GILMORE & BELL
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2405 GRAND BOULEVARD, SUITE 1100
KANSAS CITY, MISSOURI 64108-2521

816-221-1000
FAX: 816-221-1018
WWW.GILMOREBELL.COM

ST. LOUIS, MISSOURI
WICHITA, KANSAS
LINCOLN, NEBRASKA

February 22, 2011

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

Re: File Number S7-45-10, SEC Release 34-63576 (the "Proposing Release")

Dear Secretary Murphy:

We are writing to comment on the proposed Rules 15Ba1-1 through 15Ba1-7 and related forms under the Securities Exchange Act of 1934, as amended, all as set forth in the above-referenced Proposing Release. Terms used herein and not otherwise defined have the meanings given those terms in the Proposing Release.

Background and Overview

Our views relative to regulation of the municipal industry are derived from our firm's 32+ years experience as one of the leading bond counsel firms in the country. Gilmore & Bell, P.C. served as bond counsel for 632 bond issues in 2010, which ranked first in the nation by number of issues. The diversity of the municipal bond issuers discussed in the Proposing Release is reflected in our practice – we serve as bond counsel to the smallest fire districts and library districts in Missouri, Kansas and Nebraska and the largest state agencies in those states, and other direct and conduit issuers of all sizes. Our comments below reflect a few simple themes that we have observed for many years in our bond practice, namely:

- Bond issuers (both conduit and non-conduit) take seriously their responsibilities associated with bond issuances.
- Notwithstanding the apparent perceptions in Washington, the bond issuance process in Missouri, Kansas and Nebraska does not appear to be influenced significantly by politics, patronage or influence-peddling. Elected and appointed officials diligently pursue their obligation to protect their city, county, school district, agency or authority (and thus, the bondholders) throughout the bond issuance process.
- Bond issuers – even those with prior bond issuance experience – avail themselves of professional advisors and consultants in whom they have confidence and rely heavily on those professional advisors. Professional advisors and consultants to issuers include underwriters, independent financial advisors, bond counsel, separate issuer counsel in many instances, accountants, engineers and other feasibility consultants.

- Professional advisors to bond issuers, whether currently registered as broker-dealers or unregistered participants in the industry, are generally selected based on their professional experience and reputations and not for political, patronage or influence-peddling reasons.

Although we come from that perspective, we acknowledge the widely held belief that issuers (and thus bondholders) would benefit from the registration of previously unregistered financial advisors. While many of our issuer clients primarily receive their financial structuring advice from underwriters, many also rely heavily upon independent financial advisory firms that are not registered as brokers, dealers or municipal securities dealers. The longstanding argument for registration and regulation of these financial advisory firms stems from the perceived advantages of requiring these advisors to be subject to the same types of regulation as the underwriter firms with which they frequently compete. We cannot, and do not, object to the logic of this argument. Likewise, we largely concur with the themes in the recently proposed amendments to MSRB Rule G-23 that eliminate conflicts associated with a financial advisor becoming the bond purchaser or underwriter on the same bond issue.

But, as discussed below, we view the Proposing Release and associated proposals coming from the MSRB as an inappropriate extension of the "municipal advisor" definition to virtually every person who has a nexus with the bond offering process. We believe this is beyond the intent of the Dodd-Frank Act, which mandates rulemaking of municipal advisors, not all persons associated with a bond issue.

The SEC and the MSRB have the opportunity to facilitate great improvements in the municipal finance market. The extraordinary success of EMMA and the technological innovations that will clearly drive future improvements to EMMA are possibly the most beneficial government intervention on behalf of bondholders since the Rule 15c2-12 continuing disclosure amendments became effective in 1995. While we believe registration of municipal advisors is warranted, the Commission will greatly enhance its standing with bond issuers and bondholders if this initial rulemaking relating to municipal advisors were more targeted in its scope.

These proposed new rules and the Commission's interpretations of them need not be the Commission's final say on the matter. If the final rulemaking is substantially reduced in scope, as we argue it should be, the Commission will not be precluded from further limiting the exclusions from the definition of "municipal advisor" in subsequent rulemaking if persons (for example appointed governmental officials) become a risk to the integrity of the municipal market in the future.

