

distributor of a 529 college savings plan makes available to employers the opportunity to initiate a workplace marketing program for those employees who choose to enroll and make contributions under the 529 college savings plan.² The selling broker typically meets with the employer's human resources/benefits representatives, who then may agree to have the employer participate in the workplace marketing program. One form of workplace marketing program provides for the employer to utilize its existing payroll direct deposit process for after-tax contributions by employees. In other cases, employee contributions may be effected by means of ACH (automated clearing house) bank transfers or other means, whether electronically or by check.

After the employer has agreed to participate in a workplace marketing program, its employees can establish an account in a variety of manners, depending upon the specific 529 college savings plan. For example, many workplace marketing programs provide for the employee to establish an account with the primary distributor by completing an online or paper account application and participation agreement, which is submitted directly to the primary distributor. In other cases, applications may be submitted to a transfer agent³ or the issuer, or may be handled by the selling broker itself. Typically, the selling broker provides the employer with materials for distribution to interested employees describing the particular 529 college savings plan, including but not limited to the program disclosure document that meets the definition of "official statement" under Exchange Act rule 15c2-12. Further, the selling broker may, but does not always, hold informational meetings with employees, either in groups or individually. However, in many workplace marketing programs, once the employer has agreed to participate, employees can enroll in the program and make contributions directly through the primary distributor,

² In some cases, the primary distributor itself, rather than a separate dealer, may initiate a workplace marketing program and undertake the various functions of a selling broker described in this notice. In other cases, the selling broker may have a contractual relationship with the issuer rather than with, or in addition to, the primary distributor.

³ Third-party transfer agents are generally considered, under section 3(a)(25) of the Exchange Act, to be providing services on behalf of the issuer of securities. The MSRB understands that, in the 529 college savings plan market, transfer agents may sometimes be engaged by the primary distributor to handle certain recordkeeping and processing functions on behalf of the primary distributor.

transfer agent or issuer without any further involvement of the selling broker.

When an employee enrolls in the workplace marketing program, certain information regarding the employee's enrollment is made available to the parties who are involved in the processing of the enrollment and contributions. Typically, however, the selling broker will receive notification of an account opening and any transactions effected for an individual employee only after the fact, either on a transaction-by-transaction basis or in periodic *summaries* of trade activities.⁴ Thus, unless the selling broker itself handles the enrollment and contribution functions for employees, the selling broker may not learn the identity of individual employees actually making investments in the 529 college savings plan until well after the time of trade and settlement on such transactions. The selling broker generally receives commissions on an individual participant basis for those employees who enroll and invest in the 529 college savings plan.

The MSRB has established a number of rules designed to protect customers purchasing municipal securities (including investments in 529 college savings plans) from or through dealers. In particular, under rule G-19, a dealer that recommends a 529 college savings plan transaction to a customer must have reasonable grounds for believing that the recommendation is suitable, based upon information available from the issuer or otherwise and the facts disclosed by or otherwise known about the customer. To assure that a dealer effecting a recommended transaction with a non-institutional customer has the information needed about the customer to make its suitability determination, the rule requires the dealer to make reasonable efforts to obtain information concerning the customer's financial status, tax status and investment objectives, as well as any other information reasonable and necessary in making the recommendation. In addition, the dealer has certain disclosure-related obligations to the customer, regardless of whether the dealer has recommended a particular transaction to the customer. For example, under rule G-32, the

⁴ Where the primary distributor itself serves in the role of selling broker, it will obtain information concerning the transaction on a timely basis where enrollment and contributions are effected directly with the primary distributor and, where enrollment and contributions are effected with a transfer agent that has a direct contractual relationship with the primary distributor, the transfer agent will obtain such information on a timely basis on behalf of the primary distributor.

dealer is obligated to deliver an official statement to the customer by settlement of the transaction.⁵

Further, under rule G-17, each dealer, in the conduct of its municipal securities activities, must deal fairly with all persons and must not engage in any deceptive, dishonest or unfair practice. This rule has been interpreted to require a dealer to disclose to its customer, at or before the time of trade, all material facts concerning the transaction known by the dealer, as well as material facts about the security when such facts are reasonably accessible to the market.⁶ This rule G-17 disclosure obligation applies regardless of whether the dealer has made a recommendation to the customer. If the customer is investing in an out-of-state 529 college savings plan, the dealer also is obligated to inform the customer that, depending upon the laws of the customer's home state, favorable state tax treatment for investing in a 529 college savings plan may be limited to investments made in a plan offered by the customer's home state.⁷ Further, rule G-17 prohibits the dealer from misleading customers regarding facts material to the transaction, including but not limited to the availability of state tax benefits in connection with an investment in a 529 college savings plan.⁸

A dealer is obligated under rule G-17 to deal fairly not only with customers but with all persons in connection with the conduct of its municipal securities activities. Thus, in addition to dealing fairly with employees that have agreed to participate in a workplace marketing program, a selling broker that enters into a formal or informal agreement with an employer to undertake a workplace marketing program also is obligated under rule G-17 to deal fairly with the employer itself.⁹ Whether a dealer has

⁵ In the case of a repeat purchaser who has already received the official statement, dealers generally are required to deliver any amendments or supplements to the official statement in connection with subsequent investments in the 529 college savings plan.

⁶ See rule G-17 Interpretation—Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts, March 20, 2002, *MSRB Rule Book*.

⁷ See rule G-21 Interpretation—Application of Fair Practice and Advertising Rules to Municipal Fund Securities, May 14, 2002, *MSRB Rule Book*.

⁸ *Id.*

⁹ Under section 15B(c)(1) of the Exchange Act, any dealer that attempts to induce the purchase of municipal securities must do so in compliance with MSRB rules. This would include an attempt by a selling broker (or a primary distributor acting in the role of a selling broker) to induce employees to invest in a 529 college savings plan through an employer participating in a workplace marketing program. Thus, the selling broker generally will become obligated to comply with the duties