

112TH CONGRESS
2D SESSION

S. 3620

To amend the Securities Exchange Act of 1934 to clarify provisions relating to the regulation of municipal advisors, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21, 2012

Mr. WICKER introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To amend the Securities Exchange Act of 1934 to clarify provisions relating to the regulation of municipal advisors, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. REGISTRATION OF MUNICIPAL SECURITIES**
4 **DEALERS.**

5 Section 15B(a)(1)(B) of the Securities Exchange Act
6 of 1934 (15 U.S.C. 78o–4(a)(1)(B)) is amended by strik-
7 ing “or on behalf of”.

1 **SEC. 2. MUNICIPAL SECURITIES RULEMAKING BOARD;**
 2 **RULES AND REGULATIONS.**

3 Section 15B(b)(2)(L) of the Securities Exchange Act
 4 of 1934 (15 U.S.C. 78o-4(b)(2)(L)) is amended—

5 (1) in clause (iii), by striking “and” at the end;

6 (2) in clause (iv), by striking the period and in-
 7 serting “; and”; and

8 (3) by adding at the end the following:

9 “(v) not regulate as a municipal advi-
 10 sor the activities of a person referred to in
 11 subparagraph (C) of subsection (e)(4), to
 12 the extent that such activities are de-
 13 scribed under such subparagraph.”.

14 **SEC. 3. DISCIPLINE OF MUNICIPAL SECURITIES DEALERS;**
 15 **CENSURE; SUSPENSION OR REVOCATION OF**
 16 **REGISTRATION.**

17 (a) IN GENERAL.—Section 15B(c)(1) of the Securi-
 18 ties Exchange Act of 1934 (15 U.S.C. 78o-4(c)(1)) is
 19 amended to read as follows:

20 “(1) No broker, dealer, or municipal securities
 21 dealer shall make use of the mails or any means or
 22 instrumentality of interstate commerce to effect any
 23 transaction in, or to induce or attempt to induce the
 24 purchase or sale of, any municipal security, and no
 25 broker, dealer, municipal securities dealer, or munic-
 26 ipal advisor shall make use of the mails or any

1 means or instrumentality of interstate commerce to
2 provide advice to or on behalf of a municipal entity
3 or obligated person with respect to municipal finan-
4 cial products, the issuance of municipal securities, or
5 to undertake a solicitation of a municipal entity or
6 obligated person, in contravention of any rule of the
7 Board. A municipal advisor, when acting pursuant
8 to an engagement described in subsection
9 (e)(4)(A)(i), and any person associated with such
10 municipal advisor, shall be deemed to have a fidu-
11 ciary duty with respect to such engagement to any
12 municipal entity for whom such municipal advisor
13 acts as a municipal advisor, and no municipal advi-
14 sor may engage in any act, practice, or course of
15 business which is not consistent with such municipal
16 advisor's fiduciary duty or that is in contravention
17 of any rule of the Board. In issuing regulations to
18 carry out the previous sentence and subsection
19 (b)(2)(L)(i), the Board shall—

20 “(A) require that a municipal advisor act
21 in accordance with its fiduciary duty to its mu-
22 nicipal entity clients, but only in connection
23 with those specific activities involving such mu-
24 nicipal entity client described under subsection

1 (e)(4)(A)(i) (and not excluded under subsection
 2 (e)(4)(C));

3 “(B) specify when such duties begin and
 4 terminate in relation to such activities; and

5 “(C) not prohibit principal transactions by
 6 municipal advisors or the receipt of compensa-
 7 tion based on commissions or other standard
 8 compensation in relation to the purchase or sale
 9 of a security or other instrument (including de-
 10 posit or foreign exchange), except that the
 11 Board—

12 “(i) may issue rules requiring a mu-
 13 nicipal advisor to only engage in such
 14 transactions or receive such compensation
 15 in a manner that is consistent with the
 16 municipal advisor’s fiduciary duty; and

17 “(ii) may prohibit a municipal advisor
 18 that has been engaged to provide advice
 19 with respect to an underwritten offering of
 20 securities from concurrently acting as an
 21 underwriter of such offering.”.

