**Subject: File Number S7-45-10**
**From: Nathan R. Howard, Esq.**
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I appreciate this opportunity to comment on Securities and Exchange Act Release No. 34-63576 (the "Release"). The Securities and Exchange Commission (the "Commission") has been entrusted with the responsibility of undertaking a daunting task and overall should be commended for the work that it has done. However, some further clarifications are necessary with respect to the definition of municipal advisor and, in particular, the exclusion from the definition for brokers, dealers, and municipal securities dealers ("broker-dealers") serving as underwriters and for attorneys providing services of a traditional legal nature. In addition, this letter will address generally a method by which the Commission can create additional exclusions for individuals who provide municipal advisory services.

## Background

With the enactment of the Securities Act of 1933 (the "Securities Act") and the Securities and Exchange Act of 1934 (the "Exchange Act"), Congress effectively created two securities markets, the corporate securities market and the municipal securities market. This is exemplified by the many exemptions for municipal securities from the provisions of the Securities Act and the Exchange Act.[1] Then, beginning in 1975, through the enactment of the Securities Act Amendments of 1975 (the "1975 Amendments"), Congress began to clarify the distinctions between the corporate and municipal securities markets, a fact illustrated by the creation of the Municipal Securities Rulemaking Board whose mission was to "promulgate rules concerning broker and dealer transactions in *municipal* securities."[2]

Although the 1975 Amendments further clarified the distinction between the corporate and municipal securities markets, the historical participants found in both the municipal and corporate securities markets (e.g. banks, underwriters, and bond counsel) continued to engage in substantially similar activities. For example, underwriters acting in both the corporate and municipal securities markets provided advice on matters such as the type and amount of securities to be sold, the timing of the issuance, the terms and other similar matters concerning the issuance of securities.[3]

However, with the enactment of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), Congress further emphasized the distinction between the corporate securities market and the municipal securities market through the creation of a category of regulated municipal market participants designated as

[1] *See* Securities Exchange Act Release No. 63576 (December 20, 2010), ("Registration of Municipal Advisors"), at 12.
[2] *See id*. at 13 (emphasis added).
[3] *See* James D. Cox et al., Securities Regulation: Cases and Materials 120 (Vicki Been ed., Aspen Publishers) (2006). *See also* Municipal Securities Rulemaking Board (the "MSRB") Rule G-23(b) (a broker, dealer or municipal securities dealer acting as underwriter may render advice to an issuer with respect to the structure, timing, terms or other similar matters concerning a new issue of municipal securities).

"municipal advisors." If there were any lingering questions, the Dodd-Frank Act made the distinction unequivocal, there are, in fact, two very distinct securities markets, one corporate and one municipal, and each operates under a distinct set of rules.

In adopting the Dodd-Frank Act, Congress determined that the municipal market had developed a unique set of market participants who provide advice to municipal entities on matters such as the type and amount of securities to be sold, the timing of the issuance, and other similar matters concerning the issuance of municipal securities or municipal financial products, and defined these individuals as "municipal advisors." These individuals are now subject to the requirements of the Exchange Act, including registration and fiduciary duty, regardless of the role they played in the municipal market prior to the Dodd-Frank Act. To clarify, prior to the enactment of the Dodd-Frank Act, any individual, such as an attorney, financial advisor, engineer, or broker-dealer, could provide advice relating to the structure, timing, terms, and other similar matters concerning municipal financial products or the issuance of municipal securities without having to register or act with a fiduciary duty. Under the Dodd-Frank Act, however, if an individual chooses to provide this kind of advice, this person must now register as a municipal advisor and act as a fiduciary when providing this advice.

## Comments

### 1. In general, further clarification of the exclusions from the definition of municipal advisor should be provided.

Under the Exchange Act, the term "municipal advisor" is defined as:

> a person that 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.[4]

The Commission properly states that the definition of a municipal advisor "includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors that *engage in municipal advisory activities*."[5] In addition, the Commission further clarifies that the term "financial advisor" includes, but is not limited to, "broker-dealers already registered with the Commission, that provide advice[6] to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products."[7]

The Commission also properly defines the term "municipal advisory activities," *inter alia*, as advice provided "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

[4] §15B(e)(4)(A)(i) of the Securities and Exchange Act of 1934 (the "Exchange Act").
[5] Release No. 63576, at 20 (internal quotations omitted) (emphasis added).
[6] The Commission should clarify that the term "advice," as it is used here, is referring to "*municipal advisory* advice," as that term is defined herein.
[7] Release No. 63576, at 21.

respect to the structure, timing, terms and other similar matters concerning such financial products or issues) or undertake a solicitation of a municipal entity or obligated person"[8] (hereinafter referred to as "municipal advisory activities," "municipal advisory advice," and "municipal advisory services").

