WILLIAM T. MILLER
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JAMES H. BYRD
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SEAN T. BEENY
RANDOLPH LEE ELLIOTT
JOSHUA L. MENTER
CRAIG W. SILVERSTEIN
PHYLLIS G. KIMMEL
ROGER B. WAGNER

LAW OFFICES

MILLER, BALIS & O'NEIL

A PROFESSIONAL CORPORATION

TWELFTH FLOOR
1015 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-2607
(202) 296-2960
FAX (202) 296-0166
www.mbolaw.com

JUSTIN R. COCKRELL
KEVIN J. CONOSCENTI
JEFFREY K. JANICKE
BETHANY PRIBILA

STANLEY W. BALIS
*LINDA K. BROWNING
BARRY COHEN
MILTON J. GROSSMAN
DENISE C. GOULET
MARY A. HEKMAN
COUNSEL

*ADMITTED IN OTHER THAN THE DISTRICT OF COLUMBIA

VIA EMAIL
rule-comments@sec.gov

February 22, 2011

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

Re: Registration of Municipal Advisors; Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

The American Public Gas Association ("APGA") respectfully submits the following comments in response to the Securities and Exchange Commission's ("SEC's" or "Commission's") Notice of Proposed Rulemaking dated December 20, 2010 in Release No. 34-63576, File No. S7-45-10 ("NOPR").[1] APGA submits, among other things, that all members of a municipal entity's governing body should be deemed employees of a municipal entity and thus excluded from the definition of "municipal advisor," regardless of whether the members are elected or appointed. In addition, it is important that the Commission make clear that the mere act of voting on a municipal bond issuance by an appointed or elected official or discussing its terms in a governing body meeting is not tantamount to giving advice with respect to financial products or the issuance of municipal securities.

Background

APGA

APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with over 700 members in 36 states. Overall, there are some 950

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

publicly-owned systems in the United States. Publicly-owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public municipal agencies that have natural gas distribution facilities. APGA members issue municipal securities and engage in related transactions in order to finance wholesale gas supplies and gas distribution facilities. APGA recently submitted a "Governance Survey" to its members; some 35% of respondents indicated that they are governed by utility boards or councils that are appointed in whole or in part. Of course, the hundreds of appointed officials associated with municipal natural gas systems are just the tip of the iceberg – there are literally many thousands of appointed officials in this country related to municipal power, water, sewer, wastewater, and like activities that, absent clarification, will be impacted by the subject NOPR.

The Dodd-Frank Act and the NOPR

Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'')[2] amended Section 15B of the Securities Exchange Act of 1934 (as amended, the ''Exchange Act'') to require "municipal advisors" to register with the SEC.[3] The NOPR proposes a permanent registration regime for municipal advisors to replace the temporary regime that is currently in place.

The Dodd-Frank Act defines a "municipal advisor" as:

> a person (who is not a municipal entity or an employee of a municipal entity) 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 undertakes a solicitation of a municipal entity[4]

The NOPR clarifies that at least some members of a municipal governing body fall into the statutory exception for "employee[s] of a municipal entity" and should be exempted from registration. The NOPR states 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 of a municipal entity."[5] The NOPR thereby draws a distinction between elected and appointed members of a municipal governing body. Under the NOPR, elected officials and those appointed *ex officio* would be exempted as "employee[s] of a municipal entity" while appointed officials would not be so exempted and, if they meet the second part of the test (i.e., "provide advice" regarding municipal financial products or the issuance of municipal securities), would

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).
[3] 15 U.S.C. § 78o-4 (2010).
[4] 15 U.S.C. § 78o-4(e)(4)(A).
[5] NOPR at 834.

need to register as municipal advisors. The NOPR asks, "Are these distinctions [between appointed and elected officials] appropriate?"[6] APGA respectfully responds "no," for a host of reasons.

There Is No Valid Basis for Distinguishing Between Appointed and Elected Members of a Municipal Entity's Governing Body in Determining Whether Such Members Are Employees of a Municipal Entity.

