

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55302; File No. SR-MSRB-2006-09)

February 15, 2007

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 21, 2006, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change, and amended such proposed rule change on February 12, 2007 (“Amendment No. 1”), as described in Items I, II, and III below, which Items have been substantially prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The MSRB has filed with the SEC 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 proposes that the proposed rule change be made effective on April 1, 2007. The text of the proposed rule change is available on the MSRB’s Web site (<http://www.msrb.org>), at the MSRB’s principal office, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

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 (“dealers”) of municipal fund securities, including interests in 529 college savings plans (“529 plans”).³ This section of the rule was modeled in part on Rule 482 adopted by the SEC under the Securities Act of 1933, as amended (the “Securities Act”), 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.⁴

³ 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).

⁴ See Rule G-21 Interpretive Letter – 529 College Savings Plan Advertisements, MSRB Interpretation of May 12, 2006, published in MSRB Notice 2006-13 (May

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 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 would apply to advertisements of all types of municipal securities, including bonds and notes.

Provisions of General Applicability

Definition of Advertisement. The proposed rule change modifies the existing definition of "advertisement" as set forth in Rule G-21(a)(i)⁵ to more closely conform it to the terms "advertisement" and "sales literature" under NASD Rule 2210(a)(1) and (2). The revised definition is intended to be as inclusive as the terms "advertisement" and "sales literature" are used under NASD and SEC rules, except as otherwise specifically provided in Rule G-21(a)(i). Thus, the reference in the revised definition of "advertisement" to any electronic or other public media should be read as broadly as in the definition of "advertisement" under NASD Rule 2210(a)(1), even though the definition set forth in Rule G-21(a)(i) does not include the list of media that currently or in the future may appear in the NASD definition.

15, 2006) (the "May 2006 Interpretation"). When approved, the proposed rule change will supersede this May 2006 Interpretation.

⁵ The proposed rule change re-designates several existing provisions and incorporates new headings for many provisions to assist in compliance with the rule. References herein to rule provisions refer to such provisions as re-designated in the proposed rule change.

Definition of Form Letter. The proposed rule change adds a new definition of “form letter” in Rule G-21(a)(ii) that is consistent with Rule 24b-1 under the Investment Company Act of 1940, as amended (the “Investment Company Act”), but clarifies that a form letter includes both written letters (including post cards and similar mailings) and electronic mail messages.

Definitions of and Content Standards for Professional and Product Advertisements. The proposed rule change provides explicit definitions for “professional advertisement” and “product advertisement” and sets forth the applicable content standards for these types of advertisements. The amendment to the definition of “professional advertisement” under Rule G-21(b)(i) does not effect a change in how such term has been viewed historically under the rule. The amendment to the definition of “product advertisement” under Rule G-21(c)(i), however, clarifies that it applies to advertisements of specific municipal securities or advertisements that discuss specific features of municipal securities, rather than to advertisements that may merely mention general categories of municipal securities.⁶ The content standard for professional advertisements under Rule G-21(b)(ii) is unchanged, as is the baseline standard for product advertisements under Rule G-21(c)(ii).⁷

General Content Standard for Advertisements. Rule G-21(a)(iii) establishes a general content standard for advertisements that are neither professional advertisements

⁶ The definition of “product advertisement” in the proposed rule change codifies interpretive guidance provided in the May 2006 Interpretation.

⁷ However, the additional specific content standards under section (e) of Rule G-21 for municipal fund securities product advertisements are modified by the proposed rule change, as described below.

nor product advertisements.⁸ This standard is the same as the existing baseline content standard for product advertisements. The MSRB emphasizes that all advertisements, regardless of category, are subject to the MSRB's basic fair dealing rule, Rule G-17, which requires each dealer, in the conduct of its municipal securities activities, to deal fairly with all persons, and prohibits the dealer from engaging in any deceptive, dishonest or unfair practice. The proposed rule change does not alter these fair dealing principles, which continue to apply to all advertisements.

