FINRA stated that ''while many such violations may appropriately be handled with a Cautionary Action Letter or other informal action, FINRA can envision circumstances where negligence or insufficient vetting or oversight of a software vendor might warrant a disposition pursuant to the MRVP or, in more serious cases, through a reportable disciplinary action.'' Finally, FINRA noted that a FINRA member or associated person is not obligated to accept an MRV disposition and may always avail itself of the procedural rights under FINRA rules to challenge an allegation in any complaint that may be filed.

IV. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a Registered Securities Association.[10] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[11] because expanding the list of FINRA rules that are subject to the MRVP should afford FINRA increased flexibility in carrying out its enforcement and disciplinary responsibilities and, in doing so, help to meet the aim of protecting investors and the public interest.

The Commission also believes that the proposal is consistent with Section 15A(b)(2) and 15A(b)(7) of the Act,[12] which require that the rules of a Registered Securities Association enforce compliance with, and provide appropriate discipline for, violations of Commission and Association rules. The Commission believes that the proposed changes to Rule 9217 should, by expanding the list of rules subject to the MRVP, strengthen FINRA's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. However, the Commission notes that designating a rule as subject to the MRVP does not signify that violation of the rule will always be deemed a minor violation. In the proposal, FINRA represents that it will remain able to require, on a case-by-case basis, formal disciplinary action for any particular violation. Therefore, the Commission believes that the proposed rule change will not compromise FINRA's ability to seek more stringent sanctions for the more serious violations of rules listed in FINRA Rule 9217.

In addition, because members may contest any fine imposed under Rule 9217 and thus receive a full disciplinary proceeding, the Commission believes that FINRA's rules provide for a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 15A(b)(8) and 15A(h)(1).[13]

The Commission also finds that the proposal is consistent with the public interest, the protection of investors, or is otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[14] which governs minor rule violation plans. The Commission believes that the proposed changes to Rule 9217 will strengthen FINRA's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization, in cases where full disciplinary proceedings are unsuitable in view of the nature of a particular violation.

The Commission notes FSI's views that some minor violations of rules should not be subject to disciplinary action at all and that FINRA should only consider a member's activity a rule violation if the violation becomes systemic as well as intentional or willful. The Commission believes that it is appropriate and consistent with the Act to permit FINRA to exercise its discretion, based on the facts and circumstances of each situation, to assess whether or not to address the alleged violation of a FINRA rule through more informal means, such as a Cautionary Action Letter, or through progressively more formal actions up to and including action under the MRVP, an AWC, or a formal complaint against a member. The Commission notes that, as FINRA stated in its Response Letter, a FINRA member or associated person can always avail itself of the procedural rights under FINRA rules to challenge any allegation of a rule violation.

In approving this proposed rule change, the Commission emphasizes that in no way should the amendment of the rule be seen as minimizing the importance of compliance with FINRA's rules and all the other rules subject to imposition of fines under Rule 9217. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, Rule 9216 provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handing certain violations. The Commission expects that FINRA will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, of whether a violation requires formal disciplinary action under FINRA Rule 9000 *et seq.* The Commission also notes that Exchange Act Rule 19d–1(c)(2) [15] and FINRA 9216(b) [16] require that FINRA, on a quarterly basis, report to the Commission all disciplinary actions taken under its MRVP.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–FINRA–2013–033) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24012 Filed 10–1–13; 8:45 am]

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[10] In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78o–3(b)(6).

[12] 15 U.S.C. 78o–3(b)(2) and 78o–3(b)(7).

[13] 15 U.S.C. 78o–3(b)(8) and 78o–3(h)(1).

[14] 17 CFR 240.19d–1(c)(2).

[15] 17 CFR 240.19d–1(c)(2).

[16] *See* Securities Exchange Act Release No. 32076 (March 3, 1993), 58 FR 18291 (April 3, 1993).

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70531; File No. SR–MSRB–2013–04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change Relating to a New MSRB Rule G–45, on Reporting of Information on Municipal Fund Securities

September 26, 2013.