While APGA fully supports the NOPR's determination that elected officials should be deemed employees of a municipal entity, APGA strongly believes that the NOPR's distinction between members of municipal entity's governing body that are either elected or appointed *ex officio* and municipal officials that are otherwise appointed is without basis on its face as well as in the context of the Dodd-Frank Act and its goals. As a threshold matter, APGA submits that the Dodd-Frank definition quoted above is clear on its face that members of a municipal entity's governing body are, as employees of a municipal entity, to be excluded from consideration as municipal advisors; there is simply no basis under the plain meaning of the referenced section of the Dodd-Frank Act for distinguishing between appointed and elected members of a municipal entity's governing body.

The NOPR suggests (without substantive discussion) that appointed members of a municipal entity's governing body are not accountable to the entities that they serve.[7] That quite simply is not an accurate depiction of the status of appointed officials serving on municipal boards. Appointed municipal officials share the same roles, with the same expectations from the public, as elected municipal officials, and like elected officials they are typically residents of the community they serve and compensated modestly for their services. Appointed governing body members owe the same duty to the organizations that they are tasked with governing as elected officials. And they may be terminated as quickly, if not more quickly, than elected officials.

State and local laws hold appointed officials accountable for their actions and takes steps to ensure ethical behavior. For example, in most states elected and appointed members of a municipal entity's governing body both qualify as "public officials" (or a synonymous term) and are subject to the same ethical and legal standards.[8] In many instances, appointed officials may be held accountable for illegal or otherwise unethical

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[6] *Id.* at 837
[7] *Id. at 834.*
[8] *See, e.g.* Ala. Code § 36-25-1 (2010) (defining elected and appointed municipal entity board members as "public officials" subject to the same standards under the Alabama Code of Ethics); *see also* Alaska Stat. § 39.50.200(8)(J); Arizona Rev. Stat. § 41-1231; California Gov't Code § 82048; Delaware Code Ann. tit. 11, § 1240; Florida Stat. § 112.311; Georgia Code Ann. § 45-10-20; Hawaii Rev. Stat. § 710-1000(15); Idaho Code § 59-703(10); Kansas Stat. Ann. § 60-1205; Kentucky Rev. Stat. Ann. § 83A.010(10); Maine Rev. Stat. Ann. tit. 21, §1 34; Mo. Rev. Stat. § 105.452; Nevada Rev. Stat. §281.005; New York Legis. Law § 1-c(l)(v); North Dakota Cent. Code § 26.1-21-01; Ohio Rev. Code Ann. § 2921.01; Oklahoma Stat. tit. 51, § 304(25); Oregon Rev. Stat. §244.020(15); Pennsylvania Cons. Stat. § 1102; Rhode Island Gen. Laws § 36-10.1-2; South Carolina Code Ann. § 8-13-100; South Dakota Codified Laws §3-1-10; Tennessee Code Ann. § 8-4-502.

behavior more swiftly than elected officials, because they may be removed from office for cause by the officials that appointed them without a lengthy formal impeachment process or the need to wait until the next election cycle.[9]

In addition and importantly, elected and appointed members of a municipal entity's governing body serve the same role. Both act as proxies for the citizens in the community and make decisions on behalf of the municipal entities that they serve. The typical member of a municipal entity's governing body, whether elected or appointed, deliberates and votes "yea or nay" on a host of matters, from the mundane to the not-so-mundane, including proposed bond issuances and related transactions. They receive input on these matters from many sources and they vote, and if they act improperly, they may be sanctioned, without regard to whether they are appointed or elected.[10] As recognized by the Dodd-Frank Act,[11] municipal officials may rely on outside financial advisors when rendering a decision, and of course in most instances on matters of significance such as bond issuances, outside advice is solicited. In brief, the members of a municipal entity's governing body, be they elected or appointed, are the decision-makers – the advisees, not the advisors – who act based upon whatever record is made regarding the issue under consideration.

