National Association of Independent Public Finance Advisors
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September 6, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-25-11

Dear Ms. Murphy:

The National Association of Independent Public Financial Advisors ("NAIPFA") submits this letter in response to the invitation of the Securities and Exchange Commission ("SEC") to comment on the proposed rule stated in Release No. 34-64766 [File No. S7-25-11] entitled Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants.

NAIPFA, founded 21 years ago, is a professional organization composed of independent public finance advisory firms located across the nation. Our member firms solely and aggressively represent the interests of issuers of municipal securities.

The Proposed Rule

The Securities and Exchange Commission ("Commission") is proposing for comment new rules under the Securities Exchange Act of 1934 ("Exchange Act") that are intended to implement provisions of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") relating to external business conduct standards for security-based swap dealers ("SBS Dealers") and major security-based swap participants ("Major SBS Participants").

Section 764 of the Dodd-Frank Act amends the Exchange Act by adding new Section 15F. Paragraph (h) of the new section authorizes and requires the Commission to adopt rules specifying business conduct standards for SBS Dealers and Major SBS Participants in their dealings with counterparties, including counterparties that are "special entities." Special Entities are generally defined to include federal agencies, states and their political subdivisions, employee benefit plans as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"), governmental plans as defined under ERISA, and endowments.

Section 15F(h)(4) of the Exchange Act requires that an SBS Dealer that "acts as an advisor to a special entity" must act in the "best interests" of the special entity and undertake "reasonable efforts to obtain such information as is necessary to make a reasonable determination" that a recommended security-based swap is in the best interests of the special entity. Section 15F(h)(5) requires that SBS Entities that offer to or enter into a security-based swap with a special entity comply with any duty established by the Commission that requires an SBS Entity to have a "reasonable basis" for believing that the special entity has an "independent representative" that meets certain criteria and undertakes a duty to act in the "best interests" of the special entity. This provision also requires that an SBS Entity disclose in writing the capacity in which it is acting (e.g., as principal) before initiating a transaction with a special entity.

Section 15F(h)(6) of the Exchange Act directs the Commission to prescribe rules governing business conduct standards for SBS Dealers and Major SBS Participants (collectively, "SBS Entities"). These standards, as described in Exchange Act Section 15F(h)(3), must require an SBS Entity to: verify that a

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counterparty meets the eligibility standards for an "eligible contract participant" ("ECP"); disclose to the counterparty material information about the security-based swap, including material risks and characteristics of the security-based swap, and material incentives and conflicts of interest of the SBS Entity in connection with the security-based swap; and provide the counterparty with information concerning the daily mark for the security-based swap. Section 15F(h)(3) also directs the Commission to establish a duty for SBS Entities to communicate in a fair and balanced manner based on principles of fair dealing and good faith.

Under Exchange Act Section 15F(h)(5)(A), any SBS Entity that offers to enter into or enters into a security-based swap with a special entity must comply with any duty established by the Commission requiring that SBS Entity to have a "reasonable basis" for believing that the special entity has an "independent representative" that meets certain requirements, including that it undertakes a duty to act in the best interests of the counterparty it represents. Proposed Rules 15Fh-2(c) and 15Fh-5(a) would implement this provision. In particular, proposed Rule 15Fh-2(c) would define an "independent representative," and proposed Rule 15Fh-5(a) would require an SBS Entity to have a reasonable basis to believe that this independent representative is qualified to represent the special entity by virtue of satisfying certain specified requirements.

The SEC is proposing to apply qualified independent representative requirements to Major SBS Participants as well as to SBS Dealers that offer to or enter into a security-based swap transactions with all Special Entities. Proposed Rule 15Fh-5(a) would require that the SBS Entity have a reasonable basis to believe that a special entity has as qualified "independent representative." Under proposed Rule 15Fh-2(c)(1), a representative of a special entity must be independent of the SBS Entity that is the counterparty to a proposed security-based swap. Proposed Rule 15Fh-2(c)(2) would provide that a representative of a special entity is "independent" of an SBS Entity if the representative does not have a relationship with the SBS Entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative.