The Exchange Act also contains various exclusions from the definition of municipal advisor. Excluded from the definition of municipal advisor are "municipal entities and employees of municipalities."[9] In addition, the Commission properly states that the term municipal advisor "explicitly excludes a broker, dealer, or municipal securities dealer serving as an underwriter, as well as attorneys offering legal advice or providing services that are of a traditional legal nature and engineers providing engineering advice."[10] These exclusions can be broadly categorized into two distinct groups: (i) those without limitations, and (ii) those with limitations. Those without limitation are "municipal entities and employees of municipal entities" (the "Entities and Employees Exclusion").[11] All other individuals excluded from the definition of municipal advisor are limited exclusions (the "15B(e)(4)(C) Exclusions"). [12] This characterization of the exclusions is reinforced by the textual structure of the Exchange Act; the Entities and Employees Exclusions are specifically set out in §15B(e)(4)(A) of the Exchange Act, whereas 15B(e)(4)(C) Exclusions are specifically set out in §15B(e)(4)(C) of the Exchange Act. This illustrates that Congress intended that these groups be treated differently; one set of rules applies for those excluded under §15B(e)(4)(A) and another set of rules applies for those excluded under §15B(e)(4)(C).

Notably, the Entities and Employees Exclusions exempt individuals from the definition of municipal advisor regardless of the type of advice they provide. Therefore, municipal entities and employees of municipal entities can engage in municipal advisory services with respect to the issuance of municipal securities and the use of municipal financial products without regard to any provision of the Exchange Act relating to municipal advisors.

However, individuals excluded under §15B(e)(4)(C) of the Exchange Act are excluded from the definition of municipal advisor only if they do not provide municipal advisory advice. Section 15B(e)(4)(C) of the Exchange Act specifically excludes individuals giving certain kinds of "non-municipal advisory advice"[13] from the definition of municipal advisor because the services they provide during the course of a municipal issuance or transaction involving municipal products are **not** municipal advisory activities.

As currently written, the Release creates ambiguities by not emphasizing this distinction. This has led to confusion and anxiety among some market participants who are uncertain as to whether they engage in municipal advisory activities.

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[8] *Id*. at 20.
[9] §15B(e)(4)(A) of the Exchange Act.
[10] *Id.* (internal quotes omitted).
[11] *Id.*
[12] §15B(e)(4)(C) of the Exchange Act.
[13] Non-municipal advisory advice is to be understood to mean all advice provided to a municipal entity or obligated person except for advice 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.

To avoid ambiguities and confusion, the definition of municipal advisor should be clarified by adding the following to Section II.A.1.b. of the Release:

> Any individual who provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities (including advice with respect to the structure, timing, terms and other similar maters concerning such financial products or issues), is a municipal advisor and must register as a municipal advisor, unless the advisor is a municipal entity or the employee of a municipal entity.[14]
>
> Individuals who do not engage in municipal advisory activities, which includes individuals engaged in the specific types of activities identified in §15B(e)(4)(C) of the Exchange Act, will not be deemed to be municipal advisors under the Exchange Act and therefore do not have to register as municipal advisors. Conversely, all individuals, including, but not limited to, brokers, dealers, municipal securities dealers, attorneys, engineers, investment advisors and accountants, that engage in municipal advisory activities, will be deemed to be municipal advisors and must comply with the affirmative obligations of the Exchange Act with respect to municipal advisors, including the registration and fiduciary duty requirements.

