MSRB Rule D-15 — Sophisticated Municipal Market Professional

Rule D-15 defines the set of customers that may be SMMPs as (1) a bank, savings and loan association, insurance company, or registered investment company; (2) an RIA; or (3) any other person or entity with total assets of at least $50 million. To qualify as an SMMP under the rule, the dealer must have a reasonable basis to believe the customer is capable of independently evaluating investment risks and market value, in general and with respect to particular transactions and investment strategies in municipal securities. In addition, the customer is required to affirm that it is exercising independent judgment in evaluating the quality of execution of the customer's transactions by the dealer. Further, the customer is required to affirm that it is exercising independent judgment in evaluating the transaction price in non-recommended agency secondary market transactions where the dealer's services are explicitly limited to providing anonymity, communication, order matching and/or clearance functions, and the dealer does not exercise discretion as to how or when the transactions are executed. Finally, the customer is required to affirm that it has timely access to "material information" available publicly from "established industry sources" as those terms are defined in Rule G-47. The customer affirmation may be given orally or in writing, and may be given on a transaction-by-transaction basis, a type-of-municipal security basis, an account-wide basis or a type-of-transaction basis.

Importantly, the definition of SMMP under Rule D-15 is not self-executing, nor are the contingencies for its application solely controlled by the dealer. Rather, classification as an SMMP requires the customer to make the affirmation noted above. Consequently, any customer, even if otherwise qualifying as an SMMP, could choose not to make the affirmation in order to obtain the benefits of those obligations that otherwise would be modified (*e.g.*, best execution). Overall, the customer affirmation requirement is designed to ensure that SMMPs have affirmatively and knowingly agreed to forgo certain protections under MSRB rules.

MSRB Rule G-48 — Transactions with Sophisticated Municipal Market Professionals

Rule G-48 addresses modified obligations of dealers when dealing with SMMPs. It relieves dealers of the time-of-trade disclosure obligation under Rule G-47 for information reasonably accessible to the market, the pricing obligations under MSRB Rule G-30 under certain circumstances,[3] the customer-specific suitability obligation under MSRB Rule G-19,[4] certain obligations with respect to the dissemination of quotations under MSRB Rule G-13,[5] and the best-execution obligation under Rule G-18.[6]

Interpretive Guidance

The rules referenced above, including Rule G-48 on certain modified obligations, are, or relate to the application of, various investor/customer protections. As such, a threshold approach to the interpretive questions is to focus on who the dealer's customer is, and, thus, to whom the dealer owes these protections when an RIA has full discretion over investor clients' accounts.

According to past guidance, there are facts and circumstances under which the MSRB considers the RIA, and not the underlying investors, to be the dealer's customer. When an independent investment adviser (including an RIA) purchases securities from one dealer and instructs that dealer to make delivery of the securities to other dealers where the investment adviser's clients have accounts, and the identities of individual account holders are not given to the delivering dealer, the investment adviser is the customer of the dealer and must be treated as such for recordkeeping and other regulatory purposes.[7] Accordingly, in those scenarios, the dealer does not have any customer obligations to the underlying investors.

Even if the underlying investors are, or are considered to be, customers of the dealer, the MSRB interprets Rule G-48 to mean, under certain circumstances, that the obligations modified by that rule are modified with respect to the underlying investors, as well as the RIA that is an SMMP. Specifically, when an investor has granted an RIA full discretion to act on the investor's behalf for all transactions in an account, the RIA has effectively become that investor for purposes of the application of Rule G-48 when engaging in transactions with the dealer. Therefore, if that RIA is an SMMP, to whom the dealers' obligations are modified under Rule G-48, then, for purposes of complying with the rules addressed in Rule G-48, the dealer should not be required to satisfy any greater or additional obligations with respect to the ultimate investor who holds that account. When the MSRB included RIAs in the set of customers that may be SMMPs, it was, of course, aware that RIAs typically act on behalf of third-party clients. It would have been anomalous for Rule G-48 to modify the dealers' obligations to an RIA that is an SMMP, only essentially to re-impose them on the dealer with respect to the underlying investors who have given the RIA full discretion to act on their behalf.

