



Municipal Securities Rulemaking Board

December 1, 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-2017-08**

Dear Secretary:

On October 13, 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.¹ That proposed rule change would amend Form G-45 under MSRB Rule G-45, on reporting of information on municipal fund securities, to collect data about the transactional fees primarily assessed by ABLE programs and about any variance in the account maintenance fee that is based on the residency of the account owner (the “proposed rule change”).² The MSRB believes the proposed rule change is consistent with the Securities Act of 1934, as amended (the “Exchange Act”),³ and necessary and appropriate to help the MSRB receive more reliable, complete and accurate information about 529 college savings plans (“plans”) and ABLE programs.⁴ The Commission published the proposed rule change for comment in the Federal

¹ [File No. SR-MSRB-2017-08](#).

² Rule G-45 requires that brokers, dealers and municipal securities dealers (collectively “dealers”), that act as underwriters to plans or ABLE programs, as the terms “underwriter,” “plan,” and “ABLE program” are defined under Rule G-45(d) and Rule G-45(e), to submit information to the MSRB about the plans or ABLE programs they underwrite.

³ 15 U.S.C. 78a., *et seq.*

⁴ In 2016, the MSRB sought and obtained guidance from the SEC staff about the status of interests in ABLE accounts under the federal securities laws. After the MSRB received that guidance, the MSRB began its regulation of dealer and underwriter activity in ABLE programs. [See](#) Letter dated March 31, 2016 from Jessica S. Kane, Director, Office of Municipal Securities, U.S. Securities and Exchange Commission to Robert A. Fippinger, Esq., Chief Legal Officer, Municipal Securities Rulemaking Board, in response to letter dated December 31, 2015 from Robert A. Fippinger to Jessica S. Kane, both letters are available at <https://www.sec.gov/info/municipal/msrb-letter-033116-interests-in-able-accounts.pdf>. Among other things, the MSRB filed for immediate effectiveness an amendment to Rule G-45 to delay, by two years from August 29, 2016 until August 29,

Register on October 27, 2017,⁵ and the Commission received one comment letter.⁶ This letter responds to the comments raised in that comment letter.

Discussion

As discussed below, the proposed rule change would provide significant regulatory value and would provide the MSRB, as well as other financial regulators, with key information about ABLE programs and plans. Further, the proposed rule change would apply to all underwriters to ABLE programs and plans, no matter how those ABLE programs or plans are marketed, and thus would not unduly burden competition between ABLE programs or plans sold in an advisor-sold marketing channel versus ABLE programs or plans sold in a direct-sold marketing channel. Finally, the MSRB reiterates that Form G-45, including the information to be provided under the proposed rule change, requires an underwriter to submit only information that the underwriter possesses or has the legal right to possess.

A. Regulatory value

The proposed rule change would provide significant regulatory value. As noted above, the proposed rule change would amend Form G-45 to require underwriters to ABLE programs or plans to submit information about the transactional fees primarily assessed by ABLE programs. In addition, the proposed rule change would require underwriters to submit information about any variance in the account maintenance fee due to the residency of the account owner.

Information about the fees assessed by ABLE programs and plans is core to the MSRB's understanding and analysis of those ABLE programs and plans, and would assist the MSRB in fulfilling its statutory responsibilities. The MSRB, as well as other financial regulators charged

2018, the date that submissions are due under Rule G-45 from underwriters to ABLE programs. See [File No. SR-MSRB-2016-11](#). The MSRB believed that the delay would help ensure that the MSRB would receive reliable, complete and accurate filings on Form G-45 from such underwriters. The MSRB also believed that the delay would help ensure that the MSRB would receive more meaningful data about a larger set of ABLE programs on Form G-45.

⁵ See Exchange Act Release No. 81921 (Oct. 23, 2017), 82 FR 49908 (Oct. 27, 2017).

⁶ A comment letter was submitted by Leslie M. Norwood, Managing Director and Associate General Counsel, and Bernard Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association, dated November 17, 2017 ("commenter").

with enforcing the MSRB's rules, use (or may use) the information submitted on Form G-45 to enhance their understanding of ABLÉ programs and plans. Such information may inform the MSRB of the risks and impact of each ABLÉ program or plan and provide other financial regulators with information to monitor the market for wrongful conduct. The Commission has agreed with the MSRB that the collection of information under Form G-45 is "intended to protect investors, municipal entities and the public interest and prevent fraudulent and manipulative acts and practices by allowing the MSRB to collect comprehensive, reliable and consistent electronic data on the 529 plans,"⁷ and the MSRB believes that this view has equal application to the similar ABLÉ programs.

