

compliance concerns. Both the Commission and the MSRB believe that rule G-37 is essential to diminish pay-to-play practices in the municipal securities market. The rule has provided substantial benefit to the industry and the investing public by reducing the direct connection between political contributions to issuer officials and the awarding of municipal securities business.

The comment letters welcome the amendments proposed as a means to reduce industry costs and burdens. The Commission does not believe that the proposed rule change will threaten the purpose and efficacy of the pay-to-play restrictions. The Commission believes that the proposed rule change adequately provides essential protections in the exemption process and the revised definition of municipal finance professional. Furthermore, proposed revision of the look back and look forward periods to better correlate with the municipal finance professionals' role and business activity will continue to safeguard against the potential link between obtaining municipal securities business and contributions.

#### IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act,<sup>11</sup> that the proposed rule change (File No. SR-MSRB-2002-12) be and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47815; File No. SR-MSRB-2003-03]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Marketing of 529 College Savings Plans in the Workplace

May 8, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") and rule 19b-4 thereunder,<sup>1</sup> notice is hereby given that

on April 29, 2003, the Municipal Securities Rulemaking Board (the "MSRB") filed with the Securities and Exchange Commission (the "Commission") a proposed rule change (File No. SR-MSRB-2003-03) (the "proposed rule change") described in items, I, II, and III below, which items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change 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 Commission a proposed rule change consisting of an interpretive notice on marketing by brokers, dealers and municipal securities dealers ("dealers") of 529 college savings plans in the workplace. The entire text of the proposed rule change appears at the end of this notice.

#### 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

The MSRB has received a number of requests for guidance on dealer responsibilities under MSRB rules with respect to the marketing of 529 college savings plans (a type of state program that issues municipal fund securities) through the workplace to employees. Such workplace marketing programs raise unique interpretive issues under MSRB rules. The MSRB has determined to provide interpretive guidance on the application of rule G-8, on recordkeeping, rule G-17, on fair dealing, rule G-19, on suitability, rule G-27, on supervision, and rule G-32, on disclosure, in the context of workplace marketing programs relating to 529 college savings plans.

###### (2) Basis

The MSRB believes that the proposed rule change is consistent with section

15B(b)(2)(C) of the Exchange Act, which provides that the MSRB's rules shall:

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 will provide guidance to dealers engaged in workplace marketing programs for 529 college savings plans as to how to comply with MSRB rules in a manner that ensures that the investor protection objectives of the rules are met.

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

The MSRB does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act since it would apply equally to all dealers involved in workplace marketing programs for 529 college savings plans.

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

On November 18, 2002, the MSRB published for comment draft interpretive notice on marketing of 529 college savings plan employee payroll deduction programs. The MSRB received six comment letters.<sup>2</sup> After reviewing these comments, the MSRB approved the draft interpretive notice, with certain modifications, for filing with the SEC.<sup>3</sup> The comments and the MSRB's responses are discussed below.

<sup>2</sup> Letter from Robert W. Berta, Jr., Vice President—Compliance, Countrywide Investment Services, Inc. ("Countrywide"), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated December 17, 2002; letter from M. Shawn Drefflein, President, National Planning Corporation ("NPC"), to Ernesto A. Lanza, dated January 7, 2003; letter from Natalie A. Kavanaugh, Legal Specialist, Fidelity Investments ("Fidelity"), to Ernesto A. Lanza, dated January 9, 2003; letter from Diana F. Cantor, Chair, College Savings Plan Network ("CSPN") and Executive Director, Virginia College Savings Plan, to Ernesto A. Lanza, dated January 10, 2003; letter from Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association ("SIA"), to Ernesto A. Lanza, dated January 10, 2003; and letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute ("ICI"), to Ernesto A. Lanza, dated January 10, 2003.

<sup>3</sup> After reviewing the comments, the MSRB modified the draft interpretive guidance to: (i) Change the term "introducing broker" to "selling broker;" (ii) reflect the existence of other scenarios in which 529 college savings plans are marketed in

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4 thereunder.

