February 22, 2011

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

Re: File Number S7-45-10 – Registration of Municipal Advisors, Exchange Act Release No. 63576, 76 *Fed. Reg.* 824 (Jan. 6, 2011)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission ("**SEC**") to establish a permanent registration program for municipal advisors under Section 975 ("**Section 975**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**").[2]

I. Executive Summary

SIFMA supports the principle that advisors to municipal entities and obligated persons should operate in a fair, transparent and well-regulated manner. However, SIFMA believes that the SEC's proposed rules and proposed interpretative positions regarding municipal advisory activities are overly broad in

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Section 975 amended Section 15B of the Securities Exchange Act of 1934 (the "**Exchange Act**").

light of both the text of Section 975 and Congressional intent; may ultimately result in more limited and costly services provided by fewer financial institutions to municipal entities and obligated persons; and will subject many currently regulated entities to burdensome, overlapping, duplicative and unnecessary requirements and potential liabilities. In particular, the SEC's proposed definition of "investment strategies" and limited guidance on the term "advice" raise concerns regarding the breadth of the SEC's interpretation of the scope of Section 975.

The legislative intent behind Section 975 indicates that it was primarily aimed at regulating *unregulated* persons that render advice with respect to an enumerated list of activities and financial products (*i.e.*, advice with respect to municipal derivatives or guaranteed investment contracts; plans or programs for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal securities).[3] The text of Section 975 itself suggests that it is intended to regulate previously unregulated persons. Specifically, the definition of "municipal advisor" enumerates categories of entities covered by the definition, and none of the listed categories by their terms are regulated entities.[4]

By proposing expansive interpretations, the SEC risks transforming Section 975 into a wide-ranging program of duplicative regulation that will impact large portions of the banking, brokerage and investment advisory industries. There is no evidence of legislative intent to broadly expand the regulation of the banking, brokerage and investment advisory communities through Section 975, or to create new responsibilities for banks, brokers and investment advisers with regard to municipal entities or obligated persons. Congress could have chosen to write a statute that broadly reclassified all government-facing business into a new regulatory scheme and created a new

---

[3] *See Enhancing Investor Protection and the Regulation of Securities Markets—Part II: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 71 (2009) (statement of Ronald Stack, Chair, Municipal Securities Rulemaking Board ("**MSRB**")) ("[S]ome of the problems . . . that [the MSRB has] encountered are that there are many participants in [the municipal securities] market who right now are *unregulated*: financial advisors, swap advisors, investment advisors. *They are not registered with the SEC*, and we have no power to regulate them.") (emphasis added); *id.* at 175-76; *id.* at 178-79 ("Firms that offer . . . investment advice to issuers are *not*, for the most part, regulated. . . . At a minimum, given the investment advice they provide to clients, these firms should be registered as investment advisors with the SEC.") (emphasis added).

[4] Exchange Act § 15B(e)(4) (providing that the term "municipal advisor" includes "financial advisors, placement agents, solicitors, finders, and swap advisors").

standard of care depending on the type of client being served. Had that been Congress' intent, then there would have been significant debate and discussion about such a major overhaul and Congress would have sought the input of the banking, brokerage and investment advisory communities in the drafting of Section 975.[5]

By expanding the scope of who is a municipal advisor, the SEC proposal could have the unintended consequence of causing highly regulated banks, trust companies, broker-dealers and investment advisers, on whom municipal entities and obligated persons rely for financial services, to curtail their services provided to municipal entities and obligated persons; in fact, anecdotal evidence suggests such a withdrawal from the marketplace is already occurring. For example, because the as-yet undefined fiduciary standard under Section 975 could potentially restrict principal transactions with a municipal entity to whom a municipal advisor owes a fiduciary duty, such interpretations could effectively limit or even prohibit sales of fixed income and other products to municipal entities and obligated persons as principal. This would ultimately reduce competition and raise the cost of services to municipal entities and obligated persons with little corresponding regulatory benefit.

Furthermore, the proposed registration process for municipal advisors and their associated persons is unnecessarily burdensome and duplicative for registered and otherwise regulated entities. Banks and trust companies in particular would be subject to extensive new costs to register their associated persons. In addition, the registration as municipal advisors of individuals who are associated persons of municipal advisors would be very costly and challenging with little apparent benefit. The SEC's proposal does not appear to adequately consider the costs of the rule, both in terms of costs of implementation and likely costs to be incurred by municipal entities and obligated persons as a result of increases in service prices.

---

[5] The fact that there is an absence of legislative intent to broadly overhaul the regulatory programs already applicable to such regulated persons as banks, broker-dealers, and investment advisers is evidenced by the section-by-section summary of the Dodd-Frank Act, released by the Senate Committee on Banking, Housing, and Urban Affairs in March 2010. In that summary, the only statement regarding municipal advisor regulation and Section 975 is that Section 975 "provides for the regulation of municipal advisors under the Securities Exchange Act of 1934."). S. Comm. on Banking, Housing, and Urban Affairs, *Section-by-Section Summary of the Restoring American Financial Stability Act of 2010*, 51 (Mar. 16, 2010). Notably absent from the summary is any mention that Section 975 would recraft or redirect the regulatory program applicable to broker-dealers under the Exchange Act, let alone the regulatory program applicable to banks, trust companies and investment advisers.

Therefore, to avoid disrupting and raising the cost of services provided to municipal entities and obligated persons, the SEC should take a deliberative approach: first, the SEC should adopt a rule that addresses the activities of municipal advisors that are unregulated today; second, after the SEC has had time to adequately consider the interaction between existing regulatory frameworks and potential municipal advisor regulation, the SEC could adopt any additional regulations that are necessary to address the activities of regulated entities, such as broker-dealers, investment advisers, banks and trust companies.

In addition, when the SEC considers the impact of its proposed municipal advisor rules on regulated entities, SIFMA believes that the SEC should, among other things:

- issue interpretations that narrow the scope of regulated municipal advisor activities;
- provide additional guidance regarding what it means to provide "advice" and the contours of the definition of "investment strategies";
- clarify that the underwriter exception extends to activities closely related to the underwriting or private placement of securities issued by a municipal entity or obligated person, or remarketing activity;
- provide broad-based exceptions for banks and trust companies with respect to their traditional banking, advisory, fiduciary and trust activities;
- clarify that a person acting as a placement agent for a pooled investment vehicle does not engage in "solicitation" for purposes of Section 975; and
- significantly reduce the size and scope of the proposed registration structure, including providing for alternative mechanisms for persons already registered with the SEC to register for municipal advisory activities and eliminating the separate registration process for individuals, such as employees.

SIFMA also believes that the SEC should clarify that a municipal advisor has a fiduciary duty to its municipal entity clients only, and not to obligated persons or persons who are not clients of the entity that is a municipal advisor. Moreover, the SEC should consider guiding principles when it drafts rules and

interpretative guidance, and evaluates MSRB rule proposals concerning the fiduciary duty of municipal advisors (*i.e.*, the fiduciary duty should be clearly defined, apply only to municipal advisory activities and be consistent with other standards of care imposed, or to be imposed, on service providers).

The SEC should recognize that many persons that are also municipal advisors already provide non-municipal advisory services to their municipal entity clients, and are subject to a fiduciary duty, other similar obligation or are otherwise subject to regulation with respect to such services. Drafting rules and interpretative guidance in light of the guiding principles outlined below will allow municipal entities to continue to receive the full range of municipal and non-municipal advisory services on which they have come to rely, while providing the protections sought by Section 975.

Finally, the SEC should reconsider the scope of information required of applicants and eliminate the proposed requirement to register individuals separately on Form MA-I, in light of the burdens that its proposed registration structure would place on the industry versus the incremental regulatory benefit, if any, of its extensive registration proposal.

II. Municipal Advisor: Definitional and Interpretative Issues

Under Section 975, a municipal advisor is a person that either 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, including advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues, or undertakes a solicitation of a municipal entity or obligated person.[6]

Section 975 regulates municipal *advisors*. SIFMA believes that a person should be considered a municipal advisor under the "advice" prong of the municipal advisor definition only when it actually advises a municipal entity or obligated person with respect to the activities or products enumerated in Section 975 (*i.e.*, advice with respect to municipal derivatives or guaranteed investment contracts; plans or programs for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal

[6] Exchange Act § 15B(e)(4). Municipal financial products are municipal derivatives, guaranteed investment contracts and investment strategies, the latter of which "includes 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." *Id.* § 15B(e)(3) and (5).

securities), and not when the municipal entity or obligated person happens to have a bank, trust or brokerage account that contains some proceeds of municipal securities, let alone when this account contains public funds in general.

Indeed, because municipal entities and obligated persons have a wide range of advisory relationships with financial and non-financial entities, it is imperative that the SEC provide clear guidance as to what it means to provide "advice" to a municipal entity or obligated person for purposes of Section 975 and what exactly constitutes a municipal financial product, and, in particular, what will be considered an "investment strategy." In addition, the SEC should clarify the meaning of other terms, and applicable exceptions, related to the definition of "municipal advisor," as set forth in the following discussion.

A. The SEC Should Clarify What It Means To Provide "Advice"

The touchstone for determining whether a person is a municipal advisor is whether the person is providing "advice" to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities.

1. The SEC Should Clarify What Types of Communications Constitute the Provision of "Advice"

The SEC should clarify the types of investment-related communications with a municipal entity or obligated person that constitute "advice" for purposes of Section 975, and in particular that not every discussion of a financial instrument or the services available from a financial institution constitutes "advice."

The SEC should, at a minimum, provide in its rules or guidance that a person will not be considered a municipal advisor to a municipal entity or obligated person if such municipal entity or obligated person is or will be represented by an independent advisor that is itself registered as a municipal advisor (or eligible for an applicable exception, such as an investment adviser providing investment advice) and any relevant documentation states that the person is not acting as an "advisor" and the municipal entity or obligated person is not relying on any advisory communications from such person.

Further, the SEC should provide, by rule, that a person will be considered a "municipal advisor" only where such person:

- provides advice that relates directly to the issuance of municipal securities or the specific municipal financial products enumerated in Section 975 to a municipal entity or obligated person

- pursuant to a mutual written agreement:

    - that the advice will serve as a primary basis for the municipal entity or obligated person's decisions with respect to municipal financial products or the issuance of municipal securities and

    - that the advice will be individualized based on the particular needs of the municipal entity or obligated person, and

- the person is not otherwise subject to a fiduciary duty with regard to its actions.

Under this standard, a person that makes a recommendation or otherwise engages in communications in the context of a particular transaction would not be considered a municipal advisor absent the presence of all of the other above-listed factors. By ensuring that a person will only be a municipal advisor when there is a mutual written agreement pursuant to which it has undertaken to provide particularized advice, the SEC will provide potential municipal advisors with practical criteria by which they can conduct their affairs and determine exactly when they need to register as municipal advisors and implement programs to ensure that their municipal entity clients receive the benefits of Section 975's fiduciary duty.[7]

The above-written standard would provide a person engaging in activities with a municipal entity or obligated person with the clearest guidance as to when it is a municipal advisor. However, if the SEC determines not to limit municipal advisor regulation to only those instances where there is written evidence of a formal advisory engagement and include other communications, outside of a

[7] SIFMA notes that proposed MSRB interpretations contemplate that municipal advisors will enter into written agreements with municipal entities and obligated persons. *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011) (proposing an interpretation providing that municipal entities and obligated persons may consent to conflicts of interest "that are clearly described in [a municipal advisor's] engagement letter or other written contract with the municipal advisor").

formal engagement, as constituting "advice" for purposes of Section 975, the SEC should clarify that a communication should constitute advice only when it is provided with respect to and directly relates to an enumerated municipal financial product or the issuance of municipal securities, and it is a recommendation that is particularized to the needs and circumstances of the recipient such that, under the prevailing facts and circumstances, a municipal entity or obligated person would reasonably expect that it could rely and take action, without further input, based upon such communication.

In the absence of documentation or other agreement as to whether a person is providing advice, a municipal entity or obligated person's reasonable expectations could be determined by examination of other factors. These factors include a municipal entity or obligated person's retention of an independent municipal advisor (or person excepted from registration, such as an investment adviser providing investment advice), or its acknowledgement that the supposed municipal advisor is not acting as its advisor or fiduciary. Such factors also include a supposed municipal advisor's explicit statement, whether in a document or orally, that it is not acting as a municipal advisor or acting as a fiduciary to the municipal entity or obligated person. Moreover, when the documentation agreed to by the parties explicitly states that the person is not acting as a municipal advisor to the municipal entity or obligated person, then the presence of such a factor should be dispositive of the fact that there is no municipal advisory relationship between the parties.

In addition, the SEC should clarify that the following communications and activities are illustrative of situations that would not generally be regarded as providing advice in the absence of an agreement between the parties:

- Responding to a request for proposals or qualifications from a municipal entity or obligated person regarding investment products.
- Providing terms on which a financial institution or other entity is generally prepared to enter into a transaction (*e.g.*, in the form of a term sheet).
- Presenting multiple options available from a financial institution for the short-term investment of excess cash (*e.g.*, interest-bearing accounts and overnight or other periodic investment sweeps and local government investment pools) and negotiating the terms of such an investment.

