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Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street NW
Washington, DC 20549-0609

April 12, 2004

Re: S7-06-04 Proposed Confirmation and Point of Sale Disclosure Requirements

Dear Mr. Katz:

The following comments with respect to the proposed Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, 17 CFR Parts 239, 240 and 274 (69 Fed. Reg. 6438 (February 10, 2004)) (the "Proposed Rules") are respectfully submitted by Hawkins Delafield & Wood LLP. Our firm has acted as special counsel to several state entities that have established and administer qualified tuition programs in connection with disclosure and other matters affecting such programs. These comments are intended to address only the applicability of the Proposed Rules to qualified

tuition programs that include the offering of municipal fund securities, and their impact upon the state entity issuers of such municipal fund securities, and are not intended to address the applicability of the Proposed Rules to the direct sale of interests in mutual fund securities or unit investment trust securities.

We recognize that the Proposed Rules seek to improve investor access to material information about investments, including distribution-related cost and compensation arrangements, and generally support reasonable measures to assure that qualified tuition program participants have available in a timely fashion sufficient information to make appropriate investment decisions. More particularly, we share the Commission's concern that qualified tuition program account owners have readily accessible to them, at the time their investment decisions are made, meaningful information as to their investment costs and as to compensation to be received by broker-dealers, and their affiliates, that may create conflicts of interest potentially bearing upon the reliability of such broker-dealers' investment advice. However, we strongly feel that a number of factors differentiate between qualified tuition programs and mutual funds or unit investment trust securities in ways that make other means to this goal more appropriate for qualified tuition programs than the requirements prescribed in the Proposed Rules.

Interests in most qualified tuition programs are municipal securities, many of which are subject to active state entity oversight as a matter of state statutory requirements. All such programs that are sold by registered broker-dealers are issued by unrelated state entity issuers whose securities have heretofore been exempt from federal securities registration and disclosure content regulation. In contrast, the issuers of mutual funds and unit investment trust securities may be affiliates of their broker-dealers and are, in any event, for-profit entities. Many

programs, and especially many direct sold programs, offer investment options with features, such as extremely small balance and contribution requirements (which may be as low as $5.00) and guaranteed or principal protected returns, that cause them to more resemble savings than investment vehicles. Numerous qualified tuition programs are either prepayment programs or savings programs that include investment options that are not invested in mutual funds or that are sold directly by state entities. We are highly concerned that, if the Proposed Rules were to become applicable in their present form to savings programs sold by broker-dealers, all qualified tuition programs might be forced, in response to concerns with potential liability pursuant to Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to adopt the practices that would be required of broker-dealers in connection with their sales of savings programs that are invested in mutual funds. In light of these considerations, we respectfully offer the following specific comments:

(i) Section 240.10b-10(g)(2) should be amended in the form of the Proposed Rules that is adopted (the "Adopted Rules") to read "municipal securities, other than municipal fund securities" in order to properly reflect the fact that "municipal fund securities" are a subset of "municipal securities" within the meaning of Section 3(a)29 of the Exchange Act, as has been recognized by the Municipal Securities Rulemaking Board in adopting its Rule D-12, as well as by the Commission Staff in numerous no-action letters. (See, generally, Municipal Securities Rulemaking Board, SEC No-Action Letter, File No. 032299033, Wash. Serv. Bur. (CCH) (Feb. 26, 1999); MSRB Interpretive Notice: Rule D-12 (Jan. 18, 2001).

(ii) We would suggest that provision of actual cost and compensation information with respect to each typically quite small contribution to qualified tuition programs: (a) would be wasteful of account owner or program resources that would be better applied to funding higher