Furthermore, appointed members of a municipal entity's governing body are, like their elected brethren, nearly always residents of the localities that they serve. Moreover, it appears from informal surveys that most appointed officials serving municipal natural gas entities are appointed by (and often from) elected boards and commissions. Appointed members of a municipal entity's governing body are indistinguishable from elected members in all ways relevant to this rulemaking. They serve the same functions and are *at least* as accountable as elected officials both in terms of the state governance statutes that relate to such matters and in terms of tenure in office (appointed officials can typically be terminated more quickly than elected officials can be un-elected or impeached).

The inappropriateness of trying to distinguish between appointed and elected officials in determining who is/is not an "employee of a municipal entity" in the context of the Dodd-Frank Act is further underscored upon analysis of the manner in which appointed officials assume office. The NOPR seems to assume that there is a clear distinction between *ex officio* appointments and other appointments, but this is often not the case. For example, in Alabama there are 16 publicly-owned gas districts.[12] Each gas district has an appointed board with at least three members, with at least one such member selected by the government of each city and town participating in the gas district.[13] Elected officials from the governments of member communities are often chosen as the appointees to serve on gas utility district boards, but in many cases they are

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[9] *See, e.g.*, Kansas Stat. Ann. § 60-1205.
[10] *See* note 8, above.
[11] 15 U.S.C. § 78o-4(e)(4)(A).
[12] Gas districts may be established and incorporated by action of any two or more municipalities pursuant to the provisions of the Alabama Gas Districts Act, Ala. Code § 11-50-390 *et. seq.*
[13] Ala. Code § 11-50-393.

not automatically appointed by virtue of their elected office. A city or town government may appoint an unelected representative, but they often appoint someone who has otherwise been elected to serve as mayor or on the city council. In brief, not only is the distinction between appointed and elected officials without a sound basis in terms of functions and accountability but in addition the distinction is frequently blurred as to the manner in which such governing body members assume office. What is clear is that they are all municipal employees who serve their respective communities and who were not intended by Congress to be subjected to the rigors of the Dodd-Frank Act. There is simply nothing in the Dodd-Frank Act from which to insinuate that Congress intended appointed officials to be treated differently from elected officials as both serve as employees of municipal entities and should be treated accordingly.

In some instances, appointed officials to one municipal entity may actually be employees of another, related municipal entity. For example, in some states municipal gas distribution utilities have joined together to create joint action agencies to help themselves finance and manage their gas supply. These joint action agencies are municipal entities that can issue their own municipal bonds and enter into related transactions. The member municipal gas distribution utilities often appoint a high-level employee (such as the utility manager) to represent them on the governing board of the joint action agency. Is it reasonable to believe that an individual that is employed by one municipal entity and appointed to the board of another is any less accountable to the one municipal entity than the other? In other instances, member entities appoint elected officials to represent them on the board of a joint action agency. Is an elected official that is appointed to the board of another related municipal entity any more accountable to the one municipal entity than to the other, or more accountable than the individual that is employed by one municipal entity and appointed to the board of another? The short answer is "no." In any scenario, the individual appointees to the board of a municipal joint action agency are accountable to that entity and the member entities that they represent.

The NOPR fails to define what it means to be elected rather than appointed, which is significant because the line between selecting governing body members by election versus by appointment is frequently not clear. For example, one member community in a gas utility district may select its representative board member by a vote of the town council, while another community in the same gas utility district may allow its mayor to appoint its representative. In other situations, not every member of a gas utility district or joint action agency may have a representative on the board. In those instances, member municipal entities may nominate representatives to the board of a joint action agency or gas utility district that are then "elected" by the sitting members of the board or by the member organizations as a group. Some individuals may be "elected" to serve as nominees by the member-entity's leadership while other nominees are appointed. In each of these examples, governing body members are selected by municipal leaders responsible for local governance and not by a popular election by the general population. Are some "elected" for purposes of the NOPR while others are considered to be appointed? Should individuals on the same board be treated differently based on the specifics of how they were selected? More importantly, is there any basis for distinction

between these classes of municipal officials for purposes of determining who is an employee of the municipal entity under the Dodd-Frank Act? APGA believes not.