- Providing the terms upon which a financial institution or other entity would purchase as principal (including as a dealer), for its own account, securities issued by the municipal entity or obligated person, such as bond anticipation notes, tax anticipation notes or revenue anticipation notes, or purchasing such securities as principal.

- Providing a presentation containing various municipal derivative alternatives that a municipal entity or obligated person could consider entering into with a financial institution as counterparty without recommending any specific alternative to the municipal entity or obligated person (regardless of whether the parties subsequently enter into a municipal derivative transaction) or entering into a municipal derivative with a municipal entity or obligated person.

- Presenting multiple securities meeting specified criteria, but without making a recommendation as to the merits of any investment particularized to a municipal entity or obligated person's specific circumstances or investment objectives, and regardless of whether the options for investment are sent to a particular municipal entity or obligated person or group of municipal entities or obligated persons.

- Providing price quotations with respect to particular municipal derivatives or securities.

- Directing or executing purchases and sales of municipal derivatives, securities or other instruments in a trust or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis.

- Providing, or the recommendation of, non-advisory services, such as administrative, custody or transfer agency services to a municipal entity or obligated person.

- Providing research information and generic trade ideas or commentary that do not purport to meet the needs or objectives of specific clients, and are provided to a municipal entity or obligated person as part of a financial institution's ongoing ordinary communications with the public or its clients.

- Providing suggestions, opinions or even recommendations regarding general financial or market information, or information regarding investments or instruments, that are not particularized to the needs or circumstances of the municipal entity or obligated person.

- Conducting a preliminary cash-flow analysis (*e.g.*, analyzing refunding savings) at the request of a municipal entity or obligated person.

If these activities and communications are not clearly excepted from the definition of "advice," then the unintended consequence of uncertainty regarding the scope of covered advice will be to deprive municipal entities and obligated persons of the services on which they have come to rely, or increase the cost of those services as financial institutions are correspondingly subjected to greatly increased costs, burdens and potential liabilities.

2. Uncompensated Advice Should Not Trigger Municipal Advisor Status

In addition, the SEC should reconsider its position that providing uncompensated advice to a municipal entity or obligated person is equally subject to regulation as providing advice for compensation.[8] This position will deprive municipal entities of a source of necessary input that is unlikely to result in the abuses at which Section 975 is directed. This advice is likely to be given as a client service by a financial institution that is providing other unrelated compensated services to the municipal entity. This is distinguishable from advice that is incidental to an investment service such as brokerage, and unlikely to be confused by a municipal entity with the type of advice provided under a more formal relationship. Without an exception for uncompensated advice, entities such as banks, trust companies and broker-dealers from which municipal entities or obligated persons seek limited, uncompensated advice (*e.g.*, conducting cash flow analyses, post-offering services and rating agency guidance, all at the request of an issuer), without intending to establish a more formal advisory relationship, may simply stop providing this type of advice. This would cause a disservice to municipal entities and obligated persons, which often do not have the research resources or budget and personnel to analyze fully the issues for which they request uncompensated advice.

---

[8] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 (Jan. 6, 2011).

3. The SEC Should Coordinate the Definition of "Advice" With Other Regulators

Persons that will be considered municipal advisors will often be engaged in business activities other than providing advice to or on behalf of a municipal entity or obligated person. These business lines include, among others, serving as a broker-dealer, investment adviser, commodity trading advisor, bank or trust company or swap dealer. Under Section 975 and the SEC's proposed rules, SEC-registered investment advisers and commodity trading advisors registered with the Commodity Futures Trading Commission ("**CFTC**") are excepted from registration and regulation as municipal advisors to the extent that they provide investment advice (in the case of investment advisers) and advice with respect to swaps (in the case of commodity trading advisors).

However, other regulated persons, such as swap dealers, that may also provide advice to a municipal entity or obligated person in connection with their business as swap dealers, would not be excepted from the definition of "municipal advisor." In such a case, a person that provides advice in connection with its other business activity may be subject to regulation by its primary regulator for that other business activity (*e.g.*, the CFTC in the case of a swap dealer) and, absent an applicable exception, become subject to additional regulation by the SEC as a municipal advisor.

Although it would be best to avoid the burdens of dual or multiple regulation by excepting any advice that is related to, or given in connection with, another regulated activity, the SEC should coordinate the definition of "advice" for purposes of municipal advisor registration and regulation with that of other regulatory programs to ensure that the communications and activities listed above are not viewed as "advice" for non-municipal advisor regulatory regimes, such as swap dealer regulation. Thus, market participants would have consistent guidance as to when a given communication constitutes and does not constitute advice. This would make it easier for them to determine whether the communication triggers obligations under all potentially applicable regulatory programs or no such program, with no gray zone in which there may be obligations under one or more, but not all, such programs.[9]

---

[9] For example, because a swap dealer (that is not otherwise registered as a commodity trading advisor) is not excepted from the definition of "municipal advisor" in any capacity, it could be required to register as a municipal advisor and be regulated as such when it provides advice with respect to municipal derivatives to or on behalf of an obligated person or municipal entity. However, the triggering point at which a communication constitutes advice for both a (…continued)

4. The SEC Should Adopt a *De Minimis* Exception

Under Section 975, the provision of *any* advice would, absent an applicable exception, require a person engaging in such advisory activity to register as a municipal advisor, even if it engages in advisory activities on an infrequent or one-off basis not in the ordinary course of its business. Therefore, the SEC should adopt a *de minimis* advisory threshold, both in terms of the number of times that a person provides advice and the amount of funds with respect to which it provides advice. Failing to adopt such an exception would lead to a tremendous over-registration of municipal advisory firms and, more significantly, individuals (should the SEC retain its proposed requirement for individual registration) who have infrequent contact with municipal entities and obligated persons but fear that they may inadvertently violate regulations applicable to municipal advisors.

For example, the SEC could clarify that a person that advises no more than a specified number of municipal entities or obligated persons per year; initiates contact with all municipal entities or obligated persons in aggregate no more than a specified number of times per year; provides advice with respect to funds that do not exceed a specified dollar amount per advisory engagement; or provides advice with respect to aggregate funds of no more than a specified dollar amount at a given time would not be considered a municipal advisor under the "advice" prong of the definition of "municipal advisor."[10]

(continued…)

municipal advisor and a swap dealer should be the same. *See* CFTC Proposed Rule 23.440(a), 75 *Fed. Reg.* 80638, 80659 (Dec. 22, 2010) (proposing, under new Section 4s(h)(4) of the Commodity Exchange Act, that a swap dealer "acts as an advisor to a Special Entity," which would include certain municipal entities and obligated persons, when it, subject to certain enumerated exceptions, "recommends a swap or trading strategy that involves the use of swaps to a Special Entity"); *see also* Exchange Act Proposed Rule 15Ba1-1(f), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011) (defining the term "municipal derivatives," for purposes of Section 975, as any "swap" or "security-based swap" to which a "municipal entity is a counterparty, or to which an obligated person, acting in its capacity as an obligated person, is a counterparty"). Municipal entities/Special Entities would also be better served and more likely to receive the protections of both the CFTC and SEC's regulatory programs were there a uniform definition of "advice." To this end, they would be able to uniformly determine when they are owed duties under both regulatory programs. They would not have to consider whether they are being given advice for the purposes of one, but not both, programs, and determine under which program, if any, they are entitled to protection.

[10] The SEC should also adopt a similar *de minimis* exception for solicitation activities under Section 975, both in terms of the number and size of investments solicited. Such an
(…continued)

5. The SEC Should Clarify That an Advisor to a Municipal Advisor Is Not Itself a Municipal Advisor

The SEC should clarify that a person that provides advice to a municipal advisor (or a person excepted from the definition of "municipal advisor") in connection with the latter's provision of advice to a municipal entity or obligated person would generally not be considered to be advising the municipal entity or obligated person within the scope of Section 975. Absent some sort of direct contact with the municipal entity or obligated person, such a person would not itself be required to register as a municipal advisor. In this regard, the SEC should also clarify that the phrase "on behalf of" in the "advice" prong of the definition of "municipal advisor" is interpreted to cover advice provided to participant-directed investment programs or plans such as 529, 403(b) and 457 plans that hold the funds of retail clients but are managed for municipal entities, and is not interpreted to cover a situation in which a person provides advice to a municipal advisor (or a person excluded from such definition).[11]

B. The Definition of "Investment Strategies"

The SEC's proposed rule would define the term "investment strategies" to also "include[] plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity."[12] The proposed expanded definition of "investment strategies" is not required or even implied by the text of Section 975[13] and would subject a vast swath of activity—which was not intended to be, and need not be, further regulated—to additional regulation. Therefore, the SEC should retain only the statutory definition of "investment strategies."

(continued…)

exception would likely provide relief from municipal advisor registration to a substantial number of persons that either engage in solicitation on an infrequent or one-off basis not in the ordinary course of business.

[11] *See* Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 829 (Jan. 6, 2011).

[12] Proposed Rule 15Ba1-1(b), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011).

[13] Section 975 only enumerates "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." Exchange Act § 15B(e)(3).

Separately, within the statutory framework, the SEC should clarify the definition of "investment strategies" to provide market participants with clearer guidance as to when their activities constitute those of a municipal advisor.

1. The SEC Should Retain the Statutory Definition of "Investment Strategies"

The SEC should retain the statutory definition of "investment strategies," which applies to the two activities specifically enumerated in the statute, *i.e.*, *advice with respect to* (i) the investment of the proceeds of municipal securities and (ii) the recommendation of and brokerage of municipal escrow investments. It should not encompass all assets of a municipal entity that may be used for investment, as the SEC effectively proposes. The SEC has stated that "it does not believe that it was Congress' intent to limit the requirement to register as a municipal advisor only to those persons that provide advice with respect to plans or programs for the investment of proceeds from municipal securities"—referencing the expansive statutory definition of "municipal entity" as support for its proposed interpretation.[14] However, Congress' intent is more clearly evidenced by the fact that it had the opportunity to define "investment strategies" as broadly as it desired when it drafted Section 975. Instead, Congress chose to more narrowly limit the term to the proceeds of municipal securities and municipal escrow investments—areas and products that Congress presumed had been the subject of, or are particularly susceptible to, abuse. Advice with respect to these types of activities and financial products should be the only advisory activity that triggers a person's being considered a municipal advisor by virtue of advising on an investment strategy.

In addition to going beyond the plain language of the statutory text (and in that light Congress' intent for the scope of investment strategies as may be inferred from the language of Section 975), the SEC's proposed definition of "investment strategies" would have the effect of subjecting even more persons and activities, many of which are already regulated, to the additional burden of municipal advisor regulation than is required by Section 975. In particular, as the SEC acknowledges, it also potentially creates a situation where all advice regarding a municipal entity's bank or trust accounts, including cash and deposit management, or local government investment pools, triggers municipal advisor registration.[15] This in turn necessitates, as is discussed in Section III below, the

---

[14] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 (Jan. 6, 2011).

[15] *See id.* at 830 ("[B]ecause 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

(…continued)

need for exceptions for various activities, such as traditional banking and trust company relationships with municipal entities that are already subject to regulation, in order to ensure that municipal entities continue to have access to the full range of products currently offered to them by as many financial institutions that are currently willing to offer such products to such entities. Absent such an exception, imposing the SEC's broad definition of "investment strategies" will reduce product offerings available to municipal entities, provide them with fewer points of contact at financial institutions and increase costs in the face of reduced competition for the provision of such services to municipal entities.

2. The SEC Should Provide Further Clarification as to What Is an "Investment Strategy"

In addition to limiting the definition of "investment strategies" to the statutory definition of that term, the SEC should clarify that:

- a "plan or program" is a series of specified investment-related actions or activities that would generally be akin to a financial plan, not merely advice incidental to a particular trade or investment;[16]

- a person would not be considered to provide advice with respect to an investment strategy if the person reasonably believes that the funds for the investment strategy 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 issuances, unless the municipal entity or obligated

---

(continued…)

entities with respect to their bank accounts could be municipal advisors."); *id.* at 830 n.98 ("To the extent that the pooled investment vehicle is a [local government investment pool], the pooled investment vehicle would be considered funds 'held by or on behalf of' a municipal entity and, therefore, a person providing advice with respect to a [local government investment pool] would have to register as a municipal advisor.").

