Sherman & Howard L.L.C.

ATTORNEYS & COUNSELORS AT LAW
633 SEVENTEENTH STREET, SUITE 3000
DENVER, COLORADO 80202
TELEPHONE: (303) 297-2900
FAX: (303) 298-0940

February 22, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549–1090.

Re: Comments on Securities and Exchange Commission Release No. 34–63576; File No. S7–45–10

Ladies and Gentlemen:

Please accept the following comments of Sherman & Howard L.L.C. ("Sherman & Howard") on proposed rules 15Ba1–1 through 15Ba1–7 and Forms MA, MA–I, MA–W, and MA–NR pursuant to the request for comments set forth in Release No. 34-63576, Federal Register 76:4 (January 6, 2011) p. 824 (the "Release"). The rules proposed in the Release seek to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (the "Act").

Sherman & Howard is the oldest law firm in Denver, Colorado and has been practicing law in the area of public finance for over 115 years. Sherman & Howard's public finance attorneys serve as bond counsel, special counsel and disclosure counsel to municipal entities, including States and local governments, and additionally represent various other parties to municipal transactions, including banks, underwriters and other purchasers of municipal securities, trustees, providers of letters of credit and other credit or liquidity facilities and conduit borrowers. The firm currently provides these services in Colorado, Nevada, Idaho, Nebraska, Arizona, New Mexico and Wyoming.

Section 15B(a)(1) of the Exchange Act, as amended by the Act, makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the Commission. Section 15B(e)(4)(A) of the Exchange Act, as amended by the Act, defines the term "municipal advisor" to mean a person (who is not a municipal entity or an employee of a municipal entity) (i) 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, or (ii) that undertakes a solicitation of a municipal entity.

The definition of municipal advisor in Section 15B(e)(4)(C) of the Act excludes attorneys offering legal advice or services of a traditional legal nature. The Release states that, "with respect to the exclusion from the definition of "municipal advisor" for attorneys offering legal advice or services of a traditional legal nature, the Commission interprets this exclusion to apply only when the legal services are to a client of the attorney that is a municipal entity or obligated person." 76:4 Fed Reg at p. 833. In accordance with the Commission's interpretation, proposed Rule 15Ba1-1(d)(2)(iv) provides that the term "Municipal Advisor" shall not include "any attorney, unless the attorney engages in municipal advisory activities other than the offer of legal advice or the provision of services that are of a traditional legal nature to a client of the attorney that is a municipal entity or obligated person."

Set forth below is our response to the following specific questions asked by the Commission in the Release:

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

For the reasons set forth below, Sherman & Howard respectfully suggests that the Commission's interpretation that the exclusion from the definition of municipal advisors for attorneys applies only when the legal advice or the provisions of services that are of a traditional legal nature are to a client of the attorney that is a municipal entity or obligated person is not the appropriate interpretation, will result in unintended adverse consequences and is not necessary to serve the purposes of the Act. We further believe that the Commission's proposal alters the exclusion provided in the Act in a way that was not intended or authorized by Congress. As a result, we believe the Commission should follow the language of the Act and that attorneys who are offering legal advice or services of a traditional legal nature should be exempt from the definition of "municipal advisor," without requiring such advice or services to be to a municipal entity or obligated person that is a client of the attorney.

As described above, the Act excludes from the definition of municipal advisors "attorneys offering legal advice or services of a traditional legal nature." Section 15B(e)(4)(C). By contrast, the Release indicates that "the Commission interprets this exclusion to apply only when the legal services are to a client of the attorney that is a municipal entity or obligated

person." 76:4 Fed. Reg. at p. 833 (emphasis added). Congress did not limit the exclusion only to situations "when the legal services are to a client of the attorney that is a municipal entity or obligated person." If Congress had intended the exemption for attorneys in the Act to apply only in these limited situations, Congress could have specifically provided this in the Act. Nothing in the Act or its history implies that only advice or services provided to a client of an attorney that is a municipal entity or obligated person is intended to be exempted. We believe that in so limiting the exemption for attorneys, the Commission is going beyond what Congress intended, as shown by the language of the Act, and beyond what Congress has authorized - i.e., the expansion of the limitation on the attorney exclusion is a substantive change in the language provided by Congress, not merely an interpretation. Under the language of the Act, if an attorney offers advice or services of a traditional legal nature to a municipal entity or obligated person who is not a client of the attorney, the attorney is excluded from the definition of "municipal advisor," while under the Commission's interpretation this advice and these services are not excluded. The Commission's interpretation and proposed rule substantively changes the activities an attorney can engage in without being deemed to be a "municipal advisor," which is a substantive change to the regulation of attorney activities that was not intended or authorized by Congress.

