



February 22, 2011

Via Electronic Mail

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

Rule-comments@sec.gov

Re: Proposed Rules on the Registration of Municipal Advisors causing Board Members to Register as Municipal Advisors (the “Proposed Rules”), Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

As the General Counsel of the District of Columbia Water and Sewer Authority (“DC Water”), I submit the following comments to the draft definitions of “Municipal Advisor” currently proposed by the Securities and Exchange Commission (the “SEC”). By these comments, we¹ urge the SEC to narrow the scope of the definition of Municipal Advisor in the Proposed Rules, as set forth in Release No. 34-63576 (the “Release”) in a manner that allows appointed as well as elected members of the board of directors of a municipal entity to serve without registering with the SEC.

DC Water is governed by a Board of Directors consisting of 11 principal and 11 alternate members. The Board is composed of six District of Columbia representatives, two representatives from both Montgomery and Prince George’s Counties in Maryland, and one representative from Fairfax County in Virginia. The Mayor of the District of Columbia appoints, and the DC Council confirms, all six District Board members and alternates, including the Chairman. In addition, the Mayor appoints the five principal and alternate members who represent the surrounding jurisdictions based on executive submissions from those jurisdictions. Consequently, the Rules, if promulgated as proposed, will have a direct impact on the board members of DC Water.

¹ In this letter, I shall use the collective “we” or “our” to refer to the Office of General Counsel and DC Water collectively.

We believe that the SEC should treat appointed board members the same as elected board members and employees of a municipal entity. The SEC's Rules requiring appointed board members to comply with various registration and reporting requirements, in addition to Municipal Securities Rulemaking Board rules and regulations ("MSRB") not yet promulgated, will have significant consequences to board members of municipal entities such as DC Water. We cannot overstate the importance of our Board of Directors' contributions to DC Water and our concerns that the Proposed Rules will have a detrimental effect on our ability to find qualified individuals willing to volunteer their time and expertise on our board.

We are concerned that the definition of the term "Municipal Advisor" in the Proposed Rules is too broad and, if it remains as proposed, will inhibit the willingness of even civic-minded volunteers to serve on the boards of municipal entities. The Proposed Rules under the Securities Exchange Act of 1934 (as amended by the Dodd-Frank Act, the "Exchange Act") defines "Municipal Advisors" as a person who –

- (i) provides advice to or on behalf of a "municipal entity" or an "obligated person" with respect to municipal derivatives, guaranteed investment contracts, and investment strategies 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) undertakes a solicitation of a "municipal entity" or "obligated person."

The U.S. Congress, when it enacted the Dodd-Frank Act, deliberately excluded "employees" from the definition of Municipal Advisor.² We believe that appointed board members are more properly categorized under the definition of "employee" along with elected board members and *ex officio* board members of municipal entities. In contrast, appointed board members do not serve the same function as the "three principal types" of Municipal Advisors set forth in the Release: (1) financial advisors, including, but not limited to, broker-dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products; (2) investment advisers that advise municipal pension funds and other municipal entities on the investment of funds held by or on behalf of municipal entities (subject to certain exclusions from the definition of a "Municipal Advisor"); and (3) third-party marketers and solicitors. See Page 21 of the Release.

On its face, this broad definition of Municipal Advisors includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders and swap advisors who are engaged in municipal advisory activities.³ In addition, it appears to include

² Section 15B(e)(4)(A) of the Exchange Act, 71, as amended by the Dodd-Frank Act.

³ Municipal advisory activities include providing 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 solicitation of a municipal entity or obligated person. Dealers may constitute "Municipal Advisors" even if they do not receive compensation for advice

banks, accountants, engineers and underwriters providing “advice” and even lawyers not representing the municipal entity or a conduit borrower who are deemed providing “advice” to the municipal entity or conduit borrower, such as underwriter’s counsel, bank counsel or swap counsel. In fact, the Release makes clear that the SEC interprets “Municipal Advisor” to include non-employee, non-elected municipal officials who advise a municipal entity on its municipal securities offerings. Moreover, the proposed rules provide that a person can be considered a Municipal Advisor regardless of whether a contract exists or whether such person is compensated for the advice.

