National Association
of Bond Lawyers

PHONE 202-682-1498 Governmental Affairs Office
FAX 202-637-0217 601 Thirteenth Street, N.W.
governmentalaffairs@nabl.org Suite 800 South
www.nabl.org Washington, D.C. 20005

February 25, 2011

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

Re: File No. S7-45-10, SEC Rel. No. 34-63576, Registration of Municipal Advisors

Dear Ms. Murphy:

The following comments are submitted to the Securities and Exchange Commission by the National Association of Bond Lawyers relating to SEC Release No. 34-63576, dated December 20, 2010. The comments were prepared by an ad hoc subcommittee of the NABL Securities Law and Disclosure Committee comprised of those individuals listed on Exhibit I and were approved by the NABL Board of Directors.

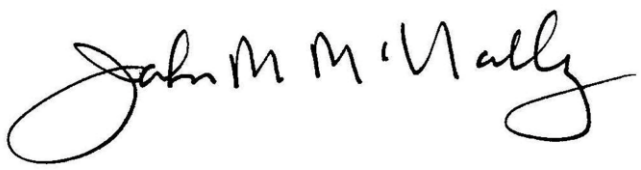
NABL appreciates the opportunity to respond to the request for comments by the Commission. We have attached as Appendix our responses to certain of the particular questions posed by the Release.

NABL exists to promote the integrity of the municipal securities market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 3,000 members and is headquartered in Washington, D.C.

If you have any questions concerning this submission, please feel free to contact the NABL Director of Governmental Affairs Victoria Rostow at (202) 682-1499 (vrostow@nabl.org).

We thank you in advance for your consideration of these comments.

Sincerely,



John M. McNally

National Association *of* Bond Lawyers

COMMENTS OF

THE NATIONAL ASSOCIATION OF BOND LAWYERS

REGARDING

SECURITIES AND EXCHANGE COMMISSION
RELEASE NO. 34-63576, FILE NO. S7-45-10
REGISTRATION OF MUNICIPAL ADVISORS

The following comments are submitted to the Securities and Exchange Commission (the "Commission") by the National Association of Bond Lawyers ("NABL") relating to SEC Release No. 34-63576, dated December 20, 2010 (the "Release"). The comments were prepared by an ad hoc subcommittee of the NABL Securities Law and Disclosure Committee comprised of those individuals listed on Exhibit I and were approved by the NABL Board of Directors.

The Release requests comments on Rules 15Ba1-1 through 15Ba1-7 (collectively, the "Proposed Rules") proposed to be issued by the Commission pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or the "Dodd-Frank Act") to implement permanent requirements for the registration of municipal advisors with the Commission and to exempt certain persons and activities from registration requirements.

NABL appreciates the opportunity to respond to the request for comments by the Commission. We have provided below an Executive Summary and our General Comments, and we have attached as Appendix A our responses to certain of the particular questions posed by the Release.

Executive Summary

Section 975 of the Act amended Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"), effective October 1, 2010, to, among other things, (1) require municipal advisors to register with the Commission, (2) establish a fiduciary duty between a municipal advisor and a municipal entity for which it is acting as a municipal advisor, and (3) subject municipal advisors to additional anti-fraud provisions.

Prior to the Dodd-Frank Act, a municipal financial advisor was not subject to registration with the Commission unless it was either a broker or dealer (subject to registration under the Exchange Act) or an investment adviser (subject to registration under the Investment Advisers Act of 1940; the "40 Act"). Section 3(a)(4) of the Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(5) of the Exchange Act defines "dealer" as "any person engaged in the business of buying and selling securities for such person's own account." Section 202(a)(11) of the 40 Act defines

"investment adviser" as "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."

The underlying purpose of Section 975 of the Dodd-Frank Act was to subject independent municipal financial advisors to Commission registration and regulatory requirements without regard to whether they can be characterized as a "broker," a "dealer," or an "investment adviser." In doing so, however, as analyzed in detail below, it created a very sweeping definition of "municipal advisor," which does not include either an "engaged in the business" or a compensation component as a requirement, both of which have been core elements of the existing regulatory scheme. The problems that arise from such a broad statutory definition would be further compounded by the Proposed Rules, which in many instances go beyond the statutory definition and intent.

Section 975 defines the term "municipal advisor" to mean "a person (who is not a municipal entity or an employee of a municipal entity) that (i) 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) undertakes a solicitation of a municipal entity." Section 975 further provides, however, that the term "municipal advisor" does *not* include, among others, (1) "a broker, dealer, or municipal securities dealer serving as an underwriter," (2) "any investment adviser registered under the Investment Advisers Act of 1940," or (3) "attorneys offering legal advice or providing services that are of a traditional legal nature."

The definition of "municipal advisor" in the Dodd-Frank Act expressly excludes "a person who is not a municipal entity or an employee of a municipal entity." The Dodd-Frank Act does not provide a definition of the term "employee." In the Proposing Release, the Commission draws a distinction between elected and non-elected members of the governing body of a municipal entity and determines that the exclusion for "employees" applies only to elected members of the governing body and not to non-elected members. We have responded to the Commission's request for comments on this issue, and we do not believe this distinction has any merit in implementing the statutory intent of the Dodd-Frank Act.

The construct reflected in the Proposing Release is fundamentally flawed. The Commission treats members of a governing body of any municipal entity or obligated person as municipal advisors, subject (with respect to municipal entities) to a limited exclusion for "elected" members. The problem is not simply the artificial distinction between elected and non-elected members, but more fundamentally the Proposed Rule fails to recognize that the governing board of a municipal entity cannot be a municipal advisor to such entity. The municipal entity acts through its governing body, which is necessarily comprised of individual members. Accordingly, the exception for a "municipal entity" should properly be interpreted to mean all governing body members. The same is the case for obligated persons.

Furthermore, the notion that non-elected members of boards of municipal entities are not accountable is incorrect. Even non-elected members are generally treated as public officers and are subject to removal for cause. In addition, non-elected board members are in almost all cases

appointed by elected officials pursuant to explicit provisions of a statute passed by elected officials. That state statute does not distinguish board members or voting strength on a board between elected and appointed members. For a federal provision to now intrude on this basic form of state governance without any congressional history or legislative intent support seems quite arbitrary.

The issuance of municipal securities and municipal financial products are legitimate matters to be examined, debated, and acted upon by municipal entities and obligated persons. To subject non-elected governing body members of municipal entities, and all employees and governing body members of obligated persons, to the registration requirements and expense, federal fiduciary standards, and federal securities law liability, can only have the effect of discouraging participation. This is flawed public policy and counter-productive to good governance.

Moreover, subjecting members of municipal entities' governing bodies to these requirements may violate the Tenth Amendment to the United States Constitution, which reserves to the States those powers not delegated to the United States by the Constitution. The legislative history of the Dodd-Frank Act is devoid of legislative intent on this point. In addition, we are concerned that the Proposed Rules may not withstand scrutiny when examined in light of the First Amendment to the United States Constitution.

The Commission may argue that registration is required only for those persons who are in fact providing financial advice. The problem with such a defense of the Proposing Release construct is that the definition of financial advice is so broad ("municipal financial products or the issuance of municipal securities") as to potentially include the adoption of an approval resolution authorizing a municipal bond issuance if at such meeting questions are asked by board members probing the "structure, timing, terms, or other similar matters," or a finance committee recommendation to the governing board relating to the issuance of municipal securities or financial products. Indeed, it is common practice for a proposed financial transaction to be considered first by a finance committee (or other specially formed committee) of a board with a recommendation made by such committee to the full board as to its structure, timing, terms and related matters. Regulation in this manner is ill-conceived. The Commission has other means to encourage and enforce the proper conduct of governing bodies of municipal entities and obligated persons, including interpretive releases and municipal enforcement actions. Moreover, many obligated persons are already subject to regulation, including Commission registrants, public utilities, and financial institutions. Rather than discouraging participation on governing bodies by requiring registration and additional potential liabilities, the Commission should be encouraging greater participation of individuals knowledgeable and experienced in finance, and the potential for the municipal advisor provisions to attach be dependent upon whether "advice" is given by a board member would have a chilling effect on board members expressing their views. As a matter of public policy, the expression of such views should be encouraged, not discouraged.

We also express our concerns with the narrow interpretation of the statutory exclusion for attorneys. In short, the narrow exclusion reflected in the Proposed Rules does not properly take into account (i) the unique interplay between law and finance that characterizes the practice of bond counsel, underwriter's counsel, and disclosure counsel in the field of public finance and (ii)

the professional responsibilities of counsel to provide advice within the penumbra of purely legal advice that may, under the Proposed Rules, be inappropriately characterized as financial advice triggering a municipal advisor determination.

General Comments

1. **The Commission Should Exercise Its Broad Interpretive and Exemptive Authority.** The Commission has express statutory authority[1] to exempt persons and activities, on its own motion, when consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act (which now include the protection of municipal entities and obligated persons) from any provision of Section 15B or the rules thereunder. In addition, the Commission has authority to adopt rules to implement the municipal advisory provisions of Section 15B. As noted below, certain provisions and applications of the proposed municipal advisor rules may be subject to constitutional challenge unless limited by interpretation or exemption. Accordingly, we suggest that these provisions and applications be limited to preserve their constitutionality consistent with the public interest, investor protection, and the purposes of Section 15B, as amended.

In other cases (explained in our responses to the Commission's questions), the provisions should be limited to avoid unintended adverse impacts on municipal issuers and obligated persons that would be contrary to the public interest (and the interests of municipal entities and obligated persons) and do not further investor protection. Given the express exemptive authority that Congress granted to the Commission, Congress recognized that the municipal advisory provisions of the Act may be broader than is necessary or desirable to protect the public interest. We believe our recommendations, if accepted by the Commission in its final rule publication, will reduce municipal issuer concerns and uncertainties regarding the rules and, thereby, increase the likelihood of compliance.

2. **The Commission Should Clarify What It Means to Provide "Advice".** The Act defines "municipal advisor" as a person that "provides advice" regarding municipal securities issues or municipal financial products to a municipal entity or obligated person. The Proposed Rules define "municipal advisor" by reference to the Act.

