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January 13, 2014

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

Re: MSRB Notice 2013-22 Relating to
Continuing Education Requirements

Dear Mr. Smith:

The Investment Company Institute (“ICI”)¹ appreciates the opportunity to provide comments to the Municipal Securities Rulemaking Board (MSRB) on its proposal to amend MSRB Rule G-3 relating to professional qualifications.² In particular, the rule would be revised to require unregistered associated persons to fulfill the “Firm Element” of the MSRB’s Continuing Education Program annually,³ require registered associated persons to fulfill a set amount of Firm Element training annually, limit the activities of associated persons who are registered in a limited capacity, and delete provisions in the rule relating to Financial Operations Principals (“FINOPs”).⁴ While the Institute supports those portions of the proposal that relate to limited representatives and FINOPs because they would better align the MSRB’s regulatory requirements with those of FINRA, we strongly oppose the proposed revisions to the Firm Element requirements.

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$16.3 trillion and serve more than 90 million shareholders.

² See *MSRB Proposes Changes to Continuing Education Program*, MSRB Regulatory Notice No. 2013-22 (Dec. 13, 2013) (the “Notice”), which is available at: <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2013-22.ashx?n=1>.

³ Pursuant to Rule G-3(h)(ii), the “Firm Element” portion of the continuing education requirement currently requires registered representatives who have direct contact with customers to participate in a training program that is tailored to the firm’s size, organizational structure, scope of business activities, and other factors. While registrants must annually evaluate and prioritize their training needs and develop a training program that satisfies the Firm Element requirements, they are not required to provide such training annually, nor are there mandatory training hours that must be fulfilled. The MSRB’s current rule is consistent with rules of other self-regulatory organizations (“SROs”) (*see, e.g.*, FINRA Rule 1250 and Rule 9.3A(c) of the Chicago Board Options Exchange (“CBOE”).

⁴ The Notice also proposes technical revisions to Rule G-7 (relating to recordkeeping) and Rule G-27 (relating to supervision) to accommodate the changes proposed to Rule G-3.

I. PROPOSED REVISIONS TO THE FIRM ELEMENT REQUIREMENTS

The Firm Element requirements in MSRB Rule G-3 currently apply only to a dealer's *registered* associated persons. The MSRB proposes to extend this requirement to *all* associated persons who are "primarily engaged" in municipal securities activities and require that such persons receive at least one hour of Firm Element training annually. As a preliminary matter, we oppose the manner in which the MSRB is unilaterally proposing substantive changes to its Firm Element requirements instead of working cooperatively with the other SROs through the Securities Industry Regulatory Council on Continuing Education (the "Council") to effect such changes. Indeed, the proposed amendments to the Firm Element requirements are inconsistent with the continuing education requirements developed by the Council and implemented by other SROs. We additionally oppose the proposed changes because of the lack of clarity regarding their application and because the proposal is not in line with the MSRB's recently announced *Policy on the Use of Economic Analysis in MSRB Rulemaking*.⁵ While we oppose the MSRB unilaterally revising the Firm Element requirements, until such time as the MSRB provides more complete information about the proposal and an economic analysis of it, we are unable to assess fully its impact on our members or provide substantive comment on its requirements. Each of these issues is discussed in more detail below.

A. The Proposal is Inconsistent with Other SROs' Requirements

The Institute has long advocated for and supported MSRB initiatives that better align the MSRB's rules and regulatory requirements with those of FINRA. This alignment is particularly important for our members that are dually registered with the MSRB and FINRA as a result of their activities as mutual fund underwriters and sponsors of state 529 college savings plans. Our members have both appreciated and benefited from the MSRB's efforts to ensure such regulatory consistency to the extent practicable. Unfortunately, the MSRB's current proposal is a significant deviation from that consistency. More importantly, it is a significant deviation from the uniform manner in which the other SROs have implemented continuing education requirements based on recommendations of the Council.

