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Financing America's Economy

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Via e-mail to rule-comments@sec.gov

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

Re: Registration of Municipal Advisors [Release No. 34-63576; File No. S7-45-10]

Dear Ms. Murphy:

The Financial Services Roundtable[1] (the "Roundtable" or "we") appreciates the opportunity to comment on the proposal (the "proposal") by the Securities and Exchange Commission (the "SEC" or "Commission"), pursuant to Section 15B of the Securities Exchange Act of 1934 (the "Exchange Act"), concerning the registration and regulation of municipal advisors.[2] Through Section 975(a)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"), Congress made it illegal for a "municipal advisor" to provide certain advice to or solicit municipal entities and other specified persons without registering with the SEC.[3] As discussed below, the Roundtable believes that the SEC's proposed definitions of "municipal entity" and "municipal advisor" are overly broad, and that the scope of the Commission's proposal is not supported by the legislative intent of the Dodd-Frank Act, or any perceived investor protection needs.

Our members are particularly concerned that the SEC's proposed definitions and interpretations are unduly expansive and would result in a complete regulatory overhaul of brokerage and banking activity when a municipal entity, obligated person, or municipal securities investor ("municipal client") is involved. There is no legislative history to suggest that Congress meant to re-write the entire brokerage and banking relationship and standard of care because a municipal client is involved in a transaction. Rather, the legislative history indicates that Congress primarily intended to regulate unregulated entities and individuals

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[1] The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] *See* Release No. 34-63576 (Jan. 6, 2011), 76 Fed. Reg. 824 (Jan. 6, 2011) (the "Proposing Release").

[3] Pub. Law No. 111-203, § 975, 124 Stat. 1376 (July 21, 2010).

engaged as "financial advisors" in the municipal securities market, and not to overhaul the standard of care for persons and entities currently subject to regulation by the SEC or by an "appropriate regulatory agency" within the meaning of Section 3(a)(34) of the Exchange Act.[4] Finally, we believe that the proposed regulations would raise concerns regarding the fiduciary roles of affected institutions and also would impose undue and excessive compliance costs.

I. "Municipal Entity"

A. The Proposed Interpretation of the Definition Is Overly Broad

Section 15B(e)(8) of the Exchange Act defines a "municipal entity" as:

> "[a]ny State, political subdivision of a State, or municipal corporate instrumentality of a State, including (i) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (ii) any plan, program, or pool of assets sponsored or established by State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (iii) any other issuer of municipal securities."

The Commission proposes to interpret the definition of "municipal entity" to include "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."[5] We believe the proposed interpretation of the definition of "municipal entity" is overly broad.

B. The Roundtable's Recommendations

The Commission should exclude from the definition of "municipal entity" appointed members of a governing body of the entity. If a state or local government, agency, local authority, or instrumentality issues municipal securities or invests public funds, and an appointed member of the board deliberates on such matters in carrying out his or her duties, the appointee would potentially be a "municipal advisor" under the proposed rule. If employees and directors of not-for-profits, who are often volunteers and philanthropists, are required to register, this could make it difficult for municipal entities, including state universities, to find qualified volunteers. We do not believe the SEC's explanation that "employees and elected members are accountable to the municipal entity for their actions whereas appointed members are not directly accountable for their performance to the citizens of the municipal entity" is sufficiently compelling to include those individuals within the definition of "municipal entity."

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[4] *See* Proposing Release, 76 Fed. Reg. at 825.

[5] *Id*. at § II.A.1.a.

II. "Municipal Advisor"

A. The Proposed Definition Is Overly Broad

Section 15B(e)(4) of the Exchange Act defines "municipal advisor" as "a person (who is not a municipal entity or an employee of a municipal 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…."[6] The Commission's proposed interpretation of the definition of "municipal advisor" is overly broad. It is so broad that it could even result in the potentially unintended consequence of regulating individuals associated with toll-road authorities.

