

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55830, File No. SR-MSRB-2006-09)

May 30, 2007

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to MSRB Rule G-21, on Advertising, and MSRB Rule G-27, on Supervision

On November 21, 2006, the Municipal Securities Rulemaking Board (“MSRB”), filed with the Securities and Exchange Commission (“SEC” or “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 (i) amendments to Rule G-21, on advertising, and Rule G-27, on supervision, and (ii) an interpretation (the “proposed interpretive notice”) on general advertising disclosures, blind advertisements and annual reports relating to municipal fund securities. The MSRB amended the proposed rule change on February 12, 2007 (“Amendment No. 1”). The proposed rule change and Amendment No. 1 thereto were published for comment in the Federal Register on February 23, 2007.³ The Commission received one comment letter regarding the proposal.⁴ On May 14, 2007, the MSRB filed a response to the comment letter.⁵ This

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55302 (February 15, 2007), 72 FR 8222 (February 23, 2007) (“Commission’s Notice”).

⁴ See letter from Jacqueline T. Williams, Chair, College Savings Plans Network, dated March 16, 2007.

⁵ See letter from Ernesto A. Lanza, Senior Associate General Counsel, MSRB, to Nancy M. Morris, Secretary, Commission, dated May 14, 2007 (“MSRB’s Response Letter”).

order approves the proposed rule change as modified by Amendment No. 1.

The proposed rule change consists of (i) amendments to Rule G-21, on advertising, and Rule G-27, on supervision, and (ii) an interpretation (the “proposed interpretive notice”) on general advertising disclosures, blind advertisements and annual reports relating to municipal fund securities. In 2005, the MSRB adopted new section (e) of Rule G-21 that established specific standards for advertisements by brokers, dealers and municipal securities dealers of municipal fund securities, including interests in 529 college savings plans.⁶ This section of the rule was modeled in part on Rule 482 adopted by the SEC under the Securities Act of 1933, as amended, and also codified previous MSRB interpretive guidance on advertisements of municipal fund securities. On May 12, 2006, the MSRB published interpretive guidance on certain elements of amended Rule G-21 as they apply to advertisements of 529 plans.⁷

The proposed rule change further harmonizes the MSRB’s advertising rule with the rules of the SEC and NASD relating to investment company advertising. The proposed rule change also provides certain clarifications of and exceptions to existing standards that the MSRB believes more closely tailor the provisions of the rule to the

⁶ Municipal fund securities are defined in Rule D-12. 529 college savings plans are established by states under Section 529(b)(A)(ii) of the Internal Revenue Code as “qualified tuition programs” through which individuals make investments for the purpose of accumulating savings for qualifying higher education costs of beneficiaries. Section 529 of the Internal Revenue Code also permits the establishment of so-called prepaid tuition plans by states and higher education institutions. All references to 529 plans are intended to encompass only 529 college savings plans established under Section 529(b)(A)(ii).

⁷ See Rule G-21 Interpretive Letter – 529 College Savings Plan Advertisements, MSRB Interpretation of May 12, 2006, published in MSRB Notice 2006-13 (May 15, 2006) (the “May 2006 Interpretation”). The proposed rule change supersedes this May 2006 Interpretation.

specific characteristics of the municipal fund securities market without reducing the investor protections afforded by the rule. Although most of the amendments effected by the proposed rule change relate specifically to advertisements of municipal fund securities, certain provisions apply to advertisements of all types of municipal securities, including bonds and notes. The MSRB proposed an effective date for the proposed rule change of April 1, 2007 to coincide with the effective date of NASD Rule 2210(d)(3). A full description of the proposal is contained in the Commission's Notice.

The College Savings Plans Network ("CSPN") stated in its comment letter that, in general, they believe that the proposed rule change may be feasibly implemented. However, CSPN stated that they believe several provisions and interpretive statements in the proposed rule change remain unclear, would be unduly costly to implement or would overly restrict their ability to make college savings information available to specific populations, such as existing account owners or potential account owners who have responded to a blind advertisement. CSPN also requested a delay in the effective date of the proposed rule change.

Transaction Confirmations and Periodic Statements

CSPN asked for clarification of the definition of "form letter" that would be added as new subsection (ii) to Section (a) of Rule G-21 to establish that transaction confirmations and periodic statements sent to account owners (along with any messages printed thereon, enclosed therewith or attached thereto) constitute "form letters" for purposes of Rule G-21. The MSRB stated in its Response Letter that "Provisions relating to transaction confirmations and periodic statements in lieu of such confirmations are set forth in MSRB Rule G-15(a). Information provided to customers in connection with

