparing multiple 529 Plans.

Disseminating Plan Disclosure Documents Electronically

Our clients are very supportive of a MSRB rule change that would permit the dissemination of 529 Plan disclosure documents electronically, so that broker-dealers could advise customers that the Official Statement is available for free electronically and that a printed version would be provided to the customer upon request. The time to implement an access equals mechanism for the 529 Plan marketplace is long overdue. Official Statement delivery requirements should be able to be satisfied via postings on the 529 Plan's website and/or EMMA. Offering materials are already being provided in an electronic format and a growing number of investors enroll and view their account information online. Dissemination of 529 Plan disclosure documents in electronic form can benefit investors in several ways. For instance, electronic versions of documents are searchable, available 24/7 from any place in the world, current and printable only when needed. In addition, electronic delivery can reduce printing and mailing costs, which might otherwise ultimately be passed on to investors.

In addition, adoption of a default e-delivery standard is consistent with the requirements of Executive Order 13563 ("Order") which, while not applicable to the MSRB, should guide its regulatory practices, just as it does federal agencies.² The Order mandates in pertinent part that federal agencies:

- "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. [Our regulatory system] must take into account benefits and costs...It must ensure that regulations are accessible..."
- "tailor its regulations to impose the least burden on society..."
- "select in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental [benefits]..."³

A default e-delivery standard meets each of these requirements—it is innovative, less burdensome, cost effective, easily accessible and almost has no effect on the environment. The Order itself further highlights the ubiquity of the Internet, specifically referencing the Internet as a powerful medium for federal agencies to use when discussing proposed regulations with the public. We believe the Order's acceptance of the Internet as a mainstream communication tool is equally well founded for delivering financial information. For instance, the Investment Company Institute found in a recent study that 90%

² Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011).

³ Order, 76 Fed. Reg. at 3821.

of U.S. households owning mutual funds had Internet access, and of this group 93% used the Internet to obtain access to e-mail and 82% used the Internet for financial purposes.⁴

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

Very truly yours,

A handwritten signature in cursive script that reads "Michael Koffler". The signature is written in dark ink and is positioned above the printed name.

Michael Koffler

⁴ 2010 Investment Company Fact Book 50th Edition, *A Review of Trends and Activity in the Investment Company Industry*, Pages 90-91, available at www.icifactbook.org.