February 22, 2011

VIA ELECTRONIC MAIL

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

RE: File Number S7-45-10; Registration of Municipal Advisors; 76 Federal Register 824, January 6, 2011

Dear Ms. Murphy:

The American Bankers Association (ABA)[1] and the ABA Securities Association (ABASA)[2] and The Clearing House Association L.L.C.[3] (collectively, the Associations) appreciate the opportunity to comment on the notice of proposed rulemaking issued by the Securities and Exchange Commission (Commission) to establish a permanent registration system for municipal advisors under Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA).[4] Our members provide a full range of products and services to state and local governmental bodies (collectively, municipalities) including deposit taking, cash management, lending, credit facilities, employee benefit, trust, securities processing and agency services, advisory services, and capital market services. In addition, many bank employees serve their communities through appointments to or volunteering for local boards and commissions in capacities which may include providing advice with respect to municipal financial products, which advice, unfortunately, would be unnecessarily and inappropriately captured by the proposed rule.

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[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

[2] ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

[3] Established in 1853, The Clearing House Association L.L.C. (THC) is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. TCH is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs, and white papers the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. See TCH's web page at www.theclearinghouse.org.

[4] Pub. L.111-203 (2010).

Section 975 establishes a system of dual registration with the Commission and the Municipal Securities Rulemaking Board (MSRB) that will require covered municipal advisors to comply with rules of business conduct, ongoing education requirements, and a fiduciary duty to their municipal entity clients. It appears to have been intended primarily to regulate financial advisors to municipalities that have not been previously regulated. The Associations support the goal of ensuring that market participants providing investment advice to municipalities are appropriately regulated. However, we believe as drafted, the proposal goes far beyond legislative intent or public policy need by purporting to regulate already-regulated traditional banking products, such as deposit, cash management and lending activities, and trust and custody products with or on behalf of municipalities. As discussed more fully below, we strongly believe that such products and services are wholly outside the ambit of Section 975. Moreover, they already are subject to a comprehensive program of regulation and examination under federal banking laws.

We believe that the Commission must state clearly that traditional banking products and services are not covered by Section 975. Failure to do so will likely force banks to increase the cost of, limit, or otherwise make less available their services to municipal entities as a result of this new mandate to register as municipal advisors, along with the attendant ongoing compliance costs and burdens for the banks and for their municipal customers. Indeed, we are aware of community banks that are already being driven to reevaluate their services to their local municipalities in light of the proposed rule.

Section 975 exempts from registration as municipal advisors, firms and individuals that are registered as investment advisers under the Investment Advisers Act of 1940 (Advisers Act). However, banks that are not required to register under the Advisers Act pursuant to a statutory exemption would nevertheless be caught by the planned implementation of Section 975. Accordingly, with respect to such bank advisory activities under the Advisers Act, we urge the Commission to provide a comparable exemption from the requirements of Section 975 for advisory activities that would be exempt were banks required to register as advisers under the Advisers Act.

In addition, we believe the Commission's proposal to exclude appointed members of a municipality's governing body from the definition of "employee of a municipal entity," thereby requiring registration of such appointed members as municipal advisors, will significantly disadvantage local governments that rely on knowledgeable citizens with valuable financial skills to provide much-needed expertise to their communities.

Furthermore, we would emphasize that this proposal, as drafted, is inconsistent with the spirit of President Obama's initiative to avoid burdensome regulation that would impede economic growth and job creation. We believe, in fact, that this proposal will significantly penalize important operations of local municipalities and the people who rely upon them.

DISCUSSION

Section 975, which amends Section 15B of the Securities and Exchange Act of 1934 (Exchange Act), requires registration as a "municipal advisor" of any entity or person that provides advice to a municipal entity with respect to "municipal financial products" or the issuance of municipal securities.[5] The statute defines "municipal financial products" as:

- Municipal derivatives;
- Guaranteed investment contracts; or
- Investment strategies.