The NOPR creates a host of issues regarding how to treat individuals that are elected to or employed by one municipal entity and are appointed to the governing body of another municipal entity.[14] Rather than draw increasingly fine distinctions that are without substantive significance, the SEC should find that all members of a municipal entity's governing body, whether elected or appointed, are "employees of a municipal entity" as all such members perform similar functions, are subject to the same standards of ethical and legal conduct, and may be held accountable for violations of the trust placed in them as members of a governing entity. The Dodd-Frank Act creates an exemption for employees of a municipal entity, and no credible substantive or logical basis has been shown for distinguishing between appointed and elected officials – both should be treated as employees of a municipal entity, for the reasons discussed above, and exempted from the definition of "municipal advisor," a term that, as the discussion below shows, was intended to cover persons performing completely different functions from municipal employees such as members of a governing body of a municipal entity.

Furthermore, the distinction that the Commission seeks to make between appointed and elected officials, if sustained in a final rule, would have a chilling effect on the willingness of citizens of communities to serve as appointed officials. The burdens of SEC and MSRB registration (discussed in more detail below) will cause many qualified persons simply to conclude that the burden is not worth the modest pay that is normally associated with such positions. Municipal entities very much rely on appointed boards to conduct business, and they rely on being able to attract qualified persons with a sense of civic duty to serve. Treating these persons as different from appointed officials and requiring them to jump through onerous regulatory hoops will negatively affect the talent pool willing to serve in such positions. This certainly was not the intended effect of the Dodd-Frank Act nor is it necessary to carry out the intended purposes of the Act.

The NOPR's Failure To Address What Is Meant by "Advice" Is a Fatal Flaw, Especially If It Maintains the Distinction Between Appointed and Elected Officials.

Putting to one side the NOPR's unsubstantiated distinction between elected and appointed officials, the NOPR should have provided guidance as to what is meant by the phrase in the Dodd-Frank Act (quoted above) regarding providing "advice to or on behalf

[14] If an employee of a municipal gas distribution utility is appointed to the board of a municipal joint action agency, is that person deemed an employee of a municipal entity or must he consider himself as possibly a municipal advisor (depending upon whether he provides "advice" as that term is used in the Act)? Does the answer depend on the scope of the individual's employment, the employee's expectations upon hiring, or does the answer depend on the intricacies how governing board members are appointed? What if an individual retires from his employment with a member gas distribution utility but chooses to stay on for the remainder of his term on a joint action agency's board? What about a gas district board member that is also the mayor of a member community? Is there a difference between a city councilor that is appointed to the board of a local gas district by a mayor versus a city councilor that is voted on to the board of a local gas district by her fellow city councilors?

of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities,…"[15] The failure to address this phrase is particularly egregious if the Commission, despite the inherent illogic of the appointed-versus-elected official distinction in the NOPR, maintains it since at that point appointed officials, by reason of not being deemed "municipal employees," will have to determine if they are "municipal advisors"; and the key to this determination is whether they are providing "advice" as set forth in the Dodd-Frank Act.

APGA assumes, based on the language of the NOPR, that the Commission does not intend that an individual qualify as a municipal advisor under the Dodd-Frank Act automatically by virtue of his or her appointment to the governing body of a municipal entity. If an appointed member of a municipal entity's governing body is simply fulfilling her mandate to act as a member of a governing body, to consider and to vote up or down on all matters requiring action by the governing body, without more, surely Congress did not intend that such a person be deemed a "municipal advisor" and held accountable under the Dodd-Frank Act; rather, such a person should only be deemed a "municipal advisor" if she acts outside her normal duties as an appointed official and actually provides (versus receives) substantive advice regarding financial products and the issuance of municipal securities. Any other reading of the statute simply jars common sense and ignores standard rules of statutory construction.