This interpretation, under which dealer obligations to certain investors would be modified, is supported by the existence (where the conditions of the interpretation are met) of substantially similar federal and/or state obligations. For example, RIAs registered with the SEC are subject to the Investment Advisers Act of 1940 ("Advisers Act") and the rules thereunder, including a fiduciary duty extending to all services undertaken on behalf of clients.[8] Obligations flowing from the fiduciary duty, include, but are not limited to, the requirements to:

- Provide full disclosure of material facts, including conflicts of interest and disciplinary events and precarious financial condition;[9]
- Give suitable advice;[10]
- Have a reasonable basis for recommendations;[11] and

- Meet best-execution obligations.[12]

These and other investor protections provided by the regulatory regime under the Advisers Act reduce the need for the similar investor protections provided by time-of-trade disclosure, customer-specific suitability, best execution and the other obligations required by MSRB rules but modified under Rule G-48.[13] Additionally, where an investor has affirmatively and in writing authorized the RIA to exercise full discretion in the investor's account, the investor has delegated decision-making authority over what to buy and sell in the account. Finally, the MSRB notes that, where the RIA is an SMMP, the RIA has affirmed and the dealer has a reasonable basis to believe that the RIA has the sophistication to obviate the need for the protections flowing from the obligations modified under Rule G-48, which the MSRB believes is also indicative of the RIA's ability to provide similar protections to its clients when a dealer is not required to do so. When combining the investor protections afforded by substantially similar federal or state regulatory requirements for RIAs, the full discretionary power affirmatively provided to an RIA, and the RIA's status as an SMMP, there is sufficient protection afforded to the account holders, who are the RIA's clients, and, therefore, for purposes of the application of the rules modified by Rule G-48, dealers do not owe these underlying account holders any greater or additional obligations than those which apply to the RIA.[14]

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[1] Although the specific inquiries focused on the applicability of Rule G-47, MSRB Rule G-18, on best execution, and the exemption from Rule G-18 when executing transactions for or with an SMMP, this interpretive guidance applies to all the modified obligations under Rule G-48, as discussed herein.

[2] The public availability of material information through the MSRB's Electronic Municipal Market Access (EMMA®) system, or other established industry sources, does not relieve dealers of their disclosure obligations, and dealers may not satisfy the disclosure obligation by directing customers to established industry sources or through disclosure in general advertising materials.

[3] The pricing obligations under Rule G-30 are modified only when the transactions are non-recommended secondary market agency transactions; the dealer's services with respect to the transactions have been explicitly limited to providing anonymity, communication, order matching, and/or clearance functions; and the dealer does not exercise discretion as to how or when the transactions are executed.

[4] The customer-specific suitability obligation requires that a dealer have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile. *See* Supplementary Material .05(b) to Rule G-19. Rule G-48 does not relieve dealers of the obligations regarding reasonable-basis and quantitative suitability. *See* Supplementary Material .05(a) and (c) to Rule G-19.

[5] As modified by Rule G-48, if a dealer is disseminating a quotation on behalf of an SMMP, the dealer shall have no reason to believe the quotation does not represent a bona fide bid for, or offer of, municipal securities, or that the price stated in the quotation is not based on the best judgment of the fair market value of the securities of the SMMP, and no dealer shall knowingly misrepresent a quotation relating to municipal securities made by any SMMP.

[6] Under Rule G-18, in any transaction for or with a customer or a customer of another dealer, a dealer must use reasonable diligence to ascertain the best market for the subject security and buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions

[7] *See* MSRB Notice 2003-20 (May 23, 2003); Interpretive Notice on Recordkeeping (Jul. 29, 1977).

