



Government Finance Officers Association
1301 Pennsylvania Avenue, NW Suite 309
Washington, D.C. 20004
202.393.8020 fax: 202.393.0780

February 22, 2011

Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F St., N.E.
Washington, DC 20549-1090

Re: Request for Comment on Proposed Rule on Registration of Municipal Advisors (File No. S7-45-10)

Dear Ms. Murphy:

The Government Finance Officers Association (GFOA) is the professional association of state, provincial and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to the government finance profession through research, education and the development of best practices. Our more than 17,000 members are dedicated to the sound management of government financial resources.

We are writing with serious concern about the Security and Exchange Commission's (SEC) definition of municipal financial advisor under Proposed Rule 34-63576. GFOA supports the policy and intent of the *Dodd-Frank Act* to regulate the municipal advisors to governments, governmental authorities, public pension funds, and to borrowing obligor institutions. However, as proposed, the SEC's definition of a municipal financial advisor is improperly and unnecessarily broad, and its application to governmental-body board members will harm the ability for our members to make appropriate and responsible basic governance and financial decisions for their communities. There is no evidence that Congress intended the definition of municipal advisor to include board members in the regulations, nor were there hearings on the matter.

A municipal financial advisor provides advice to a state or municipal entity as to the issuance of municipal securities, swap transactions and/or investment strategies. The SEC's proposed rule exempts elected members, elected ex-officio, and employees of a municipal entity's governing board from the definition; however, non-elected (appointed) members of a governing board would be considered to be municipal financial advisors. Under the Proposed Rule, many thousands of citizens would have to register with the SEC and meet various regulatory requirements set forth by both the SEC and the Municipal Securities Rulemaking Board (MSRB), including registration, payment of fees, federal fiduciary standards, federal securities law liabilities, and federal financial disclosure standards.

While the proposed rule exempts elected officials and employees of that particular government from this definition, it treats appointed members differently, by classifying them as municipal advisors. The GFOA's position is simply that all members of a governing body should be exempt from the municipal advisor definition. Whether employed, elected or appointed, any member of a governing body serves the same duty to make responsible decisions for his or her government or authority.

Including non-elected board members as municipal advisors would have a chilling effect on citizen participation and day-to-day governmental governance. It is not helpful to state that the rule applies only if the board member gives advice, for no member would take the risk that expressing a view could subject him or her to registration fees, exams and additional legal obligations and exposure to additional liability. Hiring more lawyers to evaluate every nuance of boards and commissions actions is neither feasible nor affordable.

Additionally, board members cannot serve as advisers to themselves because they embody the institution as its governors. Unlike the rendering of advice by a true advisor to the institution, a board member governs in large part by expressing his or her point of view, evaluating other viewpoints and changing that view based on the discussion among the board members and making the decisions for that institution. Discussion is an essential part of collaborative decision making.

Considering board members as municipal advisors would stifle and probably damage this process. It would discourage the very people who volunteer their experience and knowledge of finance and whom the SEC should want to serve on these boards. This also would deter employees or elected officials of one entity to serve on a board of another entity. The proposed rule seems to indicate that even these employees, as a function of their responsibilities or volunteer efforts, could be considered a municipal financial advisor in these situations.

Our members issue tax-exempt bonds and invest public funds in order to provide essential infrastructure and services to their citizens. State and local governments are constituted by specific state and local statutes that provides directives on, among other things, the number, the type and qualification of authority directors, their duties and responsibilities, conflicts of interest, disclosure, fiduciary duties, and related matters. Some of the issuers are stand-alone governmental authorities, some are directly under the control and authority of the municipal government or state treasurer, and some report directly to state governors.

The board members of these state and local government bodies range from *ex officio*, statutorily-designated members, such as treasurers, comptrollers and similar public officials, to other statutorily-designated state and local employees as well as to appointed volunteer members representing a variety of backgrounds, including private sector employees or retirees associated with various governmental functions such as water and sewer, roads, buildings, healthcare or educational institutions, financial, banking or bond experts, and unaffiliated citizens. These individuals serve pursuant to their sense of civic duty and responsibility. In many states, these citizens are appointed to the board of the authority by the mayor, governor, city or county council and are approved by the legislature or local council.

The distinction between elected and non-elected board members is fallacious and disrespectful to state and local governance. All board members are accountable and generally have equal legal obligations. For example, in many states, such as New Jersey and Maine, state treasurers are not popularly elected and sit on many boards precisely to provide input into decisions including ones related to bond issuance. The SEC's concern that unelected board members are not directly accountable to the state and municipalities citizens is misplaced and indicates a lack of understanding about how state and local government is structured.

The SEC has grossly underestimated the numbers of persons that would be included in its expanded definition. It is not an exaggeration to claim that there are literally thousands of "municipal entities" under the *Dodd-Frank Act* definition that are governed by multiple appointed members. By considering these members to be financial advisors, the SEC would not only place a considerable unfunded mandate on these entities as they would need to restructure themselves in order to comply with these rules, but also raises issues of federalism. At the very least, this proposal violates the spirit of the Tenth Amendment of the U.S. Constitution by suggesting that the SEC and the MSRB should have some type of oversight capabilities over the governance structures of state and local governments and the officials who serve on their governing body. It is an attempt by the federal government to overreach into state and local government operations.

It also is important to note two directives from President Obama that relate to this proposed definition. First, a May 2009 memorandum from the President to federal government departments and agencies cautioned against actions that pre-empt state law. We believe that by defining as municipal advisors – and therefore mandating the registration of – members of state and local governing bodies, the federal government effectively is pre-empting state laws that already exist regarding the placement and oversight of appointed governing board members. Second, the January 11, 2011 Executive Order, "Improving Regulation and Regulatory Review" calls on federal agencies to take many issues into consideration when drafting rules and reviewing current regulations, including the "costs and benefits to society." It is clear that the SEC has not taken this into account regarding this proposed regulation, especially as it pertains to defining municipal financial advisors and including within that definition appointed members of a state and local government bodies.

Congress has recently shared its concern with the SEC that regulations are being proposed too quickly, without proper review, understanding and public input. This proposed rule speaks directly to Congress's concern, not only because this rule was proposed with little or no consultation about the effect of its breadth but also because separately, on uncoordinated tracks, new municipal advisor rules are being advanced or are in place before the SEC has clearly finalized the definition of who is a municipal advisor. This is causing disruption for state and local governments.

As an example, the deadline has passed for municipal advisors to register, and both the SEC and MSRB are on the cusp of setting new rules for advisors. How can anyone evaluate, comment on or comply with these rules if the SEC has not yet determined to whom they apply? If the SEC mistakenly does not take into account the strong objections from the state and local government community and moves forward with the rule as proposed, thousands of appointed board members could find themselves non-compliant. Therefore, it is critical that since the Commission has created this problem it act promptly to finalize this rule and exclude all board and commission members from the rule's scope.

The GFOA strongly urges the SEC to weigh our comments and the many comments your action has generated from state and local governments about this proposed rule, as well as other municipal market participants.

Thank you for the opportunity to comment on this proposed rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Susan Gaffney". The signature is written in a cursive, flowing style.

Susan Gaffney
Director, Federal Liaison Center