



VIA EMAIL

rule-comments@sec.gov

February 22, 2011

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

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

Dear Ms. Murphy:

The Minnesota Municipal Utilities Association (“MMUA”) respectfully submits the following comments in response to the Securities and Exchange Commission’s (“SEC’s” or “Commission’s”) Notice of Proposed Rulemaking dated December 20, 2010 in Release No. 34-63576, File No. S7-45-10 (“NOPR”).¹ MMUA submits, among other things, that all members of a municipal entity’s governing body should be deemed employees of a municipal entity and thus excluded from the definition of “municipal advisor,” regardless of whether the members are elected or appointed. In addition, it is important that the Commission make clear that the mere act of voting on a municipal bond issuance by an appointed or elected official is not tantamount to giving advice with respect to financial products or the issuance of municipal securities.

MMUA. MMUA is a nonprofit association which represents the interests of Minnesota’s 125 municipal electric utilities and its 31 municipal gas utilities.

Minnesota’s municipal electric and gas utilities. Publicly-owned electric and gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. In Minnesota the great majority of municipal electric and gas utilities are located in relatively small communities in the rural areas of the state. The average municipal electric utility has 2,909 customers; the median number of customers is 1,247. The average municipal gas utility has 2,660 customers; the median number of customers is 552.

Municipal Utility Governance in Minnesota. In Minnesota a municipal utility may be governed directly by the city council or it may be governed by a separate public utilities commission. Minn. Stat. § 412.331. Commissioners are appointed by the city council. Minn. Stat. § 412.341. The term of office is three years. *Id.* Home rule charter cities may make some modifications to these statutory provisions. For example, a home rule charter city may choose to have an elected board rather than a board appointed by the council.

¹ 76 Fed. Reg. 824 (January 6, 2011).

Of Minnesota's 125 municipal electric utilities, 65 (52 %) are governed by a commission appointed by the city council; 58 (46 %) are governed directly under the city council; 2 (2 %) are governed by an elected board. Of Minnesota's 31 municipal gas utilities, 10 (32 %) are governed by a commission; 20 (65 %) are governed directly under the city council; 1 is governed by an elected board.

An appointed utility commissioner in a small town in Greater Minnesota may have some background in business, but it is very unlikely that a commissioner would possess special expertise in a field as specialized as issuance of tax-exempt securities. It is virtually universal practice in Minnesota that when units of local government issue government debt they obtain the advice and services of a qualified financial advisor, whose role is to provide expert advice to the management and governing body. Thus, an appointed utility commissioner is virtually never in the position of giving financial advice. The commissioner receives advice from the political subdivision's financial advisor.

Dodd-Frank. Last year, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, part of which provides for greater regulation of municipal securities. The legislation identified a new group, "municipal advisors," that are subject to regulation by the Municipal Security Rulemaking Board ("MSRB") and must register with the SEC by October 1, 2010.

The Dodd-Frank Act defines a "municipal advisor" as:

a person (who is not a municipal entity or an employee of a municipal entity) 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 undertakes a solicitation of a municipal entity.²

The definition further states that the term municipal advisor "includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors." Thus, the statute expressly specifies that the term "municipal advisor" applies to persons similar to and including financial advisors, transaction facilitators, and other market professionals, if they provide advice with respect to municipal financial products or the issuance of municipal securities. The definition explicitly excludes municipal entities and their employees.

The Current Proceeding. In its Notice of Proposed Rulemaking (NOPR) on December 20, 2010, the SEC proposed a permanent rule to include *appointed* members of the governing body of a municipal entity in the definition of municipal advisors. The NOPR distinguishes elected

² 15 U.S.C. § 78o-4(e)(4)(A).

members of a municipality's governing body from appointed members, expressing the opinion that appointed officials are not as accountable to the municipal entities they serve and should not be similarly excluded from the definition of municipal advisors who must register with the SEC.³

The Role of Appointed vs. Elected Governing Body Members. We respectfully submit that the SEC has somehow confused ballot status with the level of authority and responsibility that goes with the role of commissioner. The SEC has effectively drawn a distinction without a difference. Under Minnesota law the role of an appointed commission member with respect to a municipal gas or electric utility is the same as that of an elected city councilor or elected board member serving as a governing member of a similar utility. The degree of fiduciary responsibility is the same. There is no reason to insulate the elected official from the registration requirement, but require the appointed official performing the same function to go through the registration process.

The fact that an appointed commissioner does not appear on the ballot does not mean that the commissioner is not fully accountable to the city. As we note above, the commissioner has the same fiduciary duty. And the commissioner must stand for reappointment to the commission at the end of a term. A commissioner who has not performed capably in the role is just as unlikely to serve another term as a city councilor who has not performed well in elected office.

We find the issue of elected or appointed status to be irrelevant to the question of whether a governing body member is actually performing the function of a municipal advisor. The SEC acknowledges as much by specifically exempting city staff, who are probably more likely to serve in an advisory role than a member of the governing body. If non-elected staff are exempt, and elected governing body members are exempt, we see no legitimate public policy reason for denying the exemption to an appointed governing body member.

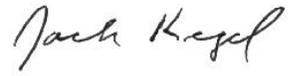
Quite simply, a common sense interpretation of the Dodd-Frank Act is that appointed officials that are voting on but not advising regarding the issuance of municipal securities should not be deemed municipal advisors. The final rule should be modified so that the test is functional, not organizational. One who is providing the services of a municipal advisor should be required to register. One who is not providing those services should not be required to register simply because he or she occupies a certain position in the organizational chart.

Conclusion. The SEC should modify the Proposed Rules so that the definition of "municipal advisor" does not include any board member of a municipal entity. Further, the Proposed Rules should be modified to better clarify the circumstances under which a broker-dealer is acting as a municipal advisor.

³ NOPR at 834.

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Respectfully submitted,

A handwritten signature in black ink that reads "Jack Kegel". The signature is written in a cursive, slightly slanted style.

Jack Kegel
Executive Director