GREATER TEXOMA UTILITY AUTHORITY

5100 AIRPORT DRIVE
DENISON, TEXAS 75020-8448
903/786-4433
FAX: 903/786-8211
www.gtua.org

February 16, 2011

Via E-MaiL

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

File Number - S7-45-10

SEC Release No. 34-63575

Re: United States Securities and Exchange Commission Proposed Rule (76 *Fed. Reg.* 824 January 6, 2011[1]) Concerning the Registration of Municipal Advisors

Dear Ms. Murphy:

I am the General Manager of the Greater Texoma Utility Authority (the "Authority") and I, acting on behalf of the Board of Directors of the Authority and at their direction, write to respectfully request that the United States Securities and Exchange Commission (the "SEC" or the "Commission") modify its interpretation of the term "municipal advisor," or grant exemptive relief, so as to exclude appointed boardmembers from that term.

The Authority is a special-law district duly created, existing, and acting under the provisions of the Constitution of the State of Texas and by virtue of Chapter 97, Acts of the 66th Legislature of the State of Texas, Regular Session 1979, as amended (the "Act"). The Authority was established with power to assist municipalities and other governmental entities and nonprofit corporations with water, wastewater and solid waste needs and is declared in the Act to be essential to the accomplishment of the purposes of Article XVI, Section 59, of the Constitution of the State of Texas.

The Act establishes the Authority's governance structure, but the Authority is also subject to significant regulatory authority by other applicable Texas law, including the Texas open meetings and open records legislation. Policy-making functions of the Authority are the responsibility of, and are invested in, the Board of Directors, consisting of a maximum of nine members (each a "Director" or collectively referred to as the "Board"). Each Director is appointed by a member city or cities, as applicable, within the Authority's boundaries for a two year period and no Director may be an officer, employee, or member of a governing body of a municipal corporation.

The management structure envisions that the Board will establish policies, provide general oversight, approve maintenance and operations and capital budgets, establish strategic goals and plans, approve certain contracts, and receive, review, and make appropriate decisions based upon management input received from the General Manager and other employees and outside consultants. These outside

[1] 76 *Fed. Reg.* 824 (January 6, 2011)

consultants, which with respect to the issuance of municipal securities would be bond counsel and persons or companies generally referred to as financial advisors, would provide their professional advice with a duty to the Authority relating to the issuance of municipal securities. I, as the General Manager of the Authority, am the senior official of the Authority with the primary responsibility to manage the day-to-day operations of the Authority.

As you are well aware, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended Section 15B of the Securities and Exchange Act of 1934 (the "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 municipal advisor is registered with the United States Securities and Exchange Commission (the "SEC" or the "Commission"). The Dodd-Frank Act also gives the Municipal Securities Rulemaking Board (the "MSRB") regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors when providing advice to municipal entities. As amended by the Dodd-Frank Act, Section 15B of the Exchange Act is intended for the protection of municipal entities as well as investors. Under Section 23 of the Exchange Act, the Commission is authorized to adopt rules to implement the provisions of the Exchange Act, including Section 15B. In addition, the Commission is specifically authorized by Section 15B(a)(4) of the Exchange Act, as amended by the Dodd-Frank Act, to exempt municipal advisors from any provision of Section 15B, including the registration requirements, fiduciary duties, and MSRB rules applicable to municipal advisors, if it finds that the exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B.

Section 15B(e)(4), of the Exchange Act, as amended by 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.[2]

Thus, under the statute, an employee of a municipal entity cannot be a "municipal advisor" and is exempt from the proposed rule. As such, all employees of the Authority, would be exempt from the proposed rule. In its release the Commission provides interpretation on who is an "employee of a municipal entity." The release interprets "municipal employees" to include members of a municipal entity's elected governing body and appointed members of a governing body to the extent such appointed members are ex officio members of the governing body by virtue of holding an elective office, but to exclude members of an appointed governing body. Under this interpretation, all members of the 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 officials in the interpretation in the SEC commentary is that appointed boardmembers "are not directly accountable for their

[2] Section 15B(e)(4)(A) of the Securities Exchange Act.

performance to the citizens of the municipal entity." We believe strongly that the Board is more accountable, or at least as accountable, to its citizens as to the accountability that is deemed to be afforded an employee of a municipality in the Commission's release. Based upon our facts and the referenced Texas law, each Director of the Board is appointed by a member city or cities within its boundaries and is subject to the scrutiny of the particular municipal entity that appointed the Director. Furthermore, although the Board alone has the legal authority to issue any debt, such debt issuances must be approved by the governing body of the entity for whose benefit the debt is issued and such approval takes place in open meetings as required by Texas law. For these reasons, we believe that the Commission's proposed policy decision to treat elected and appointed officials differently concerning their potential classification as a municipal advisor has no merit and we respectfully request that the Commission modify its interpretation to exempt governing body members who are appointed by elected officials.

