MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

February 22, 2011

VIA EMAIL

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

Re: Registration of Municipal Advisors; File Number S7-45-10

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments in response to the Securities and Exchange Commission's release, "Registration of Municipal Advisors,"[2] which would implement the amendments to Section 15B of the Securities Exchange Act of 1934 ("Exchange Act") in Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") that establish a new SEC-registration framework for municipal advisors (the "Release").

We generally support the SEC's proposed approach to implementing the municipal advisor registration regime. We recommend, however, that the Commission provide additional guidance on the definition of municipal advisor to avoid potential overlapping and duplicative regulation of already regulated entities that engage in investment advisory activities, including investment advisers registered under the Investment Advisers Act of 1940 ("Advisers Act"), commodity trading advisors ("CTAs") registered under the Commodity Exchange Act, and other investment advisers. Our specific recommendations are described in detail below.

Treatment of Managers to Pooled Investment Vehicles

Under the amendments to Section 15B of the Exchange Act, the term "municipal advisor" includes a person or entity that 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

[1] MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $1.9 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

[2] Exchange Act Release No. 63576 (Dec. 20, 2010).

concerning such financial products or issues," or that "undertakes a solicitation of a municipal entity." "Municipal financial products" are defined as "municipal derivatives, guaranteed investment contracts, and investment strategies," and the term "investment strategies" includes plans 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.[3]

Under the proposed rules, "investment strategies" would include plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity.[4] In response to comments about the scope of the definition, the SEC discusses the circumstances in which a money manager may provide advice with respect to plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity. As part of the discussion, the Commission confirms that to the extent a person is providing advice to a pooled investment vehicle in which a municipal entity has invested funds 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, the person providing advice to the pooled investment vehicle would not have to register as a municipal advisor.[5] We support this position, and commend the Commission for confirming this point.

The SEC requests comment on whether it should modify this position so that an adviser to a pooled investment vehicle would become subject to the definition of municipal advisor if municipal entities are deemed to be the "primary investors" in the pooled vehicle. We have strong concerns that imposing such an artificial threshold would create uncertainty for private fund managers, require burdensome, ongoing monitoring of the level of municipal entity investments, and limit or even prevent municipal entities from investing in private funds. The SEC should instead adopt a clear, consistent definition of municipal advisor that does not apply to an investment adviser managing a pooled investment vehicle that has both municipal entity and non-municipal entity investors.[6]

Solicitation of a Municipal Entity

In addition to providing advice to a municipal entity about municipal financial products, a person or entity may fall within the definition of municipal advisor if it undertakes a solicitation

[3] Exchange Act Section 15B(e).

[4] Proposed Exchange Act Rule 15Ba1-1.

[5] Release at 26.

[6] The position in the Release is consistent with the Advisers Act, in which the pooled investment vehicle is the client of the manager. The Dodd-Frank Act affirms this long-standing policy by prohibiting the SEC in certain circumstances from defining the term "client" for purposes of Sections 206(1) and Section 206(2) to include an investor in a private fund. *See* Sections 406 and 913.

of a municipal entity. With respect to an investment adviser, solicitation of a municipal entity means a communication with a municipal entity by a person, for compensation, on behalf of an 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 an engagement by a municipal entity of an investment adviser to provide advisory services.[7] The SEC confirms that, under these terms, persons soliciting a municipal entity on behalf of affiliated entities would not fall within the definition of municipal advisor. For example, a private fund manager employee that solicits a municipal entity on behalf of the manager would not be deemed to be undertaking a solicitation of a municipal entity. The definition applies instead only to a third-party solicitor engaged by a fund manager to solicit a municipal entity on its behalf for the purpose of the manager providing the municipal entity with advisory services. We believe the definition, by excluding personnel of an investment adviser or its affiliates that may engage in certain marketing or solicitation activities on behalf of the adviser, appropriately avoids subjecting individuals or entities, who are already subject to SEC or CFTC regulation, to overlapping, and unnecessary, regulation as municipal advisors.[8]

The SEC should also clarify how the definition of solicitation would apply in connection with the SEC's proposed amendments to its pay to play rule, and, if necessary, modify the proposed amendments. The SEC has proposed to amend the provision in Rule 206(4)-5 that prohibits an investment adviser from paying persons to solicit government entities unless such persons are "regulated persons," which includes registered investment advisers or registered broker-dealers subject to pay to play restrictions, to require instead that such entities be registered as municipal advisors.[9] In particular, the proposed pay to play rule amendments would appear to require an entity that is affiliated with an investment adviser and that currently meets the definition of a "regulated person," such as a registered broker-dealer, to register as a municipal advisor if its employees solicit a municipal entity on behalf of the affiliated investment adviser. Such a result would seem inconsistent with the exclusion from registration as a municipal advisor in Section 15B of the Exchange Act for persons that solicit a municipal entity on behalf of an investment adviser and control, are controlled by, or are under common control with, that investment adviser.

