



ORLANDO - ORANGE COUNTY

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February 22, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549-1090

Re: File Number S7-45-10 – Registration of Municipal Advisors

Dear Madam Secretary:

The Orlando-Orange County Expressway Authority (“OOCEA”) respectfully submits the following comment regarding the above cited Proposed Rule:

BACKGROUND OF THE OOCEA

The OOCEA is a body politic and corporate, and an agency of the State of Florida, created by the Florida Legislature in 1963. The Authority is responsible for the planning, design, construction and operation of the region’s expressway system. It operates pursuant to general law, Florida Statutes 348.751-348.765.

OOCEA’s governing Board is a five member body comprised of two ex-officio members and three members who are appointed by the Governor of the State of Florida.

One of the ex-officio members is the Mayor of Orange County, an elected official. The second ex-officio member is the District V Secretary of the Florida Department of Transportation, an employee of the State of Florida, but not of the OOCEA.

The remaining three Board members are gubernatorial appointees. These Board appointees serve four year terms and are unpaid volunteers. The only authorized compensation is to be eligible for travel reimbursement as prescribed by state statute. Additionally, a citizen volunteer appointed by the Board, serves on the OOCEA Finance Committee.

Under the Proposed Rule, all of these OOCEA Board and Finance Committee members, except the Orange County Mayor, would be required to register with the SEC and maintain eligibility requirements as a “municipal advisor” in order to serve their terms.

The Proposed Rule is premised on a fundamental misconception as to the role of a municipal entity Board member in the issuance of municipal securities. In the course of

issuing municipal securities, OOCEA Board members act as the *issuer* of the bonds on behalf of the Authority, see Fla. Stat. 348.754 2(g).

OOCEA Board and Finance Committee members do not provide advice to the Authority, rather they evaluate the financial advice that is provided to them by competitively contracted outside third parties who are charged with that responsibility. Ultimately the Board members approve the Resolution authorizing the municipal bond issue. In short, they are the client, not the advisor. To classify any Board member as a “municipal advisor” is not factually accurate and serves no purpose other than to obfuscate their true role in the process.

Exchange Act Section 15B(e)(4)(A) provides that the term “municipal advisor” excludes employees of a municipal entity. The Commission interprets “employees” to include elected members of the governing body of a municipal entity, but not appointed members.

NO RATIONAL BASIS FOR DIFFERING TREATMENT

The Commission’s stated basis for the distinction is 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.

The SEC does not contend that there is any substantive difference in the role that an elected Board member fulfills in authorizing a municipal entity’s bond issues versus that of an appointed member. Apparently all Board members are deemed to engage in the giving of “advice,” but only the appointees are required to register with the SEC.¹

The stated distinction does not constitute a rational basis for the differing treatment. It ignores the fact that under Florida law all Board members are subject to the same Code of Ethics set out in Florida Statutes Chapter 112. For example:

- 1) All OOCEA Board members are required to file full annual financial disclosure stating income, assets and source of income. Fla. Constitution Article II Section 8; Fla. Stat. 348.0003(4)(c).
- 2) All OOCEA Board members are prohibited from voting on any measure that would inure to their private gain, Fla.Stat.112.3143.
- 3) All OOCEA Board members are prohibited from accepting anything of value based on the understanding that the vote, official action, or

¹ The Proposed Rule’s basic presumption that all Board members give “advice” with respect to municipal financial products or the issuance of municipal securities is also erroneous due to the Florida Sunshine Law which prohibits Board members from discussing official business with other Board members outside the parameters of a public hearing. Fla. Stat. 286.011.

judgment of the official would be influenced thereby. Fla. Stat. 112.313(2).

- 4) All OOCEA Board members are prohibited from doing business with one's agency. Fla. Stat. 112.313(3).

Because Florida's Ethics Code uniformly applies to both elected and appointed state officials, the stated basis for the distinction, i.e., that appointees are not accountable is incorrect. Appointed Board members are subject to the same ethical standards as are elected officials. They are subject to the jurisdiction of the Florida State Commission on Ethics for alleged violations.

