KUTAK ROCK LLP

THE OMAHA BUILDING
1650 FARNAM STREET
OMAHA, NEBRASKA 68102-2186

402-346-6000
FACSIMILE 402-346-1148

www.kutakrock.com

ATLANTA
CHICAGO
DENVER
DES MOINES
FAYETTEVILLE
IRVINE
KANSAS CITY
LITTLE ROCK
LOS ANGELES
OKLAHOMA CITY
PHILADELPHIA
RICHMOND
SCOTTSDALE
WASHINGTON
WICHITA

February 21, 2011

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

Re: File No. S7-45-10

Dear Ms. Murphy:

This letter is written in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Rules 15Ba1-1 through 15Ba1-7, and accompanying Forms (the "Proposed Rule"), to require municipal advisors to register with the Commission as set forth in Release No. 34-63576 (the "Release"). The Proposed Rule implements the requirements of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). We endorse the Commission's broad request to solicit comments with respect to the Proposed Rule, and offer our comments based on our firm's broad-based national municipal finance practice and the experience we have accumulated in our daily interactions with municipal entities and obligated persons. We assume the initial breadth of the Proposed Rule is an attempt to cast the regulatory net as broadly as possible, particularly in light of the lack of helpful statutory direction, and that it will be followed by a revised rule which is both more specific and more reflective of the practices and realities of municipal finance. When implementing the requirements of the Act it is important to be mindful of the Executive Order issued on January 18, 2011 by the President which states, *inter alia*, that each federal regulatory agency "must . . . tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives . . . ."

To facilitate our response to your request for comments, we have organized our comments based upon the groups of questions outlined under the heading "Requests for

Comments" set forth on pages 835-838 of the Release as published in the Federal Register. The Requests for Comment which we wish to address are set forth below, followed by our comments with respect to the same.

In light of our understanding of Congressional objectives and intent, are the Commission's interpretations under the definition of "municipal advisor" and related terms, and the exclusions from the definition of "municipal advisor" appropriate? Should any of these interpretations be modified or clarified in any way?

We believe the definition of "municipal advisor" in the Proposed Rule is vague and unreasonably broad in scope in view of the policy concerns invoked, exceeds any reasonable interpretation of Congressional intent, and will impose unreasonable and unrealistic burdens and limitations on the ability of municipal entities (and obligated persons) to conduct even routine financial operations. As the extensive Request for Comment clearly indicates, these problems appear to stem in large part from the vague and uncertain meaning of "provides advice" within the "municipal advisor" definition. Substantial ambiguity exists as to the meaning of the term "provides advice," and, even aside from the misfit of an inappropriately broad definition with real world practicalities and decision making, this definition fosters neither coherent regulatory compliance nor enforcement. Congress has provided some guidance in the statute itself by specifying, in the "municipal advisor" definition, that such a person is one who provides a municipal entity or obligated person with "advice with respect to the structure, timing, terms and other similar matters concerning" municipal financial products or the issuance of municipal securities. The definition specifically includes "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap providers, ..." The identified providers of advice are classic examples of persons or entities who are hired by municipal entities or by third parties seeking access to municipal entities for the purpose of providing the municipal entity, in return for compensation, municipal securities-related advice or financial products. The identified providers notably do not include banks, bank subsidiaries, financial institutions, finance companies or other persons that in the normal and ordinary course of business provide financing or lend money directly or indirectly to municipal entities or obligated persons or purchase for their own accounts municipal securities issued by municipal entities or obligated persons. We believe that such entities should be specifically excluded from the definition of "municipal advisor." This is emblematic of a Congressional intent to narrowly define those encompassed by the Act and its regulatory scheme. The Congress indicated a concern about overregulation in the Act. The MSRB is directed in Section 975(b)(2) to "not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities and obligated persons, ..." We urge the Commission to adopt clear definitions rather than casting the extremely broad and tangled net of the Proposed Rule. In fact, we believe that regulatory temperance and moderation are not only consistent with Congress' intentions as embodied by the Act, but also are required in view of President Obama's January 18, 2011 Executive Order.

We further urge that the Commission embrace and encourage—and not effectively discourage—persons knowledgeable about bond market and related financial matters to respond to inquiries by municipal entities and to volunteer, without expectation of compensation, information within their particular expertise without concern that such might be characterized as "providing advice" subject to regulatory enforcement.

Historically the Commission has been pragmatic in carrying out its regulatory function. We encourage it to continue such pragmatism with respect to the implementation of the Act. The simple word "advice" is generally understood to contain a recommendation component as distinguished from the mere giving of factual, objectively-determinable information, and construed very broadly and, carried to its extremes, lacks practical, and, hence, clear and enforceable boundaries. In fact, some pronouncements of the Commission itself could be construed as "advice" to municipal entities. A troubling footnote to the Proposed Rule commentary (footnote number 111) suggests that compensation is irrelevant because there is no true "free" advice. As we describe below in greater detail, we strenuously disagree. We recognize the prevailing and discouraging cynicism in the media, on Wall Street and in Washington, D.C. However, we are fortunate in our daily practice across the length and breadth of the United States to observe that information and advice regularly is provided to municipal entities and obligated persons by knowledgeable persons as a public service and without compensation. Having access to such information and advice without substantial impediment of elaborate and burdensome federal regulatory compliance and the attendant legal exposure is vitally important to the smooth operations and decision making of such municipal entities and obligated persons. We are uncertain, furthermore, that a constitutionally defensible bright line can be drawn by the Commission between the free exercise of a citizen's First Amendment rights, for instance to speak at a public meeting, and at least some of the "speech" that is implicated by the Proposed Rule. We urge that the Commission implement a practical approach that recognizes that "incidental" advice, particularly if given to a municipal entity as only an occasional accommodation and without direct or indirect compensation for the same, is not "providing advice" under the Act and the Rule. We commend to the Commission's attention its very practical approach as set out in the Division of Investment Management: Staff Bulletin No. 11, Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers, dated September 19, 2000.

We further suggest that the giving of factual information to a municipal entity without an opinion or recommendation component voluntarily or in response to a municipal entity's request be *per se* excluded from the regulatory meaning of "advice."

Likewise, the identification and provision of names of entities that purchase municipal securities or provide various kinds of financial products (such would include a list of banks which actively provide various types of interest rate swaps, GICs or liquidity or credit) on a purely informational basis as an accommodation to a municipal entity or obligated person, without compensation, should not be considered advice with respect to financial products or

municipal securities or the solicitation of financial products or municipal securities. For example, a credit enhancer of variable rate conduit bond financing may require that the "obligated person" borrower maintain an interest rate cap with an "AA" or better rated entity, and as an accommodation the credit enhancer will maintain, and make available to the borrower at no expense and for no compensation, a list of "AA" or better rated entities which (to the best knowledge of the credit enhancer) are then providing such interest rate caps. Similarly, a seller of computers or other equipment may provide to a purchasing municipal entity or obligated person, at no expense and for no compensation from anyone, a list of entities which routinely finance such sales.