The term "investment strategies" is further defined by the statute to "include plans or programs for the investment of the proceeds of municipal securities . . . and the recommendation of and brokerage of municipal escrow investments."[6]

Thus, the statutory requirement to register as a municipal advisor is predicated on the provision of "advice" with respect to certain municipal derivatives and investment products or investment activities. Importantly, the source of a municipality's funds is referenced only with respect to the investment of *proceeds* of municipal securities, not any other funds of a municipality which may be derived from tax collections, employee pension plan contributions, or from families' contributions to state 529 plans, etc.

1. Traditional bank products and services are not covered by Section 975.

In the regulatory proposal, the Commission has expanded the definition of "investment strategies" to encompass any funds "held" by a municipal entity.[7] Thus, under the proposal, a municipal advisor is any entity or person that provides advice with respect to any funds held by a municipality, *regardless of whether such funds are related to the issuance of municipal securities or investment of the proceeds thereof.* Having defined "investment strategies" so broadly, the Commission then seeks comment on whether it should provide a number of exemptions from registration, including whether it should provide an *exemption* for advice to municipal entities with respect to bank deposits and other traditional bank products and services. As discussed below, the Associations strongly believe that Congress did not intend to require duplicative regulation of activities already subject to comprehensive supervision and examination. To the extent these advisory activities involve traditional bank products as defined in the Gramm-Leach-Bliley Act (GLBA) and codified in the Exchange Act,[8] we think advice with respect to such products and activities need no exclusion beyond the recognition that they are already outside of the scope of Section 975. Given the Commission's public proposal, however, a reaffirmation of that point by the Commission will now be necessary.

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[5] Sec. 975(a)(1)(B).
[6] Section 975 (e)(3).
[7] Exchange Act Release No. 34-63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011).
[8] Pub. L. 106-102 (1999) codified at 15 U.S.C. § 78c(a)(4)(i)-(x).

We believe the proposal fails to recognize the many touch points that banks have with governmental entities that simply have no connection to municipal securities or "municipal financial products" as defined in Section 975 or intended by Congress to be reached by the provision. Deposit accounts, cash management products, loans, and trust and custody products are but four broad types of such products and services. All are extensively regulated, and the institutions providing them are supervised and regularly examined by the federal bank regulators. To the extent these products are offered within a bank trust department, that department must adhere to the higher standards of fiduciary and other governing law and are regularly examined in accordance with such requirements. In addition, many bank products and services offered to municipalities are overseen by state treasurers. To impose on these traditional bank products and services an overlay of securities law regulation when offered to municipalities serves no public purpose.

The inadvisability of the Commission's interpretation is demonstrated by the fact the proposed rule would require registration of tellers or branch managers who might merely recommend an interest-bearing deposit account, or a sweep account to a municipal official. Moreover, this registration requirement would apply despite the fact that such discussions occur only on an occasional, incidental basis. Surely Congress could not have intended this result. In the preamble to the proposal, the Commission stated that "Congress included in the statutory definition of 'municipal advisor' a limited number of exclusions from the definition, and such exclusions did not include banks in any capacity.[9] However, this statement demonstrates that the Commission has seriously misconstrued Congressional intent in enacting Section 975. Rather, the Associations strongly believe that the very fact that banks are *not* addressed in Section 975 reflects the fact that Congress did not even consider banks to be covered by its provisions.

This view is supported by the structure of the statute and its exceptions. We believe Congress' goal was to regulate entities whose municipal advisory activities were not subject to regulation and to do so by imposing only a single regulatory program on such activities. Heretofore unregulated financial advisors would be regulated by the Commission and MSRB. By contrast, entities already subject to regulation would not need to be required to register, as there was no regulatory gap to fill. For example, municipal advice provided by registered investment advisers is already subject to regulation and, therefore, an exemption from registration is warranted. However, to impose on bank municipal advisory activities the Commission/MSRB regulatory scheme would be to add a second and different layer of regulation on top of federal bank regulation of those advisory activities, unlike the path followed for registered investment advisers.