The Council is the successor organization to a Task Force on Continuing Education that was created in May 1993 under the sponsorship of the NASD (n/k/a FINRA), other SROs,⁶ the North American Securities Administrators Association, and the Securities Industry Association (n/k/a SIFMA) to study the issue of continuing education for securities professionals and develop

⁵ See *MSRB Adopts Policy for Integrating Economic Analysis into Rulemaking Process* MSRB Press Release (Sept. 26, 2013) announcing the MSRB's new *Policy on the Use of Economic Analysis in MSRB Rulemaking* ("Economic Analysis Policy"). The Economic Analysis Policy is available at: <http://www.msrb.org/About-MSRB/Financial-and-Other-Information/Financial-Policies/Economic-Analysis-Policy.aspx>.

⁶ These other SROs were the American Stock Exchange, CBOE, the MSRB, the New York Stock Exchange ("NYSE"), and the Philadelphia Stock Exchange.

recommendations. In September 1993, the Task Force published a report recommending an “industry-wide program for continuing education” that included a “Firm Element.”⁷ The Task Force’s Report also specifically discussed which securities professionals should be subject to the continuing education requirements:

. . . The Firm Element should be applicable to *registered* producing personnel in sales, trading, and investment banking positions who conduct business with customers (retail or institutional) and their first-level immediate supervisor. With this delineation, implementation of the [continuing education] program would be simplified, industry acceptance would be more easily achieved *and the desired benefits could be obtained*.⁸

To oversee ongoing implementation of the proposed continuing education requirements, the Task Force also recommended creation of a permanent industry/regulatory council on continuing education. Consistent with this recommendation, in November 1993, the Council was created “with specific advisory and consultative responsibilities for the Continuing Education Program” that had been recommended by the Task Force. The Council consisted of thirteen industry representatives and six SRO representatives.⁹ In August 1994, it published details of a proposed mandatory Continuing Education Program (“Program”) that included a Firm Element. The Council’s proposal was jointly proposed by the SROs, subsequently approved by the SEC, and uniformly implemented by the SROs. As noted in the SROs’ joint proposal, the purpose of this joint rulemaking was “to adopt *uniform* enabling rules for the implementation of a continuing education program for the securities industry.”¹⁰ Since its adoption, the Program has only applied to *registered* securities professionals as recommended by the Council.¹¹

⁷ See *Report and Recommendations of the Securities Industry Task Force on Continuing Education* (Sept. 1993) (“Task Force Report”).

⁸ Task Force Report at p. 7. (Emphasis added.)

⁹ Today, the Council consists of 18 industry representatives and representatives from three SROs (*i.e.*, FINRA, the CBOE, and the MSRB). In addition, FINRA and the SEC each have four liaisons to the Council.

¹⁰ See SEC Release No. 34-35102 (Dec. 15, 1994) at p. 2. The SROs participating in this rulemaking were the American Stock Exchange, CBOE, the Chicago Stock Exchange, the MSRB, the NASD, the NYSE, the Pacific Stock Exchange, and the Philadelphia Stock Exchange.

¹¹ To this day, the Council remains actively engaged in overseeing and making recommendations to the SROs regarding their uniform Programs. According to its website, it continues to meet quarterly to fulfill its mission to recommend updates to the SROs’ Programs and to “[promote] effective implementation of meaningful continuing education to the securities industry.” It also continues to publish twice a year a “Firm Element Advisory” to identify current regulatory and sales practice issues that registrants may want to consider including in their Firm Element training plans. For more about the Council’s ongoing activities, see http://www.cecouncil.com/the_council/activities_and_new_initiatives/ and <http://www.cecouncil.com/Documents/2011+Council+Status+Report.pdf>.

To our knowledge, the Council, which includes the MSRB among its members, has never recommended extending any portion of the continuing education requirements to persons who are not registered as securities professionals, nor has it mandated specific training hours for registered associated persons. Also, to our knowledge, in the past when the MSRB has proposed amendments to its continuing education requirements, such amendments have been consistent with recommendations of the Council and with similar amendments proposed by the other SROs.¹² Notwithstanding this, the MSRB has determined that its Firm Element requirements should be unilaterally revised to apply to *unregistered* persons and to mandate specific training hours for all persons subject to the Firm Element requirements. It does not appear as though the MSRB's proposal has been vetted by the Council; nor is it being proposed jointly with the other SROs in order to ensure uniformity in the continuing education requirements imposed on securities industry professionals.

