

January 19, 2011

Re: File Number S7-45-10

SEC proposal to require officers of governmental entities to register as “municipal advisors” Release 34-63576

Dear Chairman Schapiro and Members of the Commission;

I am writing to comment on the exclusions from the definition of “municipal advisor” as proposed in Release 34-63576 concerning registration of municipal advisors that fails to exempt appointed local government officials from the definition of “municipal advisor”. The Commission’s proposal overreaches, misunderstands basic principles of local government law, and will have a negative effect on local government budgets and their operations.

In discussing the definition of Municipal Employee, in response to the question of whether appointed officials of the entity were intended to be included within the definition of “municipal employee” the proposal responds:

. . .The Commission does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a “municipal advisor.” [*Footnote omitted.*]

*Municipal Advisors.* 76 Fed. Reg. 834 January 6, 2011.

Throughout the United States, local governments depend upon the members of their communities to help facilitate and run their governments through varying volunteer activities. These volunteers form the bulwark of American democracy and the foundation of our volunteer spirit. Tens of thousands of community volunteers give their time, expertise and common sense to enable their local governments to plan, to zone, to invest and to run various facets of local government operations. Some are true volunteers and others receive stipends.

As the commentator suggested, many of these people hold offices, elective or otherwise, in the local government. Because they are “officers,” they are not employees of the local government, no matter how much they may be paid, as most states distinguish between officers and employees and have done so since colonial days and before the formation of our union. Thus, the position quoted above creates two problems:

- It would require thousands of community spirited volunteers to spend money and to subject themselves to federal regulatory controls, and would expose them to liability.
- It would create ambiguity over the issue of whether only elected “officers” are included within the definition of “municipal employee.”

I assume as to the latter that the Commission does not intend to exclude from its definition of “municipal employee” the many appointed officers of local government who provide advice to their elected leaders and who hold positions variously titled: treasurer, comptroller, manager, etc. Nevertheless, I believe this issue must now be clarified. As to the former, persons who hold positions of trust within a state or local government subject themselves to state and local ethics laws and common law responsibilities that include potential penalties for misfeasance or malfeasance. Each of these controls meet the Commission’s stated intent of protecting the public by providing significant and sufficient state and local deterrent to misconduct that another layer of protection does not enhance. Worse, seeking guidance on federal regulatory issues expands the costs to local governments and the complexity of those regulations deters volunteer service.

When Congress exempted the municipal entity and its employees from the definition of “municipal advisor,” I believe it did so with the express intent to include all of the entity’s officers and employees, including its volunteer board members within that exemption. To do otherwise creates the anomalous result that the proposed regulation requires when it seeks to bring into the concept of “advice” those discussions by board members on investment objectives when those discussions involve decision-making debates by issuers and, in the case of boards of pension trustees, investors. Requiring registration for those who participate in those discussions chills informed analysis and debate - exactly the opposite result the SEC should be seeking. The SEC is mistakenly failing to recognize that members of governing bodies and other state and local officials are the personnel that operate the municipal entities. The “municipal advisors” serve those officials. It confuses the issue to suggest that those officials—the very intended beneficiaries of municipal advisor regulation—somehow are “municipal advisors” themselves. In short, the proposed regulations turn on its head the concept of “advice” and transform decision makers of entities who should be receiving advice into “advisors”.

To be fair, the Commission identifies past instances of misconduct to justify its need to regulate pervasively. Nevertheless, municipal finance statistics suggest that there are far fewer instances of violations and misconduct than in the area of private finance where the Commission already regulates pervasively. The current economic situation has devastated state and local government budgets, but there are far fewer defaults and municipal bankruptcies than the number of banks taken over by the FDIC. In short, virtually every state and local government subjects itself to a transparency that surpasses that of the Commission’s exemplary efforts at transparency through a combination of public information and public meeting laws and extensive reporting through the media to their stakeholders. These are coupled with an accessibility that fosters immediate individual contact with those concerned stakeholders.

The cost to local governments and officials to comply with this regulation will be extensive and comes at the worst time for local governments. Local governments will be required to pay the cost for registering municipal advisors who serve the local government in a volunteer capacity and for those who are its officials. In addition, the local government will need to hire counsel with expertise in dealing with the SEC to be sure that these officials are properly trained and advised in the intricacies of securities law, without reducing the expense for counsel and various advisors who in the past have handled issues on behalf of the municipal entity.

I ask respectfully that you consider expanding the exclusion for local government officials, including among them, appointed board members and other elected and appointed officials that may advise “municipal entities,” from the requirement to register as “municipal advisors” by including them within the definition of “municipal employee.”

Sincerely,

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