Nevertheless, as the commenter noted, some of the information about fees that underwriters would be required to submit on Form G-45 under the proposed rule change may be contained in ABLÉ program or plan disclosure documents. According to the commenter, underwriters simply could provide the hyperlinks to those documents to the MSRB.⁸ However, even if some of that information were contained in those ABLÉ program or plan disclosure documents, that information would not be published in an electronic format that would allow for efficient analysis or comparison. Rather, that information would be embedded in static documents in a portable document format.

Moreover, while the MSRB is sensitive to the potential costs of its rulemaking and appreciates the commenter's suggestion that the MSRB hyperlink to ABLÉ program or plan disclosure documents, there is no requirement that state issuers prepare those disclosure documents in a uniform format.⁹ Further, unlike with plans,¹⁰ there are no recommended voluntary disclosure

⁷ Exchange Act Release No. 71598 (Feb. 21, 2014), 79 FR 11161, 11167 (Feb. 27, 2014) ([File No. SR-MSRB-2013-04](#)) (stating that "to fulfill its statutory responsibilities to investors and municipal entities in the context of 529 plans, the Commission believes that it is appropriate for the MSRB to possess basic, reliable information regarding 529 plans, including the underlying investment options").

⁸ SIFMA letter at 2. The MSRB notes that underwriters are required to submit such disclosure documents under Rule G-32, on disclosures in connection with primary offerings.

⁹ For example, because municipal fund securities are not subject to registration with the SEC, there is no registration statement that would ensure data about ABLÉ programs and plans is provided in a uniform format.

¹⁰ The voluntary disclosure principles developed by the College Savings Plans Network for plans are not applicable to ABLÉ programs, but according to CSPN, those principles may be of use to such programs. See College Savings Plans Network Disclosure Principles

principles, at this time, to guide state issuers in the preparation of their disclosure documents that are applicable to ABLE programs. Thus, the MSRB submits that it is even more likely that the information in the ABLE program disclosure documents would not be presented in a uniform format (even if that information were to be provided electronically) that would facilitate analysis and comparison among ABLE programs.

As the MSRB has previously stated both in the proposed rule change and in prior MSRB rulemaking initiatives,¹¹ simply referencing the ABLE program or plan disclosure documents would not meet the MSRB's regulatory need. For the regulatory benefits to be realized, the data provided must be in a uniform electronic format that can be aggregated and analyzed. While the MSRB acknowledges that some up-front costs may be associated with providing this data due to technical changes to underwriters' reporting systems, those costs should mostly be one-time only costs.¹² The MSRB believes the cumulative benefits of receiving data in a uniform electronic format should exceed the upfront costs over time.

B. The proposed rule change applies to all underwriters to ABLE programs and plans

i. Advisor-sold versus direct-sold ABLE programs or plans

The commenter states that the MSRB "must be mindful of the negative impacts . . . of continually imposing unduly regulatory requirements on [the] dealer-sold 529 college savings plan and ABLE programs market versus direct-sold programs that are not regulated by the

Statement No. 6 (adopted July 1, 2017), available at <http://www.collegesavings.org/wp-content/uploads/2015/06/CSPN-Disclosure-Principles-Statement-No.-6.pdf>.

¹¹ See [File Nos. SR-MSRB-2017-08](#) and [SR-MSRB-2013-04](#).

¹² An underwriter may submit data on Form G-45 through the MSRB's Electronic Municipal Market Access (EMMA[®]) dataport or through a computer-to-computer interface. The MSRB believes that the potential one-time costs associated with the proposed rule change may be less for underwriters that submit data through the MSRB's EMMA dataport as compared to underwriters that submit data through a computer-to-computer interface. Underwriters that submit data through the EMMA dataport may not incur the same amount of one-time programming costs that would be incurred by underwriters that use a computer-to-computer interface to submit data.

EMMA is a registered trademark of the MSRB, and is the official repository for information on virtually all municipal bonds, providing free access to official disclosures, trade data and other information about the municipal securities market.

MSRB.”¹³ The commenter appears to suggest that the duty to submit information about the fees assessed by ABLE programs and plans on Form G-45 would create an undue burden because the MSRB’s jurisdiction is limited to underwriters to advisor-sold ABLE programs or plans. However, based on (i) the MSRB’s jurisdiction over all underwriters to ABLE programs and plans and (ii) evidence of industry compliance since 2015 with Rule G-45, the MSRB believes that such an undue burden on competition would not exist.