Specific Comments in Response to the Proposing Release

Having disclosed our perceptions relative to the Proposing Release, we offer specific comments to a number of the topics on which you sought specific comment, as follows:

- Are the definition of "municipal advisor" and the exclusions from that definition appropriate in view of Congressional objective and intent?
- Is your interpretation of the exclusion from the definition of a "municipal advisor" for a broker-dealer serving as an underwriter appropriate?
- Are there persons who engage in uncompensated "municipal advisory activities" that the Commission should exclude from the definition of "municipal advisor"?
- What additional types of advisory services should qualify an accountant for an exclusion from the definition of "municipal advisor"?

- Is it the Commission's interpretation that preparation of feasibility studies by an engineer or accountant constitutes "municipal advisory activities" appropriate?
- Should the Commission provide an exclusion for all activities of an attorney as long as that attorney has an attorney-client relationship with the municipal entity or obligated person?
- Are appointed officials of a municipal entity's governing body appropriately included in the definition of "municipal advisor"?
- Should employees and board members of obligated persons be excluded from the definition of "municipal advisor"?

Because many of our comments relate to several of these topics, we have grouped them in an order that focuses on the types of persons sought to be registered (and thus regulated) as municipal advisors. As will be evident at the end, we believe the answer to the first request for comment is obviously, "No," and the proposed exclusions from the definition of "municipal advisor" in the Proposing Release are unnecessarily restrictive.

Appointed Officials as Municipal Advisors

The distinction between elected officials (excluded from the definition of "municipal advisor") and appointed officials (treated as "municipal advisors") is misplaced and would have far-reaching and unintended consequences. What evidence exists of widespread (or isolated) instances of appointed officials who have supported inappropriate bond issues, as compared to elected officials who have approved questionable bond issues or bond structures? In the most prominent SEC enforcement actions in recent years, the bond issues in question have ultimately been approved by elected officials and their staffs. *See, e.g.,* Jefferson County Sewer District, State of New Jersey, City of San Diego, Orange County, etc.

The very concept of an appointed official being a municipal advisor turns the world upside down. An appointed member of the board of a statewide bond issuing authority or a local industrial development authority is not an advisor to the issuer. Rather, the collective members of the appointed board of such an authority are the issuer itself. The issuer (the statewide authority or the local IDA) acts only by and through its board of appointed officials. It is not the board members who seek to advise the state or local authority, rather, it is the appointed members of the board, acting collectively through the board, that seeks the advice of financial advisors, underwriters, lawyers, accountants and others in the bond issuance process. The board member, whether appointed or elected, is not advising, but is *receiving* advice.

The Commission makes this distinction between elected and appointed officials on the premise that elected officials are directly responsive to the electorate (and, therefore, are likely to be better stewards of the public trust than appointed officials). While appointed officials of municipal entities may not be directly responsive to the electorate, their conduct is still governed by state statutes relating to conflicts of interest, political affiliation, and requirements relating to areas of expertise. *See* **Appendix A** for a summary of a sample of the state statutes in Missouri, Kansas and Nebraska relating to the responsibilities of appointed officials of bond issuing entities and authorities.

There are numerous other statutes and constitutional provisions in all three states that have a stated or implicit purpose of requiring appointed officials of governmental bodies to provide their objective, informed and impartial views to the board on which they sit. We suspect that there are dozens, if not hundreds, of similar statutes nationwide governing the conduct of appointed governmental officials who sit on boards or agencies that have bond issuance powers. While the Commission may question

whether these statutes and regulations provide the same sort of controls over appointed officials as the "discipline" of the electorate, we would challenge the assumption that elected officials are held to a higher standard. Again, where is the evidence, anecdotal or otherwise, that appointed officials have jeopardized the integrity of the municipal securities process in the past or are at risk of doing so in the future? Our observation is that these appointed officials are doing their jobs well and are already sufficiently regulated by state statutes governing their appointment, duties and responsibilities.

The unintended consequences of this perceived distinction between elected and appointed municipal officials would be extraordinary. What local citizen would agree to serve on his or her county IDA or statewide bond issuing authority if the consequence of serving his or her community was (i) registration as a "municipal advisor" with the MSRB and SEC, (ii) limitations on his or her campaign contributions (when there is no evidence that volunteer board members are making political contributions to obtain bond business in the first instance), (iii) professional competence testing and training, and (iv) whatever else the SEC and MSRB may require for municipal advisors in the future?

Imagine the discussion as you sit at the kitchen table of a local community supporter and describe to her what she will have to do in order to serve on the local IDA, which meets once or twice a year to consider a new bond issue. The consequence is that no local IDA would retain its board. No one can possibly believe that any community leader would agree to be appointed to a voluntary municipal entity board with bond issuance powers if the consequence was that he or she would have to be registered with and regulated by the SEC and the MSRB.

