



BROWNSVILLE
PUBLIC UTILITIES BOARD

February 18, 2011

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. 34-63576

RE: United States Securities and Exchange Commission Proposed Rule¹ Concerning the Registration of Municipal Advisors

Dear Ms. Murphy:

We write to respectfully request that the Commission (hereinafter defined) modify its interpretation of the term "municipal advisor," or grant exemptive relief, so as to exclude appointed Board members from that term. We ask that you take that action in furtherance of established principles of federalism and to protect municipal entities (a purpose of the applicable provision), from adverse consequences.

We serve as the General Manager & Chief Executive Officer and as the Chief Financial Officer to an agency of the City of Brownsville, Texas (the "City") that was created in 1963, pursuant to Article IV of the City's Home Rule Charter, and by the City Commission of the City in accordance with the City's electric, water, and wastewater systems (the "Systems") revenue bond ordinances (the "BPUB Bond Ordinances") and is referred to as the City of Brownsville, Texas Public Utilities Board ("BPUB"). The assets of the Systems are owned by the City, but the management, control, operation, and maintenance of the Systems have been delegated in the BPUB Bond Ordinances and the City's Home Rule Charter to a seven-member appointed Board of Trustees (the "BPUB Board"), including the Mayor of the City who serves as an ex-officio (but voting) member of the BPUB Board. The BPUB Board, excluding the Mayor, is subject to the appointment, review, and removal process set forth in the BPUB Bond Ordinances and the City's Home Rule Charter. We have enclosed the "Management" section of a recent BPUB Bond Ordinance as Exhibit A to this letter for your review and files.

This management structure envisions that the BPUB Board will establish policies; provide general oversight; approve maintenance, operations, and capital budgets; establish strategic goals and plans; approve certain contracts; and receive, review, and make appropriate

¹ 76 Fed. Reg. 824 (January 6, 2011)

recommendations based upon management input received from the General Manager & Chief Executive Officer of BPUB, his senior staff, other employees, and outside consultants. These outside consultants, which with respect to the issuance of municipal securities would be bond counsel and entities generally referred to as financial advisors, would provide their professional advice with a duty to BPUB relating to the issuance of municipal securities.

BPUB is the largest municipally-owned provider of electric, water, and wastewater utility services in South Texas. Each of the national rating agencies, in providing BPUB with their extremely favorable ratings for municipally-owned revenue bond issuers, have commented favorably concerning the importance of this governance structure. As employees of the City-owned utility, BPUB employees are public employees just like their counterparts working directly for City government, and BPUB is significantly regulated by the City's Home Rule Charter, the Texas Utilities Code, Chapter 1502, as amended, Texas Government Code, and a variety of other Texas statutes. Each appointed member of the BPUB Board is subject to scrutiny by the Brownsville City Commission. Lastly, the BPUB Board is subject to the Texas open meetings and open records laws.

The Brownsville City Commission alone has the legal authority to approve any debt issuances, to approve any changes in utility rates or structures, to commence any condemnation proceedings, and, as discussed above, to appoint, review, and remove members of the BPUB Board. The entire Brownsville City Commission is subject to election every two years as set forth in the City's Home Rule Charter and other applicable law.

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, and any act or omission made in reliance on Commission rules in good faith is exempted from liability. 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 City, including those of BPUB, would be exempt from the proposed rule. 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” and, as such, would be exempt from the proposed rule.

In its proposing 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, members of the BPUB Board, excluding the Mayor, could be considered municipal advisors and therefore, required to register with the SEC and be subject to MSRB regulation, if they fulfill their official duties by giving advice to BPUB concerning municipal securities issues or municipal financial products. The only reason given for the differing treatment of elected and appointed members in the interpretation in the SEC commentary is that appointed Board members “are not directly accountable for their performance to the citizens of the municipal entity.”³ We believe strongly that the BPUB is more accountable, or at least as accountable, to the “citizens of the municipal entity” as to the accountability that is deemed to be afforded an employee of the municipality in the Commission’s release.

Based upon our facts and the referenced Texas law, 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. For the reasons set forth above, each appointed member of the BPUB Board is subject to significant regulatory “control” by the Brownsville City Commission, who are elected officials. As such, we respectfully request that the Commission modify its interpretation, or exercise its exemptive authority, to exempt governing body members who are appointed by elected officials.

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

³ 76 *Fed. Reg.* 837 (January 6, 2011).

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.

