



COMMENTS OF THE  
**CALIFORNIA MUNICIPAL FINANCE AUTHORITY**  
REGARDING  
**SECURITIES AND EXCHANGE COMMISSION**  
**RELEASE NO. 34-63576**  
**FILE NO. S7-45-10**

RELATING TO SECTION 975 OF TITLE IX OF THE DODD-FRANK WALL  
STREET REFORM AND CONSUMER PROTECTION ACT

**February 22, 2011**

**Via E-Mail: rule-comments@sec.gov**

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

Re: Comments to Proposed Rule Regarding Registration of  
Municipal Advisors, SEC Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

The California Municipal Finance Authority (the "CMFA") submits the attached comments drafted by our counsel, Squire, Sanders & Dempsey, relating to Release No. 34-63576 (the "Proposed Rules"), in which the Securities and Exchange Commission (the "Commission") proposes rules designed to give effect to provisions of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") that, among other things, amended Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act") to establish a permanent registration regime with the Securities and Exchange Commission (the "Commission" or "SEC") for municipal advisors and would impose certain record-keeping requirements on such advisors.

The CMFA is a joint exercise of powers authority created under the California Joint Exercise of Powers Act (California Government Code Sections 6500 et seq.) (the "California JPA Act") and a Joint Exercise of Powers Agreement Relating to the California Municipal Finance Authority, dated as of January 1, 2004 (the "JPA Agreement") among over 100 cities, counties and special districts for the purpose of strengthening local communities by assisting with the financing of economic development and charitable activities throughout the State of California. With the goal of giving back to California communities, the CMFA, as a conduit issuer, assists local governments, nonprofits and businesses with the issuance of taxable and tax-exempt financings aimed at improving the standard of living in California, among other objectives. According to the California Secretary of State's office, approximately 1,800 joint exercise of powers authorities have been formed in California.<sup>1</sup> Pursuant to the JPA Agreement and Section 6506 of the California JPA Act, CMFA's governing body, which administers the JPA Agreement, consists of the Board of Directors of the California Foundation for Stronger Communities, a nonprofit public benefit corporation organized under the laws of the State of California.

The CMFA supports the ongoing efforts by the Commission and the Municipal Securities Rulemaking Board (the "MSRB") to expand the protection of issuers of municipal securities and the entities whose credit stands behind municipal securities.

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<sup>1</sup> *Governments Working Together: A Citizen's Guide to Joint Powers Agreements*, California State Legislature Senate Local Government Committee, August 2007 at pg. 10.

However, the CMFA respectfully submits that certain aspects of the Proposed Rules will not further the spirit or the letter of the Dodd-Frank Act, and will, conversely, have an undesirable and significant chilling effect on the willingness of experienced and knowledgeable individuals to serve on the governing boards of public agencies, such as the CMFA, and share their experience and expressing their views with other members of the governing board.

The CMFA urges the SEC to revise its position in the Proposed Rules so that *all* members of governing bodies of municipal entities, including California joint powers authorities, such as the CMFA, whether appointed or elected be explicitly excluded from the definition of "municipal advisor." The CMFA also respectfully requests that the SEC clarify what constitutes "providing advice" for purposes of determining what other individuals and firms are municipal advisors under the Dodd-Frank Act. Our counsel's comments, expanding on these points, are attached.

Thank you for your consideration.

Sincerely,

John P. Stoecker, on behalf of the

**CALIFORNIA MUNICIPAL FINANCE AUTHORITY**



LEGAL  
COUNSEL  
WORLDWIDE

SQUIRE, SANDERS & DEMPSEY (US) LLP

M E M O R A N D U M

**To:** Ms. Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission

**From:** Squire, Sanders & Dempsey (US) LLP, counsel to the California  
Municipal Finance Authority

**Date:** February 22, 2011

**Re:** Comments to Proposed Rule Regarding Registration of Municipal  
Advisors, SEC Release No. 34-63576; File No. S7-45-10

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As counsel to the California Municipal Finance Authority (the “CMFA”), Squire, Sanders & Dempsey (US) LLP, respectfully submits the following comments relating to Release No. 34-63576 (the “Proposed Rules”), in which the Securities and Exchange Commission (the “Commission”) proposes rules designed to give effect to provisions of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) that, among other things, amended Section 15B of the Securities Exchange Act of 1934 (as amended, the “Exchange Act”) to establish a permanent registration regime with the Securities and Exchange Commission (the “Commission” or “SEC”) for municipal advisors and would impose certain record-keeping requirements on such advisors.

