



TO: **Securities and Exchange Commission**

FROM: **Michael J. Stanard, Executive Director
Health and Educational Facilities Authority of the State of Missouri**

DATE: **January 24, 2011**

RE: **“Municipal Advisors” Interpretation**

Disagreement With SEC “Municipal Advisors” Interpretation

The Health and Educational Facilities Authority of the State of Missouri (“MoHEFA”) is concerned about the SEC’s preliminary interpretation suggesting that appointed board members of municipal bond issuers may be considered a “municipal advisor.” Such an interpretation would have a chilling effect on the ability to attract and retain qualified board members for MoHEFA and other Missouri issuers.

MoHEFA is primarily involved in the issuance of tax-exempt bonds for the benefit of nonprofit health care and educational institutions. All of MoHEFA’s board members are appointed by the Governor of Missouri with the consent of the Missouri Senate. There are several other similar Missouri state authorities which issue tax-exempt bonds for specialized matters such as housing, the environment and economic development.

Appointed Board Members Are Subject To Same Laws As Elected Officials

In Missouri, both elected and appointed officials of governing bodies are subject to the same “conflicts of interest” and “fiduciary duty” laws. Thus, it makes no sense to distinguish between the two as to the applicability of the definition of “municipal advisor.” Section 105.452 Revised Statutes of Missouri (“RSMo”) sets out several prohibitions for public officials. These include limits on bribery (broadly defined) and on the use of confidential information for personal gain, or the gain of spouse or children, or a related business. Favorably acting (or failing to act) on a matter is forbidden where the official or family will enjoy special benefits. Section 105.458 RSMo forbids certain conduct by members of a governing body in any contractual or business dealings with a governmental entity which they serve. In addition, Section 105.462 contains additional prohibitions.

Copies of these statutes referred to above are attached hereto.

Board Members of Nonprofit Health Care and Educational Institutions

MoHEFA also understands that the SEC interpretation could treat the board members of nonprofit health care and educational institution borrowers as “municipal advisors.” This interpretation is also of concern as MoHEFA exists to benefit such borrowing institutions. Such board members are

typically not experts in municipal finance and contribute their time as volunteers to the nonprofit entities. Such board members are also subject to fiduciary duties and conflicts of interest prohibitions. Missouri, like most other states, has adopted a form of the Model Nonprofit Corporation Act which includes such provisions. See attached Sections 355.416 and 355.426 RSMo. The IRS rules applicable to nonprofit organizations also place limitations on the activities of board members of nonprofit entities.

We will be happy to provide additional information on these topics.

Missouri Revised Statutes

Chapter 105

Public Officers and Employees--Miscellaneous Provisions

Section 105.452

August 28, 2010

Prohibited acts by elected and appointed public officials and employees.

105.452. 1. No elected or appointed official or employee of the state or any political subdivision thereof shall:

- (1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or
- (2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;
- (3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;
- (4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse or dependent children, including but not limited to increases in retirement benefits, whether received from the state of Missouri or any third party by reason of such act. For the purposes of this subdivision, "special monetary benefit" means being materially affected in a substantially different manner or degree than the manner or degree in which the

public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected. In all such matters such officials must recuse themselves from acting, except that such official may act on increases in compensation subject to the restrictions of section 13 of article VII of the Missouri Constitution; or

(5) Use his decision-making authority for the purpose of obtaining a financial gain which materially enriches himself, his spouse or dependent children by acting or refraining from acting for the purpose of coercing or extorting from another anything of actual pecuniary value.

2. No elected or appointed official or employee of any political subdivision shall offer, promote, or advocate for a political appointment in exchange for anything of value to any political subdivision.

(L. 1978 H.B. 1610 § 3, A.L. 1990 H.B. 948, A.L. 1991 S.B. 262, A.L. 2008 H.B. 2233)

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Missouri Revised Statutes

Chapter 105

Public Officers and Employees--Miscellaneous Provisions

Section 105.458

August 28, 2010

Prohibited acts by members of governing bodies of political subdivisions, exceptions.

105.458. 1. No member of any legislative or governing body of any political subdivision of the state shall:

(1) Perform any service for such political subdivision or any agency of the political subdivision for any consideration other than the compensation provided for the performance of his or her official duties, except as otherwise provided in this section; or

(2) Sell, rent or lease any property to the political subdivision or any agency of the political subdivision for consideration in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received; or

(3) Attempt, for any compensation other than the compensation provided for the performance of his or her official duties, to influence the decision of any agency of the political subdivision on any matter; except that, this provision shall not be construed to prohibit such person from participating for compensation in any adversary proceeding or in the preparation or filing of any public document or conference thereon.

2. No sole proprietorship, partnership, joint venture, or corporation in which any member of any legislative body of any political subdivision is the sole proprietor, a partner having more than a ten percent partnership interest, or a coparticipant or

owner of in excess of ten percent of the outstanding shares of any class of stock, shall:

(1) Perform any service for the political subdivision or any agency of the political subdivision for any consideration in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let after public notice and competitive bidding, provided that the bid or offer accepted is the lowest received;

(2) Sell, rent or lease any property to the political subdivision or any agency of the political subdivision where the consideration is in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received.