22 (b) TECHNICAL CORRECTION.—

23 (1) IN GENERAL.—Section 975(c)(5) of the
 24 Dodd-Frank Wall Street Reform and Consumer Pro-
 25 tection Act is amended to read as follows:

1 “(5) in paragraph (4), by inserting ‘or munic-
 2 ipal advisor’ after ‘municipal securities dealer’ each
 3 place that term appears;”.

4 (2) EFFECTIVE DATE.—The amendment made
 5 by paragraph (1) shall take effect on the date of the
 6 enactment of the Dodd-Frank Wall Street Reform
 7 and Consumer Protection Act, as if included in such
 8 Act.

9 **SEC. 4. DEFINITION OF INVESTMENT STRATEGIES.**

10 Section 15B(e)(3) of the Securities Exchange Act of
 11 1934 (15 U.S.C. 78o–4(e)(3)) is amended to read as fol-
 12 lows:

13 “(3) the term ‘investment strategies’—

14 “(A) means plans or programs for the in-
 15 vestment of the direct proceeds of municipal se-
 16 curities (but not other public funds) that are
 17 not municipal derivatives or guaranteed invest-
 18 ment contracts, and the recommendation of and
 19 brokerage of municipal escrow investments,
 20 where, with respect to the municipal advisor of-
 21 fering such plans, programs, or recommenda-
 22 tions, such proceeds of municipal securities and
 23 municipal escrow investments—

24 “(i) are known or should be known to
 25 the municipal advisor to be comprised of

1 funds or investments maintained in a seg-
2 regated account that is exclusively for the
3 purpose of maintaining such proceeds or
4 escrow investment; or

5 “(ii) have been identified to the mu-
6 nicipal advisor, in writing, as funds or in-
7 vestments that constitute the proceeds of
8 municipal securities or municipal escrow
9 investments; and

10 “(B) does not include—

11 “(i) merely acting as a broker or prin-
12 cipal with respect to the purchase or sale
13 of a security or other instrument (includ-
14 ing deposit or foreign exchange);

15 “(ii) providing a list of, or price
16 quotations for, investment options or secu-
17 rities or other instruments which may be
18 available for purchase or investment or
19 which satisfy investment criteria specified
20 by a municipal entity;

21 “(iii) acting as a custodian;

22 “(iv) providing generalized informa-
23 tion concerning investments which are not
24 tailored to the specific investment objec-
25 tives of the municipal entity; or

1 “(v) providing advice with respect to
 2 matters other than the investment of funds
 3 or financial products;”.

4 **SEC. 5. DEFINITION OF MUNICIPAL ADVISOR.**

5 Section 15B(e)(4) of the Securities Exchange Act of
 6 1934 (15 U.S.C. 78o–4(e)(4)) is amended to read as fol-
 7 lows:

8 “(4) the term ‘municipal advisor’—

9 “(A) means a person (who is not a munic-
 10 ipal entity or obligated person, or an employee
 11 of a municipal entity or obligated person)
 12 that—

13 “(i) is engaged, for compensation, by
 14 a municipal entity or obligated person to
 15 provide advice to a municipal entity or ob-
 16 ligated person with respect to municipal fi-
 17 nancial products or the issuance of munic-
 18 ipal securities, including advice with re-
 19 spect to the structure, timing, terms, and
 20 other similar matters concerning such fi-
 21 nancial products or issues; or

22 “(ii) undertakes a solicitation of a
 23 municipal entity;

24 “(B) includes financial advisors, guaran-
 25 teed investment contract brokers, third-party

1 marketers, placement agents, solicitors, finders,
2 and swap advisors, if such persons are de-
3 scribed in either of clauses (i) or (ii) of sub-
4 paragraph (A) and are not excluded under sub-
5 paragraph (C); and

6 “(C) does not include, solely as a result of
7 their performing the following activities—