Preliminary Statement

Of all financial and capital markets transactions, securities based swap transactions provide the greatest potential of risk to issuers of municipal securities. NAIPFA recognizes such transactions have assisted issuers to experience associated savings through the years. Correspondingly, such transactions have cost issuers significantly both in economic and political terms and also caused billions of dollars in financial losses for issuers and investors. Many municipal issuers do not possess the capability to actively measure, metric, and manage the risk and cost associated with securities based swap transactions. NAIPFA believes participation in such transactions by issuers where capability does not exist to appropriately quantify and qualify downside risk and cost is problematic and that any issuer contemplating a swap should carefully consider suitability of such a structure and seek experienced, qualified independent advice.

The current financial crisis was caused in part by the acts of dealer firms acting as financial advisors to serve multiple entities and interests while engaged in conflicts of interest that were either undisclosed, or disclosed and misunderstood, by debt issuers, borrowers, and investors. While conflicts of interest may have been disclosed to issuers, we believe it evident many did not fully understand the meaning of how their interests could be adversely affected by permitting such conflicts of interest to exist. Many issuers did not understand the implications associated with firms they trusted to represent their interests in transactions being engaged to serve in multiple capacities such as underwriter, remarketing agent, liquidity agent, credit enhancement provider, swap advisor, swap broker, or swap counterparty where

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transaction interests were not aligned and gain to such firms was at direct or indirect expense to tax and rate payers.

NAIPFA suggests it was the express intent of the Dodd-Frank Act to eliminate actual or perceived conflicts resulting from the actions of financial entities to represent more than one interest in a transaction and to provide for protections for issuers, investors, and the public trust to safeguard against such conflicts in future years. Our organization opposes perpetuating any culture of conflict where dealers are allowed to offer advice to issuers in the course of acting to serve as broker, dealer, counterparty as recent history has proven that such practices add cost and risk to transactions that are not in the interests of issuers, investors, or the public trust.

NAIPFA recommends that an independent representative be truly and fully independent. A higher standard of independence than proposed is needed. The standard should be the same as the general standard of independence for a fiduciary. A fiduciary duty is deemed to exist when an individual or entity justifiably reposes its confidence and trust in another individual or entity to represent its interests. A swap advisor should not be allowed to provide services where there exist actual, perceived, direct, or indirect conflicts of interest to those of the issuer. A swap advisor should not provide services to an issuer for which it has served duty to represent the interests of another party to a transaction of the Issuer for a period of two years following the cessation of such duty.

Comments

NAIPFA would recommend in the strongest possible terms the following to any municipal issuer considering a swap based securities transaction:

1. Issuers should not utilize swaps based securities transactions (i) that create extraordinary leverage or financial risk; (ii) where liquidity is insufficient to terminate at market; (iii) that provide insufficient price transparency to allow reasonable valuation; or (iv) not subject to independent evaluation by a swap advisor separate from the institution proposing to provide structuring, broker, or counterparty services.

2. Issuers should be aware there are many types of securities based swap transactions and the cost and risk factors associated with the respective types vary widely. Interest rate swaps; interest rate caps; options swaps; basis swaps; forward rate locks; structured notes; total return swaps; and other financial derivatives products are examples of differing types of securities based swap transactions.

3. Issuers should carefully evaluate all derivative financial products with respect to risks particular to specific securities based swap transactions considered for execution. Specific determination should be made that the expected benefits exceed the identified risks by an adequate margin over those available with traditional cash or debt markets. If marginal benefits are available as compared to the traditional cash or debt markets, financial derivative or swap products should not be utilized. Market; tax; termination; uncommitted funding; legal; counterparty; credit or ratings; basis risk; and subsequent business conditions are examples of risk types associated with securities based swap transactions. Issuers should evaluate the potential risk involved with any financial derivative or swap transaction by examining all of the risk factors listed above to include an analysis of the impact of a proposed swap transaction to the overall financial assets and liabilities of the issuer.