I. Introduction

On June 10, 2013, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''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 consisting of new MSRB Rule G–45 (reporting of information on municipal fund securities) and MSRB

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Form G–45; amendments to MSRB Rule G–8 (books and records); and MSRB Rule G–9 (preservation of records). The proposed rule change was published for comment in the **Federal Register** on June 28, 2013.[3] The Commission received five comment letters on the proposal.[4] On August 9, 2013, the MSRB granted an extension of time for the Commission to act on the filing until September 26, 2013. This order institutes proceedings under Section 19(b)(2)(B) of the Act[5] to determine whether to disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The MSRB's Electronic Municipal Market Access (''EMMA'') system currently serves as a centralized venue for the submission by underwriters of 529 plan primary offering disclosure documents (''plan disclosure documents'') and continuing disclosures, such as annual financial reports submitted by issuers or their agents. However, the MSRB does not currently receive detailed underwriting or transaction information as it does for other types of municipal securities. Accordingly, the proposed rule change would, for the first time, provide the MSRB with more comprehensive information regarding 529 plans underwritten by brokers, dealers, or municipal securities dealers by gathering data directly from such persons.

The MSRB proposes to adopt new Rule G–45 to require each underwriter of a primary offering of municipal fund securities[6] that are not interests in local government investment pools to report to the MSRB on new Form G–45 the information relating to such offering by no later than 60 days following the end of each semi-annual reporting period ending on June 30 and December 31.[7] In addition, the MSRB would require that performance data be submitted annually. As described in further detail below, the required information would include plan descriptive information, assets, asset allocation information (at the investment option level), contributions, withdrawals, fee and cost structure, performance data, and other information.[8]

Under proposed Rule G–45, the obligation to submit the requested information to the MSRB would be placed on brokers, dealers, or municipal securities dealers that are underwriters under Rule 15c2–12(f)(8) of the Act.[9] The MSRB notes that there may be more than one underwriter in a particular primary offering, stating that in the case of 529 plans, program managers, their affiliates, including primary distributors, and/or their contractors, may fall within the definition of underwriter. However, the MSRB would deem the obligation to submit the required information fulfilled if any one of the underwriters submits the required information. Accordingly, on Form G–45, each submitter could indicate the identity of each underwriter on whose behalf the information is submitted.

Form G–45 would require the submission of the following information:

Plan Descriptive Information: The underwriter would provide the MSRB with the (i) Name of the state, (ii) name of the plan, (iii) name of the underwriter and contact information, (iv) name of other underwriters on whose behalf the underwriter is submitting information, (v) name of the program manager and contact information, (vi) plan Web site address and (vii) type of marketing channel (whether sold with or without the advice of a broker-dealer).

Aggregate Plan Information: The underwriter would provide the MSRB with (i) total plan assets, as of the end of each semi-annual reporting period, (ii) total contributions for the most recent semi-annual reporting period, and (iii) total distributions for the most recent semi-annual reporting period.

Investment Option Information: For each investment option offered by the plan, the underwriter would provide the MSRB with (i) the name and type of investment option (*e.g.,* age-based, conservative), (ii) the inception date of the investment option, (iii) total assets in the investment option as of the end of the most recent semi-annual period, (iv) the asset classes in the investment option, (v) the actual asset class allocation of the investment option as of the end of the most recent semi-annual period, (vi) the name of each underlying investment in each investment option as of the end of the most recent semi-annual period, (vii) the investment option's performance for the most recent calendar year (as well as any benchmark and its performance for the most recent calendar year), (viii) total contributions to and distributions from the investment option for the most recent semi-annual reporting period and (ix) the fee and expense structure in effect as of the end of the most recent semi-annual reporting period. The MSRB proposes to permit the performance and fee and expense information to be submitted in a format consistent with the College Savings Plans Network's (''CSPN'') published Disclosure Principles Statement No. 5 (''Disclosure Principles''), which commenters informed the MSRB is the industry norm for reporting such information.

Lastly, the MSRB proposes to amend its books and records rules under MSRB Rules G–8 and G–9 to require underwriters obligated to submit information to the MSRB under proposed Rule G–45 to maintain the information required to be reported on new Form G–45 for six years.

