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Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Comments to Proposed Rulemaking; File Number S7-45-10

Ladies and Gentlemen:

Thank you for the opportunity to comment on Rules 15Ba1-1 through 15BA1-7 of the Securities and Exchange Act of 1934 (the "Exchange Act") proposed to be issued by the Commission pursuant to SEC Release 34-63576, dated December 20, 2010 (the "Proposed Rules"). I realize that these comments will be received well beyond the deadline therefor but hope that they may still be considered by the Commission in its final rulemaking. My comments will be limited to a few sections of the Proposed Rules and the SEC Staff discussion thereof (the "Discussion") and leave other comments to others with more expertise in the areas affected.

In General

I am an attorney in private practice that represents a number of companies in the solid waste, recycling and related energy industries. My practice includes (but is not limited to) giving advice to those clients related to negotiations with lenders who provide financing to the industry. There are many other lawyers, accountants and others who represent one or more of these type clients including lawyers and law firms that specialize in "project finance" which is non-recourse financing for specific projects where the lender is secured only by the contracts and other assets of the project.

After review of the Proposed Rules, the Discussion, the Exchange Act and comments of other interested parties, I do not believe that such activities would require those of us who include such advice in our broader representation to register as "municipal advisors". However, I further believe that there is considerable ambiguity which, if interpreted incorrectly (in my opinion) could lead to unintended consequences. That is because some of our clients do take advantage of the fact that much of their capital expenditures can be financed through the issuance of tax exempt bonds issued under Section 142 of the Internal Revenue Code by a "conduit" public issuer. As a result, in negotiation of credit arrangements for clients, in addition to provision of typical LIBOR and "Base Rate" loan options, provisions allowing--in some circumstances--for the lender to also issue letters of credit securing a bond issue are often included in the credit agreements. While this option may be less attractive in the next few years as the provisions of the Basel 3 accords begin to take effect and the additional reserve requriements for letters of credit such as those may make such financings less attractive, some of my clients still avail themselves of the opportunity.

While these bonds are almost invariably issued in 7-day variable rate mode, and although I am informed by the underwriters of such bonds that the purchasers thereof rely on the letter of credit and the credit rating of the lender issuing same for their purchase decision rather than the ultimate borrower, and security/collaterial provided by these borrowers goes to the lender/letter of credit issuer and not the bondholder, and other factors effectively distance my clients from direct obligations to bondholders, these clients would nevertheless be "Obligated Persons" under interpretations of that term in the Exchange Act with which I am familiar.

It is important to understand that the "real" borrower/lender relationship is between the borrower and the bank issuing the letter of credit, one bank actually describing these transactions from their viewpoint as "tax exempt loans". This has become even more obvious as some banks continue to propose their direct purchase of bonds benefiting their clients even after the expiration of temporary advantages for banks to direct purchase tax exempt debt at the end of last year. In such cases, there is no public offering and the whole transaction is negotiated between bank and borrower with the issuer having little to do with structure.

This raises three questions which I will discuss and then suggest some remedies:

- First, are such activities solely on behalf of these types of obligated persons meant to be—or due to ambiguities in the relevant language, could they be—subject to regulation and registration?
- Second, given the Commission's power to interpret and exempt ably discussed in the Comments to the Proposed Rules by the National Association of Bond Lawyers dated February 22, 2011 (the "NABL Comments"), on Page 2 to which, for the most part, I subscribe, should these activities alone require regulation and registration?
- And finally, even if these activities would otherwise require registration, are there exemptions from that requirement under which they would fall.

Do Such Activities Constitute "Municipal Advisor" Status?

I would answer that I don't think so to the first question above whether they are performed by a private company's accountant, lawyer, or other advisor. The ambiguities to which I refer perhaps give us some guidance as to the intention—or at least the primary intention---of the Dodd-Frank legislation and the Proposed Rules related thereto. By that I mean that while the legislation was clearly meant to regulate what have normally been termed "financial advisors" retained by municipalities to advise them on municipal bond transactions, and while the term "obligated person" was attached, almost all of the Proposed Rules and discussion relate only the former, and not to the latter and in fact, the latter is often seemingly included almost as an afterthought. And, I think they therefore do not recognize how representation of "obligated persons", at least those like our clients, differs from representation that is typically provided by "financial advisors" who provide such advice to an issuer or other municipal entity.