Neither the Act, the Proposed Rules nor the Release provides clarity as to the type of communications that would be considered "providing advice" requiring registration of, and if given to a municipal entity, imposing a fiduciary duty upon, the advice-giver. Given the concerns which we have expressed, the Commission should develop a workable definition and provide examples of what the term "advice" means, in order for persons to determine whether they are "providing advice" that would subject them to registration as a municipal advisor.

[1] Section 15B(a)(4) of the Exchange Act, as amended by the Dodd-Frank Act.

NABL is concerned that the Commission not interpret the term "advice" too broadly, and suggests that the Commission establish a "reasonable expectations" standard. This standard[2] would require a two-part analysis:

- **First, has specific "advice" or a specific recommendation been provided?**

- **Second, if based upon either the nature of the prior relationship between a municipal entity or obligated person and another person[3] or express statements of the municipal entity or obligated person's intent, the municipal entity or obligated person would *reasonably expect*[4] that the person providing advice was acting as a fiduciary, then a municipal advisory relationship should be deemed to exist.**

In determining whether "advice" has been provided, NABL believes that the Commission should distinguish between situations in which *information* is provided to a municipal entity or obligated person as opposed to a *recommendation* as to a specific course of action. Neither broker-dealers nor citizens will volunteer useful information or informed opinions to municipal entities or obligated persons if doing so could subject them to regulation by the Commission and the MSRB or fiduciary obligations.

NABL recognizes that there are difficult examples, such as responses to a request for proposals by a municipal entity for financial advisory services which recommend specific potential courses of action. For examples such as these, the second part of the analysis would be dispositive, as it is not reasonable for the municipal entity or obligated person to believe that a municipal advisory relationship had been established.

3. **Greater Specificity is Required to Give Fair Notice of Criminal Conduct**. Because the Act amends certain provisions of the Exchange Act, and violation of the applicable provisions of the Exchange Act may be a criminal offense, the Commission should specifically define prohibited conduct to give fair notice to regulated entities and to prevent the provisions from being legally unenforceable, including (a) defining terms (e.g., "guaranteed investment contract") for which the Act merely provides examples, (b) defining "advice" and "municipal derivatives," and (c) specifying the fiduciary duties that would be applicable to municipal advisors. The nature and extent of fiduciary duties ultimately imposed by the Commission or the MSRB will greatly affect the willingness of persons to act as municipal advisors, particularly because many who serve as board-level members of municipal entities do so for no or nominal

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[2] This standard is adopted from the one suggested to the Investor Advisory Committee by the Investor as Purchaser Subcommittee in its February 15, 2010 memorandum, "Fiduciary Duty Issue" (the *"Fiduciary Duty Memo"*).

[3] The term, "nature of the relationship" refers to the totality of factors that entail the actual relationship, including, but not limited to, the client's reliance on the advisor's advice, the client's financial sophistication, and the personalized nature of the advice.

[4] The "reasonable expectations" standard is an objective one, i.e., the expectations that a reasonable client in similar situations would have based on the external indicia of the relationship, as opposed to the solely subjective expectations of a particular client.

compensation. Accordingly, the Commission should enact broad exemptions from the definition of "municipal advisor" at least temporarily until the scope of fiduciary duties is clarified.

4. **Certain Provisions of the Act should be limited to assure its Constitutionality.** The First Amendment of the United States Constitution protects the rights of citizens to communicate to all departments of government, regardless of their motive.[5] *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329 (7 Cir. 1977). Under the First Amendment, content-based restrictions of speech are presumptively invalid and must survive strict scrutiny to withstand the presumption. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538 (1992). The Act imposes fiduciary duties on municipal advisors, and defines municipal advisors by the type of advice provided, i.e., by the content of such advice. Because the Act abridges freedom of speech in a manner that is not content-neutral, it is presumed unconstitutional unless it can withstand strict scrutiny. It is unlikely that the municipal advisory provisions of the Act will withstand constitutional scrutiny unless the regulated advice is limited to commercial speech by persons engaged in the business of providing the advice (e.g., by incorporating the "being in the business, for compensation" limitation of the Investment Company Act of 1940), as opposed, e.g., to citizens and advisory boards who make uncompensated recommendations to municipal entities.

In addition, the Tenth Amendment of the Constitution prevents Congress from exercising powers delegated to it in a fashion that impairs states' integrity or their ability to function effectively.[6] *Fry v. U.S.*, 421 U.S. 542, 95 S.Ct. 1792 (1975): "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." Given the Act's registration requirements and fiduciary duties, as proposed to be interpreted by the Commission, the Proposed Rules may discourage individuals from giving advice to municipal entities and restricts the access of municipal entities to advice required for sound decision-making. The Commission should interpret the municipal advisor provisions narrowly so as to assure that they are not held to be in violation of the Tenth Amendment.

The Commission should narrow the scope and reach of the municipal advisor provisions of the Act to preserve the constitutionality of the provisions. Any exemption that preserves or eliminates doubt as to the constitutionality of the Act's restrictions on non-exempt activity and persons would clearly be consistent with the public interest, investor protection, and the purposes of Section 15B.

5. **The Exemptions for Attorneys Should be Broadened so as Not to Discourage Practices that Are in the Public Interest.** As described in our responses to Commission questions, the Commission should clarify the statutory exemption for attorneys to prevent the imposition of fiduciary duties to issuers that are inconsistent with the duties of lawyers under their state professional conduct rules. As part of their representation of underwriters, credit enhancers, or other financing participants, attorneys should be free to express opinions to municipal entities or obligated persons at the request or for the benefit of their clients without

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[5] "Congress shall make no law . . . abridging the freedom of speech, . . .; or the right of the people . . . to petition the Government for a redress of grievances." U.S. Constitution, Amendment I.

[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X.

taking on fiduciary obligations in favor of non-client transaction participants, which in many cases could violate or undermine state lawyer professional conduct rules that prohibit conflicts of interest. More generally stated, a municipal entity's or obligated person's transaction counterparties, and these counterparty's advisors, must be free to discuss matters relating to proposed and actual transactions with the municipal entity or obligated person without fear of falling subject to regulation as its municipal advisor.

6. **Consistent with Congressional Intent, Regulated Investment and Derivative Advice Should be Limited to Transactions with a Nexus to Municipal Securities Issues**. The municipal advisor provisions evidence clear Congressional intent to reach only advice in connection with municipal securities issues that are offered in the public securities markets; derivative contracts, guaranteed investment contracts, and escrow securities related to such municipal securities; and strategies for investing proceeds securing such municipal securities issues, as opposed to all investment and derivative transactions of municipal entities and obligated persons. The statutory definition of "municipal entity" contains three clauses that ends with "any ***other*** issuer of municipal securities" (emphasis added), making clear that the types of governmental entities, plans, programs, and pools coming before are limited to those that issue municipal securities. Similarly, the statutory definition of "investment strategies" specifically includes only strategies for "the investment of the proceeds of municipal securities" and "the recommendation of and brokerage of municipal escrow investments," which are government obligations pledged as security for municipal securities to defease the issuer's obligation to pay the securities. In this context, it is apparent that Congress intended that "municipal derivatives" and "guaranteed investment contracts" refer not to all derivatives and guaranteed investment contracts entered into by municipal entities, but rather only those that are related to issues of bonds and similar municipal securities. Congress's intent may be inferred from its placement of the municipal advisor provision in Section 15B, which is headed "Municipal Securities." As further evidence of its intent, the Senate Banking Committee summary of the Conference Report on the Act lists the municipal advisor provisions under the heading "Better Oversight of Municipal Securities Industry," and it summarizes the fiduciary duty provision by stating that it "[i]mposes a fiduciary duty on advisors to ensure that they adhere to the highest standard of care when advising municipal issuers." See also our response to Question No. 2 in Appendix A. The Commission should revise its interpretation and the Proposed Rules to make them consistent with this clear Congressional intent.

7. **We Urge the Commission to re-propose the Proposed Rules**. Following its review of the comments delivered to the Proposed Rules, if the Commission amends substantially the Proposed Rules in light of comments received, we urge the Commission to re-propose the rule for review and comment and to grant broad interim relief limiting the scope of municipal advisor regulatory requirements pending the adoption of final rules concerning municipal advisors and their fiduciary duties.

Appendix A

Certain questions posed by the Release and NABL's responses follow.

1. In light of our understanding of Congressional objectives and intent, are the Commission's interpretations under the definition of "municipal advisor" and related terms, and the exclusions from the definition of "municipal advisor" appropriate? Should any of these interpretations be modified or clarified in any way?

In some very important and fundamental respects, we believe the Commission's interpretations and exclusions from the definition of "municipal advisor" are insufficient. For an overview of their deficiencies, please refer to the introductory statement to these comments. For specific recommendations regarding how they should be changed, please refer to our responses to specific Commission questions set out below.

2. The Commission notes that the definition of "municipal entity" includes, but is not limited to, public pension funds, local government investment pools and other state and local governmental entities or funds as well as participant-directed investment programs or plans such as 529, 403(b), and 457 plans. Is the Commission's interpretation of "municipal entity" for purposes of the proposed definition of "municipal advisor" appropriate? Is additional clarification necessary? If so, how should the Commission further clarify this interpretation?

The language of Section 975, as well as the applicable legislative history, require a much more limited scope of the terms "municipal entity" and "investment strategies" than is suggested by the interpretive language included in the Release. As stated in paragraph 6 in our introductory statement to these comments, "municipal entity" should extend to public pension funds, local government investment pools, other governmental asset pools, and investor-directed governmental plans only to the extent that they are political subdivisions of a state or corporate instrumentalities of a state that issue municipal securities in the public securities market. (Although the statutory definition is most clearly intended to include state and local debt obligations, it would appear that interests in 529 plans may be deemed to be included.) This scope of definition is consistent with the principal purpose of the statutory provision, which was to level the playing field between regulated dealers and unregulated independent financial advisors, when advising issuers as to securities that are available in the public municipal securities marketplace. On the other hand, local government investment pools, tax sheltered annuity and deferred compensation plans generally should not be deemed to be "municipal entities". Such entities do not issue in the public municipal securities marketplace and expanding SEC regulatory oversight to include their affairs would constitute a federal intrusion into general state and local fiscal affairs. The statutory text does not require, and the legislative history does not suggest an intent to require, such an expansion of SEC responsibility beyond the public securities markets.

