



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

May 24, 2011

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

Re: Proposed Regulation of Municipal Advisors, File No. S7-45-10

Dear Ms. Murphy:

I am writing to convey the comments of the Office of the Comptroller of the Currency (“OCC”) on rules that the Securities and Exchange Commission (the “Commission” or “SEC”) has proposed to implement the municipal advisor registration requirement mandated by Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Section 975”).¹ Section 975 defines the term “municipal advisor” and establishes municipal advisors as a new category of SEC registrant. The Proposed Rules broaden the definition of municipal advisor, define additional terms, provide exclusions, and establish the related registration requirements.

The Commission specifically requested comments on whether to “exclude from the definition of a ‘municipal advisor’ banks providing advice to a municipal entity or obligated person” with respect to certain traditional banking products and services, including deposit transactions and trust and fiduciary services.² Section 975 was designed to strengthen oversight of the municipal securities market by extending registration requirements to previously unregulated transactions.³ In contrast, traditional banking products and services, such as commercial deposit-taking and trust and fiduciary services, already are subject to extensive supervision and regulation. In our view, imposing the additional registration, examination, and other requirements as set forth in the Proposed Rules to those services is unnecessary and duplicative. We therefore strongly support the type of exclusion from the definition of “municipal advisor” upon which the Commission sought comment.

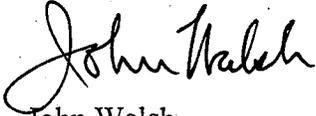
¹ Registration of Municipal Advisors, SEC Release No. 34-63576, 76 Fed. Reg. 824 (Jan. 6, 2011) (“Proposed Rules”).

² 76 Fed. Reg. at 837.

³ S. Rep. No. 111-176, at 147 (2010).

Attached are OCC staff comments that describe our concerns in more detail. The OCC appreciates the opportunity to comment on this proposal, and would welcome the opportunity to discuss any questions regarding these comments, as appropriate. OCC points of contact are Ellen Broadman, Director, Securities and Corporate Practices (202-874-5210) and Judy Foster, Risk Specialist, Credit and Market Risk (202-874-7450).

Sincerely,

A handwritten signature in cursive script that reads "John Walsh".

John Walsh
Acting Comptroller of the Currency



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**OCC STAFF COMMENTS RE: SEC PROPOSAL TO
IMPLEMENT MUNICIPAL ADVISOR REGISTRATION REQUIREMENTS**

Background

Section 975 amended the Securities and Exchange Act of 1934⁴ (“Exchange Act”) to add “municipal advisors” as a new category of regulated persons to the existing regulatory scheme for municipal securities brokers and dealers. A municipal advisor is subject to a comprehensive regulatory framework developed by the Securities and Exchange Commission (SEC) and the Municipal Securities Rulemaking Board (MSRB). The SEC has proposed rules implementing Section 975.⁵ In addition, Section 975 directs the MSRB to issue rules providing for, among other things, continuing education requirements and professional standards specific to municipal advisors.⁶

The statute defines a municipal advisor as someone who “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...”⁷ The statute limits municipal financial products to “municipal derivatives, guaranteed investment contracts, and investment strategies.” The statute also clarifies that investment strategies are “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.”⁸ In the Proposed Rules, the Commission expands the meaning of “investment strategies” to include “plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity,” and requires that

⁴ 15 U.S.C. § 78a et seq.

⁵ Registration of Municipal Advisors, SEC Release No. 34-63576, 76 Fed. Reg. 824 (Jan. 6, 2011) (“Proposed Rules”).

⁶ See MSRB Notice 2010-47 (Nov. 1, 2010). Recently the MSRB has requested comments on several rules that would apply to municipal advisors, including: Rule G-17 (applying fair dealing rule to municipal advisors); Rule G-20 (gifts and gratuities); Rule G-36 (fiduciary duty rule); and a draft proposal prohibiting “pay to play” activities. The MSRB has not yet issued proposals on the qualifications, training, and certification requirements for municipal advisors.

⁷ 15 U.S.C. § 78o-4(e)(4).