First, while attorneys and accountants are regulated by governmental and professional associations and investment advisors, underwriters and others by the SEC, MSRB, etc., I do not believe the Dodd-Frank legislation was intended to expand the SEC's regulatory powers to persons who assist clients on matters which deal with borrowing by the client from its bank.

I do not and have never represented any municipal entity (and I imagine most of my colleagues who represent similar environmental companies haven't either) nor, in the absence of the words "obligated person" would any reasonable person consider either me or my colleagues to be "municipal advisors". (To be perfectly clear, notwithstanding that the words "obligated person" are indeed included in the definition, I do not believe that my work meets the definition of "municipal advisor" in any event.) Having said that, I appreciate that some of the Commission's questions presented for discussion seemed designed to elicit exactly the type (and hopefully the advice) of comments that I present here.

I will give some examples of what I mean in the Proposed Rules and Discussion. The Discussion in particular is rife with sentences which refer to advice or services rendered to municipal entities without mention of "obligated persons". Among the many references are:

- The Discussion describes the statutory provisions of Dodd-Frank:

  > … distinct groups of professionals that offer different services and compete in distinct markets. The three principal types of municipal advisors are: (1) financial advisors, including, but not limited to, broker-dealers already registered with the Commission, that *provide advice to municipal entities* with respect to their

issuance of municipal securities and their use of municipal financial products; (2) investment advisers that advise municipal pension funds and other municipal entities on the investment of funds held by or on behalf of municipal entities (subject to certain exclusions from the definition of a "municipal advisor"); and (3) third-party marketers and solicitors. [emphasis mine] See Discussion, Page 21.

- "Municipal advisors also engage in municipal advisory activities with respect to municipal financial products." See Discussion, Page 7. Well, I don't other than to refer clients to the Underwriter and/or their bank for discussion of swaps and other hedging devices and yet the discussion could be read to apply to my activities which, I believe, is not intended.

- "In addition, municipal advisors may provide advice to municipal entities concerning investment strategies." See Discussion, Page 7. Again, I don't. And, again there is no mention of obligated persons to which this doesn't seem to apply except that since "municipal advisor" is defined to include obligated persons, it actually might.

I could go on as there are such references to "advising municipal entities" without mention of obligated persons on many pages in the Discussion but I trust that these few examples illustrate my point. That is, the Proposed Rules, in properly focusing on those that actually do advise municipalities, do not really address obligated persons and therefore could have unintended consequences for those of us who advise such persons. And, lack of such discussion necessarily can lead to misunderstandings related to the meaning of general regulatory terms that may apply differently to parties whose regulation is not the primary focus of the statutory and regulatory effort.

I do not believe that me and my colleagues are "persons" who provide 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 concerning such financial products or issues, or (ii) that undertakes a solicitation of a municipal entity." 15 U.S.C. 78o-4(e)(4)(A). But, I can't be sure of that. First, my role is to assist private company clients in negotiation with their banks that provide them with credit. In many cases, accountants and others also assist with that process. But, incidental to being sure clients have the opportunity to use that credit in the most cost effective way, provision for the issuance of letters of credit backing bond issues is often included. If a client decides to pursue bond financing, we generally do comment on documents to which they are a party, and participate in the normal conference calls, etc. connected therewith. I think that activity should not make anyone a municipal advisor as pointed out very effectively by the NABL Comments.