Finally, employees and representatives of a nonmunicipal entity should not be considered to be "providing advice" to any other entity simply because they are negotiating the terms of a municipal security or financial product.

In this light we offer the following comments specific to the following requests.

The Commission notes that the definition of "municipal entity" includes, but is not limited to, public pension funds, local government investment pools and other state and local governmental entities or funds as well as participant-directed investment programs or plans such as 529, 403(b), and 457 plans. Is the Commission's interpretation of "municipal entity" for purposes of the proposed definition of "municipal advisor" appropriate? Is additional clarification necessary? If so, how should the Commission further clarify this interpretation?

Including public pension funds, participant-directed investment programs or plans such as 529, 403(b) and 457 plans in the definition of "municipal entity" seems to overreach Congressional intent. Such a broad inclusion does not consider the underlying manner in which these plans operate. While Section 15B(e)(8)(B) specifies that "municipal entity" includes "any plan, program or pool of assets sponsored or established by the State, political subdivision . . .", Section 15B(e)(8)(C) directly follows to include "any other issuer of municipal bonds or securities." This language suggests that Congress intended to have public pension plans, including 403(b), 457 and 529 plans, included in the definition of municipal entity but only to the extent that such plans issue municipal bonds or securities. To broadly sweep public pension plans, or 403(b), 457 and 529 plans, that are not issuers of municipal bonds or securities imposes regulations that are not intended to apply to these entities. The end result is unnecessarily increasing the cost of administering these plans and programs by placing financial and administrative burdens on all public pension plans.

In what circumstances with respect to municipal financial products or the issuance of municipal securities should charter schools be considered municipal entities? In what circumstances with respect to municipal financial products or the issuance of municipal securities should charter schools be considered obligated persons? To what extent do state

laws vary in their treatment of charter schools in ways that would affect their classification as municipal entities or obligated persons?

Charter schools are unique entities from a legal standpoint. Charter schools were authorized under state laws (and effectively condoned under various federal laws) as a way to encourage private nonprofit organizations to provide primary education outside the purview of the traditional local school district template and their many restrictions. As a result, they are exempt from many of the traditional constraints otherwise applicable to local school districts. Under federal tax laws, they generally are not considered to be "political subdivisions" because they lack the ability to directly tax, exercise police power or utilize eminent domain powers. However, in virtually every state, they are subject to a number of controls by the related school districts or state. In fact, the level of control is so extensive that in many cases the charter school is considered an "instrumentality" of the school district or state under the federal tax laws. Under state laws, in most instances charter schools are subject to the same types of general rules on conflicts, open meetings and the like to which a local political subdivision is subject. In addition, they often receive state tax moneys. However, under federal tax laws, charter schools are generally not authorized to issue tax-exempt bonds directly; they must have bonds issued "on their behalf" by a local financing governmental entity, and, in that regard, they are a classic example of an "obligated person." If a charter school receives tax moneys from a state or school district, we would suggest it be treated as a municipal entity; otherwise we suggest it be treated as an "obligated person" like any other nonprofit borrower and user of tax-exempt bond proceeds.

The Commission proposes to exempt from the definition of "obligated person" providers of municipal bond insurance, letters of credit, or other liquidity facilities so that the definition of "obligated person" for purposes of the proposed rules is consistent with the definition of "obligated person" in rule 15c2-12 under the Exchange Act. Should the proposed definition be modified or clarified in any way? Should the term "obligated person" for purposes of municipal advisor registration be consistent with the definition of "obligated person" for purposes of rule 15c2-12? If so, why? If not, why not? Should the Commission include additional exemptions from the definition of "obligated person"? If so, please explain and provide specific examples.

As we commented previously, we believe the definition of "obligated person" should be consistent between Rule 15c2-12 and the Proposed Rule. However, we do believe additional exemptions need to be added, lest the final Rule lead to some anomalous results.

Clearly an "obligated person" includes an entity to which 100% of the proceeds of a municipal bond issue are loaned to finance a particular project qualifying under the federal tax law (such as a manufacturing project, an airport facility, a port facility or the like, or a project owned and operated by a nonprofit entity). In some cases, those entities are companies that are reporting companies under the Securities Exchange Act of 1934. It is highly improbable that the

Congress intended to authorize the Commission to impose additional and broad-reaching regulatory requirements on such registered companies and their advisors through an expansive reading of the Proposed Rule under the rubric of an "obligated person." Thus we would suggest that, in this context, given that there is already a panoply of extensive regulation of companies registered under the 1934 Act, such companies should be excluded from the definition of "obligated persons," as it would seem that such registered companies are fully capable of dealing with "municipal advisors" and are already subject to regulation and accountable to their shareholders.

On occasion the federal government (including agencies thereof such as the IRS, Department of Justice and Department of Defense), or one of its instrumentalities, is an "obligated person." We would suggest they ought to be exempted as there are already numerous federal laws regulating their advisors.

Similarly, on occasion foreign governments or their instrumentalities are obligated parties. We would suggest they be exempted from the definition of "obligated persons" as well – we doubt the Congress intended to have the Commission regulate the advisors to foreign governments through the Proposed Rule.

We also suggest the Commission should consider exempting religious organizations from the definition of "obligated persons." Constitutional issues aside (which are not insignificant), does the Commission desire to determine who are (and then regulate) the "advisors" to the Mormon Church, the Catholic Church or any of the thousands of independent religious organizations in the United States, especially considering that substantial amounts of "advice" are contributed to such organizations, usually by members or congregants? We would note that such considerations have for many years been the basis for very limited regulation of religious-based organizations, or even total exemption from regulation.

We furthermore suggest that entities already subject to substantial oversight and regulation be exempted, such as banks, credit unions, regulated investment companies, insurance companies, systemically important entities and the like. It seems inconceivable that the Congress intended to indirectly regulate "advice" given to such entities through the Proposed Rule, yet not directly through their applicable regulatory/oversight process which is specifically designed for the businesses of such entities.

The Commission proposes to interpret the term "investment strategies" to include plans or programs for the investment of the proceeds of municipal securities (other than municipal derivatives and guaranteed investment contracts), plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity, or the recommendation of or brokerage of municipal escrow investments. Should the Commission modify or clarify this interpretation in any way? If so, why? If not, why not? Please provide any suggested alternative language. Should the Commission exclude plans, programs or pools

of assets that invest funds held by or on behalf of a municipal entity that are not proceeds of the issuance of municipal securities from the definition of investment strategies? If so, why? If not, why not? If the Commission were to limit investment strategies to "plans or programs for the investment of the proceeds of municipal securities (other than municipal derivatives and guaranteed investment contracts) or the recommendation of or brokerage of municipal escrow investments," how should the Commission determine when funds should no longer be considered "proceeds of municipal securities?" What obligations should parties other than the municipal entity have in determining whether funds held by or on behalf of a municipal entity are proceeds of municipal securities?