The recordkeeping and reporting requirements established under the bank regulatory regime, which have long been in place, are tailored to bank structure, capital requirements, and banking activities. The municipal advisor regulatory scheme, by contrast, is a securities-based regime based on traditional investment adviser structures. The cost of complying with a markedly different recordkeeping and reporting system would be substantial and would necessarily be passed on to customers. Further, because of the dispersion throughout a bank of business with municipalities, the entirety of a bank's recordkeeping would become subject to Commission oversight, a result so unnecessarily duplicative of the banking agencies' functions that it begs the question as to what public purpose can be served by such excessive reach.

[9] Exchange Act Release 34-63576, 76 *Fed. Reg.* 824, 835 (Jan. 6, 2011).

Rather than help municipalities, such duplicative, unnecessary and burdensome regulation will ultimately harm state and local governments by raising costs or threatening the availability of important financial services.

Given that Section 975 is an amendment to the Exchange Act, which is intended to regulate transactions in the U.S. securities markets and the conduct of participants in those markets, ABA believes it wholly unwarranted to attempt to encompass advice with respect to traditional bank products and services into the scope of activities covered by Section 975.

In the Gramm-Leach-Bliley Act, Congress determined that banks should be able to continue to engage in traditional bank activities, already comprehensively regulated under the federal banking laws, without registering with the Commission as broker-dealers and subjecting themselves to the supervisory, examination and recordkeeping regime applicable to securities brokers and dealers. Indeed, Congress codified that determination in Section 3(a)(4)(B)(i)–(x) of the Exchange Act[10] by providing an express exemption from broker-dealer registration for a bank that effects transactions in identified banking products or other enumerated activities, including deposit-taking and lending, sweep accounts, trust and fiduciary, investment adviser, safekeeping and custody, municipal securities, and transfer agency activities, as later implemented in Regulation R.

Neither the statutory language of Section 975 nor its legislative history indicate that Congress intended to upend the determinations concerning traditional bank activities that it made in 1999. Indeed, we believe Section 975 was primarily directed at establishing a regulatory scheme for persons *unregulated* with respect to providing advice to municipalities about certain complex transactions, namely, municipal derivatives, guaranteed investment contracts, the issuance of municipal securities, or investment strategies with respect to the proceeds of such issuances.[11] Accordingly, in any final rule, the Commission should state clearly that neither Section 975 nor its implementing regulation reach traditional bank products and services, including but not limited to those defined in Section 3(a)(4)(B)(i)–(x) of the Exchange Act.

2. The Commission should clarify definitional issues in the proposal.

a. Definition of "advice"

As noted above, the statutory requirement to register as a municipal advisor is predicated on the provision of (1) "advice" to or on behalf of a municipal entity (2) with respect to municipal derivatives, guaranteed investment contracts, investment strategies or the issuance of municipal securities. The Associations believe that there are circumstances where it is clear that an institution is providing "advice" to a municipality, as in the case where there is an advisory contract between an institution and a municipality. Other situations are far less clear, however, and we urge the SEC to provide guidance to assist institutions in determining whether registration is required.

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[10] 15 U.S.C. §78c(a)(4)(i)-(x).

[11] *See Enhancing Investor Protection and the Regulation of Securities Markets—Part II: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 71 (2009) (statement of Ronald Stack, Chair, Municipal Securities Rulemaking Board) ("[S]ome of the problems . . . that [the MSRB has] encountered are that there are many participants in [the municipal securities] market who right now are *unregulated*: financial advisors, swap advisors, investment advisors. They are not registered with the SEC, and we have no power to regulate them."); *Id.* at 175-76. *See also,* Municipal Securities Rulemaking Board, *Unregulated Municipal Market Participants: A Case for Reform,* April 2009.

The term "advice" is undefined in both Section 975 and the proposal. The commonly understood definition of "advice" is a recommendation to act. We believe strongly that for conduct to trigger the registration requirement, the communication to a given municipal entity must constitute a "recommendation" that the entity take an action that is sufficiently particularized as to be distinct from normal sales efforts. Thus, absent such a recommendation that is particularized to the needs of the municipality and is distinct from normal sales activities, registration should not be required.

