THE PORT AUTHORITY OF NY & NJ

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February 18, 2011

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

Re: File Number S7-45-10; Release No.34-63576 – Registration of Municipal Advisors

Dear Ms. Murphy:

This letter is submitted on behalf of The Port Authority of New York and New Jersey (the "Port Authority") in response to the request of the Securities and Exchange Commission (the "Commission") for comments on its proposed new rules 15Ba1-1 through 15Ba1-7 and related forms implementing Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Section 975 amended Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"), effective October 1, 2010, to, *inter alia*, (i) require municipal advisors to register with the Commission, (ii) establish a fiduciary duty between a municipal advisor and a municipal entity for which it is acting as a municipal advisor, and (iii) subject municipal advisors to additional anti-fraud provisions.

Pursuant to proposed new rule 15Ba1-1, the term "municipal advisor" would have the same meaning as in Exchange Act Section 15B(e)(4) (as added by the Dodd-Frank Act), which expressly excludes "a municipal entity or an employee of a municipal entity" from the definition of the term "municipal advisor." However, the Dodd-Frank Act did not define the term "employee," and in Release No. 34-63576 (the "Proposing Release"), the Commission has indicated that it believes only persons serving as elected members of the governing body of a municipal entity acting within the scope of their role as such members (and such appointed *ex officio* members of the governing body who so serve by virtue of holding an elective office) should be considered "employees of a municipal entity" for purposes of exclusion from the definition of "municipal advisor." As discussed below, the Port Authority respectfully disagrees with the following aspects of the position articulated by the Commission in the Proposing Release with respect to the definition of "municipal advisor" in the proposed new rules:

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- the concept that appointed members of the governing body of a municipal entity, who act for the entity as decision makers, are municipal advisors to such entity; and

- the distinction drawn by the Commission between elected and appointed members of the governing body of a municipal entity, for the purpose of determining who is a "municipal advisor" as defined in proposed rule 15Ba1-1, under the premise that unlike elected members, appointed members lack accountability to the citizens.

Role of Municipal Entity Board Members as the Embodiment of the Entity

The legislative intent of the Dodd-Frank Act was to create a system of oversight for those engaged in the business of providing advice to municipal entities. While as noted in the Proposing Release, "municipal advisors may provide advice to municipal entities concerning investment strategies," the proposed rule overlooks the fact that a municipal entity acts through a governing body, whether elected or appointed, comprised of individuals. Furthermore, the scope of "advice" provided in the definition of "municipal advisor" – i.e., advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues – is so broad that board members voting on a resolution to approve a municipal bond issuance may be acting as "municipal advisors" if, at or before the meeting where the vote occurs board members ask questions about the structure, timing, terms, or other similar matters, or if they have served on a finance committee of the governing body making a recommendation to the full governing body with respect to the proposed issuance. In the end, however, members of the governing body of a municipal entity are not advisors to the entity, but rather, collectively, decision makers, the embodiment of the entity, through which the entity acts.

Accountability of Municipal Entity Board Members

The Commission's rationale that "appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity," overlooks the existing regulatory and ethical environment in which governing body members function. Elected and appointed members of municipal entity boards are all equally accountable for their performance. Just like elected members, appointed members are generally considered to be public officers subject to removal for cause, and are almost always appointed by elected officials pursuant to statutory provisions adopted by elected officials (i.e., legislatures). Such statutory provisions typically do not make a distinction between elected and appointed members. As public officers, both elected and appointed board members are also typically subject to statutory ethical rules and restrictions, and they have a fiduciary duty

