

MEMO# 27983

March 25, 2014

SEC Approves MSRB Rule G-45 and Form G-45; First Filing of Form Required by August 30, 2015

[27983]

March 25, 2014

TO: BROKER/DEALER ADVISORY COMMITTEE No. 14-14
OPERATIONS COMMITTEE No. 14-14 RE: SEC APPROVES MSRB RULE G-45 AND FORM G-45;
FIRST FILING OF FORM REQUIRED BY AUGUST 30, 2015

The Securities and Exchange Commission has announced its approval of Municipal Securities Rulemaking Board (MSRB) Rule G-45 and Form G-45. [\[1\]](#) Rule G-45 requires “underwriters” to 529 plans to electronically file specified data with the MSRB on a semi-annual or annual basis (depending on the information) on new Form G-45. As you know, the Institute has long been working to address members’ concerns with the MSRB’s proposal. While the contents of the adopted rule and form are identical to the version filed with the SEC last summer, [\[2\]](#) the SEC Order provides some clarity on issues raised by the Institute in our comment letters of the proposal. The new rule and form are summarized below, as are the issues that were clarified in the SEC Order.

According to the MSRB’s website, the first submission of Form G-45 is “due by August 30, 2015, which is 60 days after the end of the first reporting period of January 1 – June 30, 2015.” [\[3\]](#) Thereafter, the form is to be updated semi-annually, with the exception of performance information, which need only be updated annually. The filing instructions and details are to be set forth in the MSRB’s G-45 Manual, which has not yet been posted to the MSRB’s website.

Summary of Rule G-45’s Requirements

New Rule G-45 consists of 4 subsections as follows:

Subsection (a) – requires “each underwriter of a primary offering of municipal fund securities,” other than local government investment pool securities, to file Form G-45 “by no later than 60 days following the end of each semi-annual reporting period ending on June 30 and December 31.” It further provides that the performance data required by Form G-45 “shall be reported annually by no later than 60 days following the end of the reporting period ending on December 31.”

Subsection (b) – sets forth the Form G-45 reporting procedures. It requires, among other things, that the form be submitted electronically and in accordance with the requirements of the Form G-45 Manual.

Subsection (c) – provides that Form G-45 contains the specifications for reporting the required information, the user guide for submitting Form G-45, and “other information relevant to reporting under” Rule G-45. Such Manual is to be available on the MSRB’s website and its contents “may be updated [by the MSRB] from time to time.”

Subsection (d) – contains definitions for the following terms, which are relevant to a registrant’s filing obligations: “asset class,” “benchmark,” [\[4\]](#) “contributions,” “designated electronic format,” “distributions,” “investment option,” [\[5\]](#) “marketing channel,” “performance,” [\[6\]](#) “plan,” “program manager,” “primary offering,” “reallocation,” “underlying investment,” and “underwriter.” [\[7\]](#)

Summary of Form G-45 [\[8\]](#)

Consistent with previous versions of the form that were published for comment, Form G-45 requires the underwriter to submit the following information on the 529 plan:

- Plan Descriptive Information;
- Aggregate Plan Information (including total assets, contributions, and distributions);
- Investment Option Information (including inception date, type of option, contributions, distributions, asset class, and asset class allocation percentage);
- Investment performance (which is reported inclusive and exclusive of sales charges);
- Fee and Expenses (broken out by fee type);
- Benchmark Performance (if relevant); and
- Underlying Investment Information.

