



February 22, 2011

VIA E-MAIL

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

File Number - S7-45-10

SEC Release No. 34-63576

Re: United States Securities and Exchange Commission Proposed Rule¹ Concerning the
Registration of Municipal Advisors

Dear Ms. Murphy:

I write to respectfully request that the Commission (hereinafter defined) modify its interpretation of the term "municipal advisor," or grant exemptive relief, so as to exclude appointed board members from that term. I ask that you take that action in furtherance of established principles of federalism and to protect municipal entities (a purpose of the applicable provision), from adverse consequences.

I am the Vice President Strategic, Financial, and Management Services of a component unit of the City of El Paso, Texas (the "City") that was created in 1952 by the City Council of the City in accordance with the City's water and wastewater systems (the "Systems") revenue bond ordinances (the "1952 Water and Sewer Revenue Bond Ordinance") and is referred to as the El Paso Water Utilities Public Service Board of El Paso, Texas ("Board"). The management, control, operation, and maintenance of the Systems was delegated in the 1952 Bond Ordinance to a five member appointed Board of Trustees, later changed by State Law to seven members, including the Mayor of the City who serves as an ex-officio (but voting) member of the Board. The Board, excluding the Mayor, is subject to the appointment, review, and removal process set forth in the Bond Ordinances.

This management structure envisions that the Board will establish policies, provide general oversight, approve maintenance and operations and capital budgets, establish strategic goals and plans, approve certain contracts, and receive, review, and make appropriate recommendations based upon management input received from the President/Chief Executive Officer and his senior staff and other employees and outside consultants. These outside consultants, which with respect to the issuance of municipal securities would be bond counsel and entities generally referred to as financial advisors, would provide their professional advice with a duty to the Board

¹ 76 *Fed. Reg.* 824 (January 6, 2011)

relating to the issuance of municipal securities. The El Paso City Council is the legal authority to approve any debt issuances; and, as discussed above, to appoint, review, and remove members of the Board. The entire City Council is subject to election every four years as set forth in the City's Home Rule Charter and other applicable law.

As you are well aware, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended Section 15B of the Securities and Exchange Act of 1934 (the "Exchange Act") to make it unlawful for a municipal advisor to provide advice to a municipal entity with respect to municipal financial products or the issuance of municipal securities unless the municipal advisor is registered with the United States Securities and Exchange Commission (the "SEC" or the "Commission"). The Dodd-Frank Act also gives the Municipal Securities Rulemaking Board (the "MSRB") regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors when providing advice to municipal entities. As amended by the Dodd-Frank Act, Section 15B of the Exchange Act is intended for the protection of municipal entities as well as investors. Under Section 23 of the Exchange Act, the Commission is authorized to adopt rules to implement the provisions of the Exchange Act, including Section 15B, and any act or omission made in reliance on Commission rules in good faith is exempted from liability. In addition, the Commission is specifically authorized by Section 15B(a)(4) of the Exchange Act, as amended by the Dodd-Frank Act, to exempt municipal advisors from any provision of Section 15B, including the registration requirements, fiduciary duties, and MSRB rules applicable to municipal advisors, if it finds that the exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B.

Section 15B(e)(4), of the Exchange Act, as amended by Section 975 of the Dodd-Frank Act, defines "municipal advisor" as:

"(A)... a person (who is not a municipal entity or an employee of a municipal entity) (i) that 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) that undertakes a solicitation of a municipal entity.²

Thus, under the statute, an employee of a municipal entity cannot be a "municipal advisor" and is exempt from the proposed rule. As such, all employees of the City, including, I would argue, employees of El Paso Water Utilities Public Service Board, the City-owned utility, would be exempt from the proposed rule. I would also note that the Commission could exercise its regulatory authority to define that all issuers and their elected or appointed governing bodies would be classified as the "municipal entity" and, as such, would be exempt from the proposed rule.

² Section 15B(e)(4)(A) of the Securities Exchange Act.

In its proposing release, the Commission provides interpretation on who is an “employee of a municipal entity.” The release interprets “municipal employees” to include members of a municipal entity’s elected governing body, and 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, but to exclude members of an appointed governing body. Under this interpretation, members of the Board, excluding the Mayor, could be considered municipal

advisors and therefore required to register with the SEC and be subject to MSRB regulation, if they fulfill their official duties by giving advice to El Paso Water Utilities Public Service Board concerning municipal securities issues or municipal financial products. The only reason given for the differing treatment of elected and appointed members in the interpretation in the SEC commentary is that appointed board members “are not directly accountable for their performance to the citizens of the municipal entity.”³

Based upon the facts and the referenced Texas law, I believe that the Commission’s proposed policy decision to treat elected and appointed officials differently concerning their potential classification as a municipal advisor has no merit. I respectfully request that the Commission modify its interpretation, or exercise its exemptive authority, to exempt governing body members who are appointed by elected officials.