Texas law concerning an appointed Board member's "duty" is not settled law. In fact, Texas law provides a mechanism by which "officials" may disclose a conflict of interest and then recuse themselves 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.

Commentators have noted that the proposed rule does not define "provides advice" and that arguably the BPUB Board's deliberations and voting on recommendations concerning the issuance of debt by the City (that would have to be approved by the Brownsville City Commission) or concerning the investment of public funds or the approval of derivative transactions is not providing "advice" that is the focus of the proposed rule.

We, in good conscience are not willing to accept this definitional determination. Although the BPUB Board has engaged independent financial advisors, bond counsel, and accountants, and selected various investment banks to be members of underwriting pools that will form syndicates to sell the City's municipal securities pursuant to BPUB Bond Ordinances, the BPUB Board has active discussions concerning its proposed plan of finance, structuring assumptions, the use of swaps and other derivative products, 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. In fact, the BPUB Board is required under the BPUB Bond Ordinances to make recommendations to the Brownsville City Commission concerning the issuance of municipal securities. Lastly, we also believe that the Commission's previous enforcement actions concerning municipal securities around the United States compel both elected and appointed Board members 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 BPUB 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 BPUB Board and trigger the reporting, record keeping, and certification requirements set forth in the proposed rule.

It is also our understanding that the Commission's existing MA-T Municipal Advisory Temporary Registration Form (that is attached hereto as Exhibit B and incorporated by reference for all purposes) may be the template for the creation of the proposed rule's MA-I format. We believe that the proposed rule's MA-I Form is cumbersome, unnecessary in our situation, and may have a chilling effect on prospective Board members, because the information disclosed in the MA-I Form will be publically available, and discourage their contemplated public service as a member of the BPUB Board. We are confident that you will agree that having the most qualified members on the BPUB Board is in the public's best interest. It seems to us that the proposed rule's MA-I Form 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 BPUB Board.

We also have concerns about the annual certification requirement in the proposed rule, if and when an appointed Board member is deemed to be a municipal advisor that is providing "advice" to its board. Once again, 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 Board member to take further time away from their regular full-time jobs and potentially their families is not justified under the BPUB factual scenario.

For each of the stated reasons, we respectfully request that the Commission significantly limit the scope of the "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 governing body of the BPUB 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 Board members 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 Board members 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.

Sincerely,


John S. Bruciak, PE
General Manager & Chief Executive Officer


Leandro G. Garcia, CPA
Chief Financial Officer

Enclosure

- c: **Mr. Arturo Farias (Chairman, Board of Trustees, BPUB)**
- Honorable Pat Ahumada (Mayor, City of Brownsville, Texas)**
- Mr. Charles Cabler (City Manager, City of Brownsville, Texas)**
- Mr. Mark Sossi (City Attorney, City of Brownsville, Texas)**
- Mr. Pete Gonzalez (Chief Financial Officer, City of Brownsville, Texas)**
- Honorable John Cornyn (United States Senator)**
- Honorable Kay Bailey Hutchison (United States Senator)**
- File**

EXHIBIT A

Management Section of Bond Ordinance

Management of System. As provided in Article VI of the Charter, the Board shall have absolute and complete authority and power with reference to the control, management and operation of the System, and the expenditure and application of the Gross Revenues of the System, subject to the provisions contained in this Ordinance and the laws of the State, and, while any of the Senior Lien Obligations authorized by this Ordinance are outstanding, the Board shall have full power, within the limitations prescribed in said Article VI of the Charter, unless or until the Charter is amended to provide otherwise, to operate the System and make rules and regulations governing the furnishing of service to patrons, for the payment of same and to discontinue service for failure to pay therefore when due. The Board shall exercise the powers and perform the duties and functions conferred upon and agreed to by the Issuer to the extent provided for in this Ordinance and unless the context clearly implies otherwise, the Board shall be authorized and required to carry out and perform on behalf of the Issuer all covenants, agreements and obligations undertaken by or imposed upon the Issuer by the terms and provisions of this Ordinance to the extent permitted by law. It is specifically provided that in the event the Charter is amended to transfer management and control of the System to the Governing Body or if for any lawful reason the Board cannot assume and discharge the duties and obligations thus imposed, the management, control and operation of the System, upon the effective date of such Charter amendment or upon the receipt by the Board and the Issuer of an final order by a court of competent jurisdiction determining that the Board has not discharged its duties and obligations pursuant to the provisions of this Ordinance, then, based upon such Charter amendment or this final court order, the management, control, and operation of the System shall be assumed and discharged by the Governing Body of the Issuer, and it shall be authorized and required to carry out and perform on behalf of the Issuer all covenants, agreements and obligations undertaken by or imposed upon the Issuer or the Board by the terms and provisions of this Ordinance.