While the Institute had recommended that underwriters not be required to update information previously reported on the form when there is but a de minimis change to such information, the MSRB disagreed with this recommendation noting that “even a small change in the information reported could be material.” [\[9\]](#)

The SEC Order

As noted above, the SEC Order provides clarification of some – but not all – of the issues raised in the final comment letter the ICI filed with the SEC on the proposal. [\[10\]](#) The issues clarified in the SEC Order are as follows:

- Underwriter Responsibility for Reporting Information it Neither Owns Nor Controls – According to the SEC Order, Rule G-45 “would require an underwriter . . . to submit only information it possesses or has a legal right to obtain. In this regard, the MSRB stated its belief that an underwriter has a legal right to obtain all information that is related to its activities in connection with the underwriting, even where it has designated an affiliate or contractor to perform such activities. [\[11\]](#) The MSRB also takes the view that an underwriter’s duty to report information is not affected by a “voluntary relinquishment” by contract or otherwise of its legal right to obtain information. [\[12\]](#)
- Underwriter Responsibility for Verifying Information – The Institute sought clarification that an underwriter is not responsible for verifying the accuracy or completeness of information it reports on Form G-45 that it receives from another party in the normal course of business. According the SEC Order, the MSRB has affirmed that “to the extent information reported in Form G-45 is prepared by the underwriter or one of its

contractors or subcontractors and the information is inaccurate or incomplete, the underwriter would be responsible for the information and therefore be liable for such information under Rule G-45. However, . . . if the underwriter did not prepare or authorize others to prepare on its behalf information submitted under Rule G-45, it would not be obligated to verify or confirm the accuracy and completeness of the information.” [\[13\]](#)

- Public Dissemination of Form G-45 Information – The Institute has consistently opposed the MSRB making public the information submitted on Form G-45. According to the SEC Order, the MSRB has reiterated “that it would publicly disseminate the information collected on Form G-45 only after approval of a separate proposed rule change by the Commission.” [\[14\]](#) It further affirmed that “at this time,” it does not intend to publicly disseminate such information.

Additional Concerns Raised by the ICI

One issue on which the Institute sought clarity from the SEC and the MSRB, which is crucial to determining responsibility for filing Form G-45, relates to the meaning of the term “underwriter” as used in the rule. Unfortunately, both the SEC and the MSRB have failed to provide such clarity. The comment letters the ICI filed with the MSRB and the SEC on this issue discussed in detail concerns with the MSRB’s view that the term “underwriter” as used in Rule G-45 may be read to include the 529 plan’s program manager, recordkeeper, investment manager, custodian, and state sponsor. In response to this concern, the MSRB “disagreed that 529 plan underwriters are limited to primary distributors” and stated that the rule “should be interpreted in the same manner as the definition of ‘underwriter’ in Rule 15c2-12(f)(8) under the [Securities Exchange] Act [of 1934].” [\[15\]](#) In response to the MSRB’s comments, the SEC Order states that the “Commission agrees with the MSRB that whether a firm is an underwriter will require an individual analysis of the particular facts.” [\[16\]](#) The SEC Order provides no further guidance on this issue.

The Institute’s letters also discussed technical issues regarding the reporting of a 529 plan’s investment options, fees and expenses, and performance. The resolution of these issues will remain unknown until the MSRB posts the Form G-45 Manual on its website. As regards the contents of such Manual, the SEC rejected the Institute’s argument that the Form G-45 Manual constitutes a rulemaking under Federal law and should be published for public comment prior to its adoption. While the Institute’s letter argued that the Manual will contain information impacting registrants’ substantive filing obligations, the MSRB countered these arguments by representing that the Manual’s contents would be limited to “technical requirements to facilitate the submission of information, not substantive information concerning the reporting obligations under Rule G-45” and that publication of the Manual would “unreasonably retard system development.” [\[17\]](#) The SEC Order states that, “[b]ased on the MSRB’s representation that the Manual will contain purely technical specifications, such as instructions for data entry, the Commission does not believe that the Manual must be submitted as part of the proposed rule change.” However, “should the Manual contain any substantive requirements, it would need to be submitted as part of a proposed rule change,” [\[18\]](#) thereby subjecting its contents to public comment. Once the Manual is published by the MSRB, we should be able to determine whether its contents must be published for public comment prior to its use by the MSRB.

