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February 22, 2011

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

RE: File Number S7-45-10; Release 34-63576

Dear Secretary Murphy:

This letter is being submitted on behalf of ourselves and those entities listed on Attachment A hereto (the "Joining Entities") in order to comment on the interpretation of the definition of "municipal advisor" proposed by the Securities and Exchange Commission (the "Commission") in its release, Registration of Municipal Advisors, Release No. 34-63576[1] (the "Release"). Our clients are nonprofit institutions that are exempt from taxation under Section 501(c)(3) of the United States Tax Code and certain for-profit entities, who, from time to time, act as conduit borrowers in the municipal securities markets and who are considered "obligated persons" as defined in Section 15B(e)(10) of the Securities Exchange Act of 1934, as amended[2] (the "Exchange Act"). We are respectfully requesting that the Commission clarify in its final rules that such obligated persons, whether nonprofit or for-profit entities and their employees, officers, and directors are not required to register as municipal advisors. We believe that requiring such registration would be inconsistent with the intent of Congress when mandating the regulation of municipal advisors and that any such requirement will have negative, unintended consequences for our clients.

The rules proposed in the Release are designed to implement the provisions of Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] The primary Congressional intent underlying passage of Section 975 is to ensure that previously unregulated advisors to issuers of municipal securities and obligated parties will now be regulated by the Commission. Although our clients would like the Commission to clarify certain aspects of the rules proposed by the Release, our clients strongly support the efforts of the Commission to establish greater accountability for municipal advisors. This comment letter will focus primarily on why employees and all board members

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

[2] 15 U.S.C. 78*o*-4(e)(10).

[3] Pub.L.111-203; H.R. 4173.

of obligated persons (whether appointed, elected or otherwise) should be excluded from the definition of "municipal advisor."

Section 15B(e)(4) of the Exchange Act defines a "municipal advisor" as:

> 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.[4]

The Release further clarifies the exclusion of any person who is "an employee of a municipal entity" by explicitly including a person "serving as an elected member of the governing body" of the municipal entity in this excluded category, but maintaining that *appointed* members who are not acting *ex officio* of such bodies should still be classified as municipal advisors due to the concern that such "appointed members," unlike elected members, "are not directly accountable for their performance to the citizens of the municipality."[5]

The Commission did not directly address whether obligated persons and their employees and directors could be considered "municipal advisors" when acting in their decision-making role as such, but did solicit comment on the status of employees of obligated persons.[6] This request for comment, together with the Commission's proposed distinction between elected and appointed directors[7] of municipal entities, creates significant confusion about the extent to which the Commission is appropriately distinguishing between those persons intended to be protected by municipal advisor regulation and those who will be subject to it.

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[4] Section 15B(e)(4) of the Exchange Act, as amended by the Dodd-Frank Act; 15 U.S.C. 78*o*—4(e)(4)(A).

[5] 76 Fed. Reg. 824, 834. Multiple comments received by the Commission in response to the Release have argued that appointed governing members should be treated in the same fashion as elected members and be excluded from the municipal advisor classification and compliance obligations. Such arguments include, but are not limited to, the following: (i) municipal entity board members are not advisors or consultants to municipal entities in that they receive advice from third-party municipal advisors and are responsible for making final decisions rather than merely advising on any course of action; (ii) every municipal entity board member, whether elected or appointed, takes the same oath, operates under the same constraints (*e.g.*, state law regarding open board meetings, etc.) and codes of conduct and behavior and each is subject to the same liability for fraud and malfeasance; (iii) appointed municipal entity board members are often citizen volunteers and have strong ties to their municipal communities and municipal leaders and are thus accountable to this base when acting in their capacity as board members; (iv) appointed municipal entity board members often serve limited, fixed terms at the pleasure of the elected official that appointed them and are therefore at risk of losing their positions if their actions are not consistent with the municipal entity's interests; and (v) the onerous compliance processes, costs and risks associated with the municipal advisor classification will have a chilling effect on attracting the best and most qualified volunteers to serve on boards. *See, e.g.*, Letter from Mark R. Hayes, Esquire, General Counsel, Arkansas Municipal League, North Little Rock, Arkansas, to the Commission, dated February 3, 2011; Letter from John J. Coffey, Chairman, Orange County (Florida) Health Facilities Authority, Orlando, Florida, to the Commission, dated February 2, 2011; Letter from Alejandro J. Valella, Esquire, Vice President and Deputy Counsel, New York State Homes and Community Renewal, New York, New York, to the Commission, dated February 1, 2011; Letter from John Murphy, Executive Director, National Association of Local Housing Finance Agencies, to the Commission, dated January 27, 2011. Although we are not commenting specifically on this point, we believe these letters fairly articulate the reasons the Commission's interpretation of this point in the Release should be reconsidered and revised.