[8] *See* SEC Study on Investment Advisers and Broker-Dealers (January 2011) at 21 ("The Supreme Court has construed Advisers Act Section 206(1) and (2) as establishing a federal fiduciary standard governing the conduct of advisers.") ("IA-BD Study"). *See also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963); Transamerica Mortgage Advisors, Inc., 444 U.S. 11, 17 (1979) ("[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.").

[9] *See* IA-BD Study at 22 ("[A]n adviser must fully disclose to its clients all material information that is intended 'to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'").

[10] "To fulfill the obligation, an adviser must make a reasonable determination that the investment advice provided is suitable for the client based on the client's financial situation and investment objectives." Id. at 27-28.

[11] "[A]n investment adviser has 'a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.'" Id. at 28.

[12] For accounts in which investment advisers exercise discretion, they generally have the responsibility to select dealers to execute client trades. Id. "In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients in such a manner that the client's total cost or proceeds in each transaction are the most favorable under the circumstances." Id. "An investment adviser should 'periodically and systematically' evaluate the execution it is receiving for clients." Id. at 29

[13] The MSRB also believes that state rules and regulations for investment advisers offer similar protections that support the MSRB's interpretations here. Although the requirements are not uniform, "[s]tates generally impose requirements upon state-registered investment advisers that are similar to those under the Advisers Act." Id. at 85. *See also* Scott J. Lederman, Hedge Fund Regulation (2d Ed.), Ch. 17. State Advisory Regulation, 17-3 (Nov. 2012) ("State securities regulators generally impose requirements on state-registered advisers that are similar to those found in the Advisers Act. However, state regulation often contains additional requirements not found at the federal level.").

[14] The MSRB notes that implicit in this interpretation is the expectation of dealers' compliance with all existing recordkeeping requirements associated with the various conditions for the interpretation's applicability.

Rule G-48 Amendment History (since 2003)

Release No. 34-75934 (September 17, 2015), 80 FR 57410 (September 23, 2015); MSRB Notice 2015-23 (November 20, 2015)

Release No. 34-73764 (December 5, 2014), 79 FR 73658 (December 11, 2014); MSRB Notice 2014-22 (December 8, 2014)

Release No. 34-72129 (May 8, 2014), 79 FR 27662 (May 14, 2014); MSRB Notice 2014-11 (May 12, 2014)

Release No. 34-71665 (March 7, 2014), 79 FR 14321 (March 13, 2014); MSRB Notice 2014-07 (March 12, 2014)

MSRB DEFINITIONAL RULES

Rule D-1
General

Unless the context otherwise specifically requires, the terms used in the rules of the Municipal Securities Rulemaking Board shall have the respective meanings set forth in the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) and the rules and regulations of the Securities and Exchange Commission thereunder.

Rule D-2
"Act"

The term "Act" shall mean the Securities Exchange Act of 1934, as from time to time amended.

Rule D-3
"Commission"

The term "Commission" shall mean the Securities and Exchange Commission.

Rule D-4
"Board"

The term "Board" shall mean the Municipal Securities Rulemaking Board.

Rule D-5
"Member"

The term "Member" shall mean a member of the Board.

Rule D-6
"Whole Board"

The term "Whole Board" shall mean the total number of members of the Board provided for in the administrative rules of the Board without regard to vacancies.

Rule D-7
"Proposed Rules and Rules of the Board"

The term "Rule" shall mean a rule which the Board shall have adopted within the scope of its authority under section 15B of the Act, which shall have become effective in accordance with section 19(b) of the Act or which shall have been amended by the Commission pursuant to section 19(c) of the Act. The term "Proposed Rule" shall mean a rule of the Board prior to the time when the same shall have become effective in accordance with section 19(b) of the Act.

Rule D-8
"Bank Dealer"

The term "Bank Dealer" shall mean a municipal securities dealer which is a bank or a separately identifiable department or division of a bank as defined in rule G-1 of the Board.

Rule D-9
"Customer"

Except as otherwise specifically provided by rule of the Board, the term "Customer" shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities.