The current pay to play rule, which would not require such affiliated, SEC-registered entities to also register as municipal advisors, is consistent with the approach taken by policy makers in Section 15B, and, in particular, avoids duplicative regulation of entities that are already registered with the SEC and subject to extensive regulation. We believe this approach provides the SEC with appropriate oversight of entities involved with solicitation of municipal

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[7] Exchange Act Section 15B(e).

[8] For example, employees of a registered investment adviser are subject to the SEC's prohibition on "pay-to-play" activities in Advisers Act Rule 206(4)-5.

[9] Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3110 (Nov. 19, 2010).

entities while avoiding unnecessary additional registration, and we recommend that the SEC maintain this provision of the pay to play rule, or provide additional guidance that an affiliated entity of the sort described in Section 15B that is a "regulated person" under the pay to play rule would not need to also register as a municipal advisor.

Exclusion from Registration for Registered Investment Advisers and Registered CTAs

Under the amendments to Section 15B of the Exchange Act, the definition of municipal advisor specifically excludes "any investment adviser registered under the Investment Advisers Act or persons associated with such investment advisers who are providing investment advice," and "any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps."[10] Under the SEC's proposed rules, however, a registered investment adviser would not be able to rely on the exclusion from the definition of municipal advisor if the adviser or person associated with it engages in municipal advisory activities other than providing investment advice that would subject the adviser or person to the Advisers Act.[11] Similarly, a registered CTA would be excluded from being a municipal advisor only to the extent the CTA is providing advice as to swaps.[12]

The SEC provides two examples of the types of municipal advisory activities that are not investment advice under the Advisers Act or advice related to swaps, and thus would cause an investment adviser or CTA to fall outside the exclusion of municipal advisor. An SEC-registered investment adviser or registered CTA would be required to register as a municipal advisor if it: (i) provides advice with respect to how a municipal entity should structure or issue municipal securities, or (ii) solicits a municipal entity on behalf of a municipal advisor. These municipal advisory activities, which are specifically identified in the definition of municipal advisor, are not the type of activities that are regularly performed by an investment adviser or CTA on behalf of a client, and generally are deemed to be outside the scope of the Advisers Act.[13]

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[10] Exchange Act Section 15B(e).

[11] Release at 34.

[12] It appears that a person or entity would not be subject to registration as a municipal advisor for advising a municipal entity as to trading in futures contracts. Under Section 15B, municipal financial products include, among other things, "municipal derivatives," which the SEC proposes to define to include swaps and security-based swaps (as defined in the Commodity Exchange Act and the Exchange Act). Under Section 721 of the Dodd-Frank Act, a contract of sale of a commodity for future delivery (or option on such a contract) and a security futures product, or agreement, contract, or transaction (generally known as futures contracts), are excluded from the definition of swap (and security-based swap). As a result, a person advising a municipal entity as to such a contract would appear not to be advising the municipal entity with respect to municipal financial products and would not fall within the definition of municipal advisor.

[13] *See* Release footnote 118.

We are concerned, however, that the proposed interpretation of the exclusion could have the unintended consequence of requiring registered investment advisers and CTAs to register as municipal advisors due exclusively to their performing ordinary investment advisory services. An investment adviser, in the normal course of its advisory services, may provide clients or prospective clients with services ancillary to its investment advice, such as advising clients as to investments other than securities (*e.g.*, bank deposits), or providing clients or prospective clients with research and other related reports and information. These types of activities may not cause the adviser to fall within the definition of investment adviser under the Advisers Act, even if the adviser performs the activities in connection with investment advisory services.[14] Similarly, a CTA may, in connection with providing advice about swaps, provide clients or prospective clients with research or advice about instruments other than swaps. If these ancillary services fall within the scope of municipal advisory activities, and yet are not deemed to be the type of investment advice or advice about swaps described in the exclusion, a registered adviser or CTA that performs these services for a municipal entity client would need to register as a municipal advisor.

Such a result would lead to unnecessary, duplicative regulation of registered investment advisers and CTAs. A registered investment adviser remains subject to the Advisers Act, and a registered CTA remains subject to the Commodity Exchange Act, with respect to the services they provide to clients.[15] In general, the types of ancillary services that an adviser or CTA may provide to clients in connection with investment advice, such as those described above, are the sort subject to regular oversight by the SEC and CFTC. This existing oversight and examination framework for registered investment advisers and CTAs is effective, and adopting an entirely new set of registration and regulatory requirements for these ancillary services would be inefficient and confusing.

