

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82238; File No. SR-MSRB-2017-08)

December 8, 2017

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change to Amend MSRB Form G-45 to Collect Additional Data About the Transactional Fees Primarily Assessed by Programs Established to Implement the ABLE Act

I. Introduction

On October 13, 2017, the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend MSRB Form G-45 under MSRB Rule G-45, on reporting of information on municipal fund securities,³ to collect additional data about the transactional fees primarily assessed by programs established to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act” and an “ABLE program”) (the “proposed rule change”).⁴ The proposed rule change was published for comment in the Federal Register on October 27, 2017.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR § 240.19b-4.

³ Form G-45 is an electronic form on which submissions of the information required by Rule G-45 are made to the MSRB.

⁴ The ABLE Act was enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014 (Pub. L. No. 113-295).

⁵ Securities Exchange Act Release No. 81921 (October 23, 2017) (the “Notice of Filing”), 82 FR 49908 (October 27, 2017).

The Commission received one comment letter on the proposed rule change.⁶ On December 1, 2017, the MSRB responded to the comments received by the Commission.⁷

II. Description of Proposed Rule Change

In the Notice of Filing, the MSRB stated that the proposed rule change would amend Form G-45 to collect additional information relating to fees and expenses to help ensure that the MSRB continues to receive comprehensive information regarding ABLE programs and 529 college savings plans.⁸ The MSRB stated that this data would enhance the MSRB's understanding of the markets for ABLE programs and 529 college savings plans, including the differences among such programs or plans.⁹ Further, the MSRB stated that the additional fee and expense information would assist the MSRB in fulfilling its investor protection mission.¹⁰ The MSRB also stated that the information about fees and expenses would continue to be submitted in a format that is consistent with the disclosure principles of the College Savings Plan Network ("CSPN"), an affiliate of the National Association of State Treasurers, which, the MSRB added,

⁶ See Letter to Secretary, Commission, from Leslie Norwood, Managing Director and Associate General Counsel, and Bernard Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), dated November 17, 2017 (the "SIFMA Letter").

⁷ See Letter to Secretary, Commission, from Pamela K. Ellis, Associate General Counsel, MSRB, dated December 1, 2017 (the "MSRB Response Letter"), available at <https://www.sec.gov/comments/sr-msrb-2017-08/msrb201708-2743045-161576.pdf> .

⁸ See Notice of Filing.

⁹ Id.

¹⁰ Id.

commenters on previous MSRB rulemaking proposals relating to MSRB Form G-45 have stated is the industry norm.¹¹

As further described by the MSRB in the Notice of Filing, under the proposed rule change, an underwriter to an ABLÉ program or a 529 college savings plan would be required to submit data on Form G-45 about the following additional fees and expenses, as applicable:

- account opening fee;
- investment administration fee;
- change in account owner fee;
- cancellation/withdrawal fee;
- change in investment option/transfer fee;
- rollover fee;
- returned excess aggregate contributions fee;
- rejected ACH or EFT fee;
- overnight delivery fee;
- in-network ATM fee;
- out-of-network ATM fee;
- ATM mini statement fee;
- international POS/ATM transaction fee;
- foreign transaction fee;
- overdraft fee;
- copy of check or statement fee (per request);

¹¹ Id.

- copy of check images mailed with monthly statement fee;
- check fee (i.e., fee for blank checks);
- returned check fee;
- checking account option fee;
- re-issue of disbursement check fee;
- stop payment fee;
- debit card fee;
- debit card replacement fee;
- outgoing wire fee;
- expedited debit card rush delivery fee;
- paper fee; and
- miscellaneous fee (to address any miscellaneous transactional fee that is not otherwise specified on Form G-45).¹²

In addition, under the proposed rule change, the MSRB stated that it would collect data about any variance in the annual account maintenance fee due to the residency of the account owner.¹³ The MSRB also stated that the proposed rule would apply to underwriters to ABLE programs as well as to underwriters to 529 college savings plans.¹⁴ The MSRB, however, stated that it anticipates that most of the data that would be collected by the proposed rule change would relate to ABLE programs.¹⁵ The MSRB also noted that it believes that 529 college savings

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

plans generally do not assess the fees and charges that are the subject of this proposed rule change.¹⁶

The MSRB requested in the Notice of Filing that the proposed rule change be approved with an effective date of June 30, 2018.¹⁷

