

VIA ELECTRONIC MAIL

April 28, 2011

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

RE: File Number S7-45-10 – Registration of Municipal Advisors

Dear Ms. Murphy:

On December 20, 2010, the Securities and Exchange Commission (SEC) proposed new Rules 15Ba1-1 through 15Ba1-7¹ and new Forms MA, MA-I, MA-W, and MA-NR under the Securities Exchange Act of 1934² (Proposed Rules).³ The Proposed Rules will establish a permanent registration regime for municipal advisors pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).⁴

The Financial Services Institute (FSI)⁵ welcomes this opportunity to comment on the Proposed Rules. FSI requests that the SEC clarify that the provision of advice to a municipal entity or obligated person, when such advice is solely incidental to the conduct of business as a broker or dealer and the broker or dealer receives no special compensation therefore, does not, without more, require registration as a municipal advisor.

Background on FSI Members

FSI represents independent broker-dealers (IBD) and the independent financial advisors that affiliate with them. The IBD community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their

¹ 17 CFR 240.15Ba1-1 through 15Ba1-7.

² 15 USCA §§ 78a-1 through 78oo ("Exchange Act").

³ Exchange Act Release No. 63576, available at <http://www.sec.gov/rules/proposed/2010/34-63576.pdf> ("Proposing Release").

⁴ Section 975 amended Section 15B of the Exchange Act.

⁵ The Financial Services Institute is an advocacy organization for the financial services industry – the only one of its kind – FSI is the voice of independent broker-dealers and independent financial advisors in Washington, D.C. Established in January 2004, FSI's mission is to create a healthier regulatory environment for their members through aggressive and effective advocacy, education and public awareness. FSI represents more than 126 independent broker-dealers and more than 15,000 independent financial advisors, reaching more than 15 million households. FSI is headquartered in Atlanta, GA with an office in Washington, D.C. For more information, visit financialservices.org.

unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 financial advisors – or 64% percent of all practicing registered representatives – operate as self-employed independent contractors, rather than employees, of their affiliated broker-dealer firm.⁶ These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁷ Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients’ investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI’s mission is to ensure our members operate in a regulatory environment that is fair and balanced. FSI’s advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Rules

As stated above, FSI believes the SEC should clarify that the provision of advice to a municipal entity or obligated person, when solely incidental to the conduct of ordinary business as a broker or dealer and not specially compensated, does not, without more, require registration as a municipal advisor.

The Proposed Rules indirectly, but significantly, broaden the definition of “municipal advisor” in a manner that may be read to cover broker-dealers engaged in ordinary brokerage business, a result not suggested by the language of the Dodd-Frank Act or by the legislative history. Within the context of ordinary brokerage relationships, broker-dealers may provide to their municipal entity clients advice regarding investment of municipal funds that is solely incidental to effecting securities transactions in the course of their business as broker-dealers. Congress has made clear that broker-dealers do not become investment advisers by virtue of providing such advice. Similarly, the provision of such advice should not subject broker-dealers to regulation as municipal advisors. In this regard, we believe the SEC should clarify what it means to provide “advice” for purposes of the Proposed Rules, and should narrow its definition of “investment

⁶ Cerulli Associates at <http://www.cerulli.com/>.

⁷ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

strategies” so that it applies only to proceeds of municipal securities, as set forth in the Dodd-Frank Act.

The Dodd-Frank Act defines the term “municipal advisor” in part to mean a person or firm “that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products.”⁸ Municipal financial products are defined as “municipal derivatives, guaranteed investment contracts, and investment strategies.”⁹ Investment strategies is defined in turn as including both “plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of or brokerage of municipal escrow investments.”¹⁰

On their face, these definitions appear intended expressly to limit the types of advice sought to be regulated to specific categories of financial advice. They are not written to cover broadly any type of investment advice, which could have been done with simpler language. In its rule proposal, however, the SEC interprets the definition of investment strategies as also including “plans, programs, or pools of assets” that invest any funds held by or on behalf of a municipal entity.¹¹ Pursuant to this interpretation, any person that provides advice with respect to such plans or programs, or with respect to “pools of assets” — language not found in the statutory definition of “investment strategies,” but proposed to be read into it by the Commission¹² — must register as a municipal advisor. This broadens the registration requirement significantly as compared to the statutory language of the several interrelated definitions. It may be construed to cover, for example, brokerage not only of “municipal escrow investments” (which is referenced specifically in the definition), but of any investment that is made with municipal funds and is deemed to be part of a “plan” or “program,” or of any “pool of assets” — effectively doing away with the specific text in the statutory definition of “investment strategies,” and redefining it and “municipal financial product” to cover any investment of any kind.

