



# **Texas Department of Transportation**

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February 22, 2011

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

Re: File Number S7-45-10

Dear Ms. Murphy:

As the Executive Director of the Texas Department of Transportation ("TxDOT"), I am submitting the comments below on behalf of the Texas Transportation Commission (the "Commission") in respect of the proposed rule of the Securities and Exchange Commission (the "SEC") implementing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") that require municipal advisors to register with the SEC and the Municipal Securities Rulemaking Board (the "MSRB"). I am writing to request that the SEC revise its interpretation of the definition of the term municipal advisor to exclude board members of a state governmental entity, whether elected or appointed. In discussing the exclusion of "employees of a municipal entity" from the definition of "municipal advisor," the SEC has provided its interpretation that elected members of a governing body would be considered employees, and therefore, exempt from the definition of "municipal advisor," but that appointed members of a municipal entity's governing body would not be excluded unless such appointed members are ex officio members of the governing body by holding an elective office.

The SEC explained that a distinction between elected and appointed members of a governing body was made due to the concern that appointed members, unlike elected officers and elected ex officio members, are not directly accountable for their performance to the citizens of a municipal entity. TxDOT does not believe such interpretation is correct and believes that appointed state officers who, acting collectively, take decisions and establish policy have accountability equal to that of elected officers, if not more, for all of the reasons provided in this comment letter and should not be required to register as municipal advisors. Moreover, the proposed rule reflects a threshold misunderstanding of the role of appointed members. Such members do not "provide advice" in the sense that they are acting in a professional capacity providing knowledge and expertise in municipal financial matters. Rather, they rely on such advisors, selected according to administrative rules and policies, for guidance on bond issuance, financings and related investments. The function of the Commissioners is to participate in the deliberative process, expressing views on matters relating to municipal bond issues and to decide, in conjunction with the other Commissioners, on a course of action. To suggest that function is akin to that of a "municipal advisor" is incorrect.

THE TEXAS PLAN

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The Commission, as an agency of the State of Texas, is a municipal entity as defined by the SEC's proposed rules. Among its many functions, the Commission is authorized by the state's constitution and statutes to issue bonds and carry out various financial assistance programs to provide direct and indirect support of eligible costs of transportation infrastructure projects incurred by local governmental entities throughout the state. Often, the financial assistance agreements are pledged to support bonds issued by the recipients, making the Commission and/or TxDOT an "obligated person" on a frequent and ongoing basis and subject to disclosure obligations as a consequence. Several TxDOT employees serve on the board of the Texas Private Activity Bond Surface Transportation Corporation, a conduit issuer that acts on behalf of the Commission under Chapter 431 of the Texas Transportation Code to issue bonds in connection with certain concession arrangements for the construction and operation of transportation infrastructure. In connection with some of the Commission's bond issues and its commercial paper program, the Commission and TxDOT uses various financial products, including municipal derivatives and investment contracts, as well as maintaining liquidity and credit facilities. In short, because of extensive public financing programs, the Commission and some TxDOT employees could be subject to inappropriate additional layers of regulation in multiple contexts if the SEC maintains its interpretation of the term "municipal advisor," notwithstanding the fact that all of the Commission's and TxDOT's activities are already well regulated by state officials and rules established under the Texas Administrative Code.

#### The Commission Constitutes the Municipal Entity

TxDOT is governed by the Texas Transportation Commission, composed of five members appointed by the Governor of the State of Texas and subject to confirmation by the Texas Senate. The Commission is the policy and decision-making body for TxDOT. All bonds and short-term notes at the state level relating to transportation are issued in the name of the Commission. Chapters 201 and 222 of the Texas Transportation Code provide the powers of the Commission, including those relating to the issuance of bonds, and Sections 201.101 and 201.201 states that the governance and regulation of TxDOT is vested in the Commission. Without the governing body, TxDOT cannot exist and function on its own. The Commission makes all decisions and has all control of management of the TxDOT and constitutes a "municipal entity" itself, particularly in relation to the financing function. Because the Commission itself constitutes a municipal entity, the appointed state officers serving on it could not be required to register as municipal advisors because of the exclusion in the Act.

It should be noted that the SEC's interpretation poses a different dilemma for the TxDOT employees who serve as board members of the Commission's conduit issuer. They are clearly employees of TxDOT, but not of the Texas Private Activity Bond Surface Transportation Corporation, the non-profit corporation acting on behalf of the Commission. Must these employees resign from the board to which they have been appointed as a part of their duties of employment to avoid being caught in the SEC's strained interpretation excluding appointed board members as "employees," thereby including them as "municipal advisors?"

#### Appointed State Officers Do Not Provide Advice

As appointed state officers, the Commissioners deliberate and vote for decisions that are made as a collective governing body. Any action that is taken by the Commission must be voted by a

majority of the Commissioners with a quorum present. The discussion process that a board collectively goes through to vote on each action taken does not constitute a state appointed officer rendering "advice." An individual appointed officer does not recommend a decision to the Commission. Each Commissioner reviews the information and advice rendered to the Commission so that such Commissioner can make an individual decision on how to vote in a duly constituted meeting. The majority vote of the Commission then dictates the approval of such action. Thus, an appointed state officer serving on the Commission is not rendering "advice" to the municipal entity, but rather is serving as part of the deliberation and decision-making process that is integral to the function of the governing body of a municipal entity.

