

July 23, 2012

Chairman Mary Schapiro
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 10549

Re: MSRB Description of Municipal Advisory Services

Dear Chairman Schapiro:

The American Bankers Association,¹ on behalf of its Corporate Trust Committee, is writing to express our concerns with the description of traditional municipal advisory services provided to the Securities and Exchange Commission (Commission) by the Municipal Securities Rulemaking Board (MSRB) by letter dated November 9, 2011.² The letter was in conjunction with the requirement mandated in Section 975 of the Dodd-Frank Act for registration and regulation of municipal advisors.

ABA's Corporate Trust Committee focuses on the role of banks in providing corporate trust products and services to corporate institutional and governmental clients, and is currently comprised of representatives of thirteen banking institutions that provide more than 95 percent of corporate trust activities in the U.S. Appended to the MSRB's letter was a listing of what the MSRB believes to be "traditional" municipal advisory activities, broken down into strategic services, transaction-related services, derivatives services and post-issuance services. ABA continues to believe that no bank should be required to register as a municipal advisor. The listing provided by the MSRB only expands the collection of readily apparent unintended business consequences that would result from unnecessarily treating banks as being within the scope of the registration requirement. The Corporate Trust Committee describes below activities conducted by corporate trustees that are on the MSRB list but that do not involve the types of advice provided by financial advisors. We point out these differences to ensure that routine corporate trust activities are not inadvertently encompassed in the Commission's final municipal advisor rule.

ABA Position on Municipal Advisor Registration

ABA wishes to reiterate our continued strong opposition to the applicability to banks of municipal advisor registration requirements as set forth in the Commission's proposal for a permanent registration regime for municipal advisors.³ As stated in our comment letter on the proposal,⁴ ABA believes that the imposition on highly regulated banks of a wholly duplicative securities-based regulatory scheme is a critically flawed reading of the statute. As such, it serves no public purpose, but would have significant unintended consequences on municipalities – the very entities intended to receive the benefit of the registration requirement.

We believe the proposal fails to recognize the many touch points that banks have with municipalities that simply have no connection to municipal securities or "municipal financial products" as defined in Section 975 or intended by Congress to be reached by the provision. Typical examples are deposit accounts,

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees.

² A copy of the letter is available at <http://www.msrb.org/msrb1/pdfs/MSRB-Letter-to-SEC-on-Municipal-Advisory-Services.pdf>.

³ The proposal is available at <http://sec.gov/rules/proposed/2010/34-63576fr.pdf>.

⁴ A copy of our comment letter on the proposal is attached [here](#).

cash management products, and trust and custody services. The cost of complying with a markedly different recordkeeping and reporting system would be substantial and would necessarily be passed on to municipalities. For some smaller banks, the compliance costs may be sufficiently prohibitive as to warrant withdrawal from the municipal market.⁵ Rather than help municipalities, such duplicative, unnecessary and burdensome regulation will ultimately harm state and local governments by raising costs and/or threatening the availability of important financial services.

Corporate Trust Activities

We address below key descriptions set forth in the MSRB letter that could be misconstrued to cover traditional corporate trust activities but should not be considered activities that trigger municipal advisor registration. Our comments follow the same structure as the MSRB list.

1. Strategic Services

Analysis of and advice on new financial products. Broadly construed, this activity would arguably cover the operational or administrative analysis and guidance provided by a trustee bank to enable it to internally service an account. Rather, this item should be limited to the provision of *financial* analysis and advice. As a general matter, transactions may already be structured when brought to the trustee, fiscal agent or escrow agent. However, the structure may need to be modified to accommodate systems, or operational or other constraints of banks acting in these or similar capacities.

Assistance to issuers in establishing and or monitoring the implementation of financial controls as they relate to sources of repayment for and uses of proceeds of issuers' financing transaction. This activity does not constitute "advice," but rather is operational in nature. An overly broad construction would cover any operational and administrative activity of a bank acting as trustee or in related capacities.

Assist in negotiation of contracts with significant financial terms that includes the use of bonds or alternative funding sources. In the ordinary course of providing trustee and related services to municipalities, banks negotiate agreements covering trustee, fiscal agent and escrow agent services but from the perspective of the bank providing the services. Some programs also have ancillary documents that are not signed by the trustee or agent, but include provisions related to the services to be provided by the bank pursuant to the agreement the bank signed. (For example, an ancillary agreement may be assigned to the bank to administer). It is important that these documents work together. A bank should be able to provide comments on the operational and administrative portions of such ancillary agreements without triggering municipal advisor registration.

Similarly, banks provide traditional bank products to municipal entities in the context of corporate trust programs (e.g., back-up liquidity facilities such as loans and letters of credit for a bond program). A bank must be able to discuss and negotiate contracts with municipal entities or obligated persons for the bank's own services and protections without triggering municipal advisor registration.