Should the MSRB want to pursue an expansion of the Firm Element, we recommend that it begin the process through its membership on the Council to ensure that any changes made to its Program have wide support among the members of the Council, including those representing financial services firms. This would also ensure that other SROs are willing to implement similar changes to their programs as appropriate to preserve uniformity across the securities industry.

B. The Proposal is Unclear

According to the Notice, the Firm Element requirements would apply to all "covered persons that are primarily engaged in municipal securities activities, as described in Rule G-3(a)(i)."¹³ Identifying which of its associated persons are "primarily engaged in municipal securities activities" may be a relatively easy exercise for municipal securities dealers whose primary business consists of the offer and sale of municipal securities other than municipal fund securities. In the case of our members and other dealers whose municipal securities activities are limited to the offer and sale of municipal fund securities, such as 529 plan securities, this will be an incredibly difficult exercise. This is because our members' associated persons who are engaged in municipal securities activities and whom the MSRB hopes to capture in its proposal – *i.e.*, those "who work in the dealer's back and middle office and do not have direct contact with customers" – are likely involved in the processing of transactions involving both mutual fund shares and 529 plan securities. For the sake of efficiency, our members' 529 plan and mutual fund businesses tend to be integrated; transactions involving 529 plan securities are handled through the same systems and by the same back office and middle office personnel who process transactions involving mutual fund shares. As such, it would be very difficult, if not impossible, for our members to determine which back office and middle office personnel are "primarily engaged in

¹² See, e.g., SEC Release No. 34-39576 (Jan. 23, 1998), in which the MSRB proposed amendments to its Program that "will be adopted uniformly with rule changes of other SRO Council members . . ." Release at p. 2.

¹³ Notice at p. 4. MSRB Rule G-3 expressly excludes from the definition of "municipal securities representative" and "municipal securities sales limited representative" any person whose function is "solely clerical or ministerial."

municipal securities activities.” Unlike the existing Firm Element requirements, which are triggered by a person’s registration status, the MSRB’s proposed standard is not clear cut.

The MSRB’s standard for determining who is covered by the proposed requirement raises a variety of unresolved issues. In order to determine which of its employees are subject to this new requirement, a dealer presumably would first attempt to determine which of its employees are purely clerical or ministerial.¹⁴ After eliminating those employees, a dealer would then have to determine which of its remaining employees are “primarily engaged in municipal securities activities.” The MSRB’s proposal includes no guidance for dealers to use in making this determination. As such, it is impossible to know whether the determination should be based on: the number of hours a specific employee spends processing 529 plan transactions versus mutual fund transactions; the volume of 529 plan transactions a person processes versus mutual fund transactions processed; the amount of time spent designing and maintaining systems to process 529 plan securities versus mutual fund securities; all of the above; or, some other standard. Also, the period of time over which the dealer is to measure these activities to make the required determination is not specified.

Without more guidance as to how a dealer is to determine which of its associated persons are clerical and ministerial employees and which of the remaining unregistered associated persons are primarily engaged in municipal securities activities, it is impossible to determine with any degree of precision how the MSRB’s proposal will impact our members.¹⁵ In considering these issues, however, it bears noting that firms that operate their 529 plan and mutual fund businesses on an integrated basis likely do not track – or have systems designed to track – the type of information that could be used to determine which of their unregistered associated persons are “primarily engaged in municipal securities activities.”¹⁶

Our concerns with the vagueness of the MSRB’s proposal are not limited to determining which associated persons are subject to it. We also are concerned with how the proposal will impact dealers if one or more of their associated persons fail to satisfy the new Firm Element requirement. Currently, a registered associated person who fails to comply with the SROs’ continuing education requirements puts his or her registration status in jeopardy, as compliance is a requirement to maintain a registration.

¹⁴ The scope of this category also is unclear. For example, would a branch office receptionist that interacts with retail customers fall into this category?

¹⁵ Without greater clarity, we also do not believe that the MSRB can, with any degree of accuracy, assess the benefits and costs of the proposal in accordance with its Economic Analysis Policy. These issues are discussed in Section C of this letter, below.