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4. Issuers engaging in financial derivatives or securities based swap transactions should possess the capability to measure, monitor, manage and limit risk in association with such instruments. Value at Risk ("VaR") has historically been recommended as a system to measure, metric, and manage financial derivatives risk. Issuers should be aware that VaR has recently been proven as inconsistent in the evaluation and determination of associated risk and return with such products. Other limitations to the utilization of financial derivatives or securities based swap transactions should include requirements that term shall not exceed that of associated debt obligations and the notional amount of the swap agreement should not exceed the par amount of the underlying debt obligations.

5. Issuers should be aware of the recommendations of the Government Finance Officers Association ("GFOA") associated with securities based swap transactions. The GFOA recommends that issuers execute a credit derivative transaction only with counterparties with underlying credit ratings in the "AAA" category as of the transaction date. If issuers choose to enter financial derivatives or securities based swap agreements, the transactions should be structured to eliminate (i) risk of loss due to non-performance of swap counterparties; and (ii) early termination or exit fees in their entirety.

6. Issuers should prepare, maintain, and regularly update a swap management policy as a part of its overall debt management policy. Managing derivatives requires an ongoing commitment from an issuer's senior management and governing body. The governing body and all senior management personnel should become familiar with the risks and potential rewards associated with financial derivatives or securities based swap products considered for execution. Issuer debt management policy should contain a discussion of the specific details of each swap transaction, the associated risks, rewards, and exit strategies. Issuers should understand why the swap makes sense for the issuer; swap counterparty credit ratings; swap counterparty maximum derivatives exposure limits; swap counterparty percentage of maximum exposure limit attained inclusive of the swap proposed to the issuer; resolution of the governing body that it has reviewed and understands the cash flow projections detailing costs, risks, and benefits of the swap; discussion of senior management awareness of types of risk detailed under item #3 herein; methods for managing the associated risk; events that may trigger an early termination under swap trade receipts and legal documentation; assessment of the possibility of involuntary termination due to event of default of the counterparty or issuer; how variable rate exposure will be managed in the event of swap termination; and identification of specific personnel and/or positions involved in monitoring the terms of the securities based swap transaction and counterparty financial condition and credit position and standing.

7. Issuers should actively metric, measure, and manage financial derivatives and securities based swap transactions. NAIPFA suggests continuous monitoring of market conditions, interest rates, credit ratings, counterparties for emergent cost and risk in association with an independent municipal advisor/swap advisor bearing no conflict of interest to those of the issuer that solely and aggressively represents the interest of the issuer. Active management may entail modifications of existing transactions to include provisions related to early termination, structure and term, sale or purchase options, and nature of basis. Each proposed modification should be consistent with stated swap policy and issuer risk tolerance should be measured in terms consistent with the stated goals and objectives of swap management and debt management policies.

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8. Issuers should provide its governing body with monthly reports regarding the status of financial derivatives or swap transactions to include market values; cash flows, value at risk or other performance measures, and performance related to stated benchmark goals and objectives for each transaction as related to comprehensive financial goals and objectives. The reports should note all material changes to existing swap agreements and new swap based transactions executed since the most recent report. The governing body of the issuer should require strict compliance with stated swap and debt management policy; current accounting practices; and federal, state, and local regulations and requirements.

9. Issuers should carefully examine financial derivatives and securities based swap transaction legal documentation to include ISDA documentation, schedule to the master agreement, draft trade confirmations, and credit support annex. Early termination provisions should provide for the minimization or elimination of termination fees and collateral requirements should be eliminated or minimized not to exceed an equal level for the counterparties. The specified indebtedness related to credit events in the master agreement should be narrowly defined and be tailored to the interests of issuers and the public trust. Eligible collateral should be limited to US Treasury securities and cash.

