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February 22, 2011

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

Re: File Number S7-45-10

Dear Ms. Murphy:

The National Association of Independent Public Financial Advisors (NAIPFA) appreciates this opportunity to provide comments to the Securities and Exchange Commission (SEC) on proposed rules related to the registration of Municipal Advisors.

NAIPFA, founded 21 years ago, is a professional organization of independent public finance advisory firms that provide public finance advice to municipal and non-profit entities. NAIPFA is comprised of thirty-two member firms serving all fifty states from locations in twenty-six states. Independent public finance advisors offer a wide variety of consulting services to issuers and obligated persons. In 2009, NAIPFA members represented clients on over 2,800 separate bond issues with approximately $75 billion in proceeds.

I. PRELIMINARY STATEMENT

NAIPFA members differ from municipal advisors associated with broker-dealer firms and investment advisers in several key respects: they do not underwrite or trade municipal securities; they do not act as counterparties on swaps; and, except for certain firms that are also investment advisers, they do not recommend investments or have custody of client funds. Many advisors are former investment bankers, bond attorneys, or government finance officers who started their practices in order to provide greatly needed independent advice to municipal entities. Given their expertise and the personal relationship between advisors and their clients, most of these individuals chose to do business as sole proprietors or in small partnerships operating within a state or regional area. Consequently, many of our members operate out of a small office and some out of their homes. From membership information, NAIPFA believes that the median number of public finance advisors within its member firms is three to four. Approximately two-thirds of NAIPFA members have five or fewer employees engaging in public finance advisory activities. Indeed, only five member firms have twenty or more employees who would qualify as municipal advisors under the rules proposed.[1] Several member firms have only one or two employees acting as public finance advisors and operate with no secretarial or administrative staff.

Though not all independent municipal advisory firms are members of NAIPFA, its membership is likely representative of the universe of independent public finance advisory firms.

[1] The largest NAIPFA member has approximately 250 employees.

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While we are unaware of any NAIPFA member being a party to any disciplinary action related to the credit crisis or other concerns that prompted Congress to legislate that municipal advisors be regulated, NAIPFA recognizes the need for change among municipal market participants. Making clear who is an advisor, with a corresponding fiduciary duty to its client will increase transparency, professionalism and accountability in the market as well as aid in the protection of municipal entities and investors in municipal bonds.

Congress also made clear that regulators tasked with implementing its directives must take into account the impact the rules would have on small firms and also imposed deadlines for getting the rules in place. We applaud the SEC (and the MSRB) for its efforts to learn about our business, and recognize the constraints that limited resources put on that effort. The fact is, however, that the proposed rules we address in this comment and rules being proposed are coming at the early stages of the learning process, before the SEC or MSRB fully understand who we are, what we do and how we do it. We are also concerned that the SEC and MSRB may not be coordinating their efforts in a way that will result in regulation that is maximally efficient and minimally burdensome.

We believe that regulation of municipal advisors will fall hardest on the small firms that make up the large majority of independent public finance advisory firms. Indeed, we believe that, if adopted as proposed, these rules and others we have seen or anticipate will – in their totality – significantly increase direct and indirect costs and likely force a significant number of independent public finance advisors out of the business altogether or into other commercial arrangements.

For these reasons, and as further explained within this comment letter,

1. NAIPFA suggests that the SEC recognize that the business model and services provided by independent public finance advisors, or IPFAs, are different than the other market participants it regulates, and accordingly, the rules it promulgates should take into account those differences.
2. NAIPFA urges that the SEC recognize that the large majority of IPFAs would fall within the definition of “small business” that the SEC has proposed it adopt; indeed, a high percentage of IPFA firms likely generate revenue in amounts substantially less than $7 million per year. Accordingly, all of the regulations it proposes, individually and collectively, will place substantial burdens on these firms.
3. NAIPFA requests that the SEC follow the express language of Congress and reject the position taken by the MSRB that underwriters can provide “advice” with respect to the issuance of municipal securities without becoming a municipal advisor with a fiduciary duty.
4. NAIPFA asks that the SEC clarify which services typically offered by IPFAs do and do not qualify as municipal advisory activities.
5. NAIPFA recommends that the SEC not impose an ADV brochure requirement similar to the one imposed on registered financial advisers.
6. NAIPFA opposes any requirement that independent parties review or audit municipal advisors, either prior to the first application or on an annual or other periodic basis thereafter. The SEC review of regulated firms will be sufficient to provide feedback on firm practices.
7. NAIPFA proposes that the recordkeeping requirements be modified to eliminate the need to retain all written communications, and that other requirements be clarified.

