



BNY MELLON

Raymond J. Dorado
Executive Vice President, Deputy General Counsel

February 23, 2011

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

Re: File No. S7-45-10; Registration of Municipal Advisors; Exchange Act Release No. 63576

Dear Ms. Murphy:

The Bank of New York Mellon Corporation (“**BNY Mellon**”) appreciates the opportunity to comment on the Securities and Exchange Commission’s (the “**Commission**”) proposal to establish a permanent registration program for municipal advisors under Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “**Municipal Advisor Proposal**”).¹

BNY Mellon is a global financial services company focused on helping clients manage and service their financial assets, operating in 36 countries and serving more than 100 markets. BNY Mellon is a leading provider of financial services to institutions, corporations, state and municipal governments, employee benefit programs and high-net-worth individuals, providing asset management and wealth management, asset servicing, issuer services, clearing services and treasury services through a worldwide client-focused team. BNY Mellon is also a leading provider of trust, custody and ancillary services to investors world-wide and is one of the largest providers of corporate trust services globally, providing trust, agency and escrow services to a wide variety of issuers of debt securities, including debt securities issued in connection with the raising of cash for municipalities and municipal-related projects (i.e., conduit financings). It has \$25.0 trillion in assets under custody and administration and \$1.17 trillion in assets under management, services \$12.0 trillion in outstanding debt and processes global payments averaging \$1.6 trillion per day. BNY Mellon is the corporate brand of The Bank of New York Mellon Corporation, whose primary subsidiary banks are The Bank of New York Mellon, a New York chartered bank, BNY Mellon, National Association, a nationally chartered bank, and The Bank of New York Mellon Trust Company, N.A., a limited purpose nationally chartered bank. In this letter, The Bank of New York Mellon Corporation and its subsidiaries are referred to as “BNY Mellon.”

I. Introduction

BNY Mellon supports the comments submitted by the Securities Industry and Financial Markets Association (“**SIFMA**”) and jointly by the American Bankers Association (the “**ABA**”), the ABA Securities Association (“**ABASA**”) and the Clearing House (“**TCH**”) on the Municipal Advisor Proposal. In addition, in Section II below we discuss two areas that are particularly important for the Commission to address: exempting banks from municipal advisor status and clarifying the term “advice.”

Our concerns are particularly relevant to the business of providing trust, custody and banking services, including providing municipal derivatives (as defined in Section 975). Left unaddressed, these concerns could limit the services available to municipal clients from custodian banks, impairing the financial operations of, and raising costs

¹ Registration of Municipal Advisors, Exchange Act Release No. 63576 (Dec. 20, 2010), 76 FR 824 (Jan. 6, 2011).



for, municipal entities and obligated persons. In particular, the Commission's broad proposed definition of the term "investment strategies" has the potential to subject to municipal advisor regulation activities that may arguably involve a range of advice relating to traditional banking services and products, such as cash management, deposit and lending activities, and trust and custody services. As discussed more fully below, such a result would likely limit municipal entities' access to, and raise the costs of, a broad array of services offered by banks.

II. Discussion

A. Banks Should Be Exempt From Municipal Advisor Status

We support the position contained in the SIFMA and joint ABA, ABASA and TCH comment letters that Congress did not intend Section 975 to apply to banks (and other regulated institutions) with respect to their providing of advice to municipal entities or obligated persons. Absent any clear legislative history or discussion as to whether Congress intended to include or exclude banks and other regulated entities from the scope and registration requirements of Section 975, we believe that Congress' intent can be gleaned from the text of the statute itself and the institutions specifically identified in the definition of "municipal advisor." The only institutions that Congress specifically identified in the definition of "municipal advisor" are unregulated institutions.² On the other hand, the only institutions that Congress specifically excluded from registration are regulated institutions.³

Extrapolating from the examples set out in Section 975, as well as applying normal statutory interpretation, the logical conclusion is that Section 975 should only cover institutions that are similar to the examples in the statutory definition of "municipal advisor," i.e., unregulated institutions, and that regulated institutions should not be covered. To interpret Section 975 otherwise, i.e., to interpret the term "municipal advisor" to cover regulated institutions when the statute lists unregulated institutions in the definition and excludes other regulated institutions from registration, is neither logical nor consistent with the structure of Section 975.

