



Securities Industry Association

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September 15, 2004

Ernesto A. Lanza
Senior Associate General Counsel
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314-3412

**Re: Notice 2004-16, Draft Amendments Relating to Advertisements of
Municipal Fund Securities and Draft Interpretive Guidance on Disclosures
in Connection with Out-of-State Sales of College Savings Plan Shares**

Dear Mr. Lanza:

On behalf of the Securities Industry Association, (SIA)¹ we are writing in response to Notice 2004-16, which seeks comments on modifications to the rules governing advertisements and disclosures relating to college savings plans ("529 plans"). SIA is generally supportive of the objective of the subject Notice and we appreciate the opportunity to provide specific comments on potential areas of concern.

Reliance on Official Statements

Notice 2004-16 proposes an expansion to the disclosure requirements related to sales of out-of state 529 plans to other state features, such as special financial aid considerations. Under the proposal, the obligation to disclose the potential loss of state tax benefits could be met if the required disclosure is included in the official statement delivered to the customer, appearing in a manner reasonably likely to be noted by an investor.

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 780,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift and pension plans. In 2003, the industry generated an estimated \$209 billion in domestic revenue and \$278 billion in global revenues. (More information about SIA is available on its home page: www.sia.com).

SIA is concerned about the standard “reasonably likely to be noted by an investor” and the potential for an adverse decision if the placement of the disclosure is questioned. SIA believes that there should be a presumption that the placement and adequacy of the disclosure in offering materials is reasonable. Broker-dealers should not be in the position to supplant their judgment over that of the state, particularly since the issuer is a governmental entity. In general, states will have approval over the types of information – including the broker-dealers own marketing material – and will dictate by contract, how this information is delivered to investors. SIA recommends this condition be deleted from the guidance.

MSRB Internet Information

Notice 2004-16 also requests comment on whether the MSRB should require disclosure of Internet-based material maintained by the MSRB. SIA is concerned about mandating this type of disclosure on broker-dealers. SIA applauds the MSRB for putting forward a proposal to enhance investor information and education. However, there are a number of Internet sites that include this type of information and other sites will soon be under development. The Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD) have extensive website information on a variety of products but do not require brokers to disclose the availability of information.

Many SIA members have developed Internet material for their customers and invest significant resources to keep this information current. If broker-dealers are also required to refer to an MSRB website they would bear an added burden to monitor the information on the MSRB website to ensure that it is current and accurate. SIA, however, has no concern if the MSRB moves forward with this proposal but does not require disclosure by member firms. If the MSRB pursues this option, SIA would be pleased to work with you to provide information or other material. SIA maintains extensive information on college savings plan on our investor education website: www.pathtoinvesting.com and has produced a brochure for investors interested in 529 plans.

Enhanced Disclosure With Respect to State Tax “Benefits”

While we appreciate the objectives which MSRB is pursuing, it is not clear that it is in the best interest of investors to elevate disclosure about state tax and other state “benefits” above other significant disclosure issues worthy of investor consideration. But to the extent such disclosure is mandated, one must carefully consider the complexity of the underlying issues so that the disclosure given is meaningful to the investor.

There are countless and rather complex differences in state treatment that may affect investor choice. The complexity of the state variances presents challenges to those attempting to disclose them. The appropriate place for disclosure is in the program description and referring investors to such disclosure may be the best course of action, given the challenges when trying to “summarize” such information. It is not clear whether, due to the complexities, cursory disclosure about these state issues would allow for adequate capture of the considerations that need to be made. Telling an investor about state “benefits,” without mentioning at least the existence of potential consequences associated therewith seems inadequate.

To give you a sense for the complexity of summarizing state tax treatment variation, consider the following discussion (which is not intended to be all-inclusive):

States with upfront deductions offer such deductions in various amounts to residents, and in some cases, non-resident, taxpayers. The requirements for these deductions vary. Some deductions are per taxpayer, some are per account, some are per beneficiary and some deductions have differing amounts depending on whether you are filing as a single person or married filing jointly, and some deductions are a combination of these and other requirements.

Further, some states have carry-forward provisions of varying amounts (up to an unlimited amount) that allow investors to spread upfront deductions over a period of years. These deductions are, however, contingent upon an investor having taxable income in the applicable state in the current and following years from which to deduct contributions.

Importantly, states also have provisions that require repayment in full under certain circumstances (“recapture”) of 529-related state tax deductions previously taken. New York goes even further and characterizes certain qualified withdrawals as non-qualified, thereby, taxing such withdrawals. Lastly, the tax treatment of qualified withdrawals also varies among states..

In general, we believe that the characterization of state tax treatments solely as “benefits” is misleading. Use of the terms “consequences” or “variances” (vs. “benefits”) more accurately describes the true nature of such treatments, and is a fairer and more accurate characterization.