We believe the intent of the Act and a reasonable interpretation of the provisions thereof do not warrant extending the definition of "investment strategies" to **all** of a municipal entity's funds regardless of their source, as the Commission proposes to do.

To support its interpretation of the term "investment strategies," the Commission cites Section 15B(e)(3) of the Exchange Act which defines "investment strategies" to include: " . . . plan[s] or programs for the investment of the *proceeds of municipal securities* that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." Here, the definition includes the investment of the "proceeds of municipal securities." However, the Commission interprets the definition of investment strategies to include: ". . . plans, programs, or pools of assets that invest *funds held by or on behalf of a municipal entity*, and therefore, any person that provides advice with respect to such funds must register as a municipal advisor."

In its interpretation, the Commission removes the Act's limiting concept of the *proceeds of municipal securities* from the definition of "investment strategies." We see no basis in the Act for doing so. The reference to "municipal escrow investments" undoubtedly means investments deposited in an escrow account to defease municipal securities—a common and traditional element of the "advance refunding" of municipal securities.

To support its overly expansive reading of the definition of investment strategies, the Commission employs faulty reasoning. The Commission explains its interpretation as follows:

> In proposing this interpretation of the term "investment strategies," the Commission considered the statutory definition of "municipal advisor" and "municipal entity." Specifically, the Commission noted that the definition of "municipal entity" includes "any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof." Based on these definitions, the Commission believes it was Congress's intent to include in the definition of "municipal advisor" persons that provide advice with respect to

> plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity, such as a 529 savings plan, LGIP or public pension plan.

The Commission incorrectly uses the broader meaning of "municipal entity" and "municipal advisor" to ignore the definition of "investment strategy," which is a subset of the definition of "municipal financial products."

The flaw in this logic may be easier explained by an example. Imagine a law that provided for the following "Unless a Doctor registers with the XYZ Commission, a Doctor may not provide advice to Patients with respect to X-Rays ." The plain meaning and clearest reading of this hypothetical statute would not require all Doctors to register with XYZ Commission. The only Doctors that would be required to register were those providing advice regarding X-Rays to Patients.

If we apply the Commission's reasoning to this analogy, the Commission would argue that Congress intended all Doctors to register with XYZ Commission because the definition of Patients includes many different types of patients beyond those who simply need X-Rays, and Doctors do a lot more than just give out advice about X-Rays; therefore Congress intended Doctors to be required to register with XYZ Commission whether or not their advice pertained specifically to X-Rays, or any other medical issue. The Commission's reasoning ignores the plain meaning (in this example) that the law specifically required only those Doctors who give advice pertaining to X-Rays to register.

Here the Commission ignores the plain meaning and logic of the Act: (1) municipal advisors must register when giving advice regarding "municipal financial products"; (2) "municipal financial products" are defined to specifically include derivatives, guaranteed investment contracts and "investment strategies"; and (3) "investment strategies" are specifically defined to include "plans or programs for the investment of the proceeds of municipal securities."

If the Congress intended to require all advisors to municipalities to register regardless of the source of moneys being invested, they would have omitted the "investment of the proceeds of municipal securities" language from the definition of investment strategies. Then the definition of investment strategies would simply refer to the investment of municipal funds as opposed to specifically referring to the "investment of the proceeds of municipal securities."

Advisors should also be entitled to reasonably rely on a municipal entity's tracking and characterization of the proceeds of municipal securities, as they are already entitled to do so under state and federal tax laws.

As noted above, to the extent a person is providing advice to a pooled investment vehicle in which one or more municipal entities are investors along with other investors

that are not municipal entities, the pooled investment vehicle would not be considered funds "held by or on behalf of a municipal entity" and, therefore, a person providing advice to the pooled investment vehicle would not be required to register as a municipal advisor. Should the Commission modify or clarify this interpretation in any way? If so, why? If not, why not? Please provide any suggested alternative language. Should the Commission provide that such interpretation should apply only if the investors that are not municipal entities are the primary investors in the pooled investment vehicle? If so, how, and above what level, should the Commission determine that investors that are not municipal entities are the primary investors in the pooled investment vehicle? Should such a determination be based on a dollar amount or a percentage of the pooled investment vehicle's assets? Should the Commission provide that this pooled investment vehicle interpretation would no longer apply if the municipal entity (or municipal entities) investing in the pooled investment vehicle becomes the primary investor in the pooled investment vehicle subsequent to the initial investment? If so, above what level of investment should a municipal entity (or municipal entities) be considered to be the primary investor in the pooled investment vehicle? Should such a determination be based on a dollar amount or a percentage of the pooled investment vehicle's assets?

We believe the Proposed Rule takes a balanced approach in providing that it should not apply to investment pools in which both municipal entities and nonmunicipal entities are investors. We would not suggest that terminology involving the concept of "municipal entities are the primary investors" be utilized because it is too difficult to determine just what "primary" means. The requested comments about whether a determination be based on a dollar amount or percentage of a pool simply underscore and illustrate the difficulty. Moreover, there are additional complications. If one attempts such an objective approach, is that objective approach then to be recalculated on a daily basis or a weekly basis or simply at the time when the investment is made? This is significant, since municipal entities routinely invest moneys (until needed) in overnight funds, various kinds of float funds and mutual funds. While some funds of this kind are designed specifically for municipal investors, the primary consideration for a municipal investor would be whether the particular investment vehicle represents a legal investment under state law. Many kinds of pools would meet their criterion, including a large number with immaterial numbers of municipal entity investors.

In any event, as discussed previously the advisors to any investment pool which is already subject to direct or indirect regulation (such as money market funds) should be exempt from registration under the Rule.

As discussed above, the Commission is proposing to interpret the term "investment strategies" to include plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity. Thus, commingled proceeds, regardless of when they lose their characteristic as proceeds, would still constitute "funds held by or on behalf of a municipal entity" and, therefore, any advice with respect to such funds would be municipal

advice, unless subject to an exclusion. Is this interpretation too broad? Please explain and include a discussion of concerns, if any, such an interpretation could raise.

As described above, we believe the Rule should be applied only to proceeds of municipal securities, and not to all municipal funds. The Act states this in Section 15B(e)(3). "Investment strategies" is defined "to include plans or programs for the investment of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." The concept of all funds held by a municipal entity is not included in the Act. Commingled proceeds are required by federal tax laws (applicable to tax-exempt bonds) and by state law to be traced for use and investment purposes. The suggestion that commingled proceeds would forever "taint" an investment pool is inconsistent with federal tax and state laws, as well as common sense — and, accordingly, we believe that it is inappropriate for the Proposed Rule to provide otherwise.

Municipal entities routinely handle moneys from numerous sources — real estate escrow moneys, moneys deposited with banks, lease payments, insurance moneys, payrolls and federal moneys held in trust pending disbursement under federal rules.

