



CITY OF CLEARWATER

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CITY ATTORNEY'S OFFICE

February 22, 2011

Via Email and Regular U.S. Mail

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

Re: File No. S7-45-10
SEC proposal to require officers of governmental entities to register as
"municipal advisors" Release 34-63576

Dear Chairman Schapiro and Members of the Commission:

We are writing on behalf of the City of Clearwater, Florida, to comment on the proposed exclusions from the definition of "municipal advisor" as described in the Securities and Exchange Commission's (the "Commission") Release 34-63576 concerning registration of "municipal advisors" that fails to exempt appointed local government officials and community volunteer members of a local government's boards and commissions, from the definition of "municipal advisor," and provides less than adequate guidance on the definition when considered in light of how local governments are structured and operated under applicable Florida law. The Commission's proposal overreaches, raises significant constitutional issues, misunderstands basic principles of local government law, and will have a negative affect on local government budgets and their operations.

General Background:

The City of Clearwater, Florida, is one of approximately 425 municipal governments created pursuant to Article VIII of the Florida Constitution. It is a general purpose local



government serving 110,000 people on the west coast of Florida. It is composed of a City Council of five members, including the Mayor. All the members are elected at large by the voters of the entire city. The Mayor presides at all meetings of the Council and performs such other duties consistent with its offices as may be imposed by the Council and City Charter and has a voice and vote as the presiding member of the Council but not veto power. He or she may execute legal instruments and is recognized as the official head of the City.

The City Manager is appointed by an affirmative vote of four council members and serves as the Chief Administrative Officer and Chief Executive Officer of the City. The City Manager appoints a City Clerk and a Finance Director, which appointments must be confirmed by the City Council prior to becoming effective. The City Attorney is also appointed by the affirmative vote of four council members and may be removed by the majority of the members of the council. The City Manager presents the budget and keeps the council fully advised as to the financial condition and future needs of the City.

The City Manager is generally given the power and responsibility to hire all City employees. In addition, there are various boards and commissions created by general law, special law and local law through City ordinance.

In particular, the focus of this response relates to the proper classification of "officers" of the City (who may also be "employees" of the City for certain purposes), elected members of the City Council who serve on boards and commissions which are not part of the City organization, and citizen volunteers who serve on City boards which may fall within the purview of the proposed rule.

In the City of Clearwater, a review of the applicable laws indicate there are a number of potentially affected persons within the City serving on boards such as the Police and Fire Supplemental Pension Boards and the Old Firefighters' Pension Board, The Pension Investment Advisory Committee, The Downtown Development Board, Neighborhood and Affordable Housing Advisory Board and the City of Clearwater Housing Authority. In addition, there are

other community boards on which members of the Council serve as volunteers, including the Convention and Visitors Bureau and the Pinellas Suncoast Transit Authority and the City of Clearwater Housing Authority.

City Boards:

1. Fire Supplemental Pension Plan Board - The Board administers and operates the City of Clearwater's Firefighter's Supplemental Trust Fund, and consists of five members. Two are residents of the City appointed by the City Council. Two are members of the system (and thus "employees" of the City) and appointed by a majority of the firefighters who are members of the system. The fifth is chosen by a majority of those four, subject to mandatory appointment by the City Council. The fifth appointment may or may not be an "employee" of the City. Its powers include the right to invest and reinvest the assets of the firefighter's supplemental pension fund. This Board has no involvement with the issuance of municipal securities by the City or any subordinate entity of the City, however, should the City ever issue municipal debt obligations to fund a portion of the City's pension obligations, the Board would oversee the investment of the proceeds of the debt obligations once they are deposited to the pension plan trust fund.

2. Police Supplemental Pension Plan Board - This Board administers the supplemental police officers' retirement fund, and consists of five members. Two members, unless otherwise prohibited by law, shall be residents of the City who shall be appointed by the City Council. Two members shall be police officers (and thus "employees" of the City) who shall be elected by a majority of the police officers who are participants. The fifth member shall be chosen by a majority of the other five members, subject to mandatory appointment by the City Council. The fifth appointment may or may not be an "employee" of the City. Its powers include the right to invest and reinvest the assets of the police officer's pension fund. This Board has no involvement with the issuance of municipal securities by the City or any subordinate entity of the City, however, should the City ever issue municipal debt obligations to fund a portion of the

City's pension obligations, the Board would oversee the investment of the proceeds of the debt obligations once they are deposited to the pension plan trust fund.