The statute defines the term "municipal entity" to include:

> any State, political subdivision of a State, or municipal corporate instrumentality of a State, including--

> "(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;
>
> "(B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and
>
> "(C) any ***other*** issuer of municipal securities;

(Exchange Act §15B(e)(8), emphasis added).

The plain reading of clause (C) in the above definition is to limit the scope of the term "municipal entity" to issuers of municipal securities and, in view of the breadth of the preceding portions of the provision, clause (C) would otherwise add no meaning. This limitation is consistent with the legislative history, which clearly evidences that Congress intended the provision to "cover previously unregulated market participants and…financial transactions with…municipal entities" for the purpose of strengthening "oversight of municipal securities" and broadening "current municipal securities market protections". (*The Report of the Committee on Banking, Housing, and Urban Affairs on The Restoring American Financial Stability Act of 2010* (the "Senate Report"), at 147). In discussing the purpose of Section 975 as being to establish municipal advisors as a new category of SEC registrant, the Senate Report described their activities as providing advice to municipal entities "on the issuance of municipal securities, the use of municipal derivatives, and investment advice relating to bond proceeds" (*see* Senate Report, at 147-148). See also, paragraph 6 of the introductory statement to these comments. The legislative history does not support a conclusion that the provision was intended to address advice to an entity that would be described by Section 975 based upon a mere possibility that it could become an issuer of municipal securities in the public marketplace, or that the provision was intended to address advice concerning a municipal entity's fiscal affairs generally, except to the extent that such affairs relate directly to the municipal entity's issuance or administration of such municipal securities (including hedging of risk and application of proceeds). The testimony cited in the Senate Report in connection with this provision was clearly addressed to the public municipal securities marketplace[7]; moreover, the Senate Report expressly describes the effect of the Section 975 as providing that:

> activities of a municipal advisor, broker, dealer or municipal securities dealer to solicit a municipal entity to engage an unrelated investment advisor to provide investment advisory services to a municipal entity or to… undertake…underwriting, financial advisory or other activities for a municipal entity ***in connection***

[7] The Senate Report specifically cited, at 148, *Enhancing Investor Protection and the Regulation of Securities Markets—Part I: Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 111th Congress, 1st session, at 9-10 (2009) (Testimony of Mr. Timothy Ryan), *Enhancing Investor Protection and the Regulation of Securities Markets—Part II: Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 111th Congress, 1st session, [at 55] (2009) (Testimony of Mr. Ronald A. Stack) and *Legislative Proposals to Improve the Efficiency and Oversight of Municipal Finance: Testimony before the U.S. House Committee on Financial Services*, 111th Congress, 1st session, [at14] (2009) (Testimony of The Honorable Thomas C. Leppert).

> ***with the issuance of municipal securities***, would be subject to regulation by the MSRB

(*see* Senate Report, at 148, emphasis added). Indeed, the SEC's own testimony concerning the originally proposed form of Section 975 describes the provision in this limited context:

> The question of whether financial advisors to ***municipal issuers and conduit borrowers*** should be regulated is a topic of significant interest to the Commission…The Municipal Advisors Regulation Act would…help address the problems we have observed concerning financial advisors who advise ***municipal issuers and conduit borrowers concerning their securities offerings, transactions in…derivatives products intended to hedge risk, and the investment of bond proceeds.***

(*see Legislative Proposals to Improve the Efficiency and Oversight of Municipal Finance: Testimony before the U.S. House Committee on Financial Services*, 111th Congress, 1st session, pp.103-104, emphasis added (2009) (Prepared Statement of Martha Mahan Haines)).

As to the types of funds, pools, and plans that do issue or invest proceeds of municipal securities, and especially if the Commission declines to accept our recommendation to limit the term to issuers of municipal securities in the public marketplace, the Commission should clarify that municipal entities include only entities that are controlled by or that are established for the benefit and enjoyment of a State or States or any of their constituent political subdivisions or municipal corporations. Some pension funds "sponsored or established" by States or their political subdivisions or municipal corporations are not controlled by the sponsoring governmental unit, but rather are controlled with plenary authority by their trustees, a majority of which are elected by employees or retirees. The Commission should clarify whether pension funds that issue or invest proceeds of municipal securities but are not controlled by a municipal entity are intended to be included as municipal entities. The Commission's interpretation that a "municipal entity" includes "public pension funds" could be read to include funds not controlled by a municipal entity. Further, some private pension funds, mutual funds, and insurance companies are entities recognized under state law as a result of a filing with a state official and issuance of a certificate of formation. The Commission should clarify that these are not intended to be included within clause (B) of the definition as a "plan, program or pool of assets sponsored or established by the State. . .," even if they issue or invest proceeds of securities. The Commission's interpretation that the definition includes "participant-directed investment programs or plans" could be interpreted to include private plans established by an entity chartered by a state. Finally, Rule 15c2-12 defines "issuer" to include conduit borrowers. The Commission should clarify that conduit borrowers are not intended to be included in clause (C) of the definition as "any other issuer of municipal securities." The Act clearly intended to treat "obligated persons" as a category distinct from "municipal entities" (subject to limited exceptions where the conduit borrowers are themselves municipal entities, such as a bond bank pool for municipalities).

3. In what circumstances with respect to municipal financial products or the issuance of municipal securities should charter schools be considered municipal entities? In

what circumstances with respect to municipal financial products or the issuance of municipal securities should charter schools be considered obligated persons? To what extent do state laws vary in their treatment of charter schools in ways that would affect their classification as municipal entities or obligated persons?

In states that have adopted charter school laws, charter schools provide an alternative to public schools but are part of the public education system. State laws vary in their treatment of charter schools, and some states have not yet adopted charter school laws.

With respect to municipal financial products or the issuance of municipal securities: (a) a charter school should be considered a municipal entity if under applicable state law it is organized as a political subdivision of a state or as an instrumentality of a political subdivision of a state; and (b) in other circumstances, when providing for payment of municipal securities a charter school should be considered an "obligated person" as defined for purposes of Rule 15c2-12.

In this regard, we note that the Release states on page 22:

> Exchange Act Section 15B(e)(8) provides that the term "municipal entity" means "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including - (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities."

We observe that it would be clearer if the phrase "any State, political subdivision of a State, or municipal corporate instrumentality of a State" had stated "any State, political subdivision of a State, or municipal corporate instrumentality of a State *or of a political subdivision of a State*" (italicized words added by us), but it seems that is the intended effect of the above-quoted clause (A). Accordingly, we agree with the conclusion at page 22-23 of the Release that "Charter schools … would fall under the definition of municipal entity," when organized as a political subdivision or instrumentality to the extent they otherwise qualify as an "issuer of municipal securities" or as an obligated person with respect to municipal securities.

4. The Commission proposes to exempt from the definition of "obligated person" providers of municipal bond insurance, letters of credit, or other liquidity facilities so that the definition of "obligated person" for purposes of the proposed rules is consistent with the definition of "obligated person" in rule 15c2-12 under the Exchange Act. Should the proposed definition be modified or clarified in any way? Should the term "obligated person" for purposes of municipal advisor registration be consistent with the definition of "obligated person" for purposes of rule 15c2-12? If so, why? If not, why not? Should the Commission include additional exemptions from the definition of "obligated person"? If so, please explain and provide specific examples.

Subject to the limitations suggested in the following paragraph, we believe the term "obligated person" for purposes of the Act should be consistent with the definition of "obligated person" for purposes of Rule 15c2-12 because (a) issuers of municipal bond insurance, letters of credit, or other liquidity facilities are not the types of entities that Congress intended to be protected by the Act's municipal advisor provisions, and (b) a uniform and consistent definition would avoid unnecessary confusion in interpretation.

The approach to identifying an obligated person on the basis of a commitment by contract or other arrangement to support payment of municipal securities to be sold has proven generally workable for purposes of Rule 15c2-12. It should be noted, however, that Rule 15c2-12 requires a contractual undertaking by only one obligated person (which may or may not be the municipal issuer) and requires information to be filed with respect to obligated persons only if financial information or operating data about such person is presented in the final official statement. Moreover, the Proposed Rules may be expected to have great consequences in the event of a failure to identify all obligated persons with respect to a municipal securities issue. In this connection, we note that interpretative guidance with respect to Rule 15c2-12 to date leaves open the possibility that some persons who are not directly committed to support payment of a municipal securities issue may nonetheless be deemed to be obligated persons with respect to that issue by reason of their commitment to support payment of underlying assets securing the issue, based upon a factual analysis of their relationship to the issue. (*see* Letter from Catherine McGuire, Chief Counsel, Div. of Mkt. Regulation, SEC, to Nat. Assn. of Bond Lawyers, at Resp. 9 (Sept. 19, 1995)). For these reasons, we would suggest that the scope of the term "obligated person," for purposes of the Proposed Rules, be narrowed by addition of a "bright line" rule to exclude persons who might otherwise be deemed to be an obligated person with respect to a municipal securities issue solely on the basis of a commitment to support payment of underlying assets that secure such issue, other than a borrower, lessee or installment purchaser under a conduit financing who is contractually responsible for payments that exceed a specified and substantial materiality standard, such as twenty percent of the projected debt service payable on the municipal securities, or a guarantor of such a payment obligation who is not otherwise excluded from the definition of an obligated person. (*see* SEC Rel. No. 34-34961, fn. 78).

5. The Commission proposes to interpret the term "investment strategies" to include plans or programs for the investment of the proceeds of municipal securities (other than municipal derivatives and guaranteed investment contracts), plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity, or the recommendation of or brokerage of municipal escrow investments. Should the Commission modify or clarify this interpretation in any way? If so, why? If not, why not? Please provide any suggested alternative language. Should the Commission exclude plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity that are not proceeds of the issuance of municipal securities from the definition of investment strategies? If so, why? If not, why not? If the Commission were to limit investment strategies to "plans or programs for the investment of the proceeds of municipal securities (other than municipal derivatives and guaranteed investment contracts) or the recommendation of or brokerage of municipal escrow investments," how should the Commission determine when funds should no longer be considered "proceeds of municipal securities?" What obligations should parties other than the municipal entity have in determining whether funds held by or on behalf of a municipal entity are proceeds of municipal securities?