It seems an obvious regulatory overreach (and beyond the Commission's authority under the Act) to suggest that all such funds (which typically far exceed the amount of any municipal security proceeds) should be controlled by the Proposed Rule just because a small portion of such funds may be commingled for investment purposes for a short time with municipal securities proceeds.

The Congress did not state in the Act that "all" municipal fund investments are the object of the proposed regulatory scheme. To indirectly do so through the Proposed Rule would clearly be inappropriate.

The need to exercise regulatory restraint is even more evident when obligated parties are taken into account. Only the investment of the proceeds of municipal securities should be considered—not all moneys of the obligated person—even if the municipal security proceeds may be commingled with other moneys of the obligated person for investment purposes. We trust the Commission does not intend to subject all moneys of the Red Cross, Salvation Army, Harvard, Yale, Princeton, the Catholic Church, Exxon, U.S. Steel and innumerable other "obligated persons" to the Proposed Rule.

In interpreting the term "solicitation of a municipal entity or obligated person," the Commission notes that, unless an exclusion applies, any third-party solicitor that seeks business on behalf of an investment adviser from a municipal entity or obligated person, such as a municipal pension fund or a local government investment pool, must register as a municipal advisor. In addition, the Commission notes that the determination regarding whether a solicitation of a municipal entity or obligated person requires a person to register as a municipal advisor is not based on the number, or the size, of investments that

are solicited. Thus, the Commission would consider a solicitation of a single investment by a municipal entity or obligated person in any amount to require the person soliciting the municipal entity or obligated person to register as a municipal advisor. Do these interpretations require further clarification? If so, how? Should these interpretations be modified in any way? Please explain and provide suggested alternative language, as appropriate. Is there a de minimis number or size of investments that should be allowed to be solicited before a person is required to register as a municipal advisor? If so, what should this de minimis amount be? Please explain the rationale for providing for a de minimis exception.

Not every communication with a municipal entity or obligated person should be considered to be a "solicitation" subject to regulation. Some communications are invited by municipal entities or obligated persons, for instance by requests for proposals or qualifications or are in conjunction with and part of the normal course of negotiated, arm's-length loans and direct municipal securities sales. In addition, municipal entities and obligated persons frequently and voluntarily include themselves on municipal securities industry mailing and email distribution lists. We strongly suggest that generic "mass mailing" solicitations, or institutional advertising, whether by print or electronic communication, especially if not targeted to a small group of particular municipal entities or obligated persons, should not subject a person or entity to the registration requirements of the Act. The same is true for newspaper or periodical ads, brochures, TV or radio ads or Internet ads. The point is reinforced when the universe of obligated parties is added.

Should the Commission, as proposed, permit the voluntary registration by persons that solicit a municipal entity or obligated person on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that controls, is controlled by, or is under common control with the person undertaking such solicitation? If not, why not? Should the Commission permit voluntary registration by any other group of persons? If so, which persons and why?

We strongly encourage permitting voluntary registration. The Congress seemed to strongly encourage transparency in the municipal advisor industry, and voluntary registration furthers that purpose. Moreover, if the Commission desires that persons or entities be registered **before** they begin to provide advice or solicit, voluntary registration seems a required option.

In interpreting the term "solicitation of a municipal entity or obligated person," the Commission also notes that such solicitation must be "for the purpose of obtaining or retaining an engagement . . . in connection with municipal financial products [or] the issuance of municipal securities." Are there types of obligated persons to which this definition should not apply in connection with the issuance of municipal securities? If so, please identify the types of obligated persons to which the definition should not apply and explain why. Are there types of municipal financial products (such as municipal

derivatives which include swaps or security-based swaps where an obligated person is the counterparty) to which this definition should not apply? If so, please identify the types of municipal financial products to which the definition should not apply and explain why.

In response to a previous question we listed a number of entities that we believe should be excluded from the definition of an "obligated person." Such entities are those that are separately regulated by the Commission or other federal or state authorities, are financially sophisticated, or which, in our view, should be excluded for other reasons as not wanting or being needful of federal regulatory protections with respect to "solicitation." We believe that they should be excluded from the "obligated person" definition and that those communicating with them should be excluded from coverage under the "solicitation" horn of the Act.

Proposed Rule 15Ba1-1(f) would define the term "municipal derivatives" to mean "any swap (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and Section 3(a)(69) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in Section 3a(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder) to which a municipal entity is a counterparty, or to which an obligated person, acting in its capacity as an obligated person, is a counterparty." Should this definition be clarified or modified in any way? If so, how? Should the definition of municipal derivatives specifically include other financial products? For example, should the definition specifically include options, forwards or futures? If so, which products and why? Should this definition include a financial product that is composed of multiple components where one or more of such components is derivative in nature, such as a structured note or convertible bond? Should this definition include financial products, in addition to swaps and security-based swaps, that are based on municipal securities that are exempted securities under the Exchange Act or are exempt from registration under the Securities Act? Should it include an over-the-counter option contract with a municipal entity? If so, which additional financial products should be included in the definition and why?

We note that the Act contains a separate series of provisions specifically addressing swap practices, and anything in the Proposed Rule should harmonize with such provisions of the Act. In particular, Sections 731 and 764 of the Act have provisions requiring registration by swap dealers and security-based swap dealers with the Commodity Futures Trading Commission and the Commission and include provisions specifically covering such dealers' activities when acting as advisors to "special entities," which include state and local governments. It would seem to be unnecessary and duplicative to require swap dealers and securities-based swap dealers to register also as municipal advisors (unless engaged in municipal advisory activities that would otherwise subject them to registration as a municipal advisor).

[We are not commenting on the Proposed Rule's next set of commentary questions and therefore do not set them forth here.]

Is our interpretation of the exclusion from the definition of a "municipal advisor" for a broker, dealer, or municipal securities dealer serving as an underwriter appropriate? Specifically, the Commission interprets this exclusion to mean that a broker-dealer acting as an underwriter or placement agent that solicits a municipal entity to invest in a security, or a broker-dealer acting as an underwriter that also advises a municipal entity with respect to the investment of proceeds of municipal securities or the advisability of a municipal derivative would be a municipal advisor. Should these interpretations be modified in any way, or further clarified? If so, how?

We believe the Commission's interpretation of the exclusion from the definition of a municipal advisor for a broker-dealer or municipal securities dealer serving as an underwriter is not appropriate or reflective of the realities of municipal finance. The Proposed Rule would imply that the exclusion is available only if the broker-dealer is an underwriter with respect to the specific bond issue in question or the investment of the proceeds thereof. The Proposed Rule defines the exclusion too narrowly, thereby failing to take into account what occurs in practice. A failure to modify the Proposed Rule to reflect the reasonable practices and realities of municipal finance will result in a significant decrease in practical advice to municipal entities and dramatically increase their costs. Municipal entities often retain underwriters pursuant to a contract for a specific period of time, and not just for the issuance and sale of a single series of bonds. Often the contractual obligations will require the underwriter to do more than simply purchase and sell bonds on behalf of the municipal issuer.