For the reasons expressed herein and in the preceding letter from our client, the CMFA, we urge the SEC to revise its position in the Proposed Rules so that *all* members of governing bodies of municipal entities, including California joint powers authorities, such as the CMFA, whether appointed or elected be explicitly excluded from the definition of “municipal advisor.” In addition, we respectfully request that the SEC clarify what constitutes “providing advice” for purposes of determining what other individuals and firms are municipal advisors under the Dodd-Frank Act.

**I. A “Municipal Entity” is Composed of and Includes the Members of its Governing Board, Whether Such Members are Elected or Not**

Section 15B(e)(4)(A) of the Exchange Act excludes from the definition of the term “municipal advisor” a person “who is a municipal entity or an employee of a municipal entity” (emphasis added).

As stated in the Proposed Rules, the governing bodies of municipal issuers are as varied as the types of issuers, ranging from state governments, cities, towns, and counties with elected officials to commissions and other special purpose enterprises

having appointed members.<sup>2</sup> The governing body of the CMFA is one example of the myriad of possibilities. Section 6506 of the California JPA Act provides: “the agency or entity provided by the [joint exercise of powers] agreement to administer or execute the agreement may be... a person, firm or corporation, including a nonprofit corporation, designated in the agreement.” Section 6507 of the California JPA Act provides: “For the purposes of this article, the [administering or governing] agency is a public entity separate from the parties to the agreement.” In excess of 100 California cities, counties and special districts have agreed in the CMFA’s JPA Agreement that the Board of Directors of the California Foundation for Stronger Communities, a California nonprofit public benefit corporation, will serve as the administering agency (or governing board) of the CMFA. Under Section 6507 (quoted above) the Board of Directors of the California Foundation for Stronger Communities, in its capacity as governing body of the CMFA, constitutes a separate public entity. Public entities, like the CMFA, act through their governing bodies, which are necessarily composed of individuals. Such individuals, when serving in their capacities as members of a governing board, constitute a municipal entity (within the meaning of the Dodd-Frank Act), and as such should be exempted from the definition of “municipal advisor” under the Dodd-Frank Act. There is no indication in the Dodd-Frank Act that Congress intended the SEC to “protect” municipal entities from the individuals serving on their governing boards.

The term “issuer” is defined in the Exchange Act as “any person who issues or proposes to issue any security...”<sup>3</sup>, and the term “person” is defined as “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.”<sup>4</sup> Finally, the term “company” includes “a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not.”<sup>5</sup> Entities are necessarily made up of the individuals who govern them.

The governing board of the CMFA, or of any other type of municipal entity, cannot be a municipal advisor to such entity, not because its members are its employees, but because, when acting in their official capacities, a governing body is indistinguishable from the municipal entity. In order to be given effect, a regulation that mandates action by a municipal entity necessarily requires that the individuals who make up its governing body so act. Accordingly, any regulation granting exemption to a municipal entity must exempt the members of its governing body when acting in their capacity as such. The group of individuals who make up the governing body of the CMFA or any other municipal entity cannot constitute the governing body of the municipal entity and simultaneously serve as municipal advisors to the municipal entity. The governing board cannot be an advisor to itself. The members of a governing board are not advisors to the municipal entity; rather they are responsible for making, and are authorized to make, final decisions on behalf of, and to authorize the actions of, the municipal entity. The members of a governing body may, however, seek the advice of

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2 Release at pg. 9.

3 15 U.S.C. § 77b(a)(4) (emphasis added).

4 15 U.S.C. § 78c(a)(9) (emphasis added).

5 15 U.S.C. 80a-2(a)(8) (emphasis added); see also Black’s Law Dictionary (9th ed. 2004)(same).

third parties, who may provide “advice” to the governing body that is subject to regulation by the SEC under the Dodd-Frank Act as “municipal advisors”.

The duties of every member of the governing board of a municipal entity are controlled by State laws, and those laws do not customarily differentiate among members based on whether they were appointed or elected to their position on the governing board. The Dodd-Frank Act does not limit the definition of municipal entity to city councils, county supervisors and other legislative bodies generally composed solely of elected members. Rather, a municipal entity is defined in the Dodd-Frank Act as “any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.”<sup>6</sup> The foregoing definition contained in the Dodd-Frank Act clearly includes many types of municipal entities that frequently have governing boards composed of members who are neither elected nor ex-officio by virtue of an elected office.