transactions in municipal fund securities in satisfaction of the requirements of Rule G-15(a), or as reasonably contemplated thereunder to be included in a confirmation or periodic statement, is treated for purposes of MSRB rules in the same manner as confirmations sent to customers in connection with transactions in any other type of municipal security, such as municipal bonds or notes. A determination of the status of information provided to customers beyond such items of information required under or reasonably contemplated by Rule G-15(a) (whether such information is physically attached to or otherwise included within a traditional confirmation or periodic statement, or is included in a separate writing or data file), such as whether such additional information would be treated as a form letter under proposed Rule G-21(a)(ii), generally should be based on a consideration of the specific nature of such additional information and any other relevant facts and circumstances.” The Commission agrees that whether any additional information not reasonably contemplated to be included in a confirmation or periodic statement by Rule G-15(a) should be treated as a form letter under proposed Rule G-21(a)(ii) should be based on the specific nature of such additional information and any other relevant facts and circumstances.

Form Letters Regarding Related Municipal Fund Securities

CSPN also asked for clarification regarding the intended operation of proposed Rule G-21(e)(i)(B)(3) concerning certain form letters to existing customers. Proposed Rule G-21(e)(i)(B)(3) provides, in part, that a form letter relating to municipal fund securities that is distributed by a dealer solely to its existing customers to whom the dealer has previously provided an official statement for any municipal fund securities issued by the same issuer as the issuer of the municipal funds securities that are the

subject of the form letter is not required to include certain disclosures under Rule G-21(e)(i)(A). CSPN stated that the MSRB's discussion of this provision in the Commission's Notice and in the MSRB's Notice⁸ may be interpreted in an unduly restrictive manner because of the use of the term "related" without further definition. The MSRB stated in its Response Letter that the descriptive information in the Commission's Notice and the MSRB Notice summarized the universe of municipal fund securities issued by such issuer as, in general terms, "the same or related municipal fund securities." The MSRB also stated that the general descriptive language does not limit or modify the plain language of the proposed rule itself, which the MSRB believes is clear. The Commission finds that the language of the rule itself is clear.

Disclosure of Loads and Annual Operating Expense Ratio

CSPN also asked for clarification that the cost information required to be disclosed by the proposed amendments to section (e)(i)(A)(3) of Rule G-21 and new subsection (i)(A)(4)(a)(iii) to be added to Section (e) of Rule G-21 is solely the cost information that is actually applicable to the municipal fund securities, rather than other information that may be generally applicable to any underlying investment. CSPN further stated: "For example, the actual cost of investing in a tuition savings program that only assesses a single, unitary, fixed fee for investment in any program investment option could be extremely unclear to a potential investor if the advertisement must list the expense ratio for the mutual fund in which the option invests. In such a scenario, a potential investor could draw the erroneous conclusion that he or she would be required to pay both the fixed fee and the underlying fund expense. ... If an investment portfolio

⁸ MSRB Notice 2006-32 (November 21, 2006) ("MSRB Notice").

within a tuition savings program invests in multiple mutual funds similar to a fund of funds, it should not be necessary to identify in a performance advertisement about such investment portfolio each separate expense charge applicable to each separate mutual fund included in the investment portfolio. Rather, it should suffice to set forth a single blended expense charge that is calculated by combining the appropriately weighted expense charges of all of the underlying mutual funds in the portfolio. ... Moreover, a tuition savings program's costs may reflect discounts from those generally applicable to one or more of the underlying investments or may be uniform across all investment alternatives offered, in which case reference to specific underlying fund expense charges could divert the investor's attention away from a positive fee scenario and obfuscate the actual expense charges directly applicable to the investor."

The MSRB responded that "In understanding how this provision is intended to be implemented, two basic principles apply: (i) as the MSRB seeks to maximize the degree to which the public will be assured of receiving information that is comparable across both the municipal fund securities and investment company securities markets, the MSRB believes that the specific fee and expense information required to be disclosed under proposed Rule G-21(e)(i)(A)(3) generally should match such information required to be disclosed under NASD Rule 2210(d)(3) and Securities Act Rule 482; and (ii) as the MSRB seeks to maximize the understandability of information received by the public about potential investments and the actual costs that an investment may entail, the MSRB believes that the specific fee and expense information required to be disclosed under proposed Rule G-21(e)(i)(A)(3) generally should be the fees and expenses that an investor would actually incur rather than a collection of the components used to

determine such actual fees and expenses. Each advertisement or correspondence⁹ that includes performance data must be examined in light of these basic principles as applied in the context of the specific facts and circumstances.

