

The City of New York
Office of Management and Budget
75 Park Place • New York, New York 10007-2146
Telephone: (212) 788-5900 • Fax: (212) 788-6300

Mark Page
Director

February 22, 2011

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

Re: Comment Letter on Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

The City of New York (the “City”), on behalf of itself, the New York City Municipal Water Finance Authority (the “Water Authority”), the New York City Transitional Finance Authority (the “TFA”), the New York City Housing Development Corporation (“HDC”), Hudson Yards Infrastructure Corporation (“HYIC”), the City’s five pension systems, and all other municipal entities created to advance City purposes, appreciates this opportunity to comment on the proposed rule relating to registration by municipal advisors with the Securities and Exchange Commission (the “Commission”).

Municipal advisors provide advice to state and local governments and other borrowers involved in the issuance of municipal securities or with respect to the investment of governmental monies. Municipal advisors also solicit business from a state or local government for a third party. Subject to certain exemptions, the definition of municipal

advisor under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders and certain swap advisors that provide municipal advisory services.

The City supports the proposed rule change. However, the City strongly believes that the Commission’s interpretation of who should be considered a “municipal advisor” is overly broad.

Section 975 of the Dodd-Frank Act defines the term “municipal advisor” to mean “a person (who is not a municipal entity or an employee of a municipal entity) that (i) 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 (ii) undertakes a solicitation of a municipal entity.” The Dodd-Frank Act excludes from the definition of municipal advisor “a municipal entity” and “employees of a municipal entity” but does not define what constitutes “employees.”

I. Board Members

The Commission has stated that it:

“... believes that the exclusion from the definition of a ‘municipal advisor’ for ‘employees of a municipal entity’ should include any person serving as an elected member of the governing body of the municipal entity to the extent that person is acting within the scope of his or her role as an elected member of the governing body of the municipal entity. ‘Employees of a municipal entity’ should also include appointed members of a governing body to the extent such appointed members are ex officio members of the governing body by virtue of holding an

elective office. The Commission 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 of a ‘municipal advisor.’ The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned that appointed members, unlike elected officials and elected ex officio members, are not directly accountable for their performance to the citizens of the municipal entity.”

This approach reflects a fundamental misunderstanding of the role of a governing body of an issuer of municipal securities. Members of a governing body do not provide advice of any kind to the issuer. They exercise the statutory powers of the issuer in accordance with state law and the issuer's by-laws. They make decisions as to the structure of, and authorize the issuance of, municipal securities and, in connection therewith, are sometimes the recipients of advice from third parties. In that process they discuss, deliberate and vote, but they do not provide advice. Since they do not provide advice, they do not fall under the statutory definition under the Dodd-Frank Act, and to subject them to the obligations imposed on municipal advisors by regulation would represent an unprecedented overreaching by the Commission that will impose a substantial burden on municipal issuers – precisely the entities that Congress was seeking to protect under these provisions of the Dodd-Frank Act.

The City, the TFA, the Water Authority and HYIC finance infrastructure and other City capital improvements through the issuance of general obligation and revenue bond debt. The Water Authority, the TFA and HYIC are single-purpose entities that act solely as financing vehicles for the benefit of the City. They have no other operations and are staffed primarily by City employees.

The Water Authority is a body corporate and politic constituting a public benefit corporation created by Section 1045 of the New York Public Authorities Law (the “Water Authority Act”). The Water Authority Act provides that the Water Authority is governed by a board of seven directors consisting of the Commissioner of Environmental Protection for the City, the New York State Commissioner of Environmental Conservation, the Director of Management and Budget of the City, the Commissioner of Finance of the City, two public members appointed by the Mayor of the City and one public member appointed by the Governor of the State of New York. The composition of the board of directors is dictated by laws of the State of New York (the “State”). None of the members of the board of directors is elected to the board, and those members who are ex officio hold their positions on the Water Authority by virtue of holding positions to which they were appointed. Not a single member of the Water Authority holds an elective office.

The TFA is a corporate governmental agency constituting a public benefit corporation created by Section 2799 of the New York Public Authorities Law. Section 2799-dd provides that the TFA is governed by five directors consisting of the Director of Management and Budget of the City, the Commissioner of Finance of the City, the Commissioner of the Department of Design and Construction of the City, the Comptroller of the City and the Speaker of the City Council. These two last persons are elected officials. Thus, all the directors of the TFA are ex officio and three are appointed to the positions which qualify them to serve as Directors of the TFA.

