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Dealers

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Request for Comment

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September 21, 2017

**Category**  
Fair Practice

**Affected Rules**  
[Rule G-45](#)

## Request for Comment on Draft Amendments to MSRB Form G-45 under Rule G-45, on Reporting of Information on Municipal Fund Securities

### Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting comment on draft amendments to MSRB Form G-45 under Rule G-45, on reporting of information on municipal fund securities. Form G-45 is applicable to brokers, dealers, and municipal securities dealers (collectively, “dealers”) that act as underwriters<sup>1</sup> to 529 college savings plans (“529 plans”) or 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<sup>2</sup> (“ABLE programs”).<sup>3</sup> The draft

<sup>1</sup> The term “underwriter,” as used in Rule G-45 and Form G-45, is defined by Rule 15c2-12(f)(8) under the Securities Exchange Act of 1934, as amended. Rule 15c2-12(f)(8) defines an underwriter as:

any person who has purchased from an issuer of municipal securities with a view to, or offers or sells for an issuer of municipal securities in connection with, the offering of any municipal security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; except, that such term shall not include a person whose interest is limited to a commission, concession, or allowance from an underwriter, broker, dealer, or municipal securities dealer not in excess of the usual and customary distributors' or sellers' commission, concession, or allowance.

<sup>2</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).

<sup>3</sup> At this juncture, the MSRB is requesting comment on the draft amendments to Form G-45. The MSRB may or may not determine to proceed beyond requesting comment. Further, as with any potential rulemaking, the MSRB may revise the potential rulemaking that it may file



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amendments to Form G-45 would require these underwriters to provide a clarification to an existing data element as well as to provide additional data relating to the investment options offered by the 529 plans and/or ABLE programs they underwrite.

Comments should be submitted no later than September 21, 2017, and may be submitted in electronic or paper form. [Comments may be submitted by clicking here.](#) Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street, NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.<sup>4</sup>

Questions about this notice should be directed to Pamela K. Ellis, Associate General Counsel, at 202-838-1500.

## Background

Beginning with the reporting period that ended June 30, 2015, underwriters to 529 plans have been required to report electronically certain information about the 529 plans they underwrite to the MSRB on Form G-45 on a semi-annual, or in the case of performance data, on an annual basis.<sup>5</sup> Similarly, beginning with the reporting period ending June 30, 2018, underwriters to ABLE programs will be required to report electronically certain information about the ABLE programs they underwrite to the MSRB on Form G-45.<sup>6</sup> Form G-45 requires that underwriters to 529 plans and/or ABLE programs report plan descriptive information, aggregate plan information, and investment option information to the MSRB.

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with the Securities and Exchange Commission (SEC) as compared with the draft amendments to Form G-45 set forth in this request for comment. The MSRB may make those revisions in response to comments from market participants or otherwise. In addition, the MSRB may determine to issue guidance to address comments received from market participants or to address the issues raised by this request for comment.

<sup>4</sup> Comments generally are posted on the MSRB's website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

<sup>5</sup> Rule G-45 requires that underwriters report the information required by the rule no later than 60 days following the end of each semi-annual reporting period ending on June 30 or December 31.

<sup>6</sup> The MSRB amended Rule G-45 to delay until the reporting period ending June 30, 2018, the date on which dealers that are underwriters to ABLE programs will begin to submit data on Form G-45. See [MSRB Notice 2016-20 \(Aug. 12, 2016\)](#).

The MSRB and other regulatory authorities charged by statute with examining dealers for compliance with and enforcing MSRB rules, including the SEC and the Financial Industry Regulatory Authority, Inc. (FINRA), use, and in the case of ABLÉ programs, will use the data submitted under Rule G-45 to analyze 529 plans and ABLÉ programs, monitor their growth rate, size and investment options, and compare plans based on fees and costs and performance. Such data enhances the MSRB's understanding of 529 plans and ABLÉ programs as well as informs the MSRB about the potential risks associated with 529 plans and ABLÉ programs. Further, the data provides appropriate regulatory authorities with additional information to monitor the market for wrongful conduct.

The most substantial information required by Form G-45 relates to the investment options offered by the 529 plan or ABLÉ program. An underwriter, under the Investment Option information section of Form G-45, must submit: identifying information about the investment option; the total assets allocated to the investment option as well as the total contributions and distributions from the investment option; the underlying investments made by the investment option; the investment performance of the investment option; the performance of the investment option as compared to its benchmark, if any; and the fees and expenses associated with the investment option.