The SEC proposes to exempt from the definition of "municipal advisor" a variety of financial institutions that act in the following capacities, unless they provide municipal advisory activities beyond the scope of the excepted activities:

a. broker, dealer, or municipal securities dealer serving as an underwriter;
b. attorneys offering legal advice or providing services that are of a traditional legal nature;
c. engineers providing engineering advice;
d. investment adviser registered under the Investment Act, or persons associated with such investment advisers who are providing investment advice;
e. commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps;
f. advisors that limit their advisory activities to advising municipal issuers as to the structuring of their financing rather than providing advice for compensation regarding the investment of assets;
g. providers of municipal bond insurance, letters of credit, or other liquidity facilities; and
h. 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 be a "municipal advisor."

Our members generally agree that these activities should be excluded from further regulation. Despite these exclusions, because of the breadth of the proposed definitions and expansive interpretations, a variety of traditional and currently regulated brokerage and banking services could become subject to redundant regulation by the SEC.[7]

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[6] The term "municipal financial products" is defined in Section 15B(e)(5) of the Exchange Act as "municipal derivatives, guaranteed investment contracts, and 'investment strategies,' which would include plans or programs for the investment of proceeds of municipal securities." 15 U.S.C. 78o-4(e)(5).

[7] The Roundtable believes that the Commission also should except other brokerage and banking services that already are subject to regulation (*e.g.*, providing a list of available securities, but without making a recommendation as to the

In the case of banks, these activities include advising a municipal entity regarding:

- The terms of a deposit account that contains funds that are merely the proceeds of the issuance of municipal securities;
- A deposit account containing the proceeds of municipal pension funds; and
- The terms upon which a bank would buy the municipal entity's securities for the bank's own account.[8]

In the case of broker-dealers, these activities could include providing general trading ideas or routine brokerage activity through which various recommendations are made for a municipal entity client to consider.

B. The Roundtable's Comments

1. Definition of "Advice"

Section 975(b) of the Dodd-Frank Act very specifically confined the scope of advice that is provided by a municipal advisor to "advice provided to or on behalf of municipal entities or obligated persons . . . with respect to municipal financial products or the issuance of municipal securities." As interpreted by the SEC in the Proposing Release, the scope of "advice" has become much broader and conceivably applies to every communication that a bank or broker-dealer has with its municipal clients, even if the discussion relates to traditional bank or brokerage services that are already regulated by the bank regulators or the SEC.

We strongly encourage the SEC to propose for public comment a definition of "advice" that is limited to specific, understandable, and trackable activity. This definition is essential to enable financial institutions to identify employees or associated persons who would be subject to registration as municipal advisors. Absent a clear understanding of the scope of "advice," there will be substantial uncertainty as to which communications with municipal entity clients would be deemed "advice."

2. Definition of "Investment Strategy"

Exchange Act Section 15B(e)(3) provides that the term "investment strategies," as enacted by Congress, encompasses "plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the

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merits of any investment tailored to a municipal entity's specific circumstances or investment activities; providing custody or transfer agency services, *etc.*). We can provide additional examples of brokerage and banking services if that would be helpful.

[8] The Roundtable's members believe that this exception should also apply to registered broker-dealers and registered investment advisers.

recommendation of and brokerage of municipal escrow investments.''[9] The Commission states in the Proposing Release that it proposes to interpret the phrase "investment strategies" so broadly as to encompass advice provided to a plan, program, or pool of assets with respect to the investment of funds held by or on behalf of a municipal entity.[10]

Because each bank or brokerage account of a municipal entity is comprised of funds "held by or on behalf of a municipal entity," money managers providing advice to municipal entities with respect to any bank or brokerage account containing any funds that were the proceeds of a municipal securities offering would be subject to regulation as municipal advisors. Even limiting the scope of municipal advisory activities by banks or broker-dealers to the provision of advice with respect to municipal securities offering proceeds would require banks or broker-dealers that have municipal entity clients to trace the funds in each account maintained at the bank or broker-dealer to verify that funds in the account(s) were not the proceeds of a municipal securities offering. Moreover, at some point, offering proceeds that are commingled with other assets lose their character as proceeds and they should no longer constitute "funds held by or on behalf of a municipal entity." We respectfully request the SEC to clarify that municipal entities, and not their municipal advisors, will have responsibility for identifying any assets in accounts maintained at banks or broker-dealers that should be deemed "proceeds" for purposes of Section 15B(e)(3).

