MSRB
Municipal Securities Rulemaking Board

February 22, 2011

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

Re: Proposed Rules on Registration of Municipal Advisors (File No. S7-45-10)

Dear Ms. Murphy:

The Municipal Securities Rulemaking Board ("MSRB") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") on its proposal, published for comment in Exchange Act Release No. 63576 (File No. S7-45-10) (the "Proposing Release"), to adopt new rules and related forms to establish the Commission's permanent registration regime for municipal advisors (the "Rule Proposal"). The Rule Proposal is being proposed under Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which amended Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"). The Rule Proposal consists of Proposed Exchange Act Rule 15Ba1-1, which would define a number of key terms relating to municipal advisors (the "Definitional Rule"); proposed Exchange Act Rules 15Ba1-2 through 15Ba1-6, which would establish application and related procedures and requirements in connection with the registration of municipal advisors (collectively, the "Registration Rules"); proposed Exchange Act Rule 15Ba1-7, which would establish certain recordkeeping requirements for municipal advisors (the "Recordkeeping Rule"); and Forms MA, MA-I, MA-W and MA-NR (the "Municipal Advisor Forms").

BACKGROUND

Section 15B of the Exchange Act provides for the regulation of municipal advisors, with registration, examination, enforcement and related responsibilities vested in the Commission and general rulemaking responsibilities vested in the MSRB. Exchange Act Section 15B(a) prohibits municipal advisors from (i) 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, or (ii) soliciting a municipal entity or obligated person, unless the municipal advisor is registered with the Commission. This section also provides the Commission with the necessary authority to register municipal advisors in a manner that parallels the provisions of Section 15B(a) requiring

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municipal securities dealers not otherwise registered with the Financial Industry Regulatory Authority ("FINRA") to register with the Commission. Section 15B(a) further provides that a municipal advisor may not make use of the mails or any means or instrumentality of interstate commerce 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 solicit a municipal entity or obligated person, in connection with which such municipal advisor engages in any fraudulent, deceptive or manipulative act or practice.

Exchange Act Section 15B(c) prohibits municipal advisors (as well as brokers, dealers and municipal securities dealers, referred to herein collectively as "dealers") from using the mails or any means or instrumentality of interstate commerce to (i) 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 (ii) solicit a municipal entity or obligated person, in contravention of any MSRB rule. Section 15B(c) also provides that municipal advisors and their associated persons are deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as municipal advisor, and a municipal advisor may not engage in any act, practice or course of business which is inconsistent with its fiduciary duty or is in contravention of any MSRB rule.

The MSRB's rulemaking authority with respect to municipal advisors and dealers is established under Exchange Act Section 15B(b). That section provides that MSRB rules for municipal advisors must, among other things: (1) promote fair dealing, the prevention of fraudulent and manipulative acts and practices, and the protection of investors, municipal entities, obligated persons and the public interest; (2) prescribe means reasonably designed to prevent acts, practices, and courses of business that are not consistent with a municipal advisor's fiduciary duty to any municipal entity for whom it acts as a municipal advisor; (3) prescribe professional standards; (4) provide continuing education requirements; (5) provide for periodic examinations; (6) provide for recordkeeping and record retention; and (7) provide for reasonable fees and charges necessary or appropriate to defray the costs and expenses of operating and administering the Board. MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

Pursuant to the new grant of authority described above, the MSRB has initiated its rulemaking activities in connection with municipal advisors. The Commission's Rule Proposal is likely to have a significant impact on the substance, interpretation and enforcement of MSRB rules already adopted and others to be adopted in the future, and the MSRB has received

numerous inquiries regarding the nature of such impact.[1] As a result, the MSRB has determined to provide comments on certain key aspects of the Rule Proposal based on its understanding of how Section 975 of the Dodd-Frank Act was intended to provide for regulation of municipal advisors.

GENERAL COMMENTS

In general, the MSRB supports the Commission's Rule Proposal, subject to certain suggestions and comments described below. The MSRB believes that the registration requirements of the Registration Rules and the information required to be provided by registrants on the Municipal Advisor Forms are generally appropriate and will assist the Commission in its examination and enforcement activities. As noted in the Proposing Release, information received by the Commission through the registration process would be made available to the MSRB, and the MSRB believes that such information would assist the MSRB in its rulemaking activities. The MSRB also believes that the Recordkeeping Rule generally provides for the creation and retention of appropriate records in connection with the registration process. The MSRB notes that it also expects to adopt recordkeeping and retention requirements applicable to the various specific substantive rules adopted by the MSRB, as contemplated by Section 975 of the Dodd-Frank Act. Finally, the MSRB supports the Commission's goal of providing greater clarity on certain key definitions under Section 975 of the Dodd-Frank Act and appreciates the Commission's detailed analysis of the various proposed definitions included in the Definitional Rule.

