



**National Association of Housing and Redevelopment Officials**  
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February 22, 2011

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

Re: Comment on Proposed Rule: *Registration of Municipal Advisors*, File No. S7-45-10

Dear Secretary Murphy:

The National Association of Housing and Redevelopment Officials (NAHRO) is pleased to offer comment concerning the above referenced proposed rule published for comment in the Federal Register on January 6, 2011. Formed in 1933, with more than 22,500 agency and individual members, NAHRO is the nation's oldest and largest nationwide nonprofit organization composed of local housing and redevelopment agencies and officials engaged in the production and operation of affordable housing and in community development. Among other things, NAHRO members provide housing or rental assistance to more than 3.5 million American families. Our membership includes more than three thousand local housing and redevelopment agencies whose boards of commissioners may be affected by the rule as proposed. This comment is directed to this aspect of the rule.

### **Summary Position**

The Commission should categorically exclude from registration requirements and from the definition of "municipal advisor" all commissioners (and directors) of local public housing agencies and local redevelopment agencies, by virtue of their official capacity. An individual commissioner or director should be required to register only if he or she engages in activities otherwise requiring registration, separate and apart from the individual's status or service as a commissioner or director of a public housing or redevelopment agency.

### **Introduction - Public Housing and Redevelopment Agencies**

The formation of local housing authorities began in the 1930's in response to perceived needs to create affordable housing, eliminate urban blight and slums, and stimulate employment. Although they administered funds that were primarily federal in origin, these public agencies were, and are, authorized under state enabling statutes. These laws typically require action by the local jurisdiction to activate the agency serving the jurisdiction. Housing and redevelopment

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agencies are separately authorized in some jurisdictions, and in other states these functions are combined. For the sake of brevity, references in this comment to public housing agencies includes housing and redevelopment housing agencies, and combined agencies.

A common feature of local public housing agencies, as authorized under the various state enabling acts, is that they are governed by appointed boards of commissioners (“directors” in a few cases).<sup>1</sup> The commissioners are responsible for hiring an executive director who, in turn, hires subordinate staff and manages the agency’s day-to-day affairs subject to the overall policy direction of the board of commissioners. Commissioners are responsible for identifying mission, approving agency policy and approving significant transactions and activities that are, in turn, implemented by agency staff. Commissioners are volunteers who (with one notable exception, the New York City Housing Authority) are either wholly uncompensated or, in a few cases, nominally compensated.

Under most housing agency enabling acts, commissioners are appointed by the mayor or other chief elected official of the host jurisdiction whose residents are served by the agency. In some cases, commissioner appointments must be ratified by the governing body of the local jurisdiction and in others, commissioners are appointed by the local governing body directly. Virtually every enabling act provides a process under which commissioners who engage in misconduct in office, inefficiency or neglect of duty may be removed from office by the appointing authority. Boards of commissioners must, with narrow exceptions, operate with near total transparency under the requirements of state freedom of information and open meetings laws. In some states, commissioners are also subject to sanction under ethics codes or other rules governing the conduct of public officials. Finally, commissioners, as stewards of agencies that almost always administer federal funding, are subject to myriad federal statutes, regulations, and reporting requirements governing their actions *vis-a-vis* federal funding. Compliance with these federal requirements is overseen by the U.S. Department of Housing and Urban Development and its Inspector General.

### **NAHRO Comment**

NAHRO strongly believes that the role of local public housing agency commissioners, when accurately understood, does not place such officials within the category of persons whom Congress intended in the Dodd-Frank Wall Street Reform and Consumer Protection Act to be

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<sup>1</sup> The United States Housing Act requires that agencies with 300 or more public housing units include in their boards of commissioners a public housing resident or other person directly assisted by the agency (42 U.S.C. §1437(b)).

subject to registration requirements. This conclusion is suggested first by simple textual analysis.

1. *The statutory language does not support a conclusion that appointed public housing agency commissioners are “municipal advisors.”*

With respect to the definition of “municipal advisor” section II.A.1.a. of the Proposed Rule discussion (76 FR 828) provides:

“Section 15B(e)(4)(A) of the Exchange Act, as amended by the Dodd-Frank Act, defines the term “municipal advisor” to mean 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 products or issues, or (ii) that undertakes a solicitation of a municipal entity.”