HDC finances the City’s program to increase and rehabilitate the stock of multi-family low- and moderate-income housing within the City by the issuance of revenue bond debt. Like the Water Authority and the TFA, HDC is a corporate governmental agency constituting a public benefit corporation. It was created by the New York Private Housing Finance Law which mandates that the corporation be governed by a seven-member board of directors consisting of the Commissioner of the Department of Housing Preservation and Development of the City (who is the chairperson), the Commissioner of Finance of the City, the Director of Management and Budget of the City, two public

members appointed by the Mayor of the City and two public members appointed by the Governor of the State. Thus, three of the directors are ex officio and four are appointed by elected officials. As with the Water Authority and the TFA, the entire composition of HDC's governing body is dictated by State law.

HYIC is a local development corporation created by the City under the New York Not-for-Profit Corporation Law with a board consisting of the Comptroller of the City and the Speaker of the City Council, both of whom are elected officials, the Deputy Mayor for Economic Development, the Deputy Mayor for Operations and the Director of Management and Budget of the City, all of whom are appointed by the Mayor. HYIC was created to finance an important City initiative: the extension of the No. 7 subway line and related capital improvements to promote the economic development of the far west side of Manhattan.

In addition to the public authorities and local development corporations that issue bonds on behalf of the City, the City sponsors five pension systems: the New York City Employees' Retirement System ("NYCERS"), the New York City Police Pension Fund ("PPF"), the New York City Fire Department Pension Fund ("FDPF"), the New York City Teachers' Retirement System ("TRS") and the New York City Board of Education Retirement System ("BERS"). These systems were created pursuant to State or local law. The City's five pension systems are each run by a board of trustees whose membership is governed by statute. While the particular composition of the boards varies, in general, the boards include elected officials serving ex officio, unelected City employees, appointed members and volunteer members. For example, the NYCERS board of trustees includes the City's elected Borough Presidents, the Public Advocate, the City Comptroller, City employee union representatives and a representative of the Mayor. The TRS board of trustees includes three employee union trustees, representatives of the Mayor (who are employed by the City), the City Comptroller, and the Chancellor of the Department of Education, as well as a non-City employee appointed by the Chancellor.

If the Commission adopts final rules defining municipal advisors to include unelected board members, all of the Water Authority's and HDC's board of directors and three of the TFA's and HYIC's five directors would be "municipal advisors," even though they do not provide advice to the Water Authority, the TFA, HDC or HYIC, as the case may be. Similarly, most of the trustees on the City pension fund boards would be deemed to be "municipal advisors," even though the boards do not provide advice on behalf of the funds "with respect to municipal financial products or the issuance of municipal securities . . ." Section 975 of the Dodd-Frank Act. In fact, the pension fund boards receive advice from municipal advisors and authorize investments based on the recommendations of municipal advisors after considered discussion. A rule that would view directors of the Water Authority, HDC, the TFA and HYIC, and trustees of a pension board, as municipal advisors would not further the Commission's stated goals of enhancing its "oversight of municipal advisors and their activities in the municipal securities markets" or of "aid[ing] municipal entities and obligated persons in choosing municipal advisors" It would, however, impose substantial burdens on these City-related entities and ultimately on the City itself.

Even assuming, for the sake of argument, that board members do render advice to the entity they govern, regulation of any board members or trustees by the Commission and the Municipal Securities Rulemaking Board would constitute an unnecessary and improper interference with State law, which imposes fiduciary, training, financial disclosure, public meeting requirements and other obligations on members of the boards of directors and trustees of entities such as the Water Authority, the TFA, HYIC, HDC and the City pension systems. These obligations are imposed equally on elected and non-elected board members, regardless of whether they are employed by the City or the municipal entity they govern.

Further assuming that, despite the duties and obligations imposed by State and local law on members of governing bodies, ensuring "accountability" of members of governing bodies is an appropriate federal regulatory goal, City and State employees such

as commissioners who serve as ex officio board members are accountable to the elected officials for whom they work, as well as the citizens of the State or municipality that employs them. The potential inclusion within the scope of “municipal advisors” of such unelected officials and employees of the City or the State highlights the overly broad scope of the Commission’s proposal.

In addition, the inclusion of board members and trustees in the definition of “municipal advisors” would make it extremely difficult for the Water Authority, HDC, the TFA, HYIC or the City’s pension fund boards to fill the board seats that are statutorily required to be appointed from among members of the public. The fees to be paid, the forms to be filled out, the records to be kept and the reports and personal financial disclosures to be made would make it unlikely that a member of the public, who receives no compensation other than (in the case of Water Authority), a modest per diem payment for attending board meetings, would be willing to serve on the Water Authority’s, HDC’s, the TFA’s or HYIC’s board, or on the respective boards of the pension funds.

The Commission should, for the purpose of the Dodd-Frank Act, expressly exempt all directors and trustees of a municipal entity, whether they are elected, ex officio or appointed, and their designees and any person serving as an appointed or elected trustee of a public pension fund from the definition of “municipal advisor.”

