Chapman and Cutler LLP
Attorneys at Law · Focused on Finance®

February 22, 2011

VIA E-MAIL

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. S7-45-10
Proposed Permanent Registration Regime for Municipal Advisors

Dear Ms. Murphy:

Chapman and Cutler LLP is pleased to submit the following comments to the Securities and Exchange Commission (the *"Commission"*) on the proposed registration rules for municipal advisors and related interpretations set forth in Release No. 34-63576, dated December 20, 2010 (the *"Proposing Release"*).

Chapman and Cutler is a nationally-recognized bond counsel firm. During 2010, we served as bond counsel, disclosure counsel or underwriter's counsel on over 800 new issues of long-term municipal securities, and represented financial institutions acting as credit enhancers, liquidity providers or direct purchasers in over 100 municipal securities transactions. We work closely with all types of state and local governments, financial advisors, underwriters and others on these transactions.

We believe that the wide variety and large number of municipal securities transactions we handle provide us with unique insights into specific aspects of the proposed rules and interpretations set forth in the Proposing Release. We have limited our comments to a handful of issues that we believe are most important. In the interest of brevity, we indicate where we concur with certain comments provided by others rather than restating those comments.

Underwriter Exclusion Should Extend to Placement Agents and Remarketing Agents

The definition of "municipal advisor" in Section 975(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (*"Dodd-Frank"*) excludes "a broker, dealer, or municipal securities dealer serving as an underwriter". We believe that this exclusion should also extend to brokers, dealers and municipal securities dealers serving as placement agents or remarketing agents for municipal securities issues. The duties of placement agents and remarketing agents with respect to the sale and pricing of municipal securities are similar to the duties of underwriters. While superficially referred to as "agents," placement agents and remarketing agents in fact are independent contractors with arm's-length relationships with municipal securities issuers. We concur with the detailed comment on this point provided by the Securities Industry and Financial Markets Association (*"SIFMA"*).

Scope of the Underwriter Exclusion Should be Clarified

In the Proposing Release, the Commission interpreted the underwriter exclusion "to apply solely to a broker, dealer, or municipal securities dealer serving as an underwriter on behalf of a municipal entity or obligated person in connection with the issuance of municipal securities" and stated that the exclusion "does not apply when such persons are acting in a capacity other than as an underwriter on behalf of a municipal entity or obligated person.[1] We request that the Commission clarify that a broker, dealer, or municipal securities dealer serving as an underwriter may provide all services regularly performed by municipal securities underwriters, including advice on the structuring and timing of an issue, the use of credit enhancement and liquidity facilities, the investment of bond proceeds, the use of swaps and related matters, without risk of being treated as a municipal advisor. While we believe that this reflects the Commission's intent in the Proposing Release, we have received a number of questions from the underwriter community on this interpretation. We concur with the detailed comment provided by SIFMA on this interpretation.

We do not believe that there is any significant risk that a municipal securities issuer will not understand whether a dealer is acting as a municipal advisor or an underwriter. In this regard, we note that the proposed amendments to MSRB Rule G-23 recently filed with the Commission by the Municipal Securities Rulemaking Board include guidance to the effect that "a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue."[2] This presumption, however, "may be rebutted if the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue."[3] If adopted, the practical result of this guidance will be the use by dealers of short written agreements to establish the existence of an underwriting relationship at the inception of a municipal securities transaction.

---

1 Proposing Release at fns. 106 and 107.

2 MSRB Notice 2011-10, *Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23,* February 10, 2011.

3 *Id*.

Legal Advice and Traditional Legal Services; Other Professionals

The definition of "municipal advisor" in Section 975(e) of Dodd-Frank excludes "attorneys offering legal advice or providing services that are of a traditional legal nature." In the Proposing Release, the Commission interpreted this exclusion (i) "to apply only when the legal services are to a client of the attorney that is a municipal entity or obligated person" and (ii) not to apply to "advice which is primarily financial in nature". We believe both of these interpretations are problematic and will present real problems for municipal finance attorneys and their issuer and underwriter clients. We specifically concur with the comments submitted by the National Association of Bond Lawyers (*"NABL"*) on these interpretations.

The Proposing Release also included the Commission's interpretations of the exclusions for accountants and engineers. We believe that both of these interpretations are unduly restrictive and support the detailed comments submitted by NABL. Our experience with thousands of municipal securities transactions indicates that the interests of the issuer and any obligated person are best served if all of the transaction participants and their counsel are free to discuss and debate all aspects of the transaction with one another. If an attorney identifies a problem with a bond pricing model, a feasibility analysis, an accountant's report or an engineering study, the attorney needs to be free to identify, discuss and resolve that problem with all of the transaction participants without concern that the attorney is providing something other than legal advice that is not primarily financial advice or traditional legal services to a client.

Municipal Entity Governing Bodies; Obligated Person Directors, Officers and Employees

Section 975(b)(2)(D)(ii) of Dodd-Frank expanded the rulemaking authority of the MSRB to include the adoption of rules designed to protect municipal entities and obligated persons. We believe that the protection of municipal entities and obligated persons, together with the protection of investors and the public interest, represents Congress' primary purpose in adopting Section 975 and should inform the Commission's interpretation of the municipal advisor provisions of that Section.

