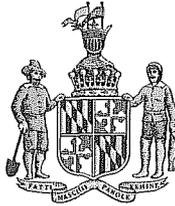


DOUGLAS F. GANSLER
Attorney General



KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

February 22, 2011

WRITER'S DIRECT DIAL NO.

Via Electronic Mail: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SEC File Number S7-45-10
Release No. 34-63576

Dear Ms. Murphy:

As the chief legal adviser for virtually every agency in each of the three branches of Maryland State Government, the Office of the Attorney General appreciates the opportunity to respond to the Commission's request for comment on proposed rules relating to the registration of municipal advisors as set forth in Release No. 34-63576 (the "Release").

In Maryland, Assistant Attorneys General represent the governing bodies of many State agencies, commissions and authorities that would constitute a "municipal entity" within the meaning of Section 15B of the Securities Exchange Act of 1934, as recently amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). The Act requires that "municipal advisors" register with the Commission and become subject to related requirements imposed by statute and regulation. Section 15B specifically excludes a "municipal entity" and the employees of a "municipal entity" from the definition of "municipal advisor." In the Release, the Commission extended the exclusion to elected members of a governing body of a "municipal entity" as well as *ex officio* members who sit on a board by virtue of holding a certain elective office. However, the Commission took the interpretive position that an "appointed" member of a governing body of a "municipal entity" would not be covered by the exclusion from the definition of "municipal advisor." The Commission's stated rationale for the distinction between elected or *ex officio* members and appointed members is that the Commission staff believes that appointed members are not directly accountable to citizens for their actions and performance as a member of the governing body of a municipal entity.

We believe that the rules as proposed have unintended consequences for public boards, and for the citizens of states and municipalities, including (1) deterring citizens from serving on public boards, (2) chilling debate, deliberation and advocacy among members of public boards, (3) interfering with the rights of a State and its executive or other appointing body to determine appropriate qualifications for members of governing bodies, (4) unfairly burdening certain public employees with registration and compliance requirements while exempting others from such burdens, and (5) indeed, unfairly burdening any public board member with registration and compliance costs and obligations, and associated liability for

200 Saint Paul Place ❖ Baltimore, Maryland 21202-2021

Main Office (410) 576-6300 ❖ Main Office Toll Free (888) 743-0023 ❖ D.C. Metro (301) 470-7534

Consumer Complaints and Inquiries (410) 528-8662 ❖ Health Advocacy Unit/Billing Complaints (410) 528-1840

Health Advocacy Unit Toll Free (877) 261-8807 ❖ Homebuilders Division Toll Free (877) 259-4525 ❖ Telephone for Deaf (410) 576-6372

www.oag.state.md.us

potential noncompliance, simply because the board member is fulfilling his or her duty to make decisions and set policy in accordance with responsibilities under State law to manage and administer the business of a public board. These unintended consequences are not aligned with the goals of the Act or the Commission's focus on the orderly regulation of market participants and the protection of investors.

Members of Governing Bodies Do Not Provide "Advice" Regarding Investments

We respectfully submit that the Commission's interpretation of the application of the definition of "municipal advisor" is overly broad with respect to members of the governing bodies of Maryland's agencies, commissions and authorities. We urge the Commission to make clear in the final rules that a member of a governing body of a "municipal entity" shall not be deemed to "give advice," and therefore does not meet the definition of a "municipal advisor," simply because the member engages in discussion, debate, policy making or decision making relating to investment matters in connection with the member's duties as a member of the governing body.¹

Although the Commission has not defined the meaning of "advice" in the context of regulation of "municipal advisors," we note that the Commission has highlighted the following types of activities in this context: advice relating to the issuance of municipal securities or swap transactions, guaranteed investment contracts, and investment strategies (including advice with respect to the structure, timing, terms, and other similar matters concerning such issues or financial products). Debate, discussion and review of investment matters and policies – the foundation of the responsible exercise of a governing body's governance responsibilities and duties – do not constitute "advice" and should not be interpreted as such. Members of public boards, in exercising their authority as decision makers and policy makers, generally are not engaged in offering advice with respect to structure, terms "or similar matters" concerning financial products or the investment of assets. Indeed, some boards *receive* advice from regulated consultants and advisors, and then act on that advice in the exercise of responsibilities on behalf of their agency, authority or commission. Deliberation and discussion among board members relating to investment issues cannot be equated with "advice" rendered by market professionals. We believe the Commission must clarify this in the final rules relating to the registration of "municipal advisors," to eliminate confusion about the scope of activities that constitute "advice."

