

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 SEC proposal to require officers of governmental entities to register as “municipal advisors” Release 34-63576

Dear Secretary Murphy:

This letter is written to provide comments in response to Release 34-63576 (the “Release”). The Release discusses proposed Exchange Act rules 15Ba1-1 through 15Ba1-7 (the “Proposed Rules”). As described in the Release, the Proposed Rules are intended to give effect to provisions of Title IX of the Dodd-Frank Act and would establish a permanent registration regime with the Securities and Exchange Commission (the “Commission”) for municipal advisors and impose heightened fiduciary duties, registration fees and record-keeping requirements on such advisors.

### **Introduction**

Our firm serves as bond counsel to numerous municipal entities that are governed by appointed board members. We are submitting this comment letter to express our concern that the requirement in the Proposed Rules subjecting appointed board members to regulation as municipal advisors would negatively impact a wide range of state and local entities governed by appointed boards. The Proposed Rules would exclude elected officials and employees of a municipal entity from the definition of “municipal advisor,” but would not exclude appointed board or commission members. In the Release, the Commission states that while employees and elected officials are not included in the definition of “municipal advisor,” it “does not believe that appointed members of a governing body of a municipal entity that are not elected ex officio members should be excluded from the definition.” In support of this approach, the Release explains that “employees and elected members are accountable to the municipal entity for their actions” and the “Commission is concerned that appointed members ... are not directly accountable for their performance to the citizens of the municipal entity.”

We believe that the Proposed Rules, if they become final, will have a chilling effect on community participation in government by imposing an unnecessary legal, financial and administrative burden on appointed board members. Moreover, we disagree, respectfully, with

the Commission's basis for distinguishing between elected officials and appointed board members. In Texas, appointed boards and commissions are subject to a system of checks and balances designed to insure accountability and to protect the public interest. This system, described in more detail below, includes an appointment and confirmation process for the vetting of nominees and transparency, conflict of interest and other accountability laws applicable to state and local boards. For these reasons, as described in more detail below, we urge the Commission to exclude appointed members of boards and commissions from the definition of "municipal advisor."

### **Chilling Effect on Local Volunteerism and Citizen Participation**

In considering this new regulatory framework, we urge the Commission to take into consideration the legitimate public interest goal of promoting citizen and community participation in government. The Proposed Rules would have a chilling effect on volunteerism and citizen participation in government by imposing an unnecessary legal, financial and administrative burden on appointed board members. For many people, community participation means serving in a volunteer role on an appointed board or commission. States and municipal entities have a long history of relying on volunteer public service with citizens who are firmly rooted in their communities serving on appointed boards and commissions to assist with a range of governmental and quasi-governmental responsibilities. This type of public service provides for community input on a multitude of local issues. Public service on these boards should be encouraged. It is the type of public service where having the input of a doctor, teacher, engineer or other professional provides for real community involvement in the operations of government.

While the benefits are unclear, the costs of subjecting appointed board members to the regulatory requirements of the Proposed Rules are apparent. We believe there would be a direct, negative impact on the ability of state and local governmental entities to function. The Proposed Rules would impose an additional layer of regulatory oversight and burdens that would likely deplete the pool of citizen volunteers willing to commit their time and expertise in pursuit of public service. Appointed boards and commissions play a large role in facilitating the work of government and delivering essential government services in Texas for a wide range of entities, including transit and transportation authorities, charter schools, hospital districts and university systems, among others. State and municipal entities already face a difficult challenge in finding interested, qualified individuals to serve on appointed boards and commissions. The Proposed Rules would place additional constraints on elected officials trying to make board appointments. Many board members serve in a part-time, unpaid, volunteer capacity. The rules would subject appointed boards to registration costs, heightened fiduciary duties and potential liability, all of which would discourage volunteer service. If the Proposed Rules become final, existing board members would likely resign and new, replacement board members would be difficult to find. Any expected benefit from the additional regulation contemplated by the Proposed Rules would be outweighed by the loss of prospective board members.

### **Sufficient Transparency and Accountability under Existing Law**

Introduction. Appointed boards and commissions are subject to a system of checks and balances that provide for accountability. The system includes a "vetting" process and legislative

oversight responsibilities for appointments, as well as a range of state and local laws that promote transparency and accountability in government. These laws include traditional open government “sunshine” laws, conflict of interest and ethics requirements and penal code mandates. For appointed boards that are responsible for the issuance of bonds or other obligations, there is an additional layer of accountability in Texas imposed by the Attorney General approval process, which is required for the issuance of public securities. Taken together, we believe this system of checks and balances provides sufficient accountability to warrant excluding appointed boards from the definition of “municipal advisor.”