### **Draft Amendments to Form G-45**

Throughout the four reporting periods during which the MSRB has analyzed data submitted on Form G-45, the MSRB has observed anomalies in the data submitted under Investment Option information. In addition, the MSRB has determined to gather industry and public input as to certain refinements to that data that could be made to more fully assist the MSRB with its analysis of the 529 plans and ABLÉ programs. Therefore, potentially to enhance its ability to analyze the data submitted under Investment Option information, the MSRB is requesting comment regarding a clarification to an existing data element as well as three additional data elements about Investment Option information. Those data elements concern the program management fee, benchmark return percent, performance data by asset class, and the investment option closing data. A summary of how those data elements would appear in the Appendix to the EMMA Dataport Manual and Specifications for 529 College Savings Plan Data (Form G-45) Submissions (version 1.4) is set forth in Appendix A.

- (i) *Program management fee*

Form G-45, under the Investment Option information subsection “Program Management Fee,” requires that an underwriter report the amount of the program management fee assessed by the 529 plan. The program management fee typically is a separately identifiable fee assessed by a 529 plan, but for some 529 plans, this is not the case.

Instead, the program management fee is sometimes included in total fund operating expenses assessed by the underlying mutual fund in which the investment option invests. The underlying mutual fund has a 529 plan share class, and the program management fee is assessed at the fund level for that 529 plan share class.

Because there is a variance among 529 plans in how the program management fee is assessed, it is more difficult for the MSRB to analyze the program management fee from one 529 plan to another. Although the MSRB will not begin to collect data about ABLÉ programs until the reporting period ending June 30, 2018, the MSRB believes that the need for this data clarification is equally applicable to ABLÉ programs. To potentially improve the ability for the MSRB to compare and analyze program management fees, the MSRB requests comment on a draft amendment to Form G-45 that would require an underwriter to report the amount of the program management fee separately if such fee is assessed by the underlying mutual fund in which the investment option invests rather than by the 529 plan or ABLÉ program itself.<sup>7</sup>

*(ii) Benchmark return percent*

Form G-45, under the Investment Option information subsection “Benchmark Total Return Percent,” requires that an underwriter report the benchmark return percent for each investment option offered by the 529 plan for specified periods that include year-to-date, one-year, annualized three-year, and annualized since inception. After having reviewed Form G-45 submissions for two annual reporting periods, the MSRB has observed that when an investment option uses a custom or blended index to benchmark its performance, the resulting performance data may be not as accurate or as easy to compare across investment options as it otherwise could be. This is

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<sup>7</sup> The MSRB previously has stated that it would not require underwriters to “calculate and artificially segment fees for purposes of completing Form G-45.” See Amendment No. 1 to SR-MSRB-2013-04. As data about the program management fee, even if that fee is assessed by the underlying mutual fund, is available and generally disclosed in footnotes to the fee table for the mutual fund, the MSRB does not believe that submitting data about the program management fee would be unduly burdensome for the underwriter.

because Form G-45 does not require an underwriter to identify and provide the weighted value of each of the component parts of a custom or blended index.

To facilitate accuracy and comparability of performance data against the relevant benchmark, the MSRB requests comment on a draft amendment to Form G-45 that would require an underwriter to a 529 plan or an ABLE program to identify and provide annually the weighted value of each index that comprises the benchmark used in determining benchmark total return percent for an investment option. The MSRB believes the data elements would result in a more accurate report of the benchmark performance.

*(iii) Performance data by asset class*

Form G-45, under the Investment Option information subsection “Asset Class(es),” requires that an underwriter provide the asset class(es) in each investment option as of the most recent semi-annual period. However, there is no corresponding requirement in the Investment Option information subsection “Investment Performance.” Because there is no corresponding requirement under “Investment Performance” to provide information about how the asset classes within an investment option are performing, it is more difficult for the MSRB to determine how a particular asset class is performing on an annual basis.

To address this issue, the MSRB requests comment on a draft amendment to Form G-45 that would require an underwriter to a 529 plan or ABLE program to submit data about how each asset class within an investment option is performing for the annual reporting period ending December 31.

*(iv) Investment option closing date*

From time to time, an investment option offered in a 529 plan may close to new investors but allow current account owners who have allocated account value in an investment option to continue to invest in that “closed” investment option. Alternatively, the 529 plan may close an investment option completely. In either case, the investment option data submitted for that investment option on Form G-45 can be contrary to analytical expectations, and the MSRB may not be able to easily determine why such variance occurred.

