

March 28, 2011

To: Securities & Exchange Commission and Municipal Securities Rulemaking Board Regulators,

**Re: Proposed Regulations for Independent Municipal Financial Advisors**

OVERVIEW:

I have long intended to comment on the MSRB's proposed regulations for independent municipal financial advisors, "FAs". I spent a few hours reading and thinking about the over two-hundred pages of proposed and "explained" regulations, but never got around to commenting for the record. Nevertheless, earlier this week I found your email address in an article by The Bond Buyer, and, as it was convenient to do so, I decided to submit my recommendations through that channel. Please understand that I am not a securities lawyer, so my comments are of a general nature and intended to help all parties understand the impact of this measure on my small business.

Before commenting, I'll summarize my experience. I began my career as a State Budget Analyst with the State of Ohio in 1983. I soon was assigned to assist the legendary Herb Kruse manage and track all state debt issuances that were controlled by the Governor's office. I moved on from there in 1989 to Ehrlich Bober, where I began my career as a public finance investment banker. On Ehrlich's departure from the business in 1991, I moved to A.G. Edwards and built a business and highly respected career for 14 ½ years. My next move was to Robert W. Baird to manage and build a "traditional" public finance operation in Ohio to complement its existing group of Ohio "structured" finance experts. I stayed at Baird for 4 ½ years and left in February 2009 to create my own advisory business. My clients are primarily the least understood in the marketplace – small- to medium-sized school districts, counties, and cities - and my client base is extensive. I believe I am very well known in state circles and that my reputation is excellent. (At least no one has told me otherwise, and I have never had even the smallest complaint about my work.) To further understand my business, please visit my website at bpaynegroup.com.

The bullet points below summarize my thoughts. Details and recommendations follow.

- Regulatory Framework – Using the financial advisor/stock broker regulatory framework to regulate a small handful of FAs in Ohio is impractical. It's like building a billion dollar damn to

regulate Old Mill Creek. Unlike the damn, however, this overkill is difficult to see, as is the eventual fallout for the small operations like mine that simply fade away under the burden. Keeping emails and correspondence is relatively painless, but the vast number of forms and required procedures are punitive. There is a much more practical and cost efficient way to do this, which I will recommend herein.

- Compliance Costs: I don't pretend to understand the regulators guesses at my compliance costs. The fact is, cost estimates published in the proposed regulations are wild guesses and were obviously generated by analysts who know absolutely nothing about my business. I estimate my costs to be a minimum of fifty thousand dollars or as much as hundreds of thousands of dollars. That would be fine if I employed twenty or more professionals including a lawyer and systems professional. I don't. The paperwork, seminars, lawyer bills, supervisory red tape and excessive opportunity costs in the proposed regulations are a small advisor death sentence in my opinion. Add to this the burden of record keeping for the tax filings I have to make to federal, state, and local levels and you have a regulatory burden with a potential cost of well over a half million dollars a year in cost and lost opportunities.
- Real-life Impact: I have one full-time employee whose job is seriously threatened by the cost of these regulations. She is a single mother who has been with me for years, and she plays a critical part of my business model. I have one part-time employee with good experience in the business, who supplements his education-related income by providing FA services to a select group of issuers, and I have another limited-time (12 hours per week) employee who is in his first job, doing a great job, and trying to build a resume. Not a single one of these jobs is safe now.

#### DETAILS:

Regulatory Framework Is Flawed - The basic premise of the regulations is tragically flawed. The premise of the FA regulations seems to be that government finance officers and legislative bodies will benefit from the same level of protection and protective procedures that "Sam the retired grocer" needs when dealing with retail stock brokers and his life savings. Using the same regulatory "architecture" for independent FA's and retail brokerage clients is a mistake and an example of extreme regulatory overkill. FAs are much different from registered stock brokers in three very important ways that also make us easier to regulate: 1) there are a relatively small number of FAs and a sea of brokers; 2) brokers manage and have access to clients' accounts and FAs do not, serving almost exclusively as advisor middlemen; 3) FA clients are mostly sophisticated industry professionals who realize that they have a duty of care to the

public, just as we have to them – broker clients are often quite defenseless and have only themselves as a final check.

I ask you to seriously compare my clients' situations to Sam above who may not know the difference between an annuity and a football and who is working with one of possibly thousands of random brokers in the state. I don't touch my clients' money and never have access to their accounts even if I wanted it, yet my clients have the qualifications necessary to know exactly what I'm doing, while Sam is quite defenseless. I realize that many of the perceived FA problems in the business over the past years are the result of poor decision making at the government level, due to lack of oversight and budgetary discipline. Therefore, local issuers should be prodded to recognize that they have a duty of care in this area to choose their advisors and bankers carefully. Federal regulators shouldn't try to "back door" this oversight through the FAs just because they can't get to the government officials. Figure out another method. Work with the states to increase local-finance-officer training and regulation or something along those lines, but don't expect to get better behavior from local government finance officers and elected officials by smothering me with regulations. It won't work.