NPC fully supported the draft interpretive notice, stating that it “clearly sets out the rationale for providing guidance in this area \* \* \* [and] will make it possible for our Representatives to assist companies in offering 529 college savings plans to their employees.” CSPN, Fidelity, ICI and SIA all generally supported the draft interpretive notice, although each requested that the MSRB further broaden and/or clarify the guidance in various respects.<sup>4</sup>

Fidelity, ICI and SIA requested that the MSRB substitute the term “selling broker” or “selling dealer” for the term “introducing broker” used in the draft interpretive notice. They stated that the term “introducing broker” is used with different meanings under the federal securities laws applicable to other types of securities and may cause some confusion. In addition, SIA recommended that, for purposes of the interpretation, the term “selling broker” also encompass the primary distributor where it directly establishes the relationship with the employer. SIA stated, “In addition to recognizing that a selling broker rarely, if ever, has a suitability obligation in the context of a payroll deduction program, the notice should clarify that a primary distributor who makes 529 Plan investments available through a third-party broker would not have a suitability obligation under rule G-19, as it too makes no recommendation to an employee.” The MSRB has changed the term “introducing broker” to “selling broker” in the revised interpretive notice. Contrary to SIA’s statement that the interpretive notice recognizes “that a selling broker rarely, if ever, has a suitability obligation,” the notice does not assess the likelihood or frequency of recommendations being made by selling brokers. The notice does provide some guidance regarding the factors to consider when determining whether a recommendation has occurred. The MSRB believes that no further guidance in this area is necessary.

CSPN, Fidelity, ICI and SIA each noted that the scenario described in the draft interpretive notice is not the only form in which dealers may seek to market 529 college savings plans through employers. In addition to arrangements where selling brokers having a contractual relationship with

the workplace; (iii) provide more guidance as to when dealers may rely on others to fulfill regulatory responsibilities; and (iv) clarify certain recordkeeping obligations. These revisions are described in greater detail below.

<sup>4</sup> Countrywide did not state its position regarding the draft interpretive notice but merely noted a possible grammatical correction.

the primary distributor to market through employers, with the employees making investments directly through the primary distributor (as described in the draft interpretive notice), these commentators noted that: (1) Primary distributors may themselves market 529 college savings plans through employers; (2) selling brokers sometimes have contractual relationships with the issuer rather than the primary distributor; (3) selling brokers may handle employee investments and maintain long-term relationships with employees, rather than merely introducing employees to the primary distributor; (4) transfer agents may undertake significant responsibilities in connection with employees’ investments; and (5) employees may in some instances use a dealer other than the selling broker or primary distributor to make an investment that may still be considered part of the employer-sponsored program. These commentators requested that the MSRB address some or all of these additional scenarios. In addition, CSPN suggested that the MSRB make clear that the scenarios addressed in the draft interpretive notice are illustrative and that other models may be implemented.

The MSRB has made significant modifications to the initial paragraphs of the notice to reflect the existence of these other scenarios. No significant change in interpretation results from a primary distributor acting in the role of a selling broker. The identity of the selling broker’s counterparty on the selling agreement also does not significantly change its regulatory obligations. Selling brokers that make recommendations remain fully obligated under MSRB rules and remain ultimately responsible where the primary distributor has not affirmatively undertaken regulatory obligations on behalf of the selling broker (as discussed below). The guidance provided by the notice is primarily intended for dealers that are formally involved in a workplace marketing program; thus, the notice is of limited applicability to dealers that do not have a formal role in such a program.

Fidelity observed that the draft interpretive notice referred to on-line enrollment with the primary distributor and noted that in many circumstances enrollment and investments continue to be handled by mail. Also, Fidelity, ICI and SIA noted that other forms of payment, such as ACH (automated clearing house) bank transfers, may be used in addition to traditional employee payroll deductions. These commentators requested that the MSRB

recognize these variants in its final notice. The revised interpretive notice now more clearly acknowledges these different processes.

CSPN, Fidelity, ICI and SIA sought further clarification on the circumstances under which selling brokers may rely on other parties to meet their regulatory obligations. CSPN and SIA stated that dealers should be able to rely on issuers to distribute official statements to customers. CSPN noted its concern that customers may be confused by the receipt of redundant (and possibly out-dated) disclosure documents if dealers must deliver official statements regardless of whether the issuer has sent them to customers. SIA suggested that the ability of the selling broker to rely on the primary distributor for delivery of the official statement as provided in the draft interpretive notice be extended to the ability to rely on other parties, such as other dealers, employers and issuers.

The revised interpretive notice permits a selling broker to conclusively rely on the primary distributor to meet its disclosure obligations and certain supervisory obligations (described below) only under the limited circumstances in which employee orders are not accepted without actual delivery of the official statement and the primary distributor has affirmatively agreed to undertake such regulatory obligations on behalf of the selling broker. In such circumstances, the primary distributor will be responsible for fulfilling such obligations. In all other circumstances, the notice clarifies that a selling broker may agree with another party to take certain actions on its behalf but that if such other party fails to take such actions, the selling broker remains responsible for fulfilling its regulatory obligation.