III. Summary of Comments Received

As noted above, the Commission received five comment letters on the proposed rule change.[10] Four of the commenters expressed general support for the MSRB's desire to collect more comprehensive information relating to 529 plans.[11] However, all of the commenters[12] raised concerns or sought clarification about certain specific aspects of the proposal, including: (i) The scope of the definition of ''underwriter;''[13] (ii) the disclosure obligations of underwriters, including their ability to obtain, and verify the accuracy of, the requested

[3] Securities Exchange Act Release No. 69835 (June 24, 2013), 78 FR 39048 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute, dated July 16, 2013 (''ICI Letter''); David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated July 18, 2013 (''SIFMA Letter''); Roger Michaud, Chairman, College Savings Foundation, dated July 19, 2013 (''CSF Letter''); Michael L. Fitzgerald, Chairman, College Savings Plans Network, dated July 19, 2013 (''CSPN Letter''); and Michael B. Koffler, Partner, Sutherland Asbill & Brennan, dated July 19, 2013 (''Sutherland Letter'').

[5] 15 U.S.C. 78s(b)(2)(B).

[6] The term ''municipal fund security'' is defined in MSRB Rule D–12 to 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.

[7] The proposed rule change would require an underwriter to report such information in the manner prescribed in the Form G–45 procedures and as set forth in the Form G–45 Manual. The MSRB provides that the Form G–45 Manual would be a new manual created to assist persons in the submission of the information required under proposed Rule G–45. This manual was not submitted as part of the proposed rule change.

[8] Interests in 529 plans are the only type of municipal fund security that would be covered by the proposed rule change.

[9] 17 CFR 240.15c2–12(f)(8).

[10] *See supra* notes 4.

[11] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

[12] *See supra* note 4.

[13] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter. One commenter also questioned the MSRB's interpretation of ''direct-sold'' versus ''advisor-sold'' plans in relation to the scope of the rule and its application to underwriters. *See* Sutherland Letter.

information; [14] (iii) the need for publication of the Form G–45 Manual; [15] (iv) the MSRB's plans to publicly disseminate information filed on Form G–45; [16] (v) the regulatory basis for the proposed rule change and value of the requested information on Form G–45; [17] and (vi) requests for certain modifications to the content of Form G–45.[18]

A. Definition of ''Underwriter''

Several commenters objected to the MSRB's description of the meaning of the term ''underwriter'' as used in Rule G–45 and stated that the MSRB should clarify the scope of the definition.[19] These commenters cited the MSRB's statements in the Notice suggesting that 529 plans may have multiple underwriters; that Rule 15c2–12(f)(8) under the Act, which the MSRB incorporates into Rule G–45, defines ''underwriter'' broadly; and that other entities (in addition to primary distributors) involved in operating or maintaining a plan, such as the plan's program manager, their affiliates and/or contractors, could be deemed underwriters for purposes of the rule. One commenter asserted that 529 plans typically have only one underwriter [20] and argued, along with other concurring commenters,[21] that many other entities involved in operating and maintaining a plan, such as the plan's program manager, recordkeeper, investment manager, custodian, and state sponsor, in most cases, would not and should not be underwriters for purposes of Rule G–45.[22]

Several commenters emphasized that, to fall within the definition of ''underwriter'' under Rule G–45, the person or entity must be a broker, dealer, or municipal securities dealer.[23] One commenter argued that a plan's program manager, recordkeeper, investment manager, custodian, and state sponsor generally are not brokers or dealers and therefore would not qualify as underwriters under the MSRB's definition.[24] Accordingly, this commenter requested that the MSRB clarify that the term ''underwriter'' would not include such entities if they provide services to the plan on behalf of the plan or its state sponsor and not as a broker, dealer, or municipal securities dealer.[25]

Two commenters also specifically argued that a state sponsor should not be treated as an underwriter for purposes of Rule G–45, as they are not brokers, dealers, or municipal securities dealers.[26] These commenters stated that language in the Notice implied that state sponsors could be deemed underwriters and thus requested confirmation that proposed Rule G–45 would not apply to municipal securities issuers exempted under Section 3(d) of the Act.[27]

Although not directly discussing the definition of ''underwriter,'' one commenter argued that the proposed rule and form should not apply to ''direct-sold'' plans because, by definition, such plans are sold without the involvement of a broker-dealer.[28] This commenter stated that the distinction between ''direct-sold'' and ''advisor-sold'' plans is not simply a ''marketing distinction,'' as MSRB had categorized it in the Notice, but is ''critical in assessing the MSRB's jurisdiction as it delineates between those 529 [p]lans that are sold through broker-dealers and those that are not.'' [29] Accordingly, this commenter concluded that ''direct-sold'' plans are not subject to the MSRB's jurisdiction.[30]