Treating appointed officials of municipal entities (or employees, directors or trustees of obligated persons, as discussed below) as "municipal advisors" would trigger a range of absurd results as regulations intended for traditional financial advisors, etc. would now be extended to appointed officials and obligated person employees. Only a brief review of MSRB Notice 2011-14 (February 14, 2011) requesting comment on draft MSRB Rule G-36 (on fiduciary duty of municipal advisors) highlights the confusion that will be created by treating an appointed official of a municipal entity, a member of a nonprofit board or an employee of an obligated person as a "municipal advisor." Under that proposed MSRB rule change and interpretive notice, the appointed official or nonprofit board member or employee, as a "municipal advisor," would be required to make a wide range of conflict of interest disclosures to the municipal entity or obligated person in addition to the requirements of state law and the policies and procedures of that municipal entity or obligated person. Likewise, those community volunteers would be limited in their political contributions when there is no evidence that volunteer board members are using political contributions in a manner to obtain bond business or other contracts with the municipal entity.

Are Attorneys Municipal Advisors?

An attorney cannot, and should not, escape registration as a municipal advisor simply because he or she is an attorney and is otherwise engaged in providing legal services to the municipal issuer or an obligated person. The proposed rules and discussion in the Proposing Release, however, place an undue emphasis on the attorney-client relationship. If an attorney is providing legal advice to a member of the bond issuance team (whether the issuer itself, the underwriter, a "true" financial advisor or the conduit borrower or other obligated person), then the legal advice provided by that attorney cannot be viewed as financial advice. It is not the nature of the attorney-client relationship that makes advice legal or financial, rather it is the nature of the advice itself (irrespective of who is hearing it and who is relying upon it).

We assume that the references to the attorney-client relationship in the discussion at notes 132 through 136 in the Proposing Release are not intended to limit the exclusion for attorneys only with respect to their clients. We request a clarification in the final rulemaking that an attorney providing legal advice is not a "municipal advisor" even if a municipal entity or obligated person that is not in an attorney-client relationship with that attorney relies on that advice. Bond counsel normally has its attorney-client relationship with the bond issuer (the municipal entity). Yet, others in the bond issue clearly rely upon the legal advice of bond counsel, including the underwriter and the obligated person in a conduit financing. The very role of bond counsel is to provide advice to the entire group relative to the state law authority for the issuance of the bonds (the approving legal opinion) and the federal and state tax status of the interest on the bonds. Similarly, as stated in the Proposing Release, underwriter's counsel, issuer's counsel or the obligated person's counsel may all express views

> " . . . comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) . . . [and provide] advice concerning the tax consequences of alternative financing structures or advice recommending a particular financing structure due to legal considerations such as the limitations included in existing contracts and indentures to which the issuer is a party."

While bond counsel, underwriter's counsel, issuer's counsel and the obligated person's counsel each has an attorney-client relationship with only one person or entity in the financing transaction, all members of the financing team exchange views relative to the types of traditional legal advice quoted above from the Proposing Release and all members of the working group rely upon those expressions of views and opinions to varying degrees. We are not talking about reliance in the strict attorney-client sense. We are talking about third-party reliance upon the expressions of views or opinions by members of the working group who happen to be attorneys.

We assume the Commission did not intend to create a question as to whether the attorney providing traditional legal advice to his or her client is somehow slipping into municipal advisory territory if others in the financing hear and rely upon that advice. We request clarification in the final rulemaking that the exclusion for attorneys turns on the nature of the advice (legal vs. financial) and not on the existence of an attorney-client relationship (assuming the attorney has an attorney-client relationship with some person associated with the financing).

Employees or Board Members of Obligated Persons as Municipal Advisors

Should the CFO or a trustee of national nonprofit university register as a municipal advisor because he or she is advising the university on its next bond issue? What about the controller of a local retirement community who is working directly with the CFO of that organization and the underwriting team to review the financial feasibility of the planned expansion of that community? What about a board member of the community hospital who has a legal duty to consider and act on any tax-exempt bond financing for the hospital? We assume that it is was not intended by Congress or the Commission that employees or board members of obligated persons would be required to register as municipal advisors, while employees of municipal entities would not.

Most of the discussion above relative to treating appointed officials of municipal entities as "municipal advisors" is equally applicable to treating employees, board members and trustees of obligated persons as "municipal advisors."