to the municipal entity they serve. Further, the duties and legal responsibilities of members of the board of a public authority such as the Port Authority (which falls within the definition of "municipal entity" under the Dodd-Frank Act), are generally equivalent to those of directors in the private and not-for-profit sectors. In other words, there is a fiduciary duty that members of the board of a municipal entity have toward the municipal entity. There is a duty of care – board members must inform themselves prior to making "business" decisions utilizing material information reasonably available to them, and they must exercise reasonable care in the discharge of their responsibilities. There is also a duty of loyalty, requiring board members to be disinterested, so they neither appear on both sides of a transaction nor expect to derive personal financial benefit from it. While the concept of fiduciary duty is typically reflected in statutory conflict of interest provisions regarding the ethical conduct of public officials, in New York State, for example, it has been specifically codified (N.Y. Public Authorities Law §§ 2824(1)(g) and 2824(1)(h)(McKinney 2011)). This concept has also been recognized in New Jersey courts as an obligation imposed by the common law on public officers. (*See, e.g., Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433, 474-476, *cert. denied*, 344 *U.S.* 838 (1952)). In the day-to-day discharge of these responsibilities, board members monitor the activities of public authority management and staff, scrutinize information provided by subordinates and consultants, and provide policy direction, in light of the agency's mission, legislative direction and executive agenda.

Moreover, the governing body of municipal entities typically includes individuals with diverse levels of professional experience. This helps to ensure a broad-based set of skills, expertise and feedback within the governing body. Financial expertise is one valuable attribute to have represented on the governing body. However, the application of financial expertise with respect to the performance of a governing body member's duties on behalf of the municipal entity is (and must be, consistent with the fiduciary duties of the member) completely separate and apart from engaging in business as a municipal advisor.

Port Authority Commissioners

The Port Authority is a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey, created and existing by virtue of the Compact of April 30, 1921, made by and between the two States, and thereafter consented to by the Congress of the United States. The Port Authority provides transportation, terminal and other facilities of commerce within an area (the "Port District") of about 1,500 square miles in both States, centering about New York Harbor. The Port Authority consists of twelve Commissioners, six from each state, appointed by the Governor thereof with the advice and consent of the respective State Senate. Commissioners must be resident voters from their respective State of appointment; at least four New York Commissioners must be resident voters of the City of New York, and at least four New Jersey Commissioners must be resident voters of the New Jersey portion of the Port District.

The actions Commissioners take at Port Authority meetings are subject to gubernatorial review and may be vetoed by the Governor of their respective State. The Governors' veto has been exercised from time to time. A Commissioner may be removed upon charges and after a hearing (in New Jersey, hearing and removal is by the State Senate; in New York, hearing and removal is by the Governor).

The Commissioners serve without remuneration for six-year overlapping terms, and file oaths of office as public officers. Commissioners are engaged in business, professional, governmental or civic activities apart from their offices as Commissioners. In some cases these activities may involve connections or relations with persons, firms, corporations, public agencies, commissions or civic bodies which may do business with the Port Authority, are actual or potential users of Port Authority facilities or review or study the activities of the Port Authority and its facilities. The Board of Commissioners has adopted a Code of Ethics incorporating applicable requirements of law (which are substantially similar in the States of New York and New Jersey with respect to unsalaried public officers) to govern their conduct, including provision of financial and other disclosure to General Counsel of the Port Authority.

Clearly, the Commissioners have a fiduciary duty to the agency, and are subject to ethical standards that govern conflicts of interest and self-dealing, and that require disclosure of substantial business and other interests and involvements. Their level of fiduciary accountability is no different than elected members of the governing body of any other municipal entity.

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In conclusion, we respectfully request that the Commission reconsider its interpretation of the definition of the term "municipal advisor" in the Proposing Release, and determine to exclude both elected and appointed members of the governing board of a municipal entity from that definition. Members of the governing body of a municipal entity, whether elected or not, are not advisors to the entity, but rather, collectively, they are the embodiment of the entity, decision makers, through which it acts. Creating an artificial distinction between categories of members of governing bodies would serve no practical purpose in the context of the Dodd-Frank Act, and would do a disservice to the State statutory arrangements governing municipal entities throughout the country. The Port Authority appreciates the opportunity to comment on the proposed new rules.

Sincerely,

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