B. Investment Adviser Exception Should Apply to Banks

If the Commission determines that regulated entities, such as banks, are covered by Section 975, the Commission should extend the investment adviser exception from municipal advisor regulation to any person that provides advice that would be subject to the Investment Advisers Act but for an exemption from registration with the Commission, such as the exemption for investment advice provided for banks. With respect to such exempted persons, such as banks, Congress has already determined that they are subject to sufficient regulation and need not be regulated by the Commission with respect to the provision of advice. In addition, banks often provide investment advisory services through personnel that are dual-hatted, as employees of both the bank and an affiliated investment adviser. Thus, requiring banks to register with the Commission as municipal advisors when acting pursuant to an exemption from investment adviser registration is inconsistent with, and would undermine, the purpose of this exemption.

C. The Commission Should Clarify the Term "Advice"

We also support the position contained in the SIFMA and joint ABA, ABASA, and TCH comment letters that the term "advice" needs to be clarified. The concept of "advice" is central to the application of Section 975. For many firms,

² Specifically, Section 975 provides that the definition of "municipal advisor" includes "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors."

³ With respect to certain activities, Section 975 excludes from the definition of "municipal advisor" the following entities: broker-dealers, municipal securities dealers, investment advisers, and commodity trading advisers.

municipal advisor status depends on whether the firm provides "advice" to a municipal entity or obligated person. It is therefore critical that there be legal certainty with respect to whether a communication constitutes "advice" within the meaning of Section 975, and the types of communications that will trigger municipal advisor status and those that will not.

In this regard, the intent and understanding of the parties should be controlling. The most obvious way for the parties to manifest their intent is to enter into an agreement or other writing. The Commission should clarify and confirm that the parties' intent and understanding, as set forth in an agreement or other writing, will govern whether the person providing a communication is a "municipal advisor." Thus, if the documentation makes clear that advice is being provided, then the communications made under the documented relationship would constitute "advice" and would be within the scope of Section 975, and the party providing such advice would be a "municipal advisor." Conversely, if the parties specify in writing that advice is not being provided, and the municipal entity or obligated person indicates that it is not relying on any communications from the other party as advice, then the party providing the communication would not be a "municipal advisor."

If there is no writing between the parties, it is important for there to be a clear understanding of what the term "advice" means. We agree with the joint ABA, ABASA and TCH comment letter that in this case the term "advice" should be given its commonly understood meaning, i.e., a recommendation to act, and not be defined to encompass a broader concept, such as investment advisory services. Indeed, had Congress intended the term "advice" to mean something broader than its commonly understood meaning, such as "investment advisory services," it could have used the broader term as it did in the definition of "solicitation of a municipal entity or obligated person" in Section 975.

In addition, in most cases in which a bank is providing a municipal derivative or other bank products and services to a municipal entity or obligated person, a third party advisor is providing advice on the transaction to the municipal entity or obligated person. The existence of such a third party advisor relationship should be viewed as further evidence that the municipal entity or obligated person is not relying on the bank for advice. Further, if the bank providing the municipal derivative is a "swap dealer" under Dodd-Frank, it would be subject to the regulatory framework that will be applicable to swap dealers and therefore municipal advisor regulation would be duplicative.

It is also important for the Commission to clarify that communications in the context of ordinary business transactions, including communications with respect to identifying and making available to municipal entities and obligated persons traditional bank products and services and negotiating the terms under which such products and services are provided to municipal entities and obligated persons, should neither constitute "advice" nor trigger "municipal advisor" status. These various types of communications are set forth in section 2(a) of the joint ABA, ABASA and TCH comment letter and in section II.A.1 of the SIFMA comment letter. In the interest of brevity, we do not repeat them here. In addition, with respect to "municipal derivatives," the Commission should clarify that the following activities do not constitute "advice":

- Providing research, general market information and product information that is not specific to a particular client and is provided to the bank's customers as part of its ordinary communications with clients or the public.
- Responding to requests for proposals or qualifications from a municipal entity or obligated person with respect to municipal derivatives.
- Providing or negotiating terms on which the bank is willing to enter into a municipal derivative transaction or other relationship, such as a deposit agreement.
- Providing information describing product alternatives that may meet the needs of a client without giving a recommendation that the client engage in any specific transaction.

The clear delineation of what activities would result in a bank being characterized as a municipal advisor in line with the parameters described in the SIFMA and the joint ABA, ABASA and TCH comment letters and above will ensure that municipal entities and obligated persons will continue to benefit from the savings and hedging protection that they currently enjoy. The activities listed in the SIFMA and the joint ABA, ABASA and TCH comment letters and above represent those that, while integral to banks offering these products to municipal entities and obligated persons,

should fall outside of what constitutes "advice." If municipal advisor status was triggered by these activities there likely would be a substantial negative impact on the economic incentive of banks to maintain this line of business.