Thus, the Associations believe the term "advice" for purposes of municipal advisor regulation should not cover the following general situations, among others, because the communication does not include a recommended course of action:

- Providing to a municipality the investment options available from the financial institution;
- Responding to requests for proposals from municipal entities for investment products offered by the bank;
- Providing and negotiating the terms on which a financial institution is generally prepared to enter a transaction;
- Providing to a municipal entity and negotiating the terms upon which a bank would purchase for the bank's own account securities issued by the municipal entity, including without limitation, bond anticipation notes, tax anticipation notes, revenue anticipation notes, or longer-term obligations;
- Directing or executing purchases and sales of securities or other instruments for or on behalf of municipalities with respect to funds in an account in accordance with predetermined investment criteria or guidelines;[12]
- Providing suggestions, opinions or even recommendations regarding general financial or market information or information regarding investments or instruments, that are not particularized to the needs or circumstances of the municipality.

As noted above, we believe that banks that provide letters of credit or similar credit enhancements or liquidity facilities for a municipal bond issuance are providing a traditional banking product that is not within the scope of Section 975. A bank may condition the provision of such products on certain transaction characteristics that could be deemed to be "structuring" a bond transaction. However, such activity is (and is generally understood to be) not directed at benefitting the municipality but rather ensuring that the transaction structure will be acceptable for the bank to put its capital at risk. Accordingly, the Associations do not believe that providing to the municipality the terms on which a bank would be willing to provide a letter of credit or similar product is making a recommendation, and therefore it should not be considered "advice" under Section 975.

[12] For example, banks that provide corporate trust or agency services to municipalities in connection with bond issuances may provide lists of investments permitted under the transaction documents without recommending any particular investment. In such cases, the mere provision of investment options should not trigger the registration requirement.

b. Investment Strategies

Section 975 defines "investment strategies" as including "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."[13] The Associations believe the term "investment strategy" by definition contemplates a series of steps to reach a particular investment goal. Similarly, a "plan or program" for the investment of proceeds would be analogous to a financial plan, in other words, a series of actions to be taken to achieve a particular investment goal.

The Commission's proposal would define the term "investment strategies" to include plans, programs or pools of assets that invest funds *held* by or on behalf of a municipal entity [emphasis added].[14] In the proposal, the Commission states that "it does not believe that it was Congress' intent to limit the requirement to register as a municipal advisor only to those persons that provide advice with respect to plans or programs for the investment of proceeds from municipal securities."[15] By doing so, however, the Commission has expanded the scope of the registration requirement from advice with respect to municipal products to advice with respect to any funds held by a municipality. As discussed above, the Associations believe such an interpretation is unsupported by the statute and would overlay on the comprehensive program of bank regulation, supervision, and examination a wholly unnecessary securities regulatory scheme. The result, far from being in the public interest, would disserve municipalities and their taxpayers by decreasing the availability of services and/or raising the cost of advisory and other services. The Associations believe the Commission should withdraw this unwarranted interpretation.

The Commission further states that its approach "avoids any need to trace the investment of proceeds of municipal securities commingled with other public funds. . ."[16] While tracing proceeds may present difficulties, those difficulties are no justification for the expansion of the statute to all monies "held" by municipalities in contravention of the statutory language. Indeed, common sense would dictate that proceeds from a bond issuance cease to be "proceeds" after they are initially invested *unless* subsequent investments are part of the "plan or program" for the investment of such proceeds established at the time of the initial investment. Otherwise, once commingled with other public funds, bond proceeds should lose their characteristic as "proceeds."

Indenture trustees and fiscal and paying agents generally receive proceeds of municipal bond issuances pursuant to the indenture and fiscal and paying agreements as well as other documents governing the transaction. These trustees and agents act solely in a ministerial capacity following instructions expressly set forth in the indenture or agreement. These instructions often require placement of proceeds in a limited number of highly liquid types of investments specified in the governing documents. Although corporate trustees or fiscal and paying agents may provide the municipal issuer with products offered by the bank that meet the required specifications, no recommendations or suggestions are made about which investment to choose. That determination is made by the issuer. The Associations seek confirmation from the Commission that such corporate trust activities do not constitute "advice" which would trigger registration as municipal advisors.