Thus, for example, if an advertisement includes performance data for a single investment option offered under a 529 college savings plan that consists of a portfolio of securities of several underlying registered investment companies, the requirements of this provision generally could be met with the inclusion of a single fee and expense figure if such figure accurately reflects the total fees and expenses that an investor would actually incur in connection with an investment in such option, taking into consideration any program level fees and expenses as well as any fees and expenses that may be attributable to the underlying securities in the portfolio or that are otherwise payable in connection with such investment. If such advertisement includes separate performance data for more than one investment option offered under a 529 college savings plan, the requirements of this provision generally could be met with the inclusion of a single fee and expense figure for each investment option for which performance data is shown if each such figure accurately reflects the total fees and expenses that an investor would actually incur in connection with an investment in each such option, taking into consideration any program level fees and expenses as well as any fees and expenses that may be attributable to the underlying securities in the option or that are otherwise payable in connection with such investment.” The Commission believes the MSRB has provided sufficient clarification of the cost information required to be disclosed under the proposed rule

⁹ Proposed Rule G-21(e)(vii) provides that all correspondence with the public that includes performance data relating to municipal fund securities must comply with the requirements of the rule regarding such performance data as if such correspondence were a product advertisement.

change. The Commission would expect the MSRB to provide additional guidance on specific situations if needed.

Currentness of Total Annual Operating Expense Ratios

CSPN also requested clarification on how frequently updates must be made to the total annual operating expense ratios that will be reported in advertisements containing performance data for municipal fund securities. CSPN said that they presume that any advertisements containing performance data, including performance tables on a program's Web site, need only disclose the total annual operating expense ratios as reported in the most recent official statement for the program.

The MSRB responded that "Proposed Rule G-21(e)(ii)(C) provides that the total annual operating expense ratio that appears in advertisements and correspondence that include performance data shall be calculated as of the most recent practicable date considering the type of municipal fund securities and the media through which data will be conveyed. NASD Rule 2210(d)(3) provides that the total annual operating expenses to be disclosed in investment company performance advertisements should be as stated in the fee table of the investment company's prospectus current as of the date of submission of an advertisement for publication or as of the date of distribution of other communications with the public. Recognizing that the MSRB cannot mandate that such information be included in the issuer's official statement for municipal fund securities, proposed Rule G-21(e)(ii)(A) provides that, to the extent that information necessary to calculate performance data or to determine loads, fees and expenses is not available from a registration statement or prospectus, the dealer is to use information derived from the issuer's official statement, otherwise made available by the issuer or its agents or derived

from such other sources which the dealer reasonably believes are reliable. The inclusion in an advertisement or correspondence of the total annual operating expense ratio obtained from the official statement, where the official statement is subject to periodic updating by the issuer and such ratio is from the most recent official statement as of the date of submission of the advertisement for publication or as of the date of distribution to the public, generally would be viewed as meeting the currentness standard under proposed Rule G-21(e)(ii)(C).” The Commission believes the MSRB has provided sufficient clarification regarding how frequently updates must be made to the total annual operating expense ratios in performance advertisements.

Blind Advertisements

CSPN asked for clarification of language in the proposed interpretive notice regarding proposed Rule G-21(e)(i)(B)(2)(b) concerning certain blind advertisements. CSPN stated that there is no need for a requirement that a “distinct barrier between the providing of information and the seeking of orders” be maintained. CSPN further stated that it is doubtful that such a requirement would meaningfully protect potential investors who have evidenced an interest in initiating an order, and that the requirement may discourage persons from actually establishing accounts.

The MSRB responded that “Proposed Rule G-21(e)(i)(B)(2) provides, in part, that an advertisement is not required to include certain disclosures under Rule G-21(e)(i)(A) and (B) if it does not identify a dealer or its affiliates and if it includes only one or more of the following: the issuer’s name, contact information to obtain the official statement or other information, the issuer’s logo or an issuer mark or slogan that does not constitute a call to invest in municipal fund securities. Clause (b) of this provision provides that, if

contact information is provided for a dealer acting as the issuer's agent in making the official statement or other information available, then no orders for municipal fund securities may be accepted through such source unless initiated by the customer. The proposed interpretive notice states, 'If a potential customer initiates an order through the source identified in the advertisement, a distinct barrier between the providing of information and the seeking of orders must be maintained to qualify as a blind advertisement.' The proposed interpretive notice also provides certain illustrative examples of this requirement.

The MSRB notes that the blind advertisement provision in proposed Rule G-21(e)(i)(B)(2) is somewhat unique within the structure of the federal securities laws and was created in part as a result of the public-private partnerships that most 529 college savings plans represent and that are not typically seen in other sectors of the securities markets. This provision was intended to permit dealers to partner with the state plans in providing to the public basic information regarding the states' public purpose goals without promoting the sales activities of the dealers. As such, the MSRB views the requirement of a distinct barrier as an appropriately measured step to help ensure that the result of such blind advertisements is more information to the public rather than merely more opportunities for dealers to make sales. The MSRB also noted that to that end, any delays in the ability of an investor to invest as a result of the proposed barrier between the provision of information and sales activity could be viewed, if anything, as providing the potential customer with a greater opportunity to review the information he or she has received and to make an investment decision in a less hurried environment. Dealers seeking more direct promotion of potential investment opportunities may do so using

materials that are subject to other provisions of Rule G-21.” The Commission believes that the proposed barrier between the provision of information and sales activity is a measured step that is not inconsistent with the Act.

