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April 11, 2011

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MSRB Notice 2011-14 Fiduciary Duty of Municipal Advisors
MSRB Notice 2011-13 Fair Dealing Obligations of Municipal Advisors
MSRB Notice 2011-12 Underwriters of Municipal Securities

Dear Mr. Smith:

The American Federation of State, County and Municipal Employees ("AFSCME") is the largest union in the AFL-CIO representing 1.6 million state and local government, health care and child care workers. AFSCME members participate in over 150 public pension systems whose assets total over $1 trillion. In addition, the AFSCME Employees Pension Plan (the "Plan") is a long-term shareholder that manages $850 million in assets for its participants, who are staff members of AFSCME and its affiliates.

AFSCME is pleased to have the opportunity to voice support for the rules proposed by the Municipal Securities Rulemaking Board ("MSRB") which delineate the fiduciary duty of municipal advisors with respect to their municipal entity clients, the obligations of municipal advisors to deal fairly with their current or prospective clients, and the requirements that underwriters have towards issuers of municipal securities. We applaud the efforts of the MSRB to protect municipal entities from self-dealing and other deceptive practices. Strong protections are required for municipal entities.

During consideration of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), AFSCME strongly supported the inclusion of provisions establishing the strongest possible market reforms, oversight and transparency for the "shadow markets" and other major provisions addressing corporate governance and investor protection. Investor protections important to AFSCME members include new market reforms addressing the sale of derivatives products and strategies, duties owed by firms and individuals offering investment advice, greater transparency for the

advisors to hedge funds and private equity investments, and improved safeguards for municipal markets.

In each of these rulemaking contexts, vendors of various investment products and services have raised concerns that new obligations of disclosure or other investor protection remedies are not workable. Perhaps unsurprisingly, many Wall Street firms and their different lobbying entities argue that new investor protections under Dodd Frank may also trigger obligations under federal pension law. The implementation of market reforms requires both coordinated rulemaking designed to facilitate the operation of well-functioning markets that deserve investor confidence, and a big picture view that prevents evasion by those who would delay and dilute market reforms. We urge the MSRB to keep both of these in mind.

One of the areas targeted by tactics of delay and misdirection is the definition of "investment advice." During passage of Dodd-Frank, workers, seniors, consumers, savers, and investors joined together to urge that the law be strengthened regarding the responsibilities of those who give investment advice, that it be "clarified" where doubt had been raised, and that it be expanded to areas – for example, over-the-counter derivatives – where it has become painfully clear that restrictions on sound market requirements were ill-advised, to say the least.

Entities that give investment advice sell both advice and products (or products and services) bundled together. These firms and their subsidiaries or affiliates sell advice, and products to "implement" that advice, in more than one market. Distinguishing advice from the products it recommends is hard to do. Identifying the accountable provider – the firm with the household name or the call center employee who answers the phone – is hard to do. Distinguishing the price of advice from the price of the product or service – and further distinguishing those prices from the amount "at work in the market" – is hard to do. Distinguishing who got paid what and works under what incentives is hard to do. Distinguishing when the worker or pension plan trustee or buyer responsible for other people's money is talking to an advisor, or another kind of provider, is hard to do. Knowing which hat is being worn by which affiliate is hard to do.

After reviewing the comments submitted by large financial firms to the different regulators, and the efforts to create cover for rolling back reforms one more time through the same old tricks of deregulating and defunding, it is hard to imagine that this difficulty is not exactly their goal. Regulators must be steadfast in order to cut through the smokescreen which permits financial firms to continue operating with serious conflicts of interest, to the detriment of investors.

In spite of the great overlap in the entities that provide advice and products (or strategies) in different markets, Wall Street firms argue that the differences are

huge and that any potential overlap in duties must be avoided. They prefer to redefine – or not define – "advice" anew in every market and every context. They limit the definition of the recipients eligible to receive the duty that comes with providing advice. They work to limit the types of products and strategies to which any advice-related duty could apply. They work to craft language limiting the application of any duty.

The harms to be avoided are always alleged to be these: too much disclosure risks seller liability; sellers withdrawing from the market; competition forces diminishing; investor choice narrowing; and prices rising. So, the argument goes, too much disclosure is bad for investors. We find this difficult to believe, and we urge you to take a very hard look at this logic.

When pension assets are involved, firms that seek to avoid their obligations warn that too much information disclosed by service providers may result in misunderstandings and promote bad decisions. It may intrude on proprietary information (meaning they have no obligation to tell clients), it certainly will cost sellers to disclose more, and they certainly would have to bill investors for that.

The challenges around implementing effective fiduciary duties are clearly present in the ongoing efforts at the MSRB. Dodd-Frank directs the MSRB to establish rules with respect to municipal advisors that "prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients." And MSRB Notice 2011-14 requesting comment on draft guidance on a fiduciary duty of municipal advisors attempts to do that.

Yet the text itself warns that this guidance was developed based on the statutory language of Dodd-Frank, and that it was developed "without regard to any interpretation of that term proposed by the SEC in its proposed permanent registration rule for municipal advisors", and that MSRB may revise its own proposed guidance and may seek additional comment. Furthermore, the SEC proposal does not define exactly what constitutes the "provision of advice" though it gives examples of the types of "advice" that would trigger "municipal advisor" status and a duty to register under the proposal. At this time there is little that appears definitive. Careful review of the whole record – and continued input - will be very important.