⁸ 15 U.S.C. § 78o-4(e)(5) and 15 U.S.C. § 78o-4(e)(3).

persons advising municipal entities on investment strategies and other financial products register as “municipal advisors.”⁹

It appears that various traditional banking products and services provided to municipal clients would satisfy the SEC’s proposed definition of “investment strategies.” As a result, banks would become municipal advisors simply by providing these traditional products and services. While the Proposed Rules include certain exemptions, the proposed framework does not exempt from registration banks that offer traditional banking products and services to municipal entities, including deposit products, and trust and fiduciary services.

For decades, banks have provided traditional banking products and services to municipal entities and obligated persons¹⁰ as an integral part of their commercial, trust, and fiduciary businesses. Traditional banking products and services are critical financial management tools, especially for smaller municipalities whose financing needs cannot be addressed through public offerings of municipal securities. In particular, as an alternative to public financing, a municipal entity may prefer to obtain funding through a bank loan, which is typically less expensive and more readily available in smaller sums. Municipal entities may also opt to minimize their liquidity risks and investment concerns by utilizing the bank’s cash management services for deposit accounts.

Banks’ deposit accounts, loan transactions, trust and fiduciary services, and other traditional products and services already are subject to an extensive and comprehensive regulatory framework and supervision by the federal banking agencies. The OCC monitors, assesses, regulates, and enforces compliance with federal regulations, guidance, and policies regarding all bank activities, including deposit accounts, trust services, and other traditional banking products and services provided to all bank customers.¹¹ In addition, the OCC evaluates banks to ensure the products and services offered do not expose the institution to litigation, financial loss, or reputation risk.¹² Thorough on-site examinations occur on a regular basis, and at large banks, the OCC has examiners on-site full-time. Banks must develop internal recordkeeping and auditing systems to track transactions with all bank customers, including municipal entities, which facilitates an effective examination process and ensures banks are themselves monitoring the

⁹ 76 Fed. Reg. at 830. However, it is unclear which types of communications would be considered “advice” because neither Section 975 nor the Proposed Rules define the term.

¹⁰ “Obligated person” means “any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.” 15 U.S.C. § 78o-4(e)(10). The SEC also clarified that obligated persons can include entities acting as conduit borrowers such as private universities, non-profit hospitals, and private corporations. 76 Fed. Reg. at 829 n.86.

¹¹ See, e.g., Comptroller’s Handbook, *Bank Supervision Process* (2007); Comptroller’s Handbook, *Asset Management* (2000); Comptroller’s Handbook, *Large Bank Supervision* (2010); Comptroller’s Handbook, *Community Bank Supervision* (2010).

¹² See, e.g., Comptroller’s Handbook, *Bank Supervision Process* (2007) (describing the evaluation of a bank’s reputational risk).

activities as well.¹³ The OCC evaluates the effectiveness of the recordkeeping systems during the extensive on-site examinations.¹⁴ The OCC also analyzes bank management to ensure the leadership at each bank has the training and experience necessary to provide the products and services offered by that bank.¹⁵

Traditional banking products and services are critical to the day-to-day financial operations of a municipal entity. Given the extensive and well-established regulatory and supervisory framework governing traditional banking products and services, discussed in more detail below, the municipal advisor framework in the Proposed Rules would be unnecessary and duplicative. At a minimum, the Commission should clarify that banks providing municipal entity customers advice regarding traditional banking products including deposit accounts, savings accounts, certificates of deposit, bankers acceptances, bank loans and letters of credit, and certain loan participations do not need to register as municipal advisors.¹⁶

Neither the statute nor the corresponding legislative history indicate that Congress intended that the registration requirements in Section 975 be triggered by providing traditional banking products and services to municipal entities. Rather, Congress sought to target previously unregulated market participants and financial transactions, not participants in already highly-regulated banking activities.¹⁷ In particular, Congress identified financial advisors, certain third party solicitors, and individuals marketing complex financial instruments such as guaranteed investment contracts, swaps, and other municipal derivatives as the intended group of municipal advisors.¹⁸ Notably absent from this list is any reference to retail bankers or the traditional banking products and services they provide.

Treatment of Municipal Deposits, Letters of Credit, and Liquidity Facilities

¹³ See, e.g., 12 C.F.R. § 9.8 (retention of records for all fiduciary accounts); 12 C.F.R. § 12.3 (securities recordkeeping requirements); 12 C.F.R. § 204.3 (requiring filing of a report of deposits); 12 C.F.R. § 205.13 (retention of records related to electronic funds transfers).