**2. Further guidance and clarification are needed with respect to the exclusion of underwriters under §15B(e)(4)(C) of the Exchange Act.**

As currently written, the Release is unclear as to (i) when a broker-dealer will be excluded from the definition of municipal advisor, and (ii) what services a broker-dealer can provide prior to being deemed a municipal advisor. Therefore, I respectfully request that the Commission clarify the exclusion for broker-dealers serving as underwriters under §15B(e)(4)(C). The Commission should also state, unequivocally, that a broker-dealer who provides municipal advisory services will be deemed to be a municipal advisor with respect to those services, and that the exclusion is limited to broker-dealers who are providing underwriting services, such as the purchasing, offering and selling of municipal securities.

Section 15B(e)(4)(C) of the Exchange Act sets forth an illustrative list of individuals who are excluded from the definition of municipal advisor. In the Release, the Commission clarifies the type of advice that can be provided by the various market participants without triggering the municipal advisor registration and fiduciary duty requirements. With the exception of the exclusion for broker-dealers acting as underwriters, the Release includes precise unequivocal statements regarding the 15B(e)(4)(C) Exclusions, which are as follows:

*Investment Advisers*. Investment advisers were excluded under §15B(e)(4)(C) if the advice they provide falls within the Investment Advisers Act. The Commission properly states that "a

[14] The Commission has stated that it is including within this group, elected officials acting within the scope of his or her role as an elected member. *See* Release No. 63576, at 40-41.

registered investment adviser or an associated person of a registered investment adviser would not have to register as a 'municipal advisor' with respect to the provisions of any *investment* advice subject to the Investment Advisers Act."[15] Conversely, an investment adviser "must register […] as a municipal advisor if the adviser or associated person engages in any municipal advisory activities that would not be investment advice subject to the Investment Advisers Act.[16] Thus, investment advisers providing investment advisory services are exempt, whereas those providing municipal advisory services are not exempt.

*Commodity Trading Advisors*. Commodity trading advisors ("CTAs") were excluded under §15B(e)(4)(C) if the advice they provide is advice related to swaps. However, the Commission properly states that "a commodity trading advisor […] must register with the Commission as a municipal advisor if the commodity trading advisor […] engages in municipal advisory activities that do not include advice related to swaps."[17]

*Attorneys*. Attorneys were excluded under §15B(e)(4)(C) if they are providing legal advice or if they provide services that are of a traditional legal nature. The Commission properly states that attorneys are excluded from the definition of municipal advisor "*unless* the attorney engages in municipal advisory activities."[18] The Commission goes on to clarify that offering legal advice or providing services that are of a traditional legal nature to a client that is a municipal entity, are not municipal advisory activities.[19]

*Engineers*. Engineers were excluded under §15B(e)(4)(C) if the advice provided is engineering advice. However, the Commission properly concludes that the "exclusion does not include circumstances in which the engineer is engaging in municipal advisory activities […] *even if those activities are incidental* to the provision of engineering advice."[20]

*Accountants*. Although not specifically excluded under §15B(e)(4)(C), the Commission properly states that accountants, like individuals specifically excluded under §15B(e)(4)(C), are exempt if they provide non-municipal advisory services.[21] The Commission noted that some accountants do engage in municipal advisory activities and therefore a "blanket exclusion"[22] would not be appropriate.[23] However, accountants who provide services, such as "preparing financial statements, auditing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person," are not engaged in municipal advisory activities and are therefore excluded from the definition of municipal advisor.[24]

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[15] *Id.* at 34 (emphasis added).
[16] *Id.*
[17] *Id.* at 36.
[18] *Id.* at 38.
[19] *Id.*
[20] *Id.* at 39 (emphasis added).
[21] *See id.* at 37.
[22] The term "blanket exclusion", as used herein, refers to an individual who can provide municipal advisory services without having to comply with any of the aspects of the Exchange Act relating to municipal advisors, including the registration and fiduciary duty requirements, such as, for example, employees of a municipal entity.
[23] *See* Release No. 63576, at 36-37.
[24] *Id.*

*Banks*. Similar to accountants, banks and trust companies were not specifically excluded under §15B(e)(4)(C); however, the Commission has properly entertained the possibility of clarifying that banks and trust companies are excluded from the definition of municipal advisor when banks provide "traditional banking services" and when banks and trust companies provide "investment advisory services."[25] The Commission also properly states that a bank or trust company would not be excluded from the definition of municipal advisor if the bank or trust company provides municipal advisory services to a municipal entity or obligated person.[26]

While these clarifications will be extremely helpful to market participants in determining the types of services they can provide without being deemed to be a municipal advisor, a similar clarification was not made with respect to the services provided by a broker-dealer serving as an underwriter.

