

# Texas Public Finance Authority

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February 15, 2011

*By Electronic Mail*

Ms. Mary L. Schapiro, Chair  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

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

Re: S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010)

Dear Chair Schapiro and Secretary Murphy:

The Texas Public Finance Authority (the Authority) submits these comments in response to the Notice of Proposed Rule for the Registration for Municipal Advisors issued by the Securities and Exchange Commission (SEC or Commission) on December 20, 2010. The proposed rules 15Ba1 to 15Ba7 (the "Rule") interpret provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). Through its amendments to the Securities Exchange Act of 1934 (the Exchange Act) in part, the Dodd-Frank Act is intended to promote financial stability in the United States and improve accountability and transparency in the financial system.

The definition of "municipal advisor" in Exchange Act section 15B(e)(4) includes a person that provides advice to or undertakes a solicitation of a municipal entity. The Authority is an agency of the state of Texas (the State) that issues debt on behalf of twenty-three state agencies and institutions of higher education as authorized by the State legislature. TEX. GOV'T CODE CH. 1231. As such, the Authority is a "municipal entity" under Section 15B(e)(8) of the Exchange Act.

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In Release No. 34-63576 (the Release) accompanying proposed Rule 15Ba1-1, the SEC interprets the term "employee of a municipal entity" to include "a person serving as an elected member of the governing body to the extent that person is acting within the scope of [the person's] role as an elected member of the governing body of the municipal entity," and also includes appointed *ex officio* members who hold elective office. Release, pp. 40-41. Through its interpretation of the definition of a municipal entity employee, the SEC excluded elected board members of a municipal entity from the registration requirements for a municipal advisor, but did not exclude appointed board members. The SEC reasoned that employees and elected members are accountable to the municipal entity for their actions, but that "appointed board members are not directly accountable to the citizens of the municipal entity." Release, p. 41.

~~The Authority respectfully disagrees with the Commission's rationale for treating appointed board members differently from municipal employees and elected board members. All board members perform the same function of policymaking and decision-making on behalf of the municipal entity they govern. So long as a board member is acting within the scope of the member's role as an official of the governing body of the municipal entity, whether the board member holds the office by virtue of election or appointment should not determine whether the member's actions on that board subject it to the registration requirements and fiduciary responsibilities imposed on a "municipal advisor" under the Rule. Individual board members acting within the scope of their role on the governing body of a municipal entity are no more or less accountable for their actions to that entity by virtue of election or appointment. Furthermore, state and local laws already impose legal safeguards over the actions of individuals serving on governing boards of municipal entities to the extent determined appropriate in the locality.~~

Elected officials are directly accountable to those who elected them and part of their responsibility to their constituency is to make appointments prudently. Appointed officials are accountable to the elected official or body that appointed them; thereby, their actions reflect directly on whoever sponsored their appointment. Most employees of a municipal entity are less broadly engaged with the citizenry of a municipal entity than either an elected or appointed official. Municipal entities governed by a board have perhaps only one or two employees who are appointed or hired directly by the board, the remainder are hired by a person who is neither an elected nor appointed official. Furthermore, few governmental entities require that employees live within the jurisdiction of the entity. Therefore, most employees are farther removed from the municipal entity's constituency than an elected or appointed officer. Of greater import is that the actions of a board member, whether appointed or elected, are better regulated by those who put them in office than by a far removed federal regulatory entity.

~~Under the Dodd-Frank Act, individuals are included in the definition of a "municipal advisor" if they provide advice to or on behalf of a municipal entity with respect to the issuance of municipal securities, including advice with respect to the structure, timing, terms and similar matters. Board members acting within the scope of their policy and decision making roles do not provide investment advice to the municipal entity. Board members consider and rely on the analysis, recommendations and advice of their employees and retained consultants when~~

deliberating the optimum structure and timing of a debt issuance. The collective vote of the individual board members defines the municipal entity's action. Thus, board members acting within the scope of their duties are the "municipal entity;" they are not advisors to the entity. It follows that the individual board members governing a municipal entity, whether elected or appointed, when acting within the scope of their responsibilities to that entity are excluded from the definition of "municipal advisor."

