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[Rule G-45](#), [Rule G-42](#),  
[Rule G-44](#)

## MSRB Delays Reporting of Information by Underwriters of ABLE Programs and Provides Guidance Relating to Municipal Advisors to Sponsors or Trustees of Municipal Fund Securities, including ABLE Programs

Immediately effective amendments delay the date on which data must be submitted under MSRB Rule G-45 by underwriters of ABLE programs, and provide guidance on the application of MSRB Rules G-42 and G-44 to municipal advisors that engage in municipal advisory activities for sponsors or trustees of municipal fund securities, including ABLE programs

### Overview

The Municipal Securities Rulemaking Board (MSRB) filed today with the Securities and Exchange Commission (SEC) a rule change related to MSRB Rules G-45, G-42 and G-44 that (i) delays reporting of information by underwriters of programs to establish the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act” and an “ABLE program”)<sup>1</sup> and (ii) provides guidance relating to municipal advisors to sponsors or trustees of municipal fund securities, including ABLE programs.

The rule change delays by two years, until August 29, 2018, the date on which submissions must be made pursuant to MSRB Rule G-45, on reporting



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<sup>1</sup> The ABLE Act was enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014 (Pub. L. No. 113-295).

of information on municipal fund securities, by underwriters of ABLÉ programs. 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-advantaged college savings plans established under Section 529 of the Internal Revenue Code of 1986, as amended (the “Code”) (a “529 college savings plan”),<sup>2</sup> remain unchanged.

In addition, the rule change provides guidance under (i) MSRB 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 ABLÉ programs and (ii) MSRB 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, ABLÉ programs, and other municipal fund securities.<sup>3</sup>

The rule change is effective immediately.

## Background

The ABLÉ 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.<sup>4</sup> Section 529 of the Code, in part, established 529 college savings plans to encourage saving for future higher education costs.<sup>5</sup> The SEC has determined that interests offered by such 529 college savings plans are municipal securities under Section 3(a)(29) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).<sup>6</sup>

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<sup>2</sup> 26 U.S.C. 529(b)(1)(A)(ii).

<sup>3</sup> See [File No. SR-MSRB-2016-11](#).

<sup>4</sup> Report to accompany H.R. 647, Committee on Ways and Means, H.R. Rept. No. 113-614, part 1 at 7 (2014).

<sup>5</sup> Section 529 also established prepaid tuition plans. 26 U.S.C. 529(b)(1)(A)(i).

<sup>6</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, 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:<sup>7</sup>

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:<sup>8</sup>

[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.

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<sup>7</sup> 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].

<sup>8</sup> *Id.*

In April 2016, after the MSRB had received the SEC staff guidance, the MSRB provided interpretative guidance under MSRB Rule D-12, on the definition of “municipal fund security.”<sup>9</sup>

The April guidance provided that interests in ABLÉ 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 MSRB rules, unless those dealers are specifically exempted from any of those rules. The April guidance also anticipated that the MSRB would publish guidance to address particular issues, including Rule G-45, applicable to the sale of interests in ABLÉ programs by dealers.<sup>10</sup> The rule change is the first of such guidance to address particular issues related to the sale of interests in ABLÉ programs by dealers and related to municipal advisory activities provided by municipal advisors to sponsors or trustees of ABLÉ programs.

### **Amendment to Rules G-45, G-42 and G-44**

As ABLÉ programs become operational, the rule change delays, by two years from August 29, 2016 until August 29, 2018, the date that submissions are due under Rule G-45 from underwriters to ABLÉ programs. The MSRB believes that the delay will 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 will help ensure that the MSRB receives more meaningful data about a larger set of ABLÉ programs on Form G-45. However, the current deadlines under Rule G-45 for submissions from underwriters of 529 college savings plans remain unchanged.

Further, the rule change provides guidance through 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 ABLÉ 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, ABLÉ programs, and other municipal fund securities. The MSRB submitted the rule change to 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 issuing this guidance in response to requests from industry groups in other MSRB rulemaking proposals.

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<sup>9</sup> [MSRB Regulatory Notice 2016-14 \(Apr. 12, 2016\)](#) (the “April guidance”).

<sup>10</sup> *Id.*

## Text of Amendments\*

### Rule G-45: Reporting of Information on Municipal Fund Securities

(a) - (d) No change.

~~(e) *Transitional Provision.* Notwithstanding section (a), the first submissions due under the rule, which are for the reporting period ending on June 30, 2015, shall be made by no later than October 28, 2015.~~

*Transition Provision for ABLÉ Programs.* Notwithstanding section (a), the first submissions due under the rule by underwriters of primary offerings of interests in programs established and maintained by a state, or an agency or instrumentality thereof, to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (an “ABLE program”), will be for the reporting period ending June 30, 2018.

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### Rule G-42: Duties of Non-Solicitor Municipal Advisors

(a) - (f) No change.