MSRB Interpretation

Excerpt from Notice of Approval of Fair Practice Rules

October 24, 1978

Rule D-9 codifies, as a definitional rule of general application, the definition of the term "customer" presently set forth in various Board rules. Employees and other associated persons of brokers, dealers and municipal securities dealers would, under this definition, be "customers" with respect to transactions affected for their personal accounts. An issuer would be a "customer" within the meaning of the rule except in the case of a sale by it of a new issue of its securities.

Rule D-10
"Discretionary Account"

The term "Discretionary Account" shall mean the account of a customer carried or introduced by a broker, dealer, or municipal securities dealer with respect to which such broker, dealer, or municipal securities dealer is authorized to determine what municipal securities will be purchased, sold or exchanged by or for the account.

Rule D-10 Interpretation

Excerpt from Notice of Approval of Fair Practice Rules

October 24, 1978

Rule D-10 defines a discretionary account as an account for which a municipal securities professional has been authorized to determine what municipal securities will be purchased, sold or exchanged by or for the account. The definition covers accounts for which a municipal securities professional exercises discretionary authority from time to time, as well as accounts in which the customer sometimes, but not always, makes investment decisions. Under rule D-10, a discretionary account will not be deemed to exist if the professional's discretion is limited to the price at which, or the time at which, an order given by a customer for a definite amount of a specified security is executed. The definition relates to discretion concerning what municipal securities will be purchased, sold or exchanged, rather than when or at what price such transactions may occur.

Rule D-11
"Associated Persons"

Unless the context otherwise requires or a rule of the Board otherwise specifically provides, the terms "broker," "dealer," "municipal securities broker," "municipal securities dealer," "bank dealer," and "municipal advisor" shall refer to and include their respective associated persons. Unless otherwise specified, persons whose functions are solely clerical or ministerial shall not be considered associated persons for purposes of the Board's rules.

Rule D-11 Interpretation

Excerpt from Notice of Approval of Fair Practice Rules

October 24, 1978

Rule D-11 is designed to eliminate the need to make specific reference to personnel of securities firms and bank dealers in each Board rule that applies both to the organization and its personnel.

The term "associated person" in rule D-11 has the same meaning as set forth in section 3(a)(18) and 3(a)(32) of the Act, except that clerical and ministerial personnel are excluded from the definition for purposes of the Board's rules, unless otherwise specified. Although the statutory definitions of associated persons include individuals and organizations in a control relationship with the securities professional, the context of the fair practice rules indicates that such rules will ordinarily not apply to persons who are associated with securities firms and bank dealers solely by reason of a control relationship.

Rule D-11 Amendment History (since 2003)

Release No. 34-63308 (November 12, 2010), 75 FR 70335 (November 17, 2010); MSRB Notice 2010-47 (November 1, 2010)

Rule D-12
"Municipal Fund Security"

The term "Municipal Fund Security" shall mean a municipal security issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act of 1940, would constitute an investment company within the meaning of Section 3 of the Investment Company Act of 1940.

Rule D-12 Interpretation

Interpretation Relating to Sales of Municipal Fund Securities in the Primary Market

January 18, 2001

The Municipal Securities Rulemaking Board (the "Board") has learned that sales of certain interests in trust funds held by state or local governmental entities may be effected by or through brokers, dealers or municipal securities dealers ("dealers"). In particular, the Board has reviewed two types of state or local governmental programs in which dealers may effect transactions in such interests: pooled investment funds under trusts established by state or local governmental entities ("local government pools")[1] and higher education savings plan trusts established by states ("higher education trusts").[2] In response to a request of the Board, staff of the Division of Market Regulation of the Securities and Exchange Commission (the "SEC") has stated that "at least some interests in local government pools and higher education trusts may be, depending on the facts and circumstances, 'municipal securities' for purposes of the [Securities] Exchange Act [of 1934]."[3] Any such interests that may, in fact, constitute municipal securities are referred to herein as "municipal fund securities." To the extent that dealers effect transactions in municipal fund securities, such transactions are subject to the jurisdiction of the Board pursuant to Section 15B of the Securities Exchange Act of 1934 (the "Exchange Act").