3. Old Firefighters' Pension Board - This Board relates to firefighters or members of the fire department employed prior to July 1, 1963. It governs the pension and benefit fund for these employees. This Board consists of the mayor, who shall be chairperson, the Chief of the City's fire department, and three members of the department either active or retired under the pension plan. A retired firefighter would generally not be considered an "employee" of the City, but rather a "former" employee. It has the power to invest and reinvest the assets of the Old Firefighter's pension fund. This Board has no involvement with the issuance of municipal securities by the City or any subordinate entity of the City, however, should the City ever issue municipal debt obligations to fund a portion of the City's pension obligations, the Board would oversee the investment of the proceeds of the debt obligations once they are deposited to the pension plan trust fund.

4. Pension Investment Advisory Committee - The City Council sits as the Trustees of the pension plan for City employees and invests and reinvests the funds. The City's pension plan calls for the creation of the Pension Investment Committee which is chaired by the City's Finance Director (who also serves as the Treasurer for the pension plan), and consists of City's Assistant Finance Director, the City's Cash & Investment Manager and one member from the general public appointed by the City Council serving as the Trustees for the pension plan. Additional members may be appointed from time to time by the City's Finance Director who may be volunteer community members. While major investment decisions, including the hiring or termination of investment managers is made by the Trustees, the Committee must approve investments which do not require the approval or formal action of the Trustees. This Committee has no involvement with the issuance of municipal securities by the City or any subordinate entity of the City, however, should the City ever issue municipal debt obligations to fund a portion of the City's pension obligations, the Committee would be involved in

overseeing the investment of the proceeds of the debt obligations once they are deposited to the pension plan trust fund.

5. Downtown Development Board - This Board consists of seven members and acts as an aid to the City and the Community Redevelopment Agency. They are elected pursuant to a freeholders' referendum, and must have his or her principal place of business ownership or employment in the downtown area or own property in the downtown area. This Board recommends policies and procedures leading to tax revenue growth, and has exclusive control (including investment control) of funds legally available to it, including an ad valorem tax levy. This Board does not have the legal authority to issue debt obligations but is empowered to levy a limited ad valorem tax.

6. Neighborhood and Affordable Housing Advisory Board - This Board is comprised of seven members appointed by the City Council. Five must be actively engaged in specific areas: residential home building industry, banking or mortgage industry, an advocate for low-income persons in connection with affordable housing; and a not-for-profit provider of affordable housing. One must be a resident of the City and one must represent employers within the City. It is unlikely that any employees, Officers or elected officials of the City would be appointed to this Board. This Board reviews, monitors and evaluates housing programs and its components. Although not directly charged with investment oversight of any funds, the Board would likely become involved in some aspect of any housing related financing undertaken by the City, which is an infrequent occurrence.

Additional Community Boards:

1. Convention and Visitors Bureau - Created by general law, this board levies and administers a local option sales tax to promote tourism. This Board serves as an advisory council to the County Commission of Pinellas County, Florida (where the City is situated) which has levied a local option sales tax on short-term accommodations. It consists of nine members appointed by the County Commission. Two members must be elected municipal

officials, at least one of whom shall be from the most populous municipality in the County (although the City of Clearwater is not the largest city in Pinellas County, as the second largest city it has historically had a representative on the Bureau). Six members must be involved in the tourist industry, not less than three or more than four shall be owners or operators of motels, hotels or other tourist accommodations subject to the tax. It continuously reviews expenditures from the tourist development trust fund. Although not directly involved with the investment of funds or the issuance of governmental debt obligations, the tourist development tax can be, and often is, a source of governmental revenue pledged to the repayment of governmental bonds for public projects.

2. Pinellas Suncoast Transit Authority – Created by special law, this Board is authorized to levy an ad valorem tax, and operates a transit system. It consists of fifteen members, one of whom shall be appointed by the City Council of the City of Clearwater from its membership. Eight are elected by other cities or combinations of cities. Four are appointed by the County Commission from its membership. One is appointed by the County Commission and another city and may not be an elected official. Among its powers are the power of eminent domain, and the power to borrow money.

3. City of Clearwater Housing Authority - This Board is created by general law, and its members are appointed by the Mayor, with the approval of the governing body, and consists of five to seven members. At least one member shall be a resident who is current in rent in a housing project owned and operated by the Housing Authority. Among its powers are the ability to lease or rent dwellings, to issue debt obligations, and to invest funds held in reserves or sinking funds.