To help clarify why there may be a variance in the investment option data, the MSRB requests comment on a draft amendment to Form G-45 that would require an underwriter to a 529 plan or an ABLE program to provide information during each semi-annual reporting period about whether an

investment option was closed to new investors, but open to current account owners, or whether the investment option terminated during the reporting period.

## Economic Analysis

### 1. The need for the draft amendments to Form G-45 and how the draft amendments to Form G-45 would meet that need.

The need for the draft amendments to Form G-45 arises from the MSRB's oversight of dealers acting as underwriters to 529 plans and ABLÉ programs. The MSRB believes that this information is required to ensure effective regulation of dealers that sell interests in and underwriters to 529 plans and ABLÉ programs. Since the data elements are not disclosed or readily available in certain instances, rulemaking is required to bring the information to the MSRB and other appropriate regulatory authorities, in the manner of other information collected on Form G-45. For example,

1. In certain instances, the program management fee is included in the total fund operating expenses assessed by the underlying mutual fund and thus is not separately disclosed. This makes comparing and analyzing program management fees across plans difficult;
2. In the case of the benchmark return percentage, Form G-45 currently does not require an underwriter to provide the component parts of a custom or blended index and subsequently the weighted value of each benchmark within the index. Consequently, the data can be inaccurate or difficult to compare to the benchmark returns of other investment options;
3. Similarly, there is no corresponding requirement to provide information about how an asset class within an investment option is performing annually. On occasions, asset classes within available investment options do change within a given reporting period, and this can be very difficult to determine retroactively with the presently available data; and
4. From time to time, an investment option may either close to new investors but allow current account owners to continue to invest, or may close to all investors completely. Therefore, investment data submitted for that investment option may not accurately portray the real annualized return.

The draft amendments to Form G-45 would require the clarification of an existing data element and the collection of additional data elements about the Investment Option information to remedy the above concerns. By requiring clarification of an existing data element and the submission of additional data elements, the MSRB could remove the burden on submitters of unnecessary follow-ups and/or referrals for what is in reality accurate albeit incomplete data. For a more thorough discussion of the need for the draft amendments, please refer to the sections above.

## **2. Relevant baselines against which the likely economic impact of elements of the draft amendments to Form G-45 can be considered.**

To evaluate the potential impact of the draft amendments to Form G-45, a baseline or baselines must be established as a point of reference in comparison to the expected state with the draft amendments in effect. The economic impact of the draft amendments is generally viewed to be the difference between the baseline and the expected states.

The baseline for the draft amendments to Form G-45 is the existing Rule G-45 and Form G-45, which require submission of certain plan information on a semi-annual, or in the case of performance data, on an annual basis. This analysis considers costs and benefits of the draft amendments above the baseline. Since certain data elements are already required under Rule G-45 and Form G-45, submission of currently-required information on a semi-annual or annual basis is considered part of the baseline for purposes of this request for comment, and only costs associated with supplying the additional data elements are addressed in the discussion of costs and benefits.

## **3. Identifying and evaluating reasonable alternative regulatory approaches.**

Presently, there are a couple of alternatives for the MSRB to obtain some of the above information without the draft amendments to Form G-45; however, neither of these alternatives is preferable as the collection of the information for investment option assessment would not be efficient and would likely be incomplete.

For example, some of the information that would be required by the draft amendments to Form G-45 is already submitted to each state treasurer on an annual basis. This is a potential alternative source of the information addressed by this request for comment. However, this information is not uniform and may be incomplete. For regulatory purposes, the MSRB needs a consistent set of uniform, reliable and relevant information about 529 plans and ABLÉ programs. Since each 529 plan's or ABLÉ program's information

may or may not be available on a given state's website, comparing across plans becomes difficult or nearly impossible. Another alternative to the draft amendments to Form G-45 is a manual review of information in plan disclosure documents submitted to the MSRB's Electronic Municipal Market Access (EMMA®)<sup>8</sup> website or on 529 plan or ABLE program websites. A manual review of information would be insufficient because some of the information sought by the MSRB may not be disclosed in public documents. In addition, information voluntarily submitted may differ with respect to its reliability and quality.

The MSRB previously considered requiring more frequent submissions (such as monthly or quarterly). The MSRB arrived at annual submission frequency for the performance of investment options and semi-annual submission frequency for other data elements in order to reduce the burden on submitters.