Of even greater concern to us is the SEC’s exclusion in the Release of persons serving as an appointed board member of a municipal entity from the term “employee of a municipal entity.” The Proposed Rules specifically exclude employees of a municipal entity from the term “Municipal Advisor,” and then goes on to exclude elected board members and *ex officio* board members of municipal entities from the definition. The Release does not exclude appointed board members from the term “Municipal Advisor.” The Release explained that the SEC’s disparate treatment is “appropriate because employees and elected members are accountable to the municipal entity for their actions.” Further, the SEC voiced its concern that “appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipality.”

We disagree with that distinction. Appointed board members, who may be removed by the elected officials who appointed them in accordance with applicable law, are no less accountable for their performance to the citizens of the municipality than regular employees of a municipality, who may only be removed from their employment in accordance with applicable laws relating to civil service. In addition, appointed board members, like elected board members, are subject to statutory fiduciary duties, ethics laws, prohibitions on conflicts of interest, and other limitations under the applicable enabling act or other state or local statutes – which statutory duties and other limitations may not be, or may be only to a lesser degree, imposed on regular employees of a municipality. Moreover, municipal entities with elected and/or appointed board members are subject to the open meetings laws that provide accountability of such board members to the municipal entities on which boards they serve and to the constituents of such municipalities.

As is the case with DC Water, it is not unusual for regular municipal employees (such as heads of agencies or cabinet members) to be among those appointed to the board of directors of municipal authorities – would they then cease to be excluded from the definition of “Municipal Advisors” because they are appointed board members? We see no reason to differentiate appointed and elected board members, all of whom should be treated as “municipal employees” excluded from the definition of “Municipal Advisor.”

given. There are only a few limited categories of exclusions from this definition; otherwise, all persons taking action as described in (i) or (ii) above will be encompassed by this definition.

It is relevant to note that, many appointed board members receive little or no pay for their service, provide municipal entities with a wide range of knowledge and experience and agree to serve only out of their sense of civic duty. Imposing a new level of regulatory compliance and potential liability on such appointed board members will only discourage citizens from becoming involved in their government, hardly a victory for participatory democracy. We do not think Congress intended to do this through the Dodd-Frank Act. Further yet, excluding appointed board members from the definition of “employee” creates a potential for abuse by municipal entities and non-profits to “employ” their appointed board members to avoid the Municipal Advisor registration and compliance.

We believe that without an exclusion from the definition of “Municipal Advisor,” the board members of municipal entities and even nonprofit organizations would be subject to the uncertainty as to whether their internal discussions, consultations and recommendations constitute advice within the meaning of the Dodd-Frank Act and thereby make them “Municipal Advisors.” Neither the Dodd-Frank Act nor the Proposed Rules provide any definition of the term “advice,” which complicates any efforts of a board member to delineate clearly, which activities cause him or her to be a “Municipal Advisor.” This may result in these employees and board members registering as Municipal Advisors as a precaution -- or choosing, even worse, not to serve as board members.

We believe it would be helpful to bear in mind that board members are policy makers who make decisions in reliance on advice received from the staff, consultants, attorneys and other experts who are engaged by the municipal entity they serve. It stands to reason that board members are entitled to, and required to, rely on such advice to perform their responsibilities as board members and as decision makers. Regulating the very decision makers who rely on such advice, *i.e.*, the board members themselves, is not appropriate. The board members of municipal entities are the representatives of municipal entities who are the *recipients* of advice, not the advisors themselves, and they should not be considered Municipal Advisors for purposes of the Proposed Rule.