For example, many municipal entities solicit advice from their underwriters with respect to the investment of moneys (both bond proceeds and other moneys such as tax moneys which are comingled with bond proceeds, or even moneys held separately for the repayment of the bonds). A number of municipal issuers conduct regular financings under open parity indentures, and in conjunction with both the issuance of new securities and the maintenance of annual ratings are required to provide projected cash flows to the rating agencies. The municipal issuers expect their underwriters to provide such projected cash flows whether or not bonds are issued or the cash flows include any bond proceeds or not. In many cases, these cash flows are not directly connected with the issuance or sales/underwriting of any particular series of bonds but simply reflect a general responsibility of the broker-dealer to the municipal issuer. Likewise, municipal issuers will routinely contact their investment bankers/underwriters for advice with respect to bond redemptions, market reactions to various possible investments, the desirability or safety of various investments and so on. As a further example, under the recent Treasury Department "New Issue Bond Program" for state and local housing finance agencies, the United States Treasury Department purchased bonds in an escrow arrangement, which bonds are then to be periodically "converted" to a permanent interest rate, in many cases in conjunction with the issuance of "market" bonds sold through the auspices of investment bankers. The state and local

housing finance agencies were required to obtain ratings with respect to the initial placement with the United States Treasury Department, and are required to obtain confirming ratings when the rate on a series of the Treasury's escrow bonds is converted to a permanent rate. State and local housing finance agencies relied upon, and utilized, their underwriters to prepare the cash flows with respect to obtaining the rating for the initial private placement of the escrow bonds with the Treasury, and will also do so with respect to the cash flows required for the conversion to a permanent rate of the Treasury-owned bonds (which may or may not include the sale of market bonds).

We would strongly suggest that an underwriter operating under an agreement with a municipal issuer should not be considered a "municipal advisor" so long as the underwriter is acting within the scope of the contractual arrangements between the municipal issuer and such underwriter, and particularly when responding to a request for advice/assistance from the municipal issuer, whether or not in conjunction with the underwriting/sale of a particular series of bonds.

Consistent with Congress's definition of the term "municipal advisor," the Commission does not believe that whether a municipal advisor is compensated for providing municipal advice should factor into the determination regarding whether the municipal advisor must register with the Commission. Are there any persons who engage in uncompensated municipal advisory activities, or municipal advisory activities for indirect compensation, that the Commission should exclude from the definition of "municipal advisor"? Please explain.

We disagree with the Commission's suggestion that compensation is irrelevant in determining whether a person or entity is a "municipal advisor" or not. And, as detailed above, we strongly disagree with the cynical observation of a previous commentator that no one does anything without compensation, direct or indirect. In "small-town" America, advice is routinely given freely. For example, the treasurer or city clerk of a small town or village will ask a retired banker who happens to live next door about the intricacies of overnight mutual funds, the mayor may ask the local banker about the complexity and advisability of "interest rate" swaps, or the city attorney may get free legal advice regarding municipal securities laws from a friendly law school professor or a bond attorney. There are numerous examples of such advice solicited and freely given with no expectation of compensation throughout "small-town" America (and, we suspect, even on Wall Street and in our Nation's capital). The Commission's utilization of the Proposed Rule to require registration in such circumstances is clearly overreaching. The Commission's intent in the Proposed Rule may be to insure that municipal entities get vetted and reliable advice. If, however, the Commission ignores the practical realities of municipal finance, the Proposed Rule may have the opposite impact. It may chill the ability of a municipal entity to receive any advice, or to receive advice without the additional costs of highly regulated (and expensive) registered "municipal advisors." Those who, prior to the Proposed Rule, would have freely given advice to a municipal entity may refuse to provide even basic information for fear of

falling under the broad reach of the Proposed Rule. A clear and narrow tailoring of the Proposed Rule is essential to insure the intent of the Act is achieved without unintended adverse consequences. Moreover, an issue remains whether the Commission even has the constitutional authority to regulate the free speech of a citizen who, without compensation, is addressing a municipal entity at a public hearing, particularly when requested to testify.

As noted earlier, we strongly urge the Commission to exclude persons who provide incidental advice without compensation, and particularly when provided in response to a request from a municipal entity or obligated person.

[We are not commenting on the Proposed Rule's next three sets of commentary questions and therefore do not set them forth here.]

The Commission proposes to exclude from the definition of a "municipal advisor" persons preparing financial statements, auditing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person. Should persons providing these accounting services be excluded from the definition of "municipal advisor"? Are there additional types of services that an accountant provides that should not require the registration of an accountant as a municipal advisor? If so, what additional types of accounting services should qualify an accountant for an exclusion from the definition of "municipal advisor"? Are there activities that are incidental to the provision of accounting services or inextricably linked to accounting services that can only reasonably be performed by an accountant that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products?

We certainly agree (and previously suggested) that there should be an exclusion for accountants to the extent they are providing traditional accounting services to a municipal entity. These would include the provision of services with respect to classic balance sheet and revenue reports, audits, budgetary and tax-related advice and reports (including federal, state and local), and management advice in connection therewith, as contemplated by accounting standards (which accounting standards are, we might note, generally based on the very accounting standards required by the Commission with respect to accountants and registered companies). Furthermore, accountants engaged in the services mentioned do so subject to an extensive set of professional standards covering both the ethical and technical aspects of their work at a level of detail far beyond anything contemplated by the Act.

We would suggest that any advice incidental to the primary provision of traditional accounting services including the preparation or review of forecasts, whether or not used in the offering of municipal securities, should not subject an accountant to the Rule, so long as the services are requested by the municipal entity or obligated person. We believe the Commission is trying to draw an overly fine line, and suggest a more general rule as outlined above. It would

be a disservice to every clerk in every small town in the country if they cannot ask their local accountant about what an "overnight repo" is and if it is a permitted investment.

Should the Commission expand the exclusion from the definition of "municipal advisor" beyond engineers providing engineering advice? If so, why and how should such exclusion be expanded? If not, why not? How should the Commission interpret the term "engineering advice"? Are there activities that are "incidental to the provision of engineering advice" or "inextricably linked to engineering advice" that can only reasonably be performed by an engineer that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products? As discussed above, the Commission does not interpret the exclusion of engineers providing engineering advice to include circumstances in which the engineer is preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects of the project and, therefore, an engineer preparing such studies would be subject to registration as a municipal advisor. Is this an appropriate interpretation? Please explain.

With respect to feasibility studies, we assume that the Commission would treat an engineer's preparation of a project feasibility study as a part of routine engineering advice, whether or not the feasibility study is related to a municipal securities offering. Examples would include whether a particular waste-to-energy system works, or whether a proposed "chunnel" can be built within a certain price range.

