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February 22, 2011

VIA ELECTRONIC MAIL

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

Re: File No. S7-45-10
Registration of Municipal Advisors

Dear Ms. Murphy:

This letter is submitted on behalf of a group of non-governmental, non-profit and tax-exempt universities[1] (the "Universities") which serve as "conduit borrowers" (as defined below) with respect to municipal securities offerings. The letter is in response to the publication of *Registration of Municipal Advisors* (the "Proposing Release"), issued by the U.S. Securities and Exchange Commission (the "SEC").[2] The Proposing Release requests comment on proposed new rules 15Ba1-1 through 15Ba1-7 and related forms (the "Proposals") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Among other things, the Proposing Release requests comment on whether "employees of obligated persons [should] 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." The Universities appreciate the opportunity to comment on this and other aspects of the Proposals.

The Universities strongly support the goals of the Proposals to regulate the activities of financial advisors to municipal entities and obligated persons. However, as discussed below, the Universities believe that employees, officers and trustees of conduit borrowers and other obligated persons should not have to register as municipal advisors.

[1] A list of the Universities is attached as Appendix A.
[2] The Proposing Release was published in Securities Exchange Act Release No. 34-63756 (December 20, 2010).

I. The Universities and their Financing Activity

Section 15B(e)(4)(A) of the Exchange Act, added by the recent Dodd-Frank legislation described below, defines the term "municipal advisor" to mean 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, or (ii) undertakes a solicitation of a municipal entity. The Universities are concerned that language in the Proposing Release (including the SEC's request for comment noted above) suggests that the SEC believes that employees, officers and trustees of the Universities need to register as municipal advisors. In particular, the Universities are concerned that the proposed definition of municipal advisor could be interpreted to cover employees, officers and trustees of non-governmental, non-profit universities who discuss the issuance of municipal securities or municipal financial products or the temporary investment of the proceeds of municipal financings in connection with their day-to-day activity on behalf of the Universities.

Non-governmental, non-profit universities are among the principal conduit borrowers of the proceeds of tax-exempt bonds. Conduit financing refers to the issuance of municipal securities by a governmental unit (referred to as the "conduit issuer") to finance a project to be used primarily by a third party, usually a for-profit entity engaged in private enterprise or a non-profit, tax-exempt organization (referred to as the "conduit borrower"). Pursuant to state law, state or local governmental agencies are authorized to issue tax-exempt bonds and to loan or otherwise make available the proceeds from those issuances to the non-governmental conduit borrowers. States have found it to be in their interest to extend conduit borrowing privileges to colleges and universities due to the acknowledged benefits of higher education opportunities to the residents of those states. Consequently, projects such as dormitories, classrooms, research buildings, and other facilities are regularly financed using tax-exempt bonds. Many large universities, including most of those on behalf of which these comments are submitted, also own and operate hospitals or hospital systems, and so borrow in the tax-exempt bond market for both university and hospital purposes.

The security for this type of bond issue is customarily the credit of the conduit borrower or pledged revenues from the project financed, rather than the credit of the conduit issuer (*i.e.*, the security for such financings is not the general obligation of the conduit issuer). The non-governmental conduit borrower (*i.e.*, a University) is liable for generating the pledged revenues and is obligated to make all payments of principal and interest required under the bonds issued by the state or local agency.

In the normal process of evaluating the use of tax-exempt financing for university and hospital facilities and equipment, the Universities submitting these comments routinely utilize the financial knowledge and expertise of their employees, officers and trustees. This knowledge and expertise ranges from very detailed cash flow and alternative financing cost models to very general expectations of anticipated borrowing costs in the near and distant terms. Tax-exempt bonds for the benefit of the Universities or their hospitals cannot be issued without approval by officers and trustees of the Universities. These analytical and approval services are provided for

the benefit of the University or its hospital and are directed toward securing the most efficient and least costly forms of financing for improvements and additions to the Universities and hospitals. Employees, officers and trustees of the Universities are also routinely involved in helping determine the temporary investment of the bond proceeds prior to expenditure for the specific authorized purposes.