In the Proposing Release, the Commission (i) stated its interpretation that appointed members of municipal entity governing bodies may be municipal advisors if they provide advice or undertake a solicitation as described in the definition of "municipal advisor" in Section 975(e) of Dodd-Frank and (ii) requested comment on whether employees of obligated persons should be afforded the same exclusion from municipal advisor status as employees of municipal entities.

With regard to appointed members of governing bodies, we note that dozens of comments have been submitted on this interpretation and believe that the Commission, at a minimum, must clarify that the discussion, deliberation and debate that members of a governing body of a municipal entity or obligated person regularly engage in with regard to municipal finance matters does not constitute "advice" within the meaning of the proposed rules.

From a broader perspective, we find nothing in Section 975 of Dodd-Frank that suggests that Congress intended to presently confer upon the Commission or the MSRB regulatory or rulemaking authority over municipal entities and obligated persons. Such authority would be a significant intrusion on state and local governments, in the case of municipal entities, or private businesses, in the case of obligated persons, and should not be implied. Nowhere does Section 975 or any other provision of Dodd-Frank authorize the direct regulation of municipal entities and obligated persons. Dodd-Frank authorizes the regulation of municipal advisors and the protection of municipal entities and obligated persons, and it should be interpreted accordingly.

We applaud the Commission's goals to improve the integrity of and the practices in the municipal securities markets. We believe that the "solicitation of a municipal entity or an obligated person" provisions of Dodd-Frank provide the Commission with appropriate authority to achieve these goals. However, Dodd-Frank's integration of the solicitation provision in the municipal advisor definition has caused a great deal of confusion. We believe that the proposed municipal advisor rules would be improved and made more clear if the provisions regulating and/or prohibiting solicitations in connection with municipal financial products or the issuance of municipal securities by any person, regardless of whether such person is a municipal advisor, are separated fully from the provisions governing what sorts of advice trigger municipal advisor status.

Definitional Issues Should be Addressed

We recommend that the Commission consider carefully the existing municipal securities provisions of the Securities Exchange Act of 1934 (the *"Exchange Act"*) and the Commission's existing rules thereunder, particularly the definition of "municipal security" in Section 3(a)(29) of the Exchange Act,[4] and the definition of "issuer of municipal securities" in Rule 15c2-12 of

[4] "Municipal securities" is defined in the Exchange Act to include both governmental bonds and tax-exempt "industrial development bonds" under an older definition that cross-references the pertinent provisions of the Internal Revenue Code of 1954 as they existed at the time of the 1970 amendments to the Securities Act of 1933 and the Exchange Act. These amendments are understood to exempt from registration "separate securities" under tax exempt bond issues (*i.e.*, loan agreements, lease agreements and installment sale agreements between a governmental issuer and a conduit borrower that provide the source of repayment of industrial development bonds). *See,* Steven L. Clark, *Taxable Municipal Bonds: A Working Guide to Federal Securities Law Considerations*, 7 Municipal Finance Journal 183 (1986).

the Commission under the Exchange Act.[5] "Municipal entity," as defined in Dodd-Frank, includes "any other issuer of municipal securities." A careful reading of these definitions leads to the conclusion that conduit borrowers under tax exempt bond issues are "issuers of separate securities" that are also "issuers of municipal securities" for purposes of the Exchange Act and, as a result, are "municipal entities" under Dodd-Frank's municipal advisor provisions. This leads to the result that the employees of an issuer of a separate security are excluded from the municipal advisor definition in the same manner as employees of a state or local government.

There are at least two difficulties with the above result. The first is whether for purposes of identifying the persons subject to the municipal advisor rules there is some reason to distinguish between a conduit borrower under a tax exempt municipal bond and a conduit borrower under a taxable municipal bond. The second problem is whether there is some reason to distinguish between a conduit borrower that "issues" a separate security under a municipal bond and all other types obligated persons that are otherwise committed to repay debt service on a municipal bond under some other arrangement. We submit that there appears to be no principled basis to make any such distinctions.

These definitional issues make it extremely difficult, if not impossible, for various categories of obligated persons to understand whether they are required to register with the Commission as municipal advisors and to comply with the rules of the MSRB. It should also be recognized that the municipal securities definitions in the Exchange Act and in Dodd-Frank provide the foundation for not only the existing municipal securities provisions of the Exchange Act, but also any further developments in the federal regulation of the municipal securities market and participants in it. We encourage the Commission to give careful consideration to harmonizing these critical definitions and their use in the proposed municipal advisor registration rules and interpretations. Providing clarity to all participants in the municipal securities market will promote compliance and reduce costs.

Thank you for your consideration of these comments.

Respectfully submitted,

CHAPMAN AND CUTLER LLP

---

[5] "Issuer of municipal securities" is defined in Rule 15c2-12 to mean "the governmental issuer specified in section 3(a)(29) of the [Exchange] Act *and the issuer of any separate security*". [emphasis added] The Commission has interpreted the term "obligated person" in Dodd-Frank to have the same meaning as in Rule 15c2-12.