(L. 1978 H.B. 1610 § 6, A.L. 1985 H.B. 193, A.L. 1998 H.B. 1120, A.L. 2005 H.B. 577 merged with S.B. 306 merged with S.B. 307)

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Missouri Revised Statutes

Chapter 105 Public Officers and Employees--Miscellaneous Provisions Section 105.462

August 28, 2010

Prohibited acts by persons with rulemaking authority--appearances--exceptions.

105.462. 1. No member of any agency of the state or any political subdivision thereof who is empowered to adopt a rule or regulation, other than rules and regulations governing the internal affairs of the agency, or who is empowered to fix any rate, adopt zoning or land use planning regulations or plans, or who participates in or votes on the adoption of any such rule, regulation, rate or plan shall:

- (1) Attempt to influence the decision or participate, directly or indirectly, in the decision of the agency in which he or she is a member when he or she knows the result of such decision may be the adoption of rates or zoning plans by the agency which may result in a direct financial gain or loss to him or her, to his or her spouse or a dependent child in his or her custody or to any business with which he or she is associated;
- (2) Perform any service, during the time of his or her employment, for any person, firm or corporation for compensation other than the compensation provided for the performance of his or her official duties, if by the performance of the service he or she attempts to influence the decision of the agency of the state or political subdivision in which he or she is a member;
- (3) Perform for one year after termination of his or her employment any service for compensation for any person, firm or corporation to influence the decision or action of the agency with which he or she served as a member; provided, however, that he or she may, after termination of his or her office or employment, perform such service for consideration in any adversary proceeding or in the preparation or filing of any public document or conference thereon unless he or she participated directly in that matter or in the receipt or analysis of that document while he or she was

serving as a member.

2. No such member or any business with which such member is associated shall knowingly perform any service for, or sell, rent or lease any property to any person, firm or corporation which has participated in any proceeding in which the member adopted, participated in the adoption or voted on the adoption of any rate or zoning plan or the granting or revocation of any license during the preceding year and received therefor in excess of five hundred dollars per transaction or one thousand five hundred dollars per annum except on transactions pursuant to an award on contract let or of sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received.

(L. 1978 H.B. 1610 § 7, A.L. 1998 H.B. 1120)

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Chapter 355 Nonprofit Corporation Law Section 355.416

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Director's conflict of interest.

355.416. 1. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a material interest. A conflict of interest transaction is not voidable or the basis for imposing liability on a noncompensated director if the transaction was not unfair to the corporation at the time it was entered into or is approved as provided in subsection 2 or 3 of this section.

2. A transaction in which a noncompensated director of a public benefit or religious corporation has a conflict of interest may be approved:

(1) In advance by the vote of the board of directors or a committee of the board if:

(a) The material facts of the transaction and the director's interest are disclosed or known to the board or committee of the board; and

(b) The directors approving the transaction in good faith reasonably believe that the transaction is not unfair to the corporation; or

(2) Before or after it is consummated by obtaining approval of the:

(a) Attorney general; or

(b) The circuit court in an action in which the attorney general is joined as a party.

3. A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:

(1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) The material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

4. For purposes of subsections 2 and 3 of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board or on the committee, who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a material interest in the transaction does not affect the validity of any action taken under subdivision (1) of subsection 2 of this section or subdivision (1) of subsection 3 of this section if the transaction is otherwise approved as provided in subsection 2 of this section or subsection 3 of this section.

5. For purposes of subdivision (2) of subsection 3 of this section, a conflict of interest transaction is authorized, approved or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by a director who has a material interest in the transaction may not be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under subdivision (2) of subsection 3 of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the voting power, whether or not present, that is entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

6. The articles, bylaws, or a resolution of the board may impose additional requirements on conflict of interest transactions.

(L. 1994 H.B. 1095)

Effective 7-1-95

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Chapter 355 Nonprofit Corporation Law Section 355.426

August 28, 2010

Liability for unlawful distribution.

355.426. 1. Except in reliance on information described in subsection 3 of this section, a director who votes for or assents to a distribution made in violation of this chapter is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

2. A director held liable for an unlawful distribution under subsection 1 of this section is entitled to contribution:

(1) From every other director who voted for or assented to the distribution without relying on the information described in subsection 3 of this section; and

(2) From each person who received an unlawful distribution for the amount of the distribution whether or not the person receiving the distribution knew it was made in violation of this chapter.

3. In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, certified public accountants or other persons as to matters the director reasonably believes are within the persons' professional or expert competence;

(3) A committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(4) In the case of a public benefit corporation which is a church or convention or association of churches, religious authorities and ministers, priests, rabbis, or other persons whose positions or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

4. A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection 3 of this section unwarranted.

(L. 1994 H.B. 1095)

Effective 7-1-95

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