In addition, as proposed the rules would create widespread uncertainty among registered advisers and CTAs as to whether the services they perform for municipal entities are the type that would require registration as a municipal advisor. In order to comply with the proposed rules, managers would need to regularly monitor each service they provide to municipal entities, determine which of the services are municipal advisory activities, and further determine which, if any, of the services may not be deemed to be investment advice or advice related to swaps. These activities would be burdensome for a private fund manager or other investment adviser, and would divert resources from the performance of its core advisory services. Rather than dedicate personnel and funds to these activities, some managers may instead choose to reduce

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[14] *See, e.g.*, BNYConvergex, SEC No-Action Letter (Sept. 21, 2010).

[15] For example, the SEC staff has recently explained that the "fiduciary standard [of an investment adviser] applies to the investment adviser's entire relationship with its clients and prospective clients," and imposes upon investment advisers an "affirmative duty of utmost good faith, and full and fair disclosure of all material facts." Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (Jan. 2011), available at: http://sec.gov/news/studies/2011/913studyfinal.pdf.

the types of services that they provide to municipal entities to ensure that they are able to rely on the exclusion from registration as a municipal advisor. We are concerned that either of these outcomes would harm fund managers and their municipal entity clients.

For these reasons, the SEC should clarify that the exclusion from registration as a municipal advisor applies to registered investment advisers and CTAs that perform services ancillary to providing investment advice or advice related to swaps, such as providing research or advice about instruments other than securities or swaps, to municipal entities in the ordinary course of their advisory activities.

State-Registered Investment Advisers and Exempt Reporting Advisers

The SEC requests comment on whether a state-registered investment adviser should be exempt from the definition of "municipal advisor" to the extent it is providing advice that otherwise would be subject to the Advisers Act, but for the operation of a prohibition to, or exemption from, registration with the SEC. We recommend that the SEC exempt state-registered investment advisers and other advisers subject to regulatory oversight from the definition of municipal advisor. Consistent with our recommendation that SEC-registered investment advisers and registered CTAs be excluded from registration with respect to ancillary investment advisory services, exempting these advisers would avoid overlapping and duplicative regulation.

The statutory exclusion from the definition of municipal advisor for investment advisers registered under the Advisers Act reflects a clear intent by policy makers to avoid applying the registration requirements to investment advisers that are already subject to extensive regulation. Consistent with that policy basis, the SEC notes that prior to the passage of the Dodd-Frank Act, municipal advisors were generally not required to register with the Commission or any other federal, state or self-regulatory entity with respect to their municipal advisory activities.[16]

We believe that the same policy reasons exist to exempt state-registered investment advisers from additional regulation as municipal advisors in performing investment advisory services for a municipal entity. Under Section 410 of the Dodd-Frank Act, investment advisers with between $25 million and $100 million of assets under management will be prohibited from registering with the SEC if they are required to register as an investment adviser with, and subject to examination by, a state securities commission. These requirements ensure that a mid-sized adviser that does not register with the SEC will nevertheless be subject to meaningful regulation and oversight at the state level. The SEC should treat such state-registered investment advisers consistently with SEC-registered advisers in connection with its regulation of municipal advisors, and exempt them from municipal advisor registration to the same extent as SEC-registered advisers.

[16] Release at 6.

We also recommend that the SEC consider exempting from the definition of municipal advisor those investment advisers that qualify as "exempt reporting advisers" to the same extent as SEC-registered advisers.[17] Under existing SEC proposed rules, exempt reporting advisers would be subject to detailed reporting requirements and inspection and examination by the SEC. Policy makers, however, have determined that such investment advisers are not of the type that must register with the SEC and be subject to Commission oversight as a registered investment adviser. We believe it would be consistent with these policy determinations to similarly exempt these advisers from the definition of municipal advisor in connection with providing investment advice to a municipal entity.

Affiliated Entities of a Registered Investment Adviser

Investment advisers that are registered with the SEC often assign or delegate management of a portion of their client's assets to an affiliated entity, such as another adviser or subadviser, when they seek specialized expertise for particular regions, strategies or products. A registered investment adviser may control, be controlled by, or be under common control with, such affiliated entities, which are typically part of the same organization as the registered adviser and are subject to the same or similar compliance and management structures. Such affiliated entities typically are, for tax or other purposes, organized as separate legal entities rather than branch offices.