[6] 76 Fed. Reg. 824, 837.

[7] Indeed the distinction made by the Commission between appointed and elected officials is entirely inapposite to non-governmental entities, as all directors and officers of nonprofit or for-profit entities, regardless of whether they are elected or appointed, are accountable to the organization. See Section 3 of this Comment Letter.

We recognize that Section 15B(e)(4) does not contain a parenthetical exclusion for obligated persons and their employees as it does for municipal entities and their employees, but we do not believe that Section 15B(e)(4) should be interpreted to include obligated persons or their employees or directors, nor do we believe such persons provide "advice" to or on behalf of municipal entities or obligated persons in the manner contemplated by the statute. Because there is no explicit exclusion equivalent to "municipal entity or an employee of a municipal entity" given to "obligated persons or employees of obligated persons" in the definition of municipal advisor, the question remains whether obligated persons and their employees and directors may potentially be subject to classification as municipal advisors on a case by case basis. Even if the Commission were to arrive at a conflicting interpretation based on its technical reading of the statutory language, we urge the Commission to use its broad exemptive authority under Section 15B(a)(4) to correct what we strongly believe would be an inappropriate result and to exclude obligated persons and their board members and employees from the definition of municipal advisor.

1. Board Members and Employees of Obligated Persons are Readily Distinguishable from Municipal Advisors.

The Commission has stated that in the municipal advisor regulations the meaning of "obligated person" should be consistent with the definition of "obligated person" in 17 C.F.R. 240.15c2-12(f)(10) ("Rule 15c2-12"):

> any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support the payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).[8]

Obligated persons are responsible for making the debt service payments on tax-exempt bond financings[9] that are issued by governmental entities. These governmental entities act as "conduits," issuing tax-exempt securities and lending the proceeds to the obligated person, which may be either a nonprofit entity or other entity designated by Congress as an eligible recipient of the proceeds of such financings. The Commission's rationale in excluding municipal entities and employees of municipal entities from the definition of municipal advisor should apply with equal force to obligated persons and their employees and board members. Moreover, Congress' concerns regarding lack of accountability and transparency do not apply to board members and employees exercising their legally mandated fiduciary obligations when deciding to authorize a bond offering, nor should it apply to employees, such as treasury

[8] 17 C.F.R. 240.15c2-12(f)(10).

[9] The term "tax-exempt bond financings" is used herein because the majority of our comments are addressing the issues that arise from the Release for nonprofit entities participating in the municipal markets; however, these comments (other than those that directly address nonprofits) apply equally to issues that arise in the context of either for-profit or nonprofit entities participating in the issuance of other securities issued by municipal entities, including taxable "Build America Bonds" and other federally subsidized programs.

officers, who are acting within the scope of their employment duties to manage the funding needs of the organization they serve. Indeed, such persons often execute their responsibilities with the help of counseling from outside municipal advisors, and they initially believed they were to receive the protections of this new legislation.

The municipal advisors our clients typically engage are financial advisors or other market professionals who assist municipal entities or obligated persons with evaluating the terms of various municipal products. These advisors have multiple clients, hold themselves out as advisors on municipal finance products, and generally do no exercise decision-making authority for the municipal entity or obligated person.