A quick review of the various Boards and Commissions utilized by the City of Clearwater (mostly through the satisfaction of state law or Charter mandates) demonstrates the extent to which the City depends on the ongoing involvement of residents of the City in the successful operation of the City government. We have listed above only those Boards and

Commissions the members of which could arguably fall within the concept of a "municipal advisor" as discussed in Release 34-63576. The City, in its operations, is not really any different from other municipalities throughout the United States. Local governments depend upon the members of their communities to help facilitate and run their governments through varying volunteer activities. The City regularly uses community volunteers who give their time, expertise and common sense to enable the City to plan, to zone, to invest and to run various facets of local government operations. Some are true volunteers and others receive stipends.

Many of the people who serve on these Boards and Commissions hold offices, elective or otherwise, in the local government. Some of these persons are serving as constitutional or statutory "officers" of the City, and thus may run the risk that they are not "employees" of the City, no matter how much they may be paid. These persons should be clearly considered "employees" of the City and thus exempt from the registration requirement for "municipal advisors." In addition, the community volunteer serving on a Board or Commission is performing specific functions directly related to the operation of the City, and should not be required to register as a "municipal advisor" as a condition to providing volunteer services. Such a requirement would significantly negatively impact the potential pool of community volunteers willing to lend their skills, talents and time to the successful operation of the City. Likewise, the provision of services of an elected officer to another government's boards or commission, or to an intergovernmental agency, should not subject that elected official to the registration requirements of a "municipal advisor," especially where that service directly affects the City.

In the Release the position of the Commission is stated as follows:

[T]he 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."

In reviewing the City of Clearwater's structure, it can be readily observed that those elected officials, employees, former employees and community volunteers serving on the City's boards and commissions, as well as those boards and commission of other local governments, should all be included in the proposed definition of "Municipal Employee." The failure to include all of these persons within the definition of "Municipal Employee" would create several unnecessary problems.

I assume that the Commission does not intend to exclude from its definition of "municipal employee" the many appointed officers of local government who provide advice to their elected leaders simply because they are classified by State law as "Officers" of the City. Nevertheless, I believe this issue must now be clarified. Persons who hold positions of trust within a state or local government, including community volunteers serving on a City Board or Commission, subjects themselves to state and local ethics laws and common law responsibilities that include potential penalties for misfeasance or malfeasance. Each of these controls meet the Commission's stated intent of protecting the public by providing significant and sufficient state and local deterrent to misconduct that another layer of protection does not enhance. Worse, seeking guidance on federal regulatory issues expands the costs to local governments and the complexity of those regulations deters volunteer service.

The Dodd-Frank Act exempted both the municipal entity and its employees from the definition of "municipal advisor." It is very difficult to distinguish the members of a board or commission which governs a municipal entity from the municipal entity itself. Indeed, under most State's laws, including Florida, the two are legally and virtually indistinguishable. I believe Congress drafted the Act in a manner to express its clear intent that all of a municipal entity's officers and employees, including its volunteer board members, were to be included within that exemption. As drafted, the Proposed Rule interprets the Act in a manner which seeks to separate the board and commission members from the municipal entity. This interpretation creates an anomalous result by transforming the concept of "advice" to include actual

investment discussions by board members, when those discussions actually involve decision making debates by the municipal entity itself. Requiring registration for those who participate in those discussions chills informed analysis and debate - exactly the opposite result the Commission should be seeking.

The Commission is mistakenly failing to recognize that members of governing bodies and other state and local officials are the personnel that actually operate the municipal entities. The "municipal advisors" serve those officials. It only serves to confuse the issue and to misdirect the solution to the perceived detrimental actions to suggest that those officials, who themselves are the very intended beneficiaries of municipal advisor regulation, somehow are "municipal advisors" themselves. In short, the proposed regulations turn on its head the concept of "advice" and transform decision makers of entities who should be receiving advice into "advisors."

In the City of Clearwater's case, existing state and local laws require a transparency that surpasses that of the Commission's exemplary efforts at transparency through a combination of ethics laws, public information and public meeting laws as well as extensive reporting in the media to the stakeholders.

In the City of Clearwater's case, this transparency is provided by protective laws in the Florida Constitution, the State statutes and by local ordinance.