Generic and Blind Advertisements for Municipal Fund Securities

Generic Advertisements. The proposed rule change establishes under Rule G-21(e)(i)(B)(1) provisions relating to generic advertising of municipal fund securities. A generic advertisement of municipal fund securities that meets the requirements of Rule G-21(e)(i)(B)(1) would not need to include the general disclosures required under Rule G-21(e)(i)(A).⁹

Blind Advertisements. The proposed rule change provides for more limited disclosures for certain blind advertisements under Rule G-21(e)(i)(B)(2). Under this provision, advertisements that promote an issuer and its public purpose without promoting specific municipal fund securities or identifying a dealer or its affiliates would

⁸ The May 2006 Interpretation effectively recognized that the professional and product advertisement content standards under existing Rule G-21 may not apply to certain advertisements that do not fit neatly into either category.

⁹ Rule G-21(e)(i)(B)(1) is modeled in part on Securities Act Rule 135a relating to generic investment company advertising. However, the proposed rule change modifies or omits certain basic features of Rule 135a to adapt the concept of generic advertising to the specific characteristics of the municipal fund securities market.

be permitted to limit basic disclosures in the same manner as generic advertisements.¹⁰

A blind advertisement may contain contact information for the issuer or its agent to obtain an official statement or other information, provided that if the dealer or its affiliate acts as such agent, no orders may be accepted through such contact unless such order is initiated by the customer. The proposed interpretive notice emphasizes that a blind advertisement may not identify the dealer or its affiliate and provides guidance to dealers acting as the issuer's agent in responding to customer inquiries and accepting customer orders made through the contact information included in a blind advertisement. The guidance provided with regard to whether an order may have been initiated by the customer applies solely to this provision of Rule G-21 and is not intended to be determinative as to whether the dealer has recommended the transaction to the customer for purposes of Rule G-19, on suitability of recommendations and transactions, since, depending on the facts and circumstances, the customer may have initiated the order based on a recommendation from the dealer.

In addition, advertisements qualifying as blind advertisements under Rule G-21(e)(i)(B)(2) are excepted from the requirement in Rule G-21(e)(iv) to include the dealer's capacity since the dealer is not identified in the advertisements.

Performance Data for Municipal Fund Securities

Disclosure of Fees and Expenses in Advertisements and Correspondence. The proposed rule change includes provisions substantially similar to recently approved NASD Rule 2210(d)(3) relating to investment company advertisements, sales literature and correspondence containing performance data, which becomes effective on April 1,

¹⁰ This provision effectively codifies, with minor modifications, interpretive guidance provided in the May 2006 Interpretation.

2007.¹¹ Rule G-21(e)(i)(A)(3)(b) and (c) will retain the existing requirement that advertisements containing performance data for municipal fund securities disclose the maximum amount of the sales load or other nonrecurring fee.¹² Such advertisement will be further required to disclose the total annual operating expense ratio, except for municipal fund securities held out as having the characteristics of a money market fund.¹³ Print advertisements will be required under Rule G-21(e)(i)(A)(4)(a)(iii) to include text box disclosure of this information, which may be combined with comparative performance and fee data and disclosures provided for under section (e) of the rule. New Rule G-21(e)(vii) will provide that any correspondence with the public that includes performance data for municipal fund securities must comply with the performance data requirements of Rule G-21(e) as if such correspondence were a product advertisement under that section of the rule.¹⁴ The proposed rule change adds language in Rule G-

¹¹ See Exchange Act Release No. 54103 (July 5, 2006), 71 FR 39379 (July 12, 2006). See also NASD Notice to Members 06-48 (September 2006).

¹² As required under NASD Rule 2210(d)(3)(A)(ii)(a), such maximum sales load (whether as a maximum sales charge or maximum deferred sales charge) must be current as of the date such advertisement is submitted for publication or is otherwise disseminated.

