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[Rule D-12](#)

## Municipal Fund Securities – Interpretation Relating to the Sales of Interests in ABLÉ Programs in the Primary Market

### Overview

The Municipal Securities Rulemaking Board (MSRB) has received guidance from the staff of the Office of Municipal Securities of the U.S. Securities and Exchange Commission (SEC) regarding accounts established pursuant to the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the “ABLE Act”). Consistent with that guidance, the MSRB is issuing interpretive guidance under MSRB Rule D-12, on the definition of “municipal fund security.” This interpretive guidance provides, in part, that interests in ABLÉ accounts may be municipal fund securities, as defined by Rule D-12, and that a broker, dealer or municipal securities dealer (collectively, a “dealer”) that effects transactions in ABLÉ programs may be subject to all MSRB rules, unless such dealer is specifically exempted from the MSRB rule.

### Background

The ABLÉ 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

<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).



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higher education costs.<sup>2</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>3</sup> and the MSRB has provided guidance that such interests may be municipal fund securities under MSRB Rule D-12.

Given the similarities between the structure of ABLÉ 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 ABLÉ account offered through an ABLÉ 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:

at least some interests in ABLÉ 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 ABLÉ account offered through an ABLÉ Program is a direct obligation of, or obligation guaranteed as to principal or interest by, a State or any agency or instrumentality thereof.<sup>4</sup>

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<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).

<sup>4</sup> Letter dated March 31, 2016 from Jessica S. Kane, Director, Office of Municipal Securities, U.S. Securities and Exchange Commission to Robert A. Fippinger, Esq., Chief Legal Officer, Municipal Securities Rulemaking Board, in response to letter dated December 31, 2015 from Robert A. Fippinger to Jessica S. Kane available at <http://www.sec.gov/info/municipal/msrb-letter-033116-interests-in-able-accounts.pdf> [footnote omitted].

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

[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.<sup>5</sup>

Having received the SEC staff guidance, the MSRB now is issuing interpretive guidance under Rule D-12.

### **Interpretive Guidance under Rule D-12**

The interpretive guidance under Rule D-12 provides that interests in ABLE accounts may be municipal fund securities. To the extent that dealers effect transactions in municipal fund securities, such transactions are subject to the jurisdiction of the MSRB pursuant to Section 15B of the Exchange Act.

The SEC staff guidance also provides that (i) the offering of interests in ABLE programs may be considered a “primary offering” pursuant to Rule 15c2-12(f)(7) under the Exchange Act and (ii) dealers that act as underwriters, as defined in Rule 15c2-12(f)(8), under the Exchange Act, in connection with a primary offering of interests in an ABLE program may be subject to the requirements of Rule 15c2-12. Therefore, consistent with the SEC staff’s views, dealers effecting transactions in ABLE programs may be subject to all MSRB rules, unless such dealers are specifically exempted from any of those rules, because those dealers would be effecting transactions in municipal fund securities. In particular, dealers acting as underwriters with respect to the sale of interests in ABLE programs may be subject to the requirements of (i) MSRB Rule G-32, on disclosures in connection with primary offerings, and the requirement to submit official statements through the MSRB’s Electronic Municipal Market Access (EMMA®) system<sup>6</sup> pursuant to Rule G-32(b) and (ii)

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<sup>5</sup> *Id.*

<sup>6</sup> EMMA is a registered trademark of the MSRB.

MSRB Rule G-45, on reporting of information on municipal fund securities, and the requirement to submit information on Form G-45 pursuant to Rule G-45(a).

Further, all interpretive guidance under MSRB rules applicable to the sale of interests in 529 college savings plans also applies to the sale of interests in ABLE programs, as relevant.

The MSRB anticipates that it will publish guidance to address particular issues, including Rule G-45, applicable to the sale of interests in ABLE programs by dealers.