III. Summary of Comments Received and MSRB's Responses to Comments

As noted previously, the Commission received one comment letter on the proposed rule change, as well as the MSRB Response Letter. The commenter, SIFMA, stated that it was “supportive of the MSRB’s efforts to fully understand the ABLÉ programs and 529 college savings plans market and fulfill its mission” but believed that municipal securities dealers who underwrite ABLÉ programs and 529 college savings plans “should only be required to submit the information required by Form G-45 to the extent it is within their possession, custody, or control”.¹⁸ SIFMA also stated that the MSRB should be mindful of the possibility that additional regulatory requirements such as the proposed rule change could increase costs to investors in dealer-sold 529 college savings plans and ABLÉ programs versus direct-sold programs that are not regulated by the MSRB.¹⁹ The MSRB stated that it believes the proposed rule change is consistent with its statutory mandate and has responded to the comments, as discussed below.²⁰

1. Submission of Information Within Custody of Dealer

SIFMA stated that some of the information about fees that underwriters would be

¹⁶ Id.

¹⁷ Id.

¹⁸ See SIFMA Letter.

¹⁹ Id.

²⁰ See MSRB Response Letter.

required to submit on MSRB Form G-45, under the proposed rule change, may be contained in ABLE program or 529 college savings plan disclosure documents and suggested that those underwriters could provide hyperlinks to those documents to the MSRB.²¹ The MSRB responded by stating that even if some of the information required to be submitted on MSRB Form G-45 were contained in those ABLE program or 529 college savings plan disclosure documents, that the information would not be published in a uniform electronic format that would allow for the MSRB's efficient analysis or comparison of such information.²² The MSRB noted that, at this time, there is no requirement that state issuers prepare those disclosure documents in a uniform format and, unlike for 529 college savings plans, there are not even voluntary disclosure principles for state issuers in the preparation of their disclosure documents that are applicable to ABLE programs.²³ As result, the MSRB stated, it is even more likely that the information in the ABLE program disclosure documents would not be presented in a uniform format that would allow the MSRB to readily analyze and compare ABLE programs.²⁴ In addition, the MSRB stated that referencing the ABLE program or 529 college savings plan disclosure documents would not meet the MSRB's regulatory need because the data provided to the MSRB must be in a uniform electronic format that can be aggregated and analyzed.²⁵ The MSRB acknowledged that the proposed rule change would result in some up-front costs to underwriters due to technical changes to underwriters' reporting systems, but the MSRB stated that those costs

²¹ See SIFMA Letter.

²² See MSRB Response Letter.

²³ Id.

²⁴ Id.

²⁵ Id.

should mostly be one-time only costs and that the cumulative benefits of receiving data in a uniform electronic format should exceed the upfront costs over time.²⁶

2. Applicability of Proposed Rule Change to Advisor-Sold and Direct-Sold ABLÉ Programs and 529 College Savings Plans

SIFMA suggested that the duty to submit information about the fees assessed by ABLÉ programs and 529 college savings plans on MSRB Form G-45 would create an undue burden because, in SIFMA’s view, the MSRB’s jurisdiction is limited to underwriters to dealer-sold ABLÉ programs or 529 college savings plans.²⁷ The MSRB responded by stating that such an undue burden on competition would not exist because the MSRB believes it has jurisdiction over all underwriters of ABLÉ programs and 529 college savings plans.²⁸ The MSRB stated that it has jurisdiction over underwriters to all 529 college savings 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 ABLÉ programs.²⁹ The MSRB also stated that it has previously discussed the application of Rule G-45 to dealers, and in doing so has said that the activities of an entity may cause that entity to be within the definition of dealer and/or underwriter set forth in the Act or rules thereunder and thus subject to MSRB Rule G-45.³⁰ The MSRB stated that, for example, the activities of a program manager to an ABLÉ program or 529 college savings plan, or its

²⁶ Id.

²⁷ See SIFMA Letter.

²⁸ See MSRB Response Letter.

²⁹ Id.