¹⁴ See Comptroller's Handbook, *Internal Controls* (2001) (describing the components of an effective control system and the procedures to examine and assess the controls).

¹⁵ See Comptroller's Handbook, *Bank Supervision Process* (2007) (detailing the CAMELS rating system and standards for evaluating bank management).

¹⁶ 15 U.S.C. § 78c note (defining "identified banking product" to include: deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank; a banker's acceptance; a letter of credit issued or loan made by a bank; a participation in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns that is sold to certain individuals).

¹⁷ S. Rep. No. 111-176, at 147 ("Section 975 strengthens oversight of municipal securities and broadens current municipal securities market protections to cover previously unregulated market participants and previously unregulated financial transactions with states, counties, cities and other municipal entities.").

¹⁸ S. Rep. No. 111-176, at 149.

The Proposed Rules require a person giving advice with regard to “plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity” to register as a municipal advisor unless covered by an exclusion.¹⁹ This definition appears broad enough to cover deposits of municipal funds in commercial, checking, savings, time, and trust accounts at insured depository institutions. As a result of this broad definition, banks simply offering a deposit account²⁰ to a municipal entity would be subject to the Proposed Rules’ recordkeeping requirements for municipal advisors.²¹ These banks may also be subject to future professional qualification standards and continuing education requirements that have not yet been established.²²

As noted above, the OCC and the other federal banking agencies have an existing regulatory framework and oversight over traditional banking products and services, which include bank deposit transactions.²³ The federal regulatory framework includes stringent recordkeeping requirements that are specific to deposit accounts at banking institutions.²⁴ Subjecting banks to recordkeeping requirements that are intended for advisors in the municipal securities market is unnecessary and duplicative.

The OCC also already evaluates the ability of bank management to monitor and control traditional banking products and services, including the administration of deposit accounts, through regular and extensive on-site examinations.²⁵ Subjecting banks and their employees to the training requirements associated with the municipal advisors regulatory framework, including any future municipal advisor certification and testing program, as a result of a bank

¹⁹ 76 Fed. Reg. at 830 (“...because every bank 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 their bank accounts could be municipal advisors.”).

²⁰ 12 U.S.C. § 1813(l) (defining deposit).

²¹ Proposed Rule 15Ba1-7 (outlining the books and records that must be made and maintained by municipal advisors).

²² 15 U.S.C. § 78o-4(c)(7); MSRB Notice 2010-47 (Application of MSRB Rules to Municipal Advisors) (Nov. 1, 2010).

²³ See, e.g., 12 U.S.C. § 24(Seventh) (authorizing national banks to receive demand deposits, Negotiable Order of Withdraw accounts, time deposits, brokered deposits, and special deposits); 12 U.S.C. § 90 (deposits of public funds); 12 C.F.R. Part 5 (providing rules, policies, and procedures for corporate activities); 12 C.F.R. § 7.4002 (regulating national bank charges on deposit accounts); 12 C.F.R. Part 30 (safety and soundness standards); 12 C.F.R. Part 205 (direct deposits and withdrawals of funds); 12 C.F.R. Part 217 (interest on demand deposits); 12 C.F.R. Part 229 (Regulation CC – Availability of Funds and Collection of Checks); and 12 C.F.R. Part 230 (Regulation DD - Truth in Savings).

²⁴ See, e.g., 12 C.F.R. § 204.3 (filing of report of deposits); 12 C.F.R. § 205.13 (retention of electronic funds transfer records).

²⁵ See Comptroller’s Handbook, *Bank Supervision Process* (2007) (detailing the CAMELS rating system and standards for evaluating bank management).

communication with a municipal entity regarding its deposit account is both unnecessary and duplicative of the existing responsibilities concerning traditional banking products and services.

The Commission's proposal would exempt certain providers of letters of credit or liquidity facilities from the definition of "obligated persons."²⁶ However, it remains unclear whether a bank may fall within the definition of municipal advisor (and thus subject to registration) merely by providing a letter of credit to a municipal entity. We suggest that the Commission further clarify that banks providing letters of credit to municipal entities or obligated persons (without otherwise providing advice to them) also are exempt from the definition of "municipal advisor." National banks have long offered letters of credit and other liquidity facilities to their clients as traditional banking products.²⁷ Letters of credit and other liquidity facilities are subject to the same thorough regulation and supervision as other traditional banking products and services, and therefore further regulation of letters of credit issued by bank providers is unnecessary and duplicative.²⁸ Therefore, we encourage the Commission to clarify that providers of letters of credit or other liquidity facilities are exempt from the definition of "municipal advisor."