Finally, one commenter expressed opposition to the imposition of the reporting requirements of new Rule G–45 on ''broker dealers that are not underwriters but that instead have entered into contracts with the plan's underwriter (primary distributor) to sell plan shares to retail investors.'' [31]

B. Underwriter Reporting Obligation

All five commenters believed the MSRB should clarify the disclosure obligations of underwriters.[32] Four of these commenters stated that the MSRB is seeking information that many primary distributors will not be able to provide.[33] All of the commenters suggested that the MSRB clarify or confirm that underwriters would not be responsible for certain information that is outside of their possession, custody, or control.[34] For example, one commenter requested that the MSRB clarify that, when an underwriter, in its normal course of business, does not create, own, control, or possess information necessary for Form G–45, the underwriter is not required to obtain such information.[35] Another commenter requested that the MSRB clarify that an underwriter is required to provide the requisite information only to the extent such information relates to the distribution by the underwriter of municipal fund securities and is in the underwriter's possession or maintained by another entity on the underwriter's behalf for purposes of complying with MSRB rules.[36]

Several commenters raised concerns that contractual provisions or privacy laws might not permit an underwriter to obtain the information required by the proposed rule and form.[37] In this regard, one commenter sought confirmation that, where the sharing of information between an underwriter and a recordkeeper would violate contractual provisions, the information would be deemed to be outside of the possession or control of the underwriter and not subject to the reporting obligations of Rule G–45.[38] Another commenter noted that, in the context of omnibus agreements, whether the required information is available to an underwriter is dependent on comprehensive servicing agreements between the plan, the underwriter, and the selling dealers.[39] Thus, this commenter noted that the agreements may not provide the underwriter with legal access to certain information and, as such, an underwriter should not be required to report such information on Form G–45.[40]

Two commenters raised concerns about the MSRB's suggestion that an underwriter's disclosure obligation extends to ''information in the possession of an underwriter's subcontractor.'' [41] These commenters believed this suggestion ''will produce confusion and disparate reporting results'' depending on factors unrelated to Rule G–45 regulatory compliance.[42] In particular, the commenters noted that, while some information may be in the possession of an underwriter's

[14] *See* ICI Letter, CSPN Letter, CSF Letter.

[15] *See* ICI Letter, SIFMA Letter.

[16] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

[17] *See* Sutherland Letter.

[18] *See* ICI Letter, SIFMA Letter, Sutherland Letter.

[19] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

[20] *See* ICI Letter.

[21] *See* SIFMA Letter, CSPN Letter, and CSF Letter, which stated that they concur and/or endorse the ICI's commenter.

[22] *See* ICI Letter.

[23] *See* CSPN Letter, CSF Letter, ICI Letter.

[24] *See* ICI Letter.

[25] *See* ICI Letter.

[26] *See* CSPN Letter, CSF Letter.

[27] *See* CSPN Letter, CSF Letter.

[28] *See* Sutherland Letter.

[29] *See* Sutherland Letter.

[30] *See* Sutherland Letter.

[31] *See* SIFMA Letter.

[32] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter, Sutherland Letter.

[33] *See* ICI Letter, CSPN Letter, CSF Letter, Sutherland Letter.

[34] *See* ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter, Sutherland Letter.

[35] *See* ICI Letter.

[36] *See* CSPN Letter.

[37] *See* CSF Letter, CSPN Letter, SIFMA Letter, Sutherland Letter.

[38] *See* Sutherland Letter.

[39] *See* SIFMA Letter.

[40] *See* SIFMA Letter.

[41] *See* CSPN Letter, CSF Letter.

[42] *See* CSPN Letter, CSF Letter.

''subcontractor,'' other information may be in the possession of an unaffiliated or affiliated entity that is not a subcontractor, and privacy laws and contractual requirements may apply differently.[43]

One commenter questioned the meaning of the MSRB's statement in the Notice that underwriters would be required to produce only information that they possess or ''have a legal right to obtain.'' [44] The commenter stated that ''unless the primary distributor has a specific, enforceable legal right, such as one existing under law (such as a right created by a statutory provision) or arising from a specific contractual provision, to obtain specified information maintained by a third party, the primary distributor does not have a legal right to obtain the information for purposes of the proposal.'' [45] As such, the commenter asserted that an underwriter may not be able to provide information in the possession of an underwriter's subcontractor.[46]