³⁰ Id.

affiliates or contractors, could include direct contact with investors through the development and distribution of ABLÉ program or 529 college savings plan advertising sales literature, or maintaining ABLÉ program or 529 college savings plan websites, including processing enrollment funds.³¹ The MSRB stated that those activities could, depending on the facts and circumstances, cause one or more of those entities to be underwriters under Rule G-45.³² The MSRB also noted that it believed the Commission has agreed with the MSRB that each entity must make its own determination about whether its activity would qualify as “underwriting” activity as that term is defined in SEC Rule 15c2-12(f)(8) under the Act.³³ In addition, the MSRB stated that, beginning in 2015, the MSRB has received data from underwriters to 529 college savings plans under Rule G-45.³⁴ The MSRB stated that it has every reason to believe that there is widespread compliance by those underwriters with their reporting obligations under Rule G-45.³⁵ Consequently, the MSRB stated, it does not believe that the requirement to submit fee information, as would be required under the proposed rule change, on MSRB Form G-45 would unduly burden competition between underwriters to advisor-sold ABLÉ programs or 529 college savings plans versus underwriters to direct-sold ABLÉ programs or 529 college savings plans.³⁶

3. Underwriter Reporting Obligation

SIFMA stated that it believed dealers that underwrite ABLÉ programs and 529 college

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

savings plans should only be required to submit information required by MSRB Form G-45 to the extent that such information is within their possession, custody and control.³⁷ The MSRB stated that, under the proposed rule change, and consistent with the MSRB's previous position on this issue, an underwriter to an ABL program or 529 college savings plan would not be required to submit information on MSRB Form G-45 that the underwriter neither possesses nor has the legal right to obtain.³⁸ The MSRB also noted that 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.³⁹ Therefore, the MSRB stated, an underwriter may designate an affiliate or contractor to perform activities in the underwriter's stead in connection with the underwriting, but that the underwriter would be properly viewed as having the legal right to obtain all information.⁴⁰

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letter received, and the MSRB Response Letter. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

In particular, the proposed rule change is consistent with Sections 15B(b)(2)(C) of the Act.⁴¹ Section 15B(b)(2)(C) of the Act states that the MSRB's rules shall be designed to prevent

³⁷ See SIFMA Letter.

³⁸ See MSRB Response Letter.

³⁹ Id.

⁴⁰ Id.

⁴¹ 15 U.S.C. 78o-4(b)(2)(C).

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.⁴² The Commission believes the proposed rule change is consistent with Section 15B(b)(2)(C) and necessary and appropriate to help the MSRB receive complete and reliable information about ABLE programs and 529 college savings plans which it can use to monitor such programs and plans and detect potential investor harm. The Commission believes that, for that data set to be complete and reliable, such data should include the data about the fees and expenses associated with an investment in an ABLE program or a 529 college savings plan that are included in the proposed rule change. In addition, the Commission believes the proposed rule change is necessary for the MSRB to gather relevant data required to ensure the MSRB's regulatory scheme is sufficient and/or to determine whether additional rulemaking is necessary to protect investors and the public interest.

The Commission believes that the proposed rule change would facilitate the MSRB's ability to better analyze the market for ABLE programs and 529 college savings plans as well as improve the MSRB's ability to evaluate trends and differences among ABLE programs and 529 college savings plans. Further, the Commission believes that the MSRB, as well as other financial regulators charged with enforcing the MSRB's rules, use (or will use) the information submitted on MSRB Form G-45 to enhance their understanding of, and ability to monitor, ABLE

⁴² 15 U.S.C. 78o-4(b)(2)(C).

programs and 529 college savings plans.

The Commission believes that the MSRB or other regulators could use the information submitted on MSRB Form G-45 to, among other things, determine if the disclosure documents or marketing materials prepared or reviewed by underwriters are consistent with the data submitted to the MSRB for regulatory purposes.

In approving the proposed rule change, the Commission also has considered the impact of the proposed rule change on efficiency, competition, and capital formation.⁴³ The Commission does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The additional data that the proposed rule change would collect is understood by the Commission to be readily available and known to the underwriters of ABLE programs and 529 college savings plans. Additionally, the Commission understands that these underwriters are already required to submit certain information to the MSRB on MSRB Form G-45 on a semi-annual basis. Also, the Commission believes that the additional information required to be submitted by the proposed rule change would be submitted on an equal and non-discriminatory basis, and the requirement would apply equally to all dealers that serve as underwriters to ABLE programs and/or 529 college savings plans. Furthermore, the Commission believes that the potential burdens created by the proposed rule change are to be likely outweighed by the benefits.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with the Act.

⁴³ 15 U.S.C. 78c(f).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴⁴ that the proposed rule change (SR-MSRB-2017-08) be, and hereby is, approved .

For the Commission, pursuant to delegated authority.⁴⁵

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Assistant Secretary

⁴⁴ 15 U.S.C. 78s(b)(2).

⁴⁵ 17 CFR 200.30-3(a)(12).