Intentional violation of Section 15B is a criminal violation that may result in imprisonment. Definitions that merely state what products are "included" but not what products are excluded do not give fair notice to prospective violators. Consequently, in order to make the statutory provisions enforceable, the Commission should define the terms precisely, not merely interpret what they include without specifying what they do not include.

It is important for the Commission to provide a clear definition of "investment strategies," since (a) that term is used to define the term "municipal advisor" and thus to determine who must register with the Commission pursuant to its proposed rules, and (b) the Act does not define the term, but rather merely provides examples of what the term "includes." The definition should be consistent with Congressional intent to limit the municipal advisor provisions to municipal securities issues as described above in response to Question No. 2 and related derivatives and investments. The Act defines a municipal advisor as one who advises "with respect to municipal financial products." Municipal financial products in turn are defined as "municipal derivatives, guaranteed investment contracts, and investment strategies." By defining "investment strategies" by reference to that term as defined in the Exchange Act[8], but then adding that the term includes "plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity," the Commission proposes to broaden the meaning of the term significantly. While the statutory focus of the Act is clearly on the investment of proceeds of municipal securities, limited as described above in our response to Question No. 2, or escrow accounts that secure such municipal securities, the broader term proposed by Rule 15Ba-1-1(b) would apply to *any* pool of assets or funds held by or on behalf of a municipal entity, rather than restricting it to moneys held with respect to the sale or defeasance of municipal securities.

Although Section 15B(e)(8) of the Exchange Act defines "municipal entity" to include "any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof," there is no indication that Congress intended for such language to be incorporated into the definition of investment strategies. To the contrary, as stated in paragraph 6 in our introductory statement to these comments, Congressional intent appears to be exactly opposite. Grafting such language onto the definition of "investment strategies" could have unintended consequences, such as affecting municipal entities that do not issue securities. For example, endowment funds created by states and political subdivisions with moneys other than proceeds of municipal securities would constitute "pool[s] of assets sponsored or established by the State" and thus municipal entities. Under the Commission's proposed interpretation, advisors to such funds would be required to register as municipal advisors, although there would be no nexus to any issue of municipal securities.

The Commission should interpret the term "investment strategies" to mean "plans or programs for the investment of the proceeds of municipal securities (other than local government investment pools, municipal derivatives and guaranteed investment contracts) or the recommendation of or brokerage of municipal escrow investments." The Commission should

[8] Section 15B(e)(3) of the Exchange Act defines "investment strategies" as follows: "the term 'investment strategies' includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments."

specifically exclude plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity that are not proceeds of the issuance of municipal securities, limited as described above in our response to Question No. 2, from the definition of investment strategies.

Funds should no longer be considered "proceeds of municipal securities" once they are commingled with other funds. In addition, unlike the more expansive definition of "proceeds" in federal tax regulations related to municipal securities, "proceeds" should be limited to proceeds of the sale of municipal securities and should not extend to "replacement proceeds" such as "pledged funds," consistent with the plain meaning of the term used by the Act. Once proceeds of municipal securities are commingled with non-proceeds, however, such commingled funds should no longer be considered proceeds of municipal securities. This approach provides a bright-line test that will be simpler for potential registrants to follow and for the Commission to administer. Thus, if a pension fund contains the proceeds of bonds issued by a municipal entity as well as other contributions, it should not thereby be a municipal entity.

The Commission should clarify that "investment strategies" encompasses only plans or programs for investments in financial investments, as opposed, for example, to investments in infrastructure, real estate, social welfare, and other non-financial investments.

The definition of "municipal financial products" should be limited when applied to products sold to obligated persons. The statutory definition of "obligated person" indicates an intent to include conduit borrowers within the ambit of the regulatory regime only in connection with municipal securities issues. Thus, if a refining company once participated in a tax-exempt municipal securities offering to finance environmental facilities, persons who advise it on subsequent derivatives or investment transactions (if unrelated to municipal securities) should not be required to register with the Commission as municipal advisors. Given the use of the term "municipal" in the definition of "municipal financial products," we also question whether Congress intended that investments of bond proceeds, or hedging activity, by a conduit borrower outside of a structured transaction should be treated as a municipal financial product. Why should advice to an obligated person regarding investments or derivatives become subject to regulation by the Commission simply because the investments are purchased with amounts borrowed from the proceeds of, or because the derivative hedges, an issue of municipal securities? We urge the Commission to interpret the term "municipal financial products" to exclude investments of bond proceeds for the accounts of obligated persons, as opposed to municipal entities (i.e., where the obligated person has the benefit or loss from the investment), as well as derivatives executed by obligated persons, when neither the investments nor the derivatives are pledged as security for a municipal securities issue. Since only a small portion of an obligated person's investible assets may represent unspent proceeds of a municipal securities issue, and since it would not be apparent to investment advisors whether private entities are obligated persons unless the Commission limits municipal financial products to those pledged as security for a municipal securities issue, any more expansive reading of the term would impose an impossible diligence burden on corporate investment advisors.

6. As noted above, to the extent a person is providing advice to a pooled investment vehicle in which one or more municipal entities are investors along with other investors that are not municipal entities, the pooled investment vehicle would not be considered funds "held by or on behalf of a municipal entity" and, therefore, a person providing advice to the pooled

investment vehicle would not be required to register as a municipal advisor. Should the Commission modify or clarify this interpretation in any way? If so, why? If not, why not? Please provide any suggested alternative language. Should the Commission provide that such interpretation should apply only if the investors that are not municipal entities are the primary investors in the pooled investment vehicle? If so, how, and above what level, should the Commission determine that investors that are not municipal entities are the primary investors in the pooled investment vehicle? Should such a determination be based on a dollar amount or a percentage of the pooled investment vehicle's assets? Should the Commission provide that this pooled investment vehicle interpretation would no longer apply if the municipal entity (or municipal entities) investing in the pooled investment vehicle becomes the primary investor in the pooled investment vehicle subsequent to the initial investment? If so, above what level of investment should a municipal entity (or municipal entities) be considered to be the primary investor in the pooled investment vehicle? Should such a determination be based on a dollar amount or a percentage of the pooled investment vehicle's assets?

For simplicity's sake, the Commission should exempt investments vehicles that accept investments from entities other than municipal entities. Advice to municipal entities regarding a plan or program to invest in such vehicles would remain covered if the moneys being invested represent proceeds of municipal securities. In addition, the Commission should clarify that advice to a local government investment pool concerning its investment strategies, for example, does not constitute advice for or on behalf of investors in the pool.

7. As discussed above, the Commission is proposing to interpret the term "investment strategies" to include plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity. Thus, commingled proceeds, regardless of when they lose their characteristic as proceeds, would still constitute "funds held by or on behalf of a municipal entity" and, therefore, any advice with respect to such funds would be municipal advice, unless subject to an exclusion. Is this interpretation too broad? Please explain and include a discussion of concerns, if any, such an interpretation could raise.

Yes, as discussed above, consistent with Congressional intent "investment strategies" should be limited to plans and programs for the investment of proceeds of municipal securities and escrow investments, not all investments by or on behalf of a municipal issuer, and funds should no longer be considered "proceeds of municipal securities" once they have been commingled with other funds. To allow commingled proceeds to constitute "proceeds of municipal securities" even after they have lost their characteristic as "proceeds" would, at worst, unnecessarily subject all of a municipal entity's or obligated person's funds to the Proposed Rules, regardless of whether there is a connection to any issuance of securities. At best, such an interpretation would create uncertainty as to what funds and assets make a person subject to registration under the Proposed Rules. The approach we suggest provides a bright-line test that would allow for greater certainty and simpler administration.

8. Proposed rule 15Ba1-1(f) would define the term "municipal derivatives" to mean "any swap (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and Section 3(a)(69) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in Section 3a(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)), including any rules and regulations

thereunder) to which a municipal entity is a counterparty, or to which an obligated person, acting in its capacity as an obligated person, is a counterparty." Should this definition be clarified or modified in any way? If so, how? Should the definition of municipal derivatives specifically include other financial products? For example, should the definition specifically include options, forwards or futures? If so, which products and why? Should this definition include a financial product that is composed of multiple components where one or more of such components is derivative in nature, such as a structured note or convertible bond? Should this definition include financial products, in addition to swaps and security-based swaps, that are based on municipal securities that are exempted securities under the Exchange Act or are exempt from registration under the Securities Act? Should it include an over-the-counter option contract with a municipal entity? If so, which additional financial products should be included in the definition and why?

For the reasons stated in paragraph 6 in the introductory statement to these comments, we recommend narrowing the definition of "municipal derivatives" to include only debt-related derivatives that are entered into by a municipal entity in connection with an issue of municipal securities, limited as described above in our response to Question No. 2, or entered into by an obligated person and pledged by contract or other arrangement as security or a source of payment for such municipal securities. Consequently, swaps that are entered into by a municipal entity to hedge the interest rate on variable rate securities, or to hedge the value of municipal securities to be issued in the future, as well as swaps that are part of a structured municipal securities financing (e.g., a structured student loan or mortgage revenue bond issue) would be covered, but derivatives that are unrelated to municipal securities issues (e.g., swaps to hedge bank loans or fuel costs) or are entered into by a conduit borrower and pledged as security or a source of payment for, the municipal securities issue would be excluded. The phrase "in its capacity as an obligated person" is not clear enough to accomplish this result for obligated persons, because it could include any derivative entered into by an obligated person to hedge a conduit borrowing, not merely those that "by contract or other arrangement . . . support the payment" of the municipal securities, to paraphrase the definition of "obligated person." Especially given its use of the term "municipal" financial product, there is no reason to believe that Congress intended to regulate transactions with non-municipal entities that do not affect municipal entities or investors, simply because they result from a municipal securities transaction, while failing to regulate the same transactions when they result from other debt. Additionally, many municipal entities, including particularly transit agencies and municipal utilities, enter into fuel or other commodity hedging transactions in connection with their operations to avoid mid-year operating budget disruptions and rate hikes. We ask that the Commission confirm that hedging transactions by such entities related to operations, rather than municipal securities, do not constitute "municipal derivatives."