10. Issuers should be aware that the financial derivatives market exists through Over the Counter ("OTC") and Exchange Traded Derivatives ("ETD") markets. The OTC market is unregulated in contrast to the regulated ETD markets. The overall derivatives market includes major classes of underlying assets to include interest rate (the largest); foreign exchange; credit; equity, commodity, property (mortgage), economic, and utility derivatives among others. Issuers should be aware that engagement in securities based swap transactions with counterparties in the OTC market may not allow for access to information regarding the other derivatives the counterparty may have engaged with other counterparties or how those counterparties have engaged in financial derivatives or securities based swap transactions with other counterparties. Issuers should be aware that another side of transaction risk may exist among transaction counterparties along varying classes of assets, types of financial derivative or securities based swap transactions, with entities of varying credit quality which may affect the risk position of issuers of municipal securities which should be integrated into adopted systems to measure, metric, and manage financial derivatives or securities based swap transactions.

11. Issuers should be aware that financial derivatives exist in notional amounts that are very large with the unregulated OTC market at the level of approximately $600 Trillion as reported by the Bank of International Settlements as of May 2011 – or an amount that is approximately 10 times the estimated gross domestic product of the countries of the world.

12. NAIPFA and the GFOA recommend that issuers retain the services of an independent municipal/swap advisor to assist in all matters related to structuring, procurement, and pricing of financial derivatives and securities based swap transactions. Stated swap policy should require issuers solicit and procure instruments through competitive bid and only counterparties conforming to the minimum credit standards outlined in stated swap and debt management policy be allowed to participate in transactions. All financial derivatives and securities based swap transaction should be

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procured in a manner consistent with the issuers stated practices to achieve the highest level of benefit at the best available terms.

Specific Responses

NAIPFA provides the following responses to specific question listed in the Proposed Rule. The rationale for answers provided should be drawn from the sentiments provided in the Comment section herein.

- Should proposed Rule 15Fh-5 apply to both SBS Dealers and Major Participants? Yes.
- Should the Commission adopt a different definition of "Independent Representative of a special entity" in proposed Rule 15-h2(c)? No.
- Are there standards of independence that the SEC should consider such as standards relevant to determining the independence of a fiduciary for ERISA purposes? Yes.
- Should such factors include consideration of relationships the independent representative may have with an SBS Entity on behalf of multiple special entities? Yes.
- Should the Commission also consider relationships the independent representative has entered into with an SBS Entity on behalf of a special entity outside of the SBS transaction context? Yes.
- Should the gross revenues in the definition exclude the revenues of affiliates of the independent representative? No.
- Is ten percent of gross revenues an appropriate measure of independence? No.
- Should the percentage be increased or decreased? Decreased.
- Should the Commission adopt a standard that is consistent with that used by the Department of Labor, for example, under which the general standard of independence for fiduciaries in connection with prohibited transaction exemptions under ERISA is that no more than 1% of an independent fiduciary's annual income is derived from or attributable to the party in interest and its affiliates? No.
- Should another financial or other quantifiable standard be used in lieu of gross revenues? No.
- Should the Commission consider a timeframe other than one year to determine whether a representative is independent of the SBS Entity? Yes.
- Should the timeframe be two years, consistent with the pay to play provisions of proposed Rule 15Fh-6? Yes.
- Should the Commission permit an independent representative that receives compensation from the proceeds of a security-based swap so long as the compensation is authorized by, and paid at the written direction of, the special entity? Yes.
- Should the Commission adopt a different definition of "independent representative of a special entity" for different types of special entities? No.

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- Are there certain types of relationships that, so long as they have been fully disclosed to the special entity and the special entity has consented to any conflicts of interest related thereto, should not be deemed to affect the independence of the representative? No.

- Commenters have suggested that an independent representative should be deemed "qualified" if it is "a sophisticated, professional adviser such as a bank, Commission-registered investment adviser, insurance company or other qualifying [Qualified Professional Asset Manager ("QPAM")] or INHAM for Special Entities subject to ERISA, a registered municipal advisor, or a similar qualified professional." Should the Commission permit this presumption? No.