More importantly, the Rule seeks to impose an additional layer of regulation on appointed board members that is not necessary to achieve transparency or accountability for their actions. State and local laws address issues of transparency and accountability for their appointed officials. State and local legislative bodies are in the best position to assess the expectations and needs of their constituents for transparency and accountability and to develop effective measures to meet those needs and expectations. Furthermore, state and local authorities are best positioned to appropriate the necessary resources to ensure that state and local officials comply with state and local law.

Like elected officials, most appointees serve a finite term of office, and may or may not be eligible for reappointment under state law. The governing bodies of most boards are subject to state open meeting and open records laws, regardless of whether the officials are appointed or elected. Whether elected or appointed, board members of a state governmental body or political subdivision acting within the scope of their authority are subject to individual state laws regarding immunity or liability for their actions. Individual state laws apply when determining whether the actions of an appointed official were taken within the scope of their authority, whether there is a fiduciary responsibility to the citizenry for actions taken, and whether there is a penalty for a breach of that responsibility.

Appointed board members, who are largely citizen volunteers, offer their time and effort to their communities. These citizens are typically community leaders appointed by the governor, or a locally elected governmental body or officer. Appointed officials take an oath to abide by the state and local laws governing their actions and are aware of the penalties for failure to abide by those laws. These volunteers assume the risks of serving their communities as an appointed board member. As policy makers and the public face of a municipal entity, board members are most likely to be the targets of public opinion about the entity. Board members are the most likely to be sued for a municipal entity's actions. Even if local laws provide immunity to protect a board member from liability, simply being a defendant in a suit extracts a toll from a board member, whether in the time expended assisting counsel in preparation for the suit or the related publicity about the suit.

All board members of the Authority are citizen volunteers serving the State as gubernatorial appointees, subject to confirmation by the State senate. TEX. GOV'T CODE § 1232.052. The members serve staggered terms of six years. TEX. GOV'T CODE § 1232.052. These appointed officials are required by State law to file regular financial disclosure documents with the Texas Ethics Commission. See TEX. GOV'T CODE CH. 572. They take an oath and are required to take

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training on their role and responsibilities, including training on the laws governing state officials acting in their official capacity. TEX. CONST. ART. 16, §1; TEX. GOV'T CODE §1232.055. Their actions are subject to open meetings and open records laws. See TEX. GOV'T CODE CH. 551 and CH. 552. They are subject to civil and criminal penalties for violating applicable conflicts of interest laws and for taking *ultra vires* actions. See TEX. GOV'T CODE §§ 572.003, 572.004, and 572.051 and TEX. CIV. PRAC. & REM. CODE CH. 104. Furthermore, state law requires that the Executive Director of the Authority with personal knowledge of a ground for removal of a board member report that information to a responsible State official to determine if removal is appropriate. TEX. GOV'T CODE §1232.054. This mechanism holds the board members accountable for their actions and ensures that their actions are subject to review throughout their term of office.

The SEC's proposed rule would require these citizen volunteers to submit to additional and more onerous SEC disclosure requirements and to be subjected to a heightened fiduciary obligation. This added layer of oversight is likely to deplete the pool of citizen volunteers willing to expend their time and expertise as serving as decision and policy makers. Those states and their political subdivisions that rely on volunteers to serve their communities are able and have already adopted laws and regulations that balance the needs of their citizens for accountability and transparency with the level of scrutiny and responsibility palatable to prospective volunteers. Any anticipated benefit from the additional regulation proposed by the Rule is outweighed by the likely loss of the prospective board members.

Accordingly, the Authority respectfully requests that the SEC reconsider its proposed rule and conclude that appointed board members of a municipal entity acting within the scope of their responsibilities to that entity fall within the same exclusion of "municipal advisor" as the elected board members and employees of a municipal entity.

Respectfully submitted,



Susan K. Durso  
General Counsel  
Texas Public Finance Authority

cc: Authority Board Members  
Dwight Burns, Executive Director