Assuming *arguendo* that public housing agency commissioners are neither municipal entities nor employees of municipal entities, they could be municipal advisors if they meet one of the other two prongs of the statutory definition. As the following discussion indicates, they do not.

- A. *Do public housing agency commissioners “provide advice to or on behalf of a municipal entity or obligated person” with respect to financial products...?*

As mentioned above, the legal role of the public housing agency commissioner is to act as a decision-maker, not to recommend or advise. It has been said that commissioners *are* the agency. Their actions, when taken collectively as a board, are the actions of the agency itself and do not constitute in any sense *advice* to the agency. We suggest therefore that commissioners cannot, by virtue of their service in that capacity, be reasonably considered to be “advisors.” They are principals carrying out legal duties under state and federal law. Expressions of opinion by individual commissioners as part of a deliberative process leading to board action should not convert their status from principals to advisors any more than members of Congress should be deemed to be advisors (lobbyists) by expressing their opinions about or voting on a budget or appropriations bill. NAHRO therefore urges that, as a threshold matter, service as a public housing commissioner, without more, does not meet the statutory definition of “municipal advisor,” irrespective of any other potentially relevant factor such as appointive, rather than elective, designation to office or the presence, absence, or expectation of compensation.

- B. *Do public housing commissioners undertake solicitations of municipal entities?*

In the ordinary course of events, public housing agency commissioners do not solicit themselves with respect to financial products or anything else. They are required by law to engage in formal procurement processes for all significant transactions, and are prohibited by law from profiting individually with respect to the agency's affairs. In short, commissioners cannot in the ordinary course of their duties satisfy this prong of the definition. They could solicit an agency or obligated party with respect to financial products, but in so doing they would be acting outside the scope of their duties as commissioners, and would presumably be subject to registration on some basis other than their status as commissioners.<sup>2</sup>

NAHRO strongly urges that, when viewed accurately, the status of, or service as, a public housing commissioner clearly does not meet either prong of the statutory definition.

NAHRO respectfully disagrees in other respects with the reasoning of the Commission as expressed in the published discussion of the proposed rule:

2. *The distinction between appointive and elective office drawn by the Commission with respect to excluding members of local governing bodies is not appropriate.*

In the discussion of the proposed rule at 76 FR 843, the Commission recites that it was requested by a previous commenter to issue a clarification excluding from the definition of municipal advisor "any person serving as an appointed or elected member of the governing body of a municipal entity such as a board member, county commissioner or city councilman." The commenter reasoned that because these persons are not technically "employees" of the municipal entity, but rather are "unpaid volunteers," they might, without such clarification be required to register as municipal advisors. NAHRO agrees with the commenter.

The Commission agreed in part, responding that the exclusion from the definition of municipal advisor for "employees of a municipal entity" should include any person serving as an *elected* member of a governing body acting within the scope of such elective office. This would also include appointed members of a governing body serving *ex officio* by virtue of their holding elective office. The Commission declined to include within the exclusion appointed members of governing bodies that are not elected *ex officio* members "...because employees and elected members are accountable to the municipal entity for their actions..." and..."unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity."

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<sup>2</sup> Federal regulations do provide for conflict of interest waivers in exceptional circumstances. Such waiver requests are strictly scrutinized by federal officials and granted, if at all, only upon determination that the best interest of the Government and the agency would be served by granting it. In such cases, the commissioners would be acting not in the capacity of commissioner but as independent contracting parties. They would not participate in the board's procurement decision.)

NAHRO respectfully suggests that this distinction is arbitrary. First, the statutory language contains no reference to such a distinction or any other basis on which such a distinction should be drawn. If Congress desired that registration should be required for appointive but not elective officials, it could, and presumably would, have said so. Further, we suggest that the apparent premise on which the Commission bases the distinction – that appointed members of local governing bodies are not sufficiently accountable to be excluded from registration requirements – is erroneous, particularly as applied to public housing agency commissioners. As mentioned above, these officials are fully, if not exceptionally, accountable to higher governmental authority. Finally, it is unclear how applying a registration requirement to these officials would make them more accountable.