SPECIFIC COMMENTS

The MSRB provides its specific comments on the Rule Proposal below, consisting primarily of suggestions for further refining various definitions in the Definitional Rule.

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[1] In MSRB Notice 2011-13 (February 14, 2011) requesting comment on a draft interpretive notice concerning the application of MSRB Rule G-17 to municipal advisors and MSRB Notice 2011-14 (February 14, 2011) requesting comment on draft new MSRB Rule G-36 and a draft interpretive notice on the fiduciary duty of municipal advisors, the MSRB stated that such draft proposals were based on the statutory definition of "municipal advisor" set forth in the Dodd-Frank Act without regard to the interpretation of such term in the Commission's Rule Proposal. The MSRB noted that, if the Rule Proposal were to be adopted in its current form, the MSRB might request comment on revisions to such draft proposals to reflect certain aspects of the Commission's interpretation of the term "municipal advisor."

Definitional Rule

Rule 15Ba1-1(a) – Guaranteed Investment Contract. The MSRB supports the Commission's proposed definition of "guaranteed investment contract."

Rule 15Ba1-1(b) – Investment Strategies. The MSRB agrees with the Commission that the use of the word "includes" in the definition of "investment strategies" in Section 975 of the Dodd-Frank Act suggests that such term is not limited merely to plans or programs for the investment of the proceeds of municipal securities, other than municipal derivatives, guaranteed investment contracts and the recommendation of and brokerage of municipal escrow investments. This definition recognizes that municipal derivatives and guaranteed investment contracts are already explicitly covered under the definition of "municipal financial product" in Section 975 of the Dodd-Frank Act and therefore excludes such products from the definition of "investment strategies." Further, the definition recognizes that the provision of investment-related advice when that advice is about a securities transaction that a broker-dealer itself will execute is treated as a recommendation, and that recommendations by a broker-dealer of a municipal escrow investment in the process of executing a transaction in such investment is already subject to existing broker-dealer regulatory regimes.[2] However, to the extent that any unrelated person provides advice, regardless of how it is characterized, to a municipal entity or obligated person on municipal escrow investments in any capacity other than as a recommendation made as agent or principal in effecting the transaction, such person would be

[2] In certain instances, brokerage of securities transactions has been viewed as being subject to state law fiduciary obligations, although the extent of the obligation varies considerably from state to state. In addition, the Commission recently released its Study on Investment Advisers and Broker-Dealers under Section 913 of the Dodd-Frank Act, in which Commission staff recommends, among other things, a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. Exchange Act Section 15(k) provides:

> the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (*and such other customers as the Commission may by rule provide*), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211of the Investment Advisers Act of 1940. [italics added]

Thus, the Commission may, by rule, provide that the legal standard for securities transactions effected by broker-dealers with municipal entities shall be the same as the standard applicable to investment advisers under the Investment Advisers Act and, pursuant thereto, could replace the existing suitability standard with a fiduciary standard.

considered a municipal advisor unless such person qualifies for one of the exceptions set out in the statutory definition of "municipal advisor."

The MSRB believes that the limited Congressional record on the purposes of Section 975 suggests an intent that "investment strategies" should apply to investment activities, analogous to plans or programs for the investment of the proceeds of municipal securities, that relate to the securities and securities-like vehicles of a municipal entity, rather than to all investment activities of municipal entities, regardless of their nature. Thus, the term would include any type of investment strategy or advice relating to the investment of proceeds of bonds, notes, warrants, certificates of participation and similar instruments issued by municipal entities, other than advice provided by a broker-dealer about a transaction such broker-dealer itself effects that is subject to federal broker-dealer suitability and related business conduct standards. The term "investment strategies" also would include any type of investment strategy or advice relating to the investment of funds of investors or other vested persons held in any plan, program or pool of assets sponsored or established by a state, political subdivision or municipal corporate instrumentality or any agency, authority or instrumentality thereof, such as those created in connection with municipal fund securities (including but not limited to 529 college savings plans and state and local government investment pools), other than broker-dealer recommendations as described above. Public defined contribution pension plans also would fall squarely within this description, and the MSRB believes that it would be appropriate to include public defined benefit pension plans as well, since they share many of the same potential direct or indirect impact on third-party beneficiaries and generally are exempt from the protections afforded by the Employee Retirement Income Security Act (ERISA) to private pension funds. Thus, in general, investment strategies would include such strategies relating to investments by all types of public pension funds, other than broker-dealer recommendations as described above.

