**National Association of Independent Public Finance Advisors**
P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
**www.naipfa.com**

May 16, 2014

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

Re: MSRB Notice 2014-08

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments in connection with Municipal Securities Rulemaking Board ("MSRB") Notice 2014-08 – Request for Comment on Establishing Professional Qualification Requirements for Municipal Advisors (the "Notice").

## 1. General Comment

For purposes of consistency and to more accurately reflect the varied roles that Municipal Advisors play within the industry,[1] we request that the examination be referred to as the "Municipal Advisor Qualification Examination" [2] rather than its proposed name, the "Municipal Securities Advisor Qualification Examination" ("MSAQE").

## 2. New Registration Classifications

We believe that the classification and definition of Municipal Advisor Principals contained within the Notice is appropriate as it clearly describes the activities that would cause an individual to fall within the proposed amendments to MSRB Rule G-3 ("Proposed G-3"). However, without further clarification, Proposed G-3 may result in firms either registering too many or too few Municipal Advisor Representatives, which will result, respectively, in either an unnecessarily elevated level of securities law violations, or an unnecessarily elevated level of compliance and/or licensing-related expenditures by municipal advisory firms.

Notably, and as discussed more fully herein, the Notice states that the definition of Municipal Advisor Representative would be substantially identical to the definition recently adopted by the Securities and Exchange Commission ("SEC") under Rule 15Ba1-2, which relates to the filing of SEC Form MA-I. As such, we believe these comments are equally applicable to both rules, and so too are the potential outcomes noted above with respect to Proposed G-3.

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[1] e.g. serving as financial advisors, investment advisors and solicitors.

[2] Additional alternative names that the MSRB may want to consider include the following: (i) Municipal Advisor Knowledge Evaluation ("MAKE"), (ii) Municipal Advisor Test ("MAT"), and (iii) Series MA-I (no acronym needed) (the supervisory corollary could then be the Series MA-SP).

For purposes of the following comments, Proposed G-3 and Rule 15Ba1-2 shall be referred to collectively as the "Rules." In addition, the following comments are designed to provide NAIPFA's interpretation of the Rules and a proposed standard that, if adopted, would allow municipal advisors to more accurately determine which employees qualify as Municipal Advisor Representatives.

### a. Definition of "Municipal Advisor Representatives"

Proposed G-3 defines the term "Municipal Advisor Representative" as a

> natural person who is an associated person of a municipal advisor who engages in municipal advisory activities on the firm's behalf, other than a person whose functions are solely clerical or ministerial.[3]

We believe this definition has two key components that must be considered when determining whether a person will be deemed a Municipal Advisor Representative: (1) whether such person is a natural person who is an *associated person* of a municipal advisor, and (2) whether such person engages in *municipal advisory activities* on the municipal advisor's behalf. Therefore, for purposes of these comments, we must also consider the meaning of the terms "associated person" and "municipal advisory activities."[4]

### b. Definition of "Associated Person"

The Notice itself does not define the phrase "associated person." Pursuant to Rule 15Ba1-2, however, the term "person associated with a municipal advisor" has the same meaning as is contained within Section 15B(e)(7) of the Securities Exchange Act of 1934 ("Exchange Act"). Thus, with respect to Municipal Advisor Representatives, the definition of associated person would include the following natural persons:

(A) any partner, officer, director, or branch manager of a municipal advisor (or any person occupying a similar status or performing similar functions);

(B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of *any activities relating to the provision of advice* to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; or

[3] Proposed Rule G-3(e).

[4] As noted herein, the definition of "Municipal Advisor Representative" is substantially identical to that utilized by the SEC for purposes of the Form MA-I in terms of determining whether a Form MA-I is required to be filed on such person's behalf. Thus, these comments are equally applicable to Exchange Act Rule 15Ba1-2.

(C) Any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.[5]

NAIPFA notes that a key aspect of the associated person definition is the phrase "any activities relating to the provision of advice," contained within Section 15B(e)(7)(B). As discussed more fully herein, the absence of this language from the definition of "Municipal Advisory Activities" is significant within the context of a determination of who qualifies as a Municipal Advisor Representative.

### c. Definition of "Municipal Advisory Activities"

Proposed Rule D-13 defines the phrase "Municipal Advisory Activities" as those "activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act and the rules and regulations promulgated thereunder." The SEC defined this phrase nearly identically in Rule 15Ba1-1(e). As such, it appears that the phrase "Municipal Advisor Activities" is universally understood to mean (i) the provision of 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 structure, timing, terms, and other similar matters concerning such financial products or issues, or (ii) the solicitation of a municipal entity or obligated person.