Consequently, the exception for a “municipal entity” should properly be interpreted to include all members of the governing body of a municipal entity when acting in their official capacity, regardless of whether they are appointed or elected to the governing board. Although our comments have focused on the aspects of the Proposed Rules and Proposed Rule directly affecting municipal entities, such as the CMFA, the foregoing reasoning equally applies to “obligated persons”, which, in the case of the CMFA, includes local governments, nonprofit corporations and for-profit corporations on whose behalf and for whose benefit the CMFA issues bonds. Obligated persons, like municipal entities, act through, and are composed of, the individuals who comprise their governing bodies.

## **II. Failure to Exclude all Governing Members of a Municipal Entity Is Contrary to the Stated Purpose of the Dodd-Frank Act to Protect Municipal Issuers and Will Have a Chilling Effect on the Participation of Knowledgeable Individuals on the Governing Bodies of Issuers and Other Beneficiaries of Municipal Securities**

The Dodd-Frank Act’s stated goals include providing further protections for municipal entities and obligated persons that participate in borrowings in the municipal securities market.<sup>7</sup> However, the effect of the Proposed Rules and the Proposed Rule is contrary to this goal, insofar as it would require members of the governing bodies of such municipal entities and obligated persons to register with the Commission and be subject to potentially increased liabilities before they can “advise” concerning issuing bonds or investing bond proceeds or entering into swaps or other municipal financial products. As many of the comments submitted to the Commission prior to these indicate, knowledgeable individuals will be dissuaded from serving on the governing boards of municipal entities or obligated persons if, simply by virtue of doing so, they

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<sup>6</sup> Exchange Act § 15B(e)(8).

<sup>7</sup> Exchange Act § 15B(b)(2)(A)

are required to register with the Commission as municipal advisors and become subject to the regulation and increased liability associated therewith. Members of the governing board of the CMFA serve without compensation. Citizens currently volunteering to serve on governing boards of municipal entities, such as the CMFA, are already subject to various uncompensated risks by virtue of their position. Imposing additional risks and burdens on such individuals would have the consequence (unintended though it may be) of diminishing the pool of citizens willing to devote their time and expertise to serving on the governing board of the CMFA and other governmental entities established for the public benefit.

We believe that there are hundreds of municipal entities in California and thousands throughout the United States, like the CMFA, that would be impacted adversely by the Proposed Rules, as outlined above. The SEC has provided no evidence of any “problems” that exist and would continue if appointed members of governing boards are excluded from its Proposed Rules. On the other hand, the CMFA’s board members have expressed that the impact of the Proposed Rules on the willingness of the CMFA’s current board members to continue to serve and the CMFA’s ability to recruit future individuals to serve on its governing board will be adversely impacted by the Proposed Rules.

### **III. The Distinction in the Proposed Rules Between Elected and Non-Elected Employees is False**

The Commission states in the Proposed Rules that it believes that members of a governing body of a municipal entity that are neither elected members nor ex officio appointed members by virtue of elected office should not be excluded from the definition of a “municipal advisor.”<sup>8</sup>

As stated above, the definition of “employee of a municipal entity” should be irrelevant to the individuals who make up the governing body of a municipal entity, because such individuals, when acting in their official capacity, should be excluded from the definition of “municipal advisor” by virtue of the fact that they constitute the municipal entity itself. However, since the Proposed Rules distinguish a municipal entity from its governing members and instead includes those governing members in the discussion of “employee of a municipal entity,” these comments will address the further distinction that is made in the Proposed Rules between the members who are either elected or appointed ex officio by virtue of elected office, and the members who are not.

The Commission states in the Proposed Rules that it believes the distinction between elected and non-elected members of governing bodies is appropriate because 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.

Members of governing boards of the CMFA and other municipal entities are typically uncompensated and have strong ties and commitments to the community they serve. As decision-makers for public entities, volunteer board members assume risks for which they are not compensated (in addition to the uncompensated time they devote

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<sup>8</sup> Release at pgs 40-41.

to their positions), including a heightened risk of being named in a lawsuit and reputational risks for events beyond their control.