By contrast, employees and directors of obligated persons act with respect to and in the interest of those entities with which they are affiliated and do not hold themselves out as advisors on municipal finance products. They act for obligated persons in connection with municipal offerings only as part of a broader range of responsibilities to the obligated person. The decision to proceed with a municipal transaction and the establishment of the relevant terms of the offering rest entirely with the board members of the relevant entity and the employees they have authorized and instructed to act. Moreover, corporate entities are able to act only through their boards of directors and employees, who are fundamentally representatives of, rather than advisors to, these entities.

As discussed below, board members and employees of obligated persons already owe extensive fiduciary duties to the entities they serve. Failure to provide an explicit exclusion from the definition of municipal advisor for such persons confuses the roles of advisor and advisee. Instead, Section 975 of the Dodd-Frank Act is clearly designed to protect obligated persons, rather than subject them, and their employees and directors, to the regulatory scheme governing their advisors and potential liability for performing the services that an employee and/or board member is expected, and in some cases required by law, to perform.

3. Board Members and Employees of Obligated Persons Are Already Subject To Extensive Regulation And It Is Beyond the Scope of the Dodd-Frank Act to Seek to Apply Additional Duties on Such Persons.

A. Nonprofit Board Members and Officers.

A comprehensive legal framework already exists for the governance of nonprofit entities, imposing strict fiduciary duties and protecting against fraudulent behavior and self-dealing. A nonprofit board's responsibility runs to donors, clients, the employees and the community at large. Its members are tasked with monitoring and overseeing management, certain operational tasks as well as fund-raising, recruiting additional qualified board members and employees, and general strategic planning. In furtherance of those objectives, nonprofit boards and employees are subject to or strongly encouraged to comply with various laws and regulations regarding governance and disclosure.

State law mandates fiduciary duties of care and loyalty requiring directors and officers of nonprofit organizations to act in the best interest of the organization rather than in the personal interest of the director or some other person or organization. For example, the Revised Model Nonprofit Corporation Act (the "Nonprofit Act") (i) requires that nonprofit directors and officers discharge their duties in good faith with the care that an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interest of the corporation;[10] (ii) regulates and requires disclosure of any director conflicts of interest;[11] and (iii) imposes direct personal liability on any directors that violate their fiduciary duties.[12] Most states have either adopted or substantively followed the Nonprofit Act fiduciary duty provisions in creating their nonprofit corporation statutes.[13] Self-dealing transactions involving interested directors are also regulated.[14]

On a federal level, the Internal Revenue Service (the "IRS") institutes oversight of nonprofit governance via disclosure regulation, encouraging nonprofits to adopt and regularly evaluate a written conflict of interest policy that requires directors and employee to (i) act solely in the interests of the nonprofit without regard for personal interests, (ii) include written procedures for determining whether a relationship, financial interest or business affiliation results in a conflict, and (iii) prescribe a course of action in the event a conflict is identified.[15] A sample conflict of interest policy is included in the Form 1023 and all nonprofits are encouraged to adopt such a policy. The Form 990 nonprofit tax return template similarly requires disclosure of any conflicts of interest and requests information on any conflict of interest policy instituted at the organization.[16] The IRS also encourages directors on nonprofit boards to adopt effective codes of ethical standards and whistleblower policies, and information on such policies is also required in any Form 990 filing. By making full and accurate information about its mission, activities, finance, and governance publicly available, a nonprofit encourages transparency and accountability to its constituents.

B. For-Profit Board Members.

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[10] Rev Mod Nonprofit Corp Act §§ 8.30(a) & 8.42.

[11] Rev Mod Nonprofit Corp Act § 8.31.

[12] Rev Mod Nonprofit Corp Act § 8.33.

[13] For example, the State of California requires any nonprofit director to "perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. CA Corporations Code §§ 5231(a), 7231(a) & 9241(a).

[14] CA Corporations Code §§ 5233, 7233 & 9243.

[15] The IRS Form 1023 exemption application requires directors of nonprofits to disclose all directors' conflict of interests, including familial and business relations and the existence of any common control with another nonprofit.