Given the express direction of Congress that the effect on small advisory firms be considered in all rulemaking, and the likely effect these rules would have on NAIPFA members and other IPFAs, we strongly urge the SEC to modify its proposed rules taking into account the concerns raised in this comment letter.

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II. WHAT IS AN INDEPENDENT PUBLIC FINANCE ADVISORY FIRM?

A. Structure. IPFAs can be differentiated from other market participants that provide services to municipal entities in that an IPFA generates all or substantially all of its revenue from the provision of advice. An IPFA does not underwrite or trade municipal securities as broker-dealers do. It does not act as counterparty in swap transactions as investment and commercial banks do. An IPFA generally does not recommend investments or manage money as retail brokerage firms and registered investment advisers do. In addition, an IPFA does not maintain accounts in which it holds customer securities or funds. And, an IPFA does not solicit on behalf of any third-party.

The business model of a typical NAIPFA member is vastly different than that of a broker-dealer, commodity trading advisor or a registered investment adviser. Independent public finance advisors are essentially consultants selling their time and financial expertise.

Consider, for example, the profile of a relatively successful independent municipal advisor. Assuming the advisor charges $175/hour for their time and is able to bill fifty-four percent of the time they devote to their business, their revenue would be $196,560.[2] A median-sized IPFA firm with four professionals would be generating less than $800,000 per year in gross revenue. Out of this gross revenue, the firm must pay all overhead costs, including staff, office, insurance, benefits, and taxes. IPFAs will also now incur the costs of being regulated.

Compensation for dealer and registered investment advisors can be very lucrative when compared to compensation for IPFAs, in part because these other market participants generate revenue in a variety of ways. In the case of underwriters or swap counterparties, they can earn spreads or profits on the transactions in which they participate and often serve as the underwriter, investment adviser, swap advisor and/or swap counterparty on the same transaction. In the case of registered investment advisers, they sometimes charge on a per transaction basis, on the basis of assets under management or as a percentage of the investment return. They may also receive fees from third-parties or share in revenue earned by their affiliates. Clients of such firms may have a difficult time understanding all the ways other financial service providers earn their money. This is also the very reason G-23 is such an issue. Underwriter municipal advisors will earn substantially higher compensation negotiating an issue instead of acting solely as a municipal advisor soliciting competitive bids. On the other hand, IPFA clients have no difficulty understanding how, and how much, they are paying for service.

Clients of IPFAs are also not confused by the conflicts inherent in their relationship because they rarely arise. IPFAs serve no master other than the municipal client. They do not have investor clients seeking to purchase the bonds the municipality is planning to sell. They are not engaging in proprietary transactions for their own account with the bonds the municipality is issuing, nor are they acting as principal in swap transactions, or as counterparty to guaranteed investment contracts or conflicted on receiving higher compensation by negotiating the issue.

[2] 2080 hours X 54% x $175/ per hour = $196,560 gross revenue. $175 per hour is a blended rate, as clients sometimes prefer to pay by the hour or pay a flat fee per project or financing.

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B. Services Provided. When assisting public and non-profit entities, the following illustrative services are often provided by an IPFA:

1. General consulting or pre-debt transaction services (Consulting services ***not tied to a specific bond issue***):

   - General financial planning such as capital improvement planning, overall long-range financial planning, or financial projections for replacement of current facilities;
   - Helping develop financial management, debt, reserve, liquidity and/or other related policies;
   - Projecting tax impact for an operating levy referendum;
   - Understanding the need or impact of a Utility Rate study;
   - Assisting in the creation of special revenue districts such as Tax Increment Districts, Business Districts, Tax Abatement Districts, Special Assessment Districts and Special Tax Districts; and
   - Benchmarking or comparison of communities to financial data (like debt per capita or debt per valuation).

2. Debt Transaction Services (Consulting services ***tied to a specific bond issue***):

   - Reviewing a specific revenue source to support a specific debt transaction in a feasibility study or fine-tuning a general planning document;
   - Explaining the various debt options available to the issuer client;
   - Assisting in the sizing and structuring of a debt issue;
   - Assisting to prepare (and reviewing responses to) Requests for Proposal from other service providers, potentially including: bond counsel, underwriters, internet sale option providers, rating agencies, verification agents, trustees, registrar or paying agents, escrow verification agents, registered investment advisors, auditing firms, insurance companies, printers, and any other financial services firms needed;
   - Coordinating the finance team;
   - Assisting in the preparation and/or review of disclosure and other documents for the transaction;
   - Assisting in the preparation of, and the issuer's presentation to, the rating agencies and insurance companies;
   - Recommending the method of sale, i.e., competitive or negotiated;
   - Preparing financing models and mathematical computations;
   - Reviewing with the issuer and negotiating the preliminary and final pricing on all negotiated issues;
   - Preparing the bid documents and conducting competitive bond sales by advertising for, receiving and analyzing the bids received;
   - Assisting in the review of all closing documents.

