

February 22, 2011

Via e-mail to rule-comments@sec.gov

Ms. Mary L. Schapiro
Chair, Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

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

Re: Comments to Proposed Rule for Registration of Municipal Advisors; SEC
Release No. 34-63576; File No. S7-45-10 (December 20, 2010)

Dear Chairman Schapiro and Secretary Murphy:

The Texas Water Development Board (TWDB) submits these comments in response to the referenced rulemaking, specifically the request by the Securities and Exchange Commission (SEC) for comments on whether the SEC's "interpretations under the definition of 'municipal advisor' and related terms, and the exclusions from the definition of 'municipal advisor' [are] appropriate".¹ The TWDB is created in the Texas constitution as "an agency of the State of Texas" with "the authority to provide for, issue and sell general obligation bonds of the State of Texas as authorized by constitutional amendment or by a [constitutional] debt proposition." Texas Constitution, Article III, Section 49-c (a), (b). The TWDB "is the state agency primarily responsible for water planning and for administering water financing for the state." Section 6.051, Texas Water Code. As a state agency, the TWDB is included in the definition of "municipal entity" under Section 15B(e)(8) of the Securities and Exchange Act of 1934 (Act). Since the creation of the TWDB in 1957, the agency has issued upwards of \$8.2 billion in bonds in support of public water supply and water quality projects and currently manages \$2.9 billion in outstanding bonds and more than \$5 billion in loans extended to municipal entities.²

Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Securities and Exchange Act to require that all municipal

¹ SEC Release No. 34-63576: File No. S7-45-10 (Release), at 42.

² Generally, the TWDB issues general obligation bonds. Some issues historically have included revenue bonds.

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advisors must register with the SEC. The term "municipal advisor" is given the same meaning as in Section 15B(e)(4) of the Act: a person who is not a municipal entity or an employee of a municipal entity that provides advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities or undertakes any solicitation of a municipal entity. Accordingly, neither the TWDB *qua* state agency nor the employees of the TWDB fall under the registration requirements of the Dodd-Frank Act. However, in response to a comment to the interim final rule³ requesting the SEC to clarify whether the exclusion of "an employee of a municipality" includes "an appointed or elected member of a municipal entity, such as a board member, county commissioner or city councilman," the SEC agreed that an elected member of a governing body should be excluded from the definition of "municipal advisor" to the extent that person is acting within the scope of his or her role as an elected member.⁴ However, the SEC concluded that *appointed* members should not be excluded "because employees and elected members are accountable to the municipal entity for their actions" apparently in contrast to appointed members.⁵ The SEC also expressed concern that appointed members, unlike their elected counterparts, "are not directly accountable for their performance to the citizens of the municipal entity."⁶ The TWDB respectfully and strongly disagrees with the SEC's conclusion.

The SEC's reasoning for stating that elected officials are more accountable to the municipal entity is not provided, nor is the basis for the SEC's "concern" that appointed members are less accountable to electors. Certainly, the SEC's deprecation of the level of accountability is not evident upon examination of municipal entities governed by appointed members. The TWDB is governed by a six-member board (Board) who "are appointed by the governor with the advice and consent of the senate." Section 6.052, Texas Water Code.⁷ The governor is elected by the voters of the state. Article IV, Section 2, Texas Constitution. The senators are elected by the voters in their respective districts and, collectively, by the voters of the state. Appointments to the TWDB Board are made "in such a manner that each member is from a different section of the state and has no conflict of interest that is prohibited by state or federal law." Section 6.052(b), Texas Water Code. There is no rational basis for the SEC's assumption that, when appointed by

³ Letter from John J. Wagner, Kutak Rock LLP, to Elizabeth M. Murphy, Secretary, SEC, dated September 28, 2010.

⁴ Release, at 40-41.

⁵ Release, at 41.