The Commission states, *inter alia*, that

> a broker, dealer or municipal securities dealer would not be excluded from the definition of a "municipal advisor" if the broker, dealer or municipal securities dealer engages in municipal advisory activities when acting in a capacity other than as an underwriter on behalf of a municipal entity or obligated person.[27]

The Commission goes on to provide two examples of activities of broker-dealers that the Commission would consider to be municipal advisory activities.[28] However, the examples provided in the Release are of only minimal utility because they do not clarify when a broker-dealer is acting in the capacity of an underwriter versus in a capacity other than as an underwriter. Further, the examples do not touch on the type of services that a broker-dealer can provide without being deemed to be a municipal advisor. Can, for example, a broker-dealer serving as an underwriter provide advice on matters such as the structure, terms, timing or other similar matters? Because the examples provided are not specific on these matters, it is unclear when a broker-dealer who otherwise would be exempt as an "underwriter" crosses the line and becomes a municipal advisor subject to the dictates of the Exchange Act.

Furthermore, it is my understanding that there will likely be numerous clarifications over the next several years with regard to the definition of municipal advisor and its exclusions. However, of immediate concern is the inconsistent regulatory framework that the Commission will create with regard to the 15B(e)(4)(C) Exclusions, if the Commission does not state with specificity when a broker-dealer will be considered to be a municipal advisor versus an underwriter. Unlike the other exclusions discussed above, the Commission does not specify when it will consider a broker-dealer to be acting as an underwriter. What is more, the lack of specificity leaves open the possibility that broker-dealers will be able to provide municipal advisory services without being deemed to be municipal advisors, a result that would be inconsistent with the purpose of the Dodd-Frank Act. Therefore, in continuing to clarify the exclusion for broker-dealers acting as underwriters, the Commission should consider the following:

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[25] *Id.* at 41.
[26] *Id.* at 42.
[27] *Id.* at 31.
[28] *See id.* at 31-32.

Under the Exchange Act, broker-dealers are granted an exclusion from the definition of municipal advisor only when they "serv[e] as an underwriter (as defined in Section 2(a)(11) of the Securities Act of 1933)."[29] Section 2(a)(11) of the Securities Act of 1933 ("Section 2(a)(11)") states, *inter alia*, that the term "underwriter" is limited to:

> 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, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.[30]

Further clarification of the term "underwriter" can be found in Rule 144 of the Securities Act ("Rule 144"), entitled "Persons Deemed Not to Be Engaged in a Distribution and Therefore Not Underwriters," which was adopted by the Commission prior to the enactment of the Dodd-Frank Act to specifically address the issue of determining when a person is acting as an "underwriter." In the preliminary note to Rule 144, the Commission states, that the interpretation of the definition of the term "underwriter" has traditionally focused on the words "with a view to" in the phrase "purchased from an issuer with a view to . . . distribution." Rule 144 makes clear that to be deemed an underwriter, an individual must (1) either purchase, offer or sell securities for an issuer, and (2) do so with a view to the distribution of any security. Therefore, an individual is not an "underwriter" if he has not purchased, offered or engaged in the selling of securities.[31]

This interpretation of Section 2(a)(11) and Rule 144 is consistent with §15B(e)(4) of the Exchange Act. Section §15B(e)(4)(C) of the Exchange Act does not provide an exclusion from the definition of municipal advisor for broker-dealers who engage in municipal advisory activities. In fact, when sections 15B(e)(4)(A)(i) and (e)(4)(C) of the Exchange Act are read in conjunction with Section 2(a)(11) and Rule 144, it becomes clear that a broker-dealer who provides municipal advisory services to a municipal entity is acting as a municipal advisor, not as an "underwriter." A broker-dealer is only exempt under §15B(e)(4)(C) of the Exchange Act when he purchases, offers or sells securities with a view to distribution. Thus, when a broker-dealer provides certain kinds of advice (i.e. municipal advisory advice) prior to the issuance of securities (i.e. prior to the existence of the securities), there has been no purchase, offer or sale of securities, and, therefore, the broker-dealer is providing advice as a municipal advisor, not as an underwriter.[32]