With respect to the applicability to municipal fund securities of Exchange Act Rule 15c2-12, relating to municipal securities disclosure, staff of the SEC's Division of Market Regulation 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 an analysis of programs that have been brought to our attention, it appears that interests in local government pools or higher education trusts 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.[4]

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."[5]

Consistent with SEC staff's view regarding the sale in primary offerings of municipal fund securities, dealers acting as underwriters in primary offerings of municipal fund securities generally would be subject to the requirements of rule G-36, on delivery of official statements, advance refunding documents and Forms G-36(OS) and G-36(ARD) to Board or its designee. Thus, unless such primary offering falls within one of the stated exemptions in Rule 15c2-12, the Board expects that the dealer would receive a final official statement from the issuer or its agent under its contractual agreement entered into pursuant to Rule 15c2-12(b)(3).[6] Such final official statement should be received from the issuer in sufficient time for the dealer to send it, together with Form G-36(OS), to the Board within one business day of receipt but no later than 10 business days after any final agreement to purchase, offer, or sell the municipal fund securities, as required under rule G-36(b)(i).[7] "Final official statement," as used in rule G-36(b)(i), has the same meaning as in Rule 15c2-12(f)(3), which states, in relevant part:

> The term *final official statement* means a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to the Participating Underwriter(s) and that sets forth information concerning the terms of the proposed issue of securities; information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the Offering; and a description of the undertakings to be provided pursuant to paragraph (b)(5)(i), paragraph (d)(2)(ii), and paragraph (d)(2)(iii) of this section, if applicable, and of any instances in the previous five years in which each person specified pursuant to paragraph (b)(5)(ii) of this section failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in paragraph (b)(5)(i) of this section.[8]

The Board understands that issuers of municipal fund securities typically issue and deliver the securities continuously as customers make purchases, rather than issuing and delivering a single issue on a specified date. As used in Board rules, the term "underwriting period" with respect to an offering involving a single dealer (*i.e.*, not involving an underwriting syndicate) is defined as the period (A) commencing with the first submission to the dealer of an order for the purchase of the securities or the purchase of the securities from the issuer, whichever first occurs, and (B) ending at such time as the following two conditions both are met: (1) the issuer delivers the securities to the dealer, and (2) the dealer no longer retains an unsold balance of the securities purchased from the issuer or 21 calendar days elapse after the date of the first submission of an order for the securities, whichever first occurs.[9] Since an offering consisting of securities issued and delivered on a continuous basis would not, by its very nature, ever meet the first condition for the termination of the underwriting period, such offering would continuously remain in its underwriting period.[10] Further, since rule G-36(d) requires a dealer that has previously provided an official statement to the Board to send any amendments to the official statement made by the issuer during the underwriting period, such dealer would remain obligated to send to the Board any amendments made to the official statement during such continuous underwriting period. However, in view of the increased possibility that an issuer may change the dealer that participates in the sale of its securities during such a continuous underwriting period, the Board has determined that rule G-36(d) would require that the dealer that is at the time of an amendment then serving as underwriter for securities that are still in the underwriting period send the amendment to the Board, regardless of whether that dealer or another dealer sent the original official statement to the Board.

In addition, municipal fund securities sold in a primary offering would constitute new issue municipal securities for purposes of rule G-32, on disclosures in connection with new issues, so long as the securities remain in their underwriting period. Rule G-32 generally requires that a dealer selling a new issue municipal security to a customer must deliver the official statement in final form to the customer by settlement of such transaction. Thus, a dealer effecting transactions in municipal fund securities that are sold during a continuous underwriting period would be required to deliver to the customer the official statement by settlement of each such transaction. However, in the case of a customer purchasing such securities who is a repeat purchaser, no new delivery of the official statement would be required so long as the customer has previously received it in connection with a prior purchase and the official statement has not been changed from the one previously delivered to that customer.[11]