Furthermore, a "municipal entity" is excluded from the definition of "municipal advisor." A "municipal entity" can act only through its governing body or employees to whom authority has been delegated. The governing body should be viewed as the functional equivalent of the "municipal entity" for purposes of analysis of the scope of the term "advice." A governing body does not "give advice to itself." Rather, a governing body deliberates and makes decisions on the basis of information available to its members. As numerous comment letters have noted, the proposed regulations have the effect of "turning on its head" the concept of "advice" and inadvertently transforming decision makers into

¹ The application of the definition of "municipal advisor" is particularly inapposite when the governing body is advised on investment matters by a third party that is subject to regulation under federal securities laws, as is the case for a number of governing bodies in Maryland such as the board of trustees of the Maryland State Retirement and Pension System and the board of the College Savings Plans of Maryland, for example.

advisors, with the result that very likely “chills informed analysis and debate --exactly the opposite of the result the SEC should be seeking to encourage.”²

The Exclusion from the Definition of “Municipal Advisor” Should Cover Elected or Ex Officio Members of a Governing Body As Well As Appointed Members

The Commission’s stated rationale for distinguishing between elected officials and appointed board members when recommending the registration of appointed members while giving elected members an “automatic” exclusion is puzzling. The Release states that Commission staff believes that appointed board members are “not accountable” to the public in the same manner as elected members or *ex officio* members who serve by virtue of elected office, and therefore should be subject to regulation. We think that staff may not have a full understanding of the high degree to which appointed members of public boards are accountable.

Many of Maryland’s governing bodies are created by enabling legislation which sets forth the scope of duties, standards of care, liability for breach of duty, limitations on certain transactions and conduct, and circumstances under which members may be disqualified or removed.³ *All* members of a particular governing body are held to the same standards regardless of whether they hold their position by virtue of elected office, election by a particular constituency, or appointment by the Governor. These provisions of law hold the members of a governing body accountable to their particular constituency, if any, as well as the citizens of Maryland.

In addition, members of the governing bodies of Maryland’s agencies, commissions and authorities are subject to Maryland’s ethics laws.⁴ Board members are required to make annual financial disclosures with the State Ethics Commission and are held accountable for meeting standards of conduct set forth in State ethics laws. Meetings are subject to Maryland’s Open Meeting Act and the minutes of those meetings are available to the public in accordance with that law.

Most importantly, in Maryland, members of many of these governing bodies, including appointed members, are deemed “public officials” with resulting accountability under the Maryland Constitution. Article 6 of the Declaration of Rights of the Maryland Constitution requires that public officials are “accountable for... [their] conduct.” As should be clear from the foregoing, there is no basis for distinguishing among different members of a governing body with respect to the degree of accountability to the citizenry or making a determination that certain of the members should be regulated under federal securities laws.

The Commission’s rationale for the distinction between the treatment of (a) elected or *ex officio* members of a governing body and (b) appointed members of a governing body

² See, e.g., January 19, 2011 letter for Jacqueline M. Kovilaritch, Assistant City Attorney, City of Petersburg, Florida.

³ See, e.g., Subtitle 2. *Fiduciary Responsibilities* of the State Personnel and Pensions Article of the Annotated Code of Maryland.

⁴ Section 15-103 of the State Government Article of the Annotated Code of Maryland.

Elizabeth M. Murphy
February 22, 2011
Page 5

is not relevant with respect to the governing body of a "municipal entity" whose members have statutory and regulatory obligations that promote and require accountability, as is the case in Maryland. As such, we urge the Commission to exclude from the definition of "municipal advisor" *all* members of the governing body of a "municipal entity."

The Treatment of Certain Ex Officio Board Members Does Not Make Sense Under State Law

The composition of the governing body of many Maryland agencies, commissions and authorities is mandated by Maryland law. In many instances, a member who serves in an *ex officio* capacity is not an elected public official, but serves by virtue of holding a specific State Cabinet level position or other office. In particular, Maryland's State Treasurer and Secretaries of various departments of the executive branch of State government serve *ex officio* on a number of governing bodies. The Treasurer, under Maryland law, is a Constitutional officer of the State and is appointed upon ballot of the Maryland General Assembly. A Secretary of a department of the executive branch is appointed by Maryland's Governor to serve in that position.

Under the rules proposed in the Release, it appears that the State Treasurer or a Secretary of a department of the executive branch would not be excluded from the definition of "municipal advisor" even though, by statute, they serve *ex officio* on certain boards and commissions as a result of the offices they hold. Further, the State Treasurer and the Secretaries of various departments of the executive branch of State government are employees of the State of Maryland although they are not employees of a particular entity on whose board they serve. We see no reasonable rationale for the different outcomes under the proposed rules between (1) an elected official (excluded) and the State Treasurer or the Secretary of an executive branch department of State government (each, not excluded), or (2) employees of a "municipal entity" (excluded) and the State Treasurer or the Secretary of an executive branch department (each, not excluded).

