

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.

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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

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## 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 issuing letters for underwriters for a municipal entity or providing advice that is related to or in connection with any such activities and not for separate compensation;

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

23          “(viii) an engineer providing engineering advice; or  
24

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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