¹³ Under Rule G-21(e)(ii)(C), the total annual operating expense ratio must be calculated as of the most recent practicable date considering the type of municipal fund securities and the media through which such information will be conveyed. Additional language included in Rule G-21(e)(i)(A)(3)(c) and (e)(ii)(A) recognizes that municipal fund securities are not subject to the registration requirements of the Securities Act and is designed to ensure that information on fees and expenses is determined in a manner consistent with the registered investment company market, to the extent possible.

¹⁴ Although the other provisions of Rule G-21 would not apply to correspondence covered by Rule G-21(e)(vii), the basic fair dealing requirements of Rule G-17 described above would still apply.

27(d)(ii), on supervision, with respect to supervisory procedures relating to the review of correspondence for compliance with this new requirement.¹⁵

Disclosures Relating to Tax-Adjusted Performance Data. The proposed rule change amends Rule G-21(e)(ii)(E) to delete subparagraph (2). The deleted provision currently requires that, in connection with the calculation of any tax-equivalent yield or after-tax return that appears in an advertisement for municipal fund securities, if the then-effective federal income tax treatment upon which such yield or return was based is subject to lapse or other adverse change without extension or change of federal law, the advertisement must disclose this fact and that such yield or return would be lower if the then-effective federal income tax treatment is not extended or otherwise changed. This deletion reflects the repeal of the sunset provision for many of the federal tax benefits enjoyed by 529 plans, as described below.

General Disclosure Requirements for Municipal Fund Securities

Substance of Disclosure. The proposed rule change makes several modifications to rule language in Rule G-21(e)(i)(A)(1) and (2) relating to disclosures designed to communicate basic information concerning investments in municipal fund securities. The modified provisions and the proposed interpretive notice clarify that these disclosures are not legends requiring the inclusion of specific language but instead require that such information be effectively conveyed. Thus, these disclosure

¹⁵ The language added to Rule G-27(d)(ii) makes clear that a dealer's supervisory procedures must provide for review of correspondence for compliance with the performance data requirements, but only to the extent that such requirements are applicable given the nature of the dealer's municipal securities activities. Thus, dealers that do not market municipal fund securities generally would not be required to provide for review of correspondence for compliance with Rule G-21(e)(vii).

requirements may be complied with if the substance of such information is effectively conveyed, regardless of the specific language used in the advertisement.¹⁶ In general, the context in which the information is provided is an important factor in determining whether the information is effectively conveyed.

The MSRB understands that these advertising disclosures have presented considerable challenges in the context of broadcast advertisements, such as traditional television or radio commercials with 30-second run-times or public service announcements that may have considerably shorter run-times.¹⁷ The proposed interpretive notice provides guidance on the use of abbreviated forms of the required disclosures in time-limited broadcast advertisements.

Home State Tax Benefits. Rule G-21(e)(i)(A)(2)(b) requires 529 plan product advertisements to include disclosure to the effect that investors should consider, before investing, whether their home states offer state tax or other benefits only available for investments in the home state 529 plan. The proposed rule change permits dealers to omit such disclosures in advertisements (such as form letters, post cards, e-mails and other written or electronic mailings) concerning a state's 529 plan that are sent to, or are otherwise distributed through means that are reasonably likely to result in the advertisements being received by, only residents of such state. The MSRB views such omission as most suitable with respect to advertisements that are delivered directly to intended recipients, and not well suited with respect to broadcast advertisements where

¹⁶ Compare Rule G-21(e)(i)(A)(3)(a), where a legend is explicitly required.

¹⁷ These disclosures can be lengthier for many 529 plan advertisements than for investment company advertisements as a result of the home state tax benefit disclosures generally required under Rule G-21(e)(i)(A)(2)(b) as described below, which are not required in connection with investment company advertisements.

the dealer would bear the burden of establishing that such broadcast is reasonably likely to result in the message being received only by in-state residents.

