Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@abanet.org

Via e-mail to: rule-comments@sec.gov

March 1, 2011

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File No. S7-45-10
Release No. 34-63576
Registration of Municipal Advisors

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its December 20, 2010 proposing release referenced above (the "Proposing Release"). The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

We appreciate the opportunity to comment on the proposed municipal advisor rules, Rules 15Ba1-1 through 15Ba1-7, and the proposed new registration forms, Forms MA, MA-I, MA-W and MA-NR. We appreciate as well the considerable effort and care that the Staff has put into the process of drafting regulations with respect to municipal advisor registration as well as the other areas in which the Dodd-Frank Act mandates regulation by the Commission.

Our comments reflect three themes, or beliefs, shared by a majority of the members of the Committee who reviewed this letter: first, the rules should be drafted narrowly to address the core conduct Congress intended to regulate; second, the rules and forms should reduce to the extent possible the burdens of regulation; and third, the rules should be clear and unambiguous, and should impart greater clarity to the text of the law, in order to aid more effective compliance with this new regulatory regime.

It is relevant to the first and second themes to note that persons who seek to advise municipal entities in connection with investments by those entities have seen a substantial, and confusing, increase in the number of state and local laws, rules, regulations and policies that apply to them. Many state and local jurisdictions now require persons who act as solicitors or otherwise seek to obtain investments from, or be retained as investment advisers to, state or local retirement systems or pension funds to register as lobbyists, and the requirements are not uniform.[1] Where Section 15B, as amended by Section 975 of the Dodd-Frank Act, gives the Commission the scope to interpret provisions of the law narrowly, we believe that the Commission should do so now, and wait to see whether wider regulation is still required after state and local authorities have acted.

"Proceeds of Municipal Securities"

The term "proceeds of municipal securities", as used in the definition of "investment strategies" in Section 15B(e)(3), should be read literally, to mean proceeds raised in securities offerings, until such time as they are used for the purposes described in the use of proceeds section of the offering document or otherwise commingled with the general funds of the municipal entity. The Proposing Release states the view of the Commission that proceeds of municipal securities should be read broadly to mean all funds of a municipal entity, regardless of the source, except funds that have been invested in a pooled investment vehicle and commingled with the funds of other investors. This would include not only the proceeds of securities offerings, but also tax receipts, pension funds contributed by the municipal entity or deducted from the salaries of government employees, and funds invested by parents in connection with so-called 529 college savings plans.

The Commission finds support for this expansive interpretation of the term "proceeds of municipal securities" in the fact that the definition of "municipal entity" includes "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." However, it would be a more precise reading of the law to say that to the extent any of those categories of municipal entity has proceeds that are literally proceeds of municipal securities, then plans or programs for the investment of those proceeds are "investment strategies." If there are categories of municipal entity that do not typically hold proceeds of municipal securities and therefore are not advised with respect to "investment strategies", they are still covered by the law in that persons who seek to solicit them may be municipal advisers on the basis of Section 15B(e)(4)(A)(ii).

---

[1] *See, e.g.*, Cal. Government Code sections 7513.8, 7513.86, 82039 and 82047.3, and New York City Administrative Code section 3-2111, *et seq.* A copy of the New York City Law Department opinion that placement agents retained to solicit New York City's pension plans are lobbyists may be found at: www.cityclerk.nyc.gov/html/lobbying/announcements.shtml.

Treatment of Banks, Trust Companies and Insurance Companies under the Rules

Exclusion of Banks and Trust Companies. Banks and trust companies[2] provide a variety of products and services to municipal entities, as they do to all kinds of persons and organizations, and in the course of providing those products and services, they can and do provide advice, from the simple (what type of checking account to open) to the complex (how to use a guaranteed investment contract to time the release of proceeds to a construction project). Banks should not be required to register as municipal advisors as a result of providing information about the ordinary banking products and services they offer. The Commission has requested comment about whether it should exclude from the definition of municipal advisor a bank or trust company that:

- provides advice to a municipal entity or obligated person concerning transactions that involve a "deposit" as defined in Section 3(l) of the Federal Deposit Insurance Act at an "insured depository institution" as defined in that Act;
- responds to requests for proposals ("RFPs") from municipal entities regarding other investment products offered by the banking entity, such as money market mutual funds or other exempt securities;
- provides to a municipal entity a list of options available from the bank for the short-term investment of excess cash;
- provides to a municipal entity the terms upon which the bank would purchase for the bank's own account securities to be issued by the municipal entity, such as bond anticipation notes, tax anticipation notes or revenue anticipation notes;
- directs or executes purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis; or
- provides other fiduciary services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities.

The Commission has also asked whether banks should be exempt from the definition of municipal advisor to the extent that they are providing advice that would subject them to registration under the Investment Advisers Act of 1940 but for the exclusion from the definition of investment adviser provided by Section 202(a)(11) of that Act. The answer to each question is yes – a bank engaged in any of those activities should be excluded from registration as a municipal advisor. The traditional banking activities of banks are already highly regulated by bank regulators, so excluding those activities from the activities requiring registration as a municipal advisor will not result in a gap in regulation.

The Commission should define "advice… with respect to municipal financial products" to exclude information and advice provided by a bank to municipal entities with respect to products and services offered by the bank. Alternatively, the Commission should consider providing an exemption to its authority under Section 15B(a)(4) for banks. Rather than listing the activities that banks may engage in without being deemed a municipal advisor, it may be

[2] As used in this letter, the term "bank" includes trust companies unless otherwise indicated.

clearer to state the activities that will cause a bank to be deemed a municipal advisor. We suggest a rule that says, in substance, that a bank shall not be deemed to be a municipal advisor except to the extent that it (i) holds itself out as an advisor to municipal entities and provides advice other than with respect to its own banking products and services and other than advice for which it would be required to register as an investment adviser but for the exclusion provided by Section 202(a)(11) or (ii) undertakes a solicitation of a municipal entity as defined in Section 15B(e)(9).

Exclusion of Insurance Companies. Insurance companies often provide administrative services as retirement plan service providers to government plans. In connection with those administrative services, they may offer an "open architecture" platform of mutual funds and group annuity products, some managed by affiliated entities, others not, available to government plan sponsors without recommending one over another. As service providers, insurance companies will discuss relative pros and cons of the funds and annuity products, done pursuant to appropriate insurance regulations. The Commission should confirm that providing these "retirement services" does not fall within the definition of municipal advisor under Section 15B(e)(4).

We believe that the arguments for narrowing the circumstances under which a bank or trust company may be deemed a municipal advisor apply as well to an insurance company providing retirement services. This is all the more true in light of the Department of Labor's detailed guidance, published in 1996 (Please see 29 C.F.R. Sect. 2509-96-1(d)) that distinguishes "investment education" under ERISA from "investment advice" to which a fiduciary obligation (similar to that established by Section 15B(c)(2)) would apply. Specifically, the following four categories of information (essentially the same as "retirement services") were determined to be of an educational nature and not investment advice:

1. Descriptive information about a plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;

2. General investment and financial information, including basic investment concepts, historic differences in the return of asset classes, effects of inflation, and assessment of investment horizon and risk tolerance;

3. Generic asset allocation models (including models relating to specific plan investment options if specified disclosure are provided) that are based on generally accepted investment theory, are not individualized, and are accompanied by specified disclosures; and

4. Interactive investment materials that, essentially, incorporate the above.

Investment education has long been accepted in the retirement plan market place and sanctioned by the Department of Labor. To the extent that retirement services consist of the above investment education they should not constitute providing advice with respect to investment strategies nor solicitation of a municipal entity for the purposes of Section 15B(e)(3), Section 15B(e)(3) or Section 15B(e)(9), as appropriate.