APGA believes that the phrase "municipal advisor" clearly is not intended to include appointed and elected officials (for all the reasons discussed above in these comments). The statutory definition of municipal advisor clarifies that the term "includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors."[16] Thus, the statute on its face specifies that the term "municipal advisor" applies to persons similar to and including financial advisors and various specialized consultants and transaction facilitators. Any contrary interpretation could only be based on a conclusion that the phrase "municipal advisor" in the statute is an ambiguous term, but it is well established that an ambiguous term in a statute must be interpreted in light of the surrounding language.[17] Any suggestion that appointed members of a municipality's own governing body are municipal advisors who must register and report to the SEC violates this basic principle of statutory interpretation by ignoring the further language in the definition of municipal advisor.

Members of a municipal entity's governing body, whether elected or appointed, serve a fundamentally different role from the types of advisors listed in Congress' definition of municipal advisor. The NOPR itself refers from time to time to municipal advisors as "market professionals" and states that there are "three principal types:"

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[15] 15 U.S.C. § 78o-4(e)(4)(A).
[16] 15 U.S.C. § 78o-4(e)(4)(B).
[17] This principal of statutory interpretation is known as the *noscitur a sociss* canon of construction. *See, e.g.*, *Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999), citing, *Babbitt v. Sweet Home Chap. of Cmtys for a Great Oregon*, 515 U.S. 687, 694 (1995).

> (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; (2) investment advisers 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 a 'municipal advisor'); and (3) third-party marketers and solicitors.[18]

Members of a municipal entity's governing body, whether elected or appointed, are inherently different from the market professionals delineated as examples of municipal advisors in the Dodd-Frank Act, and they do not fit into the principal types identified in the NOPR. There is a fundamental distinction between members of a municipality's governing body, who make decisions for a local municipal entity, and market professionals, who provide financial advice to or solicit business from various entities with regard to municipal securities.

The types of market professionals contemplated by the Dodd-Frank Act are motivated by different incentives than the members of governing bodies, and their responsibilities to a municipal entity are fundamentally different and are not governed by the same obligations that apply to appointed and elected members of a municipal entity's governing body. A member of a municipal entity's governing body, whether elected or appointed, has a duty to that entity that is not shared by these various outside advisors. A member of a municipal entity's governing body, whether elected or appointed, has broader responsibilities to that entity that extend beyond discrete transactions. As noted, state and local laws create and enforce these broader duties and responsibilities.[19]

> MSRB Rules Illustrate that Members of a Municipal Entity's Governing Body Are Not Providing "Advice" as Municipal Advisors

In addition to requiring municipal advisors to register with the SEC, the Dodd-Frank Act gave authority over municipal advisors to the Municipal Securities Rulemaking Board ("MSRB").[20] Since the Dodd-Frank Act went into effect, the MSRB has revised a number of its rules, which were previously applicable only to brokers and dealers in municipal securities, to make them applicable to municipal advisors. If the SEC finds that appointed members of a municipality's governing body should be considered municipal advisors without regard to whether they are providing substantive advice on financial products (versus voting on same), then they will become subject to MSRB regulations.[21] The revised rules promulgated by the MSRB illustrate, however,

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[18] NOPR at 829.
[19] *See* note 8, above
[20] 15 USC § 78o-4(b)(2)(L).
[21] *See* MSRB Notice 2010-60, December 29, 2010, available at http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-60.aspx?n=1 (deferring to the current NOPR's interpretation of the term "municipal advisor").

that members of a municipal entity's governing body, whether appointed or elected, are not the type of persons contemplated for regulation in the Dodd-Frank Act.

For example, municipal advisors must register with both the SEC and the MSRB. Registration with the MSRB applies to municipal advisors at the firm level; individuals are not required to register with the MSRB as municipal advisors unless they are "sole proprietors."[22] How should appointed members of the governing body of a municipal entity comply with this requirement? Should the governing body of a municipality with appointed members register as a municipal advisory firm? Should each individual appointed to a municipal governing body register as the sole proprietor of a municipal advisory firm? The MSRB registration requirement clearly contemplates the types of market professionals listed as examples of municipal advisors in the Dodd-Frank Act, not appointed members of a municipal entity's governing body.