In each of these covered types of plans, programs or pools of assets, investments generally must comply with provisions established in the legal documents governing the use of such funds, often in the form of covenants protective of investors or other beneficiaries as well as covenants necessary to comply with federal or state tax or other laws relating specifically to the purposes of such plans, programs or pools of assets. Pursuant to this approach, funds would cease to be subject to the definition of "investment strategies" once the investment of such funds is no longer governed by the legal documents or covenants. For example, once bond proceeds are considered spent for purposes of the bond documents and the covenants therein, subsequent investments of such funds would no longer be subject to the definition of "investment strategies." At this point, such funds would be treated like the general fund balances of the municipal entity, which the MSRB believes were not intended to be covered by the definition of "investment strategies." Similarly, so long as funds held in public pension funds are subject to the applicable restrictions under the governing legal documents and covenants, their investment would be within the meaning of the term "investment strategies."

Professionals advising on or executing investments of public general and other funds not subject to such specific restrictions or covenants, other than municipal derivatives or guaranteed investment contracts (which Congress explicitly named as municipal financial products subject to Section 975 of the Dodd-Frank Act without qualification as to the context in which their use would be covered) would instead be subject to existing applicable investment adviser, broker-dealer or bank regulations governing such transactions. Investment professionals who seek to provide investment advice to or other financial services for a municipal entity would be expected to make appropriate inquiries of the municipal entity regarding the existence of legal restrictions as described above applicable to public funds to be invested[3] to determine whether such professionals would be viewed as providing advice regarding investment strategies to a municipal entity and, therefore, be acting as a municipal advisor.[4]

Rule 15Ba1-1(c) – Managing Agent. The MSRB has no comment on the Commission's proposed definition of "managing agent."

Rule 15Ba1-1(d) – Municipal Advisor. The MSRB supports much of the Commission's proposed definition of "municipal advisor," including the Commission's proposal to adopt in proposed Rule 15Ba1-1(d)(1) the definition of "municipal advisor" set forth in Section 15B(e)(4) of the Exchange Act. However, in certain respects, as described below, elements of the definition should be refined to more closely reflect the history and intent of the Exchange Act as amended by the Dodd-Frank Act, as well as the unique nature of certain key participants in the municipal securities market.

Treatment of Natural Persons As Municipal Advisors – The MSRB agrees that individuals engaging in municipal advisory activities as sole proprietors should be registered as municipal advisors. Otherwise, it is unclear why individuals within a firm that is itself acting as

[3] A municipal entity seeking to receive advice regarding the investment of funds subject to legal restrictions or covenants would normally provide information about such restrictions or covenants to the professional from whom such advice is sought. Unless the professional has reason to question the veracity thereof, such professional would be able to rely on a certificate or similar documentation of the municipal entity as to the existence and nature of any such restrictions or covenants.

[4] An investment adviser registered with the Commission under the Investment Adviser Act who is providing investment advice within the meaning of the Investment Adviser Act or a broker-dealer making a recommendation in a transaction it will effect itself that is subject to federal suitability and related business conduct standards would not be treated as a municipal advisor but, of course, likely would have reason to make such inquiry in order to meet its separate legal obligations under the Investment Adviser Act or such federal suitability and related business conduct standards.

and registered as a municipal advisor would themselves be viewed as municipal advisors, rather than as associated persons of a municipal advisor as defined in Exchange Act Section 15B(e)(7). The statutory language set forth in Exchange Act Section 15B(a) regarding the registration of municipal advisors and the applicability of the Exchange Act to associated persons of municipal advisors is identical to the language applicable to municipal securities dealers and provides the Commission with ample authority to ensure proper registration of municipal advisors and the full scope of examination and enforcement authority necessary for protection of investors, municipal entities and obligated persons.[5] The MSRB believes that treating municipal advisors in the same manner as municipal securities dealers for registration purposes would be significantly more efficient for the Commission and less burdensome for municipal advisors, and also would avoid potential ambiguities arising from separate approaches arising from the same statutory language.

[5] Exchange Act Section 15B(a)(3) provides:

> Any provision of this title (other than section 5 or paragraph (1) of this subsection) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered municipal securities dealer or municipal advisor or any person acting on behalf of such municipal securities dealer or municipal advisor, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

The MSRB notes that the two exclusions in the statutory language refer to Section 5 of the Exchange Act, relating to transactions on unregistered exchanges, and paragraph (a)(1) of Exchange Act Section 15B, relating to registration of municipal securities dealers and municipal advisors. Exchange Act Section 15B(a)(3) makes clear that any person acting on behalf of a municipal advisor (which would include associated persons of the municipal advisor) would be subject to the rules of the MSRB adopted under Exchange Act Section 15B(b) and to the anti-fraud provisions of Exchange Act Section 15B(a)(5). Thus, the principal impact of this exclusion in Exchange Act Section 15B(a)(3) appears to be that registration of municipal advisors is to be limited to the entity (including partnerships, unincorporated organizations, and sole proprietors) and that such municipal advisor entities would provide the critical information about individuals within the municipal advisor entity (including associated persons of the municipal advisor entity) that the Commission appropriately proposes should be submitted during the registration process.

