

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78622; File No. SR-MSRB-2016-11)

August 22, 2016

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Delay the Due Date for Certain Submissions Under Rule G-45 and Provide Guidance on the Application of Rules G-42 and G-44 to Municipal Advisors to Sponsors or Trustees of Municipal Fund Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 12, 2016 the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “Commission” or “SEC”) the proposed rule change as described in Items I and II below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to delay by two years, until August 29, 2018, the date on which submissions must be made pursuant to Rule G-45, on reporting of information on municipal fund securities, by underwriters of programs established to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act” and an “ABLE program”).³ The submissions on Form G-45 from such underwriters currently are due August 29, 2016. However, the current due dates under Rule G-45 for submissions from underwriters of other types of municipal fund securities, namely tax-

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The ABLE Act was enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014 (Pub. L. No. 113-295).

advantaged college savings plans established under Section 529 of the Internal Revenue Code of 1986, as amended (the “Code”) (a “529 college savings plan”),⁴ would remain unchanged.

In addition, the proposed rule change would provide guidance under (i) Rule G-42, on duties of non-solicitor municipal advisors, that such rule applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of ABLE programs and (ii) Rule G-44, on supervisory and compliance obligations of municipal advisors, that such rule equally applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of 529 college savings plans, ABLE programs, and other municipal fund securities (the amendment to Rule G-45 and guidance under Rules G-42 and G-44, collectively the “proposed rule change”). The MSRB proposes an immediate effectiveness for the proposed rule change.

The text of the proposed rule change is available on the MSRB’s website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2016-Filings.aspx, at the MSRB’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

⁴ 26 U.S.C. 529(b)(1)(A)(ii).

The MSRB proposes to delay by two years, until August 29, 2018, the date the submissions are due under Rule G-45 on Form G-45 from underwriters to ABLE programs. In addition, the MSRB proposes to provide guidance under (i) Rule G-42, that such rule applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of ABLE programs and (ii) Rule G-44, that such rule equally applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of 529 college savings plans, ABLE programs, and other municipal fund securities.

The ABLE Act added Section 529A to 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.⁵ Section 529 of the Code, in part, established 529 college savings plans to encourage saving for future higher education costs.⁶ The SEC has determined that interests offered by such 529 college savings plans are municipal securities under Section 3(a)(29) of the Act.⁷

⁵ Report to accompany H.R. 647, Committee on Ways and Means, H.R. Rept. No. 113-614, part 1 at 7 (2014).

⁶ Section 529 also established prepaid tuition plans. 26 U.S.C. 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.

⁷ 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, SEC, to Diane G. Klinke, General Counsel, MSRB (Feb. 26, 1999) (determining that at least some interests in higher education trusts are municipal securities under the Act).

Given the similarities between the structure of ABLE accounts and 529 college savings plan accounts and the manner in which interests in those accounts will be distributed, the MSRB requested interpretive guidance from the SEC staff. Specifically, the MSRB requested 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.

In response to the first request, the SEC staff stated that:⁸

at least some interests in ABLE accounts . . . 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 ABLE account through an ABLE Program is a direct obligation of, or obligation guaranteed as to principal or interest by, a State or any agency or instrumentality thereof.

With respect to the second request, the SEC staff stated:⁹

[W]e 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.

⁸ Letter dated March 31, 2016 from Jessica S. Kane, Director, Office of Municipal Securities, SEC, to Robert A. Fippinger, Esq., Chief Legal Officer, MSRB, in response to letter dated December 31, 2015 from Robert A. Fippinger to Jessica S. Kane available at <https://www.sec.gov/info/municipal/msrb-letter-033116-interests-in-able-accounts.pdf> [footnote omitted].

⁹ Id.

In April 2016, after the Board had received the SEC staff guidance, the Board provided interpretative guidance under MSRB Rule D-12, on the definition of “municipal fund security.”¹⁰

The April guidance provided that interests in ABLE accounts may be municipal fund securities, and that to the extent that dealers effect transactions in municipal fund securities, such dealers may be subject to all Board rules, unless those dealers are specifically exempted from any of those rules. The April guidance also anticipated that the Board would publish guidance to address particular issues, including Rule G-45, applicable to the sale of interests in ABLE programs by dealers.¹¹ The proposed rule change is the first of such guidance to address particular issues related to the sale of interests in ABLE programs by dealers and related to municipal advisory activities provided by municipal advisors to sponsors or trustees of ABLE programs.