Certain other implications arise under Board rules as a result of the status, in the view of SEC staff, of sales of municipal fund securities as primary offerings. For example, dealers are reminded that the definition of "municipal securities business" under rule G-37, on political contributions and prohibitions on municipal securities business, and rule G-38, on consultants, includes the purchase of a primary offering from the issuer on other than a competitive bid basis or the offer or sale of a primary offering on behalf of any issuer. Thus, a

dealer's transactions in municipal fund securities may affect such dealer's obligations under rules G-37 and G-38. In addition, rule G-23, on activities of financial advisors, applies to a dealer's financial advisory or consultant services to an issuer with respect to a new issue of municipal securities.

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[1] The Board understands that local government pools are established by state or local governmental entities as trusts that serve as vehicles for the pooled investment of public moneys of participating governmental entities. Participants purchase interests in the trust and trust assets are invested in a manner consistent with the trust's stated investment objectives. Investors generally do not have a right to control investment of trust assets. *See generally* National Association of State Treasurers, Special Report: Local Government Investment Pools (July 1995); Standard & Poor's Fund Services, Local Government Investment Pools (May 1999).

[2] The Board understands that higher education trusts generally are established by states under section 529(b) of the Internal Revenue Code as "qualified state tuition programs" through which individuals make investments for the purpose of accumulating savings for qualifying higher education costs of beneficiaries. Individuals purchase interests in the trust and trust assets are invested in a manner consistent with the trust's stated investment objectives. Investors do not have a right to control investment of trust assets. *See generally* College Savings Plans Network, Special Report on State and College Savings Plans (1998).

[3] Letter dated February 26, 1999 from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, to Diane G. Klinke, General Counsel of the 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.032299033 (Feb. 26, 1999) (the "SEC Letter").

[4] SEC Letter.

[5] The definition of underwriter excludes any person whose interest is limited to a commission, concession, or allowance from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission, concession, or allowance.

[6] Section (b)(3) of Rule 15c2-12 requires that a dealer serving as a Participating Underwriter in connection with a primary offering subject to the Rule contract with an issuer of municipal securities or its designated agent to receive copies of a final official statement at the time and in the quantities set forth in the Rule.

[7] If a primary offering of municipal fund securities is exempt from Rule 15c2-12 (other than as a result of being a limited offering as described in section (d)(1)(i) of the Rule) and an official statement in final form has been prepared by the issuer, then the dealer would be expected to send the official statement in final form, together with Form G-36(OS), to the Board under rule G-36(c)(i).

[8] Dealers seeking guidance as to whether a particular document or set of documents constitutes a final official statement for purposes of rule G-36(b)(i) should consult with SEC staff to determine whether such document or set of documents constitutes a final official statement for purposes of Rule 15c2-12.

[9] See rule G-32(c)(ii)(B). If approved by the SEC, the proposed rule change will redesignate this section as rule G-32(d)(ii)(B).

[10] Similarly, an offering involving an underwriting syndicate and consisting of securities issued and delivered on a continuous basis also would remain in its underwriting period under the definition thereof set forth in rule G-11(a)(ix).

[11] This is equally true for other forms of municipal securities for which a customer has already received an official statement in connection with an earlier purchase and who proceeds to make a second purchase of the same securities during the underwriting period. Furthermore, in the case of a repeat purchaser of municipal securities for which no official statement in final form is being prepared, no new delivery of the written notice to that effect or of any official statement in preliminary form would be required so long as the customer has previously received it in connection with a prior purchase. However, if an official statement in final form is subsequently prepared, the customer's next purchase would trigger the delivery requirement with respect to such official statement. Also, if an official statement which has previously been delivered is subsequently amended during the underwriting period, the customer's next purchase would trigger the delivery requirement with respect to such amendment.