We urge clarification in the final rulemaking that officers, officials, employees, board members and trustees of municipal entities and obligated persons are excluded from the definition of "municipal advisor."

Uncompensated Financial Advisory Services

There appears to be inherent in the discussion of compensation in the Proposing Release a fear that excluding advice for which no compensation is paid would create a loophole for unethical municipal advisors to avoid registration, yet benefit from the advisory relationship through some disguised form of compensation. In our judgment, the Commission should limit "municipal advisory activities" to those services for which compensation is paid, directly or indirectly. As noted at the outset, if anecdotal or other evidence is developed to suggest that a range of inappropriate services are being provided to municipal entities and obligated persons in reliance on the exclusion for uncompensated services, then the Commission could address that concern in future rulemaking.

If the final rulemaking included a requirement that direct or indirect compensation be present to constitute "municipal advisory activities," then community volunteers, board members, etc. who are providing their services as a community service and not for direct or indirect compensation would be excluded from the municipal advisor registration and regulation requirements. We fail to see the benefits associated with making these uncompensated persons register as municipal advisors.

Feasibility Consultants as Municipal Advisors

Should engineers, accountants, or other paid professionals who provide feasibility studies, escrow verification reports or their equivalent for a bond offering be required to register as municipal advisors? The accounting and engineering professions can address these issues in the comment process. But, as bond counsel representing a wide range of governmental issuers, we believe that the registration requirements for engineers, accountants and similar advisors will likely have the effect of greatly limiting the pool of potential advisors to municipal entities and raising the costs of those services from the remaining providers.

There is no doubt that the studies or reports provided by these professionals are integral in many instances to a bond offering. As you are well aware, in many instances the feasibility study is attached to the Official Statement as a separate appendix. But participation, even significant participation, in the bond offering process does not make one a municipal advisor. The engineer or accountant is not advising the municipal entity on how to structure the bond issue. Rather, the engineer or accountant is providing its expert views regarding the economic feasibility of a toll road, a toll bridge, a convention center, a retirement community, hospital or similar revenue producing project to be funded with bond proceeds. To advise as to what level of revenues may be produced following the completion of a project taking into account various factors provided to an engineer or accountant is not to advise as to whether that project should be financed with tax-exempt or taxable municipal obligations or how those obligations should be structured.

We note that many of these professionals, including particularly accountants, are subject to strict professional licensure and related requirements for feasibility studies or verification reports. We fail to see how imposing federal registration and regulation of accountants, engineers, etc. would serve a purpose that is not already being served by the professional licensure requirements of these consultants.

More importantly, this is an area in which we believe the Commission is trying to accomplish too much with this rulemaking. Are there bond offerings done with feasibility studies that have proven to be too optimistic or founded on invalid assumptions? Undoubtedly. But will registration and regulation of these feasibility consultants by the SEC and MSRB provide better quality studies in the future? We doubt it. Will registration prevent bond issue defaults in the future as a result of reliance upon studies with assumptions that prove to be aggressive or unwarranted? Again, we doubt it. The emphasis of the Commission should appropriately be on the disclosures relating to feasibility studies, not the regulation of feasibility consultants. The issuers and underwriters have the most at stake in selecting the feasibility consultants for a bond issue, and we fail to see how requiring registration of these persons will enhance the quality of bond issues in the future that rely upon feasibility studies. While influence peddling, political contributions and similar concerns are clearly underlying the desire to require financial advisors, swap advisors, third-party solicitors and others to register as "municipal advisors," those same concerns do not appear to apply to engineers, accountants or other feasibility consultants in their capacities as such.

When is an Underwriter a Municipal Advisor?

We defer to the underwriter community to address the limited exclusion for underwriters from the definition of "municipal advisor," but we request clarification of certain aspects of the discussion of the role of underwriters in the Proposing Release. Specifically, we request clarification that if an underwriter pursues an underwriting engagement but is ultimately not hired as the underwriter for the financing, it is not deemed to be engaged in "municipal advisory activities" simply because it was not hired as the underwriter.

While many municipal issuers identify a need for a bond financing and begin to solicit underwriters for that financing, that is not always the case. For example, many governmental issuers are unaware of the potential savings from a refunding bond issue until an underwriter brings that opportunity to their attention. At that point, the would-be underwriter approaches the municipal entity about the refunding opportunity, inquires about other potential new money projects and begins the process of selling itself to the municipal entity as the best underwriter for the financing. The municipal entity may well proceed with that firm and quickly enter into an underwriting relationship. In that case, the underwriter can readily establish that all of its discussions and financial advice to the municipal entity were preliminary to establishing the underwriting relationship for the planned bond issue and thus it is excluded from the definition of "municipal advisory activities."