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3. Post-transaction Services (Consulting services ***after a specific bond issue has been closed*** and funds delivered but not including investment of bond proceeds):
   - Providing arbitrage and rebate calculations;
   - Providing services related to Continuing Disclosure and its dissemination; and
   - Projecting future pledged and unpledged revenues for outstanding debt service funds.

III. COMMENTS

A. DEFINITION OF MUNICIPAL ADVISOR AND MUNICIPAL ADVISORY ACTIVITIES

Given the nature of the activities in which NAIPFA member firms engage, NAIPFA's comments on this subject will be directed primarily to two issues: (a) which activities do and do not qualify as advisory activities "with respect to the issuance of municipal securities;" and (b) when an underwriter crosses the line and becomes a municipal advisor.

The proposed rule adopts the definition of "municipal advisor" set forth in the Dodd-Frank amendments to the Exchange Act, using as its basis the activities in which a person engages. A municipal advisor is a person

> *who provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity.*

The Underwriter Exemption

The law and the proposed rule also specifically include certain market participants and exempt others. In the Exchange Act, Congress states that a *"broker, dealer or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933"* is not a municipal advisor.

Section 2(a)(11) provides that an "underwriter" is

> *any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term ''issuer'' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.*

Congress has clearly defined municipal advisory activities to include advising issuers and borrowers with respect to the structure, timing, terms and similar matters concerning a municipal bond issue. At the same time, it has limited underwriting activities to purchasing or distributing the bonds issued. The distinction has always been understood to be that the advisor is sitting on the same side of the table with

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the issuer, with all the legal responsibilities that attach to being an advisor, while the underwriter is on the other side of the table, negotiating the terms pursuant to which it will purchase the bonds with the end goal of making a profit when they are resold. It has for years been that distinction that allowed underwriters to advise municipal issuers even though its relationship was purely commercial and its duties limited by the terms of the bond purchase contract it negotiated. Thus, when accused of misleading issuers, failing to disclose conflicts or otherwise not acting in the best interests of the issuer, underwriters argued that financial advisors might be fiduciaries, but they (underwriters) were not.

In section II.A.c of the proposed release, the SEC acknowledges the provisions of the law set forth above and makes clear that engaging in municipal advisory activities "in a capacity other than as an underwriter" would require registration and subject the firm to a fiduciary standard of care. Thus, even if the firm is at that very moment acting as an underwriter, if it engages in any municipal advisory activities such as, for example, "advising a municipal entity with respect to the investment of bond proceeds or the advisability of a municipal derivative," it is a municipal advisor.

NAIPFA believes the same logic applies when a firm acting as an underwriter provides advice with respect to the structure, timing or terms of the bond issue it seeks to purchase and distribute. Those activities have been clearly defined by Congress to be advisory in nature, and carry with them the obligations to act as a fiduciary.[3] Because the role of an underwriter conflicts with the duties of a fiduciary, the SEC should clarify that underwriters may not provide such advice.

Scope of Municipal Advisory Activities

NAIPFA described above the various services that its member firms provide to municipal entities and obligated persons. It segregated those activities into three categories:

1. Consulting services either unrelated to a debt issue at all or unrelated to a particular debt issue;
2. Consulting services directly related to a particular debt issue; and
3. Consulting services provided after the issuance of debt.

NAIPFA reads the definition of "municipal advisory activities" to include the activities set forth in category 2 above, *i.e.*, those advisory activities tied to a debt offering, would qualify as activities covered by the rule. This understanding is based not only on its reading of the definition but on proposed Form MA. Specifically, Item 4K lists a number of activities "relating to municipal securities." Activity (1) is

> *Advice concerning the issuance of municipal securities (including, without limitation, advice concerning the structure, timing, terms and other similar matters, such as the preparation of feasibility studies, tax rate studies, appraisals and similar documents,* ***related to an offering of municipal securities***.

[3] Notwithstanding the history and what NAIPFA views as a clear expression of Congressional intent in this area, the MSRB in its Rule G-23 release issued on February 9 did not propose amending its rule to modify its existing position that underwriters do not become financial advisors for purposes of Rule G-23 when, in the course of acting as an underwriter, they provide advice on the structure, timing or terms of the bond issue. NAIPFA urges the SEC to take a different approach, one that in our opinion gives effect to Congressional intent to impose a fiduciary duty on those providing advice.