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[29] §15B(e)(4)(C) of the Exchange Act.
[30] §2(a)(11) of the Securities Act of 1933 (emphasis added).
[31] *See also* MSRB Glossary of Municipal Securities Terms Second Edition (January 2004), http://msrb.org/msrb1/glossary/glossary_db.asp?sel=u (last visited February 21, 2011) (The term "Underwriter" is defined as "A broker-dealer that *purchases* a new issue of municipal securities from the issuer for resale . . .") (emphasis added).
[32] This is consistent with the MSRB's understanding of the terms "Underwriting", "Underwriter", and "Underwriting Period", which, when taken together, clearly illustrate that a broker-dealer is not engaged as an underwriter until securities are either purchased or an order has been placed. *See Id.*

Under this view, the Commission should take an approach similar to that put forth by the Commission in the case *SEC v. Howey Co.*[33] to determine whether a broker-dealer falls within the definition of municipal advisor or underwriter. Put simply, the Court in *Howey* adopted an economic realities test and determined that although a particular "investment contract" was not specifically referred to as a "security," it looked like a security and smelled like a security and had all of the "essential ingredients" of a security, and was therefore deemed to be a "security" within the meaning of the Securities Act without regard to "the legal terminology in which [the security] was clothed."[34] The Supreme Court applied this economic realities test again in *United Housing Foundation v. Forman*, and stated that "[b]ecause securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."[35]

Similarly, the Commission should refrain from attempting to delineate the distinction between broker-dealers acting as municipal advisors and broker-dealers acting as underwriters merely in terms of titles or contractual relationships. Instead, I respectfully request that the Commission utilize an approach similar to that taken by the Commission and, ultimately, the Supreme Court in *Howey* and *Forman*, and clarify that a broker-dealer will be deemed to be a municipal advisor based on the type of advice provided regardless of title or contractual relationship. Congress intended for these statutes to turn on the communicative realities underlying a transaction, and not on the name appended thereto. For example, if a broker-dealer states orally or in writing that it is acting solely as an "underwriter," but thereafter provides recommendations and advice related to items such as the structure, terms, timing and other similar matters concerning such financial products or securities, the Commission should consider this broker-dealer to be a municipal advisor even though statements to the contrary were made. This approach is also consistent with Section 2(a)(11) and Rule 144, which take a similar approach to defining who will be considered an "underwriter." For example, under Section 2(a)(11) and Rule 144, if a contract states that an individual is going to act as a "municipal advisor," but the individual thereafter purchases, offers or sells securities for the purpose of distribution, the Commission would consider this individual to be an "underwriter" without regard to the title utilized by the parties to the contract. In other words, the Commission would disregard the contract title of "municipal advisor" and deem the individual to be an "underwriter" because the individual had purchased the securities for the purpose of distribution.

What is more, apart from being contrary to the clear language of the Exchange Act, granting broker-dealers a blanket exclusion from the definition of municipal advisor would create an inherent conflict of interest and problems of accountability. Unlike municipal entities and municipal employees who are accountable for the advice they provide,[36] a broker-dealer engaged in municipal advisory activities but granted a blanket exclusion as an "underwriter" under §15B(e)(4)(C) of the Exchange Act would not be accountable for the advice it provides, even where the advice provided is detrimental to the municipal entity. This result is inconsistent with the purpose of the Dodd-Frank Act which sought to protect municipal entities and the public's interest.

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[33] *Securities and Exchange Commission v. Howey Co.*, 328 U.S. 293 (1946).
[34] *See id.* at 297-301.
[35] *United Housing Foundation, Inc. v. Forman New York v. Forman*, 421 U.S. 837, 849 (1975).
[36] *See* Release No. 63576, at 41.