[16] SIFMA notes that Section 202(a)(11)(C) of the Investment Advisers Act recognizes that a broker-dealer, by providing advice solely incidental to a broker-dealer transaction, does not become an investment adviser. Similarly, the SEC should clarify that, for purposes of Section 975, "advice" does not include broker-dealer advice that is solely incidental to a transaction. In addition, broker-dealers providing advice that is solely incidental to a transaction should be excluded from the definition of municipal advisor for the same reason that registered investment advisers are excluded (in some instances): they are already regulated. Indeed, in the case of dual registrants, they are already subject to two regulatory schemes.

person communicates to the person that the investment strategy in question is specifically for the investment of the initial proceeds of municipal securities (this "reasonably believes" standard could be satisfied by a client certification as to the facts with respect to the funds);

- funds would not be considered proceeds of municipal securities once they are commingled with other public funds and that subsequent investments of funds that were initially proceeds of municipal securities or revenues derived from the initial investment will not be considered "proceeds of municipal securities" unless the subsequent investment is part of the plan or program applicable to such proceeds that was developed at the time of, and in connection with, the initial investment; and

- municipal escrow investments are investments of funds in a segregated escrow account that was established by a municipal entity or obligated person to hold funds that have been allocated for satisfying a specific and identified obligation of the municipal entity or obligated person and maintained by an escrow agent for the municipal entity or obligated person.

Adopting each of the above-outlined positions would provide municipal entities and obligated persons with added protection when they participate in the municipal securities market, while also maintaining a robust marketplace for municipal entities. Indeed, there is no evidence that investment or other activities that municipal entities may currently engage in with commercial banks is the source of any of the regulatory concerns that Section 975 is intended to address. The language of Section 975 does not, and was not intended to, capture every use of funds for which a municipal entity or obligated person is provided advice. Instead, it was intended to provide municipal entities and obligated persons with added protection in the areas that are likely to have significant impacts on their finances and for which they were previously provided specialized types of advice by *unregulated* financial advisors—such as when they commit funds to a series of investments for the initial proceeds of municipal securities. The decisions that a municipal entity or obligated person makes at this point, and how it is advised with respect to those decisions, will have the greatest impact on its ability to, within appropriate risk limits, support its obligations under the municipal securities.

Congress clearly intended for a fiduciary relationship to apply to advice in these specific investment situations (presumably because the context of a

municipal security offering in which such advice is given is significantly more complex than when advice is given in connection with ordinary banking, trust and brokerage activity). The SEC's proposal would apply a fiduciary relationship to all advice to municipal entities, whether or not part of an advisory program or relationship, or drawing upon funds that were intended for investment. All advice to municipal entities that could be effectuated with funds from a pool holding some funds for investment would be under a fiduciary duty. There is no indication that Congress intended this result. Indeed, there is no legislative record to support the idea that Congress wanted to alter the applicable duty of care owed by a broker-dealer based solely on the type of client involved, *i.e.*, that Congress wanted a higher duty of care to apply when a broker-dealer sells a T-bill to a highly sophisticated state pension fund, but a lower suitability standard to apply when the same broker sells a T-bill to a retail investor. Moreover, in a far more appealing setting—personalized advice to retail investors—Congress required an SEC study before the SEC could apply a fiduciary standard to broker-dealers. It is highly improbable that Congress intended the result reached by the SEC's proposal. And, the upshot is that it will reduce the availability of services to municipal entities and the availability of providers willing to make such services available to such entities.

Moreover, from a practical standpoint, the SEC's proposed investment strategies definition lacks clarity. Service providers need to be able to deliver their services efficiently without having to guess whether—or worse, assume that—the funds with which they are presented would result in their advising on an investment strategy.

Providing the suggested clarifications would reduce uncertainty as to when a person's activities constitute those of a municipal advisor. This guidance would, in turn, greatly assist firms in structuring their operations without undermining the policies underlying Section 975 to ensure compliance with the municipal advisor regulatory requirements as necessitated by Section 975, while also preserving a municipal entity or obligated person's efficient access to other financial services.

3. The SEC Should Clarify That an Investment Strategy Is Implicated Only When a Person Provides Advice Regarding the "Investment Of" Funds

Even if the SEC adopts its expanded definition of "investment strategies," the SEC should nonetheless clarify that the trigger for determining whether a person is a municipal advisor by virtue of its providing advice with respect to "funds held by or on behalf of a municipal entity" is whether the person is

providing advice regarding the "investment of" those funds, and not advice regarding other expenditure or use of those funds for non-investment purposes.[17] In addition, the SEC should clarify that the types of investments about which a person must provide advice in order to be considered a municipal advisor are limited, as applicable, to investments in financial instruments and products (such as those identified or discussed throughout this letter). In particular, the SEC should clarify that the term, in any case, does not include local government investment pools, purchases of real estate or expenditures for, among others, infrastructure, equipment and personnel, which often are described as "infrastructure investments."

Limiting investment strategies to activities with respect to financial instruments or products is consistent with the text of Section 975. Indeed, in Section 975, Congress generally referred to "municipal financial products," which include municipal derivatives, guaranteed investment contracts, municipal escrow investments and proceeds of municipal securities—all of which are either financial instruments or products, or connote the same. Nowhere in the statutory text did Congress refer to other types of "investments." The SEC, by rule, should not expand the scope of activities covered by municipal advisor regulation beyond those specified by the text of Section 975.

4. The SEC Should Reiterate That an Adviser to a Pooled Investment Vehicle Is Not a Municipal Advisor

The SEC should reiterate in its final rules that, consistent with long-held interpretations under the Investment Advisers Act, an adviser to a pooled investment vehicle (such as a private equity fund, hedge fund, local government

---

[17] The SEC's proposed rule further defining "investment strategies" states that that term "includes plans, programs or pools of assets *that invest* funds held by or on behalf of a municipal entity." By contrast, the statutory definition of that term states that it "includes plans or programs for the *investment of* the proceeds of municipal securities . . . and the recommendation of and brokerage of municipal escrow investments." Implicit within the statutory definition, by use of the words "investment of," is the notion that a person that is a municipal advisor by virtue of providing advice with respect to investment strategies, as defined only by statute, must provide advice with respect to the *investment of* the funds enumerated in the statute. However, the SEC's proposed definition does not contain this investment advice requirement. Instead, the SEC's proposed definition could be read to mean that a person who merely provides *advice*—but not necessarily investment advice—with respect to plans, programs or pools of assets of a municipal entity that are used in part for investment would also be required to register as a municipal advisor. *See* Exchange Act § 15B(e)(3) (defining, by statute, the term "investment strategies"); Proposed Rule 15Ba1-1(b), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011) (proposing to further define, by rule, the term "investment strategies").

investment pool or even a mutual fund) in which a municipal entity or obligated person invests is not a municipal advisor by virtue of providing advice to such a vehicle, and that purchasing an interest in a vehicle does not create an advisory engagement between the investor and the vehicle's adviser.[18] Moreover, so as not to create confusion as to when an adviser to a pooled investment vehicle may or may not be a municipal advisor, this position should not be dependent on the percentage of investment by municipal entities or obligated persons in the vehicle, unless there is evidence of a sham. Thus, so long as there is at least one *bona fide* investor that is not a municipal entity or obligated person, the adviser to the vehicle should not be a municipal advisor.

Moreover, even if the vehicle consists entirely of investors that are municipal entities or obligated persons, the adviser should only be considered a municipal advisor if, consistent with the discussion above, the funds invested are proceeds of municipal securities issuances and the adviser knows of their identity as such, unless there is evidence of a sham. The SEC should also clarify that, in any case, an adviser would still not be considered a municipal advisor to the extent that its activities qualify for the investment adviser exception to the definition of "municipal advisor." Absent these exceptions, if an adviser to a pooled investment vehicle would be considered a municipal advisor, then fewer pooled investment vehicles would be offered to municipal entities (particularly public pension plans) and obligated persons, which would disserve municipal entities and obligated persons by limiting their access to important vehicles for the long-term investment of their funds.[19] In addition, SIFMA notes that local

---

[18] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011); *see e.g.*, *Goldstein v. SEC*, 451 F. 3d 873, 879-80 (D.C. Cir. 2006) ("[The Investment Advisers Act] define[s] 'investment adviser' as 'any person who, for compensation, engages in the business of advising others, either *directly* or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.' An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice *directly*. He invests a portion of his assets in the fund. The fund manager—the adviser—controls the disposition of the pool of capital in the fund. The adviser does not tell the *investor* how to spend his money; the investor made that decision when he invested in the fund. Having bought into the fund, the investor fades into the background; his role is completely passive. If the person or entity controlling the fund is not an "investment adviser" to each individual investor, then *a fortiori* each investor cannot be a "client" of that person or entity. These are just two sides of the same coin.") (citations omitted).

[19] SIFMA notes that the MSRB has proposed an interpretation of its "fair dealing" rule that would impose specific disclosure requirements on municipal advisors engaged in solicitation activities, such as the requirement to disclose the amount of compensation being received and product-specific disclosures. *See* MSRB Notice 2011-13, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors* (Feb.
(…continued)

government investment pools are often the only available option for the short-term investment of operating funds and are subject to state laws, which often include a fiduciary duty. The SEC's proposal likely would reduce the number of local government investment pool options available to municipalities.

C. The Definition of "Obligated Person": The SEC Should Clarify When a Person Will Be Considered To Be Engaging With an Obligated Person

The SEC should clarify that an "obligated person" is a person that is "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,"[20] which means that such person must be the *initial* obligor under such securities. A person should not be deemed an obligated person if it is not the *initial* obligor and comes to support the payment of obligations on municipal securities after the offering, through an assumption or other arrangement. For example, if a broker-dealer advises a private company that purchases a municipal asset and agrees to assume the obligation to pay outstanding municipal securities in connection with such transaction, the party assuming the debt should not be considered an obligated person and the broker-dealer should not be considered a municipal advisor.

In addition, the SEC should clarify that a person will be considered to provide advice to or on behalf of an obligated person or to undertake a solicitation of an obligated person only when such person has actual knowledge that it is advising or soliciting an obligated person, acting in a capacity as an obligated person, and has actual knowledge that it is advising or engaging in solicitation with respect to the issuance of municipal securities or that the funds with respect to which it is advising or engaging in solicitation are proceeds of municipal securities. Such person must also be rendering services with respect to the types of activities or instruments, as applicable, that make one a municipal advisor (*i.e.*, municipal derivatives or guaranteed investment contracts; plans or programs

---

(continued…)

14, 2011). These requirements would be particularly awkward if solicitation on behalf of a pooled investment vehicle triggered municipal advisor status, because the disclosure would be required with respect to an issuer of securities by a party (the solicitor) that is not necessarily in the best position to make such disclosures (*e.g.*, the issuer would obviously be in a better position to make product specific disclosures).

[20] Exchange Act § 15B(e)(10) (emphasis added).

for the investment of the proceeds of municipal securities; municipal escrow investments; and the issuance of municipal securities).

Moreover, a person engaging in activities with respect to a potential obligated person does not need to inquire affirmatively as to such person's status or the status of its funds. Anything to the contrary would have significant negative implications for the manner by which all financial firms conduct business and establish relationships with clients. Moreover, the SEC should clarify that in no event would its proposed expanded definition of "investment strategies" be applicable to engagements with obligated persons, as an obligated person's funds are not held in plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity.

The SEC should also clarify that a person that becomes an obligated person does not remain so indefinitely and is not an obligated person with respect to unrelated matters. To that end, the SEC should also clarify that any relationship between such person and its advisor will only be considered a municipal advisory relationship to the extent that it directly involves a transaction with respect to which the person is an obligated person. For example, if advisor A provides advice to for-profit corporation FPC with respect to the issuance of a recovery zone facility bond ("**RZFB**") under which FPC will be obligated to support the payment of all or part of the obligations, a derivative (related to the RZFB) to which FPC will be a counterparty and a plan or program for the investment of the proceeds of the offering, then A could only be a municipal advisor to FPC with respect to the RZFB, related municipal derivative and the investment strategy, and not with respect to any other unrelated transaction or assignment. If A, either concurrently or at any point in the future, also advised FPC on its own issuance of non-municipal, taxable bonds, a derivative related to such issuance and the investment of the proceeds of such issuance, then A would not be a municipal advisor to FPC with respect to any of the foregoing.

A similar circumstance exists where a person provides advice to a private corporation that is considering a public-private partnership in which it may purchase some public assets. Here, the advisor may not know whether private activity bonds or other municipal securities will be involved in the ultimate transaction, which would thereby make its client an obligated person. The advisor should not be considered a municipal advisor for any period of the engagement prior to when a decision is made to pursue a municipal offering and the advisor begins to advise its client—only now a potential obligated person—with respect to the particular offering that will make the client an obligated person.

These clarifications are particularly important because of the different—and arguably flawed—regulatory structure applicable to persons that provide services, which may be considered municipal advisory activities, solely to obligated persons (*e.g.*, a private company that may engage in a tax-exempt conduit transaction from time to time).[21] Because Section 975 does not impose a fiduciary duty on a person that provides services to an obligated person, it is at least questionable whether any such service provider should be subject to as extensive a regulatory program (if any program at all) as that which would apply to persons that provide similar services to municipal entities—the type of entities for which the protection and benefits of the municipal advisor regulatory program are primarily intended.