Exclusion of Municipal Entities and Their Employees from Definition of "Municipal Advisor"

Under Exchange Act Section 15B(e)(4)(A), the term "municipal advisor" does not include a person who is a municipal entity or an employee of a municipal entity. The MSRB agrees with the Commission's view that elected members of the governing body of a municipal entity, as well as appointed members of a governing body that are *ex officio* members of the governing body by virtue of holding an elective office, are excluded from the definition of "municipal advisor." However, the MSRB does not believe that this conclusion is dependent upon such members being viewed as "employees" of the municipal entity but instead as a result of the fact that they are the very means by which a municipal entity is self-governed and therefore are inextricably part of the municipal entity itself. Thus, it is the MSRB's position that any member of a governing body of a municipal entity, regardless of how such membership is attained, would be excluded from the definition of "municipal advisor" by virtue of the statutory exclusion of municipal entities from such definition, and such member could be viewed as acting other than in his or her capacity as a municipal entity only if such member is acting clearly outside the scope of his or her duties as a member of the governing body (*i.e.*, actions taken under color of membership in the governing body would be considered to be taken as a municipal advisor only if such actions are *ultra vires*). There is no evidence that Congress sought to provide authority to the MSRB or the Commission over the internal affairs of municipal entities; in fact, the Congressional decision not to amend the provisions of Exchange Act Section 15B(d), the so-called Tower Amendment, despite calls to do so by some market participants and others, suggests that Congress specifically intended for municipal entities' internal affairs to remain outside the reach of Commission and MSRB regulatory authority. The MSRB believes that this would be true even if there had been no explicit statutory language excluding municipal entities or their employees from the definition of "municipal advisor" in that Congress did not intend to regulate municipal entities' internal activities, including internally provided advice with respect to municipal financial products or the issuance of municipal securities.

The MSRB believes that the relevance of the statutory exclusion of municipal entities and their employees from the definition of "municipal advisor" lies in the relationship between two separate municipal entities. Thus, this exclusion would have the effect that one municipal entity providing advice to another about the issuance of municipal securities or municipal financial products would not result in the first municipal entity being treated as a municipal advisor to the other for purposes of the Exchange Act. Employees of the advising municipal entity, so long as their provision of such advice is within their capacity as employees of such municipal entity, also would not be treated as municipal advisors. For example, advice provided by a state bond bank that qualifies as a municipal entity to municipalities and other local municipal entities that borrow through the bond bank (and, in many cases, issue bonds or notes to the bond bank to

evidence such borrowing) would not result in the bond bank, or its employees through which such advice is provided within the scope of their duties, being treated as a municipal advisor. Similarly, advice provided by a state revolving fund program that qualifies as a municipal entity to municipalities and other local municipal entities that borrow through the state revolving fund program (and, in many cases, issue bonds or notes to the state revolving fund to evidence such borrowing) would not result in the state revolving fund program, or its employees through which such advice is provided within the scope of their duties, being treated as a municipal advisor. This would also be the case for municipal entities that have merged their financial and administrative activities, so that an employee of the merged entity, or an employee of one such component entity, could supervise administrative, financial, and bond issuance activities on behalf of the other related municipal entity.

As noted above, employees of municipal entities would qualify for the municipal entity exclusion only if they are properly acting within the scope of their duties to the municipal entity. If an employee of a municipal entity is engaged in outside business activities that involve advice to municipal entities or obligated persons (such as an employee, partner or other associated person of a broker-dealer, municipal advisor or other organization who serves with a municipal entity on a part-time basis as an employee or member of its governing body), such outside business activities could result in such employee being treated as a municipal advisor. Further, if a municipal entity engages a municipal professional or other consultant to solicit or provide advice to other municipal entities, such advice would not be covered by the municipal entity or employee exception.

In sum, there is no evidence that Congress intended to provide for the regulation of state and local intra-governmental or intergovernmental affairs through enactment of Section 975 of the Dodd-Frank Act.

Exclusion of Obligated Persons and Their Employees from Definition of "Municipal Advisor"

Exchange Act Section 15B(e)(4) does not provide an explicit statutory exclusion from the definition of "municipal advisor" for obligated persons and their employees. Nonetheless, the MSRB believes that an obligated person should not be considered a municipal advisor to the extent that it engages in any activity for its own behalf that otherwise would constitute municipal advisory activities. Further, as with employees and members of the governing bodies of municipal entities, the MSRB believes that employees and members of the governing bodies of obligated persons that engage in any activity on behalf of such obligated persons that otherwise would constitute municipal advisory activities should not be considered municipal advisors since such obligated persons act only through their employees or members of their governing bodies. The MSRB believes that Congress did not intend to regulate obligated persons' internally

provided advice with respect to municipal financial products or the issuance of municipal securities.