Furthermore, granting a blanket exclusion from the definition of municipal advisor for broker-dealers will only exacerbate the inherent conflicts of interest that existed prior to the enactment of the Dodd-Frank Act. For example, if underwriters are permitted to provide advice, without a fiduciary obligation, such advice to a municipal entity could include any or all of the following recommendations: (i) issue securities through a negotiated sale when a competitive sale would be beneficial (e.g. a municipal entity would benefit, in terms of interest costs, by selling most general obligation securities via a competitive sale); (ii) undertake an issuance of securities when such an issuance is unnecessary or detrimental to the municipal entity (e.g. recommending the issuance of securities when a low-interest state loan may be available); (iii) issue securities of a particular type because the broker-dealer's firm prefers that type of issue (e.g. recommending the issuance of securities that are annual appropriation obligations which bear significantly higher interest rates than obligations secured by a dedicated source of revenue); or (iv) refinance a prior securities issue when there are no material benefits to the municipal entity (e.g. where a refunding issue is purportedly being done to achieve "real" savings, but where the present value of the savings are in fact inconsequential).

The Dodd-Frank Act sought to insulate municipal entities from obtaining advice from individuals who lack the requisite competency and accountability.[37] Congress made the determination that allowing municipal entities to obtain municipal advisory advice from individuals who are not registered and operating as municipal advisors is not in the best interest of the municipal entity or the public as a whole. Thus, any interpretation of the Exchange Act that allows municipal entities to obtain advice that is not in their best interest from unaccountable parties would be contrary to the purpose of the Dodd-Frank Act. Therefore, the Commission should state unequivocally that any broker-dealer who engages in municipal advisory activities is a municipal advisor under the Exchange Act, and must comply with all affirmative obligations of the Exchange Act, including the registration and fiduciary duty requirements. Furthermore, as the Commission made clear with regard to engineers,[38] even if the municipal advisory advice is a service "incidental" to the provision of other services, the individual will be deemed to be a municipal advisor. Therefore, I respectfully request that the Commission clarify that even if municipal advisory services are "incidental" to the provision of underwriting services, a broker-dealer providing those services is acting as a municipal advisor, not an underwriter.

Alternatively, if the Commission is not inclined to adopt the above interpretation, further clarification is needed with regard to when a broker-dealer is subject to the Exchange Act's registration and fiduciary duty requirements, and when a broker-dealer is excluded as an underwriter. In its current form, the Release further complicates the matter by leaving in place an uncertain regulatory framework with which to operate. The Release does not provide a clear distinction between broker-dealers subject to the Exchange Act as municipal advisors and those excluded as underwriters. Consequently, broker-dealers will be unaware as to (a) whether they are required to register as municipal advisors, and (b) whether the services they provide with constitute advice thereby triggering the fiduciary duty requirements of the Exchange Act.

[37] *See infra*, at 11-12.
[38] *See supra*, at 5.

However, Congress has determined that an individual who gives certain kinds of advice to municipal entities or obligated persons, is a municipal advisor, regardless of the individual's title or contractual relationship (e.g. a CPA is a municipal advisor if the CPA gives municipal advisory services even where the CPA does not call himself a municipal advisor).[39] This interpretation is consistent with §15B(e)(4)(C) and, when this interpretation and §15B(e)(4)(C) are taken together, it becomes clear that a broker-dealer who acts beyond the scope of Section 2(a)(11) of the Securities Act by providing municipal advisory advice, becomes a municipal advisor by virtue of the advice given and must comply with all aspects of the Exchange Act relating to municipal advisors;[40] individuals should not be allowed to shirk their responsibilities under the Exchange Act by merely calling themselves underwriters.

**3. Any individual who merely provides information, is not a municipal advisor, and, more specifically, a broker-dealer who merely provides information is not a municipal advisor.**

As noted above, individuals and, in particular, broker-dealers should not be excluded from the definition of municipal advisor when they provide municipal advisory services. However, when the services provided are merely informational non-municipal advisory services, the individual should be excluded from the definition of municipal advisor. Therefore, the Commission should clarify that so long as an individual does not provide or engage in municipal advisory activities, that individual will not be deemed to be a municipal advisor and will not have to register as such.