Florida Constitution:

In the area of public ethics, Florida's Constitution provides in Article II, Section 8, that a public office is a public trust, and that the people shall have the right to secure and sustain that trust against abuse. To assure this right, several provisions are made creating constitutional rights for Florida citizens: a) all elective constitutional officers and candidates for such offices, other political officers, candidates and employees shall file full and public disclosure of their financial interest; b) all elective public officers and candidates for such offices shall file full and public disclosure of their campaign finances; c) any public officer or employee who breaches the

public trust for personal gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained and the recovery of damages is provided; d) any public officer or employee who is convicted of a felony involving the breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan; e) no member of the legislature or statewide elected office shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer for a period of two (2) years following the vacation of office and similar restrictions on other public officers and employees shall be established by law; f) an independent state commission on ethics is provided for; g) a code of ethics for all State employees and non-judicial officers prohibiting a conflict between public duty and private interest shall be prescribed by law; and h) this section does not limit disclosures and prohibitions which may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.

In addition, Article III, Section 8 of the Florida Constitution provides for a conflict of interest provision with a Code of Ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interest shall be prescribed by law. Its provisions also cover appointed board members.

Similarly, Article I, Section 24, which is part of the Declaration of Rights for Florida citizens provides for access to public records and meetings. At all meetings of any collegial public body of a municipality at which official acts are to be taken or in which public business is to be transacted, discussion must be open and noticed to the public.

The same law generally provides that every person has the right to inspect or copy any public records made or received in connection with the official business of any public body by any officer, employee of the state, or persons acting on their behalf. This section specifically includes municipalities and their boards.

These constitutional rights are embedded in Florida's organic law and cannot change without the statewide approval of the electorate.

State Ethics Law:

Part III of Chapter 112, Florida Statutes, set forth the code of ethics for public officers and employees. It provides for persons governed by the ethics laws, including a definition of public officer as defined in Section 112.313(1) and 112.3143(1)(a) to include "persons elected or appointed to hold office in any agency including any person serving on an advisory body." There is a detailed website setting out the requirements, the forms, and the information received from these public officials: www.ethics.state.fl.us.

The Code of Ethics includes an anti-nepotism law at Section 112.135, Fla. Stat.

In addition, there is a prohibition against doing business with ones own agency in Section 112.313(3), Fla. Stat., which contains two provisions. The first precludes procurement from one's own agency or from a business entity of which one has a material interest. The second relates to conflicting employment and contractual relationships, and prohibits a public officer from having a contractual relationship or employment with an agency or business entity that is subject to the regulation of or doing business with the officers or employee's agency. This prohibition is found in Section 112.313(7), Fla. Stat.

Section 112.313(6), Fla. Stat. precludes officers from corruptly using or attempting to use their official position for any property or resources in their trust to perform their official duties to secure a special benefit privilege or exemption for themselves or others.

Section 112.313(6)(a), Fla. Stat. contains a prohibition against disclosure when using information not available to members of the general public gained by using their official position for their personal gain or benefit, or for the personal gain or benefit of any other person or entity.

Subsection 112.313(4) contains a prohibition of unauthorized compensation or gifts, and requires a quarterly disclosure of any gift of \$100.00 accepted and an annual gift disclosure,

found in Commission and Ethics Form 9 and 10, respectively. There is also a provision governing voting conflicts of interests, which requires the submission of a written memorandum of conflict if an official votes upon any measure which would inure to the officer's special private gain or loss or the special gain or loss of any principal by whom the officers retained.

In the event of a voting conflict, Section 112.3143 requires that local officials holding board appointments must follow certain guidelines. If they do not intend to participate in the measure, they must make an oral declaration of the conflict and follow-up with a written form. They must file a Memorandum of Voting Conflict with the Commission, Form 8D, with the person responsible for recording the minutes of the meeting. If they do intend to participate they must abstain but make their disclosure before they participate either by filing the Memorandum of Voting Conflict form prior to the meeting or making the disclosure orally at the meeting before participating. These appointed board members would also be required to file a Form 1 Limited Disclosure, for local officers. This applies to members of various but not all appointed bodies pursuant to Section 112.3145(1)(a)(2), Fla. Stat.

These ethics provisions are a detailed and transparent set of interlocking laws which provide for significant transparency.

State Sunshine Law:

Similarly, there is an extensive set of state statutes and organic case law in the State of Florida governing the Sunshine Law, which relates to public meetings. Florida's Government in the Sunshine Law is set forth in Section 286.011, Fla. Stat. There are three basic requirements of the law: 1) meetings of public boards or commissions must be open to the public; 2) reasonable notice of such meetings must be given; and 3) minutes of such meetings must be taken. All public agencies are subject to the Sunshine Law, including appointed boards. Even *ad hoc* committees which are delegated any authority of a public body under Florida law is required to comply with its public meeting laws.

