NATIONAL ASSOCIATION OF STATE TREASURERS

February 16, 2011

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

Re: Release No. 34-63576; File No. S7-45-10

Comment Letter to the United States Securities and Exchange Commission Concerning Registration of Municipal Advisors

Headquarters
2760 Research Park Dr.
PO Box 11910
Lexington, KY 40578-1910
P (859) 244-8175
F (859) 244-8053

Office of Federal Relations
444 N. Capitol St., NW, Ste. 401
Washington, DC 20001-1557
P (202) 624-8595
F (202) 624-8677

E-mail: nast@csg.org
www.nast.org

Secretariat
The Council of
State Governments

Dear Ms. Murphy:

The National Association of State Treasurers ("NAST") is the organization that represents the Treasurers or similar fiscal officers of the fifty States, the District of Columbia and the Commonwealth of Puerto Rico. These public members typically function as the chief financial officers of their respective States with primary responsibility for a wide range of fiscal functions, including, in most instances, the State's direct debt issuance, investment management and other capital market operations. Many of them are also responsible for approving, or have other oversight responsibility for, the debt issuance and general fiscal affairs of political subdivisions and other public bodies within their respective States. These public members and their staffs daily serve as members of literally hundreds of public boards that discharge critical decision making responsibility for the fiscal affairs of State and local entities and for implementation of their public policies. They serve in these capacities along with literally thousands of other board members, including other elected and appointed public officials as well as appointed members of the public. The continued operation of these boards is fundamental to their State's systems of self-governance. It is also fundamental to the continued funding of State and local public purposes through the issuance of municipal bonds by public authorities.

NAST's membership also includes corporate affiliate members that provide accounting, financial, legal, or other advisory services to NAST's public members. NAST's affiliate organizations include the State Debt Management Network, the professional network of public sector employees responsible for the management and issuance of State debt, and the College Savings Plans Network, the professional network of public sector employees responsible for the management and supervision of qualified tuition programs.

NAST adopted on February 16, 2011, an official resolution on the subject of the proposed rulemaking pursuant to Section 975 of the Dodd-Frank Wall Street Reform

and Consumer Protection Act ("Section 975" and the "Dodd-Frank Act") described in your captioned release (the "Proposing Release").

Summary. NAST supports the appropriate regulation of professional third party municipal advisors who provide advice with respect to the issuance and administration of municipal bonds and qualified tuition programs. Based upon our extensive experience with the practical operation of State and local government finance, however, we must oppose certain SEC interpretations of the scope of such regulation as described in the Proposing Release. In particular, it is critical to the continued functioning of the many finance-related boards upon which our public members sit that such regulation not apply to: (i) board members and employees of State and local entities; (ii) other public officers and public employees; or (iii) board members or employees of obligated persons, in each case while acting in such capacity. Moreover, we strongly believe that such regulation should not be extended to persons who advise government investment pools that do not issue municipal securities to nongovernmental investors and should not require additional registration of municipal advisors who are already subject to registration requirements under federal securities law or whose general investment advisory activities became subject to State, rather than to federal, oversight through operation of Title IV of the Dodd-Frank Act.

We believe the views expressed herein to be fully consistent with the intent of the applicable provisions of the Dodd-Frank Act and with the fundamental mission of the Securities and Exchange Commission (the "SEC") of protecting investors. We do not believe that the purposes of the Dodd-Frank Act included an expansion of that mission to include general oversight of the fiscal matters or administrative procedures of State and local entities. With respect to the exclusion of public board members and other public officers and employees from SEC regulation as municipal advisors, we believe that the views expressed herein are also Constitutionally mandated.

Unsupportable Interpretations of the Terms "Municipal Entities" and "Municipal Advisor." The Proposing Release expands the scope of the statutory term "municipal entities" whose advisors are to be regulated beyond the limits authorized by Section 975. The statute defines the term "municipal entity" to include:

> any State, political subdivision of a State, or municipal corporate instrumentality of a State, including--
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> "(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;

(Exchange Act §15B(e)(8)(emphasis added)).