This concept is particularly important when addressing the questions posed by the Commission with regard to broker-dealers. In the Release, the Commission asks whether a broker-dealer should be excluded from the definition of municipal advisor if the broker-dealer merely provides a municipal entity with price quotations with respect to particular securities which the broker-dealer would be prepared to sell as principal or acquire for a municipal entity.[41] The Commission also asks whether a broker-dealer should be excluded from the definition of municipal advisor if the broker-dealer provides to a municipal entity a list of securities meeting specified criteria that are readily available in the marketplace, but without making a recommendation as to the merit of any investment particularized to the municipal entity's specific circumstances.[42]

Excluding broker-dealers who merely provide information and ideas would be consistent with the Exchange Act since providing information is not the same as providing advice. Additionally, as noted above, any individual who engages in non-municipal advisory activities is not a municipal advisor and would therefore not be subject to the registration and fiduciary duty requirements of the Exchange Act. Therefore, a broker-dealer who merely provides information is engaged in a non-municipal advisory activity and should not be deemed to be a municipal advisor. For example, if a broker-dealer were to provide a municipal entity with either a list of securities or various debt service models, but did so without making a specific

[39] *Id*.
[40] *See* §15B(e)(4)(A) and (C) of the Exchange Act.
[41] Release No. 63576, at 53.
[42] *Id.*

recommendation as to the structure, terms, timing, merit, or similar matter, the broker-dealer would not be engaged in municipal advisory activities and would not be subject to the dictates of the Exchange Act related thereto.

**4. Further guidance and clarification are necessary with respect to the exclusion of attorneys under §15B(e)(4)(C) of the Exchange Act.**

The Release adequately addresses the exclusion for attorneys providing services of a traditional legal nature. However, the example of "services of a traditional legal nature" provided in the Release is missing a key piece of terminology that may lead to an unintended exclusion for attorneys providing certain kinds of advice that would otherwise have been considered municipal advisory advice.

The Commission properly states that advice provided by a lawyer to a municipal entity or obligated person is a non-municipal advisory service and is of a "traditional legal nature" so long as the advice provided is with respect to the

> structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities [and] is provided within a lawyer-client relationship specifically related to such products *in conjunction with related legal advice*.[43]

The Commission then sets forth an example of services of a traditional legal nature (the "Example"). The Example, in part, states that:

> Advice comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering, would be considered to be services of a traditional legal nature.[44]

However, the Example does not describe an activity that is of a traditional legal nature. As currently written, the Example describes an activity that is primarily financial in nature. Merely giving advice comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments does not require legal training and, in fact, to be done properly, such an analysis requires extensive training in matters primarily financial in nature. Anecdotally, at no point in either my legal training or experience as an attorney was I provided with the knowledge or ability to compare the structures, terms, or associated costs of issuance of different types of securities or financial instruments. I only felt confident in my ability to adequately compare structures, terms or associated costs after extensive training as a financial advisor.

[43] *Id.* at 38 (emphasis added).
[44] *Id.*

Additionally, the Example appears to be inconsistent with the Commission's definition of services of a traditional legal nature, which states that attorneys may provide advice with respect to the structure, timing, terms and other similar matters only if such advice is given *in conjunction with related legal advice*.[45] However, unlike, for example, advice concerning the tax consequences of alternative financing structures, which is advice obviously legal in nature, or advice recommending a particular financing structure due to *legal* considerations,[46] the Example is not obviously legal in nature and does not specifically state that the comparison is being given in conjunction with related legal advice.

Therefore, the Commission's example should be clarified as follows: An attorney renders services of a traditional legal nature, for example, where the attorney provides advice comparing the ***legal aspects*** of the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering.

**5. Any additional exclusion created for individuals who engage in municipal advisory activities should satisfy the competency and accountability requirements of the Exchange Act.**

In the Release, the Commission asks whether the Commission should provide for an exclusion for all activities of an attorney as long as the attorney has an attorney-client relationship with the municipal entity or obligated person. In addressing this question, the Commission should consider adopting the following test as a basis for creating any additional exclusions to the definition of municipal advisor.

Under the Exchange Act, individuals who engage in municipal advisory activities must meet certain minimum standards of competency through continuing education and by undergoing periodic examination.[47] Additionally, the Exchange Act imposes a fiduciary duty on individuals who engage in municipal advisory activities,[48] creating a level of accountability that otherwise would not have existed but for the Exchange Act. Notably, Congress only excluded those individuals falling within the Entities and Employees Exclusions from the competency and accountability requirements of the Exchange Act.[49] Therefore, the Commission, prior to creating any additional exceptions for individuals who engage in municipal advisory activities, must, as a threshold matter to ensure compliance with the purpose of the Dodd-Frank Act, establish that the group to be excluded meets the minimum standards of competency and that they are "independently accountable"[50] to the municipal entity for the advice they provide.