There is no legislative history to suggest that Congress meant to subject the entire brokerage industry to a new regulatory regime layered on top of the existing regime, and with a new standard of care, with respect to all business involving municipal funds of any kind. Instead, it appears that Congress intended primarily to address the regulation of previously unregulated persons engaged as “financial advisors” in the municipal securities market. For example, the Act’s definition of municipal advisor explicitly excludes (with exceptions) from the registration requirement investment advisers registered under the Investment Advisers Act of 1940 (“Advisers Act”), who are providing investment advice subject to the Advisers Act.¹³ Broker-dealers providing advice that is solely incidental to a broker or dealer transaction should be excluded from the definition of municipal advisor for the same reason that registered investment advisers generally are excluded: they are already thoroughly regulated, and the provision of such advice similarly is thoroughly regulated via the broker-dealer regulatory structure (for example, by SRO suitability requirements in the event that the broker-dealer provides a “recommendation”¹⁴). Indeed, in the case of dual registrants, these entities are already subject to two regulatory schemes.

⁸ Dodd-Frank Act § 975(e)(4)(A), codified at Exchange Act § 15B(e)(4)(A).

⁹ Exchange Act § 15B(e)(5).

¹⁰ Exchange Act § 15B(e)(3).

¹¹ Proposing Release at 25.

¹² *Id.* at 26. The Commission proposes to import the “pool of assets” clause from the definition of “municipal entity.” It is not evident that this interpretation is correct, as there is no reason to think that Congress meant to define “investment strategies” (the subject of advice) identically to “municipal entity” (the recipient of advice). Indeed, a common understanding of a “strategy” would imply some kind of plan or program, and not simply a collection or pooling of assets.

¹³ Exchange Act § 15B(e)(4)(C).

¹⁴ See, e.g., NASD Rule 2310 and FINRA Rule 2111 (effective July 9, 2012).

FSI also contends that an ordinary brokerage relationship, including advice solely incidental to broker or dealer transactions and not specially compensated, does not, without more, constitute a “plan” or “program” that should be captured by the definition of “advice . . . with respect to municipal financial products” as interpreted in the Proposing Release.¹⁵ Advice that is incidental to a particular trade or investment is not a “plan.”¹⁶ The limited and incidental nature of such advice militates against subjecting it to an entire additional regulatory scheme where there is no clear Congressional intent to do so.

We note that the Advisers Act recognizes that a broker-dealer, by providing advice incidental to a securities transaction in the scope of its broker-dealer business, does not become an investment adviser. Specifically, that Act excludes from the definition of “investment adviser” any broker-dealer whose advice regarding securities is “solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore.”¹⁷ Similarly, for purposes of the municipal adviser definition, where a municipal entity enters into an ordinary brokerage transaction, any incidental advice provided in the scope of that relationship should not require the broker-dealer to register as a municipal advisor. Indeed, in the case of dual registrants, it would be paradoxical for such incidental advice — advice that is subordinate to the central purpose of the relationship: brokerage — to result in municipal advisor status when the provision of more substantial advice, i.e. advice that is not solely incidental to a transaction, would clearly exclude the registrant from such status.

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to clarify the application of the Proposed Rules to broker-dealers providing advice to municipal entities or obligated persons that is solely incidental to brokerage transactions. Specifically, we request that the Commission clarify what it means to provide “advice” for purposes of the Proposed Rules, and revise the proposed definition of “investment strategies” to better accord with the language of the Dodd-Frank Act.

Thank you for your consideration of our comments. Should you have any questions, please contact me at (202) 379-0943.

Respectfully submitted,



Dale E. Brown, CAE
President & CEO

¹⁵ While the assets held in a brokerage account certainly may be viewed as a “pool of assets,” we believe that importing the “pool of assets” language from the definition of “municipal entity” into the definition of “investment strategies” is incorrect and effectively negates the express statutory requirement that the advice relate to a “strategy,” “plan” or “program” (where it does not relate to “municipal derivatives” or “guaranteed investment contracts”). See footnote 12 above.

¹⁶ We note, for example, that investment advice provided as “part of a financial plan” or similar advice generally is not considered to be “solely incidental” to broker-dealer business. Investment Advisers Act Rule 202(a)(11)-1(b).

¹⁷ Advisers Act § 202(a)(11).