[16] The IRS Form 990 also requires the nonprofit's disclosure of: (i) whether or not it has a written document retention and destruction policy; (ii) a description of the process used by the board to set executive compensation; (iii) how the Form 990, Form 1023, governing documents, conflict of interest policy and financial statements will be made available for public inspection (but only the Forms 990 and 1023 are required by federal law to be disclosed); and (iv) whether or not the nonprofit has an audit committee to review its outside audit.

Directors of for-profit corporations are similarly obligated to fulfill certain fiduciary duties while acting in their capacity as directors. They owe fiduciary duties to the corporation they serve and its shareholders,[17] which such duties include the duty of care and the duty of loyalty.[18] These principles have been fully developed in common law, and most states have codified a general standard of conduct for corporate directors which follows suit.[19] The American Bar Association prepared the Model Business Corporation Act in 1950 in order to provide uniformity of the laws governing corporations from state to state and offer a template upon which states could base their own corporate statutes. This Act, adopted in some form or another by more than 24 states, calls for directors to discharge their duties in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, with the care that a person in a like position would reasonably believe appropriate under similar circumstances.[20] Corporate governance, reporting and disclosure requirements of the Sarbanes-Oxley Act of 2002, the Exchange Act, the Securities and Exchange Commission and self-regulatory organizations such as the New York Stock Exchange and the Nasdaq Stock Market all serve to further regulate public companies and their management.

C. Employees in General.

State law also imposes fiduciary duties on a corporation's employees, with the extent of such duties depending upon the nature and terms of the employment. Fiduciary duty laws vary from state to state, and many states have codified the rights and obligations accompanying the employee-employer relationship in their agency statutes.[21] Legally, employees are considered "agents" of their employers and they therefore have a fiduciary obligation to act loyally for the benefit of their employer, the "principal," in all matters connected with the agency relationship.[22] In California, while the corporation law provides no specific standards that corporate officers must observe in performing their duties, the courts have ruled that an employee owes a duty of loyalty toward his or her employer during the term of employment[23] and a corporate officer who participates in management of a corporation and exercises some discretionary authority is a fiduciary of the corporation as a matter of law.[24] The fiduciary duties attach to an officer or employee if he or she is endowed by the board of directors or the bylaws with discretionary power to manage corporate affairs.[25] An officer's obligations may be determined to be even greater than those of a director to conduct diligent inquiry under certain circumstances, owing to an officer's more active

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[17] *Ostrowski v. Avery*, 703 A.2d 117, 121-22 (Conn. 1997); *Arnold v. Society for Sav. Bancorp, Inc.*, 678 A.2d 533, 529 (Del. 1996).

[18] *Corporate Director's Guidebook—1994 Edition*, 49 Bus. Law. 1245, 1252 (1994).

[19] *See, e.g.*, Cal. Gen. Corp. Law § 309(a); N.Y. Bus. Corp. Law § 717; Va. Stock Corp. Act § 13.1-690.

[20] Model Bus. Corp. Act § 8.30(a) & (b) (2008), Committee on Corporate Laws, ABA.

[21] *E.g.*, CA Civil Code § 2295 et al.

[22] Rest 3d Agen § 8.01.

[23] *Fowler v. Varian Associates, Inc.* (1987) 196 Cal. App. 3d 34, 41, 241 Cal. Rptr. 539.

[24] *See GAB Bus. Servs., Inc. v Lindsey & Newsom Claim Servs., Inc.* (2000) 83 CA4th 409, 99 CR2d 665, modified at 83 CA4th 1308d.

[25] *See* Sparks & Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 Bus Lawyer 215 (1992).

involvement in day-to-day operations.[26] An employee's basic fiduciary duties within the scope of his or her employment that arise as a result of the agent-principal relationship with an employer often include duties of loyalty, obedience, due care and skill, communication and respect for the employer's property and confidential information. Fiduciary duties of an employee are separate from, and co-exist with, an employee's contractual duties of loyalty and good faith, which, if not expressly agreed to, may be implied in contracts of employment.