- If the Commission were to adopt a presumption, should it apply equally for all regulated persons? Yes.

- Should the presumption instead be limited to certain types of regulated persons, ERISA fiduciaries, for example? No.

- Should the Commission require that the SBS Entity obtain written representations regarding the qualifications of the independent representative directly from the independent representative? Yes.

- Should the Commission allow an SBS Entity to rely on written representations the independent representative provides to the special entity? Yes, if properly certified as per determination of the SEC.

- Which alternative would strike the best balance among the potential disadvantages to market participants, the regulatory interest in appropriate independent representation for special entities, and the sound functioning of the security-based swap market? Issuers, investors, and the public trust should be protected and the alternative providing for such protections should be implemented regardless of effect to the securities based swap market.

- In light of the additional protections that are afforded special entities under the Dodd-Frank Act should an SBS Entity be required to undertake diligence or further inquiry before it can rely on any representation from a special entity concerning the qualifications of its representative? Yes.

- If such diligence or inquiry is not required, should an SBS Entity be permitted to rely on representations from the special entity only where the SBS Entity does not have information that would cause a reasonable person to question the accuracy of the representation? No, due diligence should be required.

- Would requiring such diligence or further inquiry – or allowing reliance on representations only in such a manner – unnecessarily limit the willingness or ability of SBS Entities to provide special entities with the access to security-based swaps? Perhaps, however in the absence of such diligence access by such entities should be limited to the extent suitability is at question.

- Should the Commission require the SBS Entity to reevaluate (or, as applicable require a new written representation regarding) the qualifications of the independent representative periodically? No, if independent representatives are subject to continuing education and periodic testing requirements.

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- Should the Commission consider the development of a proficiency examination for independent representatives? Yes.

- Should such testing requirement be mandatory? Yes.

- Should it apply to both in-house and third-party independent representatives? Yes.

- Should the Commission require that independent representatives be registered with the Commission as municipal advisors or investment advisers, or otherwise subject to regulation, such as banking regulation, for example? Yes.

- Should the independent representative be required to be subject to some form of regulation (e.g., as an investment adviser or an ERISA plan fiduciary) under which the independent representative has a duty to act in the best interests of the special entity? Yes, and a fiduciary duty of loyalty and care should exist at all times.

- Should an in-house independent representative be deemed to act in the best interests of the special entity by virtue of its employment with the special entity? Perhaps, if the in house representative has met established requirements for qualification, testing, and continuing education as required for outside independent representatives.

- If the SBS Entity is not relying on written representations, should the Commission allow a presumption that an in-house independent representative, by virtue of its employment with the special entity, will make appropriate disclosures of material information to the special entity? No.

- Should the Commission also require that the SBS Entity have a reasonable basis to believe that the independent representative will make appropriate and timely disclosures to the special entity of any potential conflicts of interest that the representative may have in connection with the security-based swap transaction? No, and real or perceived conflicts of interest should not be allowed to exist.

- Are there circumstances in which an independent representative that is advising a special entity that is a State, State agency, city, county, municipality, or other political subdivision of a State, or a governmental plan, as defined in Section 3(32) of ERISA, other than an employee of the special entity, would not be subject to pay to play restrictions? No.

- Should the Commission require that the independent representative be a registered municipal advisor or Commission registered investment adviser? Yes.

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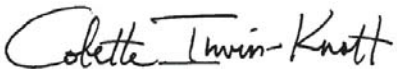
Conclusion

NAIPFA appreciates this opportunity to provide comment with respect to the Proposed Rule. Please contact us if questions regarding this response arise and we will be happy to assist the efforts of the SEC.

Sincerely,



Colette Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary L. Schapiro, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Michael Coe, Counsel to Commissioner Aguilar
Lynnette Hotchkiss, Executive Director, Municipal Securities Rulemaking Board