



4245 North Fairfax Drive  
Suite 750  
Arlington, VA 22203  
P 703.516.9300 F 703.516.9308  
www.asppa.org



April 15, 2011

Ms. Elizabeth Murphy  
Secretary  
US Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: File Number S7-45-10; Release No. 34-63576 - Registration of Municipal Advisors**

Dear Ms. Murphy,

The American Society of Pension Professionals & Actuaries (“ASPPA”) and the National Tax Sheltered Accounts Association (“NTSAA”) appreciate the opportunity to provide comments with respect to Release No. 34-63576 - Registration of Municipal Advisors (the “Release”).<sup>1</sup> ASPPA is a national organization of more than 7,500 members who provide consulting and administrative services for retirement plans covering millions of American workers. ASPPA’s membership includes the members of the NTSAA, a nonprofit organization that recently became part of ASPPA in order to expand both organizations’ strengths in serving the §403(b) marketplace. ASPPA and NTSAA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. ASPPA’s membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

ASPPA and NTSAA are concerned with application of proposed new rules 15Ba1-1 through 15Ba1-7 (the “Proposed Rule”) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to the professionals who work with governmental sponsored retirement plans. We believe that the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)<sup>2</sup> was not intended to extend the municipal advisor registration requirements to those who work with governmental retirement and savings plans. This is particularly true for governmental retirement savings plans that are funded exclusively with employee contributions. Similarly, providers of advice and information to the participants in governmental retirement and savings plans should not be subject to registration as municipal advisors. Finally, the advice provided by independent actuaries to municipal entities with respect to the necessary contributions and funded status of a governmental defined benefit

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<sup>1</sup> Registration of Municipal Advisors, Release No. 34 (Dec. 20, 2010), available at <http://www.sec.gov/rules/proposed/2010/34-63576.pdf>.

<sup>2</sup> Public Law 111-203, 124 Stat. 1376 (2010).

plan are professional activities that should be excluded from the definition of municipal advisor.

### **“Investment Strategies” Definition**

The Act requires registration of “municipal advisors.”<sup>3</sup> That term is defined to include a person who provides advice with respect to “municipal financial products.”<sup>4</sup> Under the Act, the term “municipal financial products” is defined to include “investment strategies.”<sup>5</sup> The term “investment strategies” is defined to include “plans or programs for the **investment of the proceeds of municipal securities** that are not derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.” (Emphasis added). It is very clear that only advice with respect to plans or programs for the investment of municipal security proceeds was intended to be regulated under the Act.

The Proposed Rule defines the term “investment strategies” far more broadly than the statute. It would add to the definition “plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity.”<sup>6</sup> The Release indicates that this expansive change from the statutory definition “avoids any need to trace the investment of proceeds of municipal securities comingled with other public funds.”<sup>7</sup> Although well intended, we believe this regulatory shortcut exceeds the authority granted under the Act. If Congress had intended to extend registration to professionals who work with governmental retirement and savings plans, it could have easily done so. Although the Act defines “municipal entity”<sup>8</sup> to include any plan, program, or pool of assets sponsored or established by a governmental entity, the statutory definition of “investment strategies” does not include the additional language.<sup>9</sup> Instead, the statutory language clearly demonstrates Congressional intent to only regulate those who provide advice with respect to “plans or programs for the **investment of the proceeds of municipal securities...**[.]”<sup>10</sup> (Emphasis added).

**ASPPA and NTSAA recommend** that Proposed Rule 15Ba1-1(b) be modified to conform to Exchange Act § 15B 4(e)(3) by deleting any reference to “plans, programs or pools of assets that invest the funds held by or on behalf of a municipal entity” within the definition of “investment strategies.”

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<sup>3</sup> Exchange Act § 15B(e)(4).

<sup>4</sup> Exchange Act § 15B(e)(5).

<sup>5</sup> *Id.*

<sup>6</sup> Proposed Rule § 240.15Ba1-1(b).

<sup>7</sup> Release, p.28.

<sup>8</sup> Exchange Act § 15B(e)(8)(B).

<sup>9</sup> Exchange Act § 15B(e)(3).

<sup>10</sup> *Id.*

## Exemption for Plans Exclusively Funded With Employee Contributions

As outlined above, it is the belief of ASPPA and NTSAA that all governmental retirement or savings plans should be excluded from the term “investment strategies” as defined in the Proposed Rule. Alternatively, we would submit that at the very least, those governmental retirement and savings plans that are funded exclusively through the contributions of the employees as participants should be excluded from the definition of “investment strategies.”

The Act was intended to regulate those persons who provide advice with respect to the issuance of municipal bonds and the investment of the offering proceeds. Although one might question whether the Act requires “tracing” of the proceeds of an offering when put to other municipal activities, it is absolutely clear that a retirement or savings arrangement funded exclusively with employee contributions does not include any funds that originated in a bond offering. Therefore, registration should not be required of persons whose activities have no relation to “investment strategies” and are not otherwise acting as “municipal advisors” as those terms are defined under the Act.