Two commenters also provided comments relating specifically to omnibus accounts, stating that Rule G–45 and Form G–45 should 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 accounting arrangement, the underwriter should not be required to report such information.[47] These commenters also stated that, ''in practice, the mere fact that there is an omnibus relationship between a selling dealer and a plan's underwriter does not necessarily mean the underwriter has full transparency into all account information, including account owners, beneficiaries, contributions, and withdrawals, underlying the omnibus account.'' [48]

Lastly, two commenters contended that, if the underwriter is able to obtain the required information from a third party, the MSRB should clarify that the underwriter is not responsible for ensuring the accuracy or completeness of the information before including it on Form G–45.[49]

C. Publication of the Form G–45 Manual

Two commenters believed that the MSRB should be required to publish for comment the contents of the Form G–45 Manual (''Manual'') because the Manual will contain important substantive information concerning the reporting obligations under Form G–45.[50] One commenter stated that the ''Manual's contents will not be limited to technical specifications or design or system considerations relating to the mechanics of the electronic filing process.'' [51] This commenter asserted that, apart from the addition of boxes for notes regarding performance data and fee and expense data, neither Form G–45 nor Rule G–45 reflects the MSRB's statements in the Notice that information may be submitted in a manner consistent with the Disclosure Principles.[52] As such, the commenter concluded that the details regarding how to report data consistent with these Disclosure Principles would necessarily have to be set forth in the Manual.[53] Another commenter similarly stated that it believed that the Manual would incorporate the detailed substantive instructions of the Disclosure Principles.[54] Both commenters also suggested that the one-year implementation period should commence after the Manual has been published for comment and approved by the Commission.[55]

D. Publication of the G–45 Data

Three commenters believed that confidential or proprietary information reported on Form G–45 should not be made available to the general public.[56] For example, one commenter stated that the data collected pursuant to Rule G–45 ''should be used to inform the MSRB's regulatory initiatives and priorities and not to compete with other more mature, robust, and comprehensive public sources of information on 529 plans.'' [57] Another commenter stated that the MSRB should be required to file a proposed rule change subject to Commission approval if the MSRB desires to publicly disseminate certain 529 plan data reported on Form G–45.[58]

E. Regulatory Value of Required Information and Regulatory Basis for the Proposal

While four commenters expressed general support for the MSRB's effort to collect more comprehensive information on 529 plans for regulatory purposes,[59] one commenter believed that the MSRB failed to provide a ''compelling rationale as to how the requested information would be useful to the MSRB, the SEC and FINRA given the nature of the requested information, the limited reach of the rule . . . , and the comprehensive regulatory system the MSRB has implemented for broker-dealers distributing 529 plans.'' [60] In particular, the commenter asserted that the requested information has limited value as a regulatory tool because such information cannot impact the value of mutual funds or other investments in which plan investment options invest.[61] In this regard, the commenter argued that, unlike the prices of municipal bonds, which are set by the market, the prices of 529 plans are based on the net asset value of the mutual funds in which such investment options invest.[62] This commenter also questioned the MSRB's assertion in the Notice that the information will ''inform the MSRB of the risks and impact of each plan and investment option'' and ''allow the MSRB to assess the impact of each plan on the market.'' [63] In contrast, the commenter stated that the requested information merely provides information regarding fund flows and does not indicate the risks or impact of any plan or investment option on investors.[64]

The commenter further asserted that the requested information would be substantially incomplete because the information obtained would not include data on ''direct-sold'' 529 plans, which the commenter stated represents more than half of the assets in the 529 plan industry.[65] The commenter also noted that certain data is already available in the public domain that includes both ''broker-sold'' and ''direct-sold'' plans, and therefore such existing data would be more comprehensive than the information collected by the MSRB under the proposal.'' [66] Finally, the commenter argued that the MSRB's jurisdiction does not extend to

[43] *See* CSPN Letter, CSF Letter.

[44] *See* Sutherland Letter.

[45] *See* Sutherland Letter.

[46] *See* Sutherland Letter.

[47] *See* ICI Letter, SIFMA Letter.

[48] *See* ICI Letter, SIFMA Letter.

[49] *See* ICI Letter, Sutherland Letter.

[50] *See* ICI Letter, SIFMA Letter.

[51] *See* ICI Letter.

[52] *See* ICI Letter.

