

dealt fairly with an employer is dependent upon the facts and circumstances. However, the MSRB believes that, under these circumstances, rule G-17 obligates the selling broker to disclose to the employer all material facts known by the selling broker concerning the transactions it is attempting to induce, as well as material facts about the security when such facts are reasonably accessible to the market. If the selling broker knows or has reason to know that one or more employees may not be resident in the state of the 529 college savings plan being offered under the workplace marketing program, rule G-17 requires the selling broker to disclose to the employer that, depending upon the laws of the state of residence of an employee, favorable state tax treatment for investing in a 529 college savings plan may be limited to investments made in a 529 college savings plan offered by the employee's home state. These are the same disclosures that a dealer effecting a transaction with individual customers is required to make under rule G-17.

Where a selling broker has recommended a transaction in a 529 college savings plan to an employee through a workplace marketing program, the selling broker is fully obligated to make a suitability determination under rule G-19.¹⁰ The selling broker would be responsible for obtaining and maintaining the information required under rule G-19(b) in connection with such suitability determination and the additional information required under rule G-8(a)(xi), as well as for maintaining proper supervision.¹¹ The MSRB has previously stated that whether a particular transaction is in fact recommended depends on an analysis

established under rule G-17 with respect to the employer in connection with the procurement of the employer's agreement to participate in the workplace marketing program, even if there is no assurance that any employee ultimately will enroll. This obligation would not apply to an issuer if its own personnel or agents of the issuer were to initiate a workplace marketing program with an employer, as MSRB rules do not apply to issuers.

¹⁰ A selling broker that recommends a transaction to an employee cannot avoid its suitability obligations and related duties simply because the employee places its order directly with the primary distributor, transfer agent or issuer. In addition, a primary distributor acting in the role of a selling broker that recommends a transaction to an employee cannot avoid its suitability obligations and related duties simply because the employee places its order directly with the issuer or transfer agent.

¹¹ Rule G-27 requires an appropriate principal to review the opening of each customer account and of each transaction for such customer. In addition, rules G-8 and G-9 require dealers to create and preserve certain records in connection with such accounts and transactions.

of all the relevant facts and circumstances.¹² Among the facts and circumstances that generally would be relevant in this context is the nature of the statements made by the selling broker if it conducts any informational meetings with employees. If, for example, the selling broker conducts an employee informational meeting at which it states that the particular 529 college savings plan is appropriate for most or all employees, or at which it advises individual employees that the plan or specific investment options within the plan are appropriate for such individuals, the introducing broker most likely has made a recommendation. If, however, the selling broker provides, at most, only generalized recommendations about the 529 college savings plan accompanied by clear statements that enrollment in this particular 529 college savings plan or investment in any particular investment option within the plan may not be appropriate for all employees, the selling broker must have reasonable grounds for the generalized recommendation in light of the information about the security but need not make a determination that the investment is suitable for each employee in attendance.¹³ A selling broker making a recommendation to a particular employee also is fully responsible for providing the required disclosure information under rules G-17 and G-32.

If a selling broker does not make a recommendation in connection with a transaction in a 529 college savings plan by an employee through a workplace marketing program, it has no suitability obligation under rule G-19. Although the selling broker still would be obligated to provide the required disclosures under rules G-17 and G-32, if all employee transactions under the workplace marketing program are handled by the primary distributor or a transfer agent that has contractually agreed to act on behalf of the primary distributor, the selling broker's responsibilities will be conclusively fulfilled if the placing of an order in that manner is conditioned upon actual

¹² See rule G-19 Interpretive Letter—Recommendations, February 17, 1998, *MSRB Rule Book*. The MSRB also has provided guidance on recommendations in the context of on-line communications in rule G-19 Interpretation—Notice Regarding Application of Rule G-19, on Suitability of Recommendations and Transactions, to Online Communications, September 25, 2002, *MSRB Rule Book*.

¹³ See rule G-19 Interpretation—Notice Concerning the Application of Suitability Requirements to Investment Seminars and Customer Inquiries Made in Response to a Dealer's Advertisements, May 7, 1985, *MSRB Rule Book*.

receipt of the official statement and the primary distributor has formally agreed to be responsible for such delivery.¹⁴ For example, if employees make investments directly through the primary distributor's Web site and the Web site requires that investors first view or download the official statement before being allowed to complete transactions, then the selling broker would be able to conclusively rely on this method of delivery for purposes of fulfilling its disclosure requirements.¹⁵ However, if the primary distributor does not provide assurances that necessary disclosures will be made to employees, the selling broker will be required to provide such disclosures.¹⁶ The selling broker must put in place appropriate supervisory procedures to ensure that required disclosures are provided in a satisfactory manner where it is not entitled to conclusively rely on the primary distributor as described above.

In addition, where a selling broker is entitled to conclusively rely on disclosures provided by the primary distributor or transfer agent (as described in the preceding paragraph) and the transaction is not recommended, the selling broker may conclusively rely on the primary distributor to fulfill the selling broker's supervisory obligation to review and approve customer accounts and transactions under rule G-27(c)(iii) and (vii) for such accounts and transactions if the primary distributor has formally agreed to be responsible for such

¹⁴ Under these circumstances, the primary distributor could be held responsible for any failures to meet the disclosure requirements of rules G-17 and G-32. In addition, the primary distributor should note that, if the official statement omits material information that it would be obligated to provide under rule G-17, the primary distributor would be responsible for providing such omitted information.

¹⁵ The MSRB has provided guidance on electronic delivery of required disclosure information in rule G-32 Interpretation—Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers, November 20, 1998, *MSRB Rule Book*. Arrangements assuring actual delivery of the official statement to employees may also be possible in circumstances where paper applications and participation agreements are mailed directly to the primary distributor or its transfer agent.

¹⁶ Selling brokers would be advised, for example, to provide official statements to the employer's human resource/employee benefits department and at any employee informational meetings that it attends. The selling broker may enter into contractual arrangements whereby the primary distributor, transfer agent, issuer or other party agrees to provide the required disclosures to employees. However, except as described above, the selling broker will be responsible for any failure by such third party to meet its contractual delivery obligation.