

February 22, 2011

VIA ELECTRONIC MAIL

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

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

Dear Ms. Murphy:

The Investment Adviser Association<sup>1</sup> appreciates the opportunity to submit comments on the Commission's proposed rules to implement a permanent municipal advisor registration regime required by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").<sup>2</sup> Section 975, which amended Section 15B of the Securities Exchange Act of 1934 ("Exchange Act"), took effect on October 1, 2010 and created a new category of SEC-registered entities called municipal advisors. On September 1, 2010, the Commission adopted an interim final temporary rule requiring municipal advisors to register with the Commission by October 1, 2010.<sup>3</sup> The proposed rules would replace the Commission's temporary registration process for municipal advisors after December 31, 2011. We comment with respect to one aspect of the Proposal relating to the exclusion for SEC-registered investment advisers.<sup>4</sup>

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<sup>1</sup> The Investment Adviser Association is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the IAA's membership consists of more than 500 firms that collectively manage in excess of \$10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our web site: [www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> See Registration of Municipal Advisors, SEC Rel. No. 34-63576 (Dec. 20, 2010) ("Proposal"), available at <http://www.sec.gov/rules/proposed/2010/34-63576fr.pdf>.

<sup>3</sup> See Temporary Registration of Municipal Advisors, SEC Rel. No. 34-62824 (Sept. 1, 2010), available at <http://www.sec.gov/rules/interim/2010/34-62824.pdf>. Municipal advisors were required to register with the Municipal Securities Rulemaking Board by December 31, 2010 in order to engage in municipal advisory activities.

<sup>4</sup> The IAA also submitted a comment letter on the Commission's November 19, 2010 proposal to amend the pay to play rule 206(4)-5 under the Investment Advisers Act of 1940 ("Advisers Act"). See Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC. Rel. IA-3110 (Nov. 19, 2010) ("Pay to Play Rule Amendments"). The Pay to Play Rule Amendments would prohibit an adviser from compensating its affiliate for soliciting municipal entity clients unless the affiliate is registered as a municipal advisor. See also, Proposal at 30-31, n.104 ("[a]llowing [affiliated] entities to register as municipal advisors and subject themselves to the regulatory regime for municipal advisors as a condition to being paid as solicitors on behalf of affiliated

The term “municipal advisor” is defined in Section 975(e)(4) of the Dodd-Frank Act as “a person (who is not a municipal entity or an employee of a municipal entity) that – (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity.” Section 975(e)(4)(C) of the Dodd-Frank Act specifically *excludes* from the definition of “municipal advisor,” “*any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice.*”<sup>5</sup> (emphasis added). However, the Commission’s proposed rule to implement this statutory exclusion states that “municipal advisor” shall not include “[a]n investment adviser registered under the Investment Advisers Act of 1940 [ ] or a person associated with such registered investment adviser, unless the registered investment adviser or person associated with the investment adviser engages in municipal advisory activities other than providing investment advice that would subject such adviser or person associated with such adviser to the Investment Advisers Act.”<sup>6</sup>

We are concerned that the Commission’s proposed rule interpreting the investment adviser exclusion appears to be narrower than the language of the actual exclusion in the Dodd-Frank Act. Therefore, we urge the Commission to revise proposed Exchange Act Rule 15Ba1-1(d)(2)(ii) to reflect the plain language of the broad statutory exclusion for SEC-registered investment advisers. At a minimum, we request confirmation in the adopting release that the exclusion from the definition of municipal advisor for any SEC-registered investment adviser or person associated with such investment adviser applies to the investment adviser and the adviser’s employees who may solicit municipal entities as part of their regular responsibilities to market the adviser’s investment advisory services or who may incidentally discuss the adviser’s advisory services with municipal entities. Such sales,

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investment advisers does not contravene [ ] Congressional intent.”) Our January 24, 2011 comment letter, available on our website under Comments & Statements, opposed the Pay to Play Rule Amendments and suggested alternative approaches.

<sup>5</sup> An investment adviser is defined under Section 202(a)(11) of the Advisers Act to mean “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.”

<sup>6</sup> See proposed Exchange Act Rule 15Ba1-1(d)(2)(ii). See also, proposed Exchange Act Rule 15Ba1-1(e) defining the term “municipal advisory activities” to mean “providing advice to or on behalf of a municipal entity [ ] or obligated person [ ] with respect to municipal financial products or the issuance of municipal financial securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or solicitation of a municipal entity or obligated person.”

marketing, or soliciting by the investment adviser or an employee of the investment adviser would not fall within the definition of “municipal advisory activities.”<sup>7</sup>

In addition, the term “solicitation of a municipal entity or obligated person” is defined under Section 975(e)(9) of the Dodd-Frank Act to exclude solicitations by an adviser’s affiliate. Specifically, solicitation means a “direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser [ ] that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.”<sup>8</sup> In other words, “solicitation” is a communication for a fee with a municipal entity by a person on behalf of an investment adviser that is *not* affiliated with such soliciting person.<sup>9</sup>

Thus, affiliated solicitors of investment advisers are not “soliciting municipal entities” and are also excluded from the statutory definition of municipal advisor. It would be illogical and contravene the statutory intent of the Dodd-Frank Act for such an exclusion to apply to an affiliate of an investment adviser and its employees soliciting on behalf of its affiliated adviser, but not for the same analysis to apply to an investment adviser and its own employees soliciting on their employer’s behalf, with Advisers Act anti-fraud provisions and disclosure rules applying to such activity.<sup>10</sup> Accordingly, we request confirmation that solicitation by an investment adviser or its employees on the firm’s own behalf to provide investment advisory services to a municipal entity would not be considered “municipal advisory activities.”

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<sup>7</sup> The Commission states that an SEC-registered investment adviser “that solicits a municipal entity *on behalf of a municipal advisor* would also be required to register as a municipal advisor.” (emphasis added.) See Proposal at 34-35. By contrast, an SEC-registered investment adviser or associated person of such investment adviser that solicits a municipal entity *on its own behalf* would be within the investment adviser exclusion and would *not* be required to register as a municipal advisor.

<sup>8</sup> See Proposal at 30 (“persons soliciting on behalf of affiliated entities would not fall within the definition of municipal advisor and would not be required to register pursuant to Section 15B of the Exchange Act.”)

<sup>9</sup> See Proposal at 29 (“a *third-party* solicitor that seeks business on behalf of an investment adviser from a municipal pension fund or a local government investment pool must register as a ‘municipal advisor.’” (emphasis added.))

<sup>10</sup> See, e.g., Advisers Act Section 206; Advisers Act cash solicitation rule 206(4)-3; Advisers Act advertising rule 206(4)-1; Advisers Act pay to play rule 206(4)-5.

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We appreciate the Commission's consideration of our comments on the proposed rules implementing Section 975 of the Dodd-Frank Act for municipal advisors. Please contact Karen L. Barr, IAA General Counsel, or the undersigned at (202) 293-4222 if we may provide additional information regarding these or other issues.

Sincerely,

/s/ Monique S. Botkin

Monique S. Botkin  
IAA Assistant General Counsel

cc: The Honorable Mary L. Schapiro, Chairman  
The Honorable Kathleen L. Casey, Commissioner  
The Honorable Elisse B. Walter, Commissioner  
The Honorable Luis A. Aguilar, Commissioner  
The Honorable Troy A. Paredes, Commissioner

Eileen Rominger, Director, Division of Investment Management  
Robert W. Cook, Director, Division of Trading and Markets  
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