



**National Association of Independent
Public Finance Advisors**

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July 31, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

RE: MSRB Notice 2012-28

INTRODUCTION

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide suggestions to the Municipal Securities Rule Making Board (the "MSRB") in regard to MSRB Notice 2012-28 – Request for Comment on Concept Proposal to Provide for Public Disclosure of Financial Incentives Paid or Received by Dealers and Municipal Advisors Representing Potential Conflicts of Interest (the "Notice").

NAIPFA favors rules designed to curtail conflicts of interest. For example, in the past NAIPFA has supported similar disclosure requirements contained within MSRB Notice 2012-25, MSRB Notice 2011-48, and MSRB Notice 2011-49. However, due to the lack of enactment and/or implementation of rules corresponding to these notices, NAIPFA recommends that this concept proposal be set aside until the effectiveness of these rules is measured.

The bulk of the Notice discusses the benefits that issuers and obligated persons will receive from the posting of these disclosures on EMMA. However, it is NAIPFA's understanding that issuers and obligated parties will receive the same information from their underwriter, and likely from their municipal advisor. As such, posting this information on EMMA could be a duplication of efforts. NAIPFA fears that this rule will result in increased borrowing costs to municipal issuers and obligated persons without any corresponding practical effect with respect to further curtailing conflicts of interest. To that end, NAIPFA has prepared the following comments in response to the questions posed by the MSRB in connection with this release:



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COMMENTS

- 1. Would the implementation of this concept proposal help to protect municipal entities, obligated persons, investors and the public interest (including taxpayers)?**

In light of the disclosures required to be made directly to municipal issuers by underwriters and potentially municipal advisors, NAIPFA does not believe that this requirement will lend any additional protections to municipal entities, obligated persons, investors or the public interest.

- 2. Would the disclosure of any of the items of information described in this notice have any negative effects on the protection of municipal entities, obligated persons, investors and the public interest, or on the fair and efficient operation of the municipal market? If so, please describe in detail.**

At this time, NAIPFA does not believe that the disclosures described in this notice will have a negative effect on the protection of municipal entities. However, NAIPFA is concerned that the potential value of these disclosures may not be sufficient to justify the burden that such disclosures may place on market participants. In addition, NAIPFA believes that commentary with respect to this rule's potential effect on the fair and efficient operation of the municipal market is not appropriate for discussion at this time and should be left open until an objective analysis can be made with respect to the effectiveness of the disclosures required to be made directly to municipal issuers.

- 3. Should transactions with, advice provided to, or payments made to obligated persons be treated differently under this concept proposal than with respect to municipal entities?**

At this time, NAIPFA sees no distinction between municipal entities and obligated persons with respect to this concept proposal's proposed disclosures.

- 4. The disclosures that would be required under this concept proposal are limited to payment made to, and received from, third parties. Would it be beneficial for other disclosures (such as underwriter's or municipal advisor's fees and scope of work) to be made public on EMMA?**

NAIPFA opposes such proposals as being an unnecessary and unjustified intrusion into the private business activities of its member firms without adequate justification. Further, such a rule seems wholly unrelated to the stated purpose of the Notice, and it is unclear how such a rule would benefit municipal entities and/or the public interest. In fact, such a rule may confuse and harm municipal entities and/or the public interest as the compensation received and scope of



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services provided can, for a variety of reasons, vary widely between the scope of engagements within each state and between states. What is more, NAIPFA fears that a rule such as this could lead to anticompetitive business practices.

- 5. Should disclosures of payments be limited solely to the identity of the payor or payee and the purpose of such payment, or should the amount of such payment or other additional information be required in all cases? If the amount is required, should any in-kind or *quid-pro-quo* payment be required to be disclosed based on its value or would a descriptive disclosure of such payment be acceptable?**

NAIPFA believes that to the extent the MSRB determines to adopt a rule similar to what has been proposed that the disclosures should include any and all payments, whether monetary, in-kind or *quid-pro-quo*. However, NAIPFA does not find there to be value in requiring the exact or approximate dollar amount of such a payment to be disclosed; such a disclosure may induce a municipality to weigh the value of this payment in determining whether a conflict of interest has been created. The MSRB should discourage such subjective evaluations in this context and should instead favor an objective standard, which in this case would simply be whether or not a payment has been made to, or received from, a third-party. Once an individual has learned that a dealer or municipal advisor has made a payment to, or received from, a third-party, that individual would be free to then inquire further with that party or with the municipality who received the disclosure to determine the nature of such payments if such information is important to them.