Under the SEC's current policy, non-registered advisers that are affiliated with an SEC-registered adviser are not required to register with the SEC as long as they operate under "participating affiliate" agreements with the registered adviser and comply with the specific guidance the SEC has provided in a series of no-action letters ("Affiliate Letters").[18] This approach provides the SEC with full regulatory access and oversight of the U.S. activities of each such non-registered adviser and avoids unnecessary firm registrations that would require additional SEC resources mitigates burdens on multi-jurisdictional advisory firms. We believe that the public policy purposes of the Dodd-Frank Act and the Advisers Act can be achieved without requiring each such affiliate to register, and that requiring registration of each affiliate would simply add costs to the industry and regulators without additional public policy benefits.

[17] Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3111 (Nov. 19, 2010).

[18] Mercury Asset Management plc, SEC No-Action Letter (Apr. 6, 1993). See also União de Banco de Brasileiros S.A., SEC No-Action Letter (Jul. 28, 1992); Kleinwort Benson Investment Management Limited, et al., SEC No-Action Letter (Dec. 15, 1993); Murray Johnstone Holdings Limited, et al., SEC No-Action Letter (Oct. 7, 1994); ABN AMRO Bank N.V., et al., SEC No-Action Letter (Jul. 1, 1997); and Royal Bank of Canada, et al., SEC No-Action Letter (Jun. 3, 1998).

We therefore in a separate submission have recommended that the SEC reaffirm that such affiliated entities may continue to rely on the Affiliate Letters.[19]

Under the terms of the proposed rules, such a non-registered affiliated adviser may be required to register as a municipal advisor if it provides investment advice to a municipal entity, even though its affiliated SEC-registered adviser would not be required to register. This outcome would be incongruous with the longstanding approach the SEC has taken in regulating such affiliates of registered investment advisers, in which it has not required such advisers to register with the SEC, but rather has ensured that it has appropriate access to information and oversight of such entities, and in particular those that provide advice to U.S. clients. We believe that substantially similar policy considerations are applicable with respect to the proposed rules, such that requiring non-registered affiliated entities of registered advisers to register as municipal advisors would be an inefficient use of the Commission's resources in overseeing multi-jurisdictional firms that are already subject to SEC oversight and provide the Commission with full access to their records.

We therefore recommend that the SEC provide an exemption from registration as a municipal advisor for non-registered advisers that are affiliated with a registered adviser and that comply with the requirements set out in the Affiliate Letters, or in any subsequent rulemaking under the Dodd-Frank Act that provides for similar exemptions from registration with the Commission for such affiliated advisers.

Transition Period for Municipal Advisor Registration

As a result of the new registration provisions for private fund managers in the Dodd-Frank Act, many managers that currently rely on the "private adviser exemption" from SEC-registration in former Section 203(b)(3) of the Advisers Act will need to register with the Commission by July 21, 2011. We expect that, due to the potentially significant changes that managers will need to implement to their businesses in order to be fully compliant with the Advisers Act, many private fund managers will prepare and submit their initial Form ADV filing to the Commission in the weeks prior to the registration deadline.

Under the proposed rules, such managers currently would not fall within the exclusion from the definition of municipal advisor, and therefore may be required to register as a municipal advisor for a short time period prior to their registering with the Commission. Requiring these advisers to briefly register as municipal advisors would not serve a clear regulatory purpose. We recommend that the SEC instead set a registration deadline or adopt a transition rule that would avoid requiring an investment adviser to register as a municipal advisor before July 21, 2011 if the investment adviser will be exempt from municipal advisor registration as of July 21, 2011 because it will register with the SEC as an investment adviser by that date.

[19] Letter from Richard H. Baker, President and CEO, Managed Funds Association, to Elizabeth Murphy, Secretary, Securities and Exchange Commission, dated Jan. 24, 2011, available at: http://www.managedfunds.org/downloads/MFA.Exemptions.Release.Letter.Final.1.24.2011.pdf.

Filings for Dually-Registered Investment Advisers and Municipal Advisors

The proposed Form MA, on which a municipal advisor would register with the SEC, is, but for items specifically relating to municipal advisory activities, substantially similar to Form ADV. To avoid unnecessarily burdening registered investment advisers that register with the SEC as municipal advisors, and to avoid duplicative information being submitted to the SEC, we recommend that the SEC permit these advisers to submit a short-form version of Form MA that refers to Form ADV and includes only information not already provided in Form ADV.

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MFA appreciates the opportunity to provide comments to the SEC in response to its proposals. If you have any questions regarding any of these comments, or if we can provide further information, please do not hesitate to contact Matthew Newell or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
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