EXHIBIT B

SEC Form MA-T

OMB APPROVAL
OMB Number: 3235-0659
Expires: March 31, 2011
Estimated average
Burden hours per form: 2.5
Per amendment: 0.5

Note: Form MA-T is an electronic form accessible through a link located on the website of the U.S. Securities and Exchange Commission at www.sec.gov. It may not be filed in paper form.

FORM MA-T

MUNICIPAL ADVISOR TEMPORARY REGISTRATION FORM

ITEM 1 - IDENTIFYING INFORMATION

A. This is:

- An initial temporary registration as a municipal advisor
- An amendment of temporary registration as a municipal advisor
Municipal Advisor Registration Number: ____ - _____
- A withdrawal of temporary registration as a municipal advisor
Municipal Advisor Registration Number: ____ - _____

B. Full Legal Name of municipal advisor:

(firm name or name of sole proprietor)

C. Name under which the municipal advisor conducts business, if different:

D. IRS Employer Identification Number of the municipal advisor: _____
(Note: If you are a sole proprietor, leave this space blank. Do NOT fill in your social security number.)

E. If the municipal advisor is also registered with the SEC as an investment adviser, its SEC file number: 801- _____

F. If the municipal advisor is also registered with the SEC as a broker, dealer, or municipal securities dealer, its SEC file number: _____

G. If the municipal advisor has a number ("CRD Number") assigned by the FINRA's CRD system or by the IARD system, its CRD number *(Do not provide the CRD number of the municipal advisor's officers, employees, or affiliates)*: _____

H. Municipal advisor's principal office and place of business:

(1) Address (*do not use a P.O. Box*):

(number and street)

(city) (state/country) (zip+4/postal code)

(2) Telephone number at this location:

(area code) (telephone number)

(3) Facsimile number at this location, if any:

(area code) (telephone number)

(4) General e-mail address for the municipal advisor, if any:

@

(5) Website, if any, of the municipal advisor

www. _____

I. Mailing address, if different from the municipal advisor's principal office and place of business address:

(number and street)

(city) (state/country) (zip+4/postal code)

J. Contact person: *[The contact person should be a person whom the municipal advisor has authorized to receive information and respond to questions about this registration.]*

(name)

(title)

(telephone number, including area code) (facsimile number, if any, including area code)

(number and street)

(city) (state/country) (zip+4/postal code)

@
(e-mail address, if any, of contact person)

ITEM 2 - MUNICIPAL ADVISORY ACTIVITIES

What type(s) of municipal advisory services does the municipal advisor provide? *Check all that apply.*

- (1) Advice concerning the issuance of municipal securities
- (2) Advice concerning the investment of the proceeds of municipal securities
- (3) Advice concerning guaranteed investment contracts
- (4) Recommendation and/or brokerage of municipal escrow investments
- (5) Advice concerning the use of municipal derivatives (e.g., swaps)
- (6) Solicitation of business from a municipal entity or obligated person for an unaffiliated person or firm (e.g., third party marketers, placement agents, solicitors and finders)
- (7) Preparation of feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities
- (8) Other (specify): _____

ITEM 3 - DISCIPLINARY INFORMATION

In this Item, we ask for information about the municipal advisor's disciplinary history and the disciplinary history of all associated municipal advisor professionals (as defined in the Glossary accompanying this form). For any question to which you answer "yes," a drop-down box will appear for you to supply relevant information. *Note: If you have submitted a Criminal Disclosure Report Page or Pages, a Regulatory Action Disclosure Page or Pages, or a Civil Judicial Action Disclosure Reporting Page or Pages to FINRA or the SEC in connection with other filings, you may provide such information by referencing the public disclosure system (BrokerCheck or Investment Adviser Public Disclosure) that currently contains the disclosure, the CRD number of the entity under which the disclosure is listed, and whether the entity under which the disclosure is listed is a firm or individual. (Example: Please reference BrokerCheck, CRD 123456, for the individual Mr. X for reportable disclosures; Example: Please reference IAPD, CRD 987654, for the firm X's reportable disclosures.)*

One event may result in "yes" answers to more than one of the questions below.