The Universities engage in conduit financings with various state and local governmental entities ("municipal entities"). Just as do municipal entities when they issue bonds for their own benefit, the Universities and other conduit borrowers engage their own employees, officers and trustees in making their financing decisions. As noted, the Universities are contractually obligated for the payment of the obligations of the municipal securities issued by the municipal entity that is the conduit issuer. The Proposing Release, in fact, explicitly contemplates that conduit borrowers, such as private universities, non-profit hospitals, and private corporations, can be obligated persons.[3] Accordingly, the Universities are "on the same side of the table" as, and have similar financial interests as, municipal conduit issuers, just as do the employees and officers of municipal entities that are issuers for their own benefit.

II. The Definition of Municipal Advisor Was Not Meant to Capture Employees, Officers and Trustees of Obligated Persons

In April of 2009 the Municipal Securities Rulemaking Board ("MSRB") published a study entitled "Unregulated Municipal Market Participants A Case for Reform" ("MSRB Study")[4] that set in motion a series of Congressional hearings that ultimately led to the Proposals. In the MSRB Study, the MSRB lamented that:

> The law also does not permit the MSRB to regulate either "independent" financial advisors that provide advice to issuers regarding bond offerings or investment brokers that assist issuers with investing bond proceeds. The MSRB believes regulation of these entities is essential to protect investors and market integrity, and that the MSRB should have such authority.

The MSRB also wrote that

> Based on the growth of the market, and the evident regulatory gaps, it is necessary for unregulated market participants to be subject to regulatory oversight that is similar to that mandated for dealers. . . . Much like the rules governing dealers today, the rules would be tailored to the business of financial advisors and investment brokers, based on the nature of their activities. . . . As the municipal derivatives market developed, many advisory firms developed expertise as swap advisors. Advisory firms were also formed to provide investment advice to issuers concerning funds that were available to invest. Neither swap advisors nor investment brokers are currently regulated at the federal level. . . . Given the

[3] *See* Proposing Release, *supra* note 1, at note 86.
[4] The MSRB Study is available at: http://www.msrb.org/News-and-Events/Press-Releases/Press-Releases/~/media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx.

> complexity of the municipal securities market, the variety of risks, and the reliance by many issuers on the expertise of these professionals, the MSRB is seeking authority to regulate financial advisors and investment brokers in order to protect investors and preserve market integrity.

In addition, the MSRB Study stated that:

> And yet, despite a thin patchwork of state and local laws, the majority of financial advisors is unregulated and operates in the public sphere without any legal standards or regulatory accountability. The MSRB does not have authority to regulate activities of any non-dealer professionals in the municipal finance market. These include independent financial advisors and swap advisors (collectively, "financial advisors"), and brokers of guaranteed investment contracts and other investment products purchased with proceeds from municipal bond offerings ("investment brokers"). The MSRB believes that regulation of these entities is essential . . . . The limited role of the MSRB to fully oversee all market participants has caused widespread confusion over how the market is regulated. There is a widespread assumption that all market participants are accountable to a regulatory authority. Based on the growth of the market, and the evident regulatory gaps, it is necessary for unregulated market participants to be subject to regulatory oversight that is similar to that mandated for dealers. . . . Given their integral role in municipal finance, these advisory and investment firms should be held to standards of conduct that already protect municipal issuers, taxpayers and investors in this market."

The comments from the MSRB are telling. The MSRB Study refers to "financial advisors and investment brokers," "non-dealer professionals," and "advisory and investment firms." These references all describe businesses and professionals that offer investment and advisory services in the public market; these references cannot fairly be interpreted as describing or covering employees, officers and trustees of private universities. The statements in the MSRB Study are important because it is the MSRB Study that ultimately lead to the definition of municipal advisor in the Dodd-Frank Act[5] and because the MSRB is, in most respects, the primary regulator of municipal advisors.

The legislative history of the Dodd-Frank Act confirms that the definition of municipal advisor was only meant to capture "unregulated market participants." Specifically, the Senate Report for the Dodd-Frank Act states:

> Section 975 strengthens oversight of municipal securities and broadens current municipal securities market protections to cover previously unregulated market participants and previously unregulated financial transactions with states, counties, cities and other municipal entities.[6]

[5] The Dodd-Frank Act is codified as Pub. L. No.111-203, 124 Stat.1376 (2010).
[6] S. Rep. No. 111-176, at 147 (2010).