education; and (b) risks trivializing the information. In this connection, we again note that many programs operate pursuant to statutory requirements that they accept very small contributions, or have adopted very low thresholds administratively, in order to assure that lower income participants have access to what is for many, if not most, account owners a unique tax-advantaged savings vehicle. The administration of such accounts is, of course, subsidized by larger accounts or from state sources. A requirement that actual transaction specific cost and compensation information be calculated and distributed with respect to each contribution or withdrawal may be expected to impose a more substantial burden upon the marketing of qualified tuition programs than upon the marketing of mutual fund securities or of unit investment trust securities as a result of the generally small aggregate amount of funds under investment and, as noted above, the small and irregular size of contributions characteristic of many qualified tuition programs. Because some or all of the compliance costs incurred by broker-dealers involved in the marketing of municipal fund securities may be expected to be passed through to the qualified tuition programs, which are not profit-making entities and which typically have little or no independent sources of funding, imposition of additional reporting requirements as outlined in the Proposed Rules may cause the account owners themselves to bear unreasonable fees, potentially eliminating the benefits of the intended public policy underlying Section 529 of the Internal Revenue Code of 1986, as amended, and of the enabling legislation that authorizes the operation of qualified tuition programs in most States. As noted above and in comment (iii), such costs may also be imposed, as a practical matter with respect to qualified tuition programs, or investment options, to which the Proposed Rules do not technically apply. In addition, these requirements might well have the unintended, and misleading, result of trivializing the information delivered, as it may be reasonably expected that many notices to a

prospective account owner of the precise amounts of fees applicable to or of compensation earned by a recommending broker-dealer with respect to his or her contributions may refer to de minimus transactional amounts.

We would urge the Commission to consider that the purpose of assuring timely availability to qualified tuition program account owners of material information concerning investment costs and the compensation received by private parties making investment recommendations would be best served, taking into account the concerns identified in the immediately preceding paragraph, if the Adopted Rules reflected revisions from their proposed form to require, with respect to qualified tuition programs, that broker-dealers provide specific information at the point of sale and at confirmation only to the extent that the broker-dealer concludes that the required information is not included in a clearly identified section of the applicable official statement. The information required with respect to qualified tuition programs should be presented on the basis of hypothetical examples reflecting: (a) the respective projected aggregate costs to the account owner, and fees paid to each private party who may make an investment recommendation of each investment option available to the account owner under the plan; (b) a range of realistic account balances; and (c) if applicable, a range of realistic periods of investment, as well as a statement advising of the potential availability of any applicable fee break points, and of any conditional fees or charges. With respect to plans or investment options in which contributions are invested in mutual funds, such information should be accompanied by a statement clearly advising as to the availability from other sources of the information required by the Adopted Rules with respect to such mutual funds.

Adoption of the approach described in the immediately preceding paragraph would also permit elimination from the Adopted Rules of Sections 240.15c2-2(b)(7) and 240.15c2-

2(f)(5)(iii), each of which conditions relief from point of sale requirements that are otherwise applicable to a broker-dealer upon issuer provision of specific disclosures. Inclusion of such provisions in the Adopted Rules would effectively impose primary disclosure content requirements upon issuers of municipal securities. To do so would go substantially beyond existing federal securities regulation of such disclosure. In sharp contrast, Congress, when directly considering the general appropriateness of federal securities regulation of municipal securities disclosure practices, expressly prohibited, in Section 15B(d)(2) of the Exchange Act, the Municipal Securities Rulemaking Board (the "MSRB") from requiring:

> …any issuer of municipal securities … to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer.

(iii) The adopting release should clarify the relationship between: (a) the disclosures required under the Adopted Rules, which would be applicable to broker-dealers in connection with their sale of municipal fund securities, but not to the state issuers of such securities; and (b) the general anti-fraud provisions of the federal securities laws to which issuers of municipal fund securities are subject. Issuers of municipal fund securities have heretofore been exempt from direct regulation by the Commission, and the Adopted Rules appropriately will be applicable only to broker-dealers. Although state issuers may well take fee and conflicts-related disclosures required by the Adopted Rules into consideration in formulating disclosure for direct-sold interests in qualified tuition programs, the Adopted Rules should not place them under a legal compulsion to provide these disclosures.

