



Securities Industry Association

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

Re: MSRB Notice 2005-28 – Request for Comments on Draft
Interpretation on Customer Protection Obligations Relating to the
Marketing of 529 College Savings Plans

Dear Mr. Lanza:

On behalf of the Securities Industry Association¹ (SIA), we are writing in response to the Municipal Securities Rulemaking Board (MSRB) Notice 2005-28, requesting comments on a revised application of Rules G-17 and G-19 to the marketing of 529 college savings plans (“529 Plans”). SIA is pleased to have the opportunity to comment on this important issue. Regrettably, we have significant concerns with the MSRB interpretation and believe that if approved in substantially the same form, it will undermine the ability of broker-dealers to market 529 savings plans to investors.

1. Disclosure Obligations Under Rule G-17

As the MSRB is aware, under current requirements broker-dealers must disclose that favorable state tax treatment for investing in a 529 savings plan may be limited to the investor’s home state plan. Notice 2005-28 goes far beyond this current disclosure requirement to mandate that broker-dealers ask clients about the importance of state tax benefits. This approach raises a number of concerns for broker-dealers who market 529 plans.

¹ The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA’s primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (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 nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated an estimated \$227.5 billion in domestic revenue and \$305 billion in global revenues. (More information about SIA is available at: www.sia.com.)

The practical impact of such a mandate is to require that broker-dealers provide information about every 529 savings plan available. This is an unworkable requirement. It is common practice for broker-dealers to market a limited number of 529 savings plans to their

clients. This ensures that broker-dealers understand the products that they are selling as opposed to having only superficial knowledge of dozens and dozens of products. This is a particular concern with respect to 529 savings plans, which even aside from tax considerations, have a multiplicity of other features that add complexity to the process and which vary from plan to plan. These include, but are not limited to, contribution and withdrawal limits, asset allocation, permissible investments, rollover restrictions and fee structures. Essentially, the proposed interpretation of Rule G-17 will have the counter-intuitive result of compromising a broker-dealer's ability to develop in depth expertise regarding the range of investment products it is reasonably capable of servicing.

SIA also believes that the notice goes much further than the requirements that currently apply to similar products such as mutual fund shares where the dealer is permitted to rely on the offering document as containing all material information needed by the client to make a decision. The new interpretation requiring broker-dealers to determine that the information in the offering document is sufficient would likely lead broker-dealers to create their own disclosure documents for use in marketing 529 savings plans. This disclosure would require filing with the MSRB as well as review by the National Association of Securities Dealers (NASD). In addition, if any specific state plan was cited it would also require approval at the state level. Most distribution agreements and program descriptions state that no information (either in contrast to or supplement of) other than that which appears in the official statement can be provided to investors.

2. Suitability Analysis

SIA is also concerned about the new interpretation MSRB would apply to Rule G-19. Rule G-19 imposes a duty on broker-dealers recommending a particular product to ensure that the particular product recommended is suitable. Thus the long-standing review requirement would be extended to essentially require that any 529 savings plan sold is the *most suitable* for the client.

SIA is concerned that the MSRB proposed requirements are inconsistent with the application of the suitability rule to every other product sold by broker-dealers. As stated earlier, broker-dealers universally limit the number of products sold. Firms limit the number of mutual fund companies they recommend because it is too difficult to maintain the level of expertise required to meet the suitability requirements. However, the MSRB would seek to change this long-standing interpretation with respect to 529 savings plans – a product that is complex and raises a number of tax, financial aid, and other considerations for investors. SIA is concerned that broker-dealers will be deemed to offer tax advice to customers if they perform the type of suitability analysis contemplated in the proposed requirements.

While broker-dealers already limit out of necessity the number of 529 savings plans they sell, this requirement would likely reduce the number of broker-dealers willing to market these plans. Suitability analysis is somewhat subjective. It is rare that a broker-dealer would conclude that one product is the “most suitable” for a client.

Finally, SIA is concerned that the MSRB proposed requirements would be difficult to implement from a practical standpoint. The NASD, which must review marketing material used by broker-dealers, has not in the past welcomed the use of comparisons in marketing material.

The MSRB requirement places a premium on being able to compare a number of states' 529 savings plans. However, SIA is aware of situations where NASD has rejected material that compares various 529 savings plans in a comprehensive way. NASD has voiced objections over comparisons because these plans often cannot be compared on an "apples to apples" basis.

3. Summary and Conclusion

Even without considering tax-related issues, 529 savings plans are complex investment vehicles, and the offering of such plans by broker-dealers is a labor-intensive and costly process, particularly considering that most plan investments are modest in size. Nonetheless, broker-dealers have embraced these plans for the same reason that Congress enacted section 529 legislation -- to encourage the funding of the educational needs of future generations. However, there are limits to the cost and regulatory exposure that broker-dealers are willing to endure to offer 529 savings plans. The proposed interpretation poses a significant risk of exceeding that limit.

Regulatory energy would be better directed at addressing the real source of concern regarding tax considerations, which is the lack of uniformity of tax treatment among the states with respect to investments in 529 plans. Applying different tax treatment to state residents depending on the 529 investments they select adds unnecessary complexity for college investors and further, creates an environment which imposes unreasonable and unprecedented additional obligations on broker-dealers attempting to sell these products.

We fully agree that broker-dealers should alert investors that certain 529 plan tax benefits may be limited to in-state plans, but having done so, it should be the investor's responsibility to determine, in consultation with his or her tax adviser, what weight should be given to such benefits. Clearly, the broker-dealer's primary function is to provide investment guidance, not tax advice or analysis.

If you have any questions regarding this letter please do not hesitate to contact SIA staff members Elizabeth Varley at (202) 216-2000 or Michael Udoff at (212) 618-0509.

Very truly yours,

Ira D. Hammerman
Senior Vice President and
General Counsel

CC: Annette L. Nazareth
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