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For the same reason, NAIPFA understands generally the services provided in sections 1 and 3 above would not qualify as "municipal advisory activities." NAIPFA notes that few, if any, of the services in categories 1 and 3 are listed in Item 5 (Other Business Activities) either, and seeks clarification as to whether a member that provides one or more of those services would be expected to list them under (17), "other financial product advisor."

NAIPFA seeks confirmation from the SEC regarding NAIPFA's interpretation. Understanding which of its activities are and are not municipal advisory activities is important because firms need to know not only how to fill out the forms but how to operate within the regulatory framework. More importantly, firms need to know which activities will be subject to a fiduciary standard and which fall within the jurisdiction of the SEC and the other federal regulators. NAIPFA understands and seeks confirmation that activities that are not municipal advisory activities will, for example, not be subject to the proposed recordkeeping requirements nor will those activities be subject to examination by the SEC or any organization designated by the SEC. The distinction is also important in helping firms determine which of their associated persons will and will not need to be registered as municipal advisors.

As noted above, NAIPFA recognizes that the SEC is diligently trying to learn about what advisory firms do. NAIPFA will be happy to provide the SEC with further information, examples or clarification about the various activities in which member firms engage to assist the SEC in its rulemaking.

B. FORM ADV/BROCHURE

The SEC seeks comment on whether municipal advisors should be required to prepare and distribute a brochure such as the one registered investment advisers will soon be required to produce for their clients. NAIPFA believes such a brochure is completely unnecessary for IPFAs.

An IPFA, competing with other municipal advisors servicing this business area or geographic area, is generally retained either for a defined period of time or on a project basis. A common practice is for the issuer to retain a municipal advisor by soliciting competitive proposals as part of a Request for Proposal (RFP) process. The issuer will require the responding municipal advisors to provide information such as qualifications, experience, training, compensation and project approach. After a selection process, the municipal advisor is appointed by their elected board. Each relationship with an issuer client is unique and the terms of the agreement, including fees, are negotiated separately with each issuer client. Fees are not based on financial performance outcomes.

Unlike investment advisers who may see their compensation increase if the value of their client's account increases, an IPFA does not see its compensation increase based on the interest rate the municipality achieves in the transaction.[4] IPFAs do not charge ancillary fees, nor do they receive compensation from third parties, affiliated or otherwise. There are no investment strategies to explain. Sometimes it is the municipal client that establishes the terms or insists that its form of contract be utilized.

[4] Fees may in some cases be contingent upon the closing of a transaction. Fees may vary depending on the par amount of the transaction.

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Thus, while registered investment advisers are likely to experience changes in their fee structure, soft dollar practices, directed brokerage, investment strategies or other matters the SEC has deemed appropriate to be disclosed, there is little likelihood that anything of a similar commercial nature material to an IPFA client will change during the term of its relationship. Accordingly, there is no reason to impose on IPFAs any requirement to prepare a brochure or distribute one annually or otherwise.

NAIPFA notes that MSRB Rule G-23(c) requires that dealers acting as financial advisors have a written understanding with their client setting forth

> *the basis of compensation for the financial advisory services to be rendered, including provisions relating to the deposit of funds with or the utilization of fiduciary or agency services offered by such [dealer] or by a person controlling, controlled by, or under common control with such [dealer] in connection with the rendering of such financial advisory services.*

We expect that the MSRB will be issuing a similar Rule applicable to advisors that are not dealers. We suggest that such a Rule would be the appropriate place to define the scope of the information an IPFA or other municipal advisor should disclose.

With regard to other information that might be of interest to a municipal client, NAIPFA notes that this set of proposed rules requires firms and individuals to disclose a wealth of information, most of which is intended to be made available to the public. This information will also be required to be updated. In addition, most firms have a website which provides information about the municipal advisor. A brochure would, therefore, seem to be redundant.

Apart from the reasons why such a brochure does not seem to be needed, the cost of having to put one together and distribute it could be substantial. Absent a compelling reason to create one, the cost would seem to outweigh the benefit.

C. SELF-CERTIFICATION AND THIRD-PARTY REVIEW

In its proposal, the SEC sets forth a series of self-certification requirements, including conducting a review of the firm's business, and asks if it is necessary to establish minimum review standards and/or have independent review of the firms making the certifications. NAIPFA has no objection to the requirement that the signatory to the initial and annual certification certify that it has reviewed the business, but strongly opposes the imposition of minimum review standards or independent review.