DC Water will suffer the worst possible result of the Proposed Rules since our entire board of directors is comprised of appointed members, as discussed above. Thus, under the Proposed Rules, all of our board members will be required to register with the SEC, which registration can be denied by the SEC. The implications of qualifying as a “Municipal Advisor” for purposes of the Exchange Act are significant and will subject persons qualifying as Municipal Advisors to regulation by, and registration with, the SEC and the MSRB. Registration with the MSRB is expected to require the payment of a fee of approximately \$600.

Further, registration is a formidable undertaking; it involves a comprehensive questionnaire that makes the contents of which publicly available. The information sought in such registration includes, in pertinent part: (i) personal information (including any bankruptcies, unsatisfied judgments, or any denial of bond); (ii) employment and residential history; (iii) information concerning business activities that involve a “Municipal Advisor;” (iv) information regarding past felony charges or convictions, violations of federal securities laws or MSRB rules; and (v)

information concerning any discharges or resignations relating to violations of investment-related or Municipal Advisor-related rules, fraud, wrongful taking, or failure to supervise in connection with a violation of investment-related or Municipal Advisor-related rules. Further, a Municipal Advisor is also required to comply with record-keeping requirements and consent to service of any civil action or notice of any proceeding before the Commission regarding its municipal advisory activities via registered or certified mail. Municipal Advisors also would be required to provide disciplinary history information similar to the information that the SEC obtains from registered broker-dealers and investment advisers. Individual Municipal Advisors would be required to amend the form whenever any of the required information has become inaccurate in any way. Compliance with the Proposed Rules is no small burden and is not warranted with respect to citizens volunteering to serve as appointed board members of municipal entities.

We believe that the SEC may have overlooked the fact that a municipal entity's governing body is the medium through which it conducts its business, exercises its public powers and functions and, further, a municipal entity may not take action without the approval of the members of its governing body. Without a board and its members, and without the ability of the members of a board to engage in full and open discussion in the exercise of such public powers and functions, a municipal entity would not be able to perform the essential public powers and functions for which it is formed. We believe that it would be an unreasonable and overreaching position for the SEC to allow "advice" to encompass the routine and necessary workings of the board of a municipal entity that are undertaken in good faith and in accordance with board members' existing fiduciary duties. What's more, all boards should be allowed and encouraged to discuss, debate, analyze and conduct informed votes on the issuance of municipal securities and the use of municipal financial products. Absent a clear safe harbor for these board functions, the Proposed Rules bring all board activities into the realm of a Municipal Advisor.

As if the foregoing were not enough to deter citizens from serving on the boards of municipal entities, the Proposed Rules impose a fiduciary obligation on these individuals. We would endure a significant loss from the unintended consequence of depleting the pool of citizen volunteers who expend their time and expertise as policymakers. The establishment of a fiduciary duty with respect to Municipal Advisors and all persons associated with such Municipal Advisors requires that no Municipal Advisor may engage in any act, practice or course of business that is not consistent with a Municipal Advisor's fiduciary duty or that is in contravention of any rule of the MSRB. The Municipal Advisor will likely have to comply with additional federal regulations as set forth by the final SEC rule. Currently, we believe it is unclear whether board members that qualify as "Municipal Advisors" will need to comply with additional fiduciary duties above and beyond the state or local fiduciary duties with which they are already required to comply as board members.

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In support of our position, we noted that the consequence of requiring appointed board members to submit to SEC and MSRB registration and reporting and a heightened fiduciary obligation would have the unintended consequence of depleting the pool of citizen volunteers who expend their time and expertise as policymakers. As proposed, the Proposed Rules subject appointed board members to unwarranted registration and reporting requirements, as discussed herein. Although we believe the Proposed Rules provide some appreciated regulation of many categories of Municipal Advisors who provide advice to state and local governments and other borrowers involved in the issuance of municipal securities or with respect to the investment of governmental monies, we request the SEC to adopt the approach we suggest here, which permits appointed board members to serve on the boards of directors of municipal entities under an exemption from the definition of Municipal Advisors.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Randy E. Hayman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Randy E. Hayman, Esq.
General Counsel

cc: Alethia Nancoo, Esq., Chairman of the DC Water Governance Committee