Moreover, OOCEA's appointed Board members are also subject to removal from their office by the Governor for misconduct, malfeasance, misfeasance, or nonfeasance in office. Fla. Stat. 348.753.

TENTH AMENDMENT OF THE U.S. CONSTITUTION

The proposed rule constitutes an unwarranted and unlawful intrusion by the federal government upon the State of Florida's sovereign power to establish the qualifications for political appointees of its state agencies.

The Tenth Amendment to the United States Constitution states as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

OOCEA's appointed Board members are officials of an agency created by the State of Florida. As such, their eligibility for office and their duties and responsibilities are prescribed by the state legislature. Eligibility for these positions is a matter reserved to the exclusive jurisdiction of the legislature of the State of Florida.

By requiring registration as a "municipal advisor" the proposed rule seeks to impose additional qualifications and eligibility requirements on appointed OOCEA Board members.

There is no federal constitutional reservation of power to prescribe the qualifications of a Florida Expressway Board member. The State of Florida has reserved the right to prescribe the qualifications of members of the OOCEA in particular in Fla. Stat. 348.753 and Florida Expressway Authorities in general at Fla. Stat. 348.0003.

Both Congress and the United States Supreme Court have recognized that each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. When Congress enacted the Age Discrimination in Employment Act of 1967 it dealt with the issue of how to define "employee" and it excluded not only elected

officials, but also appointed policy making officials from the Act's proscriptions. 29 U.S.C. Section 630(f).

The exclusion was upheld in *Gregory v. Ashcroft* 501 U.S. 452 (U.S. 1991) wherein the U.S. Supreme Court stated, "The authority of a State's people to determine the qualifications of their most important government officials lies at the heart of representative government."

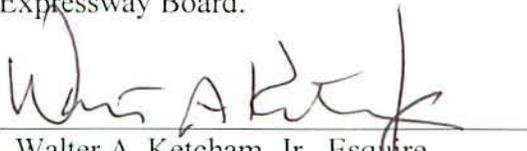
The practical effect of the proposed rule would be to allow the federal government to discourage future or current Board appointees from providing essential public service. Any current or prospective appointed Board member unwilling or unable to register with the SEC would be compelled to refrain from such service.

Unlike ex officio elected officials who receive a salary from their elected position, appointed Board members are volunteer citizens of outstanding reputation who donate their time and expertise to the public agency.

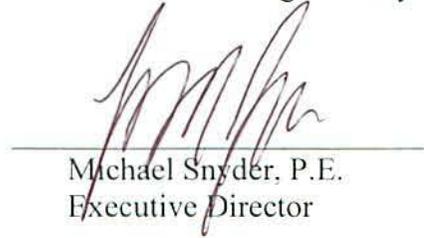
The onerous imposition of registration fees, training and periodic examination requirements all to qualify as a "municipal advisor" who does not in fact advise the municipal entity, will only further deter public minded citizens from serving on Boards such as the OOCEA.

The OOCEA requests that the SEC exclude all members of governing bodies and committees of municipal entities from the definition of "municipal advisor" under the Proposed Rule.

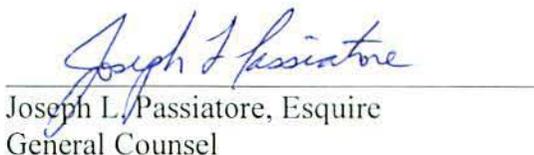
These comments are respectfully submitted on behalf of the Orlando-Orange County Expressway Board.



Walter A. Ketcham, Jr., Esquire
Chair



Michael Snyder, P.E.
Executive Director



Joseph L. Passiatore, Esquire
General Counsel

Copies provided to:
Honorable Daniel Webster, U.S. Congress
Honorable John Mica, U.S. Congress
Honorable Corrine Brown, U.S. Congress