Many older trust indentures securing outstanding bonds of public utilities require, as a condition precedent to issuing additional bonds, that an engineer's report be provided to the effect that expected project-generated revenues will exceed projected bond debt service. The work necessary for such a report is typically an arithmetical calculation pursuant to express language in the bond trust indenture, and would not ordinarily involve advice or interpretation. Such covenants have not been used in newly adopted bond trust indentures for many years, but are still extant in older bond trust indentures. Subjecting an engineering firm to registration as a condition of delivering such a report will needlessly increase costs (and utility rates) and could make such reports impossible to obtain at all. We would suggest excluding such reports from the application of the Proposed Rule.

As noted above, we also believe incidental finance advice, especially if requested by the municipal entity or any obligated person, should be excluded from the Rule. For example, a city undertaking a multi-billion-dollar sewer or tunnel system, or a municipal utility undertaking a major generating facility, will routinely ask all its professionals, including its engineers, if they have any innovative suggestions with respect to financing the same. These suggestions generate no additional compensation to the provider. It would be a disservice to the municipal entity if its engineers (and lawyers, accountants, bankers, architects and other professionals) could not respond to their clients' requests in that context.

The Commission proposes to exclude from the definition of municipal advisor attorneys offering legal advice or services of a traditional legal nature. As discussed above, the Commission interprets this exclusion to apply only when the legal services are to a client of the attorney that is a municipal entity or obligated person. Is this an appropriate interpretation? Please explain. Should the Commission provide an exclusion for all activities of an attorney as long as that attorney has an attorney-client relationship with the municipal entity or obligated person? Why or why not? Should the scope of the exclusion for attorneys be different for attorneys for obligated persons? Why or why not? Neither the Dodd-Frank Act nor the proposed rule defines the term "services of a traditional legal nature." Is the meaning of the term sufficiently clear? If not, should the Commission provide additional interpretive guidance? How should the Commission interpret the term?

We believe that limiting the exception to a situation where an attorney/client privilege exists is understandable, but not necessarily reflective of (again) the practice with respect to conduit financings involving obligated persons or "small-town" America practice, and not necessarily in furtherance of efficient and professional practice by attorneys on behalf of their clients.

In the case of conduit financings, sometimes the client of the "bond counsel" is the conduit borrower and in some cases it is the municipal entity. If the "client" is considered to be the conduit borrower, does the Rule then mean that bond counsel is unable to respond to questions from the board of the municipality issuing the bonds because it would make that counsel a "municipal advisor?" And if, instead, the "client" of the bond counsel is considered to be the municipal entity issuer, can such counsel not respond to questions from the conduit borrower? We suggest that counsel to either the municipal entity or the obligated person should be permitted to respond to issues/questions from either the municipal entity or the obligated person. Furthermore, we believe that counsel to any other significant party to a transaction (e.g., bond underwriter, bond trustee, credit/liquidity provider, bond purchaser, lender) should be accorded the same treatment under the Rule.

Furthermore, it is a routine practice for counsel to the municipal entity, conduit borrower and other parties to the transaction to deliver third-party opinions (particularly securities law and validity/enforceability opinions) to transaction parties other than their clients. None of such opinions should be considered "advice" under the Proposed Rule.

With respect to "small-town" America, it is not unusual for municipal issuers to ask local attorneys with whom they are familiar, or perhaps a friendly law professor (or maybe even a Commission lawyer) about various matters with respect to securities laws, investments of municipal moneys, bond sale notices or related matters. In such cases, advice is given on a pro bono basis, and it is not clear—and would probably quite surprise the municipal issuer—if the municipal entity were considered a "client" of the attorney.

In the above cases, excluding "incidental advice given at the request of the municipal entity/obligated person and without separate compensation for such advice" would seem appropriate.

It is not clear whether the Rule is intended to require that counsel to a registered municipal advisor also have to register themselves as municipal financial advisors if they are simply providing traditional legal services to the registered municipal advisor. We assume that is not the case – just as counsel to a registered broker-dealer is not, by virtue of providing legal advice to them, treated as a broker-dealer who needs to be registered.

Finally, most municipal bond attorneys provide post-closing advice, often years later, and/or calculate (or check the calculation of) post-issuance federal tax arbitrage rebate liabilities for bond issues. Such services are certainly part of the services traditionally provided by counsel and should be excluded in the same way as other bond counsel services.

Are there other types of professional activities that should be excluded from the definition of a "municipal advisor"? Please explain.

Teachers are excluded from the definition of an advisor under the Investment Advisers Act, and we would suggest they also be excluded from the Proposed Rule, so long as they are acting within the parameters of their profession.

The Commission is proposing to exclude from the definition of "municipal entity" elected members of a governing body of a municipal entity, but to include appointed members of a municipal entity's governing body unless such appointed members are ex officio members of the governing body by virtue of holding an elective office. Are these distinctions appropriate? Please explain. Are there other persons associated with a municipal entity who might not be "employees" of a municipal entity that the Commission should exclude from the definition of a "municipal advisor"?

The Commission states that it does not believe that appointed members of a governing body of a municipal entity should otherwise be excluded from the definition of a "municipal advisor." Frankly, we are astounded at this distinction. It appears that the Commission is suggesting that every appointed board member of an authority or agency in the United States will have to register as a municipal advisor, because board members are required by both statutory and common law principles to provide advice and vote on, and with respect to, the issuance of bonds, the provisions thereof, and generally the permitted investments of bond proceeds. In fact, statements and rules of the Commission over the last decades have emphasized and underscored the requirement that board members be actively engaged in and knowledgeable about the businesses of the entities for which they are acting as directors (e.g., Orange County). It is quite common for members of a municipal entity's board of directors to be appointed by governors, legislators, mayors, city council members or other municipal officers or bodies – just as Commission commissioners are appointed. Moreover, virtually all such board members are in

fact accountable to the municipal entity, and can be removed for dereliction of duty (and in some cases can even be removed summarily without reason). There are literally tens of thousands of such boards in the United States, having multiple appointed board members. Most are community-oriented individuals who serve for no cost (except reimbursement of out-of-pocket expenses), in the public interest. Furthermore, those individuals serving as board members for public retirement systems are held to a strict fiduciary standard in performing their duties for the plans they serve. These fiduciary standards are generally set forth in state law and municipal ordinances. To state that appointed board members are "not directly accountable for their performance" is to say that such members are not subject to the same public scrutiny and risk of removal from appointment as an elected official. In fact, in most cases appointed members are subject to higher legal and ethical standards, and are much more easily removed, than elected officials (who are generally only removable for impeachable offenses, or periodically via the election process). It is beyond the realm of reason to think that the Congress intended that all such appointees be required to register as municipal advisors simply because their entities issue bonds and they are fulfilling their fiduciary duties of inquiring and commenting on the issuance of bonds.