We believe the Commission should modify the scope of the definition of "employee" of a "municipal entity" for purposes of clarifying the availability of the exclusion from the definition of "municipal advisor." Persons who serve *ex officio* as a member of a governing body of a "municipal entity," by virtue of their status as an employee or officer of the jurisdiction in which the "municipal entity" is located, should be covered by the exclusion from the definition of "municipal advisor" that applies to each employee of such "municipal entity." In any event, as discussed above, we urge the Commission to exclude all appointed members of a governing body from the definition of "municipal advisor."

The Proposed Interpretation Interferes with States' Rights

In Maryland, as is the case in many states, the composition of and qualifications for membership on the governing body of various "municipal entities" are set forth specifically in State law. In some instances, the Governor may have more general authority under State law to make appointments of members of governing bodies. Because the Commission would have authority to reject or deny the registration application of a board member or trustee of a State agency, commission or authority if the rules are adopted as proposed, an impermissible conflict between the Commission's rules and State law would result. We do not believe that the Act, as amended to include the new "municipal advisor" provisions, was intended to permit the Commission to override appointments made under State law or to

insert into State law additional qualifications for membership on the governing body of a “municipal entity” in any state or local jurisdiction.

Stated more starkly, the Commission could be viewed as having given itself a veto over the selection and appointment of officials under a State constitution.⁵ This would create a significant constitutional issue concerning the validity of the regulation. As the Supreme Court has stated: “As against Congress’ powers ‘to regulate Commerce ... among the several States,’ the authority of the people of the States to determine the qualifications of their government officials may be inviolate.” *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). We do not believe that Congress, or the Commission, meant to tread into this constitutional territory. As in *Gregory*, the issue may be avoided if the federal law can properly be construed not to affect the selection or tenure of State officials. See *Gregory*, 501 U.S. at 464, 470 (construing federal age discrimination law not to affect mandatory retirement age for state judges and thereby avoiding constitutional issue). The Commission may avoid the constitutional issue if it concludes that an appointed board member does not become a “municipal advisor” by virtue of the appointment to the board and the performance of his or her duties under State law in that capacity.

The Interpretation Imposes a Burden on States and Public Servants, Without a Corresponding Benefit to the Public

Citizens who agree to serve the public on the governing board of a “municipal entity” may bear not only the cost of the registration fee associated with filing Form MA-1, but also the cost of ongoing compliance and legal expenses in connection with the initial filing and ongoing compliance. In Maryland, many governing bodies are prohibited by statute from compensating their members or even reimbursing expenses other than reasonable travel expenses for business specifically related to the duties of the governing body. Therefore, compliance might come at considerable personal expense to these uncompensated members if the “municipal entity” did not cover the costs. In addition, the potential for liability under the Act and related regulations is a deterrent to public service. We already have heard from several agencies in Maryland that board members would resign if burdened with the expense and compliance obligations. As noted above, we see no compelling benefit to the public related to the regulation by the Commission of people who already are subject to significant oversight and accountability to the public under State law, which would come even close to outweighing the burdens. State agencies, commissions and authorities rely on the talent of civic-minded individuals who serve on governing bodies of the many “municipal entities” in Maryland. Not only would the proposed rules impose a burden upon individual board members, but the rules also would adversely impact the State’s ability to engage in public

⁵ For example, the State Treasurer of Maryland is an office created by the Maryland Constitution and is appointed upon ballot by the Maryland General Assembly to a four-year term. Maryland Constitution, Article VI, §1. The Treasurer is one of three members of the Board of Public Works, an entity also created by the State Constitution. Maryland Constitution, Article XII. The Board of Public Works, whose other two members are directly elected by the public, functions as a “municipal entity” in certain respects. If the Commission’s proposed regulation is construed to require the State Treasurer to register with the Commission in order to perform her duties on the Board of Public Works, the regulation will have created a qualification for a constitutional State office not found in the Maryland Constitution. A similar analysis could be applied with respect to other members of State boards appointed under State law.

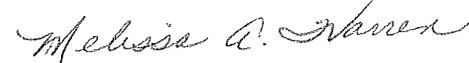
Elizabeth M. Murphy
February 22, 2011
Page 7

service the State's community leaders, professionals with particular expertise, and representatives of particular constituencies who deserve representation on public boards.

We urge the Commission to prevent the unintended and undesirable consequences of the rules, as currently proposed, by making modifications that we have suggested in this letter. We would be pleased to answer any questions or provide further information regarding the views expressed in this letter.

Very truly yours,


Douglas F. Gansler
Attorney General


Melissa A. Warren
Assistant Attorney General