It also should be noted that many of these communications are with respect to investment products and services traditionally provided to clients, including municipal clients and obligated persons, in connection with trust and custody accounts. Investment products are provided as either bank products made available by the trustee or custodian (such as interest bearing deposit accounts and collective investment funds) or through the trustee or custodian (such as money market mutual funds and other forms of sweep vehicles and government securities). Likewise, investment services include purchasing or selling securities in the trust or custody account. Clients expect their trustee or custodian to provide access to investment products and services. Discussions regarding these traditional products and services should not be deemed "advice" merely because they involve a municipal entity or obligated person. Similarly, discussions between a trustee or custodian bank and a municipal advisor (on behalf of a municipal entity or obligated person) should not trigger municipal advisor status. In such a case, the municipal advisor or municipal entity benefits from the protections provided by Section 975, and an additional layer of regulation is not necessary.

D. *The Effect of the Municipal Advisor Proposal on Traditional Corporate Trust, Custody and Cash Management Services*

The Commission proposed to define the term "investment strategies" to "include . . . plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity,"⁴ which is broader than the definition provided by Section 975 of Dodd-Frank.⁵ Section 975 defines "investment strategies" as "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." Corporate trustee and custodian banks often provide a number of services to municipal entities that could conceivably come within an expansive view of the definition of "investment strategies." The Commission should clarify that the traditional trust and custody services discussed below, which are offered by custodian banks, do not trigger municipal advisor status.

Investing Municipal Security Proceeds at the Direction of a Municipal Entity or Obligated Person. Corporate trustee and custodian banks (referred to in this section as "bank") may have received deposits from the proceeds of municipal securities offerings. These funds are invested at the direction of the municipality or its advisors. By the terms of the governing bond document, a municipal entity's investment policies, or applicable state statutes, the municipality will be restricted as to which types of investments it is permitted to direct the bank to invest in (these are usually referred to as "permitted investments"). Permitted investments are almost always limited to a list of highly liquid securities or bank deposits such as treasury or agency securities, repurchase programs involving treasury or agency securities, money market mutual funds, interest bearing bank deposits and highly rated commercial paper. Nonetheless, the securities that constitute permitted investments are not determined by the bank but by the municipality or its advisors. When there are uninvested funds the municipality can direct the bank to invest them in permitted investments. In connection with such direction the bank would make available to the municipality a limited menu of investment options it routinely offers that would meet the requirements of permitted investments. The municipality can then direct the bank to invest in one of these options or, in certain circumstances, an investment not offered directly by the bank. We do not believe that engaging in the foregoing activities should trigger municipal advisor status.

⁴ Municipal Advisor Proposal, at 76 FR 824, 881.

⁵ Section 975 defines "investment strategies" as advice with respect to "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."

General Cash Balances. Another key offering of custodian banks is general trust and custody services for a wide variety of investors, including corporate and municipal pension plans and municipal operating funds. As a part of providing such custodial services, a municipality can direct a custodian bank to invest in “sweep” products, where cash balances are “swept” (i.e., invested) into a variety of cash and cash equivalent investment products, such as bank deposit accounts and money market mutual funds and, specifically for pension plans, collective investment vehicles.

Providing these traditional custodian bank services and products should not trigger municipal advisor status. In the scenario described above, a municipal entity often receives advice from an unaffiliated investment adviser. The bank’s role is limited to providing the cash and cash equivalent investment options it makes available for investing cash balances. The decision as to which investment vehicle to select is left to the client and its advisors. Nor do banks typically provide advice regarding the appropriate amount of cash a municipal entity should maintain; this is the role of the investment adviser. The role of the bank is to simply provide options for the client and its adviser with respect to any cash balances in the client’s account.

We do not believe that providing of cash and cash equivalent investment options for investing cash balances in a custody account creates the kind of risk that Congress was concerned about and sought to address in Section 975. Consequently, the Commission should clarify that such activity does not trigger municipal advisor status.

E. Negotiations for Liquidity and Credit Facilities Should Not Trigger Municipal Advisor Status

Banks often act as providers of credit and liquidity facilities, such as letters of credit, to municipal entities. These credit and liquidity facilities provide credit enhancement to offerings of municipal securities. Customarily, banks conduct a risk management assessment of the municipal entity and the structure of the offering before determining whether and upon what terms the bank is willing to offer a credit or liquidity facility. A bank may determine that certain structures present risk that, as a credit or liquidity facility provider, the bank is not willing to accept. Thus, as a part of negotiating a credit or liquidity facility, a bank may communicate to the municipal entity that it would not offer the same terms, or any facility, under certain structures for an offering.

The Commission proposed exempting from the definition of “obligated person” providers of municipal bond insurance, letters of credit or other liquidity facilities.⁶ We support this proposed exemption, and agree with the Commission that providers of such credit enhancements do not require the type of protection that Dodd-Frank otherwise provides for those who borrow funds through municipal entities in municipal securities transactions.

The Commission also should clarify that negotiations between a credit or liquidity facility provider and a municipal entity or obligated person, such as the negotiations described above, do not trigger municipal advisor status. During these negotiations, the credit or liquidity facility provider is actually in an adverse position vis-à-vis the municipal entity, and therefore should not be viewed as providing advice with respect to the issuance of municipal securities. As noted above, any discussions regarding the structure of a transaction are motivated by the credit or liquidity facility provider’s risk management concerns, not the municipal entity’s interest in the contemplated offering.

F. Securities Lending Arrangements Should Not Trigger Municipal Advisor Status

A municipal entity that uses a custody account may also want to engage in securities lending. A custodian bank may assist a municipal entity in selecting securities appropriate for lending, developing investment guidelines for securities lending, and offering vehicles for holding and investing cash collateral.

⁶ Municipal Advisor Proposal, at 827.

The Commission should clarify that assistance with selecting securities appropriate for lending and assisting in the development of investment guidelines for securities lending do not constitute advice with respect to the investment of proceeds of municipal securities, and therefore should not trigger municipal advisor status. Selecting securities appropriate for lending and developing investment guidelines are multiple steps removed from an entity's investment decision. For example, a public pension fund may receive advice regarding how to invest its funds, and after its funds are invested, may determine that it should engage in securities lending. Only at this point would a custodian bank typically provide the public pension fund with assistance in developing investment guidelines and executing securities lending transactions. Such assistance regarding the execution of an investment decision that was previously made does not trigger the same regulatory concerns regarding investment advice, such as the need to ensure that a municipality understands the risks and benefits of a particular investment strategy, and therefore should not trigger municipal advisor status.⁷

In addition, a custodian bank is not normally aware of the origin of the funds held in the custodian account, including whether the funds are direct proceeds from an offering in municipal securities. As noted in the SIFMA letter, the Commission should clarify that a person would not be considered to provide advice that triggers municipal advisor status if the person reasonably believes that the funds for the financial activity on which the person is advising are from an account of the municipal entity or obligated person other than an account specifically for the proceeds of municipal securities or escrow funds that contains funds from multiple sources other than the initial proceeds of a municipal security, and that funds would not be considered to be proceeds of municipal securities once they are commingled with other public funds. We agree with SIFMA that service providers need to be able to offer services to municipal entities without having to guess whether their activity will trigger municipal advisor status because they are advising on funds deemed to be proceeds of an offering of municipal securities.

Moreover, for the same reasons discussed above regarding the investment of cash balances, municipal advisor status should not be triggered by the investment of cash collateral from securities lending pursuant to investments approved by a client.

III. Conclusion

For the reasons discussed above, the Commission should revise the Municipal Advisor Proposal to exclude traditional trust, custody and banking services from being regulated as municipal advisory activities. To do otherwise would create economic disincentives to offer these services and thereby limit municipal entities' access to, and raise the cost of, critical services that do not present heightened regulatory concerns that warrant municipal advisor status.

* * *

⁷ If the Commission determines that assisting a municipality with a decision to engage in securities lending or with developing investment guidelines for securities lending could be viewed as "advice," we believe that such activity should benefit from the investment adviser exception, as discussed in Section II.B above.

Ms. Elizabeth Murphy
February 23, 2011
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We would be happy to discuss the foregoing at your convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Raymond J. De". The signature is fluid and cursive, with a large initial "R" and "J".

cc: Mary L. Schapiro, Chairman
Kathleen L. Casey, Commissioner
Elisse B. Walter, Commissioner
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Robert Cook, Direct, Division of Trading and Markets
James Brigagliano, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Victoria Crane, Assistant Director, Office of Market Supervision

Lynnette Kelly Hotchkiss, Executive Director, Municipal Securities Rulemaking Board