Interpretation Relating to Sales of Interests in ABLE Programs in the Primary Market

April 12, 2016

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.[1] 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."[2]

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 to the jurisdiction of the Board pursuant to Section 15B of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[3]

With respect to the applicability to municipal fund securities of Exchange Act Rule 15c2-12,[4] 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.[5]

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[6] 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.[7] In addition, the SEC determined that interests offered by such 529 college savings plans are municipal securities under Section 3(a)(29) of the Exchange Act.[8] 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 ABLE 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 ABLE programs by dealers.

[1] 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").

[2] 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].

[3] 15 U.S.C. §78o-4.

[4] 17 CFR 240.15c2-12.

[5] *See* supra n.2.

[6] EMMA is a registered trademark of the MSRB.

[7] 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).

[8] Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67472-73 (Nov. 12, 2013).

Rule D-13
"Municipal Advisory Activities"

Except as otherwise specifically provided by rule of the Board, "municipal advisory activities" means the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act and the rules and regulations promulgated thereunder.

Rule D-13 Amendment History (since 2003)

Release No. 34-74384 (February 26, 2015), 80 FR 11706 (March 4, 2015); MSRB Notice 2015-04 (March 2, 2015)

Release No. 34-63308 (November 12, 2010), 75 FR 70335 (November 17, 2010); MSRB Notice 2010-47 (November 1, 2010)

Rule D-14
"Appropriate Regulatory Agency"

With respect to a broker, dealer, or municipal securities dealer, "appropriate regulatory agency" has the meaning set forth in section 3(a)(34) of the Act. With respect to municipal advisors, "appropriate regulatory agency" means the Commission

Rule D-14 Amendment History (since 2003)

Release No. 34-63308 (November 12, 2010), 75 FR 70335 (November 17, 2010); MSRB Notice 2010-47 (November 1, 2010)

Rule D-15
"Sophisticated Municipal Market Professional"

The term "sophisticated municipal market professional" or "SMMP" is defined by three essential requirements: the nature of the customer; a determination of sophistication by the broker, dealer or municipal securities dealer ("dealer"); and an affirmation by the customer; as specified below.

(a) *Nature of the Customer*. The customer must be:

(1) a bank, savings and loan association, insurance company, or registered investment company;

(2) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or

(3) any other person or entity with total assets of at least $50 million.

(b) *Dealer Determination of Customer Sophistication*. The dealer must have a reasonable basis to believe that the customer is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions and investment strategies in municipal securities.

(c) *Customer Affirmation*. The customer must affirmatively indicate that it:

(1) is exercising independent judgment in evaluating:

(A) the recommendations of the dealer;

(B) the quality of execution of the customer's transactions by the dealer; and

(C) the transaction price for non-recommended secondary market agency transactions as to which (i) the dealer's services have been explicitly limited to providing anonymity, communication, order matching and/or clearance functions and (ii) the dealer does not exercise discretion as to how or when the transactions are executed; and

(2) has timely access to material information that is available publicly through established industry sources as defined in Rule G-47(b)(i) and (ii).

Supplementary Material

.01 Reasonable Basis Analysis. As part of the reasonable basis analysis, the broker, dealer or municipal securities dealer should consider the amount and type of municipal securities owned or under management by the customer.

.02 Customer Affirmation. The customer affirmation may be given either orally or in writing, and may be given on a trade-by-trade basis, a type-of-transaction basis, a type-of-municipal-security basis (*e.g.*, general obligation, revenue, variable rate), or an account-wide basis.

Rule D-15 Interpretation

See:

Rule G-48 Interpretation — Interpretive Notice on the Application of MSRB Rules to Transactions in Managed Accounts, December 1, 2016.

Rule D-15 Amendment History (since 2003)

Release No. 34-75934 (September 17, 2015), 80 FR 57410 (September 23, 2015); MSRB Notice 2015-23 (November 20, 2015)

Release No. 34-73764 (December 5, 2014), 79 FR 73658 (December 11, 2014); MSRB Notice 2014-22 (December 8, 2014)

Release No. 34-71665 (March 7, 2014), 79 FR 14321 (March 13, 2014); MSRB Notice 2014-07 (March 12, 2014)