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[45] *Id.*
[46] *See id.*
[47] *See* §15B(b)(2)(A)(iii), (E) and (L)(ii) of the Exchange Act.
[48] §15B(c)(1).
[49] The Commission noted, however, that employees and elected officials are independently accountable to the municipal entity. *See* Release No. 63576, at 41.
[50] An individual is "independently accountable" if that individual can be held legally accountable for any advice or services provided, without the imposition of a fiduciary duty by the Exchange Act.

Therefore, under this view, an exclusion for all activities of an attorney who possesses an attorney-client relationship with a municipal entity would be inappropriate. Attorneys are excluded from the definition of municipal advisor if they provide "services of a traditional legal nature";[51] however, when the advice is "primarily financial in nature,"[52] attorneys are acting as municipal advisors and are subject to the requirements of the Exchange Act. Therefore, if the Commission wanted to create an exception for attorneys who engage in municipal advisory activities, the Commission would establish that attorneys acting within an attorney-client relationship meet the Exchange Act's minimum standards of competency and that they are independently accountable. In this case, attorneys possessing an attorney-client relationship would be independently accountable for the advice they provide as a result of their attorney-client relationship (i.e. fiduciary relationship). However, although attorneys do possess the training and ability to provide legal advice and advice of a traditional legal nature, because municipal advisory advice is "primarily financial in nature", it is unlikely that attorneys possess the requisite competency to provide this kind of advice since attorneys, as a group, generally lack the necessary training and ability to advise on matters primarily financial in nature.[53] Thus, the Commission should not create a blanket exclusion for all activities of attorneys possessing an attorney-client relationship with a municipal entity or obligated person because possessing a level of independent accountability, alone, is an insufficient substitute for minimum standards of competency in matters primarily financial in nature.

If the Commission adopts this approach to the creation of exceptions for individuals who provide municipal advisory services, the Commission can ensure that municipal entities receive the same level of protection contemplated by the Dodd-Frank Act, namely, that the advice given is from a competent source and that the individual providing the advice can be held accountable for the advice they provide. However, if the Commission creates exclusions that were not specifically contemplated or intended by the Dodd-Frank Act, the purpose of the Dodd-Frank Act will be diminished. Furthermore, creating additional unintended exclusions will act as a means for individuals to circumvent their legal and regulatory obligations under the Exchange Act, a result that will not adequately serve the public interest.

## Conclusion

I respectfully request that the Commission adopt the following interpretation with regard to the definition of municipal advisor: *any* individual, except for a municipal entity or an employee of a municipal entity, who engages in municipal advisory activities will be deemed to be a municipal advisor and, conversely, an individual will *not* be deemed to be a municipal advisor so long as the individual is engaged exclusively in non-municipal advisory activities.[54]

With regard to broker-dealers, the Commission should clarify that broker-dealers who engage in municipal advisory activities will be deemed to be municipal advisors,[55] but that a broker-

[51] §15B(e)(4)(C) of the Exchange Act.
[52] *See* Release No. 63576, at 38.
[53] *See supra,* at 11.
[54] *Id.* at 2-4.
[55] *Id.* at 4-10.

dealer who merely provides information will not be deemed a municipal advisor[56]. In addition, the Commission should also clarify that the title of the relationship, title of a party, or recitations of titles in a contract are irrelevant in making a determination of whether an individual is a municipal advisor.

With regard to attorneys, the Commission should refine its example of "services of a traditional nature" to emphasize that the advice provided must be with regard to some legal aspect of the matter being discussed.[57]

Finally, I respectfully request that the Commission, prior to creating any additional exclusions for individual who engage in municipal advisory activities, establish that the group of individuals being excluded meets the minimum competency standards of the Exchange Act and that the group of individuals possess a level of independent accountability.[58]

[56] *Id.* at 10-11.
[57] *Id.* at 11-12.
[58] *Id.* at 12-13.