

The revised interpretive notice clarifies that, where a selling broker does not make a recommendation and the primary distributor affirmatively agrees to take on both the disclosure responsibilities and the supervisory responsibilities with regard to opening of accounts and approval of transactions, the regulatory obligation may be shifted to the primary distributor. However, supervisory responsibility remains with the selling broker so long as the selling broker retains any affirmative duties to employees. The MSRB believes that the limited recordkeeping obligations imposed on all selling brokers in the notice are appropriate. The revised interpretive notice makes clear that the limited recordkeeping requirements that remain for subsequent transactions effected by the primary distributor where compensation is paid to the selling broker applies only when such compensation is transaction based since, depending on the facts and circumstances, this information may be necessary to determine compliance with MSRB's fair pricing and fair commission requirements.

With respect to transfer agents, SIA noted that many plans provide for applications and customer orders to be sent directly to a transfer agent, with the primary distributor's activities "limited to managing the overall marketing of the program and the production of marketing and promotional materials." SIA stated that, "only the transfer agent maintains any investor records and these records are the plan's investor records. Thus, in this model, the primary distributor's regulatory responsibilities are limited primarily to compliance with applicable rules governing marketing materials but not those rules mandating customer account related procedures." SIA sought assurance that primary distributors did not retain residual customer protection obligations under MSRB rules in the scenario where applications and orders are submitted directly to the transfer agent.

The MSRB notes that transfer agents generally are viewed under the Exchange Act as working on behalf of the issuer but that, in the 529 college savings plan market, transfer agents also sometimes contractually agree to act on behalf of the primary distributor. In the revised interpretive notice, where transactions are effected through a transfer agent without the direct involvement of the primary distributor or the selling broker, the selling broker is permitted to conclusively rely on the primary distributor to fulfill certain of the selling broker's regulatory

obligations only if the transfer agent has contractually agreed to act on behalf of the primary distributor. Otherwise, the transfer agent is effectively treated as an agent of the issuer and the dealer that enlisted the corresponding employer to participate in the workplace marketing plan remains ultimately responsible for compliance with MSRB rules.

SIA asked why a selling broker would have a fair dealing obligation under rule G-17 to an employer since the employer is not the dealer's client. SIA also sought guidance regarding the nature of information that a dealer would be obligated to provide to the employer under the rule G-17 disclosure obligation. ICI and SIA also questioned the need for the selling broker to maintain a record of the name and address of an employer that the dealer solicited, as well as for principal review of such solicitation. CSPN sought assurances that the fair dealing obligation toward the employer would not give rise to any inference that the issuer has any Federal securities law obligation to employers under the scenario described in the draft interpretive notice.

The fair dealing requirement of rule G-17 applies, on its face, to all persons, not just customers. The MSRB believes that it appropriately applies to the selling broker's relationship with employers, particularly since the selling broker is inducing the employer to create a captive audience of investors and the employer's agreement to participate in the program may lead employees to believe that the employer endorses investment under the program. Under these circumstances, it is important that selling brokers provide adequate information regarding the program to the employer so that it can make an informed decision with regard to enrollment in the program. The limited recordkeeping regarding the employer required by the notice is important in the context of documenting the ability of a selling broker to rely on the guidance provided in the notice with respect to particular transactions. The revised interpretive notice provides assurances that a dealer's fair dealing obligation to the employer is not intended to imply that the issuer has a similar legal obligation to the employer.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes

its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submissions, 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 inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the MSRB's principal offices. All submissions should refer to File No. SR-MSRB-2003-03 and should be submitted by June 4, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

### Interpretive Notice on Marketing of 529 College Savings Plans in the Workplace

The Municipal Securities Rulemaking Board ("MSRB") has received a number of requests for interpretive guidance on the responsibilities of brokers, dealers and municipal securities dealers ("dealers") under MSRB rules with respect to the marketing of 529 college savings plans through the workplace to employees ("workplace marketing programs"). Workplace marketing programs have been described to the MSRB as being offered through a variety of means.<sup>1</sup> In many cases, a dealer ("selling broker") that has signed a selling agreement with the primary

<sup>5</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The description of certain characteristics of workplace marketing programs in this notice is intended to illustrate the application of MSRB rules and is not intended to imply that workplace marketing programs having different characteristics are not permitted under MSRB rules.