#### Appointed State Officers Subject to Strict Accountability Requirements

In order to be considered for the position of an appointed state officer on the Commission, a potential appointee must go through a stringent application and appointment process, including satisfaction of specified eligibility requirements set out in Section 201.051 of the Texas Transportation Code that provide exclusions based on multiple conflict of interest considerations and other ethical considerations. Additionally, a Commissioner is subject to confirmation hearings by the Texas Senate, an elected legislative body. An appointed officer must take an oath of office upon being sworn in as a state officer and is subject to the requirements and regulations provided by Texas ethics laws. During an appointed state officer's term, the officer is required to file financial statements yearly that include an officer's individual and family finances, securities and property owned by the officer, gifts, trust benefits or any other sources of income, as well as participation in lobbying activities and other board positions that are held by such officer. These financial statements, required under the Texas Government Code to be filed by appointed state officers, are public records.

In addition to financial statements, Section 572 of the Texas Government Code sets forth the standards of conduct an appointed state officer must abide by and any conflicts of interest that an appointed officer may have that must be disclosed. The standards of conduct appointed state officer is required to comply with under Section 572.051 of the Texas Government Code include the duty to maintain independent judgment, avoid conflicts of interest, not solicit or accept benefits for exercising one's duties and not disclose confidential information. The Texas Ethics Commission oversees and enforces the laws governing state officers. Any complaints against a state officer are filed with the Texas Ethics Commission, and if the commission finds the officer in violation of Texas ethics laws, civil enforcement action can be taken, including civil penalties and the Commission can refer the matter to the state prosecutor's office for criminal prosecution. In addition to civil and criminal penalties, an appointed state officer can be impeached from office.

All action by the Commission is subject to open records in accordance with Texas law and all meetings are recorded and available to the public. Therefore, there is an extraordinary amount of oversight and accountability an appointed state officer such as a Commissioner is subject to under Texas law and these requirements must be taken into consideration by the SEC in stating its concern that appointed state officers are not directly accountable to the citizens it serves. Texas law clearly provides strict standards of conduct and penalties for violation of such standards.

### Requirements for Bond Issuances and Investment of Public Funds

Texas law requires the Commission to receive approval from several state agencies in order to issue bonds. Ultimately, the Commission must give its approval in an open meeting to issue its bonds, but the issuance of bonds by the Commission must also be approved by the Texas Bond Review Board, a state agency composed of the Governor, the Lieutenant Governor, the Comptroller of Public Accounts and the Speaker of the Texas House of Representatives, all being elected officials with the exception of the Speaker who is elected by the Texas House of Representative members. Additionally, the issuance of bonds must be reviewed and approved by the Texas Attorney General's Office, which is an elected office. Bonds issued by the Commission in respect of some programs must also receive the prior authorization of the Legislative Budget Board, a body composed of the Lieutenant Governor, the Speaker of the Texas House of Representatives and chairmen of legislative committees relating to finance and appropriations. Accordingly, the bond issuance process of the Commission includes a number of approvals by elected officials before bonds can be issued.

There are also strict statutes under Texas law regarding the Commission's investment of public funds and requirements that the Commission exercise a certain standard of judgment and care when investing public funds. In order to comply with Texas law, the Commission must adopt an investment policy and investment strategy that must be reviewed at least annually. In addition, quarterly reports showing the investments of TxDOT are provided to the Commission. The appointed state officers on the Commission must undergo training to understand Texas law regarding sound investment policies and practices. The requirements under Texas law for the issuance of bonds and investment of public funds further exhibits the amount of regulation and accountability for appointed state officers, particularly in relation to the Commission's participation in the municipal securities market.

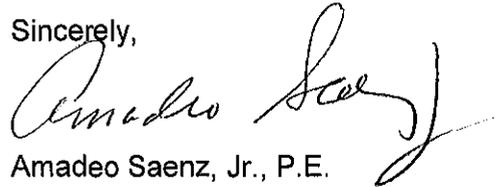
### Conclusion

Due to the fact that the Commission is the decision-making body that is the municipal entity itself, that such decision-making process consists of deliberative discussions that do not constitute giving "advice" and that there are strict accountability requirements imposed by the State of Texas that each appointed state officer must comply with in order to serve as a Commissioner, such appointed state officers should not be included in the definition of a "municipal advisor" under federal securities laws and should not be required to register as a municipal advisor. In addition, the employees of TxDOT who are appointed to the non-profit corporation that acts on behalf of the Commission to issue private activity bonds should be excluded from the definition of a "municipal advisor" because they are "employees" assuming a decision-making responsibility based on their duties of employment.

The registration requirement will, at a minimum, impede deliberative discussions regarding the issuance of bonds, financial assistance and investments by appointed members of governing boards, a result at odds with the goals of transparency, accountability and sound decision-making. A more likely result is that citizens willing to serve as members of governing bodies out of a sense of civic obligation with little or no compensation will find the burdens, financial and otherwise, of registrations too great to overcome. Valuable talent, expertise and diverse perspectives will be lost because prospective appointees to the Commission and other

governing boards will not want to subject themselves to the additional regulations of the SEC and the MSRB. All board members, whether elected or appointed officials, perform the function of policymaking and decision-making and should be treated as such. The final rule should provide specific exclusion from registration for appointed members of a municipal entity as is provided for elected officials and employees.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amadeo Saenz, Jr.", written in black ink.

Amadeo Saenz, Jr., P.E.  
Executive Director

cc: Texas Transportation Commission