Second, we don't give advice to our private clients about municipal financial products other than as noted below. Nor do we provide advice with respect to the structure of the municipal bonds—as I said, these are almost invariably letter of credit backed, variable rate demand obligations transactions ("VRDO") which the underwriter "structures". (Which, during the height of the financial crisis did suffer a temporary increase in rates due to market confusion with auction rate and other securities without the liquidity and security features of these letters of credit, but did not result in any losses to bondholders.) Obviously we advise our clients as to what the documents mean and given that the bonds are issued as VRDO's, we can tell them about the availability of swaps or other hedging devices ("municipal financial products") but we do not advise them as to the purchase, pricing, structure or other matters involved in the purchase of those products but instead refer them to the bank and/or the underwriter. As for "timing" and "terms", the timing is up to the client, and the terms are governed for all practical purposes not by the bond documents but by the Credit Agreement which governs all the client's debt whether or not there is any bond component at all. So, does all that bring me and my colleagues into the regulatory and registration scheme? I don't think so but…

Should Those Activities Require Registration as a Municipal Advisor?

I don't believe such a requirement was intended by the Dodd-Frank Act. I have not done the thorough study of legislative intent that has necessarily been done by the Commission and NABL and other commentators. However, the comments of the Municipal Securities Rulemaking Board to the Proposed Rules summarize them pretty well by quoting the Exchange Act:

> The MSRB's rulemaking authority with respect to municipal advisors and dealers is established under Exchange Act Section 15B(b). That section provides that MSRB rules for municipal advisors must, among other things: (1) promote fair dealing, the prevention of fraudulent and manipulative acts and practices, and the protection of investors, municipal entities, obligated persons and the public interest; (2) prescribe means reasonably designed to prevent acts, practices, and courses of business that are not consistent with a municipal advisor's fiduciary duty to any municipal entity for whom it acts as a municipal advisor; (3) prescribe professional standards; (4) provide continuing education requirements; (5) provide for periodic examinations; (6) provide for recordkeeping and record retention; and (7) provide for reasonable fees and charges necessary or appropriate to defray the costs and expenses of operating and administering the Board. MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for

> the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. See MSRB Comments to Proposed Rules Dated February 22, 2011, Page Two

First, I will discuss "protection". The Commission has already determined to exempt providers of credit enhancement from regulation and registration. The rationale is expressed in the Discussion:

> "As providers of credit enhancement, these entities are not borrowing funds through a municipal entity and, therefore, the commission believes they do not require the type of protection that should be applicable with respect to those who borrow funds through municipal entities in municipal securities transactions. See Discussion, Page 24.

I would make two comments. First, does this mean that the banks need no protection but my implication, my clients do? I would be happy to compare my clients' management performance with many banks' which calls into question who really might need "protection". Second, and more importantly, despite the multiple goals cited by the MSRB, I presume the most significant goal remains protection of the investor and the other goals secondary at best (or at the very least, the emphasis of the Discussion is almost exclusively on protection of investors and municipal entities). If so, why exempt one obligated person (the bank), and not the bank's borrower (my client) which is, after all, one more step removed from a direct obligation to the bondholders as a practical matter due to the existence of a direct pay letter of credit. The Commision has identified one distinction which is that bank is not a borrower and the client is. True, but to the investor in these types of letter of credit backed bonds, the bank is the initial and primary obligor and the credit of *that* party and not my client is the basis on which they have invested in the first place. (And when I say that, I mean that according to the underwriters active in financing these types of companies, without the letter of credit, it is not a matter of price but instead of an inability to access the public markets at all.) In sum, I think it perfectly proper to exempt credit enhancement providers but, the fact remains that I don't believe that the investor is protected any better by requiring registration of advisors to companies like my clients but not requiring registration of credit providers who are the primary obligors as far as the investor is concerned.

The issue is even more starkly evident when one considers a bank direct purchase of a bond issue benefiting its borrower. Presumably, just because the bank is serving as bondholder/lender rather than credit enhancer, it still does not need protection from the regulations (or does it?). The bank and borrower would negotiate in exactly the same way and the terms of the loan would not differ materially whether the bank was providing funds through purchasing bonds or using its own funds to provide a LIBOR based loan. Why on earth would the borrower in one case need regulatory protection and not in the other?