II. Employees

The proposed rule could be interpreted to include employees of a municipality who provide services for other legally distinct but related municipal entities in the definition of “municipal advisor” if such employees are not employees of the particular entity at issue. Employees of a municipality who perform services for other related municipal entities, just as when they perform services for the municipality itself, are acting within the scope of their employment and are directly accountable to the municipality and its citizens. They are hired and paid by the municipality and report to superiors in the

municipality. Therefore, this reading of the rule does not serve any of the Commission's stated goals and instead would only impose substantial additional economic and administrative burdens on the municipality and its employees.

The Water Authority, HYIC and the TFA all use the services of employees of the City, in particular those of the Office of Management and Budget ("OMB"), the Comptroller's Office and the City Law Department, who are not employees of the Water Authority, HYIC or the TFA.

The Water Authority, HYIC and the TFA also share office space with OMB and receive personnel and other administrative services from the City. Neither HYIC nor the TFA, which alone issues approximately \$3 billion of debt each year (not including refunding bonds) to finance City capital projects, has any employees. Both are staffed entirely by City employees who work on all City and City-related bond issues and by an accounting staff, which is employed by the Water Authority, but provides accounting services for the City-related bond issuing entities. Apart from three Water Authority employees who work only on Water Authority matters, all of the 13 employees of the Water Authority divide their time among the Water Authority, the TFA, HYIC and the other City-related issuers.

These staffing arrangements have permitted the City to finance its capital needs efficiently, utilizing a relatively small number of experienced employees who have developed considerable expertise in finance and the issues that arise in connection with City financings. Employees of the City should have the same exemption when they perform services for the Water Authority, HYIC or the TFA (or any other municipal entity that issues bonds to finance the City's capital program or is created to advance City purposes) as when they perform services for the City itself in connection with the City's own bonds. When they are performing these services, the City employees are acting within the scope of their City employment responsibilities for the benefit of the City. Municipal employees,

although often not elected, work for elected officials and are accountable to those officials and the public. In addition, employees of the City and the Water Authority are subject to City conflict of interest rules, and employees having substantial policy discretion are required to file financial disclosure with the City Conflict of Interest Board annually.

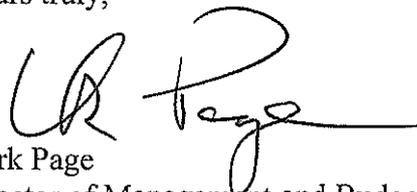
At a time when the City, like many other municipalities, is struggling to balance its budget in the face of the loss of large amounts of federal and State aid, it would be an unnecessary waste of scarce financial resources to provide separate employees for each of our bond issuing entities. Requiring all of the City employees who work on the issuance of municipal securities by entities created by, and serving the financing needs of, the City to register as “municipal advisors” cannot have been the result intended by Congress. The Commission should make it clear in its final rule that employees of a municipal entity that perform services for a legally distinct but related municipal entity are not “municipal advisors.”

III. Consultants

The Water Authority employs the services of a water and sewer rate consultant and an engineering firm to issue reports relating to the sufficiency of water and sewer rates to satisfy the Water Authority's obligations and the condition of the City's water and sewer system, respectively. The resolutions authorizing the issuance of bonds by the Water Authority require that these reports be prepared by independent engineers or consultants. These consultants are not providing advice relating to municipal securities or municipal financial products. Furthermore, the City is concerned that including rate consultants in the definition of “municipal advisor” under the proposed rule would deter the already limited number of rate consulting firms from providing these services. Similar to the exclusion for attorneys offering legal advice and engineers providing engineering advice, the City believes rate consultants providing advice regarding rates and revenues and engineering firms reporting on the condition of the water and sewer system should be excluded from the definition of “municipal advisor.”

We very much appreciate the opportunity to provide the foregoing comments in response to the Commission's proposed rule. Should you have any questions or desire clarification concerning the matters addressed in this letter, please do not hesitate to contact Albert Simons, III, Esq. of Orrick, Herrington & Sutcliffe LLP at (212) 506-5040 or Albert F. Moncure, Jr., Esq., Chief, Municipal Finance Division, New York City Law Department at (212) 788-1160. The City would also welcome the opportunity to discuss the matters addressed in this letter in an in-person meeting with the Commission's staff and would look forward to such a meeting in Washington if the Commission is so willing.

Yours truly,

A handwritten signature in black ink, appearing to read 'Mark Page', with a long horizontal flourish extending to the right.

Mark Page
Director of Management and Budget
The City of New York

cc: Martha Mahan Haines, Esq.