



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

March 31, 2016

Robert A. Fippinger, Esq.  
Chief Legal Officer  
Municipal Securities Rulemaking Board  
1300 I Street, N.W.  
Suite 1000  
Washington, D.C. 20005

Re: Interests in ABLE Accounts

Dear Mr. Fippinger:

In your letter dated December 31, 2015, you request the staff of the Office of Municipal Securities' view on:

- (i) whether interests in an account established by a State, or an agency or instrumentality thereof pursuant to the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014<sup>1</sup> (the "ABLE Act"), offered through an ABL Act program (an "ABLE Program")<sup>2</sup> are "municipal securities," as defined in Section 3(a)(29) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and
- (ii) whether a dealer participating in the sale of those interests would be participating in a "primary offering" and thus be subject to the requirements of Rule 15c2-12 under the Exchange Act.

We have not conducted an extensive review of ABL Programs. Based upon an analysis of programs that have been brought to our attention in your letter and in other communications with the staff of the Municipal Securities Rulemaking Board (the "MSRB"), however, we do believe that at least some interests in ABL accounts as described in your letter may be "municipal securities" as defined in Section 3(a)(29) of the Exchange Act, depending on the facts and circumstances, including without limitation, the extent to which an ABL account offered through an ABL Program is a

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<sup>1</sup> The ABL Act added Section 529A to the Internal Revenue Code of 1986, as amended (26 U.S.C. §529A) (the "Code").

<sup>2</sup> Based on materials the MSRB staff has provided, we understand that ABL Programs are established by States under Section 529A(b) of the Code as "qualified ABL programs" through which individuals make contributions for the purpose of accumulating savings for qualified disability expenses of beneficiaries. Individuals purchase interests in the trust and the trust assets are invested in a manner consistent with the trust's stated investment objectives. Individuals purchasing trust interests do not have a right to control the investment of trust assets. Transactions in interests described in your letter are expected to be conducted by dealers.

Robert A. Fippinger  
March 31, 2016

direct obligation of, or obligation guaranteed as to principal or interest by, a State or any agency or instrumentality thereof.<sup>3</sup>

In response to your second question, we note that Rule 15c2-12(f)(7) under the Exchange Act defines a “primary offering” as including an offering of municipal securities directly or indirectly by or on behalf of an issuer of such securities. Based upon your letter and communications with MSRB staff, it is our understanding that interests in ABLE Programs generally are offered only by direct purchase from the issuer. Accordingly, we would view those interests as having been sold in a “primary offering” as that term is defined in Rule 15c2-12. If a dealer is acting as an “underwriter” (as defined in Rule 15c2-12(f)(8)) in connection with that primary offering, the dealer may be subject to the requirements of Rule 15c2-12.

If you have any questions regarding these matters, please do not hesitate to contact me at (202) 551-5680.

Sincerely,



Jessica S. Kane  
Director, Office of Municipal Securities

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<sup>3</sup> In your letter, you compare ABLE Programs to tax-advantaged college savings plans established pursuant to Section 529 of the Code (“529 Plans”), and cite Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67472-73 (Nov. 12, 2013), as well as correspondence from Commission staff to the MSRB stating that at least some interests in 529 Plans may be, depending on the facts and circumstances, municipal securities for purposes of the Exchange Act. We note for purposes of such comparison that, in connection with no-action relief sought by many higher education trusts with respect to 529 Plans, an opinion of counsel was required to the effect that the issuer is a State, an agency or instrumentality of a State, or a political subdivision thereof. *See, e.g.,* Letters re: *New York College Choice Tuition Savings Program* (Sept. 10, 1998); *New Hampshire Higher Education Savings Plan Trust* (June 30, 1998).



Municipal Securities Rulemaking Board

December 31, 2015

**BY FEDERAL EXPRESS**

Jessica S. Kane, Esq.  
Director, Office of Municipal Securities  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**Re: Interests in ABLE Accounts**

Dear Ms. Kane:

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act”) added Section 529A to the Internal Revenue Code of 1986, as amended (the “Code”) to permit a state, or an agency or instrumentality thereof, to establish and maintain a new type of tax-advantaged savings program to help support individuals with disabilities in maintaining health, independence, and quality of life. Section 529A was modeled on Section 529 of the Code.<sup>1</sup> Section 529 of the Code, in part, established tax-advantaged college savings plans (“529 savings plans”) to encourage saving for future higher education costs.<sup>2</sup> The U.S. Securities and Exchange Commission (the “Commission”) has determined that interests offered by such 529 savings plans are municipal securities under Section 3(a)(29) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).<sup>3</sup>

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<sup>1</sup> Report to accompany H.R. 647, Committee on Ways and Means, H.R. Rept. No. 113-614, part 1 at 7 (2014).