Other State “Benefits”

Other state “benefits” vary greatly as does the population to which they are “available”. As with the state tax treatment variances noted above, these variations present challenges to those attempting to “summarize” them. States offer benefits to prospective account owners who are in-state residents, non-resident taxpayers, and in some cases non-residents who have beneficiaries who are residents of the state. These “benefits” include, among other things, fee waivers or reductions, matching grants, eligibility for scholarships and preferential in-state financial aid treatment.

State laws affecting protection of assets vary greatly too. State treatment with respect to creditor protection, divorce, and Medicaid eligibility also vary.

State program rules vary greatly as well and the complexity lies in the details. For example, many states have holding period requirements and all states have maximum investment limits, which vary in amount and style (some programs employ a balance test and others, a contribution test), to determine whether the maximum has been reached.

Other Issues

We are also taking this opportunity to comment on a number of other matters addressed in the proposal. Whenever possible, we identify the particular rule number and/or page of the proposing Notice where the item is addressed:

It should be clarified that “at or prior to the time of sale” refers to the initial sale, and that there is no obligation to provide the disclosure at/or prior to every subsequent investment. SIA would be troubled (due to the number of participants participating in automated systematic contributions and the frequency with which SIA members receive unsolicited additional lump-sum contributions) if disclosure were required each time.

G-17 (point of sale disclosure interpretation): It is difficult for dealers to become familiar with attributes of 529 programs they do not sell. Given the complexities noted above and given the fact that dealers who have not entered into distribution agreements likely would not have current (or any) offering documents from such programs, they may be challenged to provide information or to determine what information needs to be provided. In an attempt to “do the right thing,” they may inadvertently provide inadequate disclosure about the “home state” program, doing a disservice to the investor and exposing themselves to liability.

G-21 Required Disclosures (draft section (e)(i)): An abbreviated form of disclosure should be allowed for radio and television ads, as the standard length of most commercials would not permit the required disclosures to be included. Additionally, the requirement for “equal emphasis” for required disclosure would result in the commercial’s intended message being lost. It may be sufficient for certain forms of advertising (like short television and radio commercials) to inform an investor to obtain the program description and read it carefully before investing. It could also be required that the state program be named, as well as a source from which to obtain the program description of the program that is being promoted through the ad. It is difficult to meaningfully summarize complex distinctions in an advertisement. The appropriate place for disclosure is in the program description (and the need to obtain and read the program description should be referenced in the ad).

G-21 Capacity of Dealer and other Parties (draft section (e)(iv)): Some 529 programs effect transactions through many broker-dealers. It would be difficult (if not impossible in some cases) to list in an advertisement each dealer associated with a program.

We also believe that the requirement in subsection (e)(iii) of Rule G-21 that advertisements give equal prominence to the name of the issuer is unnecessary, and subject to second guessing. The policy objective of the proposed rule, which is to prevent investor confusion as to who the issuer of the security is, is satisfied by the other requirements set forth in (e)(iii) that the issuer of the security be identified and that the advertisement not imply that another entity is the issuer of the security. Introducing an “equal prominence” rule creates interpretive questions for marketing and compliance personnel that are unnecessary in light of the other requirements in (e)(iii).

The MSRB’s Notice, “Application of Fair Practices and Advertising Rules in Municipal Fund Securities”, dated May 14, 2002, set forth a similar requirement that a marketing piece

clearly identify the issuer and not imply that another entity is the issuer of the security. However, that Notice did not have an “equal prominence” requirement. There is no evidence of any kind that the existing rule set forth in the May, 2002 Notice is not working, or that investors have been confused as to who the issuers of these securities are.

The attached markup of (e)(iii) is consistent with the approach taken by the MSRB in its prior interpretive notice, and we propose that this modified version be included in any final rule:

“An advertisement for a specific municipal fund security must provide sufficient information to identify such security in a manner that is not false or misleading. An advertisement that identifies a specific municipal fund security must clearly identify the name of the issuer, and must not imply that a different entity is the issuer of the municipal fund security. To the extent an advertisement identifies an entity other than the issuer of the municipal fund security, such advertisement must clearly describe such entity’s role with respect to the municipal fund security.”

We trust you will find our comments helpful and constructive, and we share your interest in assuring that 529 plan investors receive all appropriate disclosure in a clear and balanced manner. Questions regarding this letter should be directed to either Mike Udoff (212-618-0509) or Liz Varley (202-216-2032) of SIA staff.

Sincerely,

Elizabeth Varley

Michael D. Udoff
Co-Staff Advisers
SIA Ad Hoc 529 Plans Committee