3. The Proposed Requirements Are Duplicative

The registration requirements are onerous and duplicative of existing registration and regulatory requirements already imposed on banks, registered broker-dealers and associated persons of registered broker-dealers.

a. Application To Banks

The Commission asks if banks providing advice to municipal entities or obligated persons concerning transactions that involve a deposit should be excluded from the definition of "municipal advisor." This would cover transactions with insured checking or savings accounts and certificates of deposit.

The SEC also asks if the following specific activities should be exempted: (i) responding to requests for proposals from municipal entities for investment products offered by banks (*e.g.*, money market funds); (ii) providing a list of options available from the bank for short-term investments and negotiate the terms of an investment; (iii) providing a municipal entity with terms upon which the bank would buy the entity's securities for the bank's own account; and (iv) providing fiduciary services to municipal entities, such as acting as trustee for a government pension plan. The SEC further asks if it should exclude other activities in which a bank may engage, but given the range of traditional, regulated bank activities, the scope of required exclusions would swallow the rule.

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[9] 15 U.S.C. 78o-4(e)(3).

[10] 76 Fed. Reg. at 830.

We note that, as drafted, the broad interpretations of the definitions of municipal entity and municipal advisor do extend the SEC's authority to banks and their employees, which we believe is unwarranted. Banks and their employees are already subject to ample regulation under banking laws when providing banking services. Nothing in the Dodd-Frank Act awards jurisdiction over banking activities to the SEC. For example, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency (the "OCC")/Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and some state regulators (collectively, the "Bank Regulators"), regulate the provision of trust services that the SEC now proposes to dually-regulate under Section 15B of the Exchange Act. Banks are already sufficiently regulated, even with respect to activities that would make them "municipal advisors" under the proposed rule, contrary to what the Commission states in the Proposing Release as part of the rationale for its broad interpretation of the statutory definition. Accordingly, several Roundtable members believe that there should be a categorical exclusion for banks from the definition of "municipal advisor" where banks are providing municipal entities with traditional banking services that are already subject to regulation by an "appropriate regulatory agency" within the meaning of Section 3(a)(34) of the Exchange Act. Similarly, bank investment management and trust activities that are exempt from broker-dealer registration pursuant to the Gramm-Leach-Bliley Act and Regulation R also should be exempt from municipal advisor registration and regulation.

Alternatively, we ask the Commission to allow banks and other municipal advisors to exclude separately identifiable departments or divisions from the registration requirement. By doing so, already regulated financial entities would only be required to register with the SEC those departments actually providing municipal advisory services. This would track a similar exclusion from the definition of "municipal securities dealer" that is afforded to banks by Section 3(a)(30)(B) of the Exchange Act.

b. Application to Broker-Dealers

In the case of registered broker-dealers and their associated persons involved in the securities or investment banking business, the registration requirements are onerous and duplicative and do not provide any identified regulatory benefit. These persons are already subject to a comprehensive regulatory scheme under the jurisdiction of the SEC, which includes registration, licensing, and examination requirements. We respectfully suggest that the Commission has not provided support for imposing a new regulatory scheme (and its related compliance burdens) that in large measure duplicates existing requirements applicable to broker-dealers and their associated persons.

Section 202(a)(11) of the Investment Advisers Act of 1940 recognizes that a broker-dealer, by providing advice solely incidental to a broker-dealer transaction, does not become an investment adviser.[11] Similarly, the SEC should clarify that, for purposes of Section 15B, "advice" does not include broker-dealer advice that is solely incidental to a transaction. Broker-

[11] *See* 15 U.S.C. 80b-2(a)(11).

dealers providing advice that is solely incidental to a transaction should be excluded from the definition of municipal advisor for the same reason that registered investment advisers are in some instances excluded: they are already regulated. Indeed, in the case of dual registrants, they are already subject to two regulatory schemes.

4. Implications of Fiduciary Status

The Dodd-Frank Act amended Section 15B(c) of the Exchange Act to provide that "[a] municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.''[12]

Banks have an existing fiduciary obligation to their investment advisory and trust clients under rules promulgated by the OCC. Any additional or inconsistent layering of a municipal advisor fiduciary obligation on top of the OCC regulations could result in the bank effectively having two different levels of fiduciary obligation: one to municipal entities and another to non-municipal entities. Our members do not believe that it would be in their customers' best interests to have two different statutory standards.