<sup>2</sup> Section 529 also established prepaid tuition plans. 26 U.S. Code § 529(b)(1)(A)(i). Under a prepaid tuition plan, an investor may purchase tuition credits or certificates on behalf of a designated beneficiary, which entitle the beneficiary to the waiver or payment of qualified higher education expenses. Prepaid tuition plans generally have residency requirements. Such credits or certificates generally are not viewed as being municipal securities, and dealers generally do not participate in the marketing of prepaid tuition plans.

<sup>3</sup> Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67472-73 (Nov. 12, 2013). See Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Securities and Exchange Commission, to Diane G. Klinke, General Counsel, Municipal Securities Rulemaking Board (Feb. 26, 1999) (determining that at least some interests in higher education trusts are municipal securities under the Exchange Act).

Given the similarities between the structure of ABLE accounts and 529 savings plan accounts and the manner in which interests in those accounts will be distributed, the Municipal Securities Rulemaking Board (the "MSRB" or "Board") is requesting the staff of the Office of Municipal Securities' (the "staff") guidance on:

- (i) whether interests in an ABLE account offered through an ABLE program are "municipal securities," as defined in Section 3(a)(29) of the Exchange Act, and
- (ii) whether a dealer participating in the sale of those interests would be participating in a "primary offering" and thus be subject to the requirements of Rule 15c2-12 under the Exchange Act.

The Board has been monitoring ABLE Act developments. The Board would consider the application of MSRB rules to transactions in such interests conducted by dealers; however, the Board believes it would be inappropriate to begin such investigation without knowing whether the Board has the authority to do so under Section 15B(b)(2) of the Exchange Act. This depends on whether such interests are municipal securities under Section 3(a)(29) of the Exchange Act.

An overview of ABLE programs and the differences between 529 savings plans and ABLE programs follows. As noted below, the staff of the MSRB believes that those differences, which primarily relate to qualification for the program and for the expenses for which qualified distributions may be used, are not material to the determination of the status of interests in ABLE accounts offered through an ABLE program under the Exchange Act.

An ABLE program<sup>4</sup> is a program established and maintained by a state, or agency or instrumentality thereof, under which a person may make contributions to an account established

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<sup>4</sup> Section 529A(b)(1) of the Code defines a qualified ABLE program as a program established and maintained by a state, or agency or instrumentality thereof

- (A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLE account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,
- (B) which limits the designated beneficiary to 1 ABLE account for the purposes of this section,
- (C) which allows for the establishment of an ABLE account only for a designated beneficiary who is a resident of such State or a resident of a contracting State, and
- (D) which meets the other requirements of this section.

for the purpose of satisfying the qualified disability expenses<sup>5</sup> of a designated beneficiary.<sup>6</sup> Similar to a 529 savings plan, to establish an ABLE program, a state enacts enabling legislation that generally may form a trust to hold the contributions to the ABLE program.<sup>7</sup> Also similar to a 529 savings plan, the trustee, typically the state treasurer, then may enter into an agreement with a program manager (and its affiliates and subcontractors) to provide investment management,

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<sup>5</sup> Qualified disability expenses include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses and other expenses. 26 U.S. Code §529A(e)(5).

<sup>6</sup> A designated beneficiary is an eligible individual who has established an ABLE account and is the owner of such account. An eligible individual for a taxable year is (i) an individual who is entitled to benefits based on blindness and disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual reached age 26, or (ii) an individual for whom a disability certification is filed with the Secretary of the Treasury for such taxable year. 26 U.S. Code §529A(e)(5).

<sup>7</sup> See, e.g., S.F. 505, 86<sup>th</sup> Gen. Assembly, Reg. Sess. (Iowa 2015), p. 75 – 77, available at <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=SF505> (“Sec. 77. New Section. 12I.2 Creation of Iowa ABLE savings plan trust. An Iowa ABLE savings plan trust is created. The treasurer of the state is the trustee of the trust . . . Sec. 78. New Section. 12I.3 Participation agreements for trust. On or after July 1, 2016, the trust may enter into participation agreements with account owners pursuant to the following terms and agreements . . .”); S.B. 419, 78<sup>th</sup> Leg., Reg. Sess. (Nev. 2015), p. 2-4, available at <https://www.leg.state.nv.us/Session/78th2015/Reports/history.cfm?ID=914> (“Sec. 8.3. The regulations must provide for the use of savings trust agreements and savings trust accounts to apply distributions toward qualified disability expenses in accordance with 26 U.S.C. §529A, as amended. . . Sec. 11.1. The Nevada ABLE Savings Program Trust Fund is hereby created[;] . . . 3. The Trust Fund consists of: (a) All money deposited in accordance with savings trust agreements . . .”); North Carolina Session Law 2015-203, General Assembly of North Carolina Session 2015, p. 1, available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H556> (“§147-86.51. **ABLE Program.** (a) Achieving a Better Life Experience (ABLE) Program Trust. – There is established an ABLE Program Trust to be administered by the ABLE Program Board of Trustees established in G.S. 146-86.52 to enable contributors to save funds to meet the costs of qualified disability expenses of eligible individuals. (b) Accounts. – The following provisions apply to an ABLE account: (1) An account owner or contributor may establish an account by making an initial contribution to the ABLE Program Trust, signing an application form approved by the Board or its designee, and naming the designated beneficiary. . .”).