Communications with Existing Customers. The proposed rule change adds new Rule G-21(e)(i)(B)(3), which permits dealers to distribute form letters relating to municipal fund securities that omit some or all of the disclosures required under Rule G-21(e)(i)(A)(1) and (2) to existing customers who have previously invested in municipal fund securities. Form letters sent solely to existing customers about the same or related municipal fund securities that such customers already own may omit all of the standard disclosures under such subparagraphs (1) and (2) since that information will have previously been provided to such customers. If the form letters relate to municipal fund securities other than, or unrelated to, the one the customer already invests in, then the disclosures under subparagraph (2) are required. Furthermore, if the form letter identifies a source for obtaining an official statement and the dealer underwrites the municipal fund securities advertised in the form letter, the dealer is required to disclose that it is the underwriter.

Tax-Related Disclosures for Municipal Fund Securities

Rule G-21(e)(v) requires a product advertisement for municipal fund securities that discusses tax benefits to disclose that such benefits may be conditioned on meeting certain requirements. If the nature of specific benefits is described, the factors that may materially limit their availability must be named. The proposed rule change modifies this subsection to clarify that generalized statements regarding tax benefits require only a generalized statement that certain conditions may apply and that, where specific benefits are described, only those substantive factors that may materially affect the ability to

realize such benefits must be listed, rather than explained in full. For example, a statement that 529 plans are federally tax-advantaged, or that investors may qualify for federal tax benefits by investing in a 529 plan, without identifying the specific benefits, would be viewed as generalized statements. In such cases, a statement that certain conditions may apply, or that refers customers to the official statement for more information, would be sufficient. Furthermore, the inclusion of the required home state tax disclosure under Rule G-21(e)(i)(A)(2)(b) does not, by itself, require the disclosure of conditions for receiving such state tax benefits.

Required Annual Reports Excluded from Definition of Advertisement

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.

Effective Dates

The MSRB proposes that the proposed rule change be made effective on April 1, 2007 to coincide with the effective date of NASD Rule 2210(d)(3).

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,¹⁸ which provides that the MSRB's rules shall:

¹⁸ 15 U.S.C. 78o-4(b)(2)(C).

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.

The MSRB believes that the proposed rule change is consistent with the Act because it 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 between municipal fund securities and registered mutual funds.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act since it would apply equally to all dealers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

On August 11, 2006, the MSRB published for comment draft amendments to Rules G-21 and G-27 relating to advertisements of 529 plans (the "Notice").¹⁹ The draft amendments, as published in the Notice, would: (1) modify the definition of "advertisement" to more closely align it with the usage of the terms "advertisement" and "sales literature" under SEC and NASD rules; (2) adopt a definition of "form letter"

¹⁹ See MSRB Notice 2006-26 (August 11, 2006).

consistent with the definition used by the SEC under the Investment Company Act; (3) establish an explicit baseline standard for advertisements and more clearly define “professional advertisement” and “product advertisement”; (4) adopt provisions for generic advertisements of municipal fund securities; (5) adopt provisions requiring advertisements and correspondence containing performance data to also include disclosure of fees and expenses that are substantially the same as under recently approved amendments to NASD Rule 2210(d)(3); (6) clarify and simplify the general disclosure requirements with respect to certain broadcast advertisements, promotional materials and form letters relating to municipal fund securities; and (7) clarify and simplify the nature of disclosures required in advertisements of municipal fund securities in connection with tax matters and tax-adjusted performance data.

The MSRB received comments from three commentators.²⁰ After reviewing the comments, the MSRB has determined to file this proposed rule change. The proposed rule change is substantially similar to the draft amendments, with certain modifications discussed below. The principle comments and the MSRB’s responses are also discussed below.

