



Houston Ship Channel Security

District

<http://www.hscsecurity.com>

February 11, 2011

VIA E-MAIL TO rule-comments@sec.gov

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

RE: File Number S7-45-10

Ladies and Gentlemen:

Please accept this letter from the Houston Ship Channel Security District ("District"), a special district and political subdivision of the State of Texas, created by the Harris County Commissioners Court in 2009, to plan, establish, develop, construct, maintain, repair, replace, operate or contract with other public or private persons for the joint use and implementation of security projects and services, including projects eligible for funding under the United States Department of Homeland Security's port security grant program, for the benefit of the facilities with its boundaries and protection of those facilities against the threat posed by terrorism. Upon careful review of the SEC's proposed Rules 15Ba1 to 15Ba7 (the "Rule"), **the District requests that the SEC revise its interpretation of the definition of the term "municipal advisor" to exclude appointed board members, or in the alternative, exclude appointed board members appointed by an elected official or a body of elected officials.** Appointed board members should be categorized no differently than elected board members or employees of a municipal entity. Requiring citizen volunteers to submit to SEC reporting and be subjected to a heightened fiduciary obligation serves no useful purpose and would have the unintended consequence of depleting the pool of citizen volunteers willing to expend their time and expertise as policymakers.

In Release No. 34-63576 (the "Release"), the SEC provided clarification of the term "municipal advisor." In response to comments urging the SEC to exclude persons serving as an appointed or elected





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member of a municipal entity, the SEC limited the otherwise broad language of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to interpret the term "employee of a municipal entity" to include "a person serving as an elected member of the governing body." The SEC further broadened the exclusion to include *ex officio* members who hold elective office. The SEC did not choose, however, to exclude appointed board members from the definition of municipal advisor. The Release provided that the SEC's interpretation was "appropriate because employees and elected members are accountable to the municipal entity for their actions." The SEC concluded it "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 municipality."

The District respectfully disagrees with the SEC's rationale for treating appointed board members differently from municipal employees and elected board members. Board members, appointed or elected, perform the function of policymaking and approving certain decisions of their staff. A board's function is to guide an organization in order to meet its constitutional and statutory objectives. Board members are not advisors or consultants in that they are responsible for making final decisions on behalf of the municipal entity. The duty of every board member to respective state constitutions and statutes does not discriminate based on appointment or election. Each board member takes the same oath and, just as important, is subject to liability for fraud and subject to suit for malfeasance.

Appointed board members, who are largely citizen volunteers, have strong ties to the community in which they serve and are just as accountable to the citizens they serve as elected officials. These citizens are firmly rooted in their communities and are typically community leaders. They are typically appointed by an elected official or by a body of elected officials (e.g., the governor, county commissioners, a city council). They serve limited terms with many such members serving at the pleasure of the elected sponsoring unit. To the extent they serve fixed terms, they are subject to a vote of the elected sponsoring unit for reappointment. The municipal entity's meetings are subject to state open meeting laws.





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Citizen volunteers assume great risks when they are appointed board members. They have a heightened risk of being sued as they are decision-makers for institutions that serve the public. While immunity at the state level may protect some appointed board members, immunity may not protect against all claims, including, particularly federal claims. Moreover, just being named in a suit imposes a personal burden on appointed board members. As leaders in the community with reputations at stake, appointed board members are at risk of having their reputations impugned for reasons outside of their control. Unlike employees of municipal entities or a large number of elected officials, these costs are not offset by any meaningful compensation. In many ways, citizen volunteers who serve as appointed board members assume far more risk than employees of municipal entities or compensated elected officials. Accordingly, in important facets, they are more accountable and have more to lose than employees of municipal entities or compensated elected officials.

The SEC's interpretation will impose a heavy burden on government entities while the benefits are unclear. Government entities rely on the expertise, community leadership and civic responsibility of appointed board members. Valuable talent will be lost because prospective board members will not want to subject themselves to the additional regulations of the SEC and the heightened fiduciary duty the Rule imposes. Even those prospective board members who would otherwise provide the required information, will, however, refuse to be subject to the oversight and regulations of the Rule. The extent to which the Rule will dissuade talented people from serving on boards cannot be measured. However, for states and municipalities that rely on volunteers the risk of depleting the pool of talented citizens far outweighs the benefit of requiring appointed board members to register with the SEC.

Specifically, the Board of Directors of the District is comprised of 11 persons, 8 of whom are industry representatives, nominated through a majority vote of the facility owners within the respective security zones those directors represent. Once nominated, zone directors are appointed by the County Commissioners Court to serve staggered 2 year terms. Although appointed, zone directors are directly accountable for their performance to the facilities they represent through the aforementioned majority vote nomination process. The other three





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positions on the District's Board of Directors are likewise subject staggered 2 year terms. Service on the Board of Directors of the District is completely voluntary, as Directors are not entitled to compensation for their service.

Based on the foregoing, the District requests that the SEC revise its interpretation of the term "employee of a municipal entity" to include appointed board members or, at a minimum, board members appointed by an elected official or body of elected officials.

Very truly yours,

HOUSTON SHIP CHANNEL SECURITY DISTRICT

By: ___/s/_____

Robin C. Riley, Chair
Board of Directors