Separately Identifiable Department or Division. We support the concept of permitting banks, trust companies and insurance companies to register, when required to register at all, a separately identifiable department or division ("SID"). If the Commission does not adopt the exclusion discussed above, the requirement to register the entire bank or insurance company could be unduly burdensome. For example, if the entity were not permitted to register a SID, the books and records requirements of proposed Rule 15Ba1-7 would apply to the entire bank or insurance company, and the definition of "associated person" would require disclosure about some persons (e.g., branch managers) who have no connection with a municipal advisory business.

If the Commission does not create a broad exclusion for banks or insurance companies but permits registration of a SID, the Commission should nonetheless permit banks and insurance companies to have reasonable procedures whereby employees who are not members of the SID may provide information with respect to ordinary banking products and services, for banks, or retirement services, for insurance companies, to municipal entities.

Appointed Members of Governing Bodies. The Proposing Release states the view of the Commission that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should not be excluded from the definition of a "municipal advisor." We are aware that the Commission has received a large number of comments opposing this interpretation by the Commission. We agree with those commenters that appointed members of governing boards of municipal entities should not be deemed to be municipal advisors, first and foremost because board members, appointed or elected, are not advisors to the municipal entity but the very persons who govern the municipal entity. Requiring appointed members to register as municipal advisors is likely to discourage individuals from acting as board members and add to the regulatory burdens of individuals who choose nevertheless, out of civic duty, to act as board members, without any demonstrable regulatory benefit. Activities undertaken by an appointed member of a board outside of his or her duties to the board would not be subject to this exclusion.

Attorneys Providing Legal Advice

Section 15B(e)(4)(C) excludes from the definition of municipal advisor "attorneys offering legal advice or providing services that are of a traditional legal nature." The Proposing Release states the view of the Commission that "advice which is primarily financial in nature, such as advice concerning the financial feasibility of a project or financing, advice estimating or comparing the relative cost to maturity of an issuance depending on various interest rate assumptions or advice recommending a particular structure as being financially advantageous under prevailing market conditions, would be primarily financial advice and not services of a traditional legal nature."

Lawyers have traditionally been not just legal advisors but counselors to their clients. Lawyers may, for example, draw on their experience in certain kinds of business deals to advise not only on the legality or contractual terms of a proposed transaction but the economic feasibility of the transaction. Lawyers may point out that a transaction could leave the client

under-capitalized. Lawyers are often asked by clients whether particular contractual terms are "market." Clients often rely on lawyers to recommend underwriters, trust companies, even employees. Lawyers help their clients with those matters not because they are paid specially to do so but because they want to see their clients succeed. A rule that would censor certain kinds of advice by lawyers in the context of the lawyer-client relationship would be harmful, not beneficial, to the relationship.

Furthermore, the relationship of lawyers and clients has traditionally been one within the purview of the courts and the state bar associations. We urge the Commission not to insert itself into the attorney-client relationship by categorizing some advice given in the context of that relationship as requiring registration.

Instead, we urge the Commission make a distinction between engagements that are legal in nature versus those that involve primarily municipal advisory services. One way that it may do so is to adopt the language of the exception from the definition of investment adviser provided by Section 2(a)(11) of the Advisers Act; a lawyer would not be a municipal advisor to the extent that his or her performance of services deemed to be municipal advisory services is "solely incidental to the practice of his or her profession."

Obligated Persons

Proposed Exclusion. We support the Commission's proposal to exclude from the definition of "obligated person" providers of municipal bond insurance, letters of credit and other liquidity providers.

Solicitation of an Obligated Person. In the Proposing Release (at note 102) the Commission states its view that Section 15B(e)(4)(A)(ii) includes within the definition of municipal advisor one who undertakes a solicitation of an obligated person, although that subparagraph refers only to solicitation of a municipal entity. The Commission reaches this conclusion in part based on Section 15B(a)(1)(B), which makes it unlawful for a municipal advisor to undertake a solicitation of a municipal entity or obligated person unless the municipal advisor is registered. Given that interpretation, the Commission should provide guidance with respect to that part of the definition of "solicitation of a municipal entity or obligated person" that includes "solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor in connection with municipal financial products." Specifically, the Commission should clarify that "municipal financial products" as used here (as well as in paragraph (e)(4)(A)(i)) means municipal derivatives, guaranteed investment contracts and investment strategies of the municipal entity, and not of the obligated person. If the definition of municipal advisor were read to include persons who advise obligated persons or solicit an obligated person with respect to the funds, securities or investment strategies of the obligated person, the reach of the registration requirement would expand in potentially unpredictable ways. "Obligated persons" may include large entities with numerous and varied funds and investments, many of which may have nothing to do with the transaction pursuant to which they have become an obligated person. Extending the municipal advisor registration requirements to persons who advise or solicit with

