

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Registration of Municipal Advisors)

File Number S7-45-10

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (“APPA”) submits its comments in response to the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule, “Registration of Municipal Advisors,” published in the *Federal Register* on January 6, 2011.¹

I. APPA’S INTERESTS

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers, and do business in every state except Hawaii. APPA utility members are load-serving entities, with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities.

Public power utilities serve several large communities – including Austin, Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle, and Tacoma, but most public power utilities are small. Over 70 percent of APPA’s members serve communities with less than 10,000 residents. Collectively, public power systems serve over 45 million people.

¹ 76 *Fed. Reg.* 824 (January 6, 2011).

APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms. Most are municipally-owned, and these utilities may be a department of the municipality or an independent authority established under state or local law. Other forms include political subdivisions of the state, such as public utility districts or public power districts; state-owned utilities, created under state statutes; and joint action agencies ("JAAs"), formed under state law to provide wholesale power supply and transmission service to distribution entity members. All of these types of public power utilities are "municipal entities" as defined in Section 15B of the Securities Exchange Act.

APPA periodically surveys public power utilities on their governance structures and the duties and authorities of their governing bodies. In the most recent survey,² conducted in 2010, 29 percent of respondents reported that their utilities were governed by appointed utility boards. APPA is therefore very concerned that the SEC's proposed rule will put public power board members in jeopardy of being considered "municipal advisors" and hence subject to the law's registration and regulatory requirements.

II. COMMENTS

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Securities 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 advisor is registered with the SEC. The Dodd-Frank Act also gives the Municipal Securities Rulemaking Board (MSRB) regulatory authority over municipal

² American Public Power Association, "2010 Governance Survey," published August 2010. The survey was sent to almost 1,900 public power utilities, and 658 utilities responded. The survey excludes joint action agencies and other public power utilities that sell power primarily at wholesale.

advisors and imposes a fiduciary duty on municipal advisors when providing advice to municipal entities. 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.³

Thus, under the statute, an employee of a municipal entity cannot be a “municipal advisor.”

In its proposed rule, the Commission provides interpretation on who is an employee of a municipal entity. The proposed rule defines “municipal employees” to include members of a municipal entity’s elected governing body and to exclude members of an appointed governing body. Under this interpretation, members of an appointed utility board could be considered municipal advisors and therefore required to register with the SEC and subject to MSRB regulation. The only reason given for the differing treatment of elected and appointed boards is that appointed board members “are not directly accountable for their performance to the citizens of the municipal entity.”⁴

It is true that appointed boards of public power utilities are not directly elected by the communities’ citizens, but APPA’s governance survey shows that these boards have a strong connection to citizens, as the boards are appointed and approved by elected officials. Survey responses showed that city councils play a large part in determining the make-up of appointed utility boards, as they either appoint or approve the board in most cases. Fifty-nine percent of the boards are appointed by the mayor, and 85 percent of the time, the mayor’s choices must be approved by the city council. The city council appoints the board jointly with the mayor for six percent of the utilities and on its own for 27 percent of the utilities.

³ Section 15B(e)(4)(A) of the Securities Exchange Act.

⁴ 76 *Fed. Reg.* 834 (January 6, 2011).

In addition, utility board members are by and large members of their communities. APPA's survey shows that 87 percent of utilities with appointed boards require board members to be a resident of the city or to be a customer of the utility. These board members are well aware of their communities' concerns not only through the open meeting process, but also by living and working with their fellow citizens on a daily basis. Many public power utilities' websites include the names and pictures of board members, and citizens can and do contact board members with their concerns.

For certain important decisions, such as issuing debt, many utilities require actions in addition to board approval. In these cases, the citizens themselves or their directly elected representatives have the final decision. According to APPA's survey, of the utilities with appointed boards, nine percent require a voter referendum in order to issue revenue bonds, and 52 percent require city council approval for issuing long-term bonds.

In the case of state power authorities, board members are generally appointed by the governor and confirmed by the state Senate. For most of these authorities, the majority of board seats are filled from designated service territories or customer classes, and so these board members represent specific constituencies. In addition, the state legislature can limit an authority's actions through oversight hearings or by enacting new laws. For all these reasons, board members have strong incentives to be responsive to the communities, citizens, and industries served by these power authorities.