Further compounding this is the fact that the definitional scheme of the Proposed Rule would also imply that any member of the board of directors of an "obligated person" would similarly have to register as a "municipal advisor." Numerous nonprofit organizations across the United States, including local zoos, libraries, museums, hospitals, schools and colleges/universities, the Salvation Army, Habitat for Humanity, religious organizations and the like, all take advantage of conduit financings. The effect of this commentary with respect to the Proposed Rule would require that each of those individuals register as a "municipal advisor" if their organizations ever take advantage of tax-exempt financing, which is specifically permitted by the Internal Revenue Code. States and even the Internal Revenue Service have enacted laws and rules which govern the duties of board members, prohibit conflicts and prevent private inurement of gain in such circumstances.

We would strongly urge that the definition of "employee," or "municipal entity," be expanded to include any member of the board of a governing organization so long as that board member is acting within the scope of his or her duties and responsibilities as a board member or, alternatively, that the definition of "advice" exclude any discussion or direction given by a director or board or commission member acting within such scope. In the absence of a safe harbor or guidance regarding "advice," many municipal entities and obligated parties will be struggling with the conundrum of what constitutes "advice" for purposes of complying with the Proposed Rule and will have to devote already limited resources to a "facts and circumstances" analysis that provides them with little comfort. Certainly the board member who is acting outside the scope of his or her duties as a director and is encouraging the use of a particular financing technique for his or her own personal benefit is in a different situation and should be treated differently, and we would suggest that such a person should not be covered by the exclusion.

We understand that there are concerns that a certain "political appointee" may abuse his or her position as a member of a governing body of a municipal entity. However, requiring appointed members to register as municipal advisors will not stop such individuals from becoming appointed nor stop the practice of "peddling" political influence. Moreover, there are already state-law penalties and mechanisms for removal in place when such individuals are no longer acting in the best interests of the municipal entity. It is more likely that requiring appointed members to register as municipal advisors will deter honest, civic-minded individuals, mindful of the direct and indirect costs of the regulatory burden, from contributing voluntary public service to their local governments and other municipal entities without significantly inhibiting the "peddling" of political influence by persons with such proclivities.

In a similar vein, the commentary does not address the situation of a person who is a "designee" or authorized deputy or representative of a separately elected ex officio member or appointed board member. This is a common practice with municipal entities, for often elected officials are statutorily ex officio members of numerous boards, commissions, authorities or agencies (for example, in several of the larger states anecdotal evidence indicates that the state treasurer may be an ex officio member of as many as 60 or 70 agencies or authorities). We would strongly suggest that designees, deputies or representatives of members should be exempt just as, and to the extent that, the members themselves are exempt.

Should employees of obligated persons be excluded from the definition of "municipal advisor" to the extent they are providing advice to the obligated person, acting in its capacity as an obligated person, in connection with municipal financial products or the issuance of municipal securities? One commenter expressed concern that volunteers at entities such as charter schools could be required to register as municipal advisors. Are there types of persons other than employees of obligated persons that should be excluded from the definition of "municipal advisor?" If yes, please provide examples of the specific types of persons and the specific circumstances under which they should be excluded.

Clearly, employees of obligated persons should be excluded from the definition of a municipal advisor, just as they are excluded if they are employees of a municipal entity. Likewise, as described in the previous comment, any members of the board of directors of an obligated person should be excluded. Surely the reasons for excluding employees and board members of a municipal entity are equally applicable to employees and board members of obligated persons.

Also, employees and board members of a municipal entity should be excluded to the extent they are providing advice to an obligated person (and acting within the purview of their duties), and vice versa. Otherwise the municipal entity and obligated person cannot even coordinate with respect to a financing for the obligated person.

Should the Commission exclude from the definition of a "municipal advisor" banks providing advice to a municipal entity or obligated person concerning transactions that involve a "deposit," as defined in Section 3(l) of the Federal Deposit Insurance Act at an "insured depository institution," as defined in Section 3(c)(2) of the Federal Deposit Insurance Act, such as insured checking and savings accounts and certificates of deposit? Should the Commission exclude from the definition of a "municipal advisor" banks that respond to requests for proposals ("RFPs") from municipal entities regarding other investment products offered by the banking entity, such as money market mutual funds or other exempt securities? Should the Commission exclude from the definition of "municipal advisor" a bank that provides to a municipal entity a listing of the options available from the bank for the short-term investment of excess cash (for example, interest-bearing bank accounts and overnight or other periodic investment sweeps) and negotiates the terms of an investment with the municipal entity? Should the Commission exclude from the definition of "municipal advisor" a bank that provides to a municipal entity the terms upon which the bank would purchase for the bank's own account (to be held to maturity) securities issued by the municipal entity, such as bond anticipation notes, tax anticipation notes, or revenue anticipation notes? Should the Commission exclude from the definition of "municipal advisor" a bank that directs or executes purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis? Should the Commission exclude from the definition of a "municipal advisor" banks and trust companies that provide other fiduciary services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities? Should banks and trust companies be exempt from the definition of "municipal advisor" to the extent they are providing advice that otherwise would subject them to registration under the Investment Advisers Act, but for the operation of a prohibition to or exemption from registration? Please explain any response to these questions and to the extent that an exemption is recommended, please provide suggested exemptive language.

We suggest that banks or trust companies be excluded from the definition of a "municipal advisor" to the extent that they are providing advice in the course of traditional commercial banking operations, whether these operations include deposits, checking or savings accounts, or trust services, or any other usual and customary commercial or trust operations. With respect to the purchase of municipal securities for the purchaser's own account, as described below, we suggest any lender to, or purchaser of securities of, a municipal entity or obligated person should be excluded from the definition of a "municipal advisor" whether a bank, bank subsidiary or affiliate, financial institution, finance company or any other entity.

Should the Commission exclude from the definition of "municipal advisor" a broker-dealer that provides a municipal entity with price quotations with respect to particular securities (or securities having particular characteristics) which the

broker-dealer would be prepared to sell as principal or acquire for the municipal entity? Should the Commission exclude from the definition of "municipal advisor" a broker-dealer that provides to a municipal entity a list of securities meeting specified criteria that are readily available in the marketplace, but without making a recommendation as to the merits of any investment particularized to the municipal entity's specific circumstances or investment objectives?

In both cases yes, there should be such an exclusion, provided that the proffered data and other information are clearly stated to be "for information only" and not as investment or other advice and do not include a recommendation as to a decision or course of action. Not doing so would most likely have a deleterious effect on the information that a municipal entity could obtain to prudently conduct its financial affairs, and would in fact prevent or limit the ability of a municipal entity to compare price quotations and avoid the very kind of influence peddling that the Congress apparently sought to prevent by its enactment of the Act.

Furthermore, without such an exclusion, the legitimate activities of municipal entities' financial officers in obtaining comparison quotes could be hampered (to the detriment of the entities) if the effect of the Rule were to limit the price quotes given by nonregistered advisor dealers to those given in the course of an actual trade.

Should the Commission exclude from the definition of "municipal advisor" an entity that provides to clients investment advice, such as research information and generic trade ideas or commentary that does not purport to meet the needs or objectives of specific clients, and is provided to a municipal entity as part of its ongoing ordinary communications?

