INVESTMENT COMPANY INSTITUTE

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February 22, 2011

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Registration of Municipal Advisors (File Number S7-45-10)

Dear Ms. Murphy:

The Investment Company Institute[1] welcomes the opportunity to comment on the Securities and Exchange Commission's proposal to establish a permanent registration regime for municipal advisors, pursuant to Section 975[2] of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act").[3] While we recognize and support the policy reasons for regulating advisers to municipal entities, we believe that the Commission's proposal is overly broad and will subject many already-regulated entities and individuals to burdensome, duplicative and unnecessary registration and regulatory requirements. Advisers falling within the scope of the proposal, for example, would be required not only to submit Form MA, which generally replicates the Commission's adviser registration form, Form ADV, but also to fulfill numerous responsibilities and obligations, including a fiduciary obligation, that are similar to existing requirements under the Investment Advisers Act of 1940 ("Advisers Act").

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.31 trillion and serve over 90 million shareholders.

[2] Section 975 revised the Securities Exchange Act of 1934 to require municipal advisors to register with the Commission.

[3] SEC Release No. 63576, 76 FR 824 (Jan. 6, 2011) ("Release"), available at http://www.sec.gov/rules/proposed/2010/34-63576.pdf. Our comments focus on discrete aspects of proposed Rules 15Ba1-1 through 15Ba1-7 and their impact on registered investment advisers ("advisers") and registered investment companies ("funds").

In addition, as further described below, we believe that certain aspects of the proposal lack textual support in the Dodd-Frank Act and exceed the intent of Congress. We therefore strongly encourage the Commission to narrow the scope of the municipal advisor regulatory regime to more closely align the final rules with the statutory language of Section 975 of the Dodd-Frank Act and the intent of Congress, which in turn will prevent wasteful replication of regulatory regimes.

I. Proposed Definition of the Term "Investment Strategies"

To avoid imposing redundant and unintended regulatory burdens on advisers, which already are subject to comprehensive regulation under the Advisers Act, we recommend that the Commission narrow its proposed interpretation of "investment strategies" to track the language in the Dodd-Frank Act. The Act defines the term to include "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." The Commission, however, is proposing to define "investment strategies" more broadly to include "plans, programs or pools of assets that invest funds held by or on behalf of a municipal entity" without regard to the statutory requirement that such plans involve the investment of the proceeds of municipal securities.

We believe that the Commission's proposed definition inappropriately expands the scope of "investment strategies" and is contrary to the plain meaning of the Act in two important respects. First, the definition of "investment strategies" in the Dodd-Frank Act limits the plans or programs to those for the investment *of the proceeds* of municipal securities. The Commission's proposed definition effectively reads out the statutory requirement to trace assets to the proceeds of municipal securities. Thus, an adviser providing advice to a municipal entity with respect to any plan, program or pool of assets—even if the plan, program or pool of assets did not consist of the proceeds of municipal securities (such as, for example, 529 plans and public pension plans)—would be required to register with the Commission if no exclusion is available. The Commission has not established an adequate basis to exceed the statutory language of Section 975 of the Dodd-Frank Act.

Second, the Commission's definition of "investment strategies" exceeds its statutory authority by inserting "pools of assets." The Dodd-Frank Act includes the term "pools of assets" in the definition of "municipal entity," but not in the definition of "investment strategies;" we therefore believe that Congress intended to omit "pools of assets" from the definition of "investment strategies."

As proposed, the expanded definition of "investment strategies" would subject a much larger number of entities to the registration regime. Any person providing advice to a municipal entity with respect to plans, programs or pools of assets, regardless of whether they are proceeds of municipal securities, would be required to register as a municipal advisor. The Commission itself recognized in the Release that its proposed definition of the term would produce some unusual and unintended results, noting in particular that money managers providing advice to municipal entities simply with respect to their bank accounts could be considered municipal advisors because every bank account of a

municipal entity has funds "held by or on behalf of a municipal entity." Banks are heavily regulated entities; requiring them to register as municipal advisors simply by virtue of advising municipal entities with respect to their bank accounts seems to be an unnecessary consequence of an overly broad registration regime. A similar outcome would result from requiring advisers, another entity that is already subject to regulatory oversight, to be dually registered as municipal advisors.