ICI suggested that the MSRB should permit selling brokers to enter into arrangements with the primary distributor to meet their supervisory obligations to review and approve customer accounts and transactions based upon having procedures in place that provide assurances to the selling brokers that such review and approval is being undertaken by the primary distributor. SIA questioned the value of requiring a selling broker to review customer accounts and transactions well after the transaction is executed, especially if the transaction was not recommended. In addition, SIA questioned why a requirement for such review and related recordkeeping would be dependent upon whether the selling broker receives compensation for a transaction.

The revised interpretive notice clarifies that, where a selling broker does not make a recommendation and the primary distributor affirmatively agrees to take on both the disclosure responsibilities and the supervisory responsibilities with regard to opening of accounts and approval of transactions, the regulatory obligation may be shifted to the primary distributor. However, supervisory responsibility remains with the selling broker so long as the selling broker retains any affirmative duties to employees. The MSRB believes that the limited recordkeeping obligations imposed on all selling brokers in the notice are appropriate. The revised interpretive notice makes clear that the limited recordkeeping requirements that remain for subsequent transactions effected by the primary distributor where compensation is paid to the selling broker applies only when such compensation is transaction based since, depending on the facts and circumstances, this information may be necessary to determine compliance with MSRB's fair pricing and fair commission requirements.

With respect to transfer agents, SIA noted that many plans provide for applications and customer orders to be sent directly to a transfer agent, with the primary distributor's activities "limited to managing the overall marketing of the program and the production of marketing and promotional materials." SIA stated that, "only the transfer agent maintains any investor records and these records are the plan's investor records. Thus, in this model, the primary distributor's regulatory responsibilities are limited primarily to compliance with applicable rules governing marketing materials but not those rules mandating customer account related procedures." SIA sought assurance that primary distributors did not retain residual customer protection obligations under MSRB rules in the scenario where applications and orders are submitted directly to the transfer agent.

The MSRB notes that transfer agents generally are viewed under the Exchange Act as working on behalf of the issuer but that, in the 529 college savings plan market, transfer agents also sometimes contractually agree to act on behalf of the primary distributor. In the revised interpretive notice, where transactions are effected through a transfer agent without the direct involvement of the primary distributor or the selling broker, the selling broker is permitted to conclusively rely on the primary distributor to fulfill certain of the selling broker's regulatory

obligations only if the transfer agent has contractually agreed to act on behalf of the primary distributor. Otherwise, the transfer agent is effectively treated as an agent of the issuer and the dealer that enlisted the corresponding employer to participate in the workplace marketing plan remains ultimately responsible for compliance with MSRB rules.

SIA asked why a selling broker would have a fair dealing obligation under rule G-17 to an employer since the employer is not the dealer's client. SIA also sought guidance regarding the nature of information that a dealer would be obligated to provide to the employer under the rule G-17 disclosure obligation. ICI and SIA also questioned the need for the selling broker to maintain a record of the name and address of an employer that the dealer solicited, as well as for principal review of such solicitation. CSPN sought assurances that the fair dealing obligation toward the employer would not give rise to any inference that the issuer has any Federal securities law obligation to employers under the scenario described in the draft interpretive notice.

The fair dealing requirement of rule G-17 applies, on its face, to all persons, not just customers. The MSRB believes that it appropriately applies to the selling broker's relationship with employers, particularly since the selling broker is inducing the employer to create a captive audience of investors and the employer's agreement to participate in the program may lead employees to believe that the employer endorses investment under the program. Under these circumstances, it is important that selling brokers provide adequate information regarding the program to the employer so that it can make an informed decision with regard to enrollment in the program. The limited recordkeeping regarding the employer required by the notice is important in the context of documenting the ability of a selling broker to rely on the guidance provided in the notice with respect to particular transactions. The revised interpretive notice provides assurances that a dealer's fair dealing obligation to the employer is not intended to imply that the issuer has a similar legal obligation to the employer.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the 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 the 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 is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submissions, 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 the filing will also be available for inspection and copying at the MSRB's principal offices. All submissions should refer to File No. SR-MSRB-2003-03 and should be submitted by June 4, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

### Interpretive Notice on Marketing of 529 College Savings Plans in the Workplace

The Municipal Securities Rulemaking Board ("MSRB") has received a number of requests for interpretive guidance on the responsibilities of brokers, dealers and municipal securities dealers ("dealers") under MSRB rules with respect to the marketing of 529 college savings plans through the workplace to employees ("workplace marketing programs"). Workplace marketing programs have been described to the MSRB as being offered through a variety of means.<sup>1</sup> In many cases, a dealer ("selling broker") that has signed a selling agreement with the primary

<sup>5</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The description of certain characteristics of workplace marketing programs in this notice is intended to illustrate the application of MSRB rules and is not intended to imply that workplace marketing programs having different characteristics are not permitted under MSRB rules.