[53] *See* ICI Letter. Similarly, another commenter noted that, while the MSRB explained in the Notice that the information required on Form G–45 will be reported consistently with the reporting formats under the Disclosure Principles, proposed Rule G–45 and Form G–45 are silent on this point. *See* SIFMA Letter.

[54] *See* SIFMA Letter.

[55] *See* ICI Letter, SIFMA Letter.

[56] *See* ICI Letter, CSPN Letter, CSF Letter.

[57] *See* ICI Letter.

[58] *See* SIFMA Letter.

[59] *See* ICI Letter, SIFMA Letter, CSF Letter and CSPN Letter.

[60] *See* Sutherland Letter.

[61] *See* Sutherland Letter.

[62] *See* Sutherland Letter.

[63] *See* Sutherland Letter.

[64] *See* Sutherland Letter.

[65] *See* Sutherland Letter.

[66] *See* Sutherland Letter.

regulating the 529 plan market because the ''MSRB's role is limited to regulating broker-dealers that distribute and sell municipal securities.'' [67]

F. Contents of Form G–45

Some commenters provided suggestions for modifications to the specific information requested by Form G–45 or sought clarification on how to report certain information on the form.[68] These comments are summarized below.

i. Investment Option Information

One commenter requested that the MSRB clarify in Form G–45 how to report an investment option that is used for multiple purposes.[69] This commenter also recommended that the MSRB clarify how underwriters should report fee, expense, and performance information for a mutual fund that issues multiple classes of shares with fees and expenses that vary from class to class.[70] Another commenter questioned how underwriters are supposed to report asset class and asset class percentages, and suggested that the two items related to asset class be eliminated.[71] This commenter asserted that investment options do not have or invest in asset classes, thus the use of the phrase ''asset classes in investment option'' is unclear.[72]

One commenter also recommended that the investment option information be reported in ranges rather than precise amounts, where appropriate (*e.g.,* asset class allocation percentages), because the use of ranges would relieve underwriters of having to revise previously reported information whenever there is a *de minimus* change to such information.[73] This commenter further suggested that if the MSRB elects not to use ranges, it should consider revising the updating requirements such that an update is not required to previously reported information unless there has been more than a *de minimus* change to such information.[74]

ii. Performance Information

One commenter raised several issues with respect to performance information and advanced the following specific recommendations with regard thereto: (i) The MSRB should resolve a discrepancy between the definition of ''performance'' in Rule G–45(d)(viii) that means ''total returns of the investment option expressed as a percentage net of all generally applicable fees and costs'' and the requirement in Form G–45 that requires performance be reported both ''including sale charges'' and ''excluding sales charges''; (ii) the MSRB should clarify whether a plan that is directly distributed and that has no ''sales charges,'' is expected to report the same information under ''Investment Performance (Including Sales Charges)'' and ''Investment Performance (Excluding Sales Charges)'' or just the later; (iii) the MSRB should clarify that fees that are not specific to any particular investment option are not required to be included in the performance calculation; (iv) the MSRB should resolve a discrepancy between a statement in the Notice that Form G–45 requires ''performance for the most recent calendar year'' and the Form G–45 requirement for disclosure of each investment option's 1, 3, 5 and 10 year performance, as well as the option's performance since inception; and (v) the MSRB should include a comment box under each of the two sections of Form G–45 relating to Investment Performance to avoid confusion as to whether the comments relate to performance excluding or including a sales charge.[75] Furthermore, this commenter recommended that the MSRB clarify that a 529 plan is only required to report benchmark information if the 529 plan, in fact, uses a benchmark.[76]

iii. Underlying Investments

Three commenters objected to the requirement to provide data regarding underlying investments on Form G–45.[77] In particular, two commenters recommended deleting the ''Underlying Investments'' section from Form G–45.[78] The other commenter suggested that the Commission should reject the proposed rule change as it relates to underlying investments, arguing that the MSRB does not have the legal authority or jurisdiction to mandate the filing of such information because such underlying investments are not municipal securities.[79] Two commenters also stated that this information is beyond what is required by the Disclosure Principles and is inconsistent with the MSRB's previous response to comments stating that it had eliminated from its initial proposal the collection of information regarding the underlying portfolio investments.[80] Moreover, one commenter recommended that if the MSRB determines in the future that there would be regulatory value in having this information, the MSRB should revise Form G–45 at that time.'' [81]