D. The Definition of "Municipal Derivatives"

The SEC should also clarify how a person engaging in a transaction or assignment with respect to a "municipal derivative" determines that the counterparty is "an obligated person, acting in its capacity as an obligated person." In accordance with the discussion in Section II.C above, the SEC should clarify that the person must have actual knowledge that the counterparty is an obligated person, acting as such, and have actual knowledge that the municipal derivative implicates or is related to the underlying transaction or funds that make such person an obligated person. In addition, a person need not affirmatively inquire as to the counterparty's status as an "obligated person" or the status of its funds. Anything to the contrary would have significant negative implications for the manner by which all financial firms conduct business and establish relationships with clients.

[21] If the service provider provides services directly to the municipal entity involved in the transaction, it would be subject to regulation pursuant to these provisions irrespective of whether it also provides services to the obligated person.

E. The Definition of "Solicitation of a Municipal Entity or Obligated Person"

1. The SEC Should Clarify That a Placement Agent for a Pooled Investment Vehicle Does Not Engage in Solicitation for Purposes of Section 975

As SIFMA stated in comments to the SEC dated October 5, 2009 in response to proposed Investment Adviser Act Rule 206(4)-5,[22] SIFMA supports pay-to-play restrictions and regulation of the placement agent industry. Indeed, the industry welcomes a pay-to-play rule to remedy reputational damage caused by a few bad actors but suffered by legitimate broker-dealers involved in the placement of limited partnership interests. However, SIFMA respectfully submits that classifying a placement agent as a "municipal advisor" is not the way to accomplish such a policy goal. The SEC should not adopt its proposed interpretation that "a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity or obligated person to invest in the private equity fund would be a municipal advisor with respect to that activity."[23] Section 975 does not define the term "solicitation" to include a solicitation of a municipal entity or obligated person by a placement agent for a pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or even a mutual fund, all of which involve the sale of securities (not services) by registered broker-dealers.

In drafting Section 975, Congress narrowly defined a municipal advisor's solicitation activities as limited types of communications on behalf of five enumerated categories of unaffiliated persons—a broker, dealer, municipal securities dealer, municipal advisor or investment adviser.[24] A pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or mutual fund, is not among the specific categories of unaffiliated persons enumerated in the definition of "solicitation of a municipal entity or obligated

---

[22] Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Oct. 5, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-166.pdf.

[23] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011).

[24] Exchange Act § 15B(e) (defining "solicitation of a municipal entity or obligated person").

person."[25] Placement agents that are acting as investment bankers in the sale of securities, are not involved in selling the "services" of any of the above noted types of entities. Critically, a placement agent for a pooled investment vehicle should be viewed as engaging in solicitation on behalf of the vehicle only and not on behalf of the adviser to the vehicle.

Excluding solicitations on behalf of a pooled investment vehicle parallels the SEC's own interpretation that an adviser to a pooled investment vehicle would generally not be considered a municipal advisor. Consistent with long-held interpretations under the Investment Advisers Act and its own logic, the SEC should also clarify that a person that acts as a placement agent for a pooled investment vehicle is not thereby considered to be soliciting for the provision of investment advisory services. There clearly is a distinct difference between an agent who promotes (for a fee) the retention of a particular investment adviser to manage a municipal entity's assets and a placement agent who assists in the placement of securities, such as limited partnership interests in a private placement. Indeed, in the latter case, even if the solicitor is successful and the investor purchases an interest in the vehicle, no investment advisory relationship will be created between the adviser to the vehicle and the investor.[26] In other

[25] In any event, the "solicitation" prong of the municipal advisor definition is only triggered by activities on behalf of persons not under common control with the solicitor entity. In this regard, the SEC should clarify that an SEC-registered investment adviser engaging in solicitation activities would only be required to register as a municipal advisor to the extent that it solicits on behalf of unaffiliated persons, such as an unaffiliated municipal advisor. *See* Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 833 (Jan. 6, 2011) (stating that an investment adviser engaging in solicitation activities would not be eligible for the investment adviser exception to the definition of "municipal advisor"). It should further be clarified that the exception for investment advisers should cover solicitation activities of investment adviser employees on behalf of their employer.

[26] See note 18 and accompanying text. As explained in the *Goldstein* case, "[t]he adviser owes fiduciary duties only to the fund, not to the fund's investors. . . . If the investors are owed a fiduciary duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest. . . . For the same reason, we do not ordinarily deem the shareholders in a corporation the "clients" of the corporation's lawyers or accountants. . . . While the shareholders may benefit from the professionals' counsel indirectly, their individual interests easily can be drawn into conflict with the interests of the entity. It simply cannot be the case that investment advisers are the servants of two masters in this way." 451 F.3d at 881.

If the adviser would have a conflict in representing both limited partnership investors and the fund itself then surely it would be a conflict for the placement agent placing the limited partnership interests—an agent of the investment adviser forming the fund—to have a fiduciary duty to the investors. As with the corporate attorney example, the investors in the pooled
(…continued)

words, if investing in a pooled investment vehicle does not result in an investment advisory relationship with the vehicle's adviser, then likewise the placement of an interest in such a vehicle does not constitute the solicitation of an investment advisory relationship.

To the extent that the SEC seeks to classify broker-dealers acting as placement agents that solicit municipal entities or obligated persons as municipal advisors in order to subject them to the pay-to-play rule (which SIFMA favors),[27] the SEC's objectives could be accomplished in a significantly less burdensome manner. The Financial Industry Regulatory Authority ("**FINRA**"), as broker-dealers' primary self-regulatory organization, already has the jurisdiction to promulgate a pay-to-play rule for broker-dealers.[28] Moreover, FINRA would be able to apply such a rule directly to broker-dealers, without subjecting them to the additional registration costs and regulatory burdens associated with registration as a municipal advisor.[29] Such an approach would be far preferable to the SEC's proposed classification of broker-dealers acting as placement agents for pooled investment vehicles as municipal advisors, with attendant duplication in registration and regulatory programs, in order to impose such a rule.[30] Given the

(continued…)

investment vehicles are benefitted by the placement agent's involvement and expertise, but that does not result in such an agent being deemed an advisor to the investors.

[27] See note 65 and accompanying text.

[28] *See, e.g.*, Letter from Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA to Andrew J. Donohue, Director, Division of Investment Management, SEC (Mar. 15, 2010) (stating that FINRA is "in a position to promulgate" rules that would apply to broker-dealer members of FINRA and "allow such members to act as regulated placement agents in soliciting government entities on behalf of certain investment advisers if they complied with requirements prohibiting pay to play activities by those placement agents on their own behalf or on behalf of the investment advisers in respect of whom they act as placement agent.").

[29] SIFMA notes that under the SEC's pay-to-play rule, investment advisers will not be able to utilize broker-dealers as solicitors after September 13, 2011 unless such broker-dealers are subject to a pay-to-play regime. *See* Investment Advisers Act Release No. 3043, 75 *Fed. Reg.* 41018, 41042 (July 14, 2010). SIFMA's proposed solution—under which FINRA would promulgate a pay-to-play rule for broker-dealers—would allow this deadline to be met, but without requiring broker-dealers to register "voluntarily" as municipal advisors and thus subject themselves to unnecessary and potentially duplicative and onerous registration requirements and regulation.

[30] Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Jan. 24, 2011), *available at* http://www.sec.gov/comments/s7-36-10/s73610-34.pdf ("SIFMA continues to strongly support the
(…continued)

fiduciary duty and other requirements attendant with the municipal advisor classification, the SEC risks imposing a burden on placement agents akin to the ban on certain placement activities that the SEC already rejected.[31]

If the SEC does not clarify that the mere placement of an interest in a pooled investment vehicle, such as a private equity fund, hedge fund, local government investment pool, or mutual fund, is not solicitation, then many placement agents will likely substantially curtail their placement of non-affiliated funds to municipal entities and obligated persons. This would be detrimental to municipal entities and obligated persons that seek to invest in these instruments.

2. The SEC Should Reconsider Requiring Investment Advisers To Use Municipal Advisors Under the Investment Adviser Pay-To-Play Rule

Proposed amendments to the SEC's pay-to-play rule under the Investment Advisers Act would make it unlawful for an investment adviser to "provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is[, among others,] a regulated municipal advisor."[32] This prohibition would also apply to the use of *affiliated* solicitors, a category of persons that is not required to register as municipal advisors.[33] To accommodate

---

(continued…)

SEC's goal of eliminating 'pay-to-play' practices from the selection of investment advisers by government entities.").

[31] In response to proposed Rule 206(4)-5 under the Investment Advisers Act, the SEC acknowledged that numerous commenters believed "that it would also harm public pension plans to ban payments to third parties because it would decrease competition by reducing the number of advisers competing for government business and limit the universe of investment opportunities presented to public pension funds." *See* Investment Advisers Act Release No. 3043, 75 *Fed. Reg.* 41018, 41060 (July 14, 2010). Accordingly, the SEC concluded: "We believe our decision to modify the proposed rule to permit advisers to make payments to certain 'regulated persons' to solicit government clients on their behalf . . . should alleviate many of these concerns, including those from private equity and venture capital managers on capital formation." *Id.*

[32] Investment Advisers Act Proposed Rule 206(4)-5(a)(2), 75 *Fed. Reg.* 77052, 77100 (Dec. 10, 2010); *see also* Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Elizabeth Murphy, Secretary, SEC (Jan. 24, 2011), *available at* http://www.sec.gov/comments/s7-36-10/s73610-34.pdf.

[33] See note 24.

the proposed amendment to the investment adviser pay-to-play rule, the SEC is proposing to allow entities to register voluntarily as municipal advisors.[34]

Congress expressly determined that affiliated solicitors do not need to register or become subject to the MSRB's pay-to-play rule. The SEC should not attempt to overrule this decision through its investment adviser rules. To the extent that the SEC believes that affiliated solicitors should be subject to pay-to-play rules, it should require that investment advisers condition use of affiliated solicitors on their compliance with the investment adviser or comparable pay-to-play rule. This would achieve the SEC's goal directly and avoid forcing affiliated solicitors to undertake the full municipal advisor regulatory requirements.

The SEC should also delay any further action on the proposed investment adviser pay-to-play rule until such time that the municipal advisor registration and regulatory program is finalized. At that time, the SEC will have a more concrete basis for assessing the appropriateness of the obligations that it would impose on affiliated solicitors. Moreover, only at that time will interested parties be able to fully comment as to the utility of imposing municipal advisor requirements on affiliated solicitors.

In any case, the SEC should clarify that persons engaging in solicitation under the investment adviser pay-to-play rule, especially those registering voluntarily with the SEC, will not have a fiduciary duty, under Section 975, to any municipal entity or obligated person that they solicit. This would be consistent with the MSRB's position that the statutory fiduciary duty applicable to municipal advisors does not apply in the context of their solicitation activities under Section 975.[35]

3. The SEC Should Clarify That Solicitation for Principal Investments Does Not Constitute Solicitation for Purposes of Section 975

The SEC should clarify that solicitation does not include situations where a person approaches a municipal entity or obligated person on behalf of an unaffiliated person for the purpose of such unaffiliated person's making an

[34] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 n.104 (Jan. 6, 2011).

[35] *See* note 65 and accompanying text. *See also* MSRB Notice 2011-13, *Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors* (Feb. 14, 2011) (stating that "municipal advisors are not required to exercise a fiduciary duty when soliciting municipal entities on behalf of third parties").

investment as principal in municipal securities to be issued by the municipal entity or obligated person. In this case, even if the prospective investor were one of the five enumerated categories of persons under the definition of "solicitation of a municipal entity or obligated person," such as a broker-dealer, the solicitation would not be for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of the person for or in connection with the issuance of municipal securities.[36] This is because the solicitor would not be looking to advise or otherwise enter into a relationship with the municipal entity or obligated person. Instead, the person would be contacting the municipal entity through the solicitor for the purpose of purchasing the securities to be issued by the municipal entity or obligated person.

F. The Underwriter Exception

The SEC's proposed new definition of "municipal advisor" excludes a broker, dealer or municipal securities dealer serving as an "underwriter . . . on behalf of a municipal entity or obligated person, unless the broker, dealer or municipal securities dealer engages in municipal advisory activities while acting in a capacity other than as an underwriter on behalf of a municipal entity or obligated person."[37] This proposed exception is overly narrow, and would severely limit the activities in which an underwriter may engage without having to register as a municipal advisor.

1. The Underwriter Exception Should Extend to the Full Range of Underwriting Activity

Persons serving as underwriters—who are already subject to regulation as such—do more than just distribute securities in connection with an underwriting assignment. The SEC should recognize that the various discrete transactions and communications involved in a securities offering are interconnected and, in order to provide a meaningful exception to underwriters, clarify that the underwriter

[36] Of course, in some circumstances, the soliciting person could also be acting as an advisor to the municipal entity or obligated person (and therefore be held to be a municipal advisor, unless otherwise excepted) under the "advice" prong of the definition of "municipal advisor."

