

AMERICAN COUNCIL ON EDUCATION



OFFICE OF THE PRESIDENT

February 22, 2011

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

**Re: Registration of Municipal Advisors under Section 975 of the Dodd-Frank
Wall Street Reform and Consumer Protection Act
17 C.F.R. Parts 240 and 249 – Comment
File Number S7-45-10**

Dear Ms. Murphy:

On behalf of American Council on Education (“ACE”) and the other higher education associations identified below, I write in response to Release No. 34-63576, in which the Commission solicited comments on its proposed rule concerning registration of municipal advisors. Founded in 1918, ACE is a non-profit national education association that represents all sectors of American higher education: community colleges and four-year institutions, private and public universities, and non-profit and for-profit colleges. ACE represents the interests of more than 1,600 campus executives, as well as 200 leaders of higher education-related associations and organizations. Together, ACE member institutions serve 80 percent of today's college students. We thank you for the opportunity to share our views.

We are very concerned that the proposed rule's broad definition of “municipal advisor” could be interpreted to require employees and governing board members of many of our member colleges and universities and their affiliated organizations to register with the Commission. Although the definition of “municipal advisor” expressly excludes elected trustees and employees of public colleges and universities, it does not expressly exclude appointed trustees of public institutions or trustees and employees of private institutions, institutionally related foundations,¹ and other university-affiliated non-profit entities, such as teaching hospitals.

¹ Institutionally related foundations are the private, affiliated 501(c)(3) organizations that raise private support and/or manage funds for public colleges and universities. These foundations have separate governing boards. In many cases, their employees are employed solely by the foundation and not by the affiliated institution.

Colleges and universities finance crucial facilities and educational projects through the municipal securities market. If the final rule is not clarified, tens of thousands of employees and trustees of higher education institutions and affiliated non-profit entities could be required to register with the Commission. Such an interpretation would have harmful consequences for American higher education. ACE respectfully requests that employees and trustees of higher education institutions and their affiliated entities be excluded from the definition of “municipal advisor” in the final rule.

1. The Proposed Rule Departs from Settled Policy

As the Commission appears to have acknowledged,² the proposed rule is susceptible to the interpretation that employees and trustees of obligated persons become “municipal advisors” when they discuss municipal financial issues in the performance of their duties. The term “advice” is broad and undefined. If left unqualified, it could potentially sweep in a vast range of communications regarding municipal financial products, including communications between higher education institutions and their own trustees and employees.

That interpretation would overturn established federal policy. Over many decades, in regulating the market for financial advice, Congress and the SEC have expressly declined to regulate internal advice provided by an employee to his or her employer. Existing registration requirements, such as those under the Investment Advisers Act of 1940, cover firms and persons that are in the business of providing advice; the requirements do not regulate employment relationships. Nothing in the language or history of the Dodd-Frank Act signals that Congress intended to effect a fundamental shift in this policy. The Commission should adhere to its longstanding interpretation of “advice” and exclude trustees and employees of obligated persons from the definition of “municipal advisor.”³

Under the Investment Advisers Act, the term “investment adviser” is defined to mean “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the

Institutionally related foundations often manage municipal financial products and municipal securities on behalf of the public colleges and universities they support.

² See 76 Fed. Reg. 824, 837 (Jan. 6, 2011) (“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?”).

³ Cf. Commissioner v. Keystone Consol. Indus., 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of “settled judicial and administrative interpretation[s]” of terms when it enacts a statute).

advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.”⁴ The Commission and its staff have long taken the position that this statutory language does not address internal advice within a corporate organization.⁵ In particular, the Commission has declined to regulate advice rendered by an employee to his or her employer,⁶ and has recognized that the “unique nature of the employment relationship” counsels against SEC interference in employment matters.⁷

Advice by employees of obligated persons within the scope of their employment fits comfortably within the traditional category of internal communications not subject to SEC regulation. To exclude individuals who provide such advice from the definition of “municipal advisor” would thus be consonant with established Commission policy. To regulate such internal communications would represent a fundamental and unwarranted federal policy change.

⁴ 15 U.S.C. § 80b-2(a)(11). Congress also exempted from registration “any investment adviser that is a charitable organization . . . or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, whose advice, analyses, or reports are provided only to one or more of the following: (A) any such charitable organization; (B) a fund that is excluded from the definition of an investment company . . .; or (C) a trust or other donative instrument . . . , or the trustees, administrators, settlors (or potential settlors), or beneficiaries of any such trust or other instrument.” 15 U.S.C. § 80b-3(b)(4) (emphasis added). “Charitable organization” includes all 501(c)(3) tax-exempt organizations. *Id.* § 80a-3(c)(10)(D).