We would also note that the Commission could exercise its regulatory authority to define that all issuers and their elected or appointed governing bodies would be classified as the municipal entity in the statutory definition of "municipal advisor" [i.e., "a person (who is not *a municipal entity* or an employee of a municipal entity)"]. This interpretation would give meaning to both parts of the parenthetical exclusion. The Commission's proposed interpretation ignores the first term in the parenthetical and interprets "employee of a municipal entity" to mean, in addition, to employees, elected board members (who are not "employees" in any ordinary sense). The Board members themselves, whether elected or appointed, comprise the municipal entity and, whether elected or appointed, should not be viewed as a third party advisor to the entity.

Commentators have noted that the proposed rule does not define "provides advice" and that arguably the Board's deliberations and voting on recommendations concerning the issuance of debt or concerning the investment of public funds is <u>not</u> providing "advice" that is the focus of the proposed rule. The Board frequently discusses advantages and disadvantages of various financial objectives, some of which inevitably require issuance of debt or use of some kind of municipal financial product. The Board does have discussions concerning their proposed plan of finance, structuring assumptions, the purchase of bond insurance policies or surety bonds, capital items, operation and maintenance budgets, redemption provisions, the review and approval of disclosure documents, and various other matters concerning the contemplated debt issuance. We also believe that the Commission's previous enforcement actions around the United States compel both elected and appointed boardmembers who authorize the issuance of publically-offered municipal securities to be active participants in this process. We have concerns that if the appointed members of the Board could be "deemed" by the Commission to be a "municipal advisor" pursuant to the Commission's interpretation, then such deliberations, discussions, and votes could be classified as "advice" that would impose the proposed rule's licensing requirements and fiduciary duty on the appointed members of the Board and trigger the reporting, record keeping, and certification requirements set forth in the proposed rule. We believe strongly such uncertainty will have a chilling effect on both current and prospective boardmembers and discourage their contemplated public service as a member of the Board.

We have serious concerns about the effect that the proposed interpretation has on potential legal liabilities that stem from the classification of a person as a municipal advisor and the resultant

imposition of a federal law fiduciary duty on the municipal advisor. As you are well aware, violations of this fiduciary duty could subject municipal advisors to criminal and/or civil liabilities. In addition, both the SEC and the MSRB have recently adopted or proposed additional rules to impose further regulatory restrictions and duties on municipal advisors, other than those contained in the proposed rule and interpretation that is the subject of this comment letter. We also have concerns about the annual certification requirement in the proposed rule, if and when an appointed boardmember is deemed to be a municipal advisor that is providing "advice" to its board. The administrative time and manpower costs to comply with these registration, record keeping, and certification requirements, the inevitable registration and annual certification filing fees and expenses, and additional continuing education requirements for the appointed boardmember to take further time away from their regular full-time jobs and potentially their families is not justified under our factual scenario. We are confident that you will agree that having the most qualified members on the Board is in the public's best interest. It seems to us that the proposed rule has merit and applicability for a person truly providing "financial" advice to a municipal entity but, in our case, not to an appointed member of the Board.

Texas law concerning an appointed boardmember's "duty" is not settled law. In fact, Texas law provides a mechanism by which an "official" may disclose a conflict of interest and then recuse himself from a vote concerning the matter to be voted upon by the governing body. As you are well aware, the imposition of this fiduciary duty, under federal law and the supremacy clause, may have the effect of conflicting with and superseding Texas law on this important subject.

For each of the stated reasons, we respectfully request that the Commission significantly limit the scope of "municipal advisor" to address, only from a policy standpoint, the specific factual situation that was the impetus for the Dodd-Frank provisions. We are confident that you will agree that none of the appointed members of the Board should be classified as municipal advisors for the reasons set forth in this comment submission. In closing, we request that the Commission treat all appointed boardmembers in the same manner as the interpretation treats elected officials and municipal employees.

Thank you for your careful consideration of this request to exempt all appointed boardmembers in the Commission's final rule definition of "municipal advisor" so that the final rule will accomplish its intended public purpose.

Please do not hesitate to contact us if we can provide any future clarification or support on this important manner. We appreciate the opportunity to respond to the request for comments by the Commission.

Very truly yours,

Jerry Chapman

Jerry Chapman
General Manager