Items (3) through (7) summarized in the MSRB comments also are problematic were I and my colleagues required to register. That is because what we do bears little elationship to what a “financial advisor” to municipalities does. As I have pointed out above, the financial covenants and other parts of such credit arrangements between businesses and their banks bear little relationship to those that might apply to a municipal, educational or other non-profit borrower, for example. (And vice-versa.) If a test were put together embodying both corporate finance and municipal finance concepts, I suspect municipal advisors would have a difficult time with the former and those of us who advise companies, a difficult time with the latter. But, I do not believe it is necessary to try to resolve this issue because I believe regulation of persons who advise private companies (where any nexus with municipal bonds that may exist is incidental to that advice) is far beyond the scope of the Dodd-Frank Act and the Proposed Rules.

Is Such Advice Exempt From Regulation/Registration

As noted above, I do not believe that activities described above should give rise to a requirement that the person giving the advice as limited in my discussion should have to register as a municipal advisor. However, if ultimately the Proposed Rules are clarified and such registration is deemed required, I believe that at least for those of us who are attorneys, rendering legal advice on the matters discussed herein is or should be covered by the statutory exemption for attorneys in the Dodd-Frank Act. The Commission has framed the question thusly:

> The Commission proposes to exclude from the definition of municipal advisor attorneys offering legal advice or services of a traditional legal nature. As discussed above, the Commission interprets this exclusion to apply only when the legal services are to a client of the attorney that is a municipal entity or obligated person. Is this an appropriate interpretation? Please explain. Should the Commission provide an exclusion for all activities of an attorney as long as that attorney has an attorney-client relationship with the municipal entity or obligated person? Why or why not? Should the scope of the exclusion for attorneys be different for attorneys for obligated persons? Why or why not? Neither the Dodd-Frank Act nor the proposed rule defines the term “services of a traditional legal nature.” Is the meaning of the term sufficiently clear? If not, should the Commission provide additional interpretive guidance? How should the Commission interpret the term?

I believe that at least as to those of us who advise obligated persons who are conduit borrowers, the Commission should indeed provide an exemption for all activities of an attorney as long as that attorney's attorney-client relationship is limited to that with an obligated person as opposed to the issuer or other municipal entity. As noted above, I agree with the NABL comments that the exclusion should apply even when the attorney is participating in normal conference call or other activities with other parties involved in a bond issue and giving "advice" which itself may not be protected by the attorney-client privilege, as long as the attorney-client ***relationship*** exists. And, I believe the "services of traditional legal nature", at least for those of us that advise obligated persons as opposed to municipal entities, should be interpreted in as broad a manner as possible in keeping with the American Bar Association Model Rules which are cited below.

I strongly disagree with the Commission and the NABL Comments in their focus on determining exemption based on the supposed primary reason for a person's engagement *by an obligated person*. I believe this is another case where the intent is to discuss lawyers advising municipalities rather than the services to obligated persons that I perform. Perhaps someone engaged *directly* by the municipal entity whose engagement is primarily for financial purposes (and who is actually giving the types of advice to that municipality described in the definitions and Proposed Rules) should be a municipal advisor and not be exempt merely because that person is a lawyer. But, I don't think any such "primary reason" test should be applied to those advising obligated persons for two reasons: First, my colleagues and I in most cases represent our clients for long periods, rather than on a transactional basis. While I imagine that there are municipal financial advisors that are retained over longer periods, I understand that most of that work is done only when a bond issue is contemplated even in cases where there is a long term retention. As a result, while it may be relatively easy to determine the primary purpose of a municipal type financial advisor's engagement, it will prove virtually impossible to determine ours. For example, does the Commission wish to have us make such determination on an hourly basis by counting "purely financial" and "purely non-financial" time? How do we determine that when a single discussion with a client can include aspects which could be considered to be both? What about when we assist a client with the negotiation of a new integrated credit agreement which allows the credit provided to be used as conventional loans or in some cases, as letters of credit supporting a bond issue. If that client then wants to do a bond issue shortly after the credit agreement is finalized, would that make my work on the credit agreement "primarily" related to that bond issue? What if they wait three years, is that work therefore not primary?