MSRB noted several very important issues in the comment it submitted to the SEC regarding the definition of municipal advisor for purposes of SEC registration. Given the importance of these issues to AFSCME members, and the interplay with the scope of the fiduciary duty on municipal advisors addressed in this rulemaking proposal, we would like to address them here.

First, the MSRB noted that the SEC's proposed rule would benefit from a wording change to narrow the exclusion from municipal advisor registration for CFTC-Registered Commodity Trading Advisors in order to clarify that the exclusion "is available only when the registered commodity trading advisor is providing advice relating to swaps (as defined in Section 1a(47) of the Commodity Exchange Act and Section 3(a)(69) of the Exchange Act, and the rules and regulations thereunder." In other words, "the exclusion would not be available to such registered commodity trading advisors engaged in any other municipal advisory activities, including providing advice relating to any municipal derivative other than a swap".

The MSRB also provides several additional comments that show the complexity of the connection among investment advice obligations:

> The MSRB notes that Section 913 of Dodd-Frank and the effort to hold brokers to a fiduciary standard when giving advice comes into play in this marketplace and that "the Commission may, by rule, provide that the legal standard for securities transactions effected by broker-dealers with municipal entities shall be the same as the standard applicable to investment advisers under the Investment Advisers Act and, pursuant thereto, could replace the existing suitability standard with a fiduciary standard." SIFMA and others have urged that the SEC be given time to act first.
>
> The MSRB further noted its belief that public defined contribution pension plans fall squarely within the description of "investment strategies" and investment activities that trigger SEC registration of municipal advisors. The MSRB also "believes it would be appropriate to include public defined benefit pension plans as well, since they share many of the same potential direct or indirect impact on third-party beneficiaries and generally are exempt from the protections afforded by the Employee Retirement Income Security Act (ERISA) to private pension funds. Thus, in general, investment strategies would include such strategies relating to investments by all types of public pension funds other than broker-dealer recommendations "about a transaction such broker-dealer itself effects that is subject to federal broker-dealer suitability and related business conduct standards."
>
> Finally, the MSRB notes its reading of the language and legislative history of Dodd-Frank as "strongly indicative of a Congressional intent that advice by advisors to municipal entities, particularly in but not necessarily limited to the context of a municipal securities offering, was intended to be regulated under a single comprehensive municipal advisor regulatory construct", under which CFTC would be responsible for "comprehensive regulation . . . of the swap activities of swap dealers and major swap participants (including advice on swaps provided to special entities)", and MSRB would provide for

"comprehensive regulation . . . of most typical non-dealer advisors to municipal entities (including advisors, other than swap dealers and major swap participants, providing advice on municipal derivatives).'

The MSRB says that strengthened coordination among the MSRB, the SEC and the CFTC would promote a more efficient and effective implementation of the Dodd-Frank Act and would reduce the compliance burden on market participants. This includes small municipal advisors who might provide advice to an issuer on a variable rate demand offering (VRDO) involving an interest rate swap which could be subject to MSRB rules as a municipal advisor in connection with advice on the new issue offering, while simultaneously becoming subject to distinct CFTC rules as a commodity trading advisor in connection with the swap. We again encourage such coordination among the agencies.

Another danger to avoid is that some sellers will carve themselves out of disclosure duties, that they will succeed in scaling back the reach of market reforms and staggering the effective dates, and fall artfully between the cracks. This would leave investors in a "buyer beware" bind, which might be filled by small independent advisors. These small firms would end up stepping into the disclosure breach and facing potential responsibility for unearthing the truth that sellers did not reveal.

The MSRB strongly recommends coordination. That is essential – not delay but real coordinated rulemaking. As a part of that process, both during rule development and after specifics are finalized, the MSRB, the SEC and the CFTC should undertake a series of efforts – similar to those typical of the Department of Labor's ERISA regulators - to issue not only clear explanations of their formal guidance but also informal guidance in the form of Frequently Asked Questions, regional meetings and internet webinars and other forms of explanation that help the market participants – including workers, pension participants, investors, and pension trustees – make informed decisions, knowing both the players and the rules.

Another MSRB Notice, 2011-12, requests comments on proposed interpretive guidance regarding the duty of dealers in their interactions with municipal entities as underwriters of municipal securities, "including integrally-related activities, such as interest rate swap transactions and purchases of defeasance escrow securities". The MSRB states that this duty to deal fairly requires, among other things, disclosure of all material risks and characteristics of the financing of complex municipal securities (such as a VRDO with a swap), as well as disclosure of any incentives for the underwriter to recommend the financing (e.g., third-party payments, certain credit default swaps, and profit-sharing arrangements with investors).

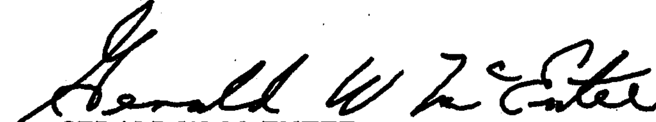
The duty of fair dealing here is also defined as including "an implied representation that the price an underwriter pays to an issuer bears a reasonable relationship to the prevailing market price of the securities. An underwriter's direct and indirect compensation for a new issue must not be excessive (i.e., disproportionate to the nature of the underwriting and related services performed)."

It seems reasonable to anticipate that this notice, too, will require coordination to ensure effective implementation and investor protection. Only that kind of coordinated implementation will fulfill the promise of Dodd-Frank and build back greater trust in the integrity of the financial markets and greater stability in the economy overall.

* * *

We appreciate the opportunity to express our views on this matter. Should you have questions regarding our comments, please contact Lisa Lindsley at (202) 429-1275.

Sincerely,



GERALD W. McENTEE
International President