In many instances, however, the dialogue between a municipal entity and the would-be underwriter may continue for months, may cover a range of financing alternatives and a range of financial advice inherent in those discussions. No formal financial advisory relationship is established, and certainly the underwriter has not been retained for any bond issue. It is not uncommon for the initial firm with the refunding or other financing idea to fail to be hired as the underwriter for the financing. The ultimate underwriter may be selected through a formal or informal RFP process and may well be a firm other than the firm initially proposing the financing structure or idea.

If an underwriting relationship is never established (and there is never certainty of establishing an underwriter relationship at the outset), the discussion in the Proposing Release and the draft rule would suggest that the would-be underwriter has inadvertently become a "municipal advisor" simply by being unsuccessful in his or her efforts to be hired. We suspect this is not an intended outcome of the underwriter exclusion, as drafted and discussed in the Proposing Release, but it is certainly an outcome some could read into it.

Because our municipal entity clients rely heavily on the free flow of ideas from the underwriter community, we would discourage any municipal advisor regulation that limits or restrains the ability of an issuer to receive unsolicited or free (but valuable) advice from a potential underwriter that is ultimately not hired to underwrite a bond issuance.

If the definition of "municipal advisor" or "municipal advisory activities" included a compensation element, as discussed above under "Uncompensated Financial Advisory Services," then the free advice from the would-be underwriter would not, in and of itself, trigger a municipal advisor registration requirement.

Conclusion

We do not dispute in any respect the benefits that could be obtained for municipal entities and obligated persons as a result of registration (and regulation) of financial advisors (in the traditional sense of the phrase), swap advisors and third-party marketers and solicitors. But we believe the Commission would and the municipal bond community would be well served by significantly expanding the exclusions from the definition of "municipal advisor" and "municipal advisory activities." If abuses develop as a result of more limited and focused rulemaking at this time, the Commission can always consider future formal amendments or new interpretations of the rules to cover those abuses.

Sincerely,

GILMORE & BELL, P.C.

By: Richard M. Wright, Jr.
Joshua C. Ditmore

APPENDIX A

The following are several examples of Missouri, Kansas and Nebraska statutes regulating appointed officials of governmental boards or authorities:

Missouri

- Section 105.452 of the Revised Statutes of Missouri ("RSMo") provides that any appointed official of the state or any political subdivision must refrain from, among other things, acting in any way that would improperly confer pecuniary gain upon the official or "offer, promote or advocate for a political appointment in exchange for anything of value."
- Section 105.458 RSMo sets forth additional prohibitions for members of governing bodies of political subdivisions regarding conflicts of interests.
- Section 105.463 RSMo requires nominees for appointment to a board or commission file a financial interest statement with the State.
- Section 355.416 RSMo governs directors' conflicts of interest laws in nonprofit corporation law.

Kansas

- Appointed members of the board of Kansas Development Finance Authority ("KDFA"), a large statewide bond issuing authority, are expressly prohibited from having any type of personal gain or financial interest in the sale or purchase of any bonds or investments of the Authority under Section 74-8915 of the Kansas Statutes Annotated ("K.S.A.").
- KDFA Board members are further subject to the "Kansas State Governmental Ethics Law," K.S.A. 46-215 through 46-293 and K.S.A. 46-237a.
- K.S.A. 75-4301a, et seq., is the "Kansas Conflict of Interest Act" and deals with local units of government, candidates for local office and local government officers (elected and appointed).

Nebraska

- Under Section 85-1711 of the Nebraska Revised Statutes (N.R.S.), members of the Nebraska Educational Finance Authority ("NEFA") are appointed and removed by the Governor, and the Board must contain at least one member who is a trustee, director, officer or employee of a private institution of higher education, one member who has skill, knowledge and experience in finance, one member with skill, knowledge and experience in educational building construction and one member who has experience in public accounting.
- N.R.S. 85-1711 also provides that the NEFA Board consists of seven members, not more than four of which may be members of the same political party.
- N.R.S. 85-1717 provides that Board members of NEFA must abstain in a vote where a conflict of interest exists.
- Public officials and board members are covered under the "Nebraska Political Accountability and Disclosure Act," N.R.S. 49-1401 through 49-14,141.