Those attorneys that specialize in project finance may advise clients more often on single transactions but even in those cases, the great majority of the work is done without regard to whether the client's project qualifies for tax exempt debt, much less whether they will ultimately use it.

Second, while being sure that some access to letters of credit securing bond issues is an important part of any negotiation with a bank for the environmental and waste management/recycling companies that I and my colleagues represent, it is only incidental to negotiating the credit arrangemetns themselves. We, and incidentally the banks who provide the letters of credit, are “agnostic” as to whether or not the credit is actually used in the letter of credit form and bonds issued. While it is typical, at least when a bond issue closely follows new credit negotiations for us to be paid in part at the time of (but not necessarily from proceeds of) a bond issue, our being paid for assistance in negotiation of the new credit is not contingent on the closing of the bond issue. As I said, in that context, we do provide advice to our clients during document review but even the Commission seems to believe that such work, *even when provided to a municipal entity*, is exempt:

> Generally, the Commission interprets advice provided by a lawyer to its client with respect to the structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities to be services of a traditional legal nature if such advice is provided within a lawyer-client relationship specifically related to such products in conjunction with related legal advice. Thus, for example, advice comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering, would be considered to be services of a traditional legal nature, as would advice concerning the tax consequences of alternative financing structures or advice recommending a particular financing structure due to legal considerations such as the limitations included in existing contracts and indentures to which the issuer is a party. <u>See Ibid, Page 38.</u>

But then, the Discussion continues:

> However, advice which is primarily financial in nature, such as advice concerning the financial feasibility of a project or financing, advice estimating or comparing the relative cost to maturity of an issuance depending on various interest rate assumptions or advice recommending a particular structure as being financially advantageous under prevailing market conditions, would be primarily financial advice and not services of a traditional legal nature. <u>See Ibid, Page 38.</u>

How are we to interpret those two parts of the discussion, read together? In the first excerpt, the matters are presumably financial in nature but nevertheless “of a traditional legal nature” and thus exempt. But, somehow the examples in the second excerpt are evidently not. As NABL points out, the American Bar Association Model Rules of Professional Conduct (“Model Rules”) requires an attorney, in representing his client, to refer not only to the law but also “….to other considerations such as…economic…factors that may be relevant to the client’s situation.” I subscribe to NABL’s view that as

attorneys we are already well regulated. I would also point out that the Model Rule cited would force those of us in the legal profession that have some understanding of financing to make an impossible choice: Either comply with the Model Rules on that point and registering as a municipal advisor; or not providing advice as to the "other considerations" of which we have knowledge and competence. (For the record, I don't advise on those matters although my advice sometimes includes predictions as to what a lender will think
of a project or financing, as opposed to whether the project or financing itself is feasible or will ultimately prove successful—my clients make those decisions themselves and would not listen to me if I did try to advise them on that. And again, even that is in the context of advising clients negotiating overall credit arrangements where tax exempt bond issues are only one possibility in certain circumstances.)

Summary

I would clarify the Proposed Rule and adopt a further exemption/clarification making it clear that a person who advises an obligated person in an arms length transaction with a lender on credit arrangements which may include provision for a lender providing credit enhancement or a direct purchase of bonds will not be considered a municipal advisor merely due to the rendering of such advice or the inclusion of such a provision.

I believe lawyers or others representing obligated persons should be treated differently than those representing municipalities. The focus of the Dodd-Frank legislation is clearly the latter and it should not be interpreted to regulate advisors to private companies merely because they may occasionally access the tax exempt market through credit enhancement provided pursuant to a credit agreement which also deals with other loan facilities clearly not the subject of Dodd-Frank.

In my opinion, the Commission should make it clear that any activities of an attorney to an obligated person are exempt as long as the attorney has an attorney-client relationship with that obligated person. As attorneys, we are already well regulated and subject to various ethical and other obligations which protect the client.

Thank you for considering these comments.

Sincerely,

ANDREW S. ROSE