9. Is our interpretation of the exclusion from the definition of a "municipal advisor" for a broker, dealer, or municipal securities dealer serving as an underwriter appropriate? Specifically, the Commission interprets this exclusion to mean that a broker-dealer acting as an underwriter or placement agent that solicits a municipal entity to invest in a security, or a broker-dealer acting as an underwriter that also advises a municipal entity with respect to the investment of proceeds of municipal securities or the advisability of a municipal derivative would be a municipal advisor. Should these interpretations be modified in any way, or further clarified? If so, how?

The Act excludes from the definition of "municipal advisor" brokers, dealers or municipal securities dealers "serving as an underwriter" as defined in Section 2(a)(11) of the Securities Act of 1933.[9] The Proposed Rules would further limit this exclusion to those acts performed "in the capacity" of an underwriter. The proposed limitation on this exclusion raises the specter of a broad program duplicating existing regulation of brokers and investment advisors. NABL supports the well articulated view expressed by SIFMA on behalf of underwriters that such duplicative regulation will unnecessarily burden the industry, serve no public policy objectives and likely have deleterious unintended consequences for large segments of the financial service industry.

10. Consistent with Congress's definition of the term "municipal advisor," the Commission does not believe that whether a municipal advisor is compensated for providing municipal advice should factor into the determination regarding whether the municipal advisor must register with the Commission. Are there any persons who engage in uncompensated municipal advisory activities, or municipal advisory activities for indirect compensation, that the Commission should exclude from the definition of "municipal advisor"? Please explain.

Yes. In a manner most consistent with the presumed constitutional basis for the Act and to observe the principles of federalism, the Commission should limit the scope of municipal advisors to only those persons who provide advice as a commercial activity or solicit municipal advisory engagements for consideration and should specifically exclude persons who provide advice to municipal entities or obligated persons merely as volunteers or interested citizens.

As noted in paragraph 4 of our general comments, the Commission should take action to ensure that enforcement of the Act does not encroach on constitutionally-protected speech in order to make other applications legally enforceable. If the Commission were to interpret the Act to require that a citizen register with the Commission before addressing the governing body of his or her municipality concerning the wisdom of the structure, timing, or terms of an offering of its municipal securities, such an interpretation would be unconstitutional. Similarly, we are concerned that any requirement that an appointed member of a state or local agency board, who is neither an employee nor an elected official, register with the Commission before fulfilling his or her duty to give sound advice to other board members concerning a proposed municipal securities offering by the agency challenges the Tenth Amendment's restrictions on impairing the ability of states to exercise their powers effectively. State and local governments are replete with appointed boards that are charged with making recommendations concerning or authorizing the issuance of municipal securities, including, in some states, "control boards" or other entities with oversight responsibilities over the financial affairs of other municipal entities. Appropriately, state and local governments often seek out individuals with special knowledge of municipal securities to fill such citizen advisory boards. Unless the Commission's proposed

[9] The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, 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; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." 15 U.S.C. §77(b)(11).

interpretation is revised, state and local governments would be forced to appoint only employees or elected officials to such boards (thus severely curtailing the pool of qualified candidates) which would exclude the participation of able and knowledgeable citizens from important public finance decisions that frequently have significant and broad effect. Application of regulatory requirements applicable to municipal advisors to the board members of obligated persons would appear to be susceptible to Constitutional attack as curtailing the right to associate of these individuals by conditioning their participation in State financing programs.

The Commission's proposed interpretation may also inhibit the very common and appropriate situations where a member of one governing body, or an officer or staff member of one governmental entity, makes presentations to or has meetings with other governmental entities or officials regarding proposed financings in his or her official capacity. For example, mayors or other members of governing bodies often make presentations to other governing bodies and share their public finance experiences regarding borrowing programs, credit enhancement programs, and investment programs that such governmental entities have successfully implemented. Members of control boards may make recommendations as to or approve or disapprove the issuance of municipal securities or financial products by the municipal entities which they oversee. Requiring such individuals to register with the Commission as municipal advisors would thwart valuable intergovernmental assistance, cooperation and oversight.

11. 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?

With respect to municipal finance attorneys, we have a number of concerns, explained further below: (1) many questions that must be asked to assure validity (e.g., regarding statutory debt ceilings) or tax exemption are of a financial nature, (2) attorneys have obligations that may extend beyond strictly legal issues, and (3) in providing advice regarding legal structure, such advice is relied upon by the financing team generally, even if the attorney-client obligations only extend to the client.

At the outset, it is important to note that the phrase "of a traditional legal nature" as used in the Act appears to apply only to "services" and not to "legal advice." Consequently, all legal advice (but not solicitations of a municipal entity for municipal advisory work) by attorneys appears to be exempted by the Act.

"Lawyers serve their clients, and the roles lawyers play in any particular matter generally reflect the roles and responsibilities of their clients."[10] The exclusion for attorneys should not be afforded only for advice given to clients, but should apply to all advice that one must be licensed

[10] *Disclosure Roles of Counsel in State and Local Government Securities Offerings,* at 53, American Bar Association and National Association of Bond Lawyers (3rd Ed. 2009).

as an attorney to give or that is given as part of services of a traditional legal nature, or that is incidental to such services. Nothing in the Act implies that only advice to clients is intended to be exempted.

Counsel representing parties other than municipal entities or obligated persons participating in municipal securities transactions are often asked to make recommendations to the municipal entity or obligated person concerning legal issues associated with an offering and their consequences; and such recommendations are often shared with other transaction participants. Counsel other than those having a client relationship with the municipal entity or obligated person include underwriter's or private purchaser's counsel, bank or other credit enhancement or liquidity counsel, counsel to the municipal issuer (when making recommendations to an obligated person) or to an obligated person (when making recommendations to the municipal issuer), counsel to the trustee, counsel to credit rating agencies, and sometimes, special tax and/or bond counsel.[11] Helpful recommendations often address the structure, timing, tax implications and terms of the offering and the securities to be offered. For example, in negotiating the terms of an offering of municipal securities, counsel to the underwriter may explain to the municipal entity or obligated person the implications and benefits of the terms desired by the underwriter. Moreover, terms are often negotiated on conference calls without the benefit of separate caucuses with clients, so advice given to clients is often simultaneously received and may be acted on by others. Free and open discussion and cooperation among the parties and their counsel is vital to a working group's achieving the best transaction structure and terms for all parties in an efficient manner. Furthermore, attorneys asked to submit engagement proposals to municipal entities before forming an attorney-client relationship are frequently asked for their advice or conclusions regarding alternate structures and the like. If such attorneys must register with the Commission and the MSRB in order to provide advice to a municipal entity or obligated person before forming an attorney-client relationship, in most cases they will choose not to offer their advice, and municipal entities and obligated persons will be adversely affected. In addition, if providing a recommendation that is incidental to traditional legal advice to a non-client municipal entity or obligated person makes such an attorney a municipal advisor, then under the Act the attorney would take on fiduciary duties to the municipal entity or obligated person, which could be inconsistent with the attorney's duties to his or her client under state professional conduct rules.

The purpose of the Act is to bring a regulatory and compliance structure to a group of professionals (municipal advisors) who were previously without oversight. See, e.g., Item I(A) of the Release. Attorneys engaged in the practice of municipal finance, however, are subject to a number of rules and regulations. The practice of law is regulated by the states, and an attorney's activities are governed by the professional conduct rules in each state covering such things as competence, scope of responsibility, confidentiality and conflicts of interest.[12] Furthermore, the Commission's own rules (see 17 CFR §§ 205.1 *et seq*.) govern the professional conduct of attorneys who appear and practice before the Commission. In addition, the Internal Revenue Service and others have promulgated rules relating to the ethical and competency requirements for attorneys who advise municipal clients. Much the same as banks and bond insurers are

[11] *Disclosure Roles of Counsel*, at 60–64, 85–121, and 147–168.

[12] *Disclosure Roles of Counsel*, at 249–60.

already exempted from the definition of "obligated persons" under the Commission's Rule 15c2-12 because they are well-regulated, attorneys should be exempted from the definition of municipal advisors in providing advice or traditional legal services, including advice that is incidental to those services (other than a solicitation of a municipal entity for municipal advisory work), because they are already subject to well-defined standards of practice.

The American Bar Association promulgated the Model Rules of Professional Conduct ("Model Rules") in 1983, and they have now been adopted in some form by each state's bar association (except California, which has proposed amendments to its rules that would bring them more closely in line with the Model Rules). Model Rule 1.1 demands that a lawyer provide competent representation to a client, and Model Rule 1.2 provides that the "lawyer shall abide by a client's decisions concerning the objectives of representation…." Other Model Rules require a lawyer to effectively explain matters so that the client can make an informed decision (Model Rule 1.4), refrain from engaging in a representation that may be compromised by the lawyers own self-interests or the interests of third parties (Model Rule 1.7), and exercise independent professional judgment and render candid advice to clients (Model Rule 2.1). In fact, Model Rule 2.1 demands that the lawyer refer not only to the law but also "to other considerations such as … economic … factors, that may be relevant to the client's situation." [13] These standards of practice already incumbent upon lawyers are sufficient to ensure competent advice, financial or otherwise, to municipal entities without the need for additional record-keeping and qualification requirements.[14] They also impose a duty sometimes not to limit advice to strictly legal issues.

In view of lawyers' duties to give counsel to clients, we believe that advice that is itself primarily financial (e.g., the relative cost of two alternative legally authorized methods of structuring a transaction) should be exempted if incidental to an overall engagement that is primarily legal in nature. Similarly, communications between a lawyer and municipal entity or obligated person that are integral to delivering validity or other legal opinions should be excluded, recognizing that such communications often concern financial matters regarding debt limitations, arbitrage restrictions and other matters with a financial impact. On the other hand, we agree that a person should not be permitted to be hired for a primarily financial engagement, or to solicit a municipal entity for municipal advisory work on behalf of another, without registering with the Commission, merely because he or she is a licensed attorney. This is in keeping with the standard set out in Model Rule 5.7, which includes "law-related services" in the matters subject to the Model Rules if such services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients.

Moreover, an exclusion limited to "advice provided within a lawyer-client relationship" is somewhat problematic and ignores the tremendous amount of planning relating to the issuance of municipal securities that may occur prior to the creation of a formal lawyer-client relationship. It is sometimes the case that the lawyer-client relationship is not established with respect to a

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[13] "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model R. Prof. Conduct 2.1 (ABA 2002).