Under most state laws, governing boards of municipal entities must act at public meetings. All meetings of the governing board of the CMFA are held subject to the requirements of the strict State open meetings laws mandated by California's Brown Act.<sup>9</sup> Moreover, pursuant to the JPA Act and the CMFA's JPA Agreement, the CMFA may not issue bonds unless a governing body or its duly authorized representative of the city, county or special district that is a member of the CMFA and has geographical jurisdiction over the bond-financed project (the "Host Government") expressly approves the proposed bond issuance following a public hearing. The governing body of the Host Government that must approve the bond issuance, in addition to the CMFA, is comprised of elected officials who are free to reject or approve the bond financing proposed by the CMFA. Consequently, the members of the governing board of the CMFA, who are appointed, are in many significant ways accountable to the public.

In addition, under California's Political Reform Act, California Government Code Section 81000, et seq., all public agencies, including the CMFA, are required to adopt a conflict of interest code that designates positions required to file Statements of Economic Interests (Form 700), and assigns disclosure categories specifying the types of interests to be reported. The CMFA has adopted such a conflict of interest code. The Form 700 is a public document intended to alert other public officials and members of the public to the types of financial interests that may create conflicts of interests. California State law makes no distinction between elected and non-elected officials under the Political Reform Act.

For reasons including all of the foregoing, the distinction made in the Proposed Rules between elected and non-elected employees is false.

#### **IV. Requiring Members of Municipal Entities' Governing Bodies to Register as Municipal Advisors May Violate the Tenth Amendment to the United States Constitution**

The Tenth Amendment to the United States Constitution reserves to the States those powers not delegated to the United States by the Constitution. Neither the text nor legislative history of the Dodd-Frank Act contains any intent of Congress to require the members of the governing boards of municipal entities, whether elected or not, to register with the SEC as municipal advisors. The Dodd-Frank Act makes no mention of any distinction between elected and non-elected individuals, and specifically includes in the definition of "municipal entity" many types of municipal entities that very often are governed by non-elected persons. The exemption afforded to municipal entities like the CMFA is rendered meaningless if it does not include their governing members. Just as a municipal entity cannot effectively act except through the collective action of its governing board, it cannot effectively be exempted from the registration requirements of the Proposed Rule except by an exemption for *all* members of its governing board when acting in their capacity as a members of the governing board.

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<sup>9</sup> California Gov. Code, § 549501 et seq.

For these reasons, any final rule promulgated by the SEC under the Dodd-Frank Act that purports to require members of the governing body of a municipal entity to register with the Commission is outside the clear legislative intent of the Dodd-Frank Act and may be in violation of the Tenth Amendment to the United States Constitution.

#### **V. Guidance is Needed With Respect to What it Means to “Provide Advice” for Purposes of the Dodd-Frank Act**

The Proposed Rules did not include a definition of what constitutes “advice” or “providing advice” with respect to the issuance of municipal securities. The SEC should clarify what these terms mean, including a requirement that a person be acting in a professional capacity or another capacity for personal gain. Otherwise, as written the Proposed Rules would require a citizen who wishes to express his or her opinion regarding or to advise the governing board of the CMFA (or any other municipal entity) concerning the issuance of municipal securities at a public meeting of the CMFA (or any other municipal entity) to first register with the SEC as a “municipal advisor”. Of course, this is an absurd result – but the words of the Proposed Rules do not provide any guidance – much less needed certainty – that this is not the case.

Guidance on what constitutes “providing advice” would lend clarity to determining who is a “municipal advisor” and who is not. During the CMFA board meetings, members of the CMFA’s board of directors typically ask questions of outside advisors and consultants to the CMFA, make comments, and discuss and vote whether to authorize proposed bond issuances. Board members receive advice from outside advisors, and hear comments and opinions from members of the public in attendance at their public meetings. Activities of an individual in his or her capacity as a member of a governing body, or a member of the public expressing a view or opinion to a municipal entity at a public meeting or otherwise, should not be considered “providing advice”. The SEC should make this clear in its final Rules.

The Proposed Rules create a cloud of uncertainty over what statements a member of a governing board or a citizen may make concerning the issuance of municipal securities – and this uncertainty is not a way to improve the quality of decision making concerning issuance of municipal bonds. It only creates uncertainty with no discernable benefits and with clear detriments.

#### **VI. Conclusion**

As counsel to the CMFA, we urge the SEC to revise its position in the Proposed Rules so that all members of governing bodies of municipal entities, including California joint powers authorities, such as the CMFA, whether appointed or elected be explicitly excluded from the definition of “municipal advisor.” We also respectfully request that the SEC clarify what constitutes “providing advice” for purposes of determining what other individuals and firms are municipal advisors under the Dodd-Frank Act.