Attachment

endnotes

- [1] See SEC Release No. 34-71598 (February 21, 2014) (the “SEC Order”), which is available at: <https://www.sec.gov/rules/sro/msrb/2014/34-71598.pdf>. The text of the new rule, which is available on the MSRB’s website at http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/~/_media/Files/SEC-Filings/2013/MSRB-2013-04-Amendment-1.ashx (at pp. 95-97), is attached. The SEC also approved amendments to MSRB Rules G-8 and G-9 to require underwriters to 529 plans to maintain the information required to be reported on Form G-45 for at least six years.
- [2] See Institute [Memorandum](#) No. 27297, dated June 12, 2013, which summarized the MSRB’s filing with the SEC and provided a link to such filing.
- [3] See MSRB to Collect Additional Data about 529 College Savings Plan, MSRB Press Release (February 24, 2015), which is available at: <http://www.msrb.org/News-and-Events/Press-Releases/2014/MSRB-to-Collect-Additional-Data-about-529-College-Savings-Plans.aspx>.
- [4] According to the SEC Order, “the MSRB confirmed that an underwriter of a 529 plan that does not use a benchmark will not be required to report benchmark performance. In such case, the MSRB represented that the Form G-45 Manual will instruct a filer to leave the section of the form blank.” See SEC Order at p. 22.
- [5] According to the SEC Order, the MSRB affirmed various issues relating to the reporting of investment options. These issues include: (1) that Form G-45 requires disclosure at the investment option level only and each investment option would report its underlying investments separately; (2) if, for example, “an investment option invests in five mutual funds, the submitter would disclose those five funds and the allocation percentage of each in the investment option;” (3) an underwriter must identify the assets held by each investment option separately, even if another investment option invested in the same funds; (4) with regard to investment options that are a mutual fund with multiple share classes, Form G-45 will include fields for fees and charges related to each share class; (5) a fund that is both an underlying investment and a stand-alone investment option would not be aggregated. Rather, data would be reported for each investment option. Also, while the Institute had sought the use of “ranges” for reporting such information, the MSRB disagreed with this recommendation stating that “precision is needed regarding asset allocations.” SEC Order at pp. 19-20.
- [6] According to the SEC Order, the MSRB has affirmed that, with respect to the reporting of performance information, “Form G-45 is consistent with the CSPN’s Disclosure Principles Statement No. 5, which suggests that performance data should be disclosed net of all generally applicable fees and costs and that, for advisor sold plans, total returns should be calculated both including and excluding sales charges.” SEC Order at pp. 21-22.
- [7] See discussion of this term below under “The SEC Order.”
- [8] A copy of Form G-45 is attached and is available through the link to the MSRB’s website in footnote 1 of this memo (at p. 91). The adopted form is identical to the version on which we previously commented.
- [9] SEC Order at p. 20.

[10] See Institute [Memorandum](#) No. 27691, dated November 8, 2013, which summarized the letter the ICI filed with the SEC recommending that the SEC disapprove the MSRB's rule. See also, Institute Memorandum No. 27414, dated July 29, 2013, which summarized the first comment letter the ICI filed with the SEC in July 2013 on the MSRB's proposal. Both ICI memos include a link to the letters they summarize.

[11] SEC Order at p. 13.

[12] Related to this topic is the lack of transparency in omnibus accounts. The Institute's letter recommended that the rule and form recognize that, to the extent an underwriter does not, in the normal course of business, have access to information on the accounts underlying an omnibus arrangement, the underwriter should not be required to report such information. While the SEC Order acknowledges the Institute raised this issue, beyond affirming that underwriters are only required to submit information they possess or have a legal right to obtain, this issue is not addressed in the SEC Order.

[13] SEC Order at p. 13.

[14] SEC Order at p. 16.

[15] SEC Order at p. 8.

[16] SEC Order at p. 29.

[17] SEC Order at p. 15.

[18] SEC Order at pp. 29-30.