A. In the past ten years, has the municipal advisor or any associated municipal advisor professional:

- (1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony? YES/NO
- (2) been charged with any felony? YES/NO
You may limit your response to Item 3.A(2) to charges that are currently pending.

B. In the past ten years, has the municipal advisor or any associated municipal advisor professional:

- (1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? YES/NO
- (2) been charged with a misdemeanor listed in Item 3.B(1)? YES/NO
You may limit your response to Item 3.B(2) to charges that are currently pending.

C. Has the SEC or the Commodity Futures Trading Commission (CFTC) ever:

- (1) found the municipal advisor or any associated municipal advisor professional to have made a false statement or omission? YES/NO
- (2) found the municipal advisor or any associated municipal advisor professional to have been involved in a violation of its regulations or statutes? YES/NO
- (3) found the municipal advisor or any associated municipal advisor professional to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted? YES/NO
- (4) entered an order against the municipal advisor or any associated municipal advisor professional in connection with investment-related activity? YES/NO
- (5) imposed a civil money penalty on the municipal advisor or any associated municipal advisor professional, or ordered the municipal advisor or any associated municipal advisor professional to cease and desist from any activity? YES/NO

D. Has any other federal regulatory agency, any state regulatory agency, or any foreign financial regulatory authority:

- (1) ever found the municipal advisor or any associated municipal advisor professional to have made a false statement or omission, or been dishonest, unfair, or unethical? YES/NO
- (2) ever found the municipal advisor or any associated municipal advisor professional to have been involved in a violation of investment-related regulations or statutes? YES/NO
- (3) ever found the municipal advisor or any associated municipal advisor professional to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted? YES/NO

- (4) in the past ten years, entered an order against the municipal advisor or any associated municipal advisor professional in connection with an investment-related activity? YES/NO
- (5) ever denied, suspended, or revoked the municipal advisor's or any associated municipal advisor professional's registration or license, or otherwise prevented the municipal advisor or any associated municipal advisor professional, by order, from associating with an investment-related business or restricted the municipal advisor's or any associated municipal advisor professional's activity? YES/NO

E. Has any self-regulatory organization or commodities exchange:

- (1) ever found the municipal advisor or any associated municipal advisor professional to have made a false statement or omission? YES/NO
- (2) ever found the municipal advisor or any associated municipal advisor professional to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the SEC)? YES/NO
- (3) ever found the municipal advisor or any associated municipal advisor professional to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted? YES/NO
- (4) ever disciplined the municipal advisor or any associated municipal advisor professional by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities? YES/NO

F. Has the municipal advisor's or any associated municipal advisor professional's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended? YES/NO

G. Is the municipal advisor or any associated municipal advisor professional the subject of any regulatory proceeding that could result in a "yes" answer to any part of Item 3.C., 3.D., or 3.E.? YES/NO

H. (1) Has any domestic or foreign court:

- (a) in the past ten years, enjoined the municipal advisor or any associated municipal advisor professional in connection with any investment-related activity? YES/NO

- (b) ever found that the municipal advisor or any associated municipal advisor professional was involved in a violation of investment-related statutes or regulations? YES/NO
 - (c) ever dismissed, pursuant to a settlement agreement, an investment-related civil action brought against the municipal advisor or any associated municipal advisor professional by a state or foreign financial regulatory authority? YES/NO
- (2) Is the municipal advisor or any associated municipal advisor professional now the subject of any civil proceeding that could result in a "yes" answer to any part of Item 3.H(1)? YES/NO

ITEM 4 – EXECUTION

The municipal advisor consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission or any self-regulatory organization in connection with the municipal advisor's municipal advisory activities may be given by registered or certified mail or confirmed telegram to the municipal advisor's contact person at the main address, or mailing address, if different, given in Items 1.H, 1.I., and 1.J.

The undersigned deposes and says that he/she has executed this form on behalf of, and with the authority of, the municipal advisor. The undersigned and the municipal advisor represent that the information and statements contained herein and other information filed herewith, all of which are made a part hereof, are current, true and complete. The undersigned and the municipal advisor further represent that, if this is an amendment, to the extent that any information previously submitted is not amended such information is currently accurate and complete.

Date: _____

Full Legal Name of Municipal Advisor: _____

By. _____
(signature)

Title: _____

Warning: Intentional misstatements or omissions of fact constitute Federal criminal violations. See, 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).