Treatment of Bank Trust and Fiduciary Services

Section 975 and the Proposed Rules would require persons who advise municipal entities on municipal financial products, including "investment strategies," to register as municipal advisors.²⁹ Trust and fiduciary services offered by banks, which are already subject to extensive standards, may fall within this definition.³⁰ Thus, banks providing advice to municipal entities related to these services could be required to register as municipal advisors under the Proposed Rules, making them subject to the municipal advisor regulatory framework.³¹ In addition to the

²⁶ 76 Fed. Reg. at 881-882 (proposed rule 15Ba1-1(i), to be codified at 17 C.F.R. § 240.15Ba1-1(i)) (excluding providers of municipal bond insurance, letters of credit, or other liquidity facilities from the definition of obligated person).

²⁷ See, e.g., 12 U.S.C. § 24(Seventh); 12 U.S.C. § 84; 12 C.F.R. Part 5; 12 C.F.R. § 7.1016 (issuance of letters of credit); 12 C.F.R. § 32.2(t) (standby letter of credit); OCC Interpretive Letter No. 494 (Dec. 20, 1989) (confirming letters of credit are part of the business of banking authorized for national banks). See also 15 U.S.C. § 78c note (letters of credit, banker's acceptances, and loan participations as identified banking products).

²⁸ See, e.g., 12 C.F.R. Part 32 (legal lending limits); 12 C.F.R. Part 215 (regulation of loans to bank insiders); Comptroller's Handbook, *Trade Finance* (1998); Federal Reserve Board Commercial Bank Examination Manual, *Liabilities and Capital* (2006).

²⁹ 76 Fed. Reg. at 830 (the Proposed Rules expand the definition of investment strategies to include plans, programs, and pools of assets that invest municipal funds).

³⁰ 76 Fed. Reg. at 837 (requesting comment on whether banks providing fiduciary services to municipal entities should be excluded from the definition of municipal advisor).

³¹ Similarly, the extent to which banks providing traditional custodial services may be encompassed by the definition of municipal advisor is unclear, and we suggest the SEC provide clarification that those activities also are exempt.

registration requirements, Section 975 imposes on municipal advisors a new fiduciary duty to their municipal entity clients.³²

Trust, fiduciary, and custody services are core banking functions. Banks have long provided these services to municipal entities as an integral part of the asset management and advisory services that banks provide to all of their trust, fiduciary, and custody customers.³³ National banks must comply with federal statutes, regulations issued by the federal banking agencies, and supervisory guidance specifically governing banks providing trust, fiduciary, and custody products and services.³⁴ Throughout the course of the banking relationship, a national bank may provide to its clients a variety of services upon which the OCC imposes a fiduciary obligation.³⁵ For example, the OCC's Part 9 regulation sets forth specific fiduciary standards governing the national banks that provide investment advice to any customer for a fee.³⁶ Moreover, banks are subject to fiduciary standards under federal and state laws intended to protect trust beneficiaries, retirement plan participants, municipal entities, and other types of investors.³⁷ The OCC also requires national banks utilizing their fiduciary powers granted in 12 U.S.C. § 92a to keep separate, detailed records of all fiduciary-related transactions.³⁸ The OCC supervises the fiduciary activities of banks through regular and extensive on-site examinations to ensure bank compliance with all fiduciary obligations.³⁹

³² 15 U.S.C. § 78o-4(c)(1) ("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 [MSRB]"). See also MSRB Notice 2011-12 (Feb. 14, 2011) (draft Rule G-36 to prohibit activities inconsistent with this fiduciary duty).

³³ See Comptroller's Handbook, *Asset Management* (2000); Comptroller's Handbook, *Custody Services* (2002); OCC Interpretive Letter No. 1078 (Apr. 19, 2007) (national banks' custody activities are permissible banking activities often offered in conjunction with the delivery of fiduciary services.); OCC Interpretive Letter No. 695 (Dec. 8, 1995) (scope of the exercise of national bank fiduciary powers).

