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NEW YORK STATE  
DIVISION OF HOUSING  
& COMMUNITY  
RENEWAL

February 1, 2011

HOUSING  
TRUST FUND  
CORPORATION

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

STATE OF  
NEW YORK MORTGAGE  
AGENCY

NEW YORK STATE  
HOUSING FINANCE  
AGENCY

Re: SEC proposal to require officers of governmental entities to register as  
"municipal advisors" [File Number S7-45-10 Release No. 34-63576]

NEW YORK STATE  
AFFORDABLE HOUSING  
CORPORATION

STATE OF  
NEW YORK MUNICIPAL  
BOND BANK AGENCY

Dear Ms. Murphy:

TOBACCO SETTLEMENT  
FINANCING  
CORPORATION

This letter responds to the Securities and Exchange Commission's (the "SEC") request for comments on its proposed rule regarding registration of municipal advisors.

Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"), effective October 1, 2010, to, among other things, (1) require municipal advisors to register with the SEC, (2) establish a fiduciary duty between a municipal advisor and a municipal entity for which it is acting as a municipal advisor and (3) subject municipal advisors to additional anti-fraud provisions.

The SEC on December 20, 2010 (Rel. No. 34-63576; the "Proposing Release") proposed permanent rules (Rules 15Ba1- through -7; collectively, the "Proposed Rule") to implement Section 975, which would take effect on a date yet to be determined.

The Proposing Release requests comments on the Proposed Rule, to be received on or before February 22, 2011.

The State of New York Mortgage Agency ("SONYMA"), the New York State Housing Finance Agency ("HFA"), the State of New York Municipal Bond Bank Agency ("MBBA"), the New York State Affordable Housing Corporation ("AHC"), the Housing Trust Fund Corporation ("HTFC") and the Tobacco Settlement Financing Corporation ("TSFC") (and collectively, the "Agencies") are public corporations created under the laws of New York (the "State"). The Agencies are independent public authorities of the State, are co-located and share common management. The Agencies have separate Boards of Directors.

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[nyshcr.org](http://nyshcr.org)

The State has integrated the programs and policies of the Agencies with those of the State's Division of Housing and Community Renewal ("DHCR"). The Agencies and DHCR now comprise the New York State Homes & Community Renewal ("HCR").

The Agencies are concerned about the SEC's proposed interpretation of the term "municipal advisor" to include appointed board members of municipal entities, while excluding elected members and appointed ex officio members who have also been elected. We think the interpretation is not appropriate, and has the potential to deeply and negatively impact the role of Board members of public authorities, particularly in the State, where amendments to the public authorities law, commencing in 2005 and as recent as 2009, have placed increasingly stringent fiduciary requirements on Board members of public authorities.

Our objections are based on two principles: (1) first, we believe that the SEC is incorrect in concluding that Board members of municipal entities can ever be "advisors" to these entities, as such term is used in the Act; and (2) second, we believe that the distinction made in the Proposed Release between the roles of "appointed" and "elected" Board members is inappropriate.

### **BOARD MEMBERS AS ADVISORS**

The SEC treats members of a governing body of any municipal entity or obligated person as municipal advisors, subject (with respect to municipal entities) to a limited exclusion for "elected" members. We believe that this approach should not be followed.

The Proposed Rule fails to recognize that the governing board of a municipal entity cannot be a municipal advisor to such entity. The municipal entity acts through its governing body, which is necessarily comprised of individual members. Accordingly, the exception for a "municipal entity" should properly be interpreted to mean all governing body members.

Board members of municipal entities do not advise municipal entities with respect to financial products, securities, or other matters. Board members of public authorities are specifically charged with certain fiduciary responsibilities, which have been explicitly set forth in State law, including (i) providing direct oversight of the authority's chief executive and other senior management in the effective and ethical management of the authority, (ii) understanding, reviewing, and monitoring the implementation of fundamental financial and management controls and operational decisions, (iii) establishing policies regarding salary, compensation and reimbursements to the chief executive and senior management, and rules governing their time and attendance, (iv) adopting a code of ethics, (v) establishing written policies and procedures on, among other things, personnel (including "whistle-blower" protections), investments, travel, the acquisition and disposal of property and procurement procedures, and (vi) adopting a defense and indemnification policy.

In 2009, the State, by legislation, codified directors' duty: to perform in good faith and with degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and may take into

consideration views and policies of the appointing entity and ultimately apply independent judgment in the best interest of agency and mission.

The emphasis in the State on the fiduciary duties of board members of public authorities flows, to some extent, from the work of experts in corporate governance. The New York State Commission on Public Authority Reform (informally known as the “Millstein Commission”) was established by Executive Order of the Governor of the State in 2004 to make recommendations and improve the governance of the State’s public authorities.