The Commission's interpretation that only advice or services provided to a client of an attorney is intended to be exempted from the definition of "municipal advisor" will result in less information being made available to the participants in a public finance transaction, which is contrary to one of the purposes of the Act, which is to provide more information and transparency to municipal entities, obligated persons and the market. Requiring that the advice and services must be to a client of the attorney that is a municipal entity or obligated person compounds the problem and puts a public finance attorney in an untenable position. Public finance attorneys represent many parties in a public finance transaction that are not municipal entities or obligated persons, such as banks, underwriters, private purchasers of securities, trustees, providers of letters of credit and other credit or liquidity facilities, conduit borrowers and other market participants. The structure, timing and terms of a public finance transaction are critical to all the parties to the transaction and the traditional role of the attorney to these parties is to negotiate terms and a structure that comply with applicable law and are most favorable to the attorney's client. Under the Commission's current interpretation of the Act, if an attorney discussed the structure, timing and terms of a public finance transaction with the municipal entity or obligated person (who was not the client of the attorney) while representing another party to the transaction, the attorney might be deemed to be providing advice to the municipal entity or obligated person, and therefore qualify as a "municipal advisor." Under the proposed regulations, an attorney that represents a party to the transaction that is not a municipal entity or obligated person may find it very difficult to participate in meetings and conference calls where the structure, timing and terms of a transaction are being discussed with the representatives of a municipal entity or obligated person without being concerned that he or she is providing advice to the municipal entity or obligated person in possible violation of the proposed regulation. However, these discussions and advice concerning the structure, timing and terms are essential in all public finance transactions and should not cause an attorney to be a "municipal advisor" just

because the attorney's client is not the municipal entity or an obligated person but is another party participating in the transaction.

In addition to questions as to whether an attorney in such a position should register as a municipal advisor, if the attorney to another participant in the transaction was deemed to be a "municipal advisor" to the municipal entity or obligated person, this would put the attorney in the untenable position of owing a fiduciary duty to such municipal entity or obligated person under the Act (Section 15B(c)(1)) while simultaneously owing a fiduciary duty to the attorney's client under state ethical rules. In such a situation, the fiduciary duty to the municipal entity or obligated person that would result from the attorney's classification as a "municipal advisor" would conflict with the duties the attorney owed to the attorney's client. The only sure way to avoid this conflict would be for the attorney to avoid discussing the terms, structure or timing of the transaction with the municipal entity or obligated person, which would prevent the attorney from representing the best interests of his or her client and would limit the information and ideas available to the municipal entity or obligated person, which would be to the detriment of the municipal entity or obligated person that the Act is designed to protect. The proposed Rule would thus discourage public finance attorneys from providing legal advice and services of a legal nature that are traditional in this area of law, and that Congress intended to allow, as described above.

It is also important to note that the advice and services of a traditional legal nature rendered by attorneys to clients and non-clients often have financial aspects - e.g., an expectation of financial feasibility of a project is often a legal requirement of state law, so attorneys must advise on it to provide their client and other non-client participants in the transaction with the correct legal advice. Further, for the attorney to proceed with a transaction that he or she believes may not be financially feasible, even absent a state law requirement of feasibility, without warning his or her client and the other participants in the transaction of the feasibility problem could implicate federal laws, including federal securities laws and federal tax laws. Thus to competently (and in many cases legally) participate as an attorney in a public finance transaction, the attorney must be able to provide his or her views on financial matters, such as project feasibility, to the client of the attorney and others in the transaction who are not clients.

Limiting the attorney exclusion from the definition of "municipal advisor" only when an attorney-client relationship exists will result in less information being available to municipal entities, obligated persons and the marketplace. Municipal entities frequently select their attorneys in connection with a written request for proposals, which may ask questions concerning the appropriate terms, structure and timing of a transaction. At the time the attorney submits the response, no attorney-client relationship yet exists. If responding to a request for proposal to a non-client would result in an attorney being classified as a "municipal advisor" this might prevent attorneys from responding to such requests, which would be detrimental to the municipal entity.