I have serious concerns about the effect that the proposed interpretation has on potential legal liabilities that stem from the classification of a person as a municipal advisor and the resultant imposition of a federal law fiduciary duty on a municipal advisor. Violations of fiduciary duty could subject municipal advisors to criminal and/or civil liabilities. In addition, both the SEC and the MSRB have recently adopted or proposed additional rules to impose further regulatory restrictions and duties on municipal advisors, other than those contained in the proposed rule and interpretation that is the subject of this comment letter.

Texas law provides a mechanism by which “officials” may disclose a conflict of interest and then recuse themselves from a vote concerning the matter to be voted upon by the governing body. The imposition of fiduciary duty, under federal law and the supremacy clause, may have the effect of conflicting with and superseding Texas law on this important subject.

The seven appointed members of the El Paso Water Utilities Public Service Board are the six members of the Board, and the Mayor of El Paso, Texas. The Mayor (as an ex-officio member of the Board and an elected official) and the President/Chief Executive Officer as Board employee would be exempt from registration pursuant to the interpretation. However, once again, I believe that the interpretation should be reversed, or the Commission should exercise its exemptive authority in a manner that, in this instance, not only the Mayor of the City,

³ 76 *Fed. Reg.* 837 (January 6, 2011).

President/Chief Executive Officer but also the other members of the Board (as **appointed** board members) should not be classified as municipal advisors pursuant to the proposed rule.

Although the Board has engaged independent financial advisors, bond counsel, and accountants, and selected various investment banks to be members of underwriting pools that will form syndicates to sell the City's authorized water and wastewater revenue municipal securities pursuant to El Paso Water Utilities Bond Ordinances, the Board has active discussions concerning its proposed plan of finance, structuring assumptions, the purchase of bond insurance policies or surety bonds, capital items, operation and maintenance budgets, redemption provisions, the review and approval of disclosure documents, and various other matters concerning the contemplated debt issuance. Lastly, I also believe that the Commission's previous enforcement actions concerning municipal securities around the United States compel both elected and appointed board members who authorize the issuance of publically-offered municipal securities to be active participants in this process.

I have concerns that **IF** the appointed members of the Board could be "deemed" by the Commission to be a "municipal advisor" pursuant to the Commission's interpretation, then such deliberations, discussions, and votes could be classified as "advice" that would impose the proposed rule's licensing requirements and fiduciary duty on the appointed members of the Board and trigger the reporting, record keeping, and certification requirements set forth in the proposed rule.

I believe that the proposed rule's MA-I Form is cumbersome, unnecessary in my situation, and may have a chilling effect on prospective board members, because the information disclosed in the MA-I Form will be publically available, and discourage their contemplated public service as a member of the Board. I am confident that you will agree that having the most qualified members on the Board is in the public's best interest. It seems to me that the proposed rule's MA-I Form has merit and applicability for a person truly providing "financial" advice to a municipal entity but not to an appointee member of the Board.

I also have concerns about the annual certification requirement in the proposed rule, if and when an appointed board member is deemed to be a municipal advisor that is providing "advice" to its board. Once again, the administrative time and manpower costs to comply with these registration, record keeping, and certification requirements, the inevitable registration and annual certification filing fees and expenses, and additional continuing education requirements for the appointed board member to take further time away from their regular full-time jobs and potentially their families is not justified under the El Paso Water Utilities Public Service Board factual scenario.

For each of the stated reasons, I respectfully request that the Commission significantly limit the scope of the "municipal advisor" to address, only from a policy standpoint, the specific factual situation that was the impetus for the Dodd-Frank provisions. I am confident that you will agree

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that the appointed members of the Board should not be classified as municipal advisors for the reasons set forth in this comment submission.

In closing, I request that the Commission treat all appointed board members in the same manner as the interpretation treats elected officials and municipal employees.

Thank you for your careful consideration of this request to exempt all appointed board members in the Commission's final rule definition of "municipal advisor" so that the final rule will accomplish its intended public purpose.

Please do not hesitate to contact me if I can provide any future clarification or support on this important manner.

Sincerely,



Nick Costanzo, Vice President Strategic, Financial,
and Management Services

cc: John F. Cook, Mayor
Ed Escudero, CPA, PSB Chair
Edmund G. Archuleta, P.E., President/CEO
Robert D. Andron, General Counsel
Marcela Navarrete, CPA, CFO