[37] Proposed Rule 15Ba1-1(d)(2)(i), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011) (further defining the "underwriter exception" to the definition of "municipal advisor").

exception also extends to the full range of activities involved in an underwriting,[38] such as:

- Advice regarding the issuance of municipal securities, municipal financial products or any other securities in the context of an underwriting. Such activities would include providing structuring alternatives or information or analysis regarding market conditions, practices, trends or timing, or terms or other similar matters, and communications with rating agencies on behalf of the municipal entity or obligated person, but would not include activities where the broker-dealer or municipal securities dealer has otherwise agreed to act as a municipal advisor with respect to the underwriting.

- Advice on the advisability of a municipal derivative (including entering into a new derivative, or amending or terminating an existing derivative) in connection with an underwriting. Even where a municipal entity or obligated person is being advised by an independent financial advisor, the municipal entity or obligated person will still ask its underwriter for its view on the advisability of entering into a swap in connection with the offering or how it should invest the proceeds of an issuance of municipal securities. If underwriters were to be considered municipal advisors by virtue of providing this advice to municipal entities or obligated persons, then they would simply stop providing such advice and limit their role to distributing the securities for the municipal entity or obligated person. Given the interconnected nature of the various discrete transactions and communications involved in a securities offering, this would be a disservice to municipal entities and obligated persons, as they would lose the input of the very underwriters that are in the unique position to provide expert views as to how they should structure their offerings and investments.

[38] SIFMA notes that the MSRB has recently stated that "a financial advisory relationship shall not be deemed to exist when, in the course of acting as an underwriter, a dealer renders advice to an issuer, including advice with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities." MSRB Notice 2011-10, *Proposed Rule Amendments and Interpretive Notice Regarding Rule G-23 on Activities of Financial Advisors* (Feb. 9, 2011).

- Advice in the capacity of a member of the municipal entity or obligated person's underwriting pool, even if not in the context of a particular deal; or providing other services after the closing of an issuance of municipal securities but which relate to the issuance for which the underwriter acted as an underwriter. For example, a municipal entity may request particularized cash flows or other computational work post-offering from one of the underwriters, making the provision of these services an integral part of the underwriting services expected, and often required, by the municipal entity or obligated person. An underwriter is generally not compensated for providing these types of services. If these activities are considered to fall outside of the underwriter exception, prospective and former underwriters will curtail them to the detriment of the municipal entity or obligated person. As a result, the municipal entity will either have to forgo receiving this advice or service, or be forced to compensate the underwriter or another advisor.

- Communications and analyses that are part of an effort or presentation to obtain business from the municipal entity or obligated person, or otherwise part of seeking to serve as an underwriter on future transactions. These communications and activities should be covered by the underwriter exception even if the municipal entity or obligated person does not ultimately provide the person engaging in such communications or activities with an underwriting mandate.

- Assistance on related transactions and related tranches of the offering.

- Service as a dealer-manager on a related tender or exchange offer for outstanding securities.

All these activities are customarily part of an underwriting engagement. Absent this interpretation of the scope of the underwriter exception, broker-dealers and municipal securities dealers would likely limit many services that they traditionally provide in connection with underwriting activities, rather than to assume registration and fiduciary and other obligations.

2. The SEC Should Also Clarify That the Underwriter Exception Extends to Private Placement and Remarketing Agents, as well as Registered Municipal Finance Professionals

The SEC should also clarify that the underwriter exception extends to a private placement agent offering securities issued by a municipal entity or obligated person, on a private placement basis under the Securities Act of 1933, even if the private placement agent is not technically serving as an "underwriter," as that term is defined in Section 2(a)(11) of the Securities Act.[39] The activities in which a person that is serving as an underwriter or private placement agent in the context of an underwriting or private placement engagement with a municipal entity or obligated person are very similar. In addition, there is no conceptual or policy justification for excepting a person that assists a municipal entity or obligated person to sell its securities to the public at-large in an underwritten distribution from the definition of "municipal advisor," while potentially requiring a person that assists a municipal entity or obligated person to sell its securities on a limited basis in a private placement to register as a municipal advisor. Moreover, the range of activities discussed previously for underwriters would also apply to private placement agents.

The SEC should also clarify that the underwriter exception extends to a remarketing agent that resells to new investors securities previously issued by a municipal entity or obligated person (such as variable rate demand obligations and other tender option bonds that have been tendered for purchase by their owner), or is responsible for resetting the interest rate for a variable rate issue or acts as tender agent. In the context of repricing and reselling an issuance in the secondary market, remarketing agents may provide advice to issuers with respect to such instruments, including ongoing advice with respect to rate setting.[40] When engaging in remarketing activities, a broker-dealer does not necessarily

[39] Securities Act § 2(a)(11) ("The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."). The term "distribution" for these purposes is generally understood to mean a public offering of securities, as opposed to a private placement. *See, e.g.*, *Neuwirth Inv. Fund, Ltd. v. Swanton*, 422 F. Supp. 1187, 1194-95 (S.D.N.Y. 1975); *The Value Line Fund, Inc. v. Marcus*, CCH Fed. Sec. L. Reg. P 91,523 (S.D.N.Y. 1965)).

[40] SIFMA does not believe that the activities of a remarketing agent generally constitute "advisory" activities for purposes of Section 975 and requests that the SEC clarify that, in most cases, a remarketing agent, acting as such, would not be considered to provide advice to a municipal entity or obligated person and therefore would not be a municipal advisor.

engage formally in a distribution as an underwriter under Section 2(a)(11) of the Securities Act. However, any activities in which a remarketing agent engages when it resells an issuance in the secondary market are similar to those of an underwriter of a primary issuance by a municipal entity or obligated person. In addition, as is the case with private placement agents, there is no conceptual or policy justification for excepting a person that assists a municipal entity or obligated person to sell its securities in the primary market in an underwritten distribution from the definition of "municipal advisor," while potentially requiring a person (or even the same person) that assists a purchaser of securities from the primary market to resell its securities in the secondary market to register as a municipal advisor. Moreover, the range of activities discussed previously for underwriters would, as relevant, also apply to remarketing agents.

The underwriter exception should also apply to employees of affiliated entities (*e.g.*, banks) that are registered municipal finance professionals. These employees are often registered as municipal finance professionals because current MSRB "solicitation" interpretations would otherwise prohibit them from being present when registered representatives of an affiliated broker-dealer discuss potential municipal securities business with a municipal entity or obligated person. These persons should not be subject to an additional regulatory program by virtue of engaging in such minimal municipal advisory activity.

G. The Investment Adviser Exception

1. The SEC's Proposed Investment Adviser Exception Is Unduly Restrictive

The SEC's proposed new definition of "municipal advisor" excludes an SEC-registered investment adviser (and its associated persons) "unless the registered investment adviser . . . engages in municipal advisory activities other than providing investment advice that would subject such adviser . . . to the Investment Advisers Act of 1940."[41] The use of the phrase "subject such adviser . . . to the Investment Advisers Act" itself raises ambiguities regarding the scope of the covered investment advice. Portions of the Investment Advisers Act, such as the anti-fraud provisions, may apply to advice that itself does not require an adviser to register. However, read narrowly to mean advice that would subject the adviser to registration requirements, the proposed exception is unduly restrictive and goes beyond the statutory definition of "municipal advisor," which

[41] Proposed Rule 15Ba1-1(d)(2)(ii), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011) (further defining the "investment adviser exception" to the definition of "municipal advisor").

excepts any SEC-registered investment adviser that is, without qualification, "providing investment advice." The SEC should be mindful that not all "investment advice" subjects a person to registration under the Investment Advisers Act, such as when an investment adviser provides advice regarding investments in instruments that are not securities.[42] The effect of this proposed narrowing of the statutory exception would mean that, without an apparent reason or policy justification, an SEC-registered investment adviser would be excepted from municipal advisor registration for only some, but not all, of its investment advisory activities—an arbitrary result.

The SEC's proposed narrowing of the statutory investment adviser exception does not recognize that the nature of the investment advice that an investment adviser may give with respect to the investment of the proceeds of municipal securities issuances could depend on how an offering of municipal securities is structured or issued. For example, an investment adviser may recommend that the municipal entity or obligated person change the terms of a proposed bond offering so that it is required to pay a lower interest rate on the securities and thereby be able to invest the proceeds in less risky investment vehicles, while still receiving the same net return on its investment.

In this light, the SEC should state that an investment adviser is not a municipal advisor when it advises a municipal entity or obligated person on the structuring or issuance of municipal securities and when such advice is provided in the context of the investment adviser's provision of investment advice to the municipal entity or obligated person. SIFMA notes that investment advisers are already subject to regulation and a fiduciary duty. Thus, they should be able to provide a municipal entity or obligated person with a particularized recommendation regarding the structuring or issuance of municipal securities in the context of providing it with investment advisory services, without being required to register as a municipal advisor.

---

[42] *See* Investment Advisers Act § 202(a)(11) (defining an "investment adviser" as "any person who . . . engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who . . . issues or promulgates analyses or reports concerning securities").

2. The Investment Adviser Exception Should Also Extend to Any Regulated Person That Provides Investment Advice

The investment adviser exception should also extend to any person to the extent that such person provides advice that otherwise would be subject to the Investment Advisers Act, but for the operation of a prohibition to, or exemption from, SEC registration, including banks and trust companies and state-registered investment advisers.

These regulated persons should be eligible for the investment adviser exception. Although they are not subject to SEC regulation, they are providing investment advice that Congress has already determined is subject to sufficient regulation to not require these persons to be registered with or regulated by the SEC with respect to the provision of such advice.

Requiring these persons to register as municipal advisors when they are providing investment advice to municipal entities or obligated persons would undermine the purpose of existing prohibitions to or exemptions from SEC registration. In order to preserve symmetry among the Congressionally mandated regulatory programs, because these advisers are not subject to SEC regulation as investment advisers when they engage in their predicate investment advisory activities, they should not be subject to registration and regulation as municipal advisors when they provide investment advice to municipal entities or obligated persons. This is particularly compelling in the case of banks and trust companies, whose investment advisory activities are comprehensively regulated.

The SEC has the authority to extend the investment adviser exception to cover banks and trust companies and state-registered investment advisers in order to provide these persons with an exemption from the definition of "municipal advisor" and the application of the SEC's registration and regulatory program. Under Section 36(a) of the Exchange Act, the SEC has general authority to exempt, among others, any person or class or classes of persons from any provision of Exchange Act if such exemption is in the public interest and consistent with the protection of investors.[43] The SEC also has authority provided

---

[43] Exchange Act § 36(a)(1) ("[T]he [SEC], by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."); *see also id.* §§ 36(b) and (c)
(…continued)

by Section 975 to provide exemptive relief with respect to any class of municipal advisors.[44]

Banks and trust companies and state-registered investment advisers are already subject to significant regulation by federal or state regulators, including fiduciary obligations with respect to trust and investment management activities. As discussed throughout this letter, imposing an additional layer of regulation on these persons would not provide an appreciable regulatory benefit or increase the protection of municipal entities or obligated persons. Similarly, exempting such persons from regulation as municipal advisors would not disserve the public interest or reduce the protection of municipal entities and obligated persons, as these persons are already subject to regulation. Municipal entities and obligated persons can rely on existing regulatory structures to protect their interests with respect to the banks and trust companies and state-registered investment advisors providing them with investment advice. Moreover, by granting these exemptions, the SEC would serve the public interest by ensuring that municipal entities and obligated persons, within the existing system created for their protection, continue to receive investment advisory services from banks and trust companies and state-registered investment advisors.

H. The Municipal Employee Exception Should Extend to Non-Elected Board Members of a Municipal Entity

The SEC's proposed interpretation of the exception from the definition of "municipal advisor" for employees of a municipal entity would include any person serving as an *elected* member of the governing body of the municipal entity and appointed members of a governing body to the extent that such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. The interpretation would not, however, exclude appointed members of a governing body of a municipal entity that are not elected *ex officio* members (*e.g.*, volunteers) from the definition of "municipal advisor."[45] Failing to exclude from the municipal entity definition non-elected members of a governing body could have a substantial impact on the composition of a

(continued…)

(providing limitations, inapplicable to Section 15B of the Exchange Act and municipal advisor regulation, to the SEC's general exemptive authority).

[44] *Id.* § 15B(a)(4).

[45] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 834 (Jan. 6, 2011).

municipal entity's governing body or the willingness of appointed board members to share their relevant financial experience with the board, for the benefit of the municipal entity. SIFMA supports the views of the municipal issuer community that the SEC should clarify that the exception from the definition of "municipal advisor" for employees of a municipal entity extends to non-elected board members of a municipal entity, including non-employee directors of local government investment pools.[46]

III. Bank- and Trust Company-Specific Issues: Traditional Banking and Trust Activities Should Not Be Investment Strategies

The SEC's proposed definition of "investment strategies," as discussed in Section II.A above, is so broad as to potentially capture bank and trust accounts holding any funds of a municipal entity that may be used for investment, regardless of whether they are proceeds of municipal securities.[47] This broad definition would pick up traditional banking and trust services involving advice, which need not even involve advice on securities investments. These banking and trust activities are already subject to comprehensive oversight by banking regulators, and need not also be regulated as municipal advisory activities any more than underwriting or investment adviser activities regulated by the SEC. Moreover, failing to except traditional banking and trust activities from the definition of "municipal advisor" may cause banks and trust companies, in the face of additional registration and regulatory burdens or a new or different fiduciary duty, to stop offering their full range of banking and trust products to municipal entities and instead provide municipal entities with limited offerings, such as deposit accounts, or even cease providing products and services to municipal entities.