As noted throughout this comment letter, IPFAs are different than other entities the SEC regulates. The nature of the services they perform, the relative simplicity of their business model, the size of the firms, the transparency of the services they provide and the fees they charge, the small number of clients they have at any time, the absence of customer accounts holding securities or funds – all of these factors speak against the need for a complicated, multi-faceted review of the business, particularly a review conducted by an independent party such as an accounting firm or law firm. NAIPFA fails to see in what way either issuers or investors would benefit from such a requirement. Additionally, the SEC at the time of their review of the firm will provide feedback.

In addition, the cost of retaining a professional to conduct a review will likely be substantial. Given that there is minimal, if any, benefit to be gained, that cost seems hard to justify.

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D. RECORDKEEPING

The SEC has asked for comment on proposed Rule 15Ba1-7, which specifies the books and records requirements applicable to municipal advisors. NAIPFA believes the requirements as proposed will be overly burdensome for IPFAs with little corresponding benefit. Accordingly, NAIPFA suggests that the SEC modify its proposal.

Of particular concern to NAIPFA is the requirement that firms retain originals or copies of all written communications, internal or external, relating to its municipal advisory activities. As noted above, IPFAs engage in many activities that are not municipal advisory activities. IPFAs are also generally quite small, and therefore do not have much infrastructure. Moreover, if the broker-dealer experience is any guide, merely keeping records will not be sufficient. Regulators will expect that firms produce, on demand, email relating to certain persons, certain transactions or for a certain period of time. The information technology and storage facilities required to keep all email or similar electronic communication and to segregate those that relate to municipal advisory business from other unrelated email is expensive. Firms would be required to either outsource this function or develop the capability in-house, which would necessitate hiring one or more IT professionals. Either way, the cost would be significant to firms with such limited revenue.

NAIPFA believes it would be more appropriate to eliminate this requirement in light of the other recordkeeping requirements proposed, which NAIPFA generally supports. NAIPFA believes that virtually all documents material to a transaction or relationship would be covered by items 2-8 in proposed Rule 15Ba1-7, and so believes that the costs and logistical burdens associated with item 1 outweigh the benefits. Alternatively, NAIPFA suggests that only certain communications with a client or generated internally, such as recommendations or approvals, should be required to be kept.

NAIPFA does request clarification with respect to one type of document. In the normal course of business, IPFAs generate multiple iterations of commonly used and routinely changing technical financial documents, typically referred to as “numbers runs”. NAIPFA asks that the SEC confirm that not every iteration of a numbers run would need to be retained, but rather any iteration either sent to a client or used internally to form the basis for a recommendation to a client would need to be retained.

E. SMALL FIRMS

Dodd-Frank requires all those charged with developing rules to implement the legislation to take into account the effect on small firms, and not impose an undue regulatory burden. The legislation does not define small firm and so the SEC proposes using $7 million in annual revenue (prior fiscal year), provided the firm is not affiliated with another firm that is not a small business. This is the criterion established by the Small Business Administration with respect to entities that provide financial investment and related activities. NAIPFA recognizes that such a definition might be appropriate for some purposes, but it should not be determinative of whether a given regulation is or is not unduly burdensome. Instead, the SEC should consider the nature of the proposed rule, the purpose of that rule, the potential benefit to municipal clients or investors and the burden it would impose.

As noted above, NAIPFA believes that the SEC should recognize the unique nature of the IPFAs and issue regulations that are tailored to fit such entities, perhaps differentiating the larger of such firms from the smaller. As noted above, NAIPFA believes that a very high percentage of all IPFAs, and therefore a significant percentage of all entities that have or will register as municipal advisors, will have revenues less than $7 million per year. Accordingly, the SEC might consider a lower threshold, perhaps $1 million per year in annual revenues, and offer truly meaningful relief to those firms.

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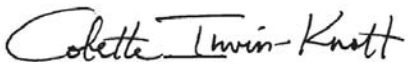
We have attempted to convey in this letter the fact that independent public finance advisors, or IPFAs, are different than the other market participants both the SEC and MSRB regulate. The size of IPFA firms is small. Our business model is different since we generally are compensated for our time. Please take this into consideration as you establish permanent regulations. If I can be of any assistance or answer additional questions, feel free to contact me.

Sincerely,



Colette Irwin-Knott, CIPFA

President

National Association of Independent Public Finance Advisors

cc: Michael E. Coe, SEC
Lynette Kelly Hotchkiss, MSRB