⁵ See, e.g., Lockheed Martin Investment Management Company, SEC No-Action Letter, 2006 WL 1624232 (June 5, 2006) (advice given by subsidiary to parent corporation); In re: CSX Financial Management, Inc., Investment Advisers Act Release No. 1808, 70 SEC Docket 361 (July 20, 1999) (order) (advice given by corporation to affiliates); Rules Implementing Amendments to the Investment Advisers Act of 1940, 61 Fed. Reg. 68480, 68486-87 & n.65 (proposed Dec. 27, 1996) (advice given by persons under the supervision and control of an investment adviser); Employer Sponsors of Defined Contribution Plans, SEC No-Action Letter, 1995 WL 931811 (Dec. 5, 1995) (advice given by employer to employees); Abid Mansoor, SEC No-Action Letter, 1992 WL 35426 (Feb. 5, 1992) (advice given by employee of investment adviser).

⁶ See Burney Company, SEC No-Action Letter, 1977 WL 13944 (Feb. 7, 1977).

⁷ Employer Sponsors of Defined Contribution Plans, SEC No-Action Letter, 1996 WL 102178 (Feb. 22, 1996); see also Employer Sponsors of Defined Contribution Plans, SEC No-Action Letter, 1995 WL 931811 (Dec. 5, 1995).

2. The Dodd-Frank Act Does Not Authorize Regulation of College and University Officers and Employees

“Congress does not enact substantive changes sub silentio.”⁸ Departures from established practice therefore “should not be inferred ‘[a]bsent a clear indication from Congress of a change in policy.’”⁹ Nothing in the Dodd-Frank Act indicates that Congress intended to depart from the decades-old federal policy described above. In fact, the language and legislative history of the Act confirm that Congress intended to extend the existing regulatory framework for advisors in other markets to the previously under-regulated municipal securities market. Congress did not intend to create a sweeping new regime that would require employees and trustees of countless non-profit organizations to register with the Commission.

The text of the Dodd-Frank Act signals Congress’s understanding that the term “municipal advisor” is limited to professional advisors acting in the market. For example, the Act requires the Municipal Securities Rulemaking Board to prescribe rules regarding municipal advisors’ fiduciary duties to their “clients.”¹⁰ Similarly, in a provision that authorizes the MSRB to “appropriately classify” municipal advisors, Congress required the Board to take into account “relevant matters, including types of business done, nature of securities other than municipal securities sold, and character of business organization.”¹¹ Congress plainly thought it was regulating advisor-client relationships in the municipal securities market, not employer-employee relationships.

The Dodd-Frank Act’s legislative history confirms this point. The Senate Committee on Banking, Housing, and Urban Affairs report refers to municipal advisors as “intermediaries in the municipal market.”¹² The statement of one of the law’s chief sponsors likewise focuses on “participants in the municipal markets” and market “intermediaries.”¹³

The Commission itself has echoed the understanding that Dodd-Frank Act does not apply to ordinary employees of obligated persons. For example, its Release refers to

⁸ United States v. O’Brien, 130 S. Ct. 2169, 2178 (2010) (citing Director of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 323 (2001)).

⁹ Id. (quoting Grogan v. Garner, 498 U.S. 279, 290 (1991)).

¹⁰ 15 U.S.C. § 78o-4(b)(2)(L)(i).

¹¹ Id. § 78o-4(b)(2)(A)(i).

¹² See S. Rep. No. 111-176, at 147–48 (2010) (quoting testimony of Timothy Ryan).

¹³ See 156 Cong. Rec. S10921 (Dec. 21, 2010) (statement of Sen. Dodd).

“market professionals” and “external advisors.”¹⁴ Elsewhere, the Release lists “three principal types of municipal advisors”: financial advisors, including broker-dealers; investment advisors; and third-party marketers and solicitors.¹⁵ In-house advisors are notably absent from these descriptions, just as they are absent from the Commission’s predictions about the number of people who will be required to register under the rule.¹⁶ The Commission’s interpretation of the Act accords with that of the Municipal Securities Rulemaking Board, which recently published a draft interpretive notice that likewise assumes municipal advisors are external advisors “engaged” by obligated person “clients.”¹⁷

The Dodd-Frank Act thus addresses advisors who offer services in the market for advice, such as intermediaries between the issuer and the market, unregulated market professionals, financial advisors, certain investment advisors, and third party marketers. The Act expressly excludes from the definition of “municipal advisor” employees of municipal entities. Nothing precludes the Commission from clarifying in rulemaking that “municipal advisor” also excludes employees and trustees of obligated persons. Indeed, the Commission has express statutory authority to exempt other categories of individuals from the definition of municipal advisor.¹⁸

3. College and University Employment Relationships Do Not Need SEC Supervision

Obligated persons need neither a burdensome registration requirement nor imposition of federal fiduciary duties to protect them from bad advice by their own employees. Officers and employees of non-profit organizations are already subject to extensive fiduciary duties, regulations, institutional conflict of interest policies, and codes of ethics. Their competence and good faith is monitored by their supervisors. Poor or unethical performance, in the infrequent instances in which it occurs, is addressed

¹⁴ 76 Fed. Reg. at 827.

¹⁵ Id. at 829.

¹⁶ See 76 Fed. Reg. at 865 & n.300 (predicting that 21,800 natural persons will register, including 16,800 investment advisors and/or broker dealers, 4,500 individuals employed at financial advisor firms, and 500 individuals employed at solicitation firms).

