



February 17, 2011

Via E-Mail: Rule-Comments@sec.gov

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. S7-45-10

Dear Ms. Murphy:

Thank you for the opportunity to comment on the Commission's proposed rules regarding the registration of municipal advisors in Release No. 34-63576 (the "Release"). I am writing this letter as general counsel to the West Virginia Housing Development Fund (the "Housing Development Fund"). Specifically, we wish to comment on the inclusion of appointed board members in the definition of "municipal advisor".

Under Section 15B of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), a "municipal advisor" is defined to include a person (who is not a municipal entity or an employee of a municipal entity) who 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 municipal financial products or securities issuance. Section 15B excludes "an employee of a municipal entity" from the definition of "municipal advisor". In the Release, the Commission stated that this employee exclusion should extend to elected members and *ex officio* members of a governing body. However, the Commission made a distinction and provided that appointed members of a municipal entity's governing body should be included in the definition of municipal advisor. The Commission stated that this interpretation is appropriate because it believes employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission believes that appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity. We respectfully disagree.

As background, the Housing Development Fund was established in 1968 as a governmental instrumentality of the State of West Virginia and a public body corporate. Its primary corporate purpose is to increase the supply of residential housing in the State of West Virginia for persons and families of low and moderate income, and, among other things, it is empowered by the West Virginia Housing Development Fund Act, W. Va. Code § 31-18-1, *et seq.* to provide construction and permanent mortgage financing to public and private sponsors of such housing. The Housing Development Fund is governed by an eleven-member board of directors consisting of West Virginia's Governor, Attorney General, Commissioner of Agriculture and Treasurer, all of whom serve *ex officio* as public directors, and seven members chosen as private directors from the general public residing in the State of West Virginia. All public directors may designate representatives to serve on their behalf. The Governor, with the advice and consent of the West Virginia State Senate, appoints private directors for staggered terms of four years.

The Housing Development Fund respectfully disagrees with the Commission's reasons for distinguishing between appointed board members and municipal employees and elected/*ex-officio* board members. Board members, whether elected or appointed, owe fiduciary obligations to the Housing Development Fund. Because of their membership on the Housing Development Fund board of directors, appointed members are bound by their fiduciary duties (as are elected/*ex officio* board members) to conduct their activities in good faith, with reasonable care and in the best interests of the Housing Development Fund. In addition, a board member's obligation is to guide the Housing Development Fund in meeting its constitutional and statutory objectives of providing low to moderate income housing within the State of West Virginia. Board members do not advise or consult but rather are responsible for deliberating and making final decisions on behalf of the Housing Development Fund. Each board member takes the same oath and is liable as public members. Additionally, appointed members can be removed for malfeasance. Further, like elected officials and *ex officio* board members, appointed board members are accountable to the electorate. Appointments to the Housing Development Fund by the Governor require the consent of the West Virginia State Senate.

Under West Virginia ethics laws, all appointed members are required to file annual financial disclosures with the State's Ethics Commission (W. Va. Code § 6B-2-6). This disclosure is very extensive (W. Va. Code § 6B-2-7). The Commission's proposed rules would place even more responsibilities and duties on appointed members, most who serve without compensation.

In addition, Housing Development Fund board members, including appointed board members, do not serve to advise municipal entities with respect to financial products, securities or other matters, but rather they oversee, as part of a board, an entity's internal operations and authorize transactions based on the recommendation of staff and compensated external advisors. These board members are not advisors in the commonly understood sense of the word but rather they are part of a board that makes decisions after due deliberation.

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A definition of municipal advisor that includes appointed members would have a chilling effect on any decision making that the board engages in and would also have a chilling effect on the deliberative process. That is, an appointed board member may choose to refrain from voting or speaking on a matter relating to a bond issuance or other matter contemplated by the proposed rules if that board member believed that such activity could require him or her to register as a municipal advisor.

Additionally, requiring an appointed board member to register as a municipal advisor would likely dissuade most private citizens from serving on a municipal board. As other commenters on the proposed rules have noted, requiring such persons to register as municipal advisors or the uncertainty regarding whether such persons must register, would have an adverse effect on private citizens' willingness to serve as appointed board members of municipal entities. This result is certainly not the intended consequence of the Commission's proposed rules. The reasons for such individuals' unwillingness or reluctance to serve are obvious. For instance, most individuals would not want to subject themselves to the registration and recordkeeping requirements of the proposed rules. Additionally, either these individuals or the Housing Development Fund would need to retain (and compensate), professionals to advise and assist appointed members of its board in complying with the Dodd-Frank Act and the rules promulgated thereunder, including the registration and recordkeeping requirements.

Based on the foregoing, we respectfully request that the Commission amend the proposed rules to exclude appointed members from the definition of municipal advisor.

Should you have any questions, or require further information, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in blue ink, appearing to read "S. L. Gee".

Samme L. Gee

cc: Joseph W. Hatfield
Erica L. Boggess