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[13] Section 975 (e)(3).
[14] Proposed Rule 15Ba1-1(b), 76 *Fed. Reg.* 824, 881 (Jan. 6, 2011).
[15] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011).
[16] Exchange Act Release No. 63576, 76 *Fed Reg.* 824, 831 (Jan. 6, 2011).

3. The Commission should adhere to the statutory exception for registered investment advisers.

Section 975 excludes from registration as municipal advisors, "any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice."[17] The proposal, without justification, qualifies the exclusion by limiting it to the provision of advice for which registration would be required. As the Commission is aware, not all "investment advice" requires registration under the Advisers Act, such as when an investment adviser provides advice regarding investments that are not securities. As a result, a registered investment adviser would be required to segregate its activities into those that are exempt and those which require registration as a municipal adviser and follow potentially conflicting rules.

4. Banks that are exempt from registration under the Advisers Act should similarly be exempt from registration as municipal advisors.

Section 975 exempts from registration as a municipal advisor, any investment adviser registered under the Advisers Act or persons associated with such investment advisers who are providing investment advice (investment adviser exemption).[18] Section 975 does not, however, address banks that would be subject to such registration but for the exemption from registration under the Advisers Act. Congress provided the bank exemption in the Advisers Act because it believed that bank advisory activities were so extensively regulated as to not require supervision or examination by the Commission. That justification is just as compelling in the context the purposes of Section 975.

As noted above, from the structure of Section 975 and its exemptions, we believe that Congress intended to impose only a single regulatory scheme on unregulated municipal advisors and that it did not intend to add an additional layer of regulation onto highly regulated entities. Thus, to impose on bank municipal advisory activities the Commission/MSRB regulatory scheme would be to add a second and different layer of regulation on top of federal bank regulation of those advisory activities

Accordingly, the Associations urge the Commission to extend the investment adviser exemption to banks that are exempt from Adviser Act registration. Doing so, we believe, is fully consistent with the Commission's authority in Section 975(a)(4) to exempt any class of municipal advisors if the exemption is consistent with the public interest, the protection of investors and the purposes of Section 15B.[19] We believe that it is not in the public interest to overlay onto the comprehensive regime of bank regulation, a separate securities regulatory scheme. To do so will provide no greater protection for municipalities, but will, in fact, disserve their interests by raising costs and reducing availability of services.

[17] Section 975(e)(4)(C).
[18] *Id.*
[19] 15 U.S.C. 78o-4(a)(4).

5. Banks should be permitted to choose how to structure municipal advisory activities.

The Commission seeks comment on whether it should permit "*only* separately identifiable departments or divisions of a bank (SIDs)" [emphasis added]. Based on the discussion above, the Associations believe that no SID should be necessary. Nonetheless, we believe strongly that the Commission should not dictate the structure of a bank's municipal business. Rather, banks should be free to choose the manner in which their municipal advisory activities are structured to best fit their business plan, not because of an arbitrary regulatory determination.

We note, however, given the dispersion of municipal advisory activities throughout the bank, banks may not be able to consolidate the activities in a *single* department or division as is contemplated in the analogous language for municipal dealer SIDs. As a result, we do not think the referenced language is workable.

6. The SEC should reiterate that an adviser to a pooled investment vehicle is not a municipal advisor.

Under the proposal, a pooled investment vehicle in which one or more municipal entities are investors, along with other non-municipal investors, would not be deemed to be "funds held by or on behalf of a municipal entity." Therefore, an advisor to such a pooled fund would not be required to register as a municipal adviser.[20] We support this interpretation, which is based on long-held interpretations under the Advisers Act.[21] We urge the Commission to reiterate this position in its final rules and clarify that this interpretation applies to collective investment funds.