However, nothing within either the Exchange Act, Exchange Act Rules 15Ba1-1 through -8, or the Notice provides any guidance with respect to the meaning of the phrase "provide advice to."[6] We note that the term "advice" is clarified within Release No. 34-70462, whereas the term "provide" is not. As such, and as NAIPFA has noted in previous comments, where terms are not defined by statute or regulation, the U.S. Supreme Court has held that such terms are to be interpreted based upon their plain and ordinary meaning in a manner designed to avoid an absurd interpretation. Therefore, the term "provide" must be interpreted accordingly in the absence of further rulemaking designed to provide a definition thereof.

As such, for purposes of the definition of Municipal Advisor Activities, the term "provide" as used within this context means "to give something wanted or needed to someone" or to "supply someone with something."[7]

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[5] Section 15B(e)(7) of the Exchange Act (emphasis added). We note that the SEC has broad authority to exempt persons from the requirements of Section 15B of the Exchange Act pursuant to Section 15B(a)(4) thereof. With respect to the "natural person" limitation adopted by the SEC as a means of clarifying which associated persons of municipal advisors are required to have a Form MA-I filed on their behalf, we believe that the SEC exercised its authority under Section 15B(a)(4) by exempting certain other persons from registration, namely non-natural persons who are associated persons of a Municipal Advisor.

[6] The term "advice" was clarified by the SEC in its release relating to Exchange Act Rules 15Ba1-1 through -8. Therefore, no additional interpretive guidance is requested with respect thereto.

[7] "Provide." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 15 May 2014. http://www.merriam-webster.com/dictionary/provide.

### d. Analysis

As noted above, the definition of associated person contains the phrase "activities relating to the provision of advice." Whereas, the definition of "municipal advisory activities" contains no similar phrase and instead only refers to the act of providing advice. This distinction is not clarified within any of the applicable Exchange Act Rule or the Notice. Thus, we are left to presume that there must be a distinction between engaging in services relating to the provision of advice and providing advice. NAIPFA finds this to be significant in terms of defining who will be deemed a Municipal Advisor Representative for purposes of the Rules.

In this regard, we believe that if the SEC and MSRB intended the term "municipal advisory activities" to extend beyond those individuals who themselves give or supply advice to municipal entities or obligated persons, that the phrase "activities relating to the provision of advice" or some similar concept would have been made a part of the definition of "municipal advisory activities." However, because this phrase is not contained within the definition of "municipal advisory activities," the SEC and MSRB's use of this term acts to modify or limit the term "associated persons" to those persons who themselves are engaged in giving or supplying advice. Thus, a person who provides services relating to the provision of advice may be an associated person, but may not necessarily be engaged in municipal advisory activities unless that person "provides advice to" a municipal entity or obligated person.

In light of the above-referenced interpretation, NAIPFA respectfully requests that the MSRB provide guidance with respect to the following scenarios in order to illustrate whether such individuals would qualify as Municipal Advisor Representatives.

1. Is an individual who, for example, solely produces debt service schedules, but who never provides those schedules to or has any direct interaction with a municipal entity or obligated person required to register as a Municipal Advisor?
2. Is an individual who, for example, solely prepares official statements, but who never provides that document to or has any direct interaction with a municipal entity or obligated person required to register?
3. What if the individual described in either number 1 or 2 above has some direct contact with an issuer, but that contact is limited to merely requesting documents and information from that municipal entity or obligated person?

In the absence of any other circumstances, and based upon the test set forth below, we do not believe that the Rules require individuals such as those described above to register because they themselves are not giving or supplying advice to a municipal entity or obligated person. Rather, such persons are engaged in passive non-advisory activities that merely relate to the provision of advice.

In light of the above interpretation of the definition of "municipal advisory activities" and the term "provide," we believe that the Rules establish that an individual only should be deemed to have provided advice to a municipal entity or obligated person to the extent that such person

himself or herself has supplied, given or furnished such advice. In other words, there must be (a) some interaction or communication between a person and a municipal entity or obligated person with respect to the municipal financial products or the issuance of municipal securities, and (b) that interaction must involve such person giving or supplying advice to a municipal entity or obligated person. Absent some interaction or communication that involves the provision of advice, NAIPFA does not believe that a person should be deemed to fall within the Municipal Advisor Representative category.

Thus, the Rules establish that there is a distinction between a person who simply prepares a debt service schedule and a person who gives a recommendation to a municipal entity or obligated person based on that debt service schedule. Similarly, the Rules establish that there is a distinction between a person who merely prepares an official statement and a person who directly supplies advice to the client relating to the types of disclosures that should be contained therein.