SIFMA believes, generally, that any activity (whether a solicitation or recommendation or provision of advice) in which a bank or trust company (and

[46] The SEC has received numerous letters from municipal entities, their representative associations and their appointed board members commenting on the SEC's proposal to make non-elected board members ineligible for the municipal employee exception to the definition of "municipal advisor." These include comment letters from Robert O. Lenna, Executive Director, Maine Municipal Bond Bank, Maine Health and Higher Educational Facilities Authority and Maine Governmental Facilities Authority (Feb. 4, 2011); Bill Longley, Texas Municipal League, Austin, Texas (Jan. 30, 2011); Stephen Walsh, California Municipal Finance Authority, Oakland, California (Jan. 28, 2011); William G. Dressel, Jr., Executive Director, New Jersey League of Municipalities (Jan. 27, 2011); and Ted Wheeler, Oregon State Treasurer (Jan. 26, 2011).

[47] See note 15 and accompanying text.

their personnel) currently engages that does not require it to register as either a broker-dealer, investment adviser or municipal securities dealer should not require registration with the SEC as a municipal advisor, including, for example:

- Providing advice concerning (or soliciting) transactions that involve a "deposit" at an "insured depositary institution," as defined in Section 3(c)(2) of the Federal Deposit Insurance Act, including advice with respect to insured checking and savings accounts and certificates of deposit.

- Directing or executing purchases and sales of securities or other instruments in a trust, fiduciary or investment management account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis.

- Providing other services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities.

- Providing advice concerning (or soliciting) transactions that are subject to an exemption under Regulation R of the Exchange Act or otherwise excluded from the definition of broker-dealer activities under the Exchange Act, including bank broker-dealer exceptions relating to third-party networking arrangements, trust and fiduciary activities, deposit "sweep" activities, custody and safekeeping activities and certain securities lending transactions.

- Serving as trustee to a pooled investment vehicle.

Banks and trust companies with which a municipal entity or obligated person may open an account are already subject to strict federal regulation (*e.g.*, by the Office of the Comptroller of the Currency ("**OCC**")) and owe a fiduciary duty to such clients.[48] Subjecting banks and trust companies to an

---

[48] *See, e.g.*, Part 9, OCC Regulations (governing the activities of national banks acting in a fiduciary capacity and when a bank may exercise fiduciary powers, who is permitted to manage or direct the exercise of those powers and how a bank may invest and exercise discretion over fiduciary funds, as well as providing requirements for policies and procedures, recordkeeping and audit of fiduciary activities). Under Part 9.2(e) "fiduciary capacity" is defined as "trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a."

additional layer of regulation would not materially strengthen the high level of protection already afforded to a bank or trust company's municipal entity or obligated person clients. Rather, imposing the municipal advisor regulatory requirements and fiduciary duty on banks and trust companies would lead to unnecessary burden and expense. There is nothing special or particular about the provision of municipal advisory services that warrants duplicative registration and regulation requirements for such activities that are already excepted from duplicative registration and regulation in the broker-dealer and investment adviser contexts.

The SEC should also be mindful that banks and trust companies do not generally maintain information regarding the disciplinary history of their personnel who are not otherwise registered with a broker-dealer, investment adviser or municipal securities dealer. It would be particularly burdensome and expensive—particularly if there were no exception for the banking and trust activities discussed above—for a bank or trust company to gather (and update as required) the disciplinary history of such individual associated persons, even if limited to disciplinary history for only persons "primarily engaged" in municipal advisory activities, as discussed in Section IV.B.2 below.[49]

As discussed previously, because banks and trust companies are already comprehensively regulated by federal and state regulators when they engage in traditional banking and trust activities, imposing an additional layer of regulation on banks and trust companies would not increase the protection of municipal entities or obligated persons. Similarly, excepting them from regulation as municipal advisors would not disserve the public interest or reduce the protection of municipal entities and obligated persons, who may rely instead on existing

---

[49] SIFMA notes that the SEC is considering whether to permit a separately identifiable department or division ("**SID**") of a bank to register, to the extent required, as a municipal advisor instead of the entire banking entity. Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 838 (Jan. 6, 2011). SIFMA strongly encourages the SEC to permit SIDs to register as municipal advisors instead of the entire banking entity. However, the SEC should recognize that, absent providing banks with the exceptions discussed above, for some banks the attractiveness of using a SID to more effectively and efficiently register a bank municipal advisor would be severely limited. This is because the resulting categories of municipal advisory activities triggering registration would be so intertwined and integrated into other traditional banking functions, and potentially spread among so many disparate geographic and operational areas of any large bank. As such, it would be neither practical nor feasible for a bank to attempt to segregate or extract all of the personnel and related records pertaining to such activities and put them into a segregated operational unit of the bank in order to qualify as a SID. At the very least, a large banking organization would incur significant burden and expense in identifying which of its individual associated persons are required to be part of the SID.

regulatory structures to protect their interests with respect to the banks and trust companies that provide services to them. Moreover, by granting these exceptions, the SEC would serve the public interest by ensuring that municipal entities and obligated persons, within the existing system created for their protection, continue to receive traditional banking and trust services.

Absent an exception, bank and trust companies that are not currently subject to SEC regulation would bear disproportionate costs and burdens in complying with the municipal advisor registration and regulatory programs, especially banks and trust companies that act as integrated multi-service organizations. These costs and burdens would be exacerbated if the SEC retained its broadly proposed rules and guidance. This would in turn cause banks and trust companies to reduce their services to municipal entities and obligated persons and increase costs, with little to no regulatory benefit.

IV. The SEC's Registration Process for Municipal Advisors

A. The Proposed Registration Process Requests Duplicative Information and Unnecessarily Imposes a Significant Administrative Burden

The information that the SEC is currently proposing to collect on Forms MA and MA-I is duplicative of information already gathered by the SEC through other registration programs, such as SEC forms for broker-dealer, investment adviser and municipal securities dealer registration. To reduce the duplicative requests for information and potentially significant costs and burden of registration—especially in light of the fact that Section 975 does not specify the manner of registration and was not intended to capture persons already subject to regulation—the SEC should consider alternative registration programs for persons that are already registered with the SEC as broker-dealers, investment advisers or municipal securities dealers. These alternatives would include allowing these registrants to check an additional box on their primary registration forms already filed with the SEC or providing them with a short-form registration process. Should the SEC still insist that persons that are already registered in another capacity complete Form MA, then it should allow such persons to incorporate by reference on Form MA any information that is included on another registration form. Moreover, whatever the form of the final registration program, the SEC

should provide municipal advisors with a sufficient phase-in period to register as such.[50]

In addition, as noted below, individual registration by employees presents significant burdens with little corresponding benefit and should be eliminated from a final rule.

1. Alternative Registration Programs for Registered Broker-Dealers, Investment Advisers and Municipal Securities Dealers

To reduce the duplicative requests for information and potentially significant burden of registration, the SEC should allow registered broker-dealers, investment advisers and municipal securities dealers to check a box on Forms BD, ADV and MSD to indicate that they are engaged in municipal advisory activities. This would significantly reduce costs and the burdens of registration for both registered entities and the SEC, as no new forms would be required to register as municipal advisors for any persons that are already registered with the SEC in another capacity.

As another alternative, the SEC could provide a short-form registration process for persons that are already registered with the SEC as broker-dealers, investment advisers or municipal securities dealers. This type of registration program would essentially require applicants to complete a short form similar to that used by the MSRB for municipal advisor registration under MSRB Rule G-40 and refer to their registrations (and those of their associated persons) already on file and available through the CRD or IARD system. Short-form registration would reduce the duplicative burdens of re-registering as municipal advisor persons already registered with the SEC, without reducing the quality of the information that the SEC would receive. The SEC could request limited additional disclosure on the short form where such information is not already disclosed on Form BD, ADV, MSD or U4 and is necessary to the proper regulation of municipal advisors.

[50] SIFMA also notes that it does not believe EDGAR is the best system through which registration should be accomplished. EDGAR was designed for the electronic filing of registration statements and other periodic reports, and has no history of registering individuals, limited history of registering entities for regulatory purposes, and limited search capabilities. Other systems, such as BrokerCheck, operated by FINRA, would be better suited for this purpose.

2. The SEC Should Allow Applicants To Incorporate by Reference Any Information Contained on Their Other Registration Forms

In the event that the SEC does not provide applicants with the alternative forms of registration proposed above, municipal advisors should be allowed to rely on their prior registrations and disclosures on Forms BD, ADV, MSD, U4, 7-R and 8-R, and incorporate any part of them (and not just disciplinary history) by reference. In addition, the additional or different disclosures requested on the municipal advisor registration forms should be limited to those unique to municipal advisory activities and essential to the purposes of registration.

This would better streamline an applicant's reliance on other registration forms and allow it to effectively satisfy its registration obligations through cross-references. In addition, the SEC should be mindful that any requests for information beyond that which is already requested by Forms BD, ADV and U4, the primary registration forms, would unnecessarily increase the cost of registration and reduce the efficiency of registration by preventing cross-referencing between registration forms.

This heightened cost of registration would raise the burden of functioning as a municipal advisor, and discourage advice to municipal entities.

Moreover, the SEC should be mindful that any large organization, whether a bank or trust company with unregistered personnel or a registered broker-dealer or investment adviser, would incur significant time, burden and expense in identifying personnel involved in activities that would subject them to registration. This registration challenge would be compounded for any applicant if individuals are required to register separately on Form MA-I. Moreover, it would be acutely costly and burdensome for banks and trust companies that are required to provide information regarding, or separately register, personnel who have not previously registered with the SEC, FINRA or NASAA in any capacity.[51]

---

[51] The SEC should also recognize that by sweeping persons that are already regulated into the definition of "municipal advisor," it will also subject them to rigorous and costly recordkeeping and reporting requirements under rules to be promulgated by the MSRB, which are in addition to the significant costs and burdens associated with registering as municipal advisors in the first place. For example, the MSRB's proposed Rule G-42 not only includes a pay-to-play limitation but also has extensive recordkeeping and reporting obligations that require a municipal advisor to report quarterly to the MSRB information regarding contributions to officials of municipal entities and bond ballot campaigns, as well as provide lists of municipal entities that the municipal advisor has either advised or solicited during the quarter. MSRB Notice 2011-04,
(…continued)

3. The SEC Should Provide Municipal Advisors With a Sufficient Phase-In Period for Registration

Whatever the final form and extent of the SEC's registration program, the SEC should provide municipal advisors with a sufficient phase-in period to register following final adoption of permanent registration rules. In order to identify the parts of their organizations that engage in municipal advisory activities, large firms would require a phase-in period of at least two years if the SEC adopted its proposed rules as final without making the modifications discussed throughout this letter (*e.g.*, it could take two years for a large firm to determine whether any public funds are in its accounts), and at least one year if the SEC modified its rules as suggested by SIFMA in this letter. Firms would also need this time to consider internal reorganizations in order to reduce the burden of initial registration and ongoing compliance with the municipal advisor registration requirements, and many firms may find it operationally most efficient to transition at the end of a calendar year (most logically, the year after the year in which final rules are adopted).

B. Selected Issues With Proposed Forms MA and MA-I and the Self-Certification

To the extent that proposed Forms MA and MA-I continue to be required for registration, the SEC should remove from the forms several particularly burdensome information requirements regarding a municipal advisor and such associated persons as its individual employees and affiliated companies (such as sister affiliates), including information relating to their other business activities that are not related to municipal advisory activities.

(continued…)

Request for Comment on Pay To Play Rule for Municipal Advisors (Jan. 14, 2011). The extensive reporting obligations of proposed MSRB Rule G-42 would further increase the costs and burdens to be placed on persons that are already subject to regulation. This would be especially true if a large firm with thousands of government accounts, were, by virtue of the SEC's proposed definition of "investment strategies," required to track and report every single account or, to reduce the volume of information reported, undertake the burden of differentiating which of those accounts were provided with "advice" in a given quarter.

1. Information Relating to Municipal Advisory Firms

(a) Disclosure Relating to Affiliates

Form MA requests overly extensive disclosure relating to a municipal advisor's affiliates, which would be particularly burdensome for a municipal advisor that is a member of a large affiliated group of financial institutions to gather and provide.

For example, Item 6 of Form MA would require the applicant to indicate in which of 20 enumerated types of businesses any of its associated persons (which include sister affiliates) are engaged (*e.g.*, broker-dealer, investment adviser, swap dealer, banking institution, pension consultant, real estate broker, sponsor or syndicator of limited partnerships). Schedule D requires the applicant to list the names and other information regarding all associated persons, including foreign affiliates, that are broker-dealers, municipal securities dealers or government securities brokers or dealers, or investment advisers, municipal advisors, registered swap dealers, banking or thrift institutions or trust companies and, for each such listed person, to indicate in which of nineteen enumerated types of businesses they are engaged. Applicants would also have to provide the name and country of any foreign financial regulatory authority, if any, with which the affiliate is registered.