administration, recordkeeping, reporting, marketing, and other services for the ABLÉ program. It is anticipated that the program manager generally will be an investment management firm (that firm may be the same firm that provides program management to the state's 529 savings plan), and that the program manager will subcontract with one or more of its affiliates to provide many of the services to the ABLÉ program. It is also anticipated that the program manager may retain an affiliated broker-dealer that is registered with the Commission under the Exchange Act to act as the primary distributor for the ABLÉ program.

Similar to 529 savings plans, there are significant federal tax benefits associated with investing in an ABLÉ program. Earnings accrue free of federal income tax, and distributions for qualified disability expenses are not subject to federal income tax or an additional 10 percent federal income tax.<sup>8</sup>

However, there are differences between a 529 savings plan and an ABLÉ program, but those differences neither relate to the basic structure of the programs nor to how interests in those programs will be/are offered and sold. Rather, those differences primarily relate to qualification for the program and to the expenses for which qualified distributions may cover. The staff of the MSRB does not believe any of those differences alter the conclusion as to the likely legal status of interests in ABLÉ programs under the Exchange Act.

The differences between an ABLÉ program and a 529 savings plan include:

- *One account limitation* – An ABLÉ program must limit a designated beneficiary to one account. A designated beneficiary of a 529 savings plan may have multiple accounts.
- *Contributions* – Except in the case of a rollover contribution from another ABLÉ account,<sup>9</sup> an ABLÉ account must provide that it will not receive aggregate contributions during a taxable year in excess of the annual gift tax exclusion amount. Contributions to a 529 savings plan are not limited to the annual gift tax exclusion amount.
- *Eligibility* – The designated beneficiary for an ABLÉ account must be an eligible individual – eligibility is based on the submission of disability certification or the determination, for purposes of certain benefits under the Social Security Act, that the

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<sup>8</sup> The staff of the MSRB is aware that states may provide certain benefits for state residents who contribute to an ABLÉ account. See Michigan HB 4543, signed into law as Public Act 161 (creating an income tax deduction for ABLÉ Act accounts, with a deduction cap of \$5,000 for a single return or \$10,000 for a joint return).

<sup>9</sup> Amounts in an ABLÉ account may be rolled over without income tax liability to another ABLÉ account for the same designated beneficiary or another ABLÉ account for the designated beneficiary's brother, sister, stepbrother, or stepsister who also is an eligible individual.

individual meets the requirements for disability or blindness.<sup>10</sup> The designated beneficiary of a 529 savings plan may be any U.S. citizen or resident alien with a valid Social Security number or taxpayer identification number.

- *Distributions* – distributions from an ABLÉ account used for “qualified disability expenses” of a designated beneficiary are not subject to federal income tax. Non-qualified distributions are subject to federal (and possibly state) income tax and may be subject to a 10 percent additional federal income tax.
- *Distributions and impact on Supplemental Security Income* – Distributions from an ABLÉ account for housing expenses or ABLÉ accounts over \$100,000 may negatively impact eligibility for Supplemental Security Income.
- *Death of designated beneficiary* – Amounts remaining in an ABLÉ account upon the death of a designated beneficiary, up to the amount of medical assistance paid for the designated beneficiary after establishment of the account, net of any premium paid to a Medicaid Buy-in program under the state Medicaid plan, may be required to be paid to the state.
- *Notice* – ABLÉ plan programs are required to (i) notify the Internal Revenue Service (the “IRS”) upon formation of an ABLÉ account of the name and state of residency of the beneficiary and (ii) submit information on a monthly basis regarding distributions and ABLÉ account balances to the Social Security Administration.

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If the staff believes that interests in ABLÉ accounts are municipal securities, the Board intends to undertake a detailed review of the application of its existing rules to these interests.

The Board appreciates the staff’s consideration of this request. Please contact the undersigned or Pamela Ellis at 703.797.6600 if you need additional information or have any questions about the MSRB’s request.

Sincerely,



Robert A. Fippinger  
Chief Legal Officer

<sup>10</sup> In general, the individual’s disability or blindness must have occurred before the date on which the individual attained age 26.