The Proposing Release, however, fails to recognize, in the text following Footnote 82, that the scope of the first two clauses of this definition must be limited to issuers of municipal securities. As a textual matter, it would otherwise be unnecessary to specify that the third clause refers to ***other*** issuers of municipal securities. More importantly, the Dodd-Frank Act text and legislative history are devoid of any indication that its provisions addressing municipal securities were intended to grant the SEC general prudential authority over State and local fiscal matters. Rather, NAST strongly believes that the Dodd-Frank Act references to municipal securities were intended to address securities (primarily municipal bonds) issued by "municipal entities" to the class of nongovernmental investors that the SEC is charged with protecting.

The Proposing Release also errs in expanding the scope of the statutory term "municipal advisor" to include certain members of a "municipal entity's" governing board or the officers or employees of another "municipal entity", with respect to actions undertaken in such capacities. The apparent underlying purpose of Section 975 was to subject any ***independent professional*** municipal financial advisor to SEC registration and regulatory requirements without regard to whether he or she can be characterized as a "broker," a "dealer" or an "investment advisor", all of which categories are currently regulated.

The text of Section 975(e)(4)(A) expressly excludes any "person who [is] a municipal entity or an employee of a municipal entity" from the definition of the term "municipal advisor". In the discussion following footnotes 139-142, however, the Proposing Release makes an unwarranted assumption that members of the governing board of a municipal entity are distinguishable from the municipal entity, and then posits a fundamentally flawed distinction between *ex officio* members serving by virtue of being directly elected public officials of the "municipal entity" and other members. These errors reflect the SEC's apparent beliefs that only directly elected members (and, presumably, *ex officio* members serving by virtue of their status as employees of the "municipal entity" or appointed members who are also employees of the "municipal entity") are sufficiently accountable to the "municipal entity", and that only directly elected members are sufficiently accountable to the "citizens of the municipal entity", for State oversight of these boards to be effective. These beliefs appear to have led the SEC to conclude that it must expand upon its actual charge under the Dodd-Frank Act to protect "municipal entities" from their own board's deliberations.

The Proposing Release fails to recognize the fundamental point that the governing board of a "municipal entity" or "obligated person" cannot be considered as independent of the entity, which acts only through its board. The fact that such boards are necessarily composed of individual members does not render those individuals independent advisors. Contrary to the suggestion that most "municipal entity" board members are unaccountable to the entities that they govern, such board members are subject to State ethical standards, are, in fact, politically accountable and are generally subject to State law duties of care to their organizations no less exacting than apply to corporate board members. Examples of effective State oversight of "municipal entity" board members may readily be found.

This suggestion of deficient board accountability is also unsupported by the text or legislative history of the provisions of the Dodd-Frank Act relating to municipal securities. Indeed, as with State investment pools, the Dodd-Frank Act text and legislative history are devoid of any indication of Congressional intent to grant the SEC authority over State and local governance practices. Moreover, by requiring that board members submit registration statements for SEC approval, the Proposing Release impermissibly asserts the SEC's authority to review a State's appointments of the individuals charged with administering its fiscal affairs. This error is compounded by the Proposing Release's distinction between elected and appointed members, which assumes authority to burden a State's decision making with respect to the manner in which such individuals will be chosen.

Impermissible Federalization of State Self-Governance. The Proposing Release's preference for direct election also betrays a lack of familiarity with the diversity of actual State and local practices. NAST's own public members evidence the variety of State governance provisions: those from 9 States, the District of Columbia and the Commonwealth of Puerto Rico are appointed; those from 4 States are elected by their legislature; and the balance are directly elected. Even where election is utilized, a State law may provide for a mid-term vacancy to be filled by appointment. It is clearly inappropriate to attempt to meaningfully distinguish between the qualifications, duties or accountability of State Treasurers based upon their States' selection processes. Many, if not most, public boards also include State Treasurers or other State or local officials, who may be elected or appointed for the primary purpose of providing expertise as to debt issuance and other financial management issues. It is no less inappropriate to attempt to so distinguish with respect to these members, or with respect to appointed public members. To attempt to do so would also be unauthorized by the Dodd-Frank Act and a Constitutionally impermissible interference in the rights of States to order their own administrative affairs.

Such considerations also require the exemption of public officers and employees, acting as such, even when not a board member, who advises a public issuer other than his or her direct employer. It is not at all uncommon for State officers or employees to be charged, either formally (e.g., by statute, administrative directive or designation as a representative of an *ex officio* member) or informally, with advising that State's municipalities and quasi governmental entities (and in some instances its non-profits) with respect to certain financing matters or with approving certain of their financial decisions. Not only would no purpose be served by requiring such individuals to submit a registration form for approval by the SEC as a municipal advisor but, the State's decision process would be impermissibly burdened by such a requirement.