The Senate Report also quotes testimony provided by Ronald A. Stack, Chair of the Municipal Securities Rulemaking Board, who said, "Investors in the municipal securities market would be best served by subjecting unregulated market professionals to a comprehensive body of rules . . . ."[7] In addition, the SEC itself characterizes municipal advisors similarly in the Proposing Release by noting the following:

> [T]he statutory definition of "municipal advisor" includes distinct groups of professionals that offer different services and compete in distinct markets. The three principal types of municipal advisors are: (1) financial advisors, including, but not limited to, broker-dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products; (2) investment advisers that advise municipal pension funds and other municipal entities on the investment of funds held by or on behalf of municipal entities (subject to certain exclusions from the definition of a "municipal advisor"); and (3) third-party marketers and solicitors.

The SEC's language also indicates that the term "municipal advisor" was meant to capture professionals that offer various types of advisory service in the financial marketplace. Thus, the legislative history of the Dodd-Frank Act and the Proposing Release acknowledge that only those entities and individuals that are professionally engaged in providing investment advice in the public marketplace were meant to be captured by the municipal advisor regulatory regime.

To read the statutory language in Section 975 to require employees, officers and trustees of obligated persons to register as municipal advisors is, therefore, inconsistent with the intent of Congress and the legislative history of Dodd-Frank Act. Congress did not intend to regulate employees, officers and trustees of obligated persons under the municipal advisor regulatory framework. Such individuals are not "market professionals," "market participants" or "advisory and investment firms." The consistent use of such phrases throughout the course of the legislative history and SEC rulemaking indicates that these University employees, officers and trustees are not the type of persons meant to be captured by the municipal advisor regulatory scheme.

Finally, the Universities note that the text and structure of Section 975 of the Dodd-Frank Act and of the Proposals characterize obligated persons and municipal entities as persons that utilize and rely on advice provided by independent municipal advisors, rather than as market participants that provide such advice to third parties.[8] In fact, the text of Section 975 and the Proposing Release acknowledges that obligated persons, along with municipal entities, are meant

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[7] S. Rep. No. 111-176, at 148 (2010).

[8] For instance, the Proposing Release provides that "Section 15B(a)(1) of the Exchange Act makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person . . . or to undertake a solicitation of a municipal entity or obligated person . . . unless the municipal advisor is registered with the Commission." Similarly, the Proposing Release states, "Thus, in proposed rule 15Ba1–1 the Commission is proposing to define 'municipal advisory activities' to mean 'advice to or on behalf of a municipal entity . . . or obligated person.'" This language recognizes that municipal entities and obligated persons are similarly situated vis-à-vis third party advisors.

to be protected by the Dodd-Frank Act from unregulated advisors.[9] Requiring the Universities' employees, officers and trustees to register as a result of their service to the Universities would essentially seek to protect the Universities from themselves. Congress did not create a totally new regulatory scheme in order to protect conduit borrowers from their own employees, officers and trustees. A carve-out from the municipal advisor definition for employees, officers and trustees of obligated persons would recognize that the activity carried out by such individuals is internal to the obligated person and that further government regulation of such activity in the form of municipal advisor registration is unnecessary.

III. There is No Need for Employees, Officers and Trustees of Obligated Persons to Register as Municipal Advisors

As noted above, Section 15B(e)(4)(A) contains the definition of the term "municipal advisor," and it includes those who provide advice "to or on behalf of" an obligated person. While Section 15B(e)(4) of the Exchange Act does not contain an explicit exclusion from the municipal advisor definition for employees, officers and trustees of "obligated persons" (as this term is defined in the Exchange Act),[10] there is no need for employees, officers and trustees of non-governmental, non-profit universities to have to register as municipal advisors merely as a result of their faithful execution of their employment, officer and trustee responsibilities. Applying the municipal advisor regulatory framework to such individuals would not serve to further the purposes of the Dodd-Frank Act or improve investor protection in any meaningful way. In this respect, the interests of employees, officers and trustees are aligned with those of the Universities with whom they are employed or associated. In fact, the employees, officers and trustees are subject to fiduciary duties,[11] conflict of interest restrictions,[12] and other Federal