Additional Disclosures Relating to Home State Tax Benefits

Rule G-21 currently requires 529 plan advertisements to state that investors should consider whether their home states offer state tax or other benefits only available

²⁰ Letters from: Jacqueline T. Williams, Chair, College Savings Plan Network (“CSPN”), to Ernesto A. Lanza, MSRB, dated September 22, 2006; Dorothy M. Donohue, Associate Counsel, Investment Company Institute (“ICI”), to Mr. Lanza, dated September 22, 2006; and Michael Udoff, Vice President, Associate General Counsel and Secretary, and Elizabeth Varley, Vice President and Director, Retirement Policy, Securities Industry Association (“SIA”), to Mr. Lanza, dated September 22, 2006.

for investments in the home state 529 plan. For advertisements (such as form letters, post cards, e-mails and other written or electronic mailings) concerning a state's 529 plan that are sent solely to residents of that state, the draft amendment modified this provision to permit dealers to omit such disclosure since it is not relevant to such recipients.

CSPN requested that language in this provision referencing advertisements published or disseminated by "the issuer or any of the issuer's agents" be deleted since the MSRB has no authority to regulate issuers. The MSRB notes that this provision was not intended to regulate the actions of issuers, but rather to limit the ability of a dealer to use this exception if its advertisement is further disseminated by other parties, including the issuer or its agents. However, to avoid ambiguity, the MSRB has modified Rule G-21(e)(i)(A)(2)(b) to replace this language with language that instead refers to advertisements made available by dealers to the issuer or any of the issuer's agents with the expectation or understanding that such other parties will otherwise publish or disseminate such advertisements.

Generic Advertisements

The draft amendments included a generic advertising provision that would allow dealers to omit many required disclosures from advertisements that contain only general information about municipal fund securities and that do not name a municipal fund security or a specific investment option or portfolio of an issuer of municipal fund securities. CSPN, ICI and SIA requested that language in the draft amendments stating that a generic advertisement may not refer by name "to any specific municipal fund security" be deleted, arguing that it creates ambiguities as to whether a reference in an

advertisement to a 529 plan's general program name would disqualify such advertisement from being considered a generic advertisement.²¹

The MSRB believes that the deletion requested by the commentators would be appropriate and consistent with the intended operation of this provision. Thus, as this provision has been modified in the proposed rule change, an advertisement that mentions the 529 plan's general program name could be considered a generic advertisement if all other relevant conditions have been met. However, mention of specific investment options or portfolios would disqualify the advertisement from being treated as a generic advertisement.

Blind Advertisements

The draft amendments provided that a blind advertisement that promotes an issuer and its public purpose without promoting specific municipal fund securities or identifying a dealer or its affiliates also would qualify as a generic advertisement. Among other things, a blind advertisement may include contact information for the issuer or an agent of the issuer to obtain an official statement or other information, provided that if such issuer's agent is a dealer or dealer affiliate, no orders for 529 plans may be accepted through such source. The provision for blind advertisements was designed to address the unique characteristics of the 529 plan market, where regulated dealers and issuers not subject to MSRB regulation often undertake public-private partnerships in marketing 529 plans, raising issues that do not arise in the registered investment company market.

²¹ CSPN observed that this ambiguity arises from the fact that some no-action letters issued by SEC staff with respect to 529 plans refer to various interests relating to such 529 plans, other than the individual shares purchased by customers, as municipal securities.

CSPN and ICI requested clarification that the use in an advertisement of a phone number or Web site that includes the name of a dealer acting as the issuer's agent would not preclude such advertisement from being treated as a blind advertisement. The intent of this provision is that a blind advertisement cannot, on its face, identify a dealer or its affiliates. Therefore, although contact information may be included in the advertisement that directs a potential customer to a dealer or its affiliate acting as agent of the issuer, the face of the advertisement may not identify such dealer or affiliate. The proposed interpretive notice provides guidance on information that may be included in a blind advertisement.

CSPN and ICI also requested modifications to the language providing that, if the source for more information identified in the advertisement is the dealer or a dealer affiliate, no orders may be accepted through that source. The commentators were concerned that a reference to a Web site for more information would preclude such Web site from allowing investments in the 529 plan. CSPN stated that “[e]very web site on which an individual can purchase interests in a Section 529 Plan requires the investor to acknowledge reading or receiving the Official Statement before investing. It is not clear what would be gained by requiring the potential investor to get information from one web site and then make the purchase on another web site.” ICI suggested alternative language to the effect that “no initial orders for municipal fund securities shall be accepted through such source, unless before placing such an order an investor is required to acknowledge that he or she received the official statement for such securities.”