8 “(i) any broker, dealer, or municipal
9 securities dealer registered with the Com-
10 mission, to the extent that such broker,
11 dealer, or municipal securities dealer is
12 serving or is seeking to serve as an under-
13 writer, placement agent, remarketing
14 agent, dealer-manager, or in a similar ca-
15 pacity, or is providing advice related to or
16 in connection with any such activities and
17 not for separate compensation, or any per-
18 son associated with such a broker, dealer,
19 or municipal securities dealer;

20 “(ii) an investment adviser registered
21 under the Investment Advisers Act of 1940
22 (15 U.S.C. 80b–1 et seq.) or with any
23 State or territory of the United States that
24 is providing investment advice (whether or
25 not of a type that would subject a person

1 to registration under such Act), or any
2 person associated with such an investment
3 adviser;

4 “(iii) any person registered under the
5 Commodity Exchange Act (7 U.S.C. 1 et
6 seq.) or this Act in relation to such per-
7 son’s activities with respect to swaps or se-
8 curity-based swaps that is providing advice
9 related to swaps or security-based swaps,
10 or providing advice that is related to or in
11 connection with any such activities and not
12 for separate compensation, or any person
13 associated with such person;

14 “(iv) a financial institution engaging
15 in any of the activities referred to in clause
16 (i), (ii), or (iii) pursuant to an exemption
17 from registration, acting as a dealer or
18 principal with respect to deposits, foreign
19 exchange, or identified banking products
20 (as defined in paragraphs (1) through (5)
21 of section 206(a) of the Gramm-Leach-Bliley
22 Act (15 U.S.C. 78c(a))), providing
23 other traditional banking or trust services
24 otherwise subject to a fiduciary duty under
25 State or Federal law, providing administra-

1 tive or operational services or support, or
2 providing advice that is related to or in
3 connection with any such activities and not
4 for separate compensation;

5 “(v) any person subject to regulation
6 by a State insurance regulator providing
7 insurance products or services or providing
8 advice that is related to or in connection
9 with any such activities and not for separate
10 compensation;

11 “(vi) an accountant (or person associated with such accountant) providing customary and usual accounting services, including any attestation or audit service or
12 issuing letters for underwriters for a municipal entity or providing advice that is
13 related to or in connection with any such
14 activities and not for separate compensation;
15 tion;

16 “(vii) any attorney offering legal advice or providing services that are of a traditional legal nature;
17 ditional legal nature;

18 “(viii) an engineer providing engineering advice; or
19 ing advice; or
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1 “(ix) any elected or appointed member
 2 of a governing body of a municipal entity
 3 or obligated person, with respect to such
 4 member’s role on the governing body;”.

5 **SEC. 6. DEFINITION OF SOLICITATION OF A MUNICIPAL EN-**
 6 **TITY OR OBLIGATED PERSON.**

7 Section 15B(e)(9) of the Securities Exchange Act of
 8 1934 (15 U.S.C. 78o–4(e)(9)) is amended by striking “or
 9 on behalf of a municipal entity; and” and inserting the
 10 following: “a municipal entity, but communications on be-
 11 half of a fund or other collective investment vehicle shall
 12 not be deemed to be on behalf of any investment adviser
 13 that advises or manages such fund or investment vehicle;”.

14 **SEC. 7. DEFINITION OF MUNICIPAL DERIVATIVE.**

15 Section 15B(e) of the Securities Exchange Act of
 16 1934 (15 U.S.C. 78o–4(e)) is amended—

17 (1) in paragraph (10), by striking the period on
 18 the end and inserting a semicolon; and

19 (2) by adding at the end the following:

20 “(11) the term ‘municipal derivative’ means a
 21 swap or security-based swap in which a municipal
 22 entity is a counterparty; and”.

1 **SEC. 8. DEFINITION OF ON BEHALF OF.**

2 Section 15B(e) of the Securities Exchange Act of
3 1934 (15 U.S.C. 78o-4(e)), as amended by section 7, is
4 further amended by adding at the end the following:

5 “(12) the term to provide advice ‘on behalf of
6 a municipal entity or obligated person’ means to
7 provide advice to a person that is known to be en-
8 gaged by a municipal entity or obligated person to
9 provide services to such municipal entity or obligated
10 person in connection with the issuance of municipal
11 securities.”.

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