Vetting and Oversight. Appointed board members are subject to a “vetting” process that includes appointment by elected officials, confirmation at a public hearing and ongoing oversight by the State Legislature or other elected officials who approve the appointment. Elected officials are directly accountable to the voters. A key responsibility of an elected official is to make appointments and conduct oversight in a prudent and responsible manner. The vetting process for individuals considered for appointment to boards and commissions is transparent and subject to public scrutiny. For state appointments, such as service on the Texas Transportation Commission or on the board of a state university system, the vetting process includes legislative hearings and confirmation by the State Senate. After an appointment has been confirmed, the State Legislature maintains continuing oversight through public hearings and testimony before legislative committees with appropriate subject matter jurisdiction. Similarly, for local boards and commissions, there is a vetting process that includes the approval or confirmation of the appointment by the governing body of the appointing authority (*e.g.*, the elected officials of a city commission or county commissioners court). Such approval or confirmation occurs at a public hearing or meeting. The city commission, commissioners court or other elected appointing authority generally maintains ongoing oversight responsibility, including in many cases oversight over the issuance of debt. To the extent that appointed board members serve fixed terms, they are subject to a vote of the elected appointing authority for reappointment.

Transparency. The deliberations of appointed boards are subject to an open meetings law, codified in Chapter 551 of the Texas Government Code, that provides for a public posting of a notice of a meeting at least 72 hours in advance and that mandates that members of the public have an opportunity to address the board at the public meeting. Chapter 551 was adopted to help make governmental decision-making accessible to the public and is based on the principle that government at all levels should operate in a way that is open and accessible to the people. The law requires that each member of a governmental body subject to the requirements of Chapter 551, whether elected or appointed, complete a course of training addressing the official’s responsibilities under the law.

Municipal entities governed by an appointed board are also subject to a state open records law. This law, codified in Chapter 552 of the Texas Government Code, is based on the principle that government transparency and openness are fundamental to American democracy. Chapter 552 is one of the primary mechanisms in Texas by which members of the public hold their government accountable. The open records law applies to every governmental body in Texas. It gives the public the right to request access to government information and sets up a framework for governmental bodies to comply with a request for information. Moreover, the law includes a

requirement that public officials, whether elected or appointed, receive training in how to comply with the law.

Conflicts of Interest and Ethics Laws. Appointed board members of municipal entities are also subject to a range of conflict of interest and ethics laws, whistleblower laws, penal code mandates and other accountability requirements. The objective of these laws, discussed in brief detail below, is to encourage appointed board members to be independent and impartial, to place the public interest above any private interest in their positions of public trust and to strive to instill confidence in the integrity of the board.

Chapter 171 of the Texas Local Government Code prohibits an appointed board member from participating in a vote or decision on a matter involving a business, contract or real property in which the board member has a substantial interest if it is reasonably foreseeable that an action on the matter would confer a special economic effect, distinguishable from its effect on the public, on the business, contract or property involved. Chapter 176 of the Texas Local Government Code requires board members to disclose business relationships and gifts.

Chapter 36 of the Texas Penal Code, among other things, prohibits a board member from soliciting or accepting any benefit as consideration for any decision, opinion, recommendation, vote or other exercise of discretion as a board member or as consideration for a violation of a duty imposed by law. Chapter 37 of the Texas Penal Code provides that a board member shall not knowingly make a false entry in, or false alteration of, a government record, make, present, or use any record, document or thing with knowledge of its falsity with the intent that it be taken as a genuine government record, intentionally destroy, conceal, remove or otherwise impair the verity, legibility or availability of a government record or possess, sell or offer to sell a government record or form with the intent that it be used unlawfully. Chapter 39 of the Texas Penal Code provides that a board member shall not misapply anything of value belonging to the municipal entity and that a board member shall not disclose confidential information or use confidential information for the purpose of acquiring or helping another to acquire a pecuniary interest in any property, transaction or enterprise that might be affected by confidential information, or use confidential information to advance the personal interests, financial or otherwise, of the board member or others, or speculate or aid another in speculating on the basis of confidential information.

Chapter 554 of the Texas Government Code provides that a board member shall not suspend, terminate the employment of or discriminate against an employee who in good faith reports a violation of the law to an appropriate law enforcement authority, opposes any discriminatory practice, files a complaint, or testifies, assists or participates in any manner in an investigation, proceeding or hearing.

Attorney General Approval of Public Securities. In Texas, appointed members of boards and commissions are subject to an additional layer of accountability if they approve the issuance of bonds or other obligations under the Texas public finance laws. Bonds are subject to approval by the Texas Attorney General under Chapter 1201 of the Texas Government Code and other laws that authorize the issuance of debt, including Chapter 1371 of the Texas Government Code. This approval process includes the review of a transcript of proceedings for legal sufficiency,

including evidence that the debt is legally authorized under state law and that the action of the board approving the issuance of the debt was taken in accordance with the requirements of state law, including open meeting requirements and requirements that govern the pricing and other terms of the bonds.

### **Conclusion**

We urge the Commission to consider the burdens associated with compliance with the Proposed Rules and the chilling effect the rules would have on public service. We also urge the Commission to reconsider its rationale for distinguishing between elected officials and appointed officials. As explained above, appointed board members are sufficiently accountable to the public under existing law. Taking all of the foregoing into consideration, we believe that the cost of compliance with the Proposed Rules would outweigh any intended benefit. Accordingly, we urge the Commission to specifically exclude appointed members of boards and commissions from the definition of “municipal advisor.” We appreciate the opportunity to provide these comments.

Respectfully,

For the Firm:

Mr. James A. Hernandez, Partner

Ms. Kelly Kenyon, Associate

Ms. Melisa Leal, Associate