Simply put, the Dodd-Frank Act does not, and cannot, authorize the SEC to approve a State's selection of the individual officers who will conduct its fiscal affairs, as would be implicit in the proposed registration process, or to otherwise burden a State's decision as to the manner in which such individuals are selected or as to which governmental officers and employees will provide advice to support, or will review, their decisions. The discretion of a State to unilaterally decide whether the individual officers who administer its government should be directly elected, indirectly elected or appointed by elected officials has been recognized since the adoption of the federal Constitution (The Federalist Nos. 39 (Madison) and 43 (Madison); *New York v. United States 505 U.S. 144 (1992)*). Such federalization of State officers would also violate long-established standards of comity between federal and State governments. It is difficult to postulate more direct intrusions upon federalist principles concerning State sovereignty.

Participation of Obligated Persons and Associated Persons Not That of Municipal Advisors. The Proposing Release indicates that the SEC believes that it is authorized to expand upon the statutory exclusions from the definition of "municipal advisor" that are expressly provided by Exchange Act §15B(e)(4)(C). In view of the expansive general view of the scope of potential "municipal advisors" expressed in the Proposing Release in the discussion following footnotes 71 through 104, NAST believes that it is necessary for the SEC to clarify that neither an "obligated person" nor its board members or employees shall be deemed to be municipal advisors on the basis of their participation in the issuance and administration of municipal securities if such "obligated person" or an affiliated organization participates in the issue as a conduit user of proceeds or as a guarantor. Numerous essential State and local finance programs for a broad range of public purposes (e.g., economic development, educational, healthcare, housing, transportation, utility and waste management) depend upon the involvement of private parties who would be "obligated persons" within the definition proposed by the Proposing Release. Any uncertainty as to whether such parties or their board members or employees might be deemed to be "municipal advisors" as a result of their application for, negotiation of or other participation in the issuance and administration of such bonds might create a significant disincentive to their continued participation in these financing programs, with unpredictable, but likely far reaching, unintended consequences for the States' ability to finance these essential functions.

NAST does not object to the sensible general reconciliation of the definition of "obligated person" for purposes of Section 975 with the definition in Rule 15c2-12 under the Exchange Act. However, NAST notes that this will result in a wide range of entities that may be deemed to be "obligated persons" and believes that clarification is necessary that such persons will not be deemed to be municipal advisors solely by reason of their consideration and authorization of the use of municipal securities, of their use of the proceeds of municipal securities, of their guarantee of municipal securities, or of assets pledged to provide payment of municipal securities, or of their exercise of their rights in such capacities. Clearly, Congressional intent was to protect, rather than to regulate, "obligated persons" and their affiliated individuals.

NAST opposes the imposition of additional federal securities registration requirements upon "municipal advisors" who are already subject to federal securities registration as investment advisors, brokers or dealers. This is because it may be expected that incremental registration costs will become "municipal entity" or "obligated person" costs and that increased regulatory burden may limit the universe of available advisors.

Avoidance of Duplicate Regulation. Finally, NAST opposes the administrative reinstatement of federal securities registration requirements upon persons whose general investment advisory activities became subject to State, rather than to federal, oversight through operation of Title IV of the Dodd-Frank Act. In addition to the incremental cost and limited universe of available advisor concerns referenced in the preceding paragraph, this would seem to undercut the Congressional policy determinations that resulted in the Dodd-Frank Act amendments to Section 203A(a) of the Investment Advisers Act of 1940.

NAST looks forward to working with the SEC to establish a workable and appropriate framework for federal regulation of third party "municipal advisors" who offer professional services in connection with the issuance and administration of municipal bonds as envisioned by Congress.

Such a framework must take into account the diversity of actual State fiscal governance practices and the practical needs of these critical financing programs. NAST appreciates the opportunity to comment on this proposed rule. Please do not hesitate to contact NAST with respect to these comments or to any other aspect of the Dodd-Frank Act bearing upon municipal securities.

Sincerely,

Hon. Kelly L. Schmidt
President, National Association of State Treasurers and
North Dakota State Treasurer