

NPC fully supported the draft interpretive notice, stating that it "clearly sets out the rationale for providing guidance in this area \* \* \* [and] will make it possible for our Representatives to assist companies in offering 529 college savings plans to their employees." CSPN, Fidelity, ICI and SIA all generally supported the draft interpretive notice, although each requested that the MSRB further broaden and/or clarify the guidance in various respects.<sup>4</sup>

Fidelity, ICI and SIA requested that the MSRB substitute the term "selling broker" or "selling dealer" for the term "introducing broker" used in the draft interpretive notice. They stated that the term "introducing broker" is used with different meanings under the federal securities laws applicable to other types of securities and may cause some confusion. In addition, SIA recommended that, for purposes of the interpretation, the term "selling broker" also encompass the primary distributor where it directly establishes the relationship with the employer. SIA stated, "In addition to recognizing that a selling broker rarely, if ever, has a suitability obligation in the context of a payroll deduction program, the notice should clarify that a primary distributor who makes 529 Plan investments available through a third-party broker would not have a suitability obligation under rule G-19, as it too makes no recommendation to an employee." The MSRB has changed the term "introducing broker" to "selling broker" in the revised interpretive notice. Contrary to SIA's statement that the interpretive notice recognizes "that a selling broker rarely, if ever, has a suitability obligation," the notice does not assess the likelihood or frequency of recommendations being made by selling brokers. The notice does provide some guidance regarding the factors to consider when determining whether a recommendation has occurred. The MSRB believes that no further guidance in this area is necessary.

CSPN, Fidelity, ICI and SIA each noted that the scenario described in the draft interpretive notice is not the only form in which dealers may seek to market 529 college savings plans through employers. In addition to arrangements where selling brokers having a contractual relationship with

the primary distributor to market through employers, with the employees making investments directly through the primary distributor (as described in the draft interpretive notice), these commentators noted that: (1) Primary distributors may themselves market 529 college savings plans through employers; (2) selling brokers sometimes have contractual relationships with the issuer rather than the primary distributor; (3) selling brokers may handle employee investments and maintain long-term relationships with employees, rather than merely introducing employees to the primary distributor; (4) transfer agents may undertake significant responsibilities in connection with employees' investments; and (5) employees may in some instances use a dealer other than the selling broker or primary distributor to make an investment that may still be considered part of the employer-sponsored program. These commentators requested that the MSRB address some or all of these additional scenarios. In addition, CSPN suggested that the MSRB make clear that the scenarios addressed in the draft interpretive notice are illustrative and that other models may be implemented.

The MSRB has made significant modifications to the initial paragraphs of the notice to reflect the existence of these other scenarios. No significant change in interpretation results from a primary distributor acting in the role of a selling broker. The identity of the selling broker's counterparty on the selling agreement also does not significantly change its regulatory obligations. Selling brokers that make recommendations remain fully obligated under MSRB rules and remain ultimately responsible where the primary distributor has not affirmatively undertaken regulatory obligations on behalf of the selling broker (as discussed below). The guidance provided by the notice is primarily intended for dealers that are formally involved in a workplace marketing program; thus, the notice is of limited applicability to dealers that do not have a formal role in such a program.

Fidelity observed that the draft interpretive notice referred to on-line enrollment with the primary distributor and noted that in many circumstances enrollment and investments continue to be handled by mail. Also, Fidelity, ICI and SIA noted that other forms of payment, such as ACH (automated clearing house) bank transfers, may be used in addition to traditional employee payroll deductions. These commentators requested that the MSRB

recognize these variants in its final notice. The revised interpretive notice now more clearly acknowledges these different processes.

CSPN, Fidelity, ICI and SIA sought further clarification on the circumstances under which selling brokers may rely on other parties to meet their regulatory obligations. CSPN and SIA stated that dealers should be able to rely on issuers to distribute official statements to customers. CSPN noted its concern that customers may be confused by the receipt of redundant (and possibly out-dated) disclosure documents if dealers must deliver official statements regardless of whether the issuer has sent them to customers. SIA suggested that the ability of the selling broker to rely on the primary distributor for delivery of the official statement as provided in the draft interpretive notice be extended to the ability to rely on other parties, such as other dealers, employers and issuers.

The revised interpretive notice permits a selling broker to conclusively rely on the primary distributor to meet its disclosure obligations and certain supervisory obligations (described below) only under the limited circumstances in which employee orders are not accepted without actual delivery of the official statement and the primary distributor has affirmatively agreed to undertake such regulatory obligations on behalf of the selling broker. In such circumstances, the primary distributor will be responsible for fulfilling such obligations. In all other circumstances, the notice clarifies that a selling broker may agree with another party to take certain actions on its behalf but that if such other party fails to take such actions, the selling broker remains responsible for fulfilling its regulatory obligation.

ICI suggested that the MSRB should permit selling brokers to enter into arrangements with the primary distributor to meet their supervisory obligations to review and approve customer accounts and transactions based upon having procedures in place that provide assurances to the selling brokers that such review and approval is being undertaken by the primary distributor. SIA questioned the value of requiring a selling broker to review customer accounts and transactions well after the transaction is executed, especially if the transaction was not recommended. In addition, SIA questioned why a requirement for such review and related recordkeeping would be dependent upon whether the selling broker receives compensation for a transaction.

the workplace; (iii) provide more guidance as to when dealers may rely on others to fulfill regulatory responsibilities; and (iv) clarify certain recordkeeping obligations. These revisions are described in greater detail below.

<sup>4</sup> Countrywide did not state its position regarding the draft interpretive notice but merely noted a possible grammatical correction.