As indicated above, the requirements of state and federal law already regulate the fiduciary duties of employees and board members of nonprofit and for-profit entities. Employees and board members are now, more than ever before, being asked to take a more active role in financial management and strategic long-term planning to ensure the financial sustainability of their organizations. Such individuals should be permitted and encouraged to support and enhance the mission or task to which they have dedicated their time without being forced to subject themselves to further registration and regulation as a result of their roles in guiding and thoroughly vetting and considering participation in the municipal markets. Their primary allegiance is already devoted to the obligated person that they represent and serve, and they have a duty to fully assess, discuss and evaluate all options and terms related to the decision regarding participation in municipal markets. They should be free to have full, open discussions on the various municipal markets and products, whether those markets and products should be part of the long-term strategic financial planning of the entity, the terms of participation in the municipal markets or products and to make fully informed decisions regarding the same, all as part of their required duties as a board member and/or employee of the obligated person in question. Requiring them to register as a municipal advisor will not only reduce the number of people willing to participate in such matters, but may in fact leave an obligated person unable to act through its employees and board members and make informed decisions that will be in the best interests of its future.

4. Registration Requirements And Potential Liability Will Have A Chilling Effect on Recruiting Nonprofit Board Members And Employees.

The burdensome compliance measures that accompany the requirement for registration as a municipal advisor will obstruct recruitment of employees and board members of nonprofit conduit borrowers on a far more dramatic scale than for municipal entities. As indicated in the Release, individual municipal advisors would be required as part of their registration to provide specific information, including but not limited to the following: social security number; all names used since age 18; history of residences for the last five years and history of employment for the last ten years; information regarding other businesses he/she participates in as owner, partner, officer, director, employee, etc.; information regarding his/her criminal, regulatory and civil judicial history, including past convictions or guilty pleas; any previous regulatory actions related to federal securities laws or other laws; personal information on their personal financial status including bankruptcy filings, and unsatisfied judgments or liens. Nonprofits are largely volunteer organizations which rely on a supply of willing

[26] *See Gaillard v. Natomas Co.* (1989) 208 CA3d 1250.

participants. Additional administrative burdens, even those far less substantial than those imposed by municipal advisor registration, can dramatically curtail volunteer recruitment. Furthermore, much of the information is extremely personal and, while potentially relevant for evaluation and regulation of professional municipal advisors, clearly is not pertinent to evaluating an individual's actions taken as part of his/her employment or board duties.

One of the primary challenges of nonprofit governance is recruiting qualified board members. Requiring directors and employees of nonprofits who participate in the municipal markets to register as municipal advisors would have an extremely chilling effect on recruiting for nonprofits. They should not be subject to registration requirements or penalties associated with failure to comply with rules and regulations governing municipal advisors and should not be required to divulge personal information as part of the requirement to work for or serve a nonprofit. They are not municipal advisors; rather their role is clearly to act in the best interests of the nonprofit and they are usually acting based on the advice of third party municipal advisors. In fact, obligated persons are among the class of persons the statute is designed to protect. We believe it is incumbent upon the Commission to correct the ambiguous language of the statute and clarify that the registration of obligated persons as municipal advisors is not required.

While we commend the Commission's efforts to register and regulate those third parties who truly advise on municipal finance offerings, we do not believe that the municipal advisor regulation applies to those who serve as directors or employees of obligated persons. We respectfully request that the Commission expressly exclude such persons from the definition of municipal advisors under the Dodd-Frank Act.

We and the Joining Entities appreciate the opportunity to comment on the Release and the proposed rules. If you have any questions regarding this letter, please do not hesitate to contact Ursula Hyman at 213-891-7906 or Anna Rienhardt at 213-891-7839.

Sincerely,

Latham & Watkins LLP

LATHAM & WATKINS LLP

ATTACHMENT A

List of Joining Entities/Alpha Order

1. Association of Independent California Colleges and Universities
2. California Institute of Technology
3. Cedars-Sinai Medical Center
4. City of Hope National Medical Center
5. The Colburn School
6. The John Thomas Dye School
7. Los Angeles Orthopaedic Hospital Foundation
8. Marlborough School
9. Music Concourse Community Partnership
10. Retirement Housing Foundation
11. Sanford Consortium for Regenerative Medicine
12. Scripps Research Institute
13. SRI International