II. Clarification of the Exclusion for Registered Investment Advisers

The Dodd-Frank Act excludes "any investment adviser registered under the Investment Advisers Act of 1940, or persons who are associated with such investment advisers who are providing investment advice" from the definition of "municipal advisor." The proposal would interpret this exclusion to mean that an adviser would only be excluded to the extent that such adviser is providing investment advice that would subject the adviser to the Advisers Act. We believe this interpretation is contrary to the plain meaning of the statute. The phrase in the statutory text "who are providing investment advice" only modifies the clause "persons who are associated with such investment advisers" and should not be read to modify the clause before the comma that refers to advisers registered under the Advisers Act. We strongly encourage the Commission to interpret the exclusion for advisers from the definition of "municipal advisor" to apply to all registered investment advisers, not just those who are providing investment advice, as is consistent with the plain language in the Dodd-Frank Act.

Assuming the proposal is adopted as written, the Commission's unduly narrow interpretation of "investment advice" would lead to duplicative registration requirements. As described above, the Commission proposes to define "investment advice" to mean only advice that would subject the adviser to registration under the Advisers Act; that is, only advice pertaining to "securities."[4] Many advisers, however, provide investment advice to their clients on asset classes other than securities, such as currencies, real estate, futures, and forward contracts. Such advisers would not be eligible for the exclusion as currently drafted. Consequently, the Commission's arbitrarily narrow interpretation of this exclusion would result in many advisers, despite the fact that they are already regulated by the Commission with respect to their advisory activities (including but not limited to Advisers Act Rule 206(4)-5 – the pay-to-play rule), being required to register with the Commission again as municipal advisors. We recognize that the Commission is attempting to eliminate any gaps in the regulatory framework related to municipal advisory activities; given that registered investment advisers are already subject to comprehensive oversight by the Commission, however, we believe this dual-registration requirement is overly burdensome, unnecessary, and inconsistent with the statutory exclusion contemplated by the Dodd-Frank Act.

[4] The Release refers to the definition of "investment advice" set forth in the Commission's Staff Legal Bulletin No. 11, which states that advice regarding securities would necessitate registration as an adviser.

III. Broker-Dealers

A. Clarification of the Exclusion for Broker-Dealers

The statutory definition of "municipal advisor" also excludes a broker, dealer or municipal securities dealer serving as an underwriter.[5] The Commission proposes to interpret this exclusion to mean that a broker, dealer or municipal securities dealer would be eligible for the exclusion only when acting in its capacity as an underwriter. Thus, a broker-dealer that serves as an underwriter but also engages in municipal advisory activities beyond underwriting, such as solicitation through a fund distributor, would be required to register as a municipal advisor. As underwriters, such broker-dealers are already subject to the Municipal Securities Rulemaking Board's Rule G-37 (on political contributions and prohibitions on municipal securities business) in addition to being regulated by the Commission in their capacity as registered broker-dealers. We therefore recommend that the Commission extend its proposed reading of this exclusion to more broadly exclude brokers, dealers and municipal securities dealers who engage in additional activities while serving as underwriters to municipal entities or obligated persons.

B. Solicitation of a Municipal Entity

The Commission also takes the position in the Release that a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity to invest in the fund would be a municipal advisor with respect to such activity. We urge the Commission to reconsider this interpretation. Acting as a placement agent for a pooled investment vehicle, such as, for example, a fund, does not fall within the statutory definition of solicitation. In relevant part, "solicitation of a municipal entity or obligated person" is defined as a communication "on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser." A placement agent soliciting a municipal entity to invest in a pooled investment vehicle acts on behalf of the pooled investment vehicle only, not on behalf of the adviser to the vehicle nor on behalf of any of the other four enumerated categories of persons contained in the definition. The activities of placement agents for pooled investment vehicles fall outside of the definition of "solicitation" and as such, the Commission should revise its position and confirm that placement agents for pooled investment vehicles are not considered to be soliciting a municipal entity and accordingly are not required to register as municipal advisors with respect to such activities.

IV. Exclusion of Appointed Officials of a Municipal Entity

Employees of a municipal entity are excluded from the definition of "municipal advisor" under the Dodd-Frank Act.[6] The proposal would clarify that persons serving as members of a governing body

[5] Exchange Act § 15B(e)(4)(C).

