

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

Registration of Municipal Advisors)

File Number S7-45-10

**COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION**

The California Municipal Utilities Association (“CMUA”)¹ respectfully submits its comments in response to the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule, “Registration of Municipal Advisors,” published in the *Federal Register* on January 6, 2011.²

I. DESCRIPTION OF CMUA INTERESTS

CMUA is a statewide organization of local public agencies in California that provide water, gas, and electricity service to California consumers. CMUA membership includes electric, water, and gas distribution systems and other special-purpose public agencies that support these essential services. CMUA members are customer-owned organizations that serve their communities with cost-based essential services on a not-for-profit basis. This mission aligns the interests of CMUA members with the interests of their communities.

¹ CMUA members include the Cities of Alameda, Anaheim, Arcadia, Azusa, Banning, Big Bear Lake, Burbank, Cerritos, City of Industry, Colton, Compton, Corona, Glendale, Gridley, Healdsburg, Hercules, Inglewood, Lakewood, Lodi, Lompoc, Long Beach, Los Angeles, Moreno Valley, Napa, Needles, Palo Alto, Pasadena, Pittsburg, Rancho Cucamonga, Redding, Riverside, Roseville, San Jose, Santa Anna, Santa Clara, Santa Cruz, Shasta Lake, Sunnyvale, Ukiah, Vernon, and Woodland, as well as the Imperial, Merced, Modesto, South San Joaquin, Turlock Irrigation Districts, the East Valley Water District, Irvine Ranch Water District, the Water Replenishment District of Southern California, the Placer County Water Agency, the Northern California Power Agency, M-S-R Public Power Agency, Southern California Public Power Authority, Transmission Agency of Northern California, Lassen Municipal Utility District, Power and Water Resources Pooling Authority, Sacramento Municipal Utility District, the Trinity and Truckee Donner Public Utility Districts, the Metropolitan Water District of Southern California, and the City and County of San Francisco, Hetch-Hetchy.

² 76 *Fed. Reg.* 824 (January 6, 2011).

CMUA members are political sub-divisions of the state of California. The precise governance structure varies; (1) cities; (2) special districts, such a irrigation or municipal utility districts; or (3) joint powers authorities that allow multiple public agencies to work in concert. All of these types of public power utilities are “municipal entities” as defined in Section 15B of the Securities Exchange Act.

All CMUA members are public agencies and, as such, are subject to rigorous public meeting, document disclosure, and conflict codes under California law. This includes those entities that have appointed boards within their governance structure. Certain CMUA members use appointed boards, in varying capacities, to aid in the consideration of decisions. CMUA is therefore very concerned that the SEC’s proposed rule will put public power board members in jeopardy of being considered “municipal advisors” and hence subject to the law’s registration and regulatory requirements.

CMUA supports the comments submitted by the American Public Power Association.

II. COMMENTS

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended the Securities Exchange Act to make it unlawful for a municipal advisor to provide advice to a municipal entity with respect to municipal financial products or the issuance of municipal securities unless the advisor is registered with the SEC. The Dodd-Frank Act also gives the Municipal Securities Rulemaking Board (“MSRB”) regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors when providing advice to municipal entities. Section 975 of the Dodd-Frank Act defines “municipal advisor” as:

- “(A). ... a person (who is not a municipal entity or an employee of a municipal entity)
 - (i) that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities,

including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, or
(ii) that undertakes a solicitation of a municipal entity.³

Thus, under the statute, an employee of a municipal entity cannot be a “municipal advisor.”