⁶ *Id.*

⁷ An appointed member of the Board is precluded from voting, deliberating, or being counted as a member for purposes of a quorum until completion of training in the law governing the agency, the agency's financing programs, the agency's budget, the agency's most recent formal audit, and the Texas statutes generally pertaining to governing bodies of state agencies, including the administrative procedures act, open meetings, public information, conflict of interest laws and the ethics policies of the TWDB and the Texas Ethics Commission. Section 6.062, Texas Water Code. As an officer of the state, each member must take the official oath of office. Section 6.055, Texas Water Code.

the Texas Governor and confirmed by the Texas Senate, the members of the TWDB Board have not effectively been "appointed" by the Texas electors, unless the SEC assumes that the Texas Governor and the Texas Senate are not accountable to the citizens of Texas for appointments to the TWDB's Board. There is no discernible distinction between "elected" and "appointed" in terms of accountability.⁸

There is no statutory basis in the Act for not treating members of a governing body, whether elected or otherwise, as being the equivalent of the "municipal entity." They are the very embodiment of the "municipal entity" they are appointed or elected to govern. The TWDB, like any corporate body, does not act as a natural person; the actions of the agency are through the members meeting to take action for the Board as the TWDB's governing body or through the "employees." There is no rational basis for excluding the TWDB *qua* "municipal entity" and including the members of the TWDB's governing body in the requirement to register with the SEC.

The SEC's decision that appointed members of a municipal entity's governing body must register as financial advisers necessarily assumes that the members provide "advice to" the municipal entity. This assumption reflects a fundamental misunderstanding of the deliberative and decision-making actions of those members. Whether elected or appointed, the members of a municipal entity's governing body do not provide "advice to" the municipal entity. The members of the TWDB's Board deliberate in open meeting and decide whether to take action on items on the Board's posted agenda.⁹ The Board does not provide "advice to" itself in the issuance of municipal securities.

Finally, the SEC has specifically requested comments on whether its interpretations under the definition of "municipal advisor" and the exclusions from that definition are appropriate, and whether any of these interpretations should be "modified or clarified"¹⁰, indicating uncertainty on the part of the SEC whether its interpretations are either justified or clear. In fairness, and considering the potential penalties for failure to have registered under Interim Final Temporary Rule 15Ba2-6T which became effective October 10, 2010, the TWDB requests that SEC waive

⁸ The SEC prefaces the rulemaking proposal by noting that "[t]he Dodd-Frank Act was enacted, among other things, to promote the financial stability of the United States by improving *accountability* and transparency in the financial system. Release, at 5 (emphasis added). Requiring the members of TWDB's Board to register with the SEC will not make them more accountable to themselves.

⁹ The business of the TWDB Board members is transparent to the public. Notice of the date, hour, place and subject matter is required to be posted seven days in advance of the Board's meeting. Section 551.044, Texas Government Code. With limited exceptions (e.g., consultation with counsel on litigation, personnel), the meeting is open to the public. Section 551.002, *id.* Every member of a governing body of a municipal entity must receive training within 90 days of appointment or election. Section 551.005, *id.*

¹⁰ Release, at 42-43.

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such penalties for failure to register due to a *bona fide* dispute with the SEC's interpretation (specifically, that appointed board members of a municipal entity must register) or a lack of clarity.

In conclusion, the TWDB makes two requests: (1) that the SEC clarify: "The term 'municipal entity' includes the members of the entity's governing body, whether the member is elected or appointed, and whether acting as a body or acting individually but within the scope of the member's official capacity" and (2) that the SEC state: "Any failure to register under Interim Final Temporary Rule 15Ba2-6T due to a *bona fide* dispute with the SEC's interpretation of whether appointed members of the governing body of a municipal entity should register as a municipal advisor will not subject such member to any penalty."

Sincerely,



Kenneth L. Petersen
General Counsel
Texas Water Development Board

cc: Texas Water Development Board Members

Melanie Callahan, Interim Executive Administrator,
Texas Water Development Board