Another commenter believed that the MSRB's request for information on ''the name of each underlying investment in each investment option . . .'' is inaccurate because 529 plan account owner funds invest solely in the 529 plan and nothing else.[82] This commenter noted that the plan trust is the sole legal and beneficial owner of the underlying investments.[83] This commenter therefore believed that it is inappropriate to request information about underlying investments because they are not part of what investors purchase and are not municipal securities.'' [84]

iv. Marketing Channel

One commenter questioned the value of requesting information on the ''marketing channel,'' which the MSRB described to be commonly known as either ''advisor-sold'' or ''direct sold.'' [85] As discussed above, this commenter argued that the requirements of the rule should not apply to ''direct-sold'' plans, since they do not involve a broker-dealer offering the securities.[86] As such, the commenter asserted that only broker-dealers would be providing the required information about ''advisor-sold'' plans, unless non-broker-dealers also made voluntary filings.[87] Such voluntary filings, the commenter urged, would only cause investor confusion.[88]

v. Program Managers

One commenter suggested that all information requests related to program managers should be deleted from Form G–45 because the MSRB lacks jurisdiction ''to seek information about an entity hired by 529 [p]lan trustees to provide services to the plan when neither the issuer nor the entity are regulated by the MSRB.'' [89] The commenter further questioned the relevance of such information to the MSRB's role as a securities regulator of

[67] *See* Sutherland Letter.

[68] *See* ICI Letter, Sutherland Letter, SIFMA Letter.

[69] *See* ICI Letter.

[70] *See* ICI Letter.

[71] *See* Sutherland Letter.

[72] *See* Sutherland Letter.

[73] *See* ICI Letter.

[74] *See* ICI Letter.

[75] *See* ICI Letter.

[76] *See* ICI Letter.

[77] *See* ICI Letter, SIFMA Letter, and Sutherland Letter.

[78] *See* ICI Letter, SIFMA Letter.

[79] *See* Sutherland Letter.

[80] *See* ICI Letter, SIFMA Letter.

[81] *See* ICI Letter.

[82] *See* Sutherland Letter.

[83] *See* Sutherland Letter.

[84] *See* Sutherland Letter.

[85] *See* Sutherland Letter.

[86] *See* Sutherland Letter; *see also supra* notes 28–30 and accompanying text.

[87] *See* Sutherland Letter.

[88] *See* Sutherland Letter.

[89] *See* Sutherland Letter.

broker-dealers distributing municipal securities.[90]

vi. Fees and Expenses

One commenter objected to the MSRB's request for information on Form G–45 related to plan fees and expenses, including State fees, audit fees, asset-based fees, annual account maintenance fees, and bank administration fees.[91] The commenter suggested that because the MSRB does not have jurisdiction over the regulation of 529 plans, it should not require primary distributors to submit data concerning securities product fees that are unrelated to the primary distributor.[92]

G. Cost/Benefit of Data Collected

Three commenters addressed the costs of the proposed rule change versus the benefits of collecting the required information.[93] One commenter stated that, while the MSRB concluded in the Notice that the benefits of its proposal will outweigh the costs, the MSRB failed to quantify either the benefits or the costs.[94] Two commenters suggested that the Commission consider adding a waiver and/or sunset provision designed to mitigate the cost burden of an underwriter's disclosure duty.[95] These two commenters stated that the addition of ''a waiver application process will allow the affected underwriter to request relief from providing data that is not reasonably practicable to obtain.'' [96] Similarly, these commenters believed a sunset provision could also ''ease the administrative burden to underwriters required to submit information on Form G–45.'' [97] In addition, these commenters suggested that the MSRB reexamine its need to collect each data point after a specified period of time and revise Rule G–45 accordingly in the event the MSRB determines that certain data points are no longer relevant.[98]

IV. Proceedings To Determine Whether To Disapprove SR–MSRB–2013–04 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [99] to determine whether the proposed rule change should be disapproved. Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change to inform the Commission's analysis whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[100] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15B(b)(2)(C) of the Act requires, among other things, that the rules of the MSRB shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons 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.[101]

As discussed above, the MSRB's proposal would require underwriters of 529 plans to report certain information to the MSRB regarding the plans. The MSRB believes that its proposal would better position the MSRB to protect investors and the public interest because the information collected under the proposed rule would allow the MSRB to assess the impact of each 529 plan on the market, evaluate trends and differences among plans, and gain an understanding of the aggregate risk taken by investors by the allocation of assets in each investment option. In the MSRB's view, the information about activity in 529 plans is necessary to assist the MSRB in evaluating whether its current regulatory scheme for 529 plans is sufficient or whether additional rulemaking is necessary to protect investors and the public interest.