Public power utilities that are JAAs have appointed boards with representatives from some or all of their member utilities, and this direct representation imposes a high degree of accountability on the JAAs. Typically, each member utility appoints its own representative to the board, and most often these board members are the managers of the utilities. These managers are

themselves municipal employees and so are already exempt from the statute's definition of "municipal advisor." Note that the only requirement for this statutory exemption is that the person be "an employee of a municipal entity." The statutory language does not require the person to be an employee of the same municipal entity to which the person is providing "advice."

However, in some cases, a member utility may appoint a community representative to the JAA's board. Such a board member provides the same governance and oversight services to the JAA as are provided by fellow board members who are general managers. But under the SEC's proposed rule, the community representative board member would be in jeopardy of being required to register as a "municipal advisor."

The proposed rule would require municipal advisors to file forms with the SEC, and information from these forms would be publicly available. If public power utilities' appointed board members were required to register as municipal advisors, they would most logically complete Form MA-1, which is to be filed by natural persons, including employees of municipal advisory firms. The form requires registrants to provide information about the filer's municipal advisory firm, 5-year residential history, and 10-year employment history, and to respond to several "disclosure" sections. These include criminal action, regulatory action, civil judicial action, customer complaint or arbitration or civil litigation, termination, and financial disclosures (including disclosure of bankruptcy proceedings). The large majority of the disclosure questions are applicable to a person's municipal-advisor-related or investment-related activities. The form's questions are clearly not relevant to the professional lives of the citizens serving on public power utility boards. A review of a handful of public power utility boards shows board members employed in the fields of legal services, real estate, health and medicine, telecommunications,

education, banking, and insurance; other board members are economic consultants, managers, small business owners, community volunteers, and retirees.⁵

Appointed board members required to register would also have to complete a “Self-Certification” statement on the Form MA-1. This certification includes the statement that a registrant meets “standards of training, experience, and competence, and such other qualifications, including testing, for a municipal advisor, required by the Commission, the MSRB or any other relevant self-regulatory organization.” For an appointed board member, meeting these municipal advisor standards would cost money, require training, and take time away from their regular full-time jobs. And, importantly, board members of public power utilities can effectively exercise their board functions without meeting municipal advisor standards set by the Commission and the MSRB.

A public power utility’s board is responsible for establishing policies, setting strategic goals and plans, and reviewing and approving management proposals, such as budgets, financial plans, and contracts. The board also may hire the general manager, who is responsible for the utility’s day-to-day operations. In regard to financing issues, the utility’s general manager and management team will determine the best plan, or range of options, for financing a large infrastructure project, for example, and then take the plan to the governing body for review and approval. Board members may then ask for more details, suggest additional options, ask for revisions based on different assumptions or scenarios, or approve management’s recommendations. Since neither the statute nor the SEC’s proposed rule defines “advice,” it is not clear which, if any, of these board actions could rise to the level of “advice” and thus require an appointed member to register as a municipal advisor.

⁵ It is, of course, possible, that a board member could also be employed as a financial advisor, and in that capacity be required to register as a municipal advisor.

Making appointed board members potentially subject to registering as municipal advisors could result in less effective governance. Given the uncertainty about what constitutes advice, board members will be understandably hesitant to comprehensively assess management's financial proposals. Or, in order to avoid being considered "municipal advisors," board members may decide to take the safest route and defer all financial judgments to independent third parties, thereby increasing costs for the utility (and their customers). Additionally, a "municipal advisor" requirement could reduce the pool of community citizens willing to serve on a public power utility's board.

Governing bodies provide important oversight and policy-setting functions for public power utilities. While these governing bodies may be structured in different ways, they all serve similar roles. Singling out appointed boards for different treatment makes no sense. As with elected boards and city councils, appointed boards are accountable to the citizens that make up their communities. Potentially requiring appointed board members to register as municipal advisors will only add to the costs of serving on the board or limit discussion of a utility's financial plans. The SEC should treat both elected and appointed boards in the same way. APPA strongly urges the SEC to include appointed boards in the definition of municipal employee.

WHEREFORE, APPA submits these comments for the Commission's consideration in this docket.

Respectfully submitted,

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February 22, 2011