#### **4. Assessing the benefits and costs of the draft amendments to Form G-45**

The MSRB policy on economic analysis in rulemaking addresses consideration of the likely costs and benefits of the draft amendments to Form G-45 with the draft amendments fully implemented against the context of the economic baseline.

The MSRB is seeking, as part of this request for comment, additional data or studies relevant to the draft amendments, specifically the cost of calculating the weighted value of each index that comprises the benchmark in determining the benchmark total return, as well as the cost of calculating how each asset class within an investment option is performing on an annual basis. The MSRB is seeking estimates of both the upfront cost and the ongoing cost of performing the calculations. In addition, the MSRB seeks estimates of a potential increase in investment into 529 plans and ABLE programs, if any, due to the benefits of enhanced regulatory disclosure.

##### **Benefits**

There would be many on-going benefits associated with collection of the draft data elements. The amendments would better enable the MSRB to carry out its regulatory responsibilities and fulfill its mission to ensure fairness and efficiency in the markets for these 529 plans and ABLE

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<sup>8</sup> EMMA is a registered trademark of the MSRB.

programs.<sup>9</sup> The MSRB would realize substantial benefits from receiving reliable, accurate reporting of the draft data elements as this would enhance the MSRB's ability to effectively and efficiently regulate. This should enhance regulatory oversight of underwriters to 529 plans and ABLÉ programs and dealers that sell interests in those 529 plans and ABLÉ programs. The additional information would also assist the MSRB in better understanding the 529 plan and ABLÉ program markets, including popular investment strategies and portfolios, thereby enabling the MSRB and other regulators to focus their regulatory resources on issues relating to the sale of interests in 529 plans or ABLÉ programs (such as suitability), and issues concerning the strategies and portfolios with the highest risk and impact on the market. Over time, this additional information would also assist FINRA, which conducts examinations of 529 plan and ABLÉ program dealers, and other regulators in their examination and enforcement activities.

With the public knowledge of greater regulatory oversight of underwriters to 529 plans and ABLÉ programs and dealers that sell interests in those plans and programs, there could be an increased interest on the part of new and existing investors in choosing these investment options if investors believe they would be better protected by regulation.

### **Costs**

The economic analysis of the potential costs does not consider the aggregate costs associated with the draft amendments, but instead focuses on the incremental costs attributable to the amendments that exceed the baseline state. The costs associated with the baseline state are, in effect, subtracted from the costs associated with draft amended Form G-45 to isolate the costs attributable to the incremental requirements of the draft amendments.

The draft amendments to Form G-45 would impose certain burdens and costs on the underwriters of 529 plans and ABLÉ programs. While some of the requested data elements could be easily determined, others may lead underwriters to hire third-party consultants to calculate and validate the data. If this is the case, there may be significant up-front costs associated with hiring vendors to complete the calculations as well as periodic on-going costs associated with updating the numbers on an annual basis. In addition, in-house staff time would be required to make the semi-annual or annual submissions to the MSRB, though the additional incremental time and cost of

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<sup>9</sup> As elaborated above, the MSRB is aware that at least some of this information is available at present on the internet through certain providers. However, the MSRB is concerned about the time and effort associated with obtaining this information in a usable format for regulatory purposes.

data submission should be *de minimis* as semi-annual submissions are already required for many other data elements under Rule G-45. The MSRB also believes underwriters may have ready access to some of the newly requested information regarding the 529 plans and ABE programs, as similar information may be already gathered and produced regularly to their issuer clients. If so, the MSRB believes that it would not be as burdensome as it might have otherwise been for underwriters to submit the newly-required information electronically to the MSRB.

On balance, the MSRB believes that while there would be initial implementation costs of the new data calculation and validation, the aggregate benefits to market participants and regulators associated with the draft amendments to Form G-45 should gradually outweigh the costs over time. Specifically, the MSRB believes the long-term accrued benefits of the draft amendments to Rule G-45, including the anticipated use of the information by the MSRB and other regulators for the protection of investors, outweigh the burden that would be imposed on underwriters.