- 6. This concept proposal includes disclosure of payments relating to closely-related transactions, which is not defined in the proposal but would include, among other things, transactions such as a swap transaction or bond proceeds investment occurring contemporaneously with a new issue. Are there other examples of transactions that should or should not be considered closely-related transactions, and are there any potential objective standards that could be used in creating a more precise definition of this term?**

In general, NAIPFA believes that for purposes of determining whether a third-party payment is a discloseable event should be determined based upon the following test: Whether an individual's interaction with a municipal entity is effectuated for the purpose of obtaining or continuing securities or securities related business with that municipal entity. If so, this rule's disclosure requirements would be triggered if this individual obtains or provides payments to third-parties. For example, both swap transactions and the investment of bond proceeds would be considered securities related business. Therefore, any individual who solicits a municipal entity for the purpose of providing these services would be subject to this rule's disclosure requirements if they receive from or make payments to a third-party.



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NAIPFA favors a test such as this rather than a more broad or subjective test containing numerous exceptions. Regardless of the MSRB's willingness to adopt the above referenced test, NAIPFA believes disclosures should be required for individuals who provide services such as feasibility studies or utility rate projections/estimates.

7. **The concept proposal would treat all payments made by underwriters and municipal advisors to third-party recipients the same. Should there be exceptions for commercially reasonable payments to third-parties providing standard services to an underwriter or municipal advisor in the normal course of doing business? For example, should disclosures include payments to entities such as third-party service providers (e.g., copy, analytic, design, printing, electronic publishing, or other services), suppliers (e.g., office supplies, equipment, or other goods) and other enterprises performing *bona fide* standard functions at commercially reasonable rates?**

In general, NAIPFA believes that there should be an exception for any payment made to a third-party entity performing *bona fide* standard functions at commercially reasonable rates, so long as such payments are not made for the primary purpose of influencing its selection or retention as either underwriter or municipal advisor for a particular transaction. NAIPFA is concerned that otherwise acceptable payments under such an exception could be utilized for the purpose of gaining undue influence. Therefore, any exception should be limited to payments provided to third-parties where such payments are made for a *bona fide* standard function, and such payments should merely be presumed to be within the above referenced exception. This limitation on the exception would likely curtail or prevent individuals from seeking out third-parties primarily for the purpose of obtaining or continuing their engagement with a particular municipality.

Again, an exception such as this should be limited to payments made to third-parties. Without further information, NAIPFA can think of no situation in which an underwriter or municipal advisor would receive a payment from a third-party where such a payment would be considered "commercially reasonable" in this context.



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- 8. Not all disclosures contemplated by this concept proposal would relate to new issue underwritings for which a reporting regime exists through EMMA. For example, some disclosures would relate to transactions involving municipal financial products, and others may relate to non-transaction based on-going municipal advisory business. Should all such disclosures be made through a unified periodic submission by dealers and municipal advisors (similar to quarterly Form G-37 submissions under Rule G-37), or should disclosures in connection with new issues be made as such issues go to market through the existing EMMA submission process and the remaining disclosures be done periodically?**

In general, NAIPFA believes that this proposed rule is premature and, therefore, so too is this question. The “series of state and federal proceedings” cited in the Notice took place prior to the adoption of and/or implementation of rules requiring direct third-party payment disclosures. The direct disclosure of third-party payments to issuers should be implemented and given sufficient time to allow for a full analysis of the impact of these disclosures on curtailing conflicts of interest. This proposed rule is a significant leap forward given that the efficacy of direct third-party payment disclosures to municipal entities and obligated persons has not been assessed.

Additionally, the underwriting rule and proposed municipal advisor rule require the provision of third-party payment disclosures to municipal entities or obligated persons at either the time of engagement or at the time of occurrence. As a result of the timing of these direct disclosures to issuers as well as the duplicative nature of these disclosures, NAIPFA believes that a periodic submission system will be sufficient to accomplish the Notice’s stated goals.

- 9. The MSRB notes that a number of states (e.g., California, Florida, New Jersey, and Texas) already require the submission of detailed information by issuers about the fees and other costs associated with in-state securities offerings. Should the MSRB consider permitting issuers to submit to EMMA, on a voluntary basis, copies of such state filings for public dissemination? In the alternative, should the MSRB consider developing, as a complement to or a substitute for this concept proposal, a standardized form that would permit issuers throughout the country to provide, on a voluntary basis, full disclosure of amounts paid to all transaction participants and service providers, including bond counsel and trustees, as well as other transaction expenses?**

NAIPFA fully appreciates the public nature of this information to the extent that the municipal entities are in possession of this information. However, NAIPFA is concerned that the widespread dissemination of such information to individuals and entities throughout the country would likely have harmful anticompetitive effects that significantly outweigh the value of providing such information. Conversely, NAIPFA believes that issuers who wish to disseminate



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this information are already doing so. Such a localized approach to the dissemination of this information is more appropriate as it is often the case that fee structures are regional in nature; dealers, municipal advisors, and municipal entities are better served by relying upon the publicly disseminated information of their neighbors rather than by relying on the publicly disseminated information of an underwriter, municipal advisor or municipality/obligated person from another state or region.