¹⁷ Municipal Securities Rulemaking Board, Request for Comment on Draft Interpretive Notice Concerning the Application of MSRB Rule G-17 to Municipal Advisors, MSRB Notice 2011-13 (Feb. 14, 2011), available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-13.aspx>.

¹⁸ See 15 U.S.C. § 78o-4(a)(4).

through a range of personnel actions, up to and including dismissal. SEC supervision of advice given by these employees to their employer is not needed.

College and university officers and other employees must adhere to comprehensive institutional conflict of interest policies and codes of ethics.¹⁹ Institutional business officers are also subject to a separate professional code of ethics.²⁰ Moreover, officers and employees are accountable to the institution's chief executive officer and ultimately to the board. The officers and board, in turn, have their own fiduciary duties to the organization, which include the duty to exercise oversight and to satisfy themselves that institutional financial personnel are competent and act in the best interests of the organization. The fiduciary duty of loyalty further requires institutional officers to act in the best interests of the institution.²¹ The institution's interests are "broadly defined" for these purposes; the duty of loyalty, for instance, extends to cases in which the officer has "a relationship with a party to the transaction that may reasonably be expected to affect the officer's judgment"²² Officers also have a duty to disclose information known to them that is material to the institution's affairs.²³

Given the broad coverage of these existing policies, regulations, and oversight mechanisms, there is no need for the SEC to regulate the relationship between college and university employees and the institutions. Too, SEC regulation here would deserve the public interest by deterring employees from offering candid views to institutional decision makers. Employees of obligated persons would be reluctant to speak about municipal financial matters if their opinions could constitute "advice" and require registration as a "municipal advisor." The Commission should therefore make clear that officers and employees of obligated persons are not "municipal advisors" when they act within the scope of their employment.

¹⁹ See, e.g., Vanderbilt University, Conflict of Interest and Commitment Policy (June 2, 2009), available at http://www.vanderbilt.edu/compliance/html/conflict_of_interest_policy.pdf; Boston University, Conflict of Interest Policy (Dec. 11, 2008), available at <http://www.bu.edu/ethics/conflict.pdf>.

²⁰ See National Association of College and University Business Officers, NACUBO Code of Ethics (Nov. 17, 2007), available at <http://www.nacubo.org/documents/about/NACUBOCODEofEthicsasamended-November1007.pdf>.

²¹ See American Bar Association, Model Nonprofit Corporation Act § 8.42(a) (3d ed. 2008); 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 844.10 (2010).

²² Fletcher, supra, § 837.60.

²³ See Model Nonprofit Corporation Act, supra, § 8.42(b).

4. Inconsistent Treatment of Trustees Is Unwarranted and Unwise

The considerations cited above regarding employees apply to trustees as well. ACE shares the concerns outlined more fully in the comment submitted by the Association of Governing Boards of Universities and Colleges. In addition to being inconsistent with the Dodd-Frank Act and unnecessary, treatment of trustees as municipal advisors would interfere with the governance of the institutions and deter highly qualified individuals from volunteering their time as trustees. The same is true for trustees and employees of university-affiliated hospitals, foundations, and other entities.

In its Release, the Commission discussed a possible rationale for excluding from the definition of “municipal advisor” elected trustees of municipal entities, such as public universities, but not excluding such entities’ appointed board members (except elected officials who serve ex officio). The Commission reasoned that the former are accountable to the public, whereas the latter are not. ACE disagrees with that rationale. Board members appointed by elected officials are accountable to those officials, who are accountable to the public. Moreover, all trustees of obligated persons, whether elected, appointed by a public official, or designated by a self-perpetuating board, are accountable under state law and various regulatory regimes to the institutions they serve. (Examples of such regimes are cited in the comment letter of the Association of Governing Boards of Universities and Colleges.) To subject members of the same governing board to different regulatory regimes, especially where those regimes serve the same ends, would advance no useful policy objective.

Similarly, there is no sound reason to regulate employees of private institutions while exempting employees of public institutions. Employees and officers of private universities perform the same functions as employees and officers of public universities. At both public and private institutions, for example, the chief financial officer is generally a key member of the executive team who reports to the president and assumes a strategic role in overall management of the entity. A chief financial officer generally has primary day-to-day responsibility for managing finance-related activities of an obligated person or municipal entity, including functions that relate to accounting, finance, forecasting, strategic planning, deal analysis, and negotiations. Because the essential duties of a chief financial officer or other officer are the same whether he or she is employed at a private university or a public university, there is no sound reason to treat employees differently based on the legal status of their employer.

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The proposed rule fosters needless and harmful ambiguity as to whether trustees and employees of private colleges and universities, certain trustees of public colleges and universities, and trustees and employees of university-affiliated organizations are “municipal advisors.” We respectfully request that the Commission construe the Dodd-Frank Act to exclude persons who act in those capacities from the definition of “municipal advisor.”

We would be pleased to discuss these matters further with any member of the Commission staff. Thank you for your attention to these views.

Sincerely,



Molly Corbett Broad
President

MCB/ldw

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Council for Advancement and Support of Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities