

I am submitting the following comments respectfully in support of the Commission’s proposal to define the term “municipal advisor” so as to include attorneys not providing traditional legal advice, engineers not performing engineering services, and others preparing expert work products that provide especially critical advice to municipal entities or obligated persons in connection with the issuance of municipal securities.

Attorneys

The legal profession generally is regulated pursuant to state judiciaries or bar associations in connection with the performance of legal services. In the municipal securities market, however, it has long been recognized that attorneys providing other services are stepping beyond their recognized roles.

For example, *The Function and Professional Responsibilities of Bond Counsel*, published by the National Association of Bond Counsel (NABL) in 1995, states—

Where the bond lawyer undertakes to exercise the option to provide non-legal advice, he or she should consider whether to advise the client that advice on financial aspects of the transaction may not subsequently be used to establish a defense of reliance on advice of counsel. *See Draney v. Wilson, Morton, Assaf & McGilligott*, (D. Ariz. 1984), CCH Fed. Sec. L. Rep. 1984 Transfer Binder ¶ 91,463, in which defendant’s reliance on counsel as a defense against scienter or negligence was stricken where the advice was on financial matters and hence outside of counsel’s “respective area of responsibility,” and of his “expertise.”

More recently, *Disclosure Roles of Counsel* (3d ed. 2009), published by NABL and the American Bar Association, states in n. 26 at p. 110—

In *Draney v. Wilson*, 592 F. Supp. 9 (D. Ariz. 1984), defendants in a securities fraud case attempted as a defense their reliance on bond counsel regarding “every aspect” of a transaction, including economic feasibility of the project in question. The court denied the defense “because the County defendants entrusted to bond counsel matters outside of counsel’s expertise” Further, since the defendants relied on bond counsel to judge the reliability of all matters relating to the project, including important nonlegal aspects such as the economic viability of the project, they created a conflict by placing an “inordinate amount of responsibility and control” on bond counsel that undermined the independence of bond counsel’s judgment. *Id.* at 11. The court implicitly defined the role of bond counsel by stating the legal matters on which defendants could rely on bond counsel, such as adequacy of notice and sufficiency and correctness of bond resolutions.

Attorneys, like anyone else, providing non-legal advice to municipal entities and obligated persons should be subject to the municipal advisors’ fiduciary duty, special

antifraud provision, professional standards, and other regulation, so that municipal entities and obligated persons may rely upon that advice with confidence.

Engineers, Accountants, and Others Preparing Expert Work Products

Expert work products are especially important to municipal entities issuing municipal securities and to obligated persons undertaking obligations in connection with those securities. These feasibility studies, financial forecasts and projections, appraisals of assets securing or otherwise supporting payment of the municipal securities, and other expert studies and work products are extremely important to municipal entities' and obligated persons' decisions to proceed with municipal securities issues.

Moreover, while expert work products may be present in other municipal securities issues, in some of the riskiest municipal securities issues—land-based financings and financings for start-up or rapidly expanding governmental enterprises or for private projects, such as for example, highly risky nursing homes, assisted living facilities and charter schools—expert work products fulfill prominent roles for both municipal entities and obligated persons, on one hand, and investors who receive official statements containing such studies, on the other.

Further, many municipal entities rely very heavily upon various other forms of expert work products, such as rate studies, studies for tax increment bond issues, tax rate studies, and the like before proceeding to issue municipal securities.

I have reviewed literally dozens of such studies in defaulted municipal issues. I have seen firsthand undisclosed conflicts of interest in which private parties or financial firms employ and pay purported “experts,” including engineers and others, that lack training or qualifications. I have seen the use of assumptions that the experts do not consider reasonable, but without disclosure of that information. I have discovered that many such studies are prepared, at times almost on the backs of envelopes, pursuant to idiosyncratic unstated internal “standards” of the preparing expert firms, in the absence of professional standards applicable to such studies, but again without disclosure of that information.

Some of the most spectacular defaults in the municipal market involved start-up governmental facilities and private nursing homes and other health care facilities that were the subject of expert studies prepared by engineers and accountants. Investors have lost billions of dollars in connection with those defaults.

Need to Protect Municipal Entities, Obligated Persons and Investors

In the prevailing circumstances of the municipal securities market, there is an overriding need to protect municipal entities and obligated persons in connection with the issuance of municipal securities by the imposition upon any party advising them (subject to the narrow Dodd-Frank exemptions) of the fiduciary duty of municipal advisors, together with application of the special antifraud provision, professional standards, and other municipal advisor regulation.

Tens of thousands of infrequent or unsophisticated municipal securities issuers are easily confused, and are vulnerable, regarding the nature of their relationships with experts and regarding the qualifications and appropriate roles of experts. This is made more difficult because the governing bodies of elected officials commonly consist of everyday citizens—lay people who know virtually nothing about finance roles or practices. Additionally, there is a relatively high turnover rate among elected officials, so that even though an official may gain experience, that experience is easily lost.

Since the beginning of the financial crisis, during which it became graphically apparent that many issuers had an inadequate understanding of complex transactions into which they entered, and of their roles and responsibilities in those transactions, a number of market participants, and Commission personnel, have stated that perhaps issuers that could not understand the market and its practices should not engage in securities offerings to the public. Further, there is a growing practice of issuers accessing direct bank loans to minimize costs.

I believe that, in many cases, direct loans are useful for issuers. On the other hand, when issuers cannot pay the typical 10-, 15- or perhaps 20-year amortizations that direct lenders require, the issuers must, by necessity, enter the securities market. They cannot fund much public infrastructure otherwise. I am certain the Commission would wish to protect those tens of thousands of local governments, so they are able to participate confidently in the municipal securities market based upon appropriate advice.

I submit respectfully that Dodd-Frank’s “municipal advisor” concept is a vehicle by means of which issuers will be able to receive the professional expert guidance they need. In terms of numbers, such a corps of municipal advisors must be grown, regulated and trained appropriately, but if the Commission makes it a key goal to facilitate those developments, then the interests of both issuers and investors will be enhanced. It then will be possible for unsophisticated issuers to remain in the market because there will be appropriate professional expert guidance available to assist them regarding the riskiest municipal securities transactions and directed to placing their interests first.

Now that the Dodd-Frank statutory structure is in place, and the regulatory structure is beginning to take shape, I submit respectfully that the Commission should encourage municipal entities and obligated persons to seek appropriate expert advice from regulated municipal advisors who are subject to the fiduciary duty, professional standards, and other aspects of municipal advisor regulation. When municipal entities or obligated persons rely upon inappropriate advice that is not in their best interests, that advice may supplant the advice the entities and persons should receive. Further, it may lead to the conduct of unsound transactions that should not be conducted and to faulty disclosure to investors.

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