Similarly, Item 8 and Schedules A, B, C and D of proposed Form MA require disclosure of every person that, directly or indirectly, controls the applicant or that the applicant directly or indirectly controls. Furthermore, Item 9 of proposed Form MA would require disclosure of disciplinary history of all associated persons of a municipal advisor, which includes not only employees engaged in municipal advisory activities but also all sister affiliates of the municipal advisor.[52] Although Form ADV, on which proposed Form MA is

[52] Exchange Act § 15B(e)(7) (defining the term "person associated with a municipal advisor" or "associated person of an advisor" as "any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions); any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and any person directly or indirectly controlling, controlled by, or *under common control with* such municipal advisor") (emphasis added); *see also* Proposed Form MA, Glossary of Terms, 76 *Fed. Reg.* 824, 964 (Jan. 6, 2011) (proposing a similar definition, which also includes common control affiliates, for the terms "associated person" or "associated person of a municipal advisor" for purposes of Form MA).

based, requests similar business information regarding an investment adviser's sister affiliates, it does not require disclosure of a sister affiliates' disciplinary history.[53]

The disclosures regarding affiliates of an applicant, particularly the disclosure of disciplinary history, potentially encompass a distant set of commonly controlled affiliates. These sister affiliates' activities may have no connection to municipal advisory activities, let alone, in the case of financial institutions with global operations, a nexus or connection to any activities in the United States. These disclosures should be limited to disclosures of affiliates that either control or are controlled by the municipal advisor. Otherwise, the forms would impose a vast information-gathering burden on applicants, which may have hundreds of sister affiliates that are located throughout the world and subject to multiple financial regulators.

Moreover, the public disclosure of this, and other similar information on Form MA, would not serve any public interest relating to the regulation of municipal advisors where such affiliates have no connection to municipal advisory activities. At a minimum, disclosure regarding sister affiliates should be substantially narrowed to only those common control affiliates that provide services to municipal entities or obligated persons in the United States.

(b) Other Unnecessary or Inapplicable Information

The disclosures required for investment advisers on Form ADV, on which proposed Form MA is based, are, in many cases, not relevant to municipal advisors. In addition, the SEC has not articulated a convincing purpose for much of the information on Form MA. A general recitation that the SEC "believes that the information . . . would be useful for its regulatory purposes, including planning and preparing for inspections and examinations, and to the public generally . . ."[54] does not constitute a sufficient explanation of the need for this intrusive information. Given the breadth of the definition of "municipal advisor" as proposed to be interpreted by the SEC, many of the activities of municipal advisors are not like those of investment advisers. For instance, brokerage of escrow funds is not like the "assets under management" investment advisory

[53] Form ADV, Item 11 (Disclosure Information) (requesting the disciplinary history of the investment adviser and all of its "advisory affiliates" (*i.e.*, all current employees; all officers, partners or directors; and all persons directly or indirectly controlling or controlled by the investment adviser)).

[54] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 856 (Jan. 6, 2011).

business that is a focus of Form ADV. Many of the questions on Form MA drawn from Form ADV are not likely to obtain useful responses from municipal advisors. Therefore, Form MA should not request information, even if it is generic and non-particularized, regarding a municipal advisor's clients, compensation arrangements, other business activities, financial industry affiliations, proprietary and sales interests in its municipal advisory clients' transactions and investment or brokerage discretion, as currently proposed on Items 1, 4, 5 and 7 and Schedule D.

Moreover, it would be difficult for a municipal advisor to collect this information on an ongoing basis, especially for large financial firms with disparate operations engaged in municipal advisory activities. Instead, in determining which, if any, disclosures drawn from Form ADV are applicable to municipal advisor registration, the SEC should carefully consider the context in which Form ADV disclosures were considered and adopted, and how the activities of municipal advisors differ from those of traditional investment advisers. In particular, information regarding a municipal advisor's proprietary and sales interests and investment brokerage discretion is transaction-specific and of little utility. Such information would be burdensome for an applicant to ascertain and gather. Moreover, it is unclear why a municipal entity or obligated person would be interested in learning about a municipal advisor's arrangement with another municipal entity or obligated person.

In addition, the SEC should delete Section 4-D of Schedule D of proposed Form MA so that a municipal advisor is not required to disclose the name and contact information of persons that solicit municipal advisory clients on its behalf. A municipal advisor may have competitive concerns about disclosing publicly the identity of those persons that it engages to undertake solicitation on its behalf. Finally, and perhaps most significantly, it is unclear what benefit disclosing this information would have.

2. Information Relating to Individuals Should Be More Limited; Individual Registration by Employees Should Be Eliminated

A municipal advisory firm should not be required to provide information regarding its individual associated persons (*e.g.*, employees) on Form MA unless those persons are "primarily engaged" in municipal advisory activities, as in Form MA-T. This is particularly true if those persons are already registered with a broker-dealer, investment adviser, municipal securities dealer, commodity trading advisor or swap dealer. Limiting disclosures to those individual persons who devote a significant amount of time or resources to, or whose primary job

activity is, the provision of municipal advisory services would focus the requirement on the persons likely to be most active in municipal advisory activities and reduce the burden on municipal advisors in identifying, gathering and disclosing information on numerous individuals.

Moreover, limiting disclosure to a more narrow category of individuals should not affect a municipal entity or obligated person's access to the key information regarding the municipal advisor; it would still receive information on those individuals with whom it is most likely to come into contact or from whom it is most likely to receive services.

In addition, the SEC should not require individuals to register separately with the SEC on Form MA-I. The information requested regarding individuals largely duplicates Form MA's disclosures regarding a municipal advisor's associated persons. Requiring separate registrations of individuals on Form MA-I would be excessively burdensome and costly. Because the definition of "municipal advisor" as currently proposed by the SEC is overly broad, large numbers of individuals will be required to register or cease their municipal advisory activities. These individuals may provide only occasional services to municipal entities or obligated persons. Indeed, the only clear purpose for having individuals register separately rather than aggregating their information on Form MA, seems to be to obtain self-certifications from individuals, which itself is problematic, as discussed below. The registration of individuals in the manner proposed by the SEC is not called for in any respect by Section 975.

In addition to imposing a significant burden and considerable costs on municipal advisory firms and their individual associated persons, registration of individuals would force the SEC to devote substantial resources to processing many individual applications for registration. This would be in addition to processing municipal advisory firms' registrations on Form MA. In fact, the SEC expects approximately 21,800—if not more—individuals to register as municipal advisors on Form MA-I. This would be in addition to the 800 municipal advisory firms that have already registered with the SEC on Form MA-T and would be required to re-register on Form MA, and at least 200 additional firms that are also expected to register.[55] The sheer number of registrations would place significant

[55] *Id.* at 865; *see also* Commissioner Elisse B. Walter, *Statement on Study Enhancing Investment Adviser Examinations (Required by Section 914 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act)* (Jan. 2011) ("The [SEC] staff expects that this requirement will result in thousands of new entities and individuals registering with the [SEC]. More than 800 entities have already registered, and at least 200 more are expected to do so. Regarding individuals, the process has not yet begun, but the staff estimates that the number of

(…continued)

strain on the SEC's budget and personnel, especially if it plans to review all applications for municipal advisors that are filed under the permanent registration program.[56] The burden of registering investment advisers, broker-dealers and associated persons of broker-dealers currently is borne by FINRA, funded by registration fees and membership charges. SIFMA questions whether the incremental regulatory benefit (which it does not believe would be significant) stemming from the public availability of the information that would be produced by a system of individual registration would justify this massive resource commitment by both applicants and the SEC.

In lieu of requiring individuals to register separately with the SEC on Form MA-I, the SEC could work with the MSRB to establish, through the MSRB, a licensing and registration mechanism for individuals who are municipal advisors, which would be similar to the program used to register a broker-dealer's licensed associated persons with FINRA. Because the MSRB is already planning to develop qualification tests for individuals engaged in municipal advisory activities,[57] having only the MSRB, as opposed to both the SEC and MSRB, involved in the licensing and registration of individuals would eliminate

---

(continued…)

individuals could be more than 20,000. [SEC Office of Compliance Inspections and Examinations (OCIE)] staff estimates that nearly half of the examinations of municipal advisors will divert resources directly from the investment advisory area.").

[56] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 860 (Jan. 6, 2011) ("The information currently required by temporary Form MA-T is not reviewed by the [SEC] prior to registration, although the [SEC] retains full authority to review such information and examine any registered municipal advisor at any time. The [SEC] intends that the permanent registration process would entail a review of each Form MA and Form MA-I filed.").

[57] *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011). The MSRB's request for comment highlights the need to limit the fiduciary duty to the statutorily defined persons. First, the MSRB specifically noted that if the current form of the SEC's permanent registration rule is adopted it may need to reconsider its notice. Second, the MSRB notice makes clear the severe consequences of inclusion in the SEC's municipal advisor definition. Under the MSRB proposal, all proprietary trading in connection with a municipal advisory assignment would be banned, except where a municipal advisor is selling a GIC to the municipal client. This prohibition, which is stricter than the Investment Advisers Act's fiduciary duty, would extend to a municipal advisor's affiliates. Thus, once classified as a municipal advisor, a firm and its affiliates could be prohibited from providing a full suite of fixed-income products and municipal derivatives, which are often sold on a proprietary basis, to municipal entities.

duplication and reserve the SEC resources for regulation of municipal advisory firms.

If it were deemed necessary to formally register individuals (in addition to licensing them), the MSRB could adopt Form U4 and require it to be filed in connection with granting a license to individuals who engage in municipal advisory activities on behalf of an SEC- and MSRB-registered municipal advisory firm. Indeed, because many individual municipal advisors may also be associated persons of a broker-dealer or investment adviser, it would better serve the interests of the public to have a single source of information—on Form U4—about a licensed individual. It would also be easier for an individual and his or her employer to ensure that the individual is properly licensed under all applicable regulatory programs if only a single form is required to be filed with any applicable regulator.

3. The SEC Should Not Require a Self-Certification

The SEC should not require a self-certification by municipal advisors and individuals as a condition to registration. The self-certification on proposed Form MA focuses not just on past performance, but also on the ability of the municipal advisor, and every natural person associated with it, to meet "such standards of training, experience, and competence, and such other qualifications, including testing, . . . required by the [SEC], the MSRB or any other relevant self-regulatory organization."[58] A similar self-certification, tailored to an individual person, is also included on proposed Form MA-I.[59] These certifications are not currently required by Form BD or ADV. Given that the SEC and MSRB have yet to even propose what standards of training, experience and competence, and such other qualifications, including testing, will be applicable to municipal advisors, it is premature for prospective municipal advisors to even comment as to whether having such a self-certification would serve a useful purpose.

In addition, requiring a municipal advisory firm to conduct an annual review of its business and reasonably determine that it can carry out the municipal advisory activities in which it is engaged, including requiring the applicant to document the review process, would be costly, burdensome and confusing. Without any guidance as to the standards against which a municipal advisory firm would be required to determine its ability to carry out its activities, firms would

[58] Proposed Form MA, Self-Certification, 76 *Fed. Reg.* 824, 917 (Jan. 6, 2011).

[59] *Id.* at 927.

be unsure as to how to conduct such reviews. As a result, they may either incur unnecessary costs in designing a review process that is overly broad, or engage in a less than thorough review, which would open the firm up to potential liability for self-certifying as to its capabilities when it was, in fact, not as capable as it determined.

It is noteworthy that the forms and their certifications would be deemed "reports" filed with the SEC,[60] which could subject inaccurate certifications to administrative, civil or even criminal liability. It is inconsistent with basic standards of fairness to be compelled to face potential criminal liability for inaccurately certifying one's competence.

If the purpose of requiring self-certifications on Forms MA and MA-I is to make it easier for the SEC to charge a firm or individual for fraudulently certifying that they were qualified to engage in municipal advisory activities, this approach would impose undefined potential liability on the person making the certification, whether on behalf of the municipal advisory firm or in an individual capacity, or both. This exposure is especially acute because the person is self-certifying to compliance with future, and as-yet unknown, requirements for engaging in municipal advisory activities. The SEC's interest in ensuring the competence of municipal advisory firms and individuals who engage in municipal advisory activities would be better served by creating an examination process through the MSRB, in which the qualifications that are necessary for any person to engage in municipal advisory activities are clearly defined by the MSRB.

V. The Fiduciary Duty

Section 975 deems a municipal advisor to have a "fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor."[61] The SEC has thus far provided no guidance as to which municipal advisory activities the fiduciary duty applies and how a municipal advisor fulfills its

---

[60] Proposed Rule 15Ba1-2(d), 76 *Fed. Reg.* 824, 882 (Jan. 6, 2011); Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 839 (Jan. 6, 2011) ("Forms MA and MA-I would constitute "reports" for purposes of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act. As a consequence, it would be unlawful for a municipal advisor to willfully make or cause to be made, a false or misleading statement of a material fact or omit to state a material fact in Form MA or Form MA-I.").