¹⁶ Anecdotally, however, because each of our members that is engaged in the 529 plan business is also engaged in the mutual fund business, and because of the limited volume of their 529 business vis-à-vis their mutual fund business, it is quite possible that none of their associated persons would meet the MSRB’s “primarily engaged in municipal securities activities” standard. According to Institute data, as of the 2012 calendar year-end, approximately \$169 billion was invested in 529 college savings plans as compared to \$13,045,220 billion invested in mutual funds. See *2013 Investment Company Fact Book*, 53rd Ed. (Investment Company Institute, 2013) at pp. 136 and 142.

The threat of de-registration is a powerful tool to ensure compliance with the existing continuing education requirements, but it will not be a tool that dealers can use to motivate unregistered associated persons to comply with the proposed requirements. We are concerned that an unregistered person's failure to comply could put a municipal securities dealer at risk of being deemed out of compliance despite its best efforts to comply.

Until such time as the MSRB provides more detailed information about the proposal's scope and how it intends to enforce these new requirements, we are unable to provide more meaningful information regarding our concerns.

C. The Proposal is Not Consistent with the MSRB's Economic Analysis Policy

The Institute also opposes the proposed Firm Element revisions to Rule G-3 because they do not appear to have been developed in accordance with the MSRB's Economic Analysis Policy, which it published in September 2013.¹⁷ According to the Economic Analysis Policy,

Economic analysis should inform, as opposed to determine, the regulatory approach to addressing a market problem or other identified need for rulemaking and serve as part of what the MSRB considers in its deliberation regarding a rule. *Economic analysis is to be included at the earliest stage of the rulemaking process to influence the choice, design, and development of policy options before a specific regulatory course has been determined.* [Emphasis added.]

We respectfully submit that the proposal is not in line with the MSRB's Economic Analysis Policy. In particular, according to the Economic Analysis Policy, the "four key elements" of a good regulatory economic analysis that should be considered "at the earliest stage of the rulemaking process" are:

1. Identifying the need for a proposed rule and explaining how it will meet that need;
2. Articulating a baseline against which to measure the likely impact of the proposed rule;
3. Identifying and evaluating alternative regulatory approaches; and
4. Assessing the benefits and costs, both quantitative and qualitative, of the proposed rule and the main reasonable alternative regulatory approaches.

The MSRB's Notice fails to satisfy *any* of these "four key elements."¹⁸

¹⁷ See fn. 5, above.

¹⁸ The Notice does include at least one statement about the MSRB's reasons for issuing the proposal. In particular, it states that the "MSRB believes the proposed rule change will enhance the overall securities knowledge, skill and professionalism of associated persons primarily engaged in municipal securities activities and, hence, will advance the MSRB's interest in protecting investors, municipal entities and the public interest." Notice at p. 4. In our view, however, a statement of the

In lieu of conducting a “good regulatory economic analysis” *prior* to publishing its proposed amendments, the MSRB instead has already determined its proposed course of action¹⁹ and now asks commenters to provide it the following feedback and “include relevant data wherever possible”:

- What are the potential benefits, if any, of the changes to the continuing education requirements?
- Please describe in detail and quantify any new burdens that the proposed change would impose on dealers;
- How much would it cost your firm to develop and deliver one hour of Firm Element continuing education annually for associated persons primarily engaged in municipal securities activities?
- What is the total cost of development and delivery of Firm Element continuing education regarding municipal securities?
- What percentage of your firm’s employees would be impacted by the proposed rule change on continuing education?
- Has technology made it easier and less costly to develop and deliver Firm Element training? What types of technology are utilized by your firm to deliver Firm Element training?
- Are there any alternatives to the proposed changes to continuing education requirements?²⁰

The information the MSRB seeks appears to be the type of information that, according to the Economic Analysis Policy, the MSRB should have considered *prior* to proposing its amendments. We oppose the MSRB pursuing adoption of the proposed amendments to the Firm Element without first undertaking an analysis that is consistent with its Economic Analysis Policy and that justifies the proposal based on qualitative and quantitative evidence of its costs and benefits. In addition to direct costs, such analysis should also consider the costs associated with the MSRB deviating from the uniform manner in which the SROs have jointly implemented continuing education requirements and the impact of such deviation on those dealers that are dually registered with the MSRB and FINRA.²¹

MSRB’s belief, in the absence of any supporting data or analysis to support it, does not meet the requirement of the Economic Analysis Policy that such analysis inform a regulatory approach to addressing a market problem or identifying a need for rulemaking. *Cf.*, MSRB Notice 2014-01, which proposes new MSRB Rule G-42 to govern the standards of conduct and duties of municipal advisors and which contains 11 pages of economic analysis that appears to be consistent with the MSRB’s Economic Analysis Policy. *See* MSRB Notice 2014-01 at pp. 17-28.