³⁴ See 12 U.S.C. § 92a (trust powers of national banks); 12 C.F.R. § 5.26 (licensing requirements for fiduciary powers); 12 C.F.R. Part 9 (fiduciary activities of national banks); Comptroller's Handbook, *Asset Management Operations and Controls* (2011); Comptroller's Handbook, *Custody Services* (2002); Comptroller's Handbook, *Asset Management* (2000).

³⁵ 12 C.F.R. § 9.2(e) (defining fiduciary capacity).

³⁶ See 12 C.F.R. § 9.2(e) (fiduciary capacity includes providing investment advice for a fee); 12 C.F.R. § 9.101 (explaining the types of investment advice that subjects banks to a fiduciary duty).

³⁷ See, e.g., Employee Retirement and Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.; 12 C.F.R. Part 12 (recordkeeping requirements).

³⁸ See 12 U.S.C. § 92a(c), 12 C.F.R. § 9.8; 12 C.F.R. § 12.3.

³⁹ See Comptroller's Handbook, *Retirement Plan Services* (2007); Comptroller's Handbook, *Investment Management Services* (2001); Comptroller's Handbook, *Asset Management* (2000); Comptroller's Handbook, *Conflicts of Interest* (2000). See also Comptroller's Handbook, *Bank Supervision Process* (2007) (highlighting the increased reputation risk exposure that accompanies fiduciary services).

By establishing the municipal advisor framework, Congress sought to increase transparency, restrict conflicts of interest, promote fair dealing, and prohibit fraudulent practices.⁴⁰ However, as described above, banks acting in a fiduciary capacity already are subject to extensive and significant prudential regulation, including strict fiduciary duty obligations, that ensure banks provide trust and fiduciary customers with fair treatment. In this context the regulation of banks as municipal advisors is unnecessary and duplicates the existing obligations already imposed on bank fiduciaries.

Municipal Securities Purchases and Requests for Proposals (“RFPs”)

The Proposed Rules also should clarify that banks would not be deemed to be providing “advice” to a municipal entity simply by providing terms upon which the bank would purchase for the bank’s own account securities issued by the municipal entity, such as bond, tax, and revenue anticipation notes. Responses to RFPs from a municipal entity regarding certain investment products the banks offer, such as money market mutual funds or exempt securities, also should not be treated as “advice” for the reasons discussed below.

Municipal entities often issue RFPs to banks to obtain funding to meet the municipal entity’s operating needs. Banks respond to the RFPs on a competitive basis, providing the municipality with alternative mechanisms such as bond, tax, and revenue anticipation notes to meet their short-term operating needs. Banks also are asked to respond to RFPs related to the investment of operating funds received from tax collections and other sources. Many municipalities are required by statute to issue RFPs to banks for their operating accounts. The operating accounts take the form of checking accounts, often with sweeps into mutual funds, repurchase agreements, and certificates of deposit. Banks are chosen by competitive bid, with the business going to lowest cost and highest yield offer to the municipality. These services have long been a customary course of dealing between banks and municipalities. Banks providing products and services offered in response to RFPs are subject to stringent regulation and oversight by prudential regulators.⁴¹

Furthermore, banks providing terms for the purchase of municipal securities for the bank’s own account should be excluded from registration as “municipal advisors.” Banks are authorized to purchase municipal securities for their own account, subject to extensive regulation and oversight.⁴² Again, these activities already are monitored for compliance with the existing

⁴⁰ S. Rep. No. 111-176 at 149.

⁴¹ See, e.g., 12 U.S.C. § 24(Seventh); 12 C.F.R. Part 7; Comptroller’s Handbook, *Bank Supervision Process* (2007); Comptroller’s Handbook, *Asset Management* (2000); Comptroller’s Handbook, *Large Bank Supervision* (2010); Comptroller’s Handbook, *Community Bank Supervision* (2010).

⁴² See, e.g., 12 U.S.C. § 24(Seventh); 12 C.F.R. Part 1 (permissible investment securities); 12 C.F.R. Part 30 (safety and soundness standards); Comptroller’s Handbook, *Bank Supervision Process* (2007); An Examiner’s Guide to Investment Products and Practices (1992); Comptroller’s Handbook for National Bank Examiners, § 203.1 *Investment Securities* (1990).

regulatory framework during regular and thorough on-site examinations, and additional oversight is unnecessary and would be duplicative.