[61] Exchange Act § 15B(c)(1).

fiduciary duty to a municipal entity.[62] SIFMA plans to respond to any proposals of the SEC and the MSRB in the area of fiduciary duty with a full range of comments. For purposes of this letter, however, SIFMA requests that the SEC preliminarily clarify that a municipal advisor has a fiduciary duty to its municipal entity clients only. SIFMA notes that Section 975 makes clear that the fiduciary duty does not extend to obligated persons.[63] SIFMA also requests that the SEC consider certain guiding principles when it drafts rules and interpretative guidance regarding the fiduciary duty.[64]

A. The Fiduciary Duty Should Extend to Municipal Entity Clients Only

The SEC should clarify that the fiduciary duty imposed under Section 975 applies only when a municipal advisor, acting as such, provides advice to its municipal entity client, and not to an obligated person. Under this framework, the fiduciary duty would also not apply when a municipal advisor undertakes a solicitation of a municipal entity because the municipal entity being solicited is not the municipal advisor's client. It would similarly not apply when a municipal advisor solicits a municipal entity in order to have the municipal entity engage

[62] SIFMA notes that the MSRB has proposed interpretive guidance regarding the fiduciary duty, but the MSRB's guidance does not take into account the SEC's overbroad interpretation of the activities that trigger municipal advisor status. *See* MSRB Notice 2011-14, *Request for Comment on Draft MSRB Rule G-36 (On Fiduciary Duty of Municipal Advisors) and Draft Interpretive Notice* (Feb. 14, 2011).

[63] Exchange Act § 15B(c)(1) (providing that a municipal advisor has a "fiduciary duty to any *municipal entity* for whom such municipal advisor acts as a municipal advisor") (emphasis added).

[64] SIFMA notes that the SEC staff recently released a study on investment advisers and broker-dealers. This study outlines the staff's recommendation that the SEC establish a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers and includes suggestions for considering harmonization of the broker-dealer and investment adviser regulatory programs. *Study on Investment Advisers and Broker-Dealers (As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act)* (Jan. 2011). SIFMA recognizes that this study will greatly inform the SEC's consideration of the obligations to be imposed under any fiduciary duty, as well as the interactions between various fiduciary duties. SIFMA also expects that the SEC will carefully consider the points raised in this study when it determines the nature of the fiduciary duty of municipal advisors and how it interacts with the marketplace for and provision of municipal and non-municipal services alike. SIFMA respectfully requests that the SEC wait until after the fiduciary duty for broker-dealers and investment advisers are harmonized in the retail context, so that it may draw on its experience when determining how to design and harmonize fiduciary duties in the municipal advisory context.

such municipal advisor as its advisor, because the municipal entity is not yet the municipal advisor's client. Limiting the application of the fiduciary duty to instances where a municipal advisor is providing advice to its municipal entity client would be consistent with the text of Section 975 and MSRB's stated position that the fiduciary duty applies only to a municipal advisor's client and never in the context of a municipal advisor's solicitation activities.[65]

In addition, clarifying that the fiduciary duty does not apply to a municipal advisor's solicitation activities would alleviate the inherent and unavoidable conflict that arises by imposing a duty to act in the interests of a person that is not one's client, such as when a person is hired by an unaffiliated third party to solicit business for that third party from municipal entities or obligated persons. If the SEC is concerned that a person engaging in solicitation may conduct its activities in an unscrupulous manner, it could work with the MSRB to draft fair dealing guidelines or rules that specifically govern the manner by which municipal advisors may solicit municipal entities.[66] Within the framework of those rules, the SEC could use its enforcement authority under the Exchange Act to discipline a municipal advisor for violating these standards of conduct.[67]

---

[65] MSRB Notice 2011-04, *Request for Comment on Pay To Play Rule for Municipal Advisors* (Jan. 14, 2011) ("Two types of persons are municipal advisors within the meaning of Section 15B(e)(4) of the Exchange Act. Some provide advice to or on behalf of municipal entities or obligated persons. Others solicit third-party business from municipal entities. . . . The first type of municipal advisor is subject to a fiduciary duty to the municipal entity with which it is engaging in municipal advisory business [*i.e.*, provides advice to or on behalf of the municipal entity]. . . . The other type of municipal advisor does not have a municipal entity as its client and, accordingly, has no fiduciary duty to the municipal entity."); *see also* MSRB Notice 2010-47, *Application of MSRB Rules to Municipal Advisors*, n.5 (Nov. 1, 2010); note 63 and accompanying text.

[66] For example, these guidelines or rules could require a municipal advisor engaging in solicitation to deal fairly with the municipal entity and disclose the identity of its third-party client; the nature of its relationship with such client; the nature and source of any compensation it receives; and the basis for determining this compensation. Because the municipal advisor would not have a fiduciary duty to the municipal entity that it solicits, it should only be required to affirmatively disclose this information to the municipal entity, and not be required to receive consent, whether express or implied, from the municipal entity.

[67] *See, e.g.*, Exchange Act § 15B(c)(1) ("[N]o municipal advisor may engage in any act, practice, or course of business . . . that is in contravention of any rule of the [MSRB]."); *id.* §§ 15B(c)(2) and (4) (providing the SEC with the authority to discipline municipal advisors and their associated persons).

B. The SEC Should Be Guided by Defined Principles When Determining the Fiduciary Duty

When proposing rules or interpretative guidance regarding the scope of a municipal advisor's fiduciary duty to its municipal entity clients, the SEC should be mindful that many persons that are also municipal advisors already provide non-municipal advisory services to their municipal entity clients. These include brokerage, investment advisory and banking and trust services, many of which may already have a fiduciary duty or other similar obligation or are otherwise subject to regulation with respect to such services. Therefore, the contours of any fiduciary duty applicable to a municipal advisor must be flexible and allow a person to continue to provide a range of municipal and non-municipal advisory services to its clients, while concurrently affording adequate protection to those clients.

In particular, the SEC, working in conjunction with the MSRB,[68] should be guided by the following principles when it drafts rules and interpretative guidance regarding the fiduciary duty of a municipal advisor to its municipal entity clients:

- The SEC should clearly define the fiduciary duty of a municipal advisor. In this regard, the fiduciary duty should apply only to personalized advice given by a municipal advisor, acting as such, in the context of a specific transaction or assignment. It should not apply to other non-advisory, ancillary or unrelated services or products that are also being provided to the municipal entity client. The fiduciary duty should also not extend indefinitely. It should generally be considered to terminate when the municipal advisor ceases to provide advice with respect to the particular transaction or assignment for which it owes the duty.

- The SEC should provide guidance as to how the fiduciary duty can be implemented by municipal advisors. Given the wide range of activities under the municipal advisor rubric based on the SEC's proposed interpretative positions, the SEC should provide guidance

[68] MSRB Notice 2010-47, *Application of MSRB Rules to Municipal Advisors* (Nov. 1, 2010) ("The MSRB will be developing additional rules for municipal advisors over the coming months and years. The [MSRB] . . . expects to provide guidance on . . . what it means for a municipal advisor to have a fiduciary duty to a municipal entity, as provided for in the Dodd-Frank Act.").

as to how the fiduciary duty may be tailored to a municipal advisor's particular business model. In this regard, the fiduciary duty should be consistent with other standards of care imposed, or to be imposed, on broker-dealers, investment advisers, banks and trust companies and swap dealers.

- The fiduciary duty should allow municipal entities to choose among various models for compensating a municipal advisor.

- Where products and services involve material conflicts of interest (*e.g.*, where a municipal advisor also acts as counterparty or takes a proprietary interest in its client's transactions), municipal advisors should be able to provide disclosures to municipal entities in a pragmatic way to clearly and effectively communicate, and receive consent to, these conflicts of interest. This disclosure and consent process should take into account the varying sophistication of the municipal entities for whom such municipal advisor acts in an advisory capacity. In addition, a municipal advisor should be able to fulfill its disclosure obligations by, at its discretion, either providing a brochure that outlines its material conflicts of interest at the outset of its first municipal advisory engagement with its municipal entity client or on a transaction-by-transaction (or assignment-by-assignment) basis.[69]

By determining the scope of a municipal advisor's fiduciary duty in light of these principles, the SEC will better ensure that municipal entities continue to receive the full range of municipal and non-municipal advisory services on which they have come to rely. The SEC will also ensure that competition in the marketplace is not reduced by potentially inflexible and conflicting fiduciary duties and other similar obligations, the effect of which would only serve to harm, and not better protect, municipal entities.

---

[69] *See*, *e.g.*, Richard Ketchum, Chairman & CEO, FINRA, *Remarks Delivered at CCOutreach BD National Seminar* (Feb. 8, 2011) ("We believe a fiduciary standard should attempt to eliminate conflicts, but where conflicts can't be eliminated, they should be properly and clearly disclosed to customers"), *available at* http://www.finra.org/Newsroom/Speeches/Ketchum/P122907.

VI. There Should Be Coordinated Regulatory Action With Respect to Municipal Advisors

As the regulatory landscape for municipal advisors develops, the SEC must ensure that there is continuous coordination internally at the SEC, as well as between the SEC, MSRB and any other regulators, such as the CFTC, involved in this area. In particular, the SEC should not issue further rule or interpretative proposals that may increase the responsibilities of municipal advisors, and should encourage regulators such as the MSRB and the CFTC to delay their rule proposals, until after the SEC issues final rules and interpretative guidance on the definition of "municipal advisor" and related terms, and on the permanent registration structure.

In order to provide meaningful comments on rule proposals such as the investment adviser pay-to-play rule currently being amended by the SEC or the MSRB's pay-to-play rule for municipal advisors,[70] market participants first need clear guidance from the SEC as to who will and will not be municipal advisors and a definitive understanding as to the scope of the final registration and regulatory programs. Only then will regulators, such as the SEC, MSRB and CFTC, be able to assess the impact of proposed regulations on persons that, for one reason or another, will be registering as municipal advisors. Similarly, it will not be until this point that market participants have an idea as to whether they will be municipal advisors and therefore be in a position to analyze how they may be impacted by any applicable proposed regulations.

VII. Conclusion

SIFMA supports the principle that municipal advisors should operate in a fair, transparent and well-regulated manner. However, as outlined above, SIFMA believes that the SEC's proposed rules and proposed interpretative positions

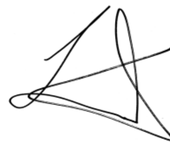
[70] Investment Advisers Act Proposed Rule 206(4)-5(a)(2), 75 *Fed. Reg.* 77052, 77100 (Dec. 10, 2010) (proposing to make it unlawful for an investment adviser to "provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is [a] regulated municipal advisor . . . ."); Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 832 n.104 (Jan. 6, 2011) (proposing to allow entities to register voluntarily as municipal advisors and subject themselves to the regulatory program for municipal advisors as a condition to being paid as solicitors on behalf of affiliated investment advisers under the proposed amendment to the pay-to-play rule under the Investment Advisers Act); MSRB Notice 2011-04, *Request for Comment on Pay to Play Rule for Municipal Advisors* (Jan. 14, 2011) (requesting comment on the MSRB's proposed pay-to-play rule, new rule G-42, for municipal advisors).

regarding municipal advisory activities are overly broad and confusing in many respects, may ultimately harm municipal entities and obligated persons and will subject currently regulated entities to burdensome, overlapping, duplicative and unnecessary requirements and potential liabilities. Thus, to avoid disrupting and raising the costs of services provided to municipal entities and obligated persons by regulated entities, the SEC should first address the activities of municipal advisors that are unregulated today, and, after considering in detail the interaction between existing regulatory frameworks and potential municipal advisor regulation, subsequently address the activities of regulated entities.

At the time the SEC addresses Section 975's application to regulated entities, the SEC should retain the narrower statutory definition of "investment strategies" and provide clear guidance as to the meaning of that term. The SEC should also provide clear guidance as to what constitutes "advice" for purposes of Section 975 and provide broad-based exceptions for banks and trust companies with respect to their traditional banking and trust activities. The SEC should also recognize that the proposed registration process for municipal advisors and their associated persons is unnecessarily burdensome and duplicative for registered entities and individual associated persons, with little regulatory benefit. In that regard, the SEC should significantly reduce the size and scope of the proposed registration structure, including by providing for alternative mechanisms for persons already registered with the SEC to register for municipal advisory activities and eliminating the separate registration process for individuals, such as employees.

SIFMA hopes that it can serve as a constructive and insightful voice of the securities industry as the SEC and other regulators work together to define the registration and regulatory structure, and fiduciary duty, applicable to municipal advisors and to establish final rules and interpretative guidance relating to municipal advisors.

Sincerely yours,



Leslie M. Norwood
Managing Director and
Associate General Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Robert Cook, Director, 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