In this regard, NAIPFA suggests that the determination of whether such activities would cause a person to be deemed a Municipal Advisor Representative based on the following test: Whether a person is required to register as a Municipal Advisor Representative depends on whether the person would be required to register as a municipal advisor regardless of his or her status as an employee of a municipal advisor firm. In other words, an associated person must him or herself actually give advice to a municipal entity or obligated person in order to fall within the scope of the Rules.

Although we believe the foregoing analysis is correct, we also believe it illustrates that the Rules may not be clear in terms of providing firms with an understanding of whether a Form MA-I must be filed with respect to a particular employee and whether such person would be deemed a Municipal Advisor Representative. We, therefore, request that the MSRB and/or SEC either provide guidance with respect to this issue, or confirm or refute our analysis of this matter if no such additional guidance is to be provided. In addition, we request that the MSRB and/or SEC either adopt, modify or reject our proposed test for determining whether an individual falls within the Rules. Further, if this test is rejected, we urge the MSRB and/or SEC to establish some clear criteria that can be utilized that will allow firms to accurately determine whether any particular natural person falls within the Rules.

### 3. Grace Period

Because neither the effective date of the proposed MSRB rule amendments contained within the Notice (collectively, the "Proposed Amendments") nor the content of the MSAQE are yet known (either generally or specifically), NAIPFA cannot opine as to whether the proposed one-year grace period will be sufficient for Municipal Advisor Representative to study and take (and, if necessary retake) the MSAQE. Furthermore, we are limited in our ability to analyze the proposed one-year grace period by the fact that there is no indication that the effective date of the Proposed Amendments will be tied to the date on which the MSAQE itself or the corresponding study guide will be made available to municipal advisors and Municipal Advisor

Representatives. Therefore, we are concerned that the true grace period, in other words, the period between the date on which the MSAQE or its study guide will be available and the date on which the MSAQE must be passed by Municipal Advisor Representatives, may be significantly less than one-year. This is particularly concerning since the date on which the MSAQE and its study guide will be available is still unknown.

Thus, we do not believe that it is possible to determine at this time whether a one-year grace period will provide Municipal Advisor Representatives with a sufficient amount of time with which to study and take (and, if necessary retake) the MSAQE. This would be true even if the grace period were to run from the date of adoption of the examination study guide because we are being asked in this instance to comment on the feasibility of something where we simply do not have sufficient information with which to base our analysis.

Further, it is anticipated that it could take an extensive amount of time for study materials to be prepared and for study preparation activities to take place. Because of this, we are also concerned that the one-year grace period, even if it were to begin on the date of adoption of the examination MASQE or the study guide, may not provide a sufficient amount of time for Municipal Advisor Representatives to study, take the MSAQE and, assuming that a person failed the first time, take the MSAQE again. Our concern in this regard stems, again, from the fact that we have not yet been provided within any indication as to the contents of the MSAQE.

We believe that it is fundamental to the continued integrity of the municipal market that Municipal Advisor Representatives, many of whom have worked in the industry for upwards of thirty years and have not previously taken a licensing examination as either a broker, investment advisor or otherwise, be afforded the opportunity to study for and take the MSAQE at least twice without undue time constraints imposed by an insufficient grace period.

Moreover, because there have been no enforcement actions brought against municipal advisors since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") in 2010, NAIPFA sees no justification for establishing an examination timeline that needlessly burdens municipal advisors or their Municipal Advisor Representatives. In addition, we anticipate that a constrained test-taking timeline could be particularly burdensome for small municipal advisors who do not have the resources to undertake an expedited study and test-taking schedule.

In light of the foregoing, NAIPFA respectfully proposes that the following two alternatives be considered in place of the grace period specified in the Notice:

(A) The MSRB could refrain from rulemaking at this time relative to the grace period, and continue to refrain from such rulemaking until either the examination study guide is adopted or the MSRB has released at least an outline of the topics that will be covered by the MSAQE. Thereafter, once the stakeholders have been provided an opportunity to review and assess the scope of the test, the MSRB could then propose a grace period. We believe that the benefit of this approach would be that the grace period ultimately adopted

would in all likelihood be more closely correlated to the content of the MSAQE than the seemingly arbitrary one-year grace period proposed in the Notice.

(B) Alternatively, the MSRB could adopt a two-year grace period that would begin to run from the date on which the examination study guide is adopted and made available to Municipal Advisor Representatives. We believe that regardless of the content of the MSAQE that a two-year grace period would provide a sufficient amount of time for studying and test-taking to occur, even for small municipal advisor firms.