In addition, after a bond issue has closed, many engagement letters specify that the attorney-client relationship has terminated. However, municipal entities frequently request post-closing advice from bond counsel, including tax law and security law questions. For example, public finance attorneys will frequently receive post issuance requests for advice on how to comply with the continuing disclosure requirements of Rule 15c2-12, including requirements that may involve feasibility or other financial matters. These requests are often easy to answer and it should not be necessary that a new attorney-client relationship be established to avoid being a "municipal advisor." An attorney should be able to respond to such questions from a former client without requiring the municipal entity to go through a formal process with its governing board to engage the attorney to answer these questions. It is in the best interest of the municipal entity and the marketplace that when there are questions as to the legal rules and regulations applicable to a municipal entity's outstanding municipal securities or municipal financial products, that the municipal entity should be able to seek the advice of qualified attorneys, even if these attorneys have not been formally retained or re-engaged by the municipal entity.

It is also Sherman & Howard's observation that an attorney should be able to disseminate general educational information to clients and non-clients relating to the issuance of municipal securities and municipal financial products without being considered to be "municipal advisors" under the Act. Public finance attorneys frequently provide valuable education and information on legal topics to parties that are not clients of the attorney, such as when an attorney speaks at public conferences or distributes educational information alerting municipal entities and other public finance participants to changes in the law, including changes in law and regulations pertaining to the structure, timing and terms of municipal securities and similar matters. For example, when the Commission amended rule 15c2-12 as of December 1, 2010, Sherman & Howard prepared an advisory alerting market participants to the change. This advisory was distributed widely, including to current clients, previous clients who were not currently active clients, and parties that were not firm clients, and the advisory was also posted on the Sherman & Howard website. Under the proposed Rule, it is not clear whether the broad dissemination of such educational materials would constitute giving advice under the Rule and therefore result in a lawyer being determined to be a "municipal advisor" to any municipal entity that received the information and was not a current client of the attorney. One of the purposes of the Act is to increase information to municipal entities and to the marketplace. Limiting the attorney exclusion from the definition of "municipal advisor" only to situations where an attorney is giving advice or providing services to a client would discourage attorneys from providing general educational information and would be contrary to the purposes of the Act.

It is Sherman & Howard's position that it is not necessary for the Commission to further define the term "services of a traditional legal nature." However, it is our observation that traditional legal services in the area of public finance by necessity include not only strictly legal considerations, such as the flow of funds under a trust indenture, but various financial considerations as well. If, for example, an attorney is preparing the underlying bond documents, the disclosure documents or representing an underwriter on a transaction, it is incumbent on the

attorney to review the entire terms of the transaction, and an attorney should not be discouraged from reviewing and discussing relevant financial information and materials with the municipal entity, an obligated person or any other party to the transaction. In fact, if an attorney did not review and comment on relevant financial information, this would conflict with the attorney's duty to his or her client. If the attorney is providing legal services on a transaction, the attorney should not be classified as a "municipal advisor" simply because the attorney also reviews and comments on financial aspects of the transaction related to the legal representation. On the other hand, a person who is primarily giving financial advice to a municipal entity or obligated person, rather than providing legal services, should not be excluded from the definition of "municipal advisor" merely because such person has a license to practice law.

As the Commission states in its Release, until the passage of the Act, the activities of municipal advisors were largely unregulated and municipal advisors were generally not required to register with the Commission or any other Federal, State or self-regulatory entity with respect to their municipal advisory activities. However, attorneys are subject to both Federal and State rules and regulations that govern their conduct and provide accountability and information to public finance participants. Each of the 50 states regulates the practice of law and there is a code of professional conduct that governs an attorney's ethics, conflicts of interest, confidentiality and related matters, as well as disciplinary procedures for attorneys who do not comply with such rules and regulations. The Commission also has rules that govern the professional conduct of attorneys who appear and practice before the Commission and the Internal Revenue Service has rules relating to the ethical and competency requirements for attorneys who advise municipal clients. There is no value to treating as municipal advisors attorneys who are providing legal advice or services of a traditional legal nature. Under the ethical rules governing the practice of law, attorneys are already subject to fiduciary duty rules and conflict of interest rules, so subjecting attorneys to the rules which will apply to municipal advisors adds nothing of value. Congress recognized that it was not necessary to further regulate attorneys under the rules related to municipal advisors when it excluded attorneys who offer legal advice or services of a traditional legal nature from the definition of municipal advisors. Narrowing the class of attorneys who meet the exemption provided by Congress either to attorneys in an attorney/client relationship or to attorneys in an attorney/client relationship whose clients are either municipal entities or obligated persons, is not necessary to further the purposes of the Act and, as discussed above, would result in adverse consequences that are contrary to the purposes of the Act.

In conclusion, we encourage the Commission to follow the language of the Act and to exempt from the definition of a municipal advisor "attorneys offering legal advice or services of a traditional legal nature" without requiring such advice to be to a municipal entity or obligated person that is a client of the attorney.

Sincerely,

Sherman & Howard L.L.C.