It is established that the MSRB has jurisdiction over underwriters to all 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”), and this view has equal application to similar ABLE programs. 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 dealer¹⁴ and/or underwriter set forth in the Exchange Act or rules thereunder and thus subject to Rule G-45. For example, the activities of a program manager to an ABLE program or plan, or its affiliates or contractors, may include direct contact with investors through the development and distribution of ABLE program or plan advertising sales literature, or maintaining ABLE program or plan websites, including processing enrollment funds. Those activities could, depending on the facts and circumstances, cause one or more of those entities to be underwriters under Rule G-45. The Commission has agreed with the MSRB

¹³ SIFMA letter at 2. The MSRB has no jurisdiction over the issuers of municipal securities, including the issuers of ABLE programs and plans. *See, e.g.*, Exchange Act Release No. 71598 (Feb. 21, 2014), 79 FR 11161 (Feb. 27, 2014), [File No. SR-MSRB-2013-04](#). Rather, the MSRB’s jurisdiction applies to (i) dealers that sell interests in, or dealers that act as underwriters to, ABLE programs or plans and (ii) municipal advisors to the sponsors or trustees of ABLE programs or plans.

¹⁴ The MSRB has stated that:

[d]epending on its activities, an entity involved in the administration of a 529 plan might be a “broker” under Section 3(a)(4)(A) of the Exchange Act, which defines “broker” as any person engaged in the business of effecting transactions in securities for the account of others.

See 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 MSRB reiterated this point in its letter responding to comments on [File No. SR-MSRB-2017-05](#). Letter to Secretary, U.S. Securities and Exchange Commission from Pamela K. Ellis, Associate General Counsel, Municipal Securities Rulemaking Board, dated Sept. 14, 2017.

that each entity must make its own determination about whether its activity would qualify as “underwriting” activity as that term is defined in Rule 15c2-12(f)(8) under the Exchange Act.¹⁵

Moreover, beginning in 2015, the MSRB has received data from underwriters to plans under Rule G-45. The MSRB has every reason to believe that there is widespread compliance by those underwriters with their reporting obligations under Rule G-45. Similarly, the MSRB has every reason to believe that underwriters to ABLE programs will comply with their reporting obligations under Rule G-45. Consequently, the MSRB does not believe that requirement to submit fee information on Form G-45 would unduly burden competition between underwriters to advisor-sold ABLE programs or plans versus underwriters to direct-sold ABLE programs or plans.

ii. Underwriter reporting obligation

The commenter reiterated its prior position that dealers that underwrite ABLE programs and plans should only be required to submit information required by Form G-45 to the extent that information is within their possession, custody and control.¹⁶ The proposed rule change, however, does not change the MSRB’s longstanding position on this issue.¹⁷ An underwriter to an ABLE program or plan would not be required to submit information on Form G-45 that the underwriter neither possesses nor has the legal right to obtain. Nevertheless, the legal right to obtain the information for purposes of the proposed rule change is not affected by a voluntary relinquishment, by contract or otherwise, of such right. Therefore, an underwriter may designate an affiliate or contractor to perform activities in the underwriter’s stead in connection with the underwriting. However, the underwriter would be properly viewed as having the legal right to obtain all information.

¹⁵ Exchange Act Release No. 71598 (Feb. 21, 2014), 79 FR 11161, 11168 (Feb. 27, 2014) ([File No. SR-MSRB-2013-04](#)) (the “Commission agrees with the MSRB that whether a firm is an underwriter will require an individual analysis of the particular facts”).

¹⁶ SIFMA letter at 2.

¹⁷ See [File No. MSRB-SR-2013-04](#); see, e.g., 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 at 9.

Secretary
U.S. Securities and Exchange Commission
December 1, 2017
Page 7

Conclusion

In summary, the proposed rule change would provide significant regulatory value by providing the MSRB with data about the fees assessed by ABLE programs or plans. That information is core to the MSRB's understanding and analysis of those ABLE programs and plans. Further, the proposed rule change would apply to all underwriters of ABLE programs or plans, and as such, would not unduly burden competition between underwriters to advisor-sold ABLE programs or plans and underwriters to direct-sold ABLE programs or plans.

If you have any questions, please feel free to contact me at [REDACTED].

Sincerely,



Pamela K. Ellis
Associate General Counsel