State Public Records Law:

The Public Records law defines public records to "include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing, software and other material regardless of the physical form, characteristics or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." The definition of "Agencies" does include appointed boards, such as those relating to the enumerated boards with appointed members in the City of Clearwater. The sanctions provided for by both sets of statutes are serious, and violations can result in criminal penalties, removal from office, fines, attorneys' fees, and the action taken may be determined by a subsequent court to be void *ab initio*.

Local Legislation:

Clearwater has adopted its own municipal lobbyist registration ordinance in 1996 which similarly requires a statement of lobbyist expenditures be made public annually. It is codified in the City of Clearwater Code at Section 2.700 *et seq.* Municipal Code of the City of Clearwater.

Potential US Constitutional Infringements:

An overly narrow definition of the term "employee" and elected officials is not only unnecessary and counter-productive, such a narrow definition could lead to a violation of the First and Tenth Amendments to the U.S. Constitution. The First Amendment protects the rights of citizens to communicate to all departments of government, regardless of their motive. The courts have consistently held that content-based restrictions on speech are presumptively invalid and are subjected to a strict scrutiny to survive the required analysis. By narrowly defining "employees" within the context of how local governments operate, such as the City, the proposed Regulations would appear to impose restrictions on members of the public serving as volunteers to local governments. Such restrictions consist of the requirement to not only register as a "municipal advisor" but to undertake ongoing educational programs and testing which are unrelated to their voluntary participation in the operation of the local

government. It is unlikely that the "municipal advisor" provisions of the Act would withstand such constitutional scrutiny unless such provisions were significantly restricted.

The Tenth Amendment prevents Congress from exercising powers delegated to it in a fashion that impairs states' integrity or their ability to function effectively. The Act's registration requirements and deemed fiduciary duties, as proposed to be interpreted by the Commission, effectively discourage individuals from giving advice to local governments, resulting in a restriction in a local government's access to advice required for sound decision making. Especially in light of the extensive ethics, public meeting and Sunshine laws and regulations imposed by the Florida Constitution, State law and local ordinance, unless the scope of the "municipal advisor" is greatly narrowed through interpretation by the Commission, these provisions could well be found to be in violation of the Tenth Amendment.

Interpretive Authority of the Commission:

The Commission has express statutory authority to exempt persons and activities, on its own motion, when consistent with the public interest. In addition, the Commission has ample authority to adopt rules to implement the municipal advisory provisions of Section 15B, and action taken in good faith in reliance on Commission rules is exempt from liability under the Exchange Act. In all events, the municipal advisory provisions should be interpreted in a manner that seeks to preserve the constitutionality of the Act and the proposed Rules. We suggest that since Congress gave express exemptive authority to the Commission, Congress recognized that the municipal advisory provisions of the Act were broader than necessary or perhaps desirable, to protect the interest of the public. Congress clearly intended that the Commission exercise this authority.

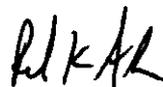
The Commission has identified past instances of misconduct in its effort to justify a need to regulate pervasively. Municipal finance statistics suggest that there are far fewer instances of violations and misconduct than in the area of private finance where the Commission already regulates pervasively. The current economic situation has devastated state and local

government budgets, including the City's budgets. Even given this dramatic downturn in the financial condition of local governments, there are far fewer defaults and municipal bankruptcies than the number of banks taken over by the FDIC. In short, virtually every state and local government subjects itself to a transparency that surpasses that of the Commission's exemplary efforts at transparency, through a combination of public information and public meeting laws and extensive reporting through the media to their stakeholders. These are coupled with an accessibility that fosters immediate individual contact with those concerned stakeholders.

The costs to local governments and officials to comply with this regulation will be extensive and comes at the worst time for local governments, such as the City. Local governments will be required to pay the costs for registering municipal advisors who serve local government in a volunteer capacity and for those who are its officials. In addition, the local government will need to hire counsel with expertise in dealing with the Commission to be sure that these officials are properly trained and advised in the intricacies of securities law, without reducing the expense for outside counsel and various advisors who in the past have handled issues on behalf of the municipal entity.

On behalf of the City of Clearwater, I ask respectfully that you consider expanding the exclusion for local government officials, to include among them (1) appointed board members, (2) other elected and appointed officials, and (3) community volunteers that may advise "municipal entities," from the requirement to register as "municipal advisors" by including them within the definition of "municipal employee."

Sincerely,



Pamela K. Akin
City Attorney