[14] For a further description of the Model Rules and their effect on municipal financial practice, see NABL's publication, The Function and Professional Responsibilities of Bond Counsel (2d ed. 1995).

particular issue of municipal securities until the municipal entity retains the lawyer by resolution or ordinance, which may not occur until the structure, timing, terms and other similar matters concerning the particular issue of municipal securities have been discussed and determined. Even if the municipal entity intends to retain the lawyer for a bond issue, no official relationship may exist until it is memorialized by action by the relevant governing body, so the exclusion as proposed would not apply to much of the financial advice provided by lawyers. Attorney-client engagement letters often state that the engagement ends upon closing of the bond transaction. However, municipal entities and obligated persons will often request and receive advice from bond counsel related to the transaction following closing. Consequently, if the Commission does not accept our recommendation not to limit the exemption to advice given to clients, we recommend that it exempt advice provided by a lawyer with respect to a municipal securities issue or municipal financial product for which there is or is expected to be a lawyer-client relationship, or for which a lawyer-client relationship previously existed.

In addition, municipal finance lawyers will often prepare educational seminars, newsletters and e-mail alerts for clients and non-clients alike. Limiting the exclusion to advice given in the context of an attorney-client relationship would severely limit this practice to the detriment of municipal entities and obligated persons, unless "providing advice" is given the limited construction urged in paragraph 4 in our introductory statement to these comments.

Should the scope of the exclusion for attorneys be different for attorneys for obligated persons? Why or why not?

The exclusion for advice and for services of a traditional legal nature should apply equally to all attorneys participating in a municipal securities transaction, whether they advise municipal entities or obligated persons. In conduit financings involving an obligated person that is not a municipal entity, the attorney representing the obligated person is sometimes the attorney primarily responsible for making recommendations to both the obligated person and the municipal entity concerning the structure, timing, and terms of the offering. By providing that the term "municipal advisor" does not include "attorneys offering legal advice or providing services that are of a traditional legal nature," Congress manifested its intent to provide a broad, uniform exclusion for all attorneys and did not limit the exclusion to attorneys representing particular parties or distinguish among attorneys based on the identities of their clients. On the other hand, only solicitations of municipal entities for municipal advisory engagements, not obligated persons, require registration with the Commission.

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?

The troubling aspect of the Proposed Rules is what NABL considers to be a misunderstanding of the nature of the issuance of municipal securities. Generally, while every issue of municipal securities needs an opinion of bond counsel at closing, there are a vast number of issues of municipal securities which do not require financial advisory or other municipal advisory activities. In short, bond lawyers are necessary to the issuance of municipal securities, but financial advisors and underwriters are not always required.

Accordingly, NABL urges the Commission not to narrowly interpret "services of a traditional legal nature" to mean only those services which it deems should be traditionally provided by attorneys in connection with municipal securities transactions or to exclude services which could be provided by other persons. Rather, the Commission should exempt all advice required to be performed by lawyers or incidental to an engagement to provide legal services. At a minimum, if a common practice in a jurisdiction is for bond counsel to set a schedule, prepare and disseminate sales notices and assist in the preparation of offering materials, then that practice should be permitted to continue without requiring attorneys to register with the Commission and not require bond counsel to register as a municipal advisor.

We are uncertain as to the Commission's intent regarding its interpretive comments on this point[15]. Attorneys have an obligation to give frank advice to their clients and, as noted above, not to limit their advice to strictly legal issues if their clients otherwise would be prejudiced. Matters that go beyond strictly legal questions may also be in the domain of another profession, depending on the attorney's area of practice.[16] For example, if a municipal entity asks whether it has authority to engage in a certain transaction, if the answer is "no," the attorney should be free to advise the client of an alternate structure that is authorized and enables the client to come as close to its objective as possible. The attorney should be free to discuss the possible pros and cons of different transaction structures if more than one is legally authorized, including practical consequences that are financial in nature. Similarly, an attorney should be free to disclose to a client his or her prior experiences with a proposed underwriter, financial advisor, or other party, and even to recommend one or another to his or her client on the basis of that experience, without registering as a municipal advisor. On the other hand, soliciting municipal advisory business with a non-client municipal entity on behalf of a client or non-client should be specifically excluded from exempted services.

The Commission has encouraged attorneys to serve as gatekeepers in municipal securities transactions, but would attorneys feel free to voice their opinions and offer candid advice to prevent "bad deals" from coming to market if they risk having to register as municipal advisors? Would they feel free to recommend voluntary disclosure undertakings or filings that are not legally required? To require that attorneys register to do so would unnecessarily inhibit the free flow of information between attorney and client. Additionally, as noted in paragraph 2 of our

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[15] The interpretive comments on page 38 of the Release immediately following footnote 132 state: "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 if such advice is provided within a lawyer-client relationship *specifically related to such products* in conjunction with related legal advice." (Emphasis added.) We ask that the Commission confirm that the italicized phrase should be read to include advice related to the issuance of municipal securities, and that the omission of "the issuance of municipal securities" from such italicized phrase was not intentional.

[16] "Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts." Model R. Prof. Conduct 2.1, cmt. 4 (ABA 2002).

introductory statement to these comments, the Commission must be careful not to interpret the Act so as to encroach on First Amendment rights.

12. The Commission is proposing to exclude from the definition of "municipal entity" elected members of a governing body of a municipal entity, but to include appointed members of a municipal entity's governing body unless such appointed members are ex officio members of the governing body by virtue of holding an elective office. Are these distinctions appropriate? Please explain.

Distinguishing between elected and appointed officials for purposes of the exemptions from registration as municipal advisors is inappropriate for a number of reasons. All members of governing bodies of municipal entities should be excluded from the definition of municipal advisor when advising their municipal entity or others within the scope of their office.

A. The distinction confuses the role of the municipal governing board.

A municipal entity acts through its governing body, which generally is vested with the powers granted to the municipal entity. 4 McQuillin Mun. Corp. § 13.03 (3rd ed. 2010). For practical purposes, governing body or advisory board members are acting as, and under a common identity with, the municipal entity, when deliberating or authorizing municipal bond issues or the execution of municipal financial products. A board member, whether elected or appointed, should not be viewed as a third party advisor to the entity, and should be excluded from the definition of municipal advisor.

The Act defines "municipal advisor" as "a person (who is not a municipal entity or an employee of a municipal entity) that (i) 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, or (ii) undertakes a solicitation of a municipal entity or obligated person." Given that a governing board is the municipal entity, the proposed distinction is inappropriate.

Statutes creating municipal issuers often state that the issuer is the board itself or the members of the issuer are its board members. In effect, there is no difference between the board and the issuer. This is especially true for purposes of authorizing the use of municipal financial products or the issuance of municipal securities. It is inconsistent to exempt the issuer but not its board members. The board members themselves, whether elected or appointed, comprise the municipal entity. Under the first portion of the Act's parenthetical exclusion, the appointed members should be excluded from registration requirements.

The Commission's description of the primary targets of the regulation further illustrates the point that appointed municipal governing board members should be excluded from the definition of municipal advisors and the registration requirement. The Commission identifies three primary types of municipal advisors to be regulated. They are: (1) financial advisors, (2) investment advisors, and (3) third-party marketers and solicitors. The Proposed Rules go on to describe these groups as "distinct groups of professionals that offer different services and compete in distinct markets." 76 Fed. Reg. at 829.

B. Appointed governing board members are accountable.

In the Release the Commission concludes that appointed members of a municipal entity's governing or advisory board are not "directly accountable for their performance to the citizens of the municipal entity." This assertion is contrary to the reality of municipal government. Appointed municipal governing or advisory board members are accountable to the municipal entities they serve in at least three ways.

First, appointed members of municipal governing or advisory boards are typically appointed to such positions by an elected official or by elected members of the governing body. Appointed members are thus accountable to, and typically are subject to removal in accordance with applicable state law. In fact, the issuance of municipal securities by an entity with an appointed board is often subject to approval by the state or political subdivision that created the entity. In this respect, appointed governing or advisory board members are *more* accountable to the citizens of the municipal entity than are the employees tasked with implementing the policies of elected governing or advisory board members. On this basis alone, appointed members should be excluded from the definition of "municipal advisor" and the registration requirement under the Act.

Second, with respect to providing advice to a municipal entity, appointed members of municipal governing or advisory boards are no less entrusted with a municipal entity's best interests simply because such members are not elected. Public entrustment of official duties is the benchmark for determining whether an individual is a public official. Like elected members and some employees, the public entrusts appointed members with the best interests of the municipal entity.

Third, members of municipal governing or advisory boards are regulated generally under state constitutions, statutes, and administrative regulations, and are further regulated under municipal charters and codes.[17] Each layer of state and local regulation provides varying types of ethical standards (including conflict of interest policies, pay-to-play rules, gift rules and revolving door provisions) and of liability for officials' conduct of office. One of the primary purposes of the Commission's regulation of municipal advisors is to establish fiduciary duties for municipal advisors. Because board members, appointed or elected, already owe fiduciary duties to the entity and citizens that they serve, registration of board members is not needed to advance the goals of the Act.

C. The announced accountability rationale is incongruous.

The Commission identifies accountability to a municipal entity as the driving factor behind the proposed distinction between employees and elected members of municipal governing boards on the one hand and appointed members of municipal governing boards on the other. Under the Proposed Rules, employees and elected members are "accountable to the municipal entity" that they serve but appointed members are not "directly accountable" to the municipal entity.

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[17] *Disclosure Roles of Counsel*, at 2.

As a threshold matter, it is unclear from the language what standard the Commission uses to determine whether one group or the other is "accountable to the municipal entity." Elected members may be held "accountable to the municipal entity" for their policy positions by the voters in the sense that they may be voted out of office assuming that they are eligible for and seek re-election. Employees, on the other hand, are not accountable to voters. Employees are accountable to an appointed manager or to an elected member of the governing body. Yet employees and elected members are excluded from the definition of municipal advisors because they are deemed "accountable to the municipal entity,"[18] which may or may not mean accountable to the citizens of the municipal entity.