The MSRB understands the concern expressed in connection with Web-based sources but believe that ICI's suggested language is not the appropriate approach to

addressing this issue, particularly since Rule G-17, on fair practice, already requires dealers to provide all material facts about the transaction known by the dealer, as well as material facts about the security that are reasonably accessible to the market, to the customer on or prior to the time of trade.²² Given that the provision for blind advertisements seeks to ensure that such advertisements are informational in nature and not primarily designed to promote sales by the dealer, the MSRB believes that a distinct barrier between providing information and seeking orders should be maintained. However, the MSRB does not believe that such barrier should create an arbitrary disincentive for those potential customers who themselves seek to initiate an order.

Thus, the proposed rule change modifies the language of Rule G-21(e)(i)(B)(2)(b) to allow the acceptance of orders if initiated by the customer. The proposed interpretive notice provides guidance on ensuring that only customer-initiated orders are accepted through a source identified in a blind advertisement.

Tax-Adjusted Performance Data

Rule G-21 currently provides that, in calculating tax-equivalent yield or after-tax return for a 529 plan advertisement, the advertisement must effectively disclose that such yield or return would be lower if the sunset provision for many of the federal tax benefits enjoyed by 529 plans, previously scheduled to occur on January 1, 2011, were not repealed. In view of the recent enactment of the Pension Protection Act of 2006 (Public Law 109-280), which repealed this sunset provision, the Notice sought comment on whether this provision should be deleted. CSPN, ICI and SIA agreed that this provision

²² See Rule G-17 Interpretation – Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts, March 20, 2002, reprinted in MSRB Rule Book.

should be deleted. Thus, the proposed rule change deletes this provision in Rule G-21(e)(ii)(E).

Required Annual Reports Excluded from Definition of Advertisement

CSPN stated that the broad definition of advertisement in Rule G-21 could be construed to include annual financial reports undertaken by many dealers acting as 529 plan program managers. CSPN stated that such annual reports are not solicitations of new business and suggested that audited annual reports produced for or in conjunction with issuers be explicitly exempted from treatment as an advertisement.

The MSRB notes that NASD has issued several interpretive letters in which NASD addresses the applicability of its advertising rule, Rule 2210, 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.²³ In each case, NASD concluded that the provision by dealers of the information required by state law would not be treated as an advertisement or sales literature for purposes of Rule 2210 so long as the information was provided solely in the manner required by law. NASD further stated that any additional use of such information beyond what is required by law would be subject to the NASD advertising rule. In addition, NASD stated in one of the interpretive letters that the use of such information

²³ See letter dated November 29, 2004, to Therese Squillacote, Chief Compliance Officer, ING Financial Advisers, LLC, from Philip A. Shaikun, Assistant General Counsel, NASD; letter dated September 30, 2002, to Sally Krawczyk, Esq., Sutherland, Asbill & Brennan, LLP, from Mr. Shaikun; and letter dated February 5, 1999, to W. Thomas Conner, Vice President, Regulatory Affairs, National Association of Variable Annuities, from Robert J. Smith, Office of General Counsel, NASD Regulation, Inc.

by the dealer remained subject to all other NASD rules and the federal securities laws, including the anti-fraud provisions.

The MSRB believes that the approach NASD has taken with respect to investment companies is appropriate as well with respect to 529 plans and other municipal fund securities programs and has provided guidance to this effect in the proposed interpretive notice.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

Within 35 days of the date of 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 such 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 change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2006-09 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2006-09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, 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 such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2006-09 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Florence E. Harmon
Deputy Secretary

²⁴ 17 CFR 200.30-3(a)(12).