To be fair to the legislators and regulators, I have asked myself this question: do I have issuer clients who are ill prepared to understand and make sensible decisions about debt issuance? Of course I do. I don't expect any of them to understand what it has taken me twenty-five years to learn simply because I try to explain it to them in a few visits. Therefore, I am intensely aware of my fiduciary responsibility. Are there bad FA apples out there who don't always deal "honestly" and "fairly" (at least as a group of knowledgeable and sensible people would define those two words)? I am saddened to say, perhaps there are. Unfortunately, email tracking, testing, and so on will have no effect whatsoever on FA actions. Those bureaucratic nuisances simply kill private jobs and hurt efficiency. Sure, we could use some oversight. However, the FA world is small and thus can be reviewed much more simply than the brokerage world can. For example, I can name only four active and well-known independent FAs working the Ohio local government market. If you want to find out who among us may need some guidance, if any, get someone on the ground here in Ohio who can ask around. Perform an occasional random transaction review. The point is, you can't prevent abusive behavior with burdensome, irrelevant paperwork, but you can certainly discourage such behavior with occasional inquiries handled by someone on the ground who actually knows the neighborhood. Otherwise, we are simply creating another federally-mandated paper jungle that fails to accomplish its intended goal. To be clear, I am

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recommending that you hire an expert for each state or region that you define, one who has an impeccable reputation for fairness and quality, to explore and discourage sloppy or unfair work among the area's FAs. Then, you could discard the bulk of your regulations, needless testing, and paperwork. The standard fraud and fairness laws would be enough.

Compliance Costs – Over my 20 years as an investment banker and independent financial advisor, 70% of my revenue has come from approximately 25% of my clients. Finding and retaining that 25% is critical to survival. The challenge is knowing when and where you will find that opportunity. Therefore, I have to be on the street, at conferences, and on the phone more than I really have time to be. And whenever I am taken away from those activities for regulatory administrative work, the more likely I am to fail. This is particularly worrisome in my position because the bulk of my clients are very small, as are my fees. Unfortunately, transaction work for small governments can be more time consuming and demanding than for larger governments, and the required degree of care is often higher.

Therefore, I expect my compliance costs, including opportunity cost, to be far in excess of my income in any year. I feel like a small business poster child for the crippling effects of onerous federal regulations. Believe me when I say that I am on the very edge of closing my doors rather than confronting this federal attack. And it's the small issuers, who need my services most, who will suffer for that. This will be bad for Ohio's small government issuers, bad for me, and good for the big boys. I'm sure that was the intention of some in Washington, but I doubt it was the intention of Congress.

If you have any interest in helping start-up advisors like me survive this process, I recommend being explicit about exemptions for small independent advisors. I can manage and support fee and conflict disclosures and outgoing email and client file retention, but that is it. And I could write rules to that effect in a sentence or two. Two-hundred and thirty pages seems a bit much.

Fees and Fair Dealing - The regulations focus a great deal on "fair dealing" and fees. I agree that our government finance officers are responsible for managing the fees they pay. They should know what they are agreeing to pay up front when possible, if a fixed fee or percentage fee, and get a cap if an hourly fee. The proposed regulations on fee disclosure are manageable and sensible – perhaps long overdue for all professionals in the public finance business. Rather than just FAs, however, all parties - FAs, bond lawyers, and underwriters - should be required to disclose any and all fees that they or any

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partner may charge prior to the engagement. That's where the regulation must stop, however. Judging the "reasonableness" of fees is an impossible duty for any out-of-state regulator, due to the vast differences in required services for unique issues and clients. There isn't a regulator alive, of whom I am aware, who knows enough to tell my clients if my fees are reasonable or not. Please do not misunderstand me, though. If the news reports on fees for the swaps and swaptions executed for certain Pennsylvania schools are true, those who charged those fees and achieved such miserable results should be called out. However, I need fee flexibility not tied to a regulator's uninformed opinion about what the fee should be. Not to be able to charge more for some and less for others will achieve the exact opposite result intended by the regulations; the small issuers most in need of the very best services and expertise will be left to the amateurs; that is, the least experienced and skilled "advisors" on the staffs of the large firms.

Again, my recommendation is to get experienced personnel on the ground in regional markets and charge them with staying on top of situations. They will know where there might be problems and their presence alone will encourage all parties to act in their clients' best interests. It's very difficult to define fairness or fair dealing for this work because the work is so different for each client, but we know what's right as a group of professionals in Ohio (FAs, underwriters, and counsel), and when someone is suspected of violating what's considered right, word gets around quickly. Having a qualified and respected person on the ground in the region would bring things into focus for the long-term benefit of all of us, including the issuers. Again, I am recommending creating an ombudsmen sort of position by local region and filling it with a known and respected individual, then discarding specific regulations in favor of much broader guidance and much less paperwork and bureaucracy.

Testing - Testing is another area I fear will be managed poorly by the regulators if history is any guide. Years ago, I was required to pass the Series 7 Registered Securities Representative test to be a public finance investment banker. The funny thing was that it had nothing to do with my job. Besides that, the test questions were so basic and irrelevant that the tests served no purpose other than to waste an entire day. Likewise, the thinking that bi-annual continuing education and initial licensing tests will help regulate public financial advisors is well-meaning, but Pollyanna. Over the years in the public finance world, testing and continuing education sessions were laughed at as absolute wastes of productive time. I have no suggested alternative other than to just totally discard them.

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Summary - The proposed FA regulations are well-intentioned, I'm sure. On the whole, however, they are a perfect example of well meaning but destructive government officials creating significant barriers to business and job growth. Worse yet, they will have absolutely no positive impact. The good news is that it doesn't have to be this way. Please, resist creating another massive bureaucracy with stultifying mounds of paperwork and administrative overkill. Back off and take a close look at who you are regulating before finalizing any rules and procedures. I believe you will realize you can do this much more efficiently simply by hiring an effective employee or two.

After reading the regulations, I had a long conversation with my staff and wife about closing my doors. Those conversations are ongoing and unsettled. It would be a shame to close, because my clients need my help badly and trust me implicitly, and they would be the first to tell you so.

Respectfully submitted for consideration,



John B. Payne

Principal (and serving as cfo, compliance officer, marketing vice president, vice president of accounting, and independent financial advisor)

Copies to:

Securities & Exchange Commission  
Municipal Securities Rulemaking Board  
Honorable Sherrod Brown  
Honorable Rob Portman  
Honorable Steve Austria