The proposing release states, with respect to each of proposed Section 240.15c2-2 and proposed Section 240.15c2-3, that compliance with the specific disclosures mandated therein

does not create a safe harbor for broker-dealers with respect to compliance with the general anti-fraud provisions of the federal securities laws. We believe that the adopting release should expressly state that the nondisclosure by an issuer of municipal fund securities of any of the items that persons subject to rule 15c2-2 and 15c2-3 would be required to disclose if selling interests in the securities shall not create any presumption that the general anti-fraud provisions of the federal securities laws have been violated by the issuer. Absent such a clarification, statements in the proposing release that the disclosures specified in the Proposed Rules are necessary or desirable information for investors may have the practical effect of forcing state issuers whose programs include, or exclusively offer, investment options that are not subject to the Adopted Rules to nonetheless make each disclosure with respect to such options, and perhaps to do so at the times and in the manner required by the Adopted Rules, in order to safeguard against the implication that failure to provide such information constitutes a material omission under the general anti-fraud provisions of the federal securities laws. This would effectively require state issuers to comply with the Adopted Rules. We do not seek to insulate state issuers from their obligation to provide full and fair disclosure regarding fee and conflict of interest information that is material to investors in municipal fund securities, but firmly believe that state issuers should not be forced into line item disclosures or particular disclosure methodologies by SEC rulemakings that may be deemed to establish specific materiality standards.

Moreover, the adopting release should expressly state that delivery by broker-dealers of information produced by such broker-dealers with respect to a qualified tuition program pursuant to the requirements of the final rule shall not be deemed to be a representation by the issuer, notwithstanding that the broker-dealer, or any affiliate, may contractually act as an agent of the issuer for some purposes. Absent such a clarification, the statements referred to may imply a

duty on the part of qualified tuition program issuers to verify the accuracy and completeness of broker-dealer statements as to which they, unlike the sponsors of mutual funds, may have no direct knowledge.

(iv) The Adopted Rules should clarify the application to qualified tuition programs of Section 240.15c2-2(c)(3), which requires specification of annual amounts of "asset-based sales charges and asset-based service fees" incurred, or to be incurred, by the issuer of a covered security in connection with the customer's purchase of the shares or units. Section 240.15c2-2(f)(2) defines an "asset-based service fee" as any "asset-based amounts for personal services and/or the maintenance of shareholder accounts, paid by the issuer or paid out of the assets of covered securities owned by the issuer." It is unclear whether this formulation, if made applicable to qualified tuition programs, would require disclosure of asset-based charges: (a) that are retained within a state trust to compensate the State and are not paid out to third parties; or (b) that are reserved for potential future payments to third parties without being paid out at the time of calculation. In this connection, we would suggest that any requirement that information concerning qualified tuition program costs be submitted to the Commission by issuers of municipal fund securities or their agents would appear to be contrary to the express limitation upon the authority of the Commission that is established by Section 15B(d)(1) of the Securities Exchange Act , which provides that:

> Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities.

Also, in this connection, we note again that qualified tuition program issuers are state entities that are, of course, unaffiliated with the broker-dealer.

(v) Assuming, however, that the Adopted Rules require disclosure of the fees paid to issuers of municipal fund securities, the Adopted Rules should also clarify the application to qualified tuition programs of the "comparison ranges" described in Section 240.15c2-2(e)(1)(iii), specifically in connection with the calculations of "asset-based sales charges and service fees".

We question whether the facts applicable to qualified tuition programs permit statistically meaningful calculation of "the median and 95th percentile range of asset-based distribution and service fees involving the same category of covered security" (emphasis added). Many States establish the administrative fee for their respective programs based on specific authorizing legislation, and there are a variety of asset-based service fees that are not necessarily similar across programs. Furthermore, while qualified tuition programs may appear comparable at a superficial level, the underlying products do not necessarily constitute a single "category of covered security" amenable to quantitative analysis. Would an investment option that, as applied to a particular beneficiary, is allocated initially more heavily to equity than to fixed income investments, but which will "migrate" to a greater percentage of fixed income investments as the beneficiary ages, be considered comparable to a static balanced portfolio with the same weighted average allocation between equity and fixed income investments over the anticipated account life? How would state specific tax or education benefits be valued for this purpose? Recognizing that the Proposed Rules expressly acknowledge that comparison ranges, as applied to mutual fund securities and unit investment trust securities, are a complicated subject that will require future rule-making, we would suggest that it may be even more complicated as applied to qualified tuition programs.

Thank you for your consideration of these comments. We would be happy to have the opportunity to discuss with you any of the issues raised or to be of any other assistance in connection with the formulation of Adopted Rules.

Very truly yours,

HAWKINS DELAFIELD & WOOD LLP
Kenneth B. Roberts, Partner