Of course, any obligated person providing advice to another unrelated obligated person or to a municipal entity with respect to municipal financial products or to the issuance of municipal securities (other than advice to a municipal entity with respect to municipal securities it issues on behalf of the obligated person) would, as a result of such advice, be treated as a municipal advisor. In addition, an employee or member of the governing body of an obligated person engaging in municipal advisory activities clearly outside the scope of his or her duties with the obligated person could be treated as acting as a municipal advisor. If an employee of an obligated person is engaged in outside business activities that involve advice to municipal entities or obligated persons (such as an employee, partner or other associated person of a broker-dealer, municipal advisor or other organization who serves on the board of an obligated person on a part-time basis), such outside business activities could result in such employee being treated as a municipal advisor.

Other Persons Excluded from Definition of "Municipal Advisor"

• *Underwriters* – The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(i), which provides that a dealer that engages in municipal advisory activities while acting in a capacity other than as underwriter on behalf of a municipal entity or obligated person would be a municipal advisor, and the explanation of this provision provided by the Commission in the proposing release is generally consistent with this rule language. The MSRB notes that it recently proposed guidance relating to the types of advice that an underwriter of municipal securities (including a placement agent for municipal securities) can provide in that capacity without being viewed as a financial advisor for purposes of MSRB Rule G-23.[6] In the proposed guidance, the MSRB states:

> For purposes of Rule G-23, a dealer that provides advice to an issuer with respect to the issuance of municipal securities will be presumed to be a financial advisor with respect to that issue. However, that presumption may be rebutted if the dealer clearly identifies itself as an underwriter from the earliest stages of its relationship with the issuer with respect to that issue. Thus, a dealer providing advice to an issuer with respect to the issuance of municipal securities (including the structure, timing, and terms of the issue and other similar matters, such as the investment of bond proceeds, a municipal derivative or other matters integrally related to the issue) where such advice is rendered in its capacity as underwriter for such issue generally will not be viewed as a financial advisor for purposes of Rule G-23. Nevertheless, a dealer's subsequent course of conduct (*e.g.*,

[6] *See* SR-MSRB-2011-03 (February 9, 2011); MSRB Notice 2011-10 (February 9, 2011).

> representing to the issuer that it is acting only in the issuer's best interests, rather than as an arm's length counterparty, with respect to that issue) may cause the dealer to be considered a financial advisor with respect to that issue. In that case, the dealer will be precluded from underwriting that issue by Rule G-23(d).

The MSRB suggests that the Commission adopt a substantially similar interpretation of advice rendered in the capacity of an underwriter for purposes of the underwriter exclusion from the definition of "municipal advisor."

• *Commission-Registered Investment Advisers* – The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(ii) regarding the exclusion for investment advisers registered with the Commission from the definition of "municipal advisor," including in particular that the exclusion is available only when the registered investment adviser is providing investment advice that would subject it to the Investment Advisers Act of 1940 and would not be available to such registered investment adviser engaged in any other municipal advisory activities.

• CFTC-*Registered Commodity Trading Advisors* – In the text of proposed Rule 15Ba1-1(d)(2)(iii) regarding the exclusion for commodity trading advisors registered with the Commodity Futures Trading Commission ("CFTC") from the definition of "municipal advisor," the Commission should replace "a commodity trading advisor" with "such registered commodity trading advisor." The MSRB agrees that the exclusion from the definition of "municipal advisor" for CFTC-registered commodity trading advisors is available only when the registered commodity trading advisor is providing advice relating to swaps (as defined in Section 1a(47) of the Commodity Exchange Act and Section 3(a)(69) of the Exchange Act, and the rules and regulations thereunder). Thus, the exclusion would not be available to such registered commodity trading advisor engaged in any other municipal advisory activities, including providing advice relating to any municipal derivative other than a swap.

The MSRB believes that further consultation among the MSRB, the Commission and the CFTC is needed prior to the Commission finalizing the full extent of the exclusion for commodity trading advisors as contemplated by Section 975 of the Dodd-Frank Act. The MSRB notes that, throughout the legislative process leading up to final enactment of the Dodd-Frank Act, the United States Senate consistently justified the regulation of municipal advisors based, in part, on losses suffered by municipal entities from complex derivatives products marketed by unregulated financial intermediaries.[7] The version of the bill passed by the United States House of Representatives also included within the definition of "municipal financial adviser" persons providing advice to municipal securities issuers with respect to, among other things, the hedging