**ASPPA and NTSAA recommend** that Proposed Rule 15Ba1-1(b) be modified to exclude from the term “plans, programs or pools of assets that invest the funds held by or on behalf of a municipal entity” any governmental retirement or savings arrangement funded exclusively with contributions from participants.

## Clarification with Respect to Advising Participants

The Act was intended to regulate “municipal advisors.”<sup>11</sup> A “municipal advisor” is defined as a person who “... provides advice to or on behalf of a municipal entity or obligated person with respect to financial products or the investment of municipal securities[ ]; or undertakes the solicitation of a municipal entity.” Under this wording, it would appear that it was not the intent of Congress to require registration of individuals who work with participants in governmental retirement or savings arrangements. There are many professionals that work with participants in governmental defined contribution 403(b), 401(a), 457 and traditional retirement plans that are not otherwise engaging in “municipal advisory activities.” For example, many of our members work with teachers in public schools who participate in a 403(b) savings plan sponsored by their school district. In many cases, these plans require employees to direct how their accounts will be invested among the options that are offered.

In situations such as these, our members provide a wide range of participant advisory services such as general investment education, computer investment modeling and individual investment advice which may be provided by investment advisers and their associated persons which are not required (or permitted) to register with the Commission. If the Act’s registration requirements were to be applied in this context, it would have a severe chilling effect on the availability of this much needed service, and may cause a market disruption in favor of larger,

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<sup>11</sup> Exchange Act § 15B(e)(4).

SEC-registered investment advisors by subjecting only smaller, local investment advisors to the municipal advisor registration requirements and associated MSRB rules. Clearly, a law aimed at regulating the practices associated with municipal bonds should not be applied inappropriately and inconsistently to those advising participants in governmental retirement and savings arrangements.

**ASPPA and NTSAA recommend** that the Proposed Rule be clarified to exclude advice given to participants in governmental retirement or savings arrangements sponsored by municipal entities, and that state-registered investment advisers be exempt from the definition of “municipal advisor” to the extent they are providing advice that otherwise would be subject to the Investment Advisers Act, but for the operation of a prohibition to, or exemption from, Commission registration.

### **Exemption for Actuarial Activities**

The Act specifically excludes certain persons who might otherwise be providing advice that could potentially require the provider to register. For example, attorneys offering legal advice or providing services of a traditional legal nature are exempted from registration.<sup>12</sup> The Release specifically asks for comment on whether other types of professional activities should be excluded from the definition of “municipal advisor”.

ASPPA and NTSAA count among our members the ASPPA College of Pension Actuaries, actuaries who advise both private sector and governmental retirement plan sponsors. Actuaries generally work with defined benefit plans where the employer promises a specific benefit to be paid in the future, typically based on an employee’s years of service and compensation. Actuaries help plan sponsors understand their financial responsibilities with respect to these pension promises and the necessary plan funding. Professional standards of practice and discipline procedures for actuaries are the responsibility of the Actuarial Standard Board and the Actuarial Board for Counseling and Discipline, respectively. Both are independent entities supported by the major United States based actuarial organizations, including ASPPA.

ASPPA and NTSAA believe that the professional activities of a retirement plan actuary providing advice and counsel to the sponsor of a governmental sponsored retirement plan were not intended to subject the actuary to registration as a “municipal advisor”. Actuaries provide professional advice on how much is needed to fund a benefit that will come due in the future. How the plan sponsor invests the necessary funds to meet that obligation is not within the purview of a retirement plan actuary’s professional activities. The advice provided by a retirement plan actuary is not related to managing asset pools or otherwise subject to regulation under the Act.

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<sup>12</sup> Exchange Act § 15B(e)(4)(C).

**ASPPA and NTSAA recommend** that the Proposed Rule be modified to specifically exclude retirement plan actuaries unless the actuary engages in municipal advisory activities other than actuarial services with respect to a retirement plan sponsored by a municipal entity.

These comments were prepared by the ASPPA/NTSAA Tax-Exempt/Governmental Plans Subcommittee of the Government Affairs Committee. We welcome the opportunity to discuss these issues with you further. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your consideration.

/s/

Brian H. Graff, Esq., APM  
Executive Director/CEO

/s/

Judy A. Miller, MSPA  
Chief of Actuarial Issues

/s/

Craig P. Hoffman, Esq., APM  
General Counsel

/s/

Mark Dunbar, MSPA, Co-Chair  
Gov't Affairs Committee

/s/

Ilene H. Ferenczy, Esq., APM, Co-Chair  
Gov't Affairs Committee

/s/

James Paul, APM, Co-Chair  
Gov't Affairs Committee