In its proposed rule, the Commission provides interpretation on who is an employee of a municipal entity. The proposed rule defines “municipal employees” to include members of a municipal entity’s elected governing body and to exclude members of an appointed governing body. Under this interpretation, members of an appointed utility board could be considered municipal advisors and therefore required to register with the SEC and be subject to MSRB regulation. The only reason given for the differing treatment of elected and appointed boards is that appointed board members “are not directly accountable for their performance to the citizens of the municipal entity.”⁴

CMUA is concerned that this broad generalization will sweep up all appointed board structures into the new regulatory requirements, despite factual distinctions. Certain CMUA members use appointed board structures that are highly responsive and accountable to their communities. Often, boards are appointed and approved by elected officials in a similar manner to which regulatory agency commissions at the state and federal level are appointed and confirmed. Appointed boards are most often appointed by city mayors and/or confirmed by city councils.

In most instances, these board members are volunteers and members of the community in which they serve. Indeed, the very reason for having an appointed board structure is to inject this community and citizen involvement directly into the governance structure for the public

³ Section 15B(e)(4)(A) of the Securities Exchange Act.

⁴ 76 *Fed. Reg.* 834 (January 6, 2011).

agency. In a real sense, appointed boards enhance, not detract from, direct citizen involvement and responsiveness.

In addition, in many instances, the voluntary, appointed Board does not have the power to approve final actions, such as issuing debt. In these cases, directly elected representatives have the final decision.

Certain CMUA members are separate public agencies created by an agreement between two or more governmental agencies pursuant to the California Joint Exercise of Powers Act (Cal. Government Code §§ 6500, et seq.). These joint powers agencies (“JPAs”) have appointed boards with representatives from some or all of their member utilities, and this direct representation imposes a high degree of accountability on the JPAs. Typically, each member utility appoints its own representative to the JPA board, and most often these board members are the managers of the member utilities. These managers are themselves municipal employees and so are already exempt from the statute’s definition of “municipal advisor” in relation to their utility. Various California laws, including the Political Reform Act (Cal. Government Code §§ 81000, et seq.), apply strict fiduciary and conflict of interest requirements on these utility managers in their role as JPA board members. Under California law, these persons are classified as “public officials,” which “means every member, officer, employee or consultant of a state or local government agency.” (Cal. Government Code § 82408(a)). Accordingly, the appointed board members of JPAs are treated as employees of the JPAs for relevant governance and oversight purposes.

The proposed rule would require municipal advisors to file forms with the SEC, and information from these forms would be publicly available. If public power utilities’ appointed board members were required to register as municipal advisors, they would likely be required to

complete Form MA-1, which is to be filed by natural persons, including employees of municipal advisory firms. The form requires registrants to provide information about the filer's municipal advisory firm, 5-year residential history, and 10-year employment history, and to respond to several "disclosure" sections. These include criminal action, regulatory action, civil judicial action, customer complaint or arbitration or civil litigation, termination, and financial disclosures (including disclosure of bankruptcy proceedings). The large majority of the disclosure questions are applicable to a person's municipal-advisor-related or investment-related activities. Form MA-1 certification includes the statement that a registrant meets "standards of training, experience, and competence, and such other qualifications, including testing, for a municipal advisor, required by the Commission, the MSRB or any other relevant self-regulatory organization." For the cross-section of community leaders that form the bulk of appointed boards for CMUA members, the form seems clearly ill-suited in its application to the citizens appointed to utility boards, and is obviously (and appropriately) tailored to persons whose livelihood is earned advising public agencies on their dealings in financial markets.

CMUA members are highly concerned that this significant increase in regulatory burdens will discourage its citizens from serving on utility boards, to the detriment of the effectiveness of overall public agency governance. At bottom, both elected and appointed governing boards for CMUA members are accountable to the citizens that make up their communities. Potentially requiring appointed board members to register as municipal advisors will only add to the costs of serving on the board or limit discussion of a utility's financial plans. CMUA urges the Commission to recognize the beneficial role played by appointed boards, their reflection and responsiveness to the communities they serve. CMUA urges the Commission to include appointed boards in the definition of "municipal employee."

WHEREFORE, CMUA submits these comments for the Commission's consideration in this docket.

Respectfully submitted,

By: _____

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