[7] *See* United States Senate, Committee on Banking Housing and Urban Affairs, Report on S. 3217 (April 30, 2010), page 38; Summary of Senate Provisions of Conference Base Text (May 28, 2010), page 10.

of any risks associated with the issuance of municipal securities or the investment of proceeds thereof, including advice as to swap agreements.[8] The final version of the Dodd-Frank Act reported by the House-Senate Conference, as subsequently enacted by Congress, included persons providing advice on municipal financial products (including municipal derivatives) within the definition of "municipal advisor." This legislative history relating to the inclusion of advisors on municipal derivatives transactions within the definition of "municipal advisor," as well as certain provisions in Title VII of the Dodd-Frank Act, are strongly indicative of a Congressional intent that advice by advisors to municipal entities, particularly in but not necessarily limited to the context of a municipal securities offering, was intended to be regulated under a single comprehensive municipal advisor regulatory construct.[9] This view is consistent with the MSRB's expanded mission to also protect municipal entities and obligated persons and to subject such advisors providing advice to municipal entities to a federal fiduciary standard.

The MSRB believes that strengthened coordination of regulatory activities among the MSRB, the Commission and the CFTC would promote a more efficient and effective implementation of the Dodd-Frank Act and would reduce the compliance burden on market participants, including in particular small municipal advisors that would otherwise become subject to two separate regulatory regimes if their advisory activities with respect to municipal derivatives would cause them to be treated as commodity trading advisors with respect to such derivatives while acting at the same time as a municipal advisor with respect to any related municipal securities financing.[10] The MSRB expects to provide to the Commission further

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8 *See* Side-by-Side Comparison of House-passed and Senate-passed versions of H.R. 4173, Title V Subtitle C – Investor Protection Section by Section (undated), page 133, available at http://democrats.financialservices.house.gov/singlepages.aspx?NewsID=1327.

9 *See* Senator Christopher Dodd's floor statement on the registration of municipal advisors, 156 Cong. Rec. S10921 (daily ed. Dec. 21, 2010) (statement of Sen. Dodd), which expresses this understanding of how the provisions of the Dodd-Frank Act are to be understood in connection with advice on municipal derivatives to municipal entities. This reading is consistent with the notion that Title VII of the Dodd-Frank Act was intended to provide for comprehensive regulation by the CFTC of the swap activities of swap dealers and major swap participants (including advice on swaps provided to special entities), while Section 975 was intended to provide for comprehensive regulation by the MSRB of most typical non-dealer advisors to municipal entities (including advisors, other than swap dealers and major swap participants, providing advice on municipal derivatives).

10 For example, a typical municipal advisor providing advice to an issuer on a variable rate demand offering involving an integrally-related interest rate swap would, without the changes suggested herein, be subject to MSRB rules as a municipal advisor in connection with its advice on the new issue offering and would simultaneously be subject to distinct

suggestions for refinement of the exclusion for CFTC-registered commodity trading advisors in light of such consultations and coordination.

• *Attorneys* – The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(iv) regarding the exclusion for attorneys, including in particular that such exclusion applies solely when an attorney is providing legal advice or services that are of a traditional legal nature to a client that is a municipal entity or obligated person. The MSRB seeks clarification from the Commission on whether bond counsel would be viewed as having a municipal entity or obligated person as a client since bond counsel has at times been described as representing "the transaction" rather than any particular party to an offering.

The MSRB believes that the Commission should consider further refining its interpretation in the Proposing Release regarding the nature of this exclusion. Thus, the MSRB suggests the following revisions to the text of the Proposing Release appearing immediately after footnote 132 thereof:[11]

> Generally, the Commission interprets advice provided by a lawyer to its client with respect to the structure, timing, terms and other similar matters concerning municipal financial products or the issuance of municipal securities to be services of a traditional legal nature **only** if such advice is provided within a lawyer-client relationship specifically related to such products **and consists of** ~~**in conjunction with related legal**~~ advice **on legal matters such as the legal ramifications of such structure, timing, terms and other matters, the appropriate documentation thereof, and matters of a similar legal nature**. Thus, for example, advice comparing the **legal ramifications of** 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 **provide legal advice to** ~~**advise**~~ a municipal entity client embarking on a bond offering~~,~~ would be considered to be services of a traditional legal nature, as would advice concerning the tax consequences of alternative financing structures or advice recommending a particular financing structure due to legal considerations such as the limitations included in existing contracts and indentures to which the issuer is a party. However, advice which is primarily financial in nature, such as advice concerning the financial feasibility of a project or financing, advice estimating or comparing the relative cost to maturity of an

CFTC rules as a commodity trading advisor in connection with the integrally-related swap.