Because municipal advisors are deemed to be fiduciaries under the Dodd-Frank Act, guidance is required concerning the scope of registrants' obligations, and exemptions will need to be provided to address activities that might be prohibited by such transactions, including the ability of a broker-dealer or bank to sell proprietary products or act as principal when engaging in transactions with municipal entities. To this end, on February 14, 2011, the Municipal Securities Rulemaking Board ("MSRB") published for comment draft MSRB Rule G-36 and a draft interpretative notice relating to the fiduciary duty of municipal advisors.[13] The MSRB's interpretive notice, however, does not reflect the Proposing Release, but is based on the MSRB's reading of Section 975.

We respectfully ask the SEC and MSRB to coordinate on their respective regulatory initiatives so that market participants have a complete picture of the scope of regulation proposed to apply to municipal advisors, and have an opportunity to analyze the full spectrum of regulation in order to provide meaningful comment. In the event that banks are subject to regulation as a municipal advisor, we further request the SEC to harmonize the municipal advisor's fiduciary duty with the existing OCC fiduciary duty, so that banks have one, clear standard of fiduciary duty owed to all customers.

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[12] 15 U.S.C. 78o–4(c).

[13] *See* MSRB Notice 2011-14 (Feb. 14, 2011). The MSRB also published for comment a draft Interpretive Notice Concerning The Application of MSRB Rule G-17 to Municipal Advisors, MSRB Notice 2011-13 (Feb. 14, 2011). The Roundtable and its members are currently reviewing these proposals.

5. Costs of Regulation

Based on information provided by our members, the Roundtable respectfully submits that the cost estimates included in the Proposing Release are grossly underestimated. Rather than the 6.5 hours estimated by the Commission, our members estimate that the initial preparation of Form MA would require significantly greater hours and much higher costs. Annual updates are estimated to require exponentially higher hours to update and maintain the filing. In this regard, some of our members have observed that the time required to prepare the Form MA-T to register under the Commission's temporary rules required well in excess of 6.5 hours. We note that the Form MA-T is not as comprehensive as the Proposed Form MA. In addition, particularly given that Form MA and the related rules are new, our members estimate that outside legal fees could easily exceed $25,000 for a financial institution that provides a variety of services to municipal clients. Because these requirements are new, we expect that our members would generally seek to retain more experienced counsel who are familiar with their range of activities, and that the SEC's estimate of $400 per hour would in many cases be too low.

In the case of registered broker-dealers, we respectfully note that Form MA is largely duplicative of Form BD. Accordingly, the Roundtable respectfully urges the SEC to allow broker-dealers to use their broker-dealer registration to effect registration as a municipal advisor, if required. To the extent that the SEC believes that certain data elements proposed to be included on Form MA should also be included on Form BD, we respectfully request that the SEC propose for public comment amendments to Form BD to capture the additional information. Similarly, rather than introducing a new Form MA-I to provide for registration of natural persons, we respectfully submit that Form U4 be adapted to allow for registration of individuals. Our members believe that it would be more efficient for the SEC to leverage existing registration forms, which have years of interpretative guidance behind them, than to create a new form seeking much of the same information as required by Forms BD and U4.

The Roundtable further notes that the SEC did not address at all the potential public costs from a reduction of services to municipal entities. Given the burden of registering as a municipal advisor, particularly for a small bank, we believe that there is a likelihood that smaller banks that offer a few products to a small number of municipal entities providing services in their communities would elect to discontinue serving municipal entities. As a consequence, there would be little to no regulatory benefit to the proposed duplicative and burdensome regulation.

III. CONCLUSION

The Roundtable and its members appreciate the opportunity to comment to the SEC on its proposals to register and regulate municipal advisors. If it would be helpful to discuss the Roundtable's specific comments or general views on this issue, please contact me at Rich@fsround.org. Please also feel free to contact the Roundtable's Senior Regulatory Counsel, Brad Ipema, at Brad.Ipema@fsround.org.

Sincerely yours,

Richard M. Whiting

Richard M. Whiting
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Financial Services Roundtable

With a copy to: 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

Robert W. Cook, Director, Division of Trading and Markets
Martha Haines, Assistant Director and Chief, Office of Municipal Securities