Yes, there should be such an exclusion. (In fact, we question whether this should even be considered "advice" within the meaning of the Proposed Rule if not provided "to" a particular municipal entity.) As noted in the previous comment, not providing such an exclusion would have only adverse effects for municipal entities and would tend to further the very type of abuses the Act was apparently intended to avoid and limit the flow of critical information to decision makers at municipal entities.

Should the Commission permit registration of only separately identifiable departments or divisions of a bank ("SIDs")? Please explain. Would the following suggested rule text, based on MSRB rule G-1 relating to SIDs engaged in municipal securities dealer activities, provide appropriate conditions for determining whether and when a SID engaged in municipal advisory activities may register as a municipal advisor: "(a) A separately identifiable department or division of a bank, as such term is used in Section 3(a)(30) of the Securities Exchange Act of 1934, is that unit of the bank which conducts all of the municipal advisory activities of the bank, provided that: (1) Such unit is under the direct supervision of an officer or officers designated by the board of directors of

the bank as responsible for the day-to-day conduct of the bank's municipal advisory activities, including the supervision of all bank employees engaged in the performance of such activities; and (2) There are separately maintained in or separately extractable from such unit's own facilities or the facilities of the bank, all of the records relating to the bank's municipal advisory activities, and further provided that such records are so maintained or otherwise accessible as to permit independent examination thereof and enforcement of applicable provisions of the Exchange Act, the rules and regulations thereunder and the rules of the MSRB relating to municipal advisors; (b) The fact that directors and senior officers of the bank may from time to time set broad policy guidelines affecting the bank as a whole and which are not directly related to the day-to-day conduct of the bank's municipal advisory activities, shall not disqualify the unit hereinbefore described as a separately identifiable department or division of the bank or require that such directors or officers be considered as part of such unit; and (c) The fact that the bank's municipal advisory activities are conducted in more than one geographic organizational or operational unit of the bank shall not preclude a finding that the bank has a separately identifiable department or division for purposes of this rule, provided, however, that all such units are identifiable and that the requirements of paragraphs (1) and (2) of section (a) of this rule are met with respect to each such unit. All such geographic, organizational or operational units of the bank shall be considered in the aggregate as the separately identifiable department or division of the bank for purposes of this rule."? Should this language be clarified or modified in any way? Please provide suggested alternative language, as appropriate. Are there reasons that the language of MSRB rule G-1, as modified, should not be used for SIDs engaging in municipal advisory activities? Please explain.

A bank creating an SID should be exempted in all its other activities from registration as an advisor.

Are there other exclusions from the definition of "municipal advisor" that the Commission should consider? Please explain.

Municipal entities and obligated persons customarily, routinely and regularly purchase from vendors and their agents and intermediaries equipment and supplies, such as computers, paper, automobiles, office equipment, medical equipment, office supplies, fire trucks, police cars and numerous other items. Such vendors and others routinely offer financing options to these municipal entities and obligated persons, including simple time payment plans, loans and leases (directly or through credit providers), as well as outright cash sales. We urge the Commission to exclude from "providing advice" under the final Rule the response to requests for proposals and the offer and negotiation, as well as the provision of such financing and leasing options and descriptions of the same (if even considered to be municipal financial products or municipal securities), with the result that such vendors, their agents, intermediaries and others providing such financing or leasing would not be "municipal advisors."

Municipal entities and obligated persons regularly borrow from or directly issue municipal securities to numerous lenders and purchasers (including banks, bank subsidiaries and affiliates, systemically important entities, financial institutions, finance companies and other persons) and apply the proceeds to equipment purchases, other capital expenditures and other day-to-day capital needs. In fact, as reported recently in the national press, this is a growing trend as a cost effective alternative to publicly selling bonds. Such lenders or purchasers of municipal securities are not acting and do not purport to act in a fiduciary capacity, nor are they intermediaries for third parties. Such loans and purchases are commercial transactions negotiated at arm's-length. (Note that if such a lender or purchaser were determined to be a "municipal advisor," it would apparently subject them to the fiduciary duty provisions of the draft MSRB Rule G-36, and make it virtually impossible for them to negotiate any loan or securities placement.) In such transactions the lender or purchaser of municipal securities typically provides a term sheet or otherwise informs the municipal entity or obligated person about the interest rate and other financial terms under which the lender or purchaser is willing to extend credit. Lenders and purchasers in these transactions, just as in commercial transactions, in order to diversify and spread the lender's or purchaser's exposure to portfolio credit risk, also regularly identify and provide to the municipal entity or obligated person the names of other possible lenders and purchasers which might participate with the lender or purchaser in a portion of the loan or sale. No substantive difference exists, in our view, between a lender's or purchaser's provision of any such information in the normal course of a commercial loan or bond placement transaction and a vendor's affixing a price tag (and related terms of sale, which might include an interest rate deferral or other terms) to a piece of equipment made available for purchase. Moreover, such lenders and purchasers act substantively the same whether entering into a financing with a commercial borrower not involving a municipal security or a municipal entity or obligated person involving a municipal security. The provision of any information in the normal course of an arm's-length negotiation of an extension of credit should not be treated as "advice" and should not subject the lender or purchaser to regulation as a "municipal advisor." Should there remain a concern that the municipal entity or obligated person might be misled or fail to understand the true nature of the loan or bond issuance, we offer the further suggestion that lenders, purchasers, vendors and other such entities involved in these transactions expressly include in their term sheets and other communications statements to the effect that the communications are not intended to, do not constitute and should not be relied upon as "advice" within the meaning of the Act, and that the municipal entity or obligated person, if it desires advice pertinent to the subject transaction, should retain a "municipal advisor" for that purpose.

Licensed insurance salesmen should probably be excluded form the definition of a municipal advisor to the extent they are simply describing, and soliciting the sale of, traditional insurance products. Although not a "security" in most cases, an insurance product tailored to a municipal entity could be construed to be a "municipal financial product" if broadly defined, although we would urge that it should not be. Such products and those who sell the same are already quite well regulated.

Also, as is the case under the Investment Advisers Act, we believe there should be an exclusion for publishers of bona fide newspapers, news magazines or business or financial publications of general and regular circulation. (Or, preferably, the type of information and analysis provided on such a basis, which is not specific to a particular municipal entity or obligated person, should not be considered "advice.")

And, finally, in the interests of providing free and fair competition and access to information and ideas, the Commission should exclude from the Proposed Rule any "advice" in a response to a municipal entity (or obligated person) request for proposal if the request is with respect to services which are exempt from the Proposed Rule, such as underwriter, counsel, accountant or trustee (which should be exempt). Technically such entities which are not selected would be providing advice and yet not qualify for an exemption (because they were not hired).

We would be pleased to discuss any of the foregoing comments in greater detail.

Very truly yours,

John J. Wagner

John J. Wagner