The Millstein Commission issues yearly reports on governance matters. In its most recent report it noted that “foremost among the [Commission’s] recommendations is the formal recognition by the board members of their fiduciary duty, including the duty of loyalty and care to the organization and commitment to its mission”. The Commission noted that “directors should also pledge to listen to and consider the viewpoint of elected officials, provided they are offered transparently, but to ultimately make good faith decisions that, above all, in support of the best interests of the authority’s mission”.

Therefore, in the State, board members are not "advisors" in the commonly understood sense of the word; rather, they have a specific fiduciary duty to provide direct oversight over the workings of their authorities. Board members are, under law, expected to understand, review and monitor the implementation of an agency’s fundamental financial and management controls and operational decisions. This is not an “advisory” role.

Board members and the municipal entities on which they serve, whether elected or appointed, are one and the same, not only for practical, operational purposes, but for formal legal purposes: Any definition of "municipal advisor" that includes a board member leads to the odd result that a board member is advising himself.

It may be argued by the SEC that board members fall within the municipal advisor definition only if they are in fact providing financial advice. The problem with this approach is that the definition of financial advice is so broad (“municipal financial products or the issuance of municipal securities”) as to potentially include the adoption of an approval resolution authorizing a municipal bond issuance if at such meeting questions are asked by board members as to the “structure, timing, terms, or other similar matters,” or a finance committee recommendation to the governing board relating to the issuance of municipal securities or financial products.

Indeed, in the State, there is a legal requirement that all proposals for the issuance of debt by public authorities be first brought up before a “finance committee” consisting of a subset of board members that is charged with the duty of making recommendations to the board. We note that State law specifically creates a subset of board members (finance committee members) who are required to make recommendations on financing proposals.

Board member participation in board decision making is not advising the Board or the agency. By creating multi-member governing bodies, legislatures have evidenced their belief that a collaborative decision-making process is superior to a process in which decisions are made by an individual, and that members need to share their viewpoints. Expressing a point of view in an open group discussion as

part of a deliberative process is not advising. Unlike the unilateral rendering of advice by a true advisor, a board member is supposed to express his or her point of view, evaluate other viewpoints, and be open to changing his view based on the discussion among board members.

For the foregoing reasons, the Agencies recommend that board members not be included within the definition of “municipal advisor”. Rather than discouraging participation on governing bodies by requiring registration and additional potential liabilities, the SEC should be encouraging greater participation of individuals knowledgeable and experienced in finance, and the potential for the municipal advisor provisions to attach being dependent upon whether “advice” is given by a board member would have a chilling effect on board members expressing their views.

### **DISTINCTION BETWEEN APPOINTED AND ELECTED BOARD MEMBERS**

In the Proposing Release the SEC sought to distinguish between appointed and elected board members:

**The Commission believes that this interpretation is appropriate because Employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned 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.**

This approach towards the roles of elected and appointed board members goes against established law in the State. In the State, every board member of a public authority is required, by law, to execute an acknowledgement of fiduciary duty. In that acknowledgment, every member, whether appointed or elected, whether ex officio or not, is required to certify that they (i) understand that their obligation is to act in the best interests of the authority and the people of the State whom the authority serves (*emphasis added*) (ii) agree that they will exercise independent judgment on all matters before the board; and (iii) understand that any interested party may comment on any matter or proposed resolution that comes before the board of directors consistent with the laws governing procurement policy and practice, be it the general public, an affected party, a party potentially impacted by such matter or an elected or appointed public official.

Moreover all board members, regardless of how they were appointed, are required to certify that they understand that the ultimate decision is the board member’s and will be consistent with the mission of the authority and the board member’s fiduciary duties as a member of the authority’s board of directors (*emphasis added*). There is no distinction, when it comes to these fiduciary responsibilities, between elected or appointed status. We also note that the State statutes under which the Agencies were created in all cases do not distinguish board members or voting strength on a board between elected and appointed members.

All board members are accountable to their authorities and to the people of the State for their actions on their respective boards. There is no distinction between appointed and elected members. Board members are required to act in the best interests of the entity they serve and its public purpose.

For the foregoing reasons, the Agencies urge the SEC to reconsider the approach taken towards board members in the Proposed Release. We recommend that the SEC provide for a specific exclusion from the definition of municipal advisor for all board members of municipal entities.

Thank you for your consideration.

Very truly yours,

**New York State Homes and Community Renewal**  
SONYMA . HFA . MBBA . AHC . HTFC . TSFC



Alejandro J. Valella  
Vice President and Deputy Counsel