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[9] As an example, the Proposing Release states, "The information provided pursuant to these rules and forms would also aid municipal entities and obligated persons in choosing municipal advisors, engaging in transactions with municipal advisors, or participating in municipal securities transactions in which a municipal advisor is also engaged." It is awkward to think of an obligated person as "choosing" its own employees, officers and trustees as municipal advisors, "engaging in transactions with" its own employees, officers and trustees, or "participating in municipal securities transactions" in which its own employees, officers and trustees are engaged as described in the Proposing Release. Likewise, the Proposing Release notes that a broker-dealer acting as a placement agent for a private equity fund that "solicits a municipal entity or obligated person to invest in the private equity fund" would be a municipal advisor with respect to that activity.

[10] The term obligated person is defined in Exchange Act Section 15B(e)(10) as "any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipals securities."

[11] These duties include a duty of good faith and loyalty to the Universities. These duties generally prohibit employees, officers or trustees from acting in a manner adverse to the Universities. The fiduciary duty of loyalty requires that employees, officers and trustees act in the best interests of the Universities, rather than their own interests. The duty of loyalty also requires employees, officers and trustees to avoid conflicts of interest if possible. As a result, none of the employees, officers or trustees has any direct or indirect financial interest in the use of tax-exempt financing or, as noted in footnote 12, if a trustee has a personal financial interest in seeing the financing occur, he or she would be precluded from acting in his or her own interest. The fiduciary duty of care requires that employees, officers and trustees act with a certain level of care in all matters related to the Universities, including making informed decisions and considering all material information before making a decision.

and/or State regulations applicable to non-profit organizations. For instance, the conduct of University trustees is subject to a number of laws, including State not-for-profit corporation laws, state education law, and IRS regulations governing tax-exempt organizations. The extensive regulation of these individuals makes additional regulation unnecessary. The foregoing laws and obligations make employees, officers and trustees accountable to the Universities they serve in a way that independent market participants (such as third-party marketers, placement agents, solicitors, finders or financial advisors) are not. The result is that these individuals act for the Universities when they discharge their respective duties; they are not acting as advisors to the Universities.

Requiring employees, officers and trustees of the Universities to register as municipal advisors would not further investor protection or prevent fraudulent practices because these individuals are accountable to the Universities. These individuals should be free to evaluate and make decisions for the Universities in the normal course of business without triggering the need to register as municipal advisors. Likewise, the Universities should be able to have their employees, officers and trustees analyze and evaluate proposed financial undertakings arising in the normal course of business without having to worry about whether such individuals are registered as municipal advisors. Neither the Universities nor other obligated persons need to be protected by this Act from their own employees, officers and trustees over which they exercise supervision, dominion and control. This dynamic is in stark contrast to the dynamic that exists when an obligated person hires an unaffiliated, independent third-party to provide advice; it is only the latter arrangement where the protections of the Dodd-Frank Act are needed.

Finally, it is important to note that the interests of conduit borrowers such as the Universities are aligned with the conduit issuers, thus making municipal advisor registration unnecessary. Since the Universities are contractually obligated for the payment of the obligations of the municipal securities issued by the municipal entity, they have similar financial interests as the municipal entities with respect to the municipal offerings. The same cannot be said for independent, unaffiliated financial advisory firms which are motivated primarily by their own financial interests.

IV. Requiring Employees, Officers and Trustees of Obligated Persons to Register as Municipal Advisors Will Not Serve the Public Interest

Extending the municipal advisor registration requirement to employees, officers and trustees of obligated persons who discharge their fiduciary responsibilities within a non-profit organization will have various adverse effects. Such a registration requirement will cause expense and confusion.[13] It will discourage employees, officers and trustees of the Universities

[12] For instance, should a volunteer trustee have a relationship with an underwriting or financial advisory firm, that trustee is precluded by conflict of interest policies from participating in the engagement of his or her firm for the financing.