[11] Underlining indicates suggested additions and strikethrough indicates suggested deletions.

issuance depending on various interest rate **or other financial market** assumptions or advice recommending a particular structure as being financially advantageous under prevailing **or anticipated** market conditions, would be primarily financial advice and not services of a traditional legal nature **and therefore would be considered municipal advisory activities undertaken by a municipal advisor.**

• *Engineers* – The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(v) regarding the exclusion for engineers, including in particular that such exclusion applies solely when an engineer is providing engineering advice. Thus, to the extent that an engineer provides advice with respect to municipal financial products, the issuance of municipal securities or other financing structure that is not considered engineering advice (such as advice on how to structure an issue to cover the costs of a project), the engineer would be considered a municipal advisor.

• *Accountants* – The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(vi) regarding the exclusion for accountants, including in particular that such exclusion applies solely when an accountant is preparing financial statements, auditing financial statements, or issuing bring down, comfort or "agreed upon procedures" letters for underwriters. Thus, to the extent that an accountant provides advice with respect to municipal financial products or the issuance of municipal securities that does not fall within these classes of excluded activities (such as advice on what information, other than financial statements, to disclose in the official statement and how such information should be disclosed), the accountant would be considered a municipal advisor.

Rule 15Ba1-1(e) – Municipal Advisory Activities. The MSRB supports the Commission's proposed definition of "municipal advisory activities," although the MSRB suggests that the Commission consider providing guidance as to the extent of activities that would be covered by the term "issuance of municipal securities" as used in this definition. In particular, the MSRB generally would view this term as including, at a minimum, any advice provided in connection with a municipal securities issue or other financing structure at any point during the pre-issuance planning process as well as throughout the life of the issuance through final payment of principal of and interest on the securities (by reason of maturity, earlier redemption or otherwise, or for such longer period due to delayed payment such as in the case of a payment default) or, if later, as long as the proceeds thereof remain subject to applicable restrictions under the governing legal documents and covenants, as described above in connection with the definition of "investment strategies."

Further, the MSRB notes that municipal securities are not limited solely to traditional tax-exempt bonds and notes but also include, among other things, taxable debt, certificates of participation, certain lease financing arrangements and non-debt securities such as interests in 529 college savings plans, local government investment pools and any other similar financial

products or interests. In addition, the MSRB views the term "issuance of municipal securities" as applying to any issuance of such securities, including private placements and direct sales by municipal entities without the use of the services of an underwriter or other dealers.[12]

Finally, the MSRB suggests that the Commission consider providing guidance on the extent to which advice to a municipal entity would be viewed as constituting municipal advisory activities when such advice is provided in connection with arrangements such as public-private partnerships where the municipal entity's direct financing activities may be closely related to other portions of the over-all financing plan that, by themselves, may not involve municipal securities. Where a municipal entity undertakes a capital or other project without the use of municipal securities, it is unclear whether advice provided by the municipal entity to forego the issuance of municipal securities in favor of another approach should be considered advice falling within the definition of "municipal advisory activities."

Rule 15Ba1-1(f) – Municipal Derivatives. The MSRB agrees that "municipal derivatives" as used in Section 975 of the Dodd-Frank Act includes both swaps and securities-based swaps to which a municipal entity or obligated person (in its capacity as an obligated person) is a counterparty but believes that this does not describe the entire universe of derivatives intended to be covered by the term "municipal derivatives" as used in the Dodd-Frank Act. Although swap transactions entered into by some municipal entities were the primary types of derivatives activities that resulted in Congressional action to enact Section 975 of the Dodd-Frank Act, the broader term "municipal derivatives" was used within the definition of "municipal financial products," rather than the narrower term "swaps" (even though the term "swap" is used elsewhere in Section 975 in describing the exclusion for registered commodity trading advisors), presumably because Congress sought to address not just the specific instances of the past but to also provide flexibility to address problems that may arise in the future in connection with the use of other existing or yet-to-be-developed forms of derivatives by municipal entities.

Thus, the MSRB believes that the language of proposed Rule 15Ba1-1(f) should be modified by changing the word "means" to "includes." In addition, the language should be modified by inserting at the end ", or which is based on the value of one or more municipal securities of a municipal entity." This latter addition would treat advice provided by any person to a municipal entity concerning, among other things, its options with regard to derivatives based on the municipal entity's municipal securities created and traded by third-parties (such as credit

[12] Thus, advice provided to a municipal entity relating to the direct issuance by such municipal entity to investors of non-traditional municipal securities such as "mini bonds" or registered warrants (also referred to as "IOUs"), the offering of 529 college savings plan interest in a direct-sold plan through state employees, or the handling of investments and redemptions in local government investment pools by public sector personnel is considered municipal advisory activities.

default swaps and interests in tender option bond programs) as municipal advisory activities and would make such person a municipal advisor subject to the federal fiduciary duty and other MSRB rules.