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.<sup>2</sup> 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 agent<sup>3</sup> 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,

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Whether a dealer has

<sup>5</sup> 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.

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

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

<sup>8</sup> *Id.*

<sup>9</sup> 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

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.<sup>10</sup> 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.<sup>11</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

<sup>12</sup> 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*.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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.

supervision.<sup>17</sup> Under circumstances where such conclusive reliance is not available to the selling broker, the selling broker may fulfill these supervisory obligations by reviewing and approving individual account openings and transactions as information becomes available from the primary distributor, transfer agent or other relevant party. In all cases of non-recommended transactions, the selling broker must undertake prompt reviews and approvals of agreements obtained from employers to participate in a workplace marketing program and for recording account information under rule G-8(a)(ii) and customer specific information for each enrolled employee required under rule G-8(a)(xi) (of which only information under items (A), (C), (E) and (H) thereunder shall be required) as it becomes available. A selling broker wishing to rely on the guidance provided in this notice also is required to record the name and principal business address of any employer agreeing to participate in a workplace marketing program, together with the signature of an appropriate principal approving such agreement. Selling brokers are reminded that the conclusive reliance permitted by this paragraph and the preceding paragraph is not available in the case of recommended transactions, in which case the selling broker retains the primary obligation to fulfill all customer protection, disclosure, supervisory and recordkeeping duties.

Dealers should note that none of the foregoing obviates the need for primary distributors to fulfill all of their customer protection obligations under MSRB rules where a selling broker is not otherwise required to fulfill such obligations. Furthermore, if transactions subsequent to the initial enrollment of an employee in a workplace marketing program are effected directly between the employee and the primary distributor, the primary distributor generally will have sole responsibility with respect to compliance with MSRB rules in connection with such subsequent transactions, provided that the selling broker will be required to record information regarding subsequent transactions as required under rule G-8(a)(ii) to the extent that it receives transaction-based compensation for such transactions. Dealers also should note that, if employees make their purchases directly from the governmental issuer (whether through the issuer's own

employees or any non-dealer agent of the issuer), the selling broker or primary distributor that enlists an employer to participate in a workplace marketing program is ultimately responsible for fulfilling all of its obligations under MSRB rules. Thus, for example, although an issuer may undertake to provide disclosure materials to investors, the dealer remains responsible under MSRB rules should the issuer fail to deliver the required disclosures to an employee who enrolls in a 529 college savings plan through a workplace marketing program promoted by the dealer acting as a selling broker, or if such disclosure information is not delivered in a timely manner.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47813; File No. SR-NYSE-2003-11]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to NYSE Broker Volume Web Service

May 8, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 22, 2003, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to establish fees for its NYSE Broker Volume Web Service, a new service that allows subscribers to view reports of broker share volume information that the NYSE produces from the NYSE Broker Volume Database. The text of the proposed rule change is below. Proposed new language is in italics.

#### NYSE 2003 PRICE LIST

\* \* \* \* \*

#### MARKET DATA FEES

\* \* \* \* \*

#### Schedule of Monthly Charges (excluding applicable taxes)

\* \* \* \* \*

#### NYSE Broker Volume

*NYSE Broker Volume Web Service—per user—\$300.00\**

NYSE Broker Volume Database access fee—\$3,000.00

NYSE Broker Volume Device Fee—per terminal—\$100.00

(Maximum monthly device fee per subscriber—\$2,500.00)

*\* Applies for web access to reports directly from NYSE. Persons that subscribe on or prior to October 1, 2003, receive a 30-day waiver of the NYSE Broker Volume Web Service fee.*

\* \* \* \* \*

#### 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 Exchange 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 Exchange 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

The Exchange proposes to establish fees to make NYSE Broker Volume information available via a new Web-based service (the "NYSE Broker Volume Web Service"). Subscribers to this new service will be able to log-on to the NYSE Web site ([www.nysedata.com](http://www.nysedata.com)) ("Web site") and receive formatted displays containing aggregate broker-dealer volume rankings in NYSE-traded securities. NYSE produces these displays from NYSE's electronic database of raw share volume information. NYSE creates that database from trades in NYSE-listed securities that participating NYSE members execute on NYSE (the "NYSE Broker Volume Database"). NYSE developed the NYSE Broker Volume Database to respond to requests from broker-dealers and others.

Vendors currently make broker volume reports available without the use of the NYSE Broker Volume

<sup>17</sup> Under these circumstances, the primary distributor could be held responsible for any failures to meet such supervisory obligations.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.