

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53959, File No. SR-MSRB-2006-03)

June 8, 2006

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change Consisting of Interpretive Guidance on Customer Protection Obligations of Brokers, Dealers and Municipal Securities Dealers Relating to the Marketing of 529 College Savings Plans

On March 31, 2006, the Municipal Securities Rulemaking Board (“MSRB” or “Board”), 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 interpretive guidance on customer protection obligations of brokers, dealers and municipal securities dealers (“dealers”) relating to the marketing of 529 college savings plans. The proposed rule change was published for comment in the Federal Register on May 2, 2006.³ The Commission received six comment letters regarding the proposal.⁴ On June 1, 2006, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 53715 (April 25, 2006), 71 FR 25867 (May 2, 2006) (the “Commission’s Notice”).

⁴ See letter from David J. Pearlman, Chairman, College Savings Foundation (“CSF”), dated April 24, 2006; letter from Frank Traynor, dated April 28, 2006; letter from Patricia D. Struck, President, North American Securities Administrators Association, Inc. (“NASAA”), dated May 22, 2006; letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (“ICI”), dated May 22, 2006; letter from Dale E. Brown, Executive Director & CEO, Financial Services Institute (“FSI”), dated May 23, 2006; and letter from Elizabeth Varley, Vice President and Director of Retirement Policy, and Michael D. Udoff, Vice President, Associate General Counsel and Secretary, Securities Industry Association (“SIA”), dated May 31, 2006.

MSRB filed a response to the comment letters.⁵ This order approves the proposed rule change.

The proposed rule change consists of interpretive guidance on customer protection obligations of dealers relating to the marketing of 529 college savings plans. The MSRB proposed an effective date for the proposed rule change of 60 calendar days after Commission approval. A full description of the proposal is contained in the Commission's Notice.

CSF, ICI, FSI and SIA supported the proposed rule change. Mr. Traynor's comment letter requested clarity concerning the meaning of the proposed rule change, stating that the proposal was 34 pages long. The MSRB noted in its response that the Commission's Notice in the Federal Register⁶ contains a two-page brief summary of the proposed rule change in Section II.A.1, and that the remainder of the notice consists of information required to be included in the notice under the MSRB's regulatory obligations established by the Commission, including an extensive discussion of the comments received on earlier draft versions of the proposed rule change that, among other things, explains the rationale for the MSRB's rulemaking determinations. In addition, the MSRB stated that it provides comprehensive information on the regulatory duties of dealers in connection with the marketing of 529 college savings plans and other information useful to investors on its Web site at <http://www.msrb.org/msrb1/mfs>, and that any member of the public seeking an explanation of the proposal or any existing

⁵ See letter from Ernesto A. Lanza, Senior Associate General Counsel, MSRB, to Martha M. Haines, Chief, Office of Municipal Securities, Commission, dated June 1, 2006 ("MSRB's Response Letter"). The MSRB's Response Letter does not address SIA's comment letter because the Commission received SIA's comment letter after the comment period for the filing had closed.

⁶ See supra note 3.

MSRB rule should not hesitate to contact MSRB staff at (703) 797-6600.

NASAA's comment letter expressed support for the efforts made by the MSRB to strengthen the marketing rules and disclosure requirements in connection with the offer and sale of 529 plans. Nonetheless, NASAA said they were concerned that certain key disclosure obligations set forth in earlier drafts of the MSRB's guidance⁷ were omitted from the proposed rule change. NASAA more specifically stated that they believe removing the comparative suitability analysis requirement and alleviating a broker-dealer's obligation to provide specific information regarding home state 529 plan benefits will have a detrimental effect on customers.

The MSRB's Response Letter states that the MSRB noted in its filing the potential adverse impact of the comparative suitability and specific home state disclosure proposals as an important factor in its approval of the disclosure and suitability language included in the proposed rule change. The MSRB stated that the comparative suitability and home state disclosure proposals from the 2005 Notice would have imposed unprecedented new obligations on dealers to become sufficiently knowledgeable about many or potentially all investment options available in the 529 college savings plan market (including a large number of 529 college savings plans that the dealer does not offer) in order to provide accurate disclosures and to arrive at appropriate conclusions in connection with a comparative suitability analysis. The MSRB stated that some state plans expressed objections over a provision that would require dealers that do not market their plans to make disclosures about such plans. The MSRB also noted a number of press reports detailing the negative impact of the comparative suitability proposal and

⁷ See MSRB Notice 2005-28 (May 19, 2005) (the "2005 Notice").

anecdotal evidence that some dealers had been withdrawing from, or considering limiting their offerings in, the 529 college savings market at least in part due to the proposal in the 2005 Notice. Further, the MSRB stated that, as noted in the filing, there is a potential for over-emphasizing the importance of a particular state's beneficial state tax treatment of an investment in its 529 college savings plan.

NASAA's comment letter also stated that while they are encouraged by the point-of-sale disclosures outlined in the Commission's Notice, they believe that these disclosures would better serve the interests of investors if they were provided in a more effective and timely manner. NASAA questioned the effectiveness of providing the out-of-state plan disclosures at the time of the transaction. NASAA stated that they believe the out-of-state disclosures should be made well before the trade to achieve maximum effectiveness, and that the mechanism for this disclosure should be more specific and concrete.

The proposal provides that the out-of-state disclosure obligation may be met if the disclosure appears in the program disclosure document, so long as the program disclosure document has been delivered to the customer at or prior to the time of trade and the disclosure appears in the program disclosure document in a manner that is reasonably likely to be noted by an investor. NASAA stated that it is left open to question whether or not customers will, in fact, take note of these disclosures. NASAA recommended that broker-dealers be required to make a disclosure separate from the plan document before their disclosure obligations are deemed fulfilled.

The MSRB's Response Letter stated that with respect to the manner and timing of the proposed time-of-trade disclosures to customers, the MSRB believes that it has

achieved an appropriate balance that ensures that the required disclosures are made in a timely and balanced manner without potentially over-emphasizing the home state tax element as compared to the other numerous items of important information provided to customers. The MSRB stated that it continues to monitor the Commission's proposed point-of-sale disclosure obligations in connection with mutual fund, variable annuity and 529 college savings plan sales under proposed Exchange Act Rule 15c2-3, which under certain circumstances could provide for the making of disclosures at a time prior to the time-of-trade. The MSRB stated that it has taken NASAA's suggestions in this regard under advisement pending final action by the SEC on proposed Rule 15c2-3.

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 MSRB⁸ and, in particular, the requirements of Section 15B(b)(2)(C) of the Act and the rules and regulations thereunder.⁹ Section 15B(b)(2)(C) of the Act requires, among other 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.¹⁰ In

⁸ 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).

⁹ 15 U.S.C. 78o-4(b)(2)(C).

¹⁰ Id.

particular, the Commission finds that the proposed rule change is consistent with the Act because it will further investor protection by strengthening and clarifying dealers' customer protection obligations relating to the marketing of 529 college savings plans, including but not limited to the duty to provide important disclosures to customers investing in out-of-state 529 college savings plans relating to state tax treatment and other benefits and to undertake active suitability analyses for recommended transactions based on appropriately weighted factors.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-MSRB-2006-03) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Nancy M. Morris
Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).