Furthermore, NAIPFA does not believe that a rule that seeks to allow for the mass dissemination of information relating to the fees paid to transaction participants is appropriate in the broader context of this proposal. It is NAIPFA's understanding that this proposal has been set forth to curtail or at least shed light on the practice of giving and receiving payments to and from third-parties by dealers/municipal advisors where such payments are made for the purpose of influencing a municipal entity's decision making with respect to the hiring or retention of a dealer/municipal advisor. As such, NAIPFA believes that a discussion of this matter should be reserved at this time; if the MSRB wishes to explore this concept, such a discussion should be had under the umbrella of a separate concept release.

- 10. To what extent, if any, would the information that would be disclosable under the concept proposal consist of information that is not already available to dealers and municipal advisors? Would dealers and municipal advisors already be retaining such records for their other regulatory, risk mitigation or financial recordkeeping purposes? Under what circumstances might a dealer or municipal advisor not have access to such information?**

Although this information may already be retained by municipal advisors and presumably underwriters alike, the information may not be in a form similar to that which will be required under a MSRB rule. Therefore, due to the uncertain nature as to the form and substance of this disclosure, a full analysis of whether this information is already retained by NAIPFA member firms is purely speculative.

- 11. Beginning on August 2, 2012, many of the proposed disclosures that would be made by underwriters under this concept release will become required disclosures by underwriter to municipal entities. What would be the incremental additional burden to dealers to report such disclosures to the public through EMMA in addition to making such disclosures to the municipal entities themselves?**

NAIPFA has no comment with respect to this question. However, as discussed above, the underwriting requirement has only recently been adopted and is not scheduled to even go into effect until August 2, 2012, and therefore sufficient time has not been given to analyze this rule's effectiveness. As such, it would seem that this requirement is premature as there would appear to



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be a dearth of quantitative data to establish a basis for expanding the dissemination of this information.

- 12. Similarly, assuming that many of the proposed disclosures under this concept proposal may also become required disclosures by municipal advisors to municipal entities under other MSRB proposals, what would be the incremental additional burden to municipal advisors to report such disclosures to the public through EMMA in addition to making such disclosures to the municipal entities themselves?**

Due to the speculative nature of this question, at this time NAIPFA is unable to determine the “incremental additional burden” of such a disclosure requirement. However, NAIPFA remains concerned that any burden will disproportionately impact the many small municipal advisory firms. Furthermore, NAIPFA is concerned that any additional disclosure obligations, where, as here, the disclosures are merely a duplication of disclosure(s) already received by the municipal entity itself, are unreasonable. Although not directly relevant to this release, NAIPFA would like to restate its position that any rule requiring municipal advisor disclosures of third-party payments should mirror that which has been established for underwriters.

- 13. Are there alternative methods the MSRB should consider to providing the protections sought under this concept proposal that would be more effective and/or less burdensome?**

The stated goal of the Notice is the protection of issuers and the public interest from potentially harmful conflicts of interest. However, to the extent that these disclosures are already being made to the issuers and obligated parties, NAIPFA does not believe that this rule will further the MRBS’s efforts in this regard. Conversely, NAIPFA believes that the MSRB’s stated goal can be accomplished through the rules already in place and proposed, and that these rules should be given ample time to remedy the conflicts of interest sought to be curtailed by the MSRB.

CONCLUSION

In general, NAIPFA believes that the Notice is premature in light of the fact that the rules relating to the direct disclosure of third-party payments to municipal issuers and obligated persons have not been either implemented or adopted. Therefore, the necessity or effectiveness of the Notice’s proposed rule is unknown at this time. Conversely, what is known is that the direct disclosure of third-party payments to municipal entities and obligated persons by municipal advisors and underwriters will likely accomplish the MSRB’s goals.

Further, NAIPFA opposes this rule as it appears to be an unnecessary duplication of information that will have already been provided to municipal issuers or obligated persons and will therefore



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have little if any practical impact on further curtailing conflicts of interest. However, a number of the items which may be incorporated into the proposed rule will likely lead to anticompetitive business practices, which ultimately would be harmful to the interests of municipal entities, obligated persons, investors and the public interest. As such, this rule's burdens and potential consequences strongly outweigh any potential positive effect it may have on the municipal market.

Sincerely,

Colette J. Irwin-Knott, CIPFA

President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board