Delaware River Joint Toll Bridge Commission

"Preserving Our Past, Enhancing Our Future"

February 18, 2011

Ms. Elizabeth Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010)
Proposed Regulations: Registration of Municipal Advisors

Dear Ms. Murphy:

I serve as the Executive Director of the Delaware River Joint Toll Bridge Commission ("DRJTBC"), a bi-state governmental entity created by Compact between the Commonwealth of Pennsylvania and the State of New Jersey, with the consent of the United States Congress. The DRJTBC builds, improves, maintains and operates seven toll bridges, eleven non-toll vehicular bridges and two pedestrian bridges over the Delaware River between New Jersey and Pennsylvania. The DRJTBC is governed by a board of ten appointed Commissioners. I write to you on behalf of the DRJTBC to offer the following comments on the SEC's decision not to include appointed government officials among those individual excluded from the definition of "municipal advisors" as proposed in SEC Release No. 34-63576.

There is a fundamental logical failing in the SEC's reasoning that the DRJTBC writes to highlight. On one hand, the SEC excludes governmental entities themselves from the definition of "municipal advisors." Excluding actual state and local governmental entities from SEC oversight certainly is appropriate and in accordance with general principles of federalism. But on the other hand, the SEC includes within the definition of "municipal advisors" those appointed government officials who, in many instances, actually comprise the entirety of the governmental entity itself. Any corporate body – including instrumentalities of states, political subdivisions, or municipalities – is essentially a legal fiction; it exists in practical terms only through those natural people who are entrusted with authority to act on its behalf. In the instance of a entity like the DRJTBC, all of its governing board members are appointed (five Commissioners by the Governor of the Commonwealth of Pennsylvania, and five Commissioners by the Governor of New Jersey upon the advice and consent of the state Senate). Thus, while the SEC's rules as proposed would rightly exclude the corporate fiction of the DRJTBC from the definition of "municipal advisor," those proposed rules would simultaneously extend the SEC's oversight to the very same people who in any practical sense *are* the DRJTBC. Put another way, a governing board comprised of members (whether appointed or elected), cannot serve as an advisor to itself. The governing board (and its members) does not *provide* advice; it *receives* advice and makes decisions on behalf of the governmental entity. The DRJTBC's Commissioners do not advise the DRJTBC; they are the DRJTBC. So the SEC's distinction between excluding the DRJTBC itself from the definition of "municipal advisor" but not the DRJTBC's Commissioners makes no practical sense.

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This apparently unrecognized fallacy has real consequence. Indeed, the SEC's definition of "municipal advisor" could even give rise to possible unconstitutional effects if left as proposed. For example, the SEC's attempted oversight of certain governmental board members almost certainly would collide with board members' legislative privileges, deliberative process privileges or other constitutionally based legal privileges. Take, for example, legislative immunity. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the United States Supreme Court expressly extended the doctrine of legislative immunity, to individual members of a bi-state agency's governing body. Id. at 393. The United States Supreme Court has since re-affirmed Lake Country Estates in a unanimous decision that extended legislative immunity even further, from regional public officials to local public officials as well in Bogan v. Scott Harris, 523 U.S. 44, 46-47 (1998). Legislative privilege or immunity emanates from the Speech or Debate Clause of the United States Constitution and protects board members from being questioned or subject to federal oversight or direction with regard to their "speech or debate" within the board or its committees, their votes, reports, issues concerning board business, communications with vendors, interest groups, or consultants. Indeed, the penumbra of legislative immunity encompasses a wide range of other activities, conduct, discussions, or communications of a legislative nature.

To show how the constitutionally based legislative immunity of the DRJTBC's Commissioners clashes with the SEC's proposed rules, consider that among its many other aspects, legislative immunity provides that a federal governmental body cannot compel the production of documents or other information from a person that enjoys the immunity. See, e.g., Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408. 421 (D.C. Cir. 1995); see also Burtnick v. McLean, 76 F.3d 611, 613 (4th Cir. 1996); MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859-60 (D.C. Cir. 1988); Miller v. Transamerican Press, Inc., 709 F.2d 524, 528-29 (9th Cir. 1983). Yet the SEC's proposed rules, if applied to appointed board members of governmental bodies who enjoy legislative immunity, like the DRJTBC's Commissioners, would unconstitutionally impose upon those board members strict recordkeeping requirements, purport to grant the SEC with the authority to inspect those records, command those board members to provide periodic written updates, and subject them to other oversight. These requirements run headlong into the long-established traditions of legislative immunity, as specifically applied to appointed board members of bi-state and other local governmental bodies by the United States Supreme Court. And this is but one illustration of how the SEC's proposed rules could result in unintended unconstitutional effects. Presumably the SEC's enforcement methods for those who do not comply with whatever permanent rules the SEC finally promulgates will similarly conflict with legislative immunity from federal oversight.

You have already received numerous comment letters from other government entities, public officials, interstate agencies and others acting on their behalf, such as the International Bridge, Tunnel and Turnpike Association ("IBTTA"), objecting to the inclusion of appointed board members in the definition of "municipal advisors." Those comment letters cover a range of objections, including comments (i) questioning the SEC's rationale for distinguishing between elected and appointed board members, (ii) explaining that all board members perform the same function of policymaking and decision-making on behalf of the entity they govern regardless of the method of their selection, (iii) identifying the numerous legal and political safeguards already in place both to deter and to penalize conduct by a board

member that exceeds the scope of his/her governing function, and (iv) observing that appointed board members are fully accountable to the public through the election of the public officials who appoint them. The comment letters almost universally lament that imposing a regime of SEC regulation on appointed members of governing bodies, especially at the local level, is likely to significantly deplete the numbers of talented people who will be willing in the future to commit to public service. These typically citizen-volunteers who are interested in serving for the public good, often at little or no pay and often having special expertise that is critical to the effective functioning of a governing body, will be deterred from serving because they will not want to subject themselves to the additional registration, regulation and reporting requirements, and other duties and responsibilities, that would be imposed on them by the proposed rules. The DRJTBC concurs wholeheartedly with these many comments.

If the DRJTBC's Commissioners are considered "municipal advisors," they would be forced to choose one of three possible courses of action to remain in compliance with the law: (1) register as "municipal advisors;" (2) abstain from participation in any discussion or decision-making by the DRJTBC regarding finance-related subjects; or (3) resign. This is an untenable position. It would do real damage to our overlapping system of government – which provides the federal government, state governments, municipal governments and other governmental entities with authority to act within their designated spheres. Imposing federal government control over municipal or local government boards (by exercising authority and control over their appointed board members) disturbs that balance and risks unintended erosion within our federalist system of government. Appointed government officials should not be faced with the choice of subjecting themselves to comprehensive, possibly unconstitutional, SEC oversight with all of its attendant costs and obligations, or being forced to abdicate their public duties as appointed governmental officials by abstaining from critical decisions involving the governing board on which they serve, or resigning.

For the reasons discussed above, the DRJTBC respectfully requests that the rules be changed to ***exclude*** appointed board members from the definition of "municipal advisors**."**

Thank you for your courtesy and consideration.

Sincerely,

Frank G. McCartney
Executive Director