D. Internal policy, deliberative, or legislative communications are not "advice."

As noted in paragraph 4 of our introductory statement to these comments, the Proposed Rules do not define with any specificity what constitutes "advice" in the context of the issuance of municipal securities. The language of the Act defining municipal advisor indicates that advice is given "to or on behalf of a municipal entity." 15 U.S.C. § 78o-4(e)(4). In either case, the language implies that a third party who is not the municipal entity is providing the advice. That type of third-party or agency relationship does not exist between governing board officials and employees of municipal employees.

Appointed and elected governing board members and municipal employees frequently discuss advantages and disadvantages of various municipal objectives, some of which inevitably require issuance of debt or use of some kind of municipal financial product to be accomplished. Such discussions fulfill the legislative function of the governing board and the legislative, policy-making duties of the board members whether appointed or elected. Any communications by governing board members acting in their capacity as board members should not be considered advice for the purpose of determining whether such members are municipal advisors. Such internal, deliberative communications fulfill the governing board's and its members' legislative roles and duties.

E. The Proposed Rules would result in board member resignations and increased difficulty in finding citizens willing to serve.

The Act and the Proposed Rules would require typically volunteer appointees to apply for registration, and if that application is denied, that appointee would be unable to serve on a board if the appointive board gives "advice" to the entity on municipal financial products or the issuance of municipal securities.

Further, the Act and the Proposed Rules would create burdensome compliance costs and time. Applicants might have to wait up to 165 days from the date of application before a determination on the applicant's registration status is decided by the Commission. Such a waiting period is unprecedented in the realm of state and local board appointments. Applicants would be required to pay registration and annual fees and would be required to submit to any

[18] "Accountable to the municipal entity" is not clearly defined by the language of the Proposed Rule. From context, it appears the SEC may have intended the phrase to mean "accountable to the citizens of the municipal entity."

required training and periodic examination. Such burdens far outweigh the benefits of registration. Subjecting appointed board members of a municipal entity to the registration requirements of the Act, including the related expense and federal securities law liability, would certainly discourage participation by the tens of thousands of non-elected board members currently serving municipal entities around the country. As a matter of public policy, the Commission should exclude all governing body, advisory board and committee members from the definition of "municipal advisor" in order to encourage participation by volunteer board members and good governance of municipal entities.

F. Solicitations by Bond Bank and Applications by Obligated Persons should be Excluded

Government agencies or instrumentalities that publicly issue bonds to facilitate their own direct purchases of municipal bonds from other governmental units or from obligated persons ("Bond Banks") will often invite such governmental units or obligated persons to sell their bonds to such Bond Banks and may advise such governmental units and obligated persons as to the terms of their bonds. Obligated persons apply to governmental bodies acting as conduit issuers, soliciting such issuers to issue bonds on behalf of the obligated person. Such solicitations by Bond Banks and obligated persons of governmental units in furtherance of their statutory or non-profit purposes should not require Bond Banks, obligated persons or their board members or employees to register as municipal advisors and should be excluded from regulation under the Act.

G. Questions Regarding Federal Fiduciary Duty

To the extent the Commission determines that members of governing boards acting in their capacities as such are subject to regulation, additional difficult issues would need to be addressed. If an appointed governing body member is deemed to be a municipal advisor, then he or she would have a federal fiduciary duty to the municipal entity. Might the federal fiduciary duty be deemed to override provisions of state and local law that provide for exculpation, indemnification and other protections of board members? Would indemnification for federal securities law liabilities be void as against public policy, as it is in connection with the Securities Act of 1933? Would the federal standards actually pre-empt fiduciary duties imposed by state law or municipal charter, with the possible result that they are diluted? The answers to such questions could have a chilling effect on a citizen's willingness to serve on a governing board.

Are there other persons associated with a municipal entity who might not be "employees" of a municipal entity that the Commission should exclude from the definition of a "municipal advisor"?

Some municipal entities are charged with providing advice to related, but distinct, municipal entities in connection with municipal securities offerings. Such advice, whether given in the name of a municipal entity or by any of its officers, directors, or employees, should also be excepted from activities that require registration. Similarly, obligated persons and their trustees, officers, and employees often communicate with conduit municipal issuers to request or urge them to participate in conduit municipal securities offerings, and the communications often

include advice concerning the structure, timing, and terms of the requested offering. Such advice should also be excepted from activities that require registration.

Many municipal entities have governing bodies comprised, in part, of members serving in an *ex officio* capacity by virtue of their status as employees (elected or non-elected) of a separate governmental entity within the same jurisdiction. Because such members are still serving as employees of a related municipal entity, we believe they should be excluded from the definition of "municipal advisor" when providing advice in that capacity even if the Commission elects to retain the unwarranted distinction between employee and non-employee board members. Otherwise the statutory phrase "employees of *a* municipal entity" would be misconstrued as "employees of *the* municipal entity," which is not desirable or intended. We ask that the Commission confirm that this view is correct. In addition, in many States, established public bodies or offices or individual State officers or employees, customarily monitor, advise and approve municipal entity decisions in connection with the issuance and administration of municipal securities and other fiscal affairs, either through formal or informal processes. Such consultation should not be subject to federal regulation.

We request that the Commission clarify that an individual appointed governing body member is not a sole proprietor for purposes of the Proposed Rules simply by virtue of his or her position as a governing body member (regardless of whether such member receives travel or expense reimbursement or compensation per meeting of the governing body).

As the concerns described above with respect to the scope of the terms "municipal entity" and "obligated person" and the potential application of the Proposed Rules to board members, public officers and employees associated with state and local entities and conduit borrowers and guarantors are presented in the Release as interpretations of the applicable statutory terms rather than in the Proposed Rules themselves, such persons must be concerned that these interpretations are intended to be applicable to determining the scope of registration and other requirements under the temporary rule that was published in the *Federal Register* on September 8 , 2010 (SEC Rel. No. 34-62824) (the "Temporary Rule"). If this were the case, it would appear to expose such persons to a newly discovered regulatory compliance burden that might be viewed as having been unsatisfied since the effective date of the Temporary Rule. This would, in turn, mean that the potentially severe adverse effects of these interpretations upon the financing programs and governance of state and local entities might begin to be felt prior to the adoption of the Proposed Rules in their final form. Accordingly, we would respectfully request that the staff issue an immediate clarification or no-action letter to the effect that the requirements of the Temporary Rule will not be deemed to have been applicable to members of a governing board of a "municipal entity", to members of a governing board and officers and employees of an "obligated person" or to public officers or employees charged with advising or approving financial affairs of a "municipal entity" or "obligated person," in each case, with respect to actions taken in such respective capacities, prior to the effective date of the Proposed Rules as finally adopted.

13. Should employees of obligated persons be excluded from the definition of "municipal advisor" to the extent they are providing advice to the obligated person, acting in its capacity as an obligated person, in connection with municipal financial products or the issuance of municipal securities? One commenter expressed concern that volunteers at entities such as

charter schools could be required to register as municipal advisors. Are there types of persons other than employees of obligated persons that should be excluded from the definition of "municipal advisor?" If yes, please provide examples of the specific types of persons and the specific circumstances under which they should be excluded.

Employees of obligated persons, and employees of obligated person board members whose services are donated, who are providing advice to the obligated person in connection with municipal financial products or the issuance of municipal securities should be excluded from the definition of "municipal advisor." Because the term "advice" is not defined in the Act or the Proposed Rules, the chief financial officer and other employees of an exempt facility user, 501(c)(3) borrower or other obligated person could become subject to registration simply by providing the ordinary services required of such employees in connection with the issuance of municipal securities or purchase of a municipal financial product. Surely Congress did not intend that the chief financial officer of a non-profit hospital must register with the Commission as a municipal advisor before advising the hospital's board on the structure, timing, or terms of a conduit municipal securities issue.

Similarly, all governing body members of the obligated person should be excluded from the definition of "municipal advisor." The routine actions taken by the board of an obligated person in connection with a bond issuance or municipal financial product, including the adoption of an authorizing resolution, could subject members of a board to the registration requirements of the Proposed Rules, unless they are clearly exempted. Because governing bodies of obligated persons operate under a common identity with the obligated person rather than as a third party advisor to the obligated person, all governing body members should be excluded from the definition of "municipal advisor" for the same reasons described in our response to Question No. 10 above with respect to governing bodies of municipal entities. In addition, most obligated persons are organized as corporations or trusts, and therefore their board members are already subject to state laws regarding the fiduciary duty owed by board members to the obligated person.

Employees or governing body members of obligated persons should also be excluded from the definition of "municipal advisors" when giving advice to the municipal issuer in connection with a bond issue involving the obligated person. Employees or governing body members for the conduit borrower often engage in discussions with the municipal issuer in which they advocate for particular terms or a particular structure. While the Commission's question contemplates excluding such parties from being "municipal advisors" for giving advice to the obligated person, they should also be excluded for giving advice to the municipal issuer in that context.

In addition, if the Commission retains a distinction between employee and non-employee representatives of a municipal entity, it should clarify what standard should be used to determine whether an individual is an employee. Rules for defining employee status differ by state and also vary from the federal income tax definition.

14. Should the Commission exclude from the definition of "municipal advisor" a broker-dealer that 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

merits of any investment particularized to the municipal entity's specific circumstances or investment objectives?

As discussed in response to question nine, NABL endorses the view of SIFMA that public policy is not well served by sweeping regulated broker-dealers into the definition of municipal advisor. In addition, as noted in paragraph 2 in our general comments, where a broker-dealer presents investment options without specifically recommending a course of action, the broker-dealer is providing "information" rather than "advice," and therefore should not be subject to registration under the Proposed Rules.

15. The Commission proposes to exclude from the definition of a "municipal advisor" persons preparing financial statements, auditing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person. Should persons providing these accounting services be excluded from the definition of "municipal advisor"? Are there additional types of services that an accountant provides that should not require the registration of an accountant as a municipal advisor? If so, what additional types of accounting services should qualify an accountant for an exclusion from the definition of "municipal advisor"? Are there activities that are incidental to the provision of accounting services or inextricably linked to accounting services that can only reasonably be performed by an accountant that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products? Should the Commission expand the exclusion from the definition of "municipal advisor" beyond engineers providing engineering advice? If so, why and how should such exclusion be expanded? If not, why not? How should the Commission interpret the term "engineering advice"? Are there activities that are "incidental to the provision of engineering advice" or "inextricably linked to engineering advice" that can only reasonably be performed by an engineer that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products? As discussed above, the Commission does not interpret the exclusion of engineers providing engineering advice to include circumstances in which the engineer is preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects of the project and, therefore, an engineer preparing such studies would be subject to registration as a municipal advisor. Is this an appropriate interpretation? Please explain.