#### ---Supplementary Material:

**.01 - .11** No change.

**.12 529 College Savings Plans, ABLÉ Programs and Other Municipal Fund Securities.** This rule applies equally to municipal advisors to sponsors or trustees of 529 college savings plans, ABLE programs (i.e., a program established and maintained by a state, or an agency or instrumentality thereof, to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014), and other municipal fund securities. All references in this rule to an “official statement” include the ~~plan~~ disclosure document for a 529 college savings plan or an ABLÉ program and the investment circular or information statement for a local government investment pool.

**.13 - .15** No change.

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\* Underlining indicates new language; strikethrough denotes deletions.

## Rule G-44: Supervisory and Compliance Obligations of Municipal Advisors

(a) - (f) No change.

### ---Supplementary Material:

**.01 Municipal Fund Securities.** This rule applies equally to municipal advisors to sponsors or trustees of 529 college savings plans, ABLÉ programs (i.e., a program established and maintained by a state, or an agency or instrumentality thereof, to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014), and other municipal fund securities.

**~~.01~~ .02 Written Supervisory Procedures.** A municipal advisor's written supervisory procedures shall take into consideration, among other things, the advisor's size; organizational structure; nature and scope of municipal advisory activities; number of offices; the disciplinary and legal history of its associated persons; the likelihood that associated persons may be engaged in relevant outside business activities; and any indicators of irregularities or misconduct (i.e., "red flags"). In the case of a municipal advisor with any associated persons permitted under all applicable law to supervise their own activities, the written supervisory procedures must address the manner in which, in the absence of separate supervisory personnel, such procedures are nevertheless reasonably designed to achieve compliance with applicable rules.

**~~.02~~ .03 Small Municipal Advisors.** A municipal advisor with few personnel, or even only one associated person, can have a sufficient supervisory system under this rule. The rule allows the designation of one person to be responsible for supervision, and allows the tailoring of written supervisory procedures based on, among other things, an advisor's size.

**~~.03~~ .04 Appropriate Principal.** Designated supervisory principals must be vested with the authority to carry out the supervision for which they are responsible and have sufficient knowledge, experience and training to understand and effectively discharge their responsibilities. They also must have the authority to implement the established written supervisory procedures and take any other action necessary to fulfill their responsibilities. Even if not so designated, whether a person has responsibility for supervision under this rule depends on whether, under the facts and circumstances of a particular case, that person has the requisite degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue.

**~~.04~~ .05 Review of Compliance Policies and Supervisory Procedures.** The reviews under paragraph (b) of this rule should, at a minimum, consider any compliance matters that arose since the previous review, any changes in the municipal advisory activities of the municipal advisor or its affiliates, and any changes in applicable rules that might suggest a need to revise the written compliance policies or supervisory procedures. Although paragraph (b) specifically requires reviews to be conducted at least annually, municipal advisors should consider the need, in order to comply with all of the other requirements of this rule, for interim reviews.

~~.05~~ **.06 Chief Compliance Officer.** A chief compliance officer has a unique and integral role in the administration of a municipal advisor's compliance processes. A chief compliance officer is a primary advisor to the municipal advisor on its overall compliance scheme and the policies and procedures that the municipal advisor adopts in order to comply with applicable rules. To fulfill this role, a chief compliance officer should have competence in the process of (1) gaining an understanding of the services and activities that need to be the subject of written compliance policies and written supervisory procedures; (2) identifying the applicable rules and standards of conduct pertaining to such services and activities based on experience and/or consultation with others; (3) developing, or advising other business persons charged with the obligation to develop, policies and procedures that are reasonably designed to achieve compliance with applicable rules and standards of conduct; and (4) developing programs to test compliance with the municipal advisor's policies and procedures. It is the intention of this rule to foster regular and significant interaction between senior management and the chief compliance officer regarding the municipal advisor's comprehensive compliance program. The chief compliance officer may be a principal of the firm or a non-employee of the firm. If a non-employee, then the person designated as chief compliance officer must have the competence described above and the municipal advisor retains ultimate responsibility for its compliance obligations.

~~.06~~ **.07 Responsibility for Compliance Functions.** The chief compliance officer, and any compliance officers that report to the chief compliance officer, shall have responsibility for and perform the compliance functions contemplated by this rule. Nothing in this rule, however, is intended to limit or discourage the participation by any of the employees of the municipal advisor in any aspect of the municipal advisor's compliance program.

~~.07~~ **.08 Ability of Chief Compliance Officer to Hold Other Positions.** The requirement to designate a chief compliance officer does not preclude that person from holding any other positions within the municipal advisor, including serving in any position in senior management or being designated as a supervisory principal, provided that person can discharge the duties of chief compliance officer in light of all of the responsibilities of any other positions.

~~.08~~ **.09 Effect of Annual Certification on Business Line Responsibility.** The Board recognizes that supervisors with business line responsibility are accountable for the discharge of a municipal advisor's compliance policies and written supervisory procedures. The signatory to the certification required by this rule is certifying only as to having processes in place to establish, maintain, review, test and modify the municipal advisor's written compliance and supervisory policies and procedures and the execution of this certification and any consultation rendered in connection with such certification does not by itself establish business line responsibility.