The MSRB's other efforts to expand its regulations to municipal advisors pursuant to the Dodd-Frank Act also appear to be geared toward previously unregulated market professionals. For example, the MSRB added municipal advisors to the persons subject to discipline under MSRB Rule G-5 and subject to a requirement of fair dealing under MSRB Rule G-17.[23] Meanwhile, members of a municipal entity's governing body are already subject to ethical and other requirements pursuant to state and local laws. Also, MSRB Rule A-12 requires municipal advisors to pay an initial fee of $100 in connection with a firm's first-time registration, and MSRB Rule A-14 requires the payment of another, annual fee of $500. Appointed members of a municipality's governing body are modestly compensated whereas the MSRB fees appear to be premised on the belief that municipal advisors are market professionals engaged in a profitable enterprise. As noted above, such regulations, if held applicable to appointed officials, will have a very chilling effect upon those who may be willing in the future to serve in such capacity.

Lumping appointed members of a municipal entity's governing body together with market professionals as municipal advisors will not only greatly enlarge the universe of "municipal advisors" well beyond what was anticipated in the Dodd-Frank Act – APGA estimates that there are thousands of appointed officials on municipal governing bodies in the United States – but in addition will cause a great deal of confusion as appointed members of a municipality's governing body will undoubtedly find the combined SEC and MSRB requirements confounding and onerous because they are, as one would expect, designed for outside market professionals that advise and solicit municipalities for profit.

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[22] MSRB Notice 2010-55, December 13, 2010, available at http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-55.aspx?n=1.

[23] MSRB Notice 2010-59, December 23, 2010, available at http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2010/2010-59.aspx?n=1.

The Proposed Rule Creates a Greater Burden Than Anticipated by the NOPR

There are approximately 950 municipal natural gas distribution entities in the United States. As indicated by APGA's Governance Survey, a substantial portion of municipal gas utilities (i.e., slightly over one third) are governed by appointed boards. This number does not include the dozens of related municipal joint action agencies that have been created by municipal natural gas distribution entities, all with some form of appointed board. The burden of registration and reporting requirements on each member of these appointed boards would be substantial. Furthermore, municipal natural gas entities are just one type of municipal service provider that would be captured by a broad interpretation of the term "municipal advisor," i.e., one that does not carefully define what is meant by the term "advice" in the statute. There are many similar municipal entities for the provision of electric, water, sewer, and waste disposal services.[24] A single city or town may have several special purpose service entities unique to that locality and be a member of larger service districts and municipal joint action agencies. The NOPR acknowledges that there are a number of "commissions and other special purpose enterprises [with] appointed members,"[25] yet it does not consider the potential burden on these special purpose municipal entities (or frankly on the Commission itself). According to the NOPR, the proposed reporting requirements will impact approximately 1,000 municipal advisory firms. This number fails to account for the substantial number of appointed municipal board members across the country, which will likely reach into the many thousands.

APGA submits that Congress did not intend the results described above; rather, it intended that the Dodd-Frank Act regulate market professionals, which is why it excluded employees of a municipal entity from the definition of municipal advisors and why it also provided that the affected persons had to be providing advice regarding financial products or the issuance of market securities.

[24] For example, according to the American Public Power Association, there are over 2,000 community-owned electric utilities in the United States. *See* "About Public Power" at http://www.publicpower.org/aboutpublic/.
[25] NOPR at 826.

Conclusion

For the reasons stated above, APGA respectfully requests that the Commission determine that appointed as well as elected officials qualify as municipal employees and are thereby not persons that may be deemed municipal advisors under the Dodd-Frank Act. In addition, and especially if the Commission refuses to make this important threshold clarification, it should make clear that appointed officials are not deemed municipal advisors by reason of serving as voting members of a governing body since the predicate for such a determination must be that the person provide substantive advice regarding financial products or the issuance of municipal securities, which is beyond the job description of appointed officials.

Respectfully Submitted,

AMERICAN PUBLIC GAS ASSOCIATION

/s/ William T. Miller__

William T. Miller
Justin R. Cockrell
Miller, Balis & O'Neil, P.C.
1015 Fifteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 296-2960

Their Attorneys

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