The MSRB wishes to make clear that it views its authority in connection with municipal derivatives as extending to the municipal advisors providing advice on such municipal derivatives to municipal entities and obligated persons, not to the activities of counterparties effecting the derivative transaction itself nor, in general, with the manner in which such municipal derivatives are permitted to be structured.[13] Such authority remains with the Commission as to securities-based swaps and the CFTC as to swaps.

Rule 15Ba1-1(g) – Municipal Financial Product. The MSRB supports the Commission's proposed definition of "municipal financial product," subject to the comments above relating to the separate definition of "investment strategies."

Rule 15Ba1-1(h) – Non-Resident. The MSRB has no comment on the Commission's proposed definition of "non-resident."

Rule 15Ba1-1(i) – Obligated Person. The MSRB supports the Commission's proposed definition of "obligated person."

Rule 15Ba1-1(j) – Principal Office and Place of Business. The MSRB has no comment on the Commission's proposed definition of "principal office and place of business."

Registration Rules

The MSRB supports the Commission's proposed Rules 15Ba1-2 through 15Ba1-6, subject to any appropriate modifications to effectuate the suggestions made by the MSRB in its comments above regarding whether natural persons should be treated as municipal advisors.

Recordkeeping Rule

The MSRB generally supports the Commission's proposed Rule 15Ba1-7, although if the Commission determines to limit the registration requirement for municipal advisors to entities and sole proprietors, Rule 15Ba1-7 may need to be modified to reflect the need for municipal advisors to make and maintain additional records in connection with the associated persons of such municipal advisors.

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13 The MSRB's dealer rules would apply, however, to any transactions in municipal securities effected by a dealer in the process of creating a municipal derivative, such as where a dealer acquires a municipal security to create a tender option bond program.

Further, the MSRB observes that the proposal's five-year retention period mirrors the retention requirements for investment advisers under the Investment Advisers Act of 1940 and differs from the general structure applicable to broker-dealers in which records are retained for either three years or six years, depending on the nature of such record. The MSRB does not oppose establishing a five-year period for municipal advisor record retention and suggests that the various regulatory agencies charged with adopting rules applicable to broker-dealers consider either also establishing a single five-year retention period as well or reducing the period of time records must be retained for categories requiring a six-year retention period to five years. Either such change should reduce the recordkeeping and compliance burden on regulated entities without reducing protections of investors, municipal entities or obligated persons. Finally, the MSRB expects to adopt from time to time its own recordkeeping requirements with respect to municipal advisors, primarily in connection with rules adopted by the MSRB applicable to municipal advisors. The MSRB will consider whether to migrate to a similar five-year retention period structure as it undertakes future recordkeeping proposals.

Municipal Advisor Forms

The MSRB generally supports the Commission's proposed Forms MA, MA-I, MA-W and MA-NR, subject to the following observations.

Municipal Advisor Entity as Registrant. Consistent with the MSRB's comments above regarding whether natural persons should be treated as municipal advisors, the MSRB believes that forms relating to individuals at municipal advisor entities should be viewed as officially submitted by the municipal advisor entity.

Scope of Terminology in Forms. The MSRB notes that in certain instances, the terminology used in the forms seems to be unnecessarily limited to the provision of advice relating to municipal securities, rather than the full range of potential municipal advisory activities. In finalizing the forms in conjunction with adoption of the Rule Proposal, the Commission should review the language thoroughly to ensure consistency with any changes made to the Rule Proposal based on the comments received and to eliminate the small number of inadvertent inconsistencies.

Burden on Small Municipal Advisors. The MSRB is prohibited under Exchange Act Section 15B(b)(2)(L)(iv) from imposing a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB recognizes that the Commission has undertaken an analysis as required under the Regulatory Flexibility Act regarding the effect of the Rule Proposal on small entities and that it has acknowledged that the analysis was not specifically tailored toward what would be

considered a small municipal advisor. Further, the MSRB recognizes that the provision of Exchange Act Section 15B(b)(2)(L)(iv) regarding small municipal advisors does not apply to the Commission's rulemaking; nonetheless, the MSRB hopes that the Commission receives significant meaningful feedback from small municipal advisors regarding the potential burdens the Rule Proposal would impose and gives due weight to such feedback in light of the Congressional intent regarding regulatory burden on small municipal advisors. Once approved and implemented, the MSRB believes that the information gleaned from the Municipal Advisor Forms will help the MSRB to better gauge the parameters of what should be considered a small municipal advisor and to structure its rules to effectuate the intent of Section 15B(b)(2)(L)(iv).

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Again, we appreciate the opportunity to provide comments to the Commission on this important proposal. If you have any questions or if the MSRB may be of further assistance to the Commission, please do not hesitate to contact me or the MSRB staff.

Sincerely,

Michael G. Bartolotta
Chairman