Moreover, once the transaction is completed, the trustee/fiscal agent/ escrow agent may be *directed* to purchase investment products on behalf of the program. Some of these investment products require the trustee to enter into agreements (such as GICs, forward delivery agreements or private placements). Negotiation of these agreements relate, not to the financial terms of the investment, but rather to the operational and administrative nature of the relationship and the bank's own protection.

⁵ We attach for your information ABA's comment letter to the MSRB, regarding its proposal (since withdrawn) for a fiduciary duty for municipal advisors, which describes additional unintended consequences of requiring banks to register.

2. Transaction-Related Services

Assisting issuers with competitive bond sales, including bid verification, TIC calculations and reconciliations/verifications of bidding platform calculations, preparation of notice of sale, obtaining CUSIP numbers. Planning and coordinating bond closings . . . Trustees may participate in these activities from an administrative and operational perspective, but are certainly not giving financial advice. Rather, trustees assist issuers and underwriters with DTC set-up and flow of funds.

Development of investment guidelines for issuer and/or permitted investments for indenture funds. Investment guidelines are often dictated by state law and, in any event, are developed by the issuer with its advisors. Banks, in their capacity as trustee or fiscal or escrow agent, may comment on the fact that a given set of guidelines are missing investment categories typically included in the guidelines for similar programs. Similarly, banks may alert issuers that particular provisions of the guidelines are not clear or are improperly drafted with respect to operational limitations of the bank.

Negotiation of various deal documents with underwriters, rating agency, obligated persons, fiduciaries (e.g., trustee, paying agent, tender agent) credit enhancers, and banks with respect to loans. As noted above, banks negotiate agreements covering trustee, fiscal agent and escrow agent services from the perspective of the bank providing the services. Banks should be able to negotiate agreements with municipal entity or obligated person with respect to the operational and administrative aspects of the program and the bank's protection without triggering municipal advisor registration. As also noted above, certain investment products require the bank, in its role as trustee or agent, to enter into agreements for such investments (e.g. GICs, forward delivery agreements or private placements). Banks do *not* negotiate the financial terms of these investments. but rather negotiate operational, administrative and bank protection provisions.

Supervision of SLGS applications. Typically, banks do not prepare the list of SLG securities nor specify the terms of the securities. However, a bank, as trustee or agent, may be directed to file the initial and final SLG subscriptions to acquire such investments.

Provide cash flow calculations for verification of cash flows in a refunding. This is solely an administrative/operational activity, and does not involve providing advice.

Coordination with DTC. This description is of major concern to our members because of the breadth of the statement. In their capacities as trustees or agents, banks are involved in numerous activities with DTC because coordination with DTC is necessary to hold DTC eligible investments in trust and escrow and similar accounts. However, these activities are solely administrative/operational activities that do not involve providing any financial advice.

3. Post-Issuance Services

Assistance provided to issuer/obligated persons regarding compliance with operating or coverage ratios. In their capacities as trustees or agents, banks may, as part of their contractual duties, be required to monitor the requirements of the financing documents and request required documents when due. However, in these capacities, banks have no discretion and merely follow the specific directions in the governing documents.

Assistance to issuers in preparing and submitting continuing disclosures as they relate to updated financial information. Banks, in accordance with duties under continuing disclosure agreements, may provide services to issuers. However, in this capacity, banks have no discretion and merely follow the specific directions in the governing documents.

Monitoring of reserve fund levels. Banks, in their capacities as trustee or agents, are required under the governing documents to monitor reserve fund levels. However, in these capacities, banks have no discretion and merely follow the specific directions in the governing documents.

Restructuring and bankruptcy services. If an issue goes into default (including bankruptcy), the bank, as trustee, is obligated to participate in the process. However, in such situations, the bank is acting on behalf of the investors, *not* the municipal entity or obligated person. In fact, the bank trustee will be opposed to them in this process. Banks, as trustee, must be able to participate in this process pursuant to obligations under the governing documents.

Conclusion

In conclusion, we reiterate our strong opposition to application of municipal advisor registration and regulation to banks. To do so will have significant unintended consequences, both for municipalities that will face increased pass-through costs and decreased services, and the substantial compliance costs for banks that choose to remain in the municipal markets. Our corporate trustee members are concerned that without further specificity to the MSRB list of municipal advisory activities, traditional services provided by banks in their capacities of trustee or agents could trigger registration as municipal advisors for activities that do not involve providing financial advice. We point out these differences to ensure that routine corporate trust activities are not inadvertently encompassed in the Commission's final municipal advisor rule. Rather, as we have described above, advice with respect to such services is of an administrative or operational nature and we believe is clearly outside of the ambit of advice Congress meant to address in Section 975 of the Dodd-Frank Act.

Our Committee members would be pleased to meet with you to amplify the above descriptions or to answer any questions you may have.

Sincerely,



Cristeena G. Naser

cc: Elisse B. Walter, Commissioner
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