As discussed above, (i) it is impossible for market participants to know at this time what the scope of the exam will be, (ii) it will likely take a significant amount of time to prepare study materials and study for the exam, (iii) it is essential that individuals be provided sufficient time with which to take the examination at least twice, if necessary, and (iv) there have been no enforcement actions brought against municipal advisors for breaches of fiduciary duty since the enactment of the Dodd-Frank Act. Therefore, we believe that either option (A) or (B) above would be appropriate in terms of addressing these issues.

**4. <u>Apprenticeship</u>**

In general, NAIPFA would be supportive of a voluntary apprenticeship or similar program pursuant to which individuals would be provided an opportunity to be employed by a municipal advisor and serve in some limited capacity as a Municipal Advisor Representative without having to first pass the MSAQE.[8] In this regard, we respectfully request that any such apprenticeship period be available for no less than a one year period from the date on which the employee begins engaging in municipal advisory activities. We believe that this apprenticeship period is vital to both municipal advisor employment practices as well as the training of those employees, particularly those who may not have any prior experience within the financial services or municipal securities industries.

Although we do not yet know what the contents of the MSAQE will be, we anticipate that it may take a significant amount of time for an individual to obtain the level of knowledge required to pass the exam. In this regard, and without any indication from the MSRB to the contrary, we anticipate that the MSAQE will be a more comprehensive, and likely more challenging, exam than either the Series 6, Series 7 or Series 66 exams administered to broker-dealer representatives since the MSAQE will be focused on a comprehensive set of municipal advisory-related matters as opposed to the more limited topics covered by each of these exams.

In light of the foregoing, we believe that a voluntary apprenticeship program is appropriate. Such a program would allow firms and, potentially, their employees to have an opportunity to determine for themselves what course of action is appropriate under the circumstances. In this regard, whether to allow individuals to serve in a limited capacity prior to attempting the

[8] Depending upon the MSRB/SEC's determination with respect to our comments in Section 2 herein, our comments in this regard may change in light of that determination.

MSAQE or require such employees to pass the MASQE immediately upon obtaining employment or prior to engaging in municipal advisory activities should be a determination left to the individual firms and there employees. Such an approach would support efficiencies within the market by not imposing a one-size-fits-all regulatory regime upon firms whose employment and training philosophies may result in differing views on whether to allow for apprenticeships. Finally, we do not foresee this approach as creating any significant regulatory issues provided that the appropriate limitations are placed on individuals utilizing the apprenticeship program.

## 5. Economic Analysis

As we have noted in several of our recent comment letters, each dollar spent by our member firms[9] meeting the obligations imposed by the MSRB is a new expense that will either need to be absorbed by the firms or passed on to their municipal entity and obligated person clients. In addition, the amount of time needed to effectively implement policies and procedures corresponding to the various rules and regulations adopted creates new burdens on municipal advisor firms that will ultimately result in decreased revenue due to lost productivity, that is, unless fees are increased. In either case, the likely result is that costs of issuance will increase, which will have a detrimental impact on municipal entities and obligated persons as well as the public. This impact must therefore be weighed against any benefit that may be achieved by these Proposed Amendments.

In this regard, NAIPFA believes that if the analysis set forth in Section 2 above is not adopted, the Proposed Amendments may encompass individuals whose registration will result in no net benefit to municipal entities and obligated persons because such a determination may cause individuals who themselves are not providing advice to a client to qualify as a Municipal Advisor Representative. This will in turn increase the financial pressures placed on municipal advisors in terms of registration fees, training and testing costs, insurance premiums, continuing education costs, and supervision-related costs. However, because these individuals are not themselves giving or supplying advice to municipal entities and obligated persons and may, instead, merely be engaged in services related to the provision of advice, we do not believe that the registration of such individuals will serve any interest the MSRB may have in protecting municipal entities, obligated persons and the public. This belief is based on the assumption that the individuals providing advice to clients, as well as Municipal Advisor Principals, will ultimately be responsible for any services that may be performed by individuals who may provide services relating to the provision of advice.

In total, regardless of whether the MSRB adopts our Section 2 analysis, the costs associated with the Proposed Amendments could be significant. If our Section 2 analysis is rejected, the compliance costs associated with the Proposed Amendments will only be exacerbated. In light of this, and for the reasons discussed above, we urge the MSRB to adopt the test set forth in Section 2 with respect to determining whether a person is a Municipal Advisor Representative. Adoption of this test would still provide municipal entities and obligated persons with the level

[9] As well as every other firm that would have traditionally been considered an "independent financial advisor."

of protection envisioned by Congress when it passed the Dodd-Frank Act while minimizing the economic impact that the Proposed Rules will have on municipal advisors, their clients and the public.

Sincerely,

Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary Jo White, Chairman
The Honorable Kara Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael Piwowar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board