[13] For instance, if a municipal advisor is deemed to include employees of an obligated person who provide advice to their employer, it will not be clear which employees are subject to registration. Since the Dodd-Frank Act and the Proposing Release fail to define the term "advice," it would be unclear, for example, whether individuals who

from handling financial matters, such as decisions involving the structure, timing, pricing and other terms of municipal financings. Perhaps more importantly, it will create a significant disincentive for qualified individuals to serve as employees, officers and trustees in the non-profit sector. Employees, officers and trustees are obligated, under the duty of care they owe to the Universities, to be informed, obtain relevant facts, and make reasoned decisions. If these individuals have to worry about whether their day-to-day activities trigger municipal advisor registration, it would tend to narrow the number of required registrants among the University's workforce and to shift to them the tasks of asking necessary questions, conducting adequate due diligence and offering their opinions. Discussion and consideration of important financial issues related to financings among employees, officers and trustees generally would be chilled. Such reluctance to engage in open and robust discussions would negatively impact the decision making process and deprive the Universities of the benefit of the experience, skills, expertise and conclusions of their employees, officers and trustees.

Moreover, if employees, officers and trustees of the Universities are required to register as municipal advisors, the Universities and other conduit borrowers will find it difficult to recruit and retain qualified individuals with diverse and contributory perspectives on the operation of educational institutions. Such employees, officers and trustees would be subject to a burdensome registration process. Among other things, they would be required to publicly disclose personal information, employment history, various forms of "bad actor" information, and information concerning arbitrations, complaints, bankruptcies and judgments. These individuals also would be required to meet training, experience, competence and recordkeeping requirements and would be subject to periodic testing. These requirements will deter prospective employees, officers and trustees from serving on behalf of the Universities or other conduit borrowers. Trustees who volunteer their time will surely consider personal registration with the SEC a task far beyond the normal expectations for uncompensated board service, making it especially more difficult to obtain the needed expertise, experience and perspectives for board participation. The SEC's proposed interpretation in the Proposing Release will thus lead to a dramatic reduction in the pool of persons qualified and willing to serve as employees, officers and trustees for conduit borrowers.

Finally, the Universities believe that both the employees, officers and trustees of public universities and the employees, officers and trustees of non-governmental, non-profit universities should be able to perform financing-related functions without having to worry about registering as municipal advisors. The Universities believe that the protections of municipal advisor registration are no more needed in one case than the other. In the Proposing Release the SEC states its intention to exclude from the definition of "municipal advisor" elected members of the governing body of municipal entities, but not appointed members of the governing body (except elected officials who serve *ex officio*). The SEC reasons that the former group is accountable to the public, whereas the latter is not. The Universities do not find persuasive the SEC's rationale

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perform general planning work (*i.e.*, evaluating which projects to undertake, how much they will cost, what sources of funds are available) or who are responsible for debt accounting or tax reporting, are subject to registration. Depending on the SEC's interpretive position, it is possible that Deans and executive officers, who do not directly oversee financial matters, could be required to register.

for treating elected public officials differently from appointed ones. Both types of public officials are legally and ethically obligated to serve the interests of the public agency they represent. In like manner, the employees, officers and trustees of non-governmental organizations have legal and ethical obligations to serve the organization's best interests. In any event, even if there is some theory that elected public officials have a higher level of responsibility than appointed ones, that distinction made by the SEC in the context of public government officials does not carry over to non-governmental obligated persons where all trustees have the same level of responsibility.

For the reasons discussed above, the Universities believe that all employees, officers and trustees of private obligated persons should be excluded from the definition of municipal advisor when they act within the scope of their authority.

V. Conclusion

Application of the municipal advisor regulatory scheme to employees, officers and trustees of the Universities (or to other obligated persons) is unnecessary and would not further the goals of the Dodd-Frank Act. Requiring such individuals to register as municipal advisors is unnecessary and unintended and will have significant adverse effects. The Universities submit that virtually no investor protection or other public benefits would accompany such registration. For these reasons, the Universities request that employees, officers and trustees of obligated persons be excluded from the definition of municipal advisor to the extent they are acting within the scope of their authority.

The Universities again appreciate this opportunity to comment on the Proposals, and would be happy to answer any questions you may have.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Michael Koffler
Michael B. Koffler

BY: James K. Hasson Jr. MBK
James K. Hasson, Jr.

APPENDIX A

Columbia University

Cornell University

Duke University

Emory University

Johns Hopkins University

Northwestern University

Princeton University

Stanford University

The George Washington University

University of Chicago

University of Pennsylvania

University of Rochester

Washington University in St. Louis

Yale University