Specifically, as ABLE programs become operational, the proposed rule change would delay, by two years from August 29, 2016 until August 29, 2018, the date that submissions are due under Rule G-45 from underwriters to ABLE programs. The MSRB believes that the delay would help ensure that the MSRB receives reliable, complete and accurate filings on Form G-45 from such underwriters. The MSRB also believes that the delay would help ensure that the MSRB receives more meaningful data about a larger set of ABLE programs on Form G-45. However, the current deadlines under Rule G-45 for submissions from underwriters of 529 college savings plans would remain unchanged.

Further, the proposed rule change would provide guidance in supplementary material under (i) Rule G-42, that such rule applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of ABLE programs and (ii) Rule G-44, that such rule

¹⁰ MSRB Regulatory Notice 2016-14 (Apr. 12, 2016) (the “April guidance”).

¹¹ Id.

equally applies to municipal advisors that engage in municipal advisory activities for sponsors or trustees of 529 college savings plans, ABLE programs, and other municipal fund securities. The proposed guidance would provide clarity about the applicability of such rules to municipal advisors that engage in municipal advisory activities for sponsors or trustees of municipal fund securities. The MSRB is proposing this guidance in response to requests from industry groups in other Board rulemaking proposals.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,¹² which provides that the MSRB's rules shall:

be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

As ABLE programs become operational, the proposed rule change would provide underwriters to ABLE programs with additional time to submit reliable, accurate and complete data to the MSRB under Rule G-45. The proposed rule change also would provide the MSRB with more meaningful data about a larger set of ABLE programs under Rule G-45. Further, the proposed rule change would provide guidance about the applicability of (i) Rule G-42 to municipal advisors that engage in municipal advisory activities for sponsors or trustees of ABLE programs and (ii) Rule G-44 to municipal advisors that engage in municipal advisory activities for sponsors or trustees of 529 college savings plans, ABLE programs, and other municipal fund securities. The proposed guidance would provide clarity about the applicability of such rules to

¹² 15 U.S.C. 78o-4(b)(2)(C).

municipal advisors that engage in municipal advisory activities for sponsors or trustees of municipal fund securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Act¹³ requires that MSRB rules be designed not to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the Act. The proposed rule change would extend the date that submissions on Form G-45 are due from underwriters to ABLE programs by two years from August 29, 2016 until August 29, 2018. The proposed rule change also would provide guidance about the applicability of (i) Rule G-42 to municipal advisors that engage in municipal advisory activities for sponsors or trustees of ABLE programs and (ii) Rule G-44 to municipal advisors that engage in municipal advisory activities for sponsors or trustees of 529 college savings plans, ABLE programs, and other municipal fund securities.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)¹⁴ of the Act and Rule 19b-4(f)(6)¹⁵ thereunder, the MSRB has designated the proposed rule change as one that affects a change that does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant

¹³ Id.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6).

burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative until 30 days after the date of filing.¹⁶ However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if consistent with the protection of investors and the public interest.¹⁷

The MSRB has requested that the Commission waive the 30-day operative delay specified in Rule 19b-4(f)(6)(iii).¹⁸ The deadline for underwriters to ABLE programs to submit data under Rule G-45 for the period ending June 30, 2016 is August 29, 2016. According to the MSRB, the waiver of the 30-day operative delay will provide certainty with respect to the due date for underwriters to make submissions on Form G-45 in connection with ABLE programs. In order to delay such submissions, the MSRB states that it is important that the proposed rule change become effective immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will provide certainty as to the due date for submissions on Form G-45 and avoid confusion in the market. Accordingly, the Commission hereby waives the 30-day operative delay specified in Rule 19b-4(f)(6)(iii) and designates the proposed rule change to be operative upon filing.¹⁹

¹⁶ Id.

¹⁷ In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change, along with a brief description and text of such proposed rule change, at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The MSRB fulfilled this obligation.

¹⁸ See SR-MSRB-2016-11 (filed with the Commission on August 12, 2016).

¹⁹ For the purpose of waiving the 30-day operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2016-11 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2016-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for

website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2016-11 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.²⁰

Robert W. Errett
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).