As noted in the Release, accountants, unlike attorneys and engineers, are not specifically excluded from the definition of municipal advisors.

NABL suggests that the exemption for accountants should be expanded to include activities incidental to the types of accounting activities described in the exemption provided in the Proposed Rules. For example, accountants may give advice about the timing of a municipal securities offering or similar advice as counseling regarding the practical consequences of accounting advice or auditing procedures. In addition, accountants sometimes provide arbitrage rebate advice in connection with a municipal securities offering as an issuer determines whether to pursue certain investment strategies in order to optimize yield-restriction or rebate compliance.

NABL also suggests that the Commission exempt feasibility reports and incidental advice provided by feasibility consultants, since such reports are directed to underwriters and investors more than municipal entities and obligated persons. So long as feasibility consultants are not making recommendations as to the structure, timing, terms and other similar matters of a municipal securities issue, they should be excluded from the definition of "municipal advisors."

Feasibility reports have been provided by consultants, including engineers, accountants and other experts, to municipal entities in connection with bond-financed projects for many decades and are very much part of the advice and services traditionally provided by engineers and accountants to municipal entities. As noted in the Release, such reports detail "the economic practicability of and the need for a proposed capital program . . ." and include analyses of many factors which may influence the sufficiency of revenues to pay projected debt service under various scenarios. Although such reports and related advice may influence the decision-making of issuers relating to the terms of securities to be issued, since the terms of such securities may affect the feasibility of the financed project, such effect is incidental and not the focus or purpose of the advice provided. As a consequence, the preparation of such reports and related advice should be regarded as advice (engineering or otherwise) relating to the project rather than advice with respect to municipal financial products or the issuance of municipal securities. Since it is not readily apparent that a feasibility report is not "advice to or on behalf of a municipal entity or obligated person with respect to . . . the issuance of municipal securities," the Commission should expand its interpretation to exempt such reports and related advice as not the type of advice intended to be within the scope of "municipal advisor" for purposes of the Act.

Because feasibility reports are also prepared by non-engineer feasibility consultants, the exemption should apply equally to other feasibility consultants. For example, many trust indentures for airport projects, as well as the rating agencies and the market in general, require the use of studies by airport consultants to support the issuance of airport project revenue bonds. In addition, there appears to be no reason to provide an exemption for the same work product and project-related advice for the engineering profession and not extend it to another. Also, limiting the field of non-registered feasibility consultants to engineers may drive up the expense to municipal issuers.

The Commission should interpret the term "engineering advice" to include incidental advice given by engineers in connection with projects which are to be financed with bond proceeds, including the preparation of feasibility reports relating to financed projects. The Commission's interpretation that the exemption for engineering advice does not extend to the preparation of "feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects of the project" does not provide clear guidance as to where the line is to be drawn between engineering advice and advice triggering the need to register as a municipal advisor since no guidance is offered as to the meaning of "analysis beyond the engineering aspects of the project." The absence of a clear demarcation point will likely effectively prevent engineers from advising municipal entities and obligated persons concerning the practical consequences of their engineering advice without registering as a municipal advisor**.** Since many engineers may choose not to register, the proposed interpretation would effectively prevent municipal entities and obligated persons from receiving the fullest extent of the engineer's knowledge and experience or, at best, limit the number of engineers who provide such advice to municipal entities, to the detriment of

municipal entities and investors alike. To the extent that fewer firms are prepared to make feasibility reports available or they become more expensive to obtain, it could also have the unintended effect of reducing the use and dissemination of feasibility reports in connection with the marketing of municipal securities, and reduce the amount of information and analyses available to investors on questions which may affect investment decisions.

A decrease in the supply of available engineering firms may not only increase borrowing and infrastructure development costs for many municipal entities, it may effectively serve to prohibit smaller municipal entities from accessing the market. Several state and local laws, along with bond purchasers in general, require the preparation of a feasibility report prior to the issuance of bonds for utility or other capital projects, regardless of the size of the project or the bond issue. These feasibility reports necessarily include one or more cash flow models to provide evidence that project revenues will be sufficient to pay debt service. If the cost of these engineering reports rises due to a scarcity of engineers willing to register as municipal advisors, the increased costs may make many projects cost-prohibitive. If the project is small, a municipal entity may find it difficult to retain an engineer that has registered as a municipal advisor. In either event, some municipal entities (most likely those that are small issuers) may not have access to the capital necessary to fund important improvements to their public works systems.

In addition, the Commission should consider the fact that the imposition of fiduciary duties on engineers or other consultants in connection with the preparation of feasibility reports may raise questions as to whether not such consultants may continue to be "independent" for various purposes under bond resolutions and indentures where independence is required or raise concerns as the objectiveness of the consultant's work product, undercutting the purpose and value associated with such reports.

Engagement letters with accountants, feasibility consultants and engineers routinely contain exculpatory provisions limiting the service provider's liability. If such service providers are not excluded from regulation, and therefore are deemed to have a fiduciary duty to a municipal entity when providing advice, then it will likely become more difficult for municipal entities and obligated persons to engage accountants, feasibility consultants and engineers at a reasonable price.

For all these reasons, the Commission should extend the exemption for "engineering advice" to similar feasibility advice provided by non-engineers, and clarify that the exemption for "engineering advice" extends to advice that is incidental to engineering advice, including the preparation of feasibility reports relating to projects funded with the proceeds of municipal securities and related engineering advice to issuers.

16. Should the Commission exclude from the definition of "municipal advisor" an entity that provides to clients investment advice, such as research information and generic trade ideas or commentary that does not purport to meet the needs or objectives of specific clients, and is provided to a municipal entity as part of its ongoing ordinary communications?

Yes. If the entity is not engaged by a municipal entity or obligated person and is not receiving compensation for such services, it should be excluded from the definition of "municipal advisor." In addition, information (even if couched as a recommendation) that is not

entity-specific should be treated as sales or marketing material, not as the sort of advice that would require registration, since there is no risk that a municipal entity or obligated person would believe that the recommendation is disinterested advice that it can rely on without further study. Otherwise, such an entity would have to purge municipal entities or obligated persons from their customer distribution lists to be sure the entity did not inadvertently send such information to them, and it would have no way of knowing whether a prospective customer is an obligated person. Would banks have to research their general marketing lists to be sure that nobody to whom they send general information is a municipal entity or obligated person? Without the exclusion, such entities could presumably be deemed "municipal advisors" by providing research information, generic trade ideas or commentary on internet sites.

EXHIBIT I

MEMBERS OF NABL SECURITIES LAW AND DISCLOSURE COMMITTEE PARTICIPATING IN PROJECT

John M. McNally, NABL President
Hawkins Delafield & Wood LLP
Washington, DC
(202) 682-1495
jmcnally@hawkins.com

John M. Kamins
Foster Swift Collins & Smith PC
Farmington Hills, MI
(248) 785-4727
jkamins@fosterswift.com

Teri M. Guarnaccia
(Committee Chair)
Ballard Spahr LLP
Baltimore, MD
(410) 528-5526
guarnacciat@ballardspahr.com

Anitra D. Lanczi
Shutts & Bowen LLP
Fort Lauderdale, FL
(954) 847-3844
alanczi@shutts.com

Joseph (Jodie) E. Smith
(Committee Vice Chair)
Maynard, Cooper & Gale, P.C.
Birmingham, AL
(205) 254-1109
jodie.smith@maynardcooper.com

Ernest M. Lorimer
Finn Dixon & Herling LLP
Stamford, CT
(203) 325-5043
elorimer@fdh.com

Michael T. Kersten
(Subcommittee Co-Chair)
Ballard Spahr LLP
Baltimore, MD
(410) 528-5853
kersten@ballardspahr.com

Alexandra M. MacLennan
Squire Sanders & Dempsey, LLP
Tampa, FL
(813) 202-1353
alexandra.maclennan@ssd.com

Bradley D. Patterson
(Subcommittee Co-Chair)
Ballard Spahr LLP
Salt Lake City, UT
(801) 531-3033
patterson@ballardspahr.com

Kenneth B. Roberts
Hawkins Delafield & Wood LLP
New York, NY
(212) 820-9512
kroberts@hawkins.com

Kenneth R. Artin
(Liaison to NABL Board)
Bryant, Miller & Olive P.A.
Orlando, FL
(407) 398-7781
kartin@bmolaw.com

Rodolfo Segura Jr.
McCall, Parkhurst & Horton L.L.P.
Dallas, TX
(214) 754-9268
rsegura@mphlegal.com

Jason Akers
Foley & Judell, L.L.P.
New Orleans, LA
(504) 568-1249
jakers@foleyjudell.com

Timothy A. Stratton
Gust Rosenfeld P.L.C.
Phoenix, AZ
(602)257-7489
TStratton@gustlaw.com

Robert Feyer
Orrick, Herrington & Sutcliffe LLP
San Francisco, CA
(415) 773-5886
bobfeyer@orrick.com

William Taylor IV
McKennon Shelton & Henn, LLP
Baltimore, MD
(410) 843-3506
william.taylor@mshllp.com

John M Gardner
Hogan Lovells US LLP
Denver, CO
(303) 899 7330
john.gardner@hoganlovells.com

Bruce Van Dusen
Hawkins Delafield & Wood LLP
New York, NY
(212) 820-9307
bvandusen@hawkins.com

Joseph Gonnella
Minnesota Housing Finance Agency
Saint Paul, MN
(651) 296-2293
Joe.Gonnella@state.mn.us

Fredric A. Weber
Fulbright & Jaworski L.L.P.
Houston, TX
(713) 651-3628
fweber@fulbright.com

William Hirata
Parker Poe
Charlotte, NC
(704) 335-9887
billhirata@parkerpoe.com

Howard Zucker
Hawkins Delafield & Wood LLP
New York, NY
(212) 820-9362
hzucker@hawkins.com