April 12, 2016

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## Text of Interpretive Guidance

### INTERPRETATION RELATING TO SALES OF INTERESTS IN ABLE PROGRAMS IN THE PRIMARY MARKET

The Municipal Securities Rulemaking Board (the “Board”) has learned that sales of certain interests in accounts held by states, or agencies or instrumentalities thereof (the “state”), may be effected through brokers, dealers or municipal securities dealers (collectively, “dealers”). The Board understands that such accounts may be established by states to implement qualified ABLE programs under Section 529A of the Internal Revenue Code of 1986, as amended.<sup>1</sup> In response to a request of the Board, staff of the Office of Municipal Securities at the Securities and Exchange Commission (the “SEC”) has stated that “at least some interests in ABLE accounts . . . may be ‘municipal securities’ as defined in Section 3(a)(29) of the [Securities] Exchange Act [of 1934], depending on the facts and circumstances, including without limitation, the extent to which an ABLE account offered 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.”<sup>2</sup>

Any such interest may, in fact, constitute interests in municipal fund securities, as defined by MSRB Rule D-12. To the extent that dealers effect transactions in municipal fund securities, such transactions are subject

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<sup>1</sup> Section 529A of the Internal Revenue Code of 1986, as amended, was enacted pursuant to the Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014 (the “ABLE Act”).

<sup>2</sup> Letter dated March 31, 2016 from Jessica S. Kane, Director, Office of Municipal Securities, U.S. Securities and Exchange Commission to Robert A. Fippinger, Esq., Chief Legal Officer, Municipal Securities Rulemaking Board, in response to letter dated December 31, 2015 from Robert A. Fippinger to Jessica S. Kane available at <http://www.sec.gov/info/municipal/msrb-letter-033116-interests-in-able-accounts.pdf> [footnote omitted].

to the jurisdiction of the Board pursuant to Section 15B of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).<sup>3</sup>

With respect to the applicability to municipal fund securities of Exchange Act Rule 15c2-12,<sup>4</sup> relating to municipal securities disclosure, staff of the Office of Municipal Securities has stated:

[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.<sup>5</sup>

Consistent with the SEC staff’s views, dealers effecting transactions in ABLE programs may be subject to all MSRB rules, unless such dealers are specifically exempted from any of those rules, because those dealers would be effecting transactions in municipal fund securities. In particular, dealers acting as underwriters with respect to the sale of interests in ABLE programs may be subject to the requirements of (i) MSRB Rule G-32, on disclosures in connection with primary offerings, and the requirement to submit official statements through the MSRB’s Electronic Municipal Market Access (EMMA<sup>®</sup>) system<sup>6</sup> pursuant to Rule G-32(b) and (ii) MSRB Rule G-45, on reporting of information on municipal fund securities, and the requirement to submit information on Form G-45 pursuant to Rule G-45(a).

Further, in 1999, the SEC staff provided guidance to the Board that (i) interests in higher education trusts established by states (“529 college savings plans”) may be municipal securities, depending on the facts and circumstances, under the Exchange Act and (ii) such interests appear to have been sold in a “primary offering” as defined under Rule 15c2-12 pursuant to the Exchange Act so that a dealer acting as an underwriter (defined in Rule 15c2-12(f)(8)) in connection with that primary offering may be subject to the requirements of Rule 15c2-12.<sup>7</sup> In addition, the SEC determined that interests offered by such 529 college

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<sup>3</sup> 15 U.S.C. §78o-4.

<sup>4</sup> 17 CFR 240.15c2-12.

<sup>5</sup> See *supra* n.2.

<sup>6</sup> EMMA is a registered trademark of the MSRB.

<sup>7</sup> Letter dated February 26, 1999 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, in response to letter dated June 2, 1998 from Diane G. Klinke to Catherine McGuire, *published as* Municipal Securities Rulemaking Board, SEC No-Action Letter, Wash. Serv. Bur. (CCH) File No. 03229033 (Feb. 26, 1999).

savings plans are municipal securities under Section 3(a)(29) of the Exchange Act.<sup>8</sup> In response to the SEC staff's guidance and the SEC's determination, the Board published interpretive guidance relating to the sale of interests in 529 college savings plans by dealers. All interpretive guidance under MSRB rules applicable to the sale of interests in 529 college savings plans also would apply to the sale of interests in ABLÉ programs, as relevant.

The Board anticipates that it will publish guidance to address particular issues, including Rule G-45, applicable to the sale of interests in ABLÉ programs by dealers.

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<sup>8</sup> Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67472-73 (Nov. 12, 2013).