¹⁹ *See* Notice at p. 1 (“The MSRB is providing notice of these proposed changes to MSRB Rule G-3, which will be filed with the Securities and Exchange Commission (“SEC”) *shortly*.” (Emphasis added.))

²⁰ Notice at pp. 8-9.

²¹ Due to the short comment period provided by the MSRB and because of the lack of clarity regarding the scope of the proposal, we are unable to assess fully the costs and benefits associated with the proposed amendments to the Firm Element program. It appears, however, that there are likely to be significant costs associated with it. Aside from developing and delivering the required Firm Element content, these costs would include, among others: designing systems to track on an

II. PROPOSED REVISIONS TO RULES G-3(A)(ii)(C), G-7, AND G-27

The Institute supports the proposed revisions to Rule G-3(a)(ii)(C) that would limit the activities of persons who are duly qualified as limited representatives. As proposed, such persons' activities would be limited exclusively to the sales and purchases from customers of municipal fund securities.²² We support this revision because it will make the MSRB's rule more consistent with FINRA's similar rule, Rule 1032. We recommend, however, that the MSRB additionally revise its rule to expressly clarify that such limited representatives may also engage in solicitation activities. This further revision is necessary to make the MSRB's rule entirely consistent with FINRA's rule, which permits limited representatives to engage in the "solicitation, purchase, and/or sale of investment company securities." In the absence of this revision, it is unclear whether the MSRB's revised rule would permit limited representatives to engage in solicitation activities involving municipal fund securities.

We additionally support the repeal of the provisions in Rule G-3(d) that currently: (1) define the term "financial and operations principal;" (2) impose qualifications requirements on a person acting as a FINOP (*i.e.*, passage of the Series 27 examination, which is administered by FINRA); and (3) require every broker, dealer, or municipal securities dealer to have at least one FINOP unless eligible for a waiver from this requirement.²³ In light of FINRA's similar FINOP requirements and the fact that municipal securities dealers that are FINRA members would be required to comply with FINRA's requirements, the MSRB has proposed to delete its separate FINOP requirements. As explained in the Notice, repeal of this provision "will simplify the qualification rules that dealers must follow and avoid regulatory duplication."²⁴ We agree and support this proposed revision. We commend the MSRB for its interest in avoiding unnecessary regulatory costs and duplication and for proposing this amendment in furtherance of such interest.²⁵

ongoing basis which associated persons are subject to the requirement and which have fulfilled their annual requirement; reminders to associated persons of their need to fulfill the requirements; and maintaining records documenting how and when the requirements have been satisfied. To the extent a dealer relies on an outside vendor to produce and deliver its continuing education content, which is not uncommon, the dealer's costs are likely to increase if the vendor imposes fees based on the number of associated persons who attend such training sessions.

²² We find use of the phrasing "purchases from customers" in this proposal awkward. Unlike municipal securities dealers that sell bonds and purchase bonds from their customers, municipal securities dealers involved in the sale of municipal fund securities do not ever "purchase" such securities back from their customers. Instead, like mutual funds, when an owner wishes to liquidate its 529 plan holdings, the securities are redeemed with proceeds paid to the customer from the 529 plan trust. While FINRA's comparable rule, Rule 1032(d) refers to a limited representative's ability to "purchase" securities, that rule extends to transactions involving closed-end fund shares. Unlike mutual fund shares, closed-end fund shares may be purchased by a broker-dealer from a customer.

²³ FINRA imposes similar requirements on FINOPs of its members. *See* FINRA Rule 1022.

²⁴ Notice at p. 7.

²⁵ We also support the technical amendments to Rule G-7 and G-27 to accommodate the proposed changes to Rule G-3(d).

Mr. Ronald W. Smith, Corporate Secretary

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We appreciate the opportunity to provide these comments and your consideration of them. If you have any questions, please contact the undersigned at (202)326-5825.

Sincerely,

/s/

Tamara K. Salmon

Senior Associate Counsel