Required Annual Reports

The proposed interpretive notice provides guidance to the effect that, in circumstances where a dealer may be required by state law or rules and regulations to prepare or distribute an annual financial report or other similar information regarding a municipal fund securities program, such report or information will not be treated as an advertisement so long as the dealer provides such report or information solely in the manner required by such state law or rules and regulations. CSPN stated that while this guidance is generally helpful, it is too narrow to the extent that it recognizes only actual state laws or formal administrative rulemaking as the means by which a dealer may be required to prepare or distribute information. CSPN stated that “This limitation is unnecessary to protect the investing public as a whole to the extent that such requirements typically address the distribution of information to existing customers. It is also both arbitrary and unnecessarily intrusive upon state discretion in administering their tuition savings programs in that it provides relief only in connection with programs operated under statutes that include disclosure requirements or administered by public entities that are authorized to adopt administrative rules or regulations and that choose to address their customer’s need for such information by exercising this authority. Some programs, however, are administered by public entities, such as trusts, that lack this authority or that choose to require dealers to prepare and provide such information as a contractual matter.”

The MSRB stated that “This interpretive guidance is intended to be consistent with similar guidance provided by NASD with respect its Rule 2210 as applied to certain performance information and hypothetical illustrations required by state laws to be provided by dealers in connection with retirement investments and variable annuity contracts. The MSRB recognizes that there is considerable variability from state to state in the methods they may use to adopt binding requirements of general applicability. Therefore, the MSRB would not view the expression ‘rules and regulations adopted by the state or an instrumentality thereof governing a particular 529 plan or other municipal fund security program’ as limiting the types of requirements to which the interpretation is applicable solely to those promulgated pursuant to a specific formal administrative rulemaking process. Instead, the MSRB generally views the interpretation as applicable where the state or instrumentality thereof establishes a mandate of general applicability to, and binding upon, any equally situated person or entity. However, a negotiated contractual provision would not satisfy this requirement as this would permit dealers to avoid the appropriate application of Rule G-21 to promotional materials through narrowly tailored contractual arrangements.” The Commission believes that this guidance is not inconsistent with the Act because it provides relief to dealers providing certain information required by state law and is intended to be consistent with similar guidance provided by NASD.

Effective Dates

With one exception, CSPN requested that the proposed rule change be made effective immediately upon publication of the Commission’s approval order, rather than the MSRB’s previously requested April 1, 2007 effective date. CSPN requested that the

revisions to proposed Rule G-21(e)(i)(A)(3) and proposed new Rule G-21(e)(i)(A)(4)(a)(iii), relating to disclosures of maximum sales loads and total annual operating expense ratio, instead be made effective sixty days after the publication of such approval order, and that dealers not be required to implement such provisions until 15 days after the end of the calendar quarter following such effectiveness.

The MSRB agrees with CSPN that the proposed rule change should be made effective immediately upon approval, provided that dealers should not be required to implement the new provisions of Rule G-21(e)(i)(A)(3) and (4)(a)(iii) relating to disclosure of maximum sales load and total annual operating expense ratio (as well as the related provisions of Rule G-21(e)(ii)(A), G-21 (e)(vii) and G-27(d)(ii)) for any advertisement submitted or caused to be submitted for publication, or any advertisement or correspondence otherwise distributed to the public, prior to July 15, 2007.

Nonetheless, the MSRB urges dealers to implement these provisions as soon as practicable. In response to these comments and in recognition of potential production, publication and related technical issues that may exist in some cases in implementing the proposed rule change, the Commission finds that the implementation period proposed by the MSRB will provide dealers adequate time to make any necessary changes.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB¹⁰ and, in particular, the requirements of Section 15B(b)(2)(C) of the Act¹¹ and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Act requires, among other

¹⁰ In approving this rule the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78o-4(b)(2)(C).

things, that the MSRB's rules 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 engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.¹² In particular, the Commission finds that the proposed rule change will further investor protection by raising the standards for advertisements of municipal fund securities and by making information provided in such advertisements comparable for different municipal fund securities investments and more comparable to registered mutual funds. The proposal will be effective upon publication in the Federal Register, except that dealers will not be required to implement the new provisions of Rule G-21(e)(i)(A)(3) and (4)(a)(iii) relating to disclosure of maximum sales load and total annual operating expense ratio (as well as the related provisions of Rule G-21(e)(ii)(A), G-21 (e)(vii) and G-27(d)(ii)) for any advertisement submitted or caused to be submitted for publication, or any advertisement or correspondence otherwise distributed to the public, prior to July 15, 2007.

¹²Id.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-MSRB-2006-09), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).