3. *In the case of public housing agency commissioners, compensation is relevant to consideration of registration requirements.*

A previous commenter urged the Commission to exclude from registration requirements a broker-dealer or other entity that provides advice or assistance to a municipal entity on an informal, non-contractual and uncompensated basis. Other commenters disagreed, pointing out that such “free services” are generally given with the expectation of a future compensated relationship. The Commission (noting that Congress did not distinguish between compensated and uncompensated advisors) stated that it “...does not believe the issue of whether a municipal advisor is compensated for providing municipal advice should factor into the determination of whether the municipal advisor must register with the Commission.” (76 FR 832).

NAHRO believes that, in the case of public housing commissioners, the matter of compensation is relevant to the appropriateness of a registration requirement. As mentioned above, with the exception of one agency, public housing agency commissioners receive no compensation or only nominal compensation. Unlike broker-dealers or other entities involved in the business of providing financial advice for compensation, commissioners do not and cannot have any expectation whatsoever of future compensation for their service as commissioners. While it may well be appropriate to disregard the absence of present compensation as a factor in applying registration requirement to persons or entities in the business of providing municipal financial advice, commissioners occupy a very different position, which must be considered in arriving at a final regulation that is reasonable as applied.

4. *Applying registration requirements to appointed members of local governing bodies is not in the public interest.*

Local public housing agencies, like many other municipal entities, rely upon the willingness of qualified citizens to serve on boards of commissioners. As mentioned, public housing agency commissioners generally undertake this public service as uncompensated volunteers. In so

doing, they assume decision-making responsibility for complex, highly regulated programs. The demands on their time and personal resources, not to mention the potential liability inherent in such service, are not inconsiderable. Qualified individuals who consent to undertaking this public service are a treasured resource. It is therefore imperative that any regulatory requirement that will discourage such service be imposed only when clearly mandated by statute or otherwise justified by compelling circumstances. This is not the case here. Adopting this rule as proposed will undermine the already difficult task of local officials to appoint qualified volunteers to the governing boards of public housing agencies and other local entities.

Further, deeming public housing agency commissioners to be municipal financial advisors with the possible attendant exposure to civil and criminal liability will discourage necessary free discourse among commissioners concerning the financial affairs of these local agencies. Inasmuch as decision-making concerning those matters is a major component of the responsibilities of a commissioner, impediments to robust discussion are inimical to the public interest.

5. *Absent a clear indication that Congress intended to require registration of local officials who are not engaged in the business of provision municipal financial advice, such officials should be excluded from registration requirements.*

Whether or not public housing agency commissioners may be appropriately required to register as municipal advisors ultimately depends upon the intent of Congress. As pointed out, in the Commission's introduction to the proposed rule, notwithstanding that municipal finance has in recent years become an increasingly complex and varied field, "[u]ntil the passage of the Dodd-Frank Act, the activities of municipal advisors were largely unregulated and municipal advisors were not generally required to register with the Commission or any other Federal, State, or self-regulatory entity with respect to their municipal advisory activities...." (76 FR 825). Although the Commission offers convincing justification for registration requirements for municipal advisors generally, its own descriptions of municipal advisors set forth in the discussion of the proposed rule do not seem to contemplate decision-making members of local governing bodies.

Regarding the statutory definition, the Commission stated:

"The statutory definition of a 'municipal advisor' is broad and includes persons that traditionally have not been considered to be municipal financial advisors. Specifically, the definition of a "municipal advisor" includes 'financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors' that engage in municipal advisory activities .... Consequently, the statutory definition of 'municipal advisor' includes distinct groups of professionals that offer different services and compete in distinct markets. The three principal types of

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municipal advisors are: (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; investment advisors 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 ‘municipal advisor’); and (3) third-party marketers and solicitors.” (76 FR 828, 829)

NAHRO submits that any fair reading of the Commission’s description of the persons and entities intended to be included within the term “municipal advisor” to whom the registration requirement is intended to apply would not include public housing agency commissioners acting in such capacity. They should not be so included interpretively.

For the reasons set forth above, NAHRO strongly urges that the Commission exclude public housing commissioners and other appointed members of local governing boards from registration requirements as municipal advisors, unless an individual basis for such registration, independent of service as a member of the governing board, exists.

Should any member of the Commission’s staff have questions about this comment or wish us to supply further information, we will be pleased to speak with them.

Thank you again for the opportunity to comment on this very important subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Saul N. Ramirez, Jr." with a stylized flourish at the end.

Saul N. Ramirez, Jr.  
Chief Executive Officer