7. The Commission should adopt a *de minimis* exception.

Section 975 contemplates that providing advice to a municipal entity on even a single occasion would require registration as a municipal advisor. However, adopting such a strict interpretation of the statute would, we believe result in registration by numerous entities and individuals whose covered advisory activities are infrequent and not in the ordinary course of business but that would register out of an abundance of caution. To remedy this potential over-regulation, the Associations urge the Commission to adopt a *de minimis* advisory threshold, both in terms of the number of times that a person provides advice and the amount of funds with respect to which it provides advice.

[20] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 830 (Jan. 6, 2011).
[21] S*ee e.g.*, *Goldstein v. SEC*, 451 F. 3d 873, 879-80 (D.C. Cir. 2006).

8. Appointed members of a municipality's governing board should be deemed to be "employees" of the municipality.

Section 975 excludes from the term "municipal advisor" employees of a municipal entity. Under the Commission's proposal, an "employee" of a municipality includes elected officials, but not appointed officials, of a municipal entity's governing bodies because appointed officials are not directly accountable for their performance to the citizens of the municipality.[22]

Many bank employees act as citizen volunteers offering their financial expertise for the benefit of their communities. In very small communities, local bankers may be the only source of much-needed financial expertise for city or county officials. Indeed, these beneficial activities have been recognized by the federal bank regulators who have provided credit under the Community Reinvestment Act for such volunteer efforts.[23] As the Commission is aware from the numerous letters already received from municipalities, citizens who are appointed to local boards provide significant benefits to their communities. If these volunteers were to be required to register as individuals with the Commission and the MSRB, and be subject to fiduciary obligations, ongoing education and reporting and recordkeeping requirements, and examination by the Commission, it is highly likely that many would be reluctant to subject themselves to these draconian requirements for a volunteer activity. Losing these citizen volunteers will be a clear harm to municipalities with no concomitant benefit. For these reasons, the Associations urge the Commission to include appointed officials in the exclusion for employees from the definition of "municipal advisor."

CONCLUSION

For the reasons stated above, the Associations believe that Section 975 is the result of Congress' intent to impose a regulatory regime on municipal advisory activities that were not previously regulated. We believe further that the absence of references to banks in Section 975 reflects an absence of intent to regulate bank products and services to municipal customers in recognition of the existing, comprehensive supervision and examination by federal and state bank regulators. To overlay onto traditional bank activities an additional, markedly different securities law regulatory regime and an additional regulator is not in the public interest. It will not provide additional protections for municipal governments, but rather will increase the cost and impair the availability of bank products and services to those bodies. Accordingly, the Associations urge the Commission to confirm unambiguously that traditional banking products and services are not within the scope of Section 975.

Consistent with this view, we further urge the Commission to provide an exemption from registration as municipal advisors to banks that would be required to register as investment advisers under the Advisers Act, but for the statutory exemption from registration. We also urge the Commission to adhere to the scope of the statutory exemption in Section 975 for registered investment advisers.

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[22] Exchange Act Release No. 63576, 76 *Fed. Reg.* 824, 834 (Jan. 6, 2011).

[23] *See, e.g.,* March 2010 Interagency Questions and Answers Regarding Community Reinvestment, .12(i) Community development service, 75 *Fed. Reg.*11642 at 11650 .

Finally, we reiterate our strong belief that this proposal, as drafted, is inconsistent with the spirit of President Obama's initiative to avoid burdensome regulation that would impede economic growth and job creation. We believe, in fact, that this proposal will significantly penalize important operations of local municipalities and the people who rely upon them.

As always, the Associations and our members remain available to discuss these positions with the Commission and staff throughout their consideration of the proposal. In the meantime, if you have any questions on the foregoing, please contact ABA's Cris Naser at 202-663-5332 or the undersigned.

Sincerely,

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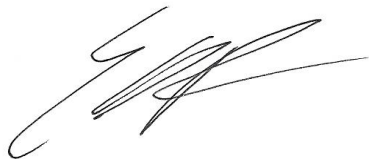

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