Four of the commenters expressed general support for the MSRB's desire to collect more comprehensive information relating to 529 plans. However, as discussed in detail above, all of the commenters raised concerns about various aspects of the proposal. Most notably, several commenters questioned the MSRB's description of the meaning of the term ''underwriter'' and suggested that the MSRB should clarify the scope of the definition as used in proposed Rule G–45. In their view, the MSRB's description of the definition of ''underwriter'' is overbroad and encompasses many other entities involved in the operation and maintenance of a 529 plan that would not, in fact, meet the Commission definition of underwriter and thus should not be deemed to be underwriters for purposes of Rule G–45.

Commenters also questioned the scope of the underwriter's reporting obligations under the proposed rule. In particular, commenters asserted that underwriters would be, in many cases, unable to obtain the required information and requested clarification as to whether underwriters would be relieved from the obligation to provide information not in the underwriter's possession or control or if the underwriter is unable to obtain the information due to contractual provisions. Further, commenters sought confirmation that, to the extent that underwriters could obtain the information from third parties, they would not be held liable for the accuracy and completeness of the requested information.

The Commission believes that these comments raise questions as to whether the MSRB's proposal is consistent with the requirements Section 15B(b)(2)(C) of the Act, including whether it would remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, protect investors, municipal entities, obligated persons, and the public interest. In particular, the comments raise concerns that the proposed rule change is unclear as to whom the obligations of the rule apply and is being interpreted in a manner that is potentially inconsistent with statutory and Commission rule definitions of ''underwriters'' and ''broker dealers.'' This uncertainty could result in noncompliance or needless compliance by entities and/or unnecessary duplicative reporting. Further, respondents may not be able to ascertain the scope of their obligations to provide the requested information under the proposed rule, including the extent to which they are responsible for providing, and verifying the accuracy of, information not in their possession. In light of the confusion related to whom the proposed rule applies, questions are raised as to whether the disclosure obligations are sufficiently balanced to support the MSRB's statutory obligation

[90] *See* Sutherland Letter.

[91] *See* Sutherland Letter.

[92] *See* Sutherland Letter.

[93] *See* CSPN Letter, CSF Letter, Sutherland Letter.

[94] *See* Sutherland Letter.

[95] *See* CSPN Letter, CSF Letter.

[96] *See* CSPN Letter, CSF Letter.

[97] *See* CSPN Letter, CSF Letter.

[98] *See* CSPN Letter, CSF Letter. The CSPN Letter and CSF Letter suggested three years.

[99] 15 U.S.C. 78s(b)(2)(B).

[100] *Id.*

[101] 15 U.S.C. 78*o*–4(b)(2)(C).

to protect both investors and municipal entities without being overly burdensome.

As summarized above, commenters also pointed out various aspects of Form G–45 that they believe needs further clarification. Accordingly, the Commission believes that, without further clarification, the proposal may result in incomplete or incorrectly reported data. As such, the MSRB would not able to fulfill its stated regulatory goals of obtaining accurate, reliable, and complete data in order to further assess and carry out its rulemaking responsibilities in this area.

For the foregoing reasons, the Commission believes the issues raised by the proposed rule change can benefit from additional consideration and evaluation in light of the requirements of Section 15B(c)(2)(C) of the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 15B(b)(2)(C) or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[102]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be disapproved by November 18, 2013. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 2, 2013.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2013–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2013–04. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2013–04 and should be submitted on or before November 18, 2013. Rebuttal comments should be submitted by December 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[103]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24020 Filed 10–1–13; 8:45 am]

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[102] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[103] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70510; File No. SR–ISE–2013–49]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend ISE Rule 2128 Relating to Clearly Erroneous Trades

September 26, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 23, 2013, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to extend a pilot program related to Rule 2128, entitled ''Clearly Erroneous Executions.'' The Exchange also proposes to remove certain references to individual stock trading pauses contained in Rule 2128(c)(4). The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.