respect to the funds or securities of obligated persons unrelated to any transaction with a municipal entity would add unnecessary burdens on persons not within the intent of Congress.

Employees of Obligated Persons. Section 15B(e)(4)(A) excludes from the definition of "municipal advisor" a person "who is not a municipal entity or an employee of a municipal entity." The definition does not contain an equivalent exclusion for an employee of an obligated person providing advice to the obligated person. The Commission should exempt employees, officers and directors of an obligated person advising the obligated person of which they are an employee, officer or director to the extent that they provide advice solely to the obligated person and not to a municipal entity.

State-Registered Investment Advisers

Section 15B(e)(4)(C) excludes from the definition of "municipal advisor" investment advisers registered under the Investment Advisers Act. The Commission should also exempt state-registered investment advisers. Such advisers are generally not able to register under the Investment Advisers Act because they do not meet the threshold requirements for federal registration. However, Congress has recognized the efficacy of state regulation of investment advisers, as evidenced by Section 410 of the Dodd-Frank Act, which raised the threshold amount of assets under management for federal registration of most investment advisers to $100 million from $25 million. The Commission should similarly recognize the efficacy of state regulation of investment advisers, particularly since the provision of advice to municipal entities is a matter of special interest to state authorities.

Advice with Respect to Brokerage of Municipal Escrow Investments

A person is a municipal advisor if he or she "provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products", which include "investment strategies". As defined in Section 15B(e)(3), the term "investment strategies" includes "the recommendation of and brokerage of municipal escrow investments." The Commission should clarify that merely providing brokerage of municipal escrow investments does not make one a municipal advisor; rather, it is providing advice with respect to the recommendations of and brokerage of municipal escrow investments. The Commission should also provide guidance with respect to the meaning of "municipal escrow investments." Even if the Commission takes an expansive approach to the meaning of "proceeds of municipal securities", it should recognize that municipal escrow investments, a different term, has a different and narrower meaning and is limited to investments held in an escrow account.

Registration of Broker-Dealers and Investment Advisers

Registered broker-dealers and investment advisers (including state-registered investment advisers) who are required to register as municipal advisors because they are engaged in activities for which the exclusions do not apply should be permitted to register as municipal advisors by amending their Forms BD or ADV, as applicable, rather than completing and filing

an additional form. The Commission should explore with the CFTC extending a similar accommodation to commodity trading advisors registered under the Commodity Exchange Act.

Definition of Associated Persons – Branch Managers

Section 15B(e)(7)(A) defines "person associated with a municipal advisor" to include a "branch manager." Form MA requires disciplinary history with respect to persons associated with the registrant municipal advisor. However, some entities, such as banks, broker-dealers and investment advisers, may have many branches, and branch managers, that have nothing to do with the entity's municipal advisory business. Furthermore, the term "branch" may be defined differently under different regulatory regimes. Form MA should be amended to require disciplinary history only with respect to branch managers of branches where a municipal advisory business is conducted.

* * *

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair of the Committee on Federal
Regulation of Securities

Drafting Committee Chair: Peter LaVigne

cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Luis A. Aguilar, Commissioner
The Hon. Kathleen L. Casey, Commissioner
The Hon. Troy A. Paredes, Commissioner
The Hon. Elisse B. Walter, Commissioner
Martha Haines, Assistant Director and Chief, Office of Municipal Securities
Victoria Crane, Assistant Director, Office of Market Supervision