[6] Exchange Act § 15B(e)(4)(A).

of a municipal entity would also be considered "employees" of the municipal entity and be excluded from the registration requirements. The Commission, however, would only exclude such members of a governing body if they are elected or *ex officio* members.

We recommend that the Commission provide that individuals who are appointed members of such governing bodies also be excluded from the definition of "municipal advisor," regardless of whether they are *ex officio* members. Otherwise, an individual appointed to the board of a state agency, a public university system, a public-bond issuing authority, or a wide variety of other state and local municipal and county instrumentalities could be subject to municipal advisor registration, the accompanying recordkeeping requirements, and a heightened fiduciary standard of care simply by participating in deliberations of the board and carrying out his or her duties as a board member. Requiring appointed members to register is an inappropriate consequence that would have a chilling effect on civic participation and would deny such entities the industry expertise they may not otherwise be able to afford.[7] Moreover, if municipal entities have to pay for that expertise in the future, it could raise borrowing costs, which could then be passed on to investors.

Further, fund advisers would face unnecessary compliance burdens if forced to develop systems to track employees' volunteer activity to identify and monitor employees who would be required by the proposal to register as municipal advisors. These entities might determine that it is necessary to prohibit employees from engaging in such civic-minded activities to the detriment of the state and local instrumentalities.

V. Solicitation on Behalf of Affiliated Entities and Interplay with the Pay-To-Play Rules

The definition of "solicitation of a municipal entity or obligated person" in the Dodd-Frank Act specifically excludes a person who undertakes a solicitation on behalf of a broker, dealer, municipal securities dealer, municipal advisor or adviser that controls, is controlled by or is under common control with the person undertaking the solicitation.[8] Recently proposed amendments to the Commission's pay-to-play rule for advisers, Rule 206(4)-5 under the Advisers Act, would require an affiliated solicitor to register as a municipal advisor in order to receive direct or indirect compensation from an adviser for solicitation of a government entity.[9] While the Commission suggests in the Release that persons soliciting on behalf of affiliated entities could "voluntarily" register in order to be compensated, the proposal, read in conjunction with the Commission's pay-to-play rule, effectively prohibits an affiliate from soliciting government business for compensation on behalf of its affiliated investment adviser

[7] Resignations of board members could disrupt the market as institutional knowledge and expertise is lost.

[8] Exchange Act § 15B(e)(9).

[9] SEC Release No. IA-3110, 75 FR 77052 (Dec. 10, 2010), available at http://www.sec.gov/rules/proposed/2010/ia-3110.pdf.

unless such affiliate is registered as a municipal advisor. Requiring affiliates to register would re-write the statutory intent plainly set forth in the Dodd-Frank Act that affiliated solicitation should not give rise to a municipal advisor registration requirement.

We have more thoroughly explained our concerns regarding the interplay between the proposal and the proposed amendments to the Commission's pay-to-play rule in a January 24, 2011 comment letter.[10] We urge the Commission again to reconsider the relationship between the proposal and the Commission's pay-to-play rule and refrain from requiring affiliated solicitors to register as municipal advisors.[11]

Given that the proposal and the Commission's pay-to-play rule are so intertwined, we would also recommend delaying the effective date of the pay-to-play rules and re-opening the comment period on those rules until at least the effective date of the municipal advisor proposal. This would allow all interested parties to comment on the pay-to-play rule in light of the new requirements included in the proposal. Further, advisers and solicitors will need sufficient time to design new internal compliance systems for the proposal and the pay-to-play rule, but until the proposal is finalized, firms will not know definitively which entities or individuals will be required to register as municipal advisors. This will impact the design and implementation of compliance policies with respect to the pay-to-play rule.

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If you have any questions on our comment letter, please feel free to contact me directly at (202) 326-5815 or Heather Traeger at (202) 326-5920.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Mary L. Schapiro

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[10] *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth Murphy, Secretary, Securities and Exchange Commission, January 24, 2011.

[11] As discussed in our prior letter, the Commission could avoid the unwarranted burdens and costs associated with requiring affiliated solicitors to register as municipal advisors by, for example, permitting any employee of an affiliate to solicit government business for compensation on behalf of an adviser that controls, is controlled by, or is under common control with the affiliate as long as the employee is treated as the adviser's "covered associate." *Id.*

The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
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