#### **Effect on Competition, Efficiency and Capital Formation**

The MSRB believes that the draft amendments to Form G-45 may improve the operational efficiency of the municipal fund security market by promoting consistency and transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of efficiency gains or losses, or the impact on capital formation, but believes that the benefits outweigh the costs over the long term. Additionally, in the MSRB's view, the draft amendments to Form G-45 would not result in an undue burden on competition since they would apply to all underwriters of 529 plans and ABE programs equally.<sup>10</sup>

Competition, however, may be adversely affected if, to compensate for costs and regulatory burden, underwriters would raise the fees charged to issuers, resulting in issuers refraining from using dealers to engage directly with potential investors, or passing on some portion of the higher fee amount to investors.

#### **Conclusion**

The MSRB believes that these draft amendments to Form G-45 would provide a range of benefits, including reducing regulatory blind spots and facilitating efficient and effective regulatory oversight of relevant

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<sup>10</sup> The draft amendments would not impose any burden on non-underwriting dealers that only sell interests in either 529 plans or ABE programs.

underwriters and dealers. However, the draft amendments to Form G-45 may impose some costs on underwriters and/or require them to revise certain business practices and spend additional resources. The MSRB is soliciting estimates of these costs in this request for comment, but believes that they would be less than the aggregate benefits that would gradually accrue over time.

### **Request for Comment**

The MSRB seeks public comment on the following questions, as well as on the other topics raised in this request. The MSRB particularly welcomes statistical, empirical, and other data from commenters that may support their views and/or support or refute the views, assumptions, or issues raised in this request for comment.

- Would the draft amendments to Form G-45 achieve their purpose of providing more precise information to enhance the MSRB's ability to understand the 529 plan and ABLÉ program markets?
- Do underwriters analyze or receive analyses of the additional investment option information about benchmark return percent and performance data by asset class discussed in this request for comment?
- Do underwriters report to issuers or receive reports concerning the additional investment option information about performance data by asset class discussed in this request for comment?
- Do sponsors or trustees of 529 plans or ABLÉ programs, or underwriters thereof, consider any of the additional investment option information concerning the benchmark return percent and the performance data by asset class discussed in this request for comment to be proprietary?
- Is there other information that the MSRB should consider collecting about 529 plans and ABLÉ programs on Form G-45?
- Are there other relevant baselines or alternatives the MSRB should consider when evaluating the economic impact of the draft amendments to Form G-45?
- If the draft amendments to Form G-45 were adopted, what would be the likely effects on competition, efficiency and capital formation?

- Are there data or studies relevant to the evaluation of the benefits and costs of the draft amendments to Form G-45 that the MSRB should consider?
  - a. Are there data relevant to the evaluation of the per firm cost of implementing the draft amendments to Form G-45?
  - b. How likely is it that underwriters would use a third-party consultant or vendor to calculate and validate the weighted annual total return of a benchmark index, as well as the annual total return of each asset class?
  - c. Is there an estimate of the cost of hiring a third-party consultant to calculate and validate the annual returns?
  - d. What is the estimated potential increase in investment into 529 plans and ABLE programs due to the benefits of enhanced regulatory disclosure?
- What specific changes would underwriters need to make to their systems to implement the draft amendments to Form G-45?

August 22, 2017

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## Appendix A

	Data Elements	Description
Investment Option Information	Investment Performance  Required for the period ending December 31	
	Total Returns Including Sales Charges	Total Returns <i>by asset class</i> of the investment option, expressed as a percentage, net of all generally applicable fees and costs, including sales charges, for the most recent calendar year. Specified periods include: year-to-date, one-year, annualized three-year, annualized five-year, annualized then -year, annualized since inception.
	Total Returns Excluding Sales Charges	Total Returns <i>by asset class</i> of the investment option, expressed as a percentage, net of all generally applicable fees and costs, excluding sales charges, for the most recent calendar year. Specified periods include: year-to-date, one-year, annualized three-year, annualized five-year, annualized then -year, annualized since inception.
Investment Option information	Benchmark Performance (if any)  Required for annual reporting period ending December 31	
	Benchmark return percent	Total returns of the benchmark for each investment option for the most recent calendar year. <i>If the benchmark is based on a custom or blended index, list</i>

	Data Elements	Description
		<i>each index that comprises the benchmark as well as the weighted value of that index to the benchmark. Specified periods include: year-to-date, one-year, annualized three-year, annualized since inception.</i>
	Program Management Fee	Program management fee in effect as of the most recent semi-annual reporting period. Ascribe as contemplated by College Savings Plans Network Disclosure Principles Statement No. 6. <i>If the program management fee is assessed by the 529 share class of the mutual fund underlying the investment option, separately list the amount of the program management fee.</i>