

STATE OF ALASKA

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Via Email (Original by Mail)

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-0690

Re: *File No. S7-45-10*
*(Securities and Exchange Commission Release No. 34-63576,
Registration of Municipal Advisors)*

Dear Ms. Murphy:

The State of Alaska ("Alaska") submits these comments to the Securities and Exchange Commission (the "Commission") in response to SEC Release No. 34-63576, dated December 20, 2010. The Commission has requested comments on its proposed Rules 15Ba1-1 through 15Ba1-7, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), that would require registration of municipal advisors with the Commission. As the Commission is well aware, under Section 15B(e)(8) of the Securities Exchange Act of 1934, "municipal" refers to "any State, political subdivision of a State, or municipal corporate instrumentality of a State."¹

The State of Alaska appreciates the opportunity to comment concerning proposed Rule 15Ba1-1. The State of Alaska is concerned about the Commission's proposed interpretation that would include within the definition of a "municipal advisor" appointed members of a "municipal," and thereby state, entity's governing body, other than appointed members serving *ex officio* by virtue of holding elective office. Such an interpretation could subject appointed members of both governing and advisory bodies to the registration requirements of the Act. Not only is a distinction between elected and

¹ More fully, Section 15B(e)(8) of the Exchange Act states that "municipal entity" includes "(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." The Commission has further clarified that clause (B) of that definition includes "public pension funds, local government investment pools and other state and local governmental entities or funds, as well as participant-directed investment programs or plans such as 529, 403(b), and 457 plans." 76 Fed. Reg. 824, 835 (Jan. 6, 2011).

appointed board members inappropriate, but neither the Act nor common sense support inclusion of either governing or advisory body members—elected or appointed—within the definition of “municipal advisor.”

The State of Alaska’s Interest

The State of Alaska has many distinct state entities or state governmental units that may participate in the purchase or sale of municipal securities and that are governed by appointed boards. Many more have appointed advisory boards. Among the State of Alaska entities governed by appointed boards are the following:

- Alaska Aerospace Corporation
- Alaska Commercial Fishing and Agriculture Bank
- Alaska Energy Authority
- Alaska Housing Finance Corporation
- Alaska Industrial Development and Export Authority
- Alaska Mental Health Trust Authority
- Alaska Municipal Bond Bank Authority
- Alaska Natural Gas Development Authority
- Alaska Pension Obligation Bond Corporation
- Alaska Permanent Fund Corporation
- Alaska Student Loan Corporation
- Alaska Railroad Corporation
- Knik Arm Bridge and Toll Authority
- University of Alaska.

Among the appointed boards governing state governmental units that may participate in the purchase or sale of municipal securities are the following:

- Alaska Retirement Management Board
- Alaska State Board of Education and Early Development
- Alaska Children’s Trust Board
- State Bond Committee.

Among the advisory boards that may, from time to time, weigh in on either the purchase or sale of municipal securities are the following:

- Alaska Marine Transportation Advisory Board
- Alaska Pioneer’s Home Advisory Board
- Aviation Advisory Board.

In addition to all of the above, are the great many governing and advisory boards at units of local government, both borough and municipal, in the State of Alaska.

Virtually none of the members of the above state boards are selected by popular election. Most are not compensated for their service. For the most part, they are private citizens appointed by elected officials, but they may be appointed cabinet level state employees designated to sit on boards *ex officio* by statute. Though state employees, even those heads of state departments are not employees of the specific entities on the boards of which they serve. In at least one instance, some board members *are* “elected,” but by the other board members.

A requirement that members of governing boards must register with the Commission, or a requirement that advisory board members, who by definition are appointed to provide “advice,” must register with the Commission, will carry four burdensome negative consequences:

1. It will be extremely difficult to entice private citizens to volunteer to serve on these boards if doing so subjects them to training and registration requirements, with associated potential increases in liability exposure;
2. Those citizens willing to deal with the burden and risk of training, registration, and increased liability exposure will either simply suffer greater personal sacrifice, or perhaps be more likely to be individuals with some personal stake, and thus potential conflict of interest;
3. It will flood the Commission with many more registrations than the Commission has projected; and
4. It will waste time, energy and resources with no material benefit to the public entities involved or to the municipal securities markets.

Government Entity Board Members Are Not Municipal Advisors

State of Alaska boards address a broad range of issues: subject area mission and strategy, operations, human resources, public policy, and, yes, financial. With a number of notable exceptions, however, neither governing nor advisory board members are expected to possess or exercise special expertise in municipal finance or securities. In only rare cases are board members relied-upon to provide such advice. Far more often, governing board members participate jointly in action to *approve or disapprove* recommendations by municipal advisors concerning finance matters. Advisory boards may provide their personal views about finance matters under consideration by an entity, but, as a general rule, members of neither governing nor advisory boards provide municipal advisory services of the nature addressed by the Act.

In its discussion whether appointed board members are exempt as "employees," the Commission seems to have lost sight of the underlying question whether such board members fall within the definition of "municipal advisor" in the first place such that the question of employee status has any relevance. Section 975 of the Act defines a municipal advisor as

a person (who is not a municipal entity or an employee of a municipal entity) that—

(i) 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) undertakes a solicitation of a municipal entity;

See, 15 U.S.C. § 78o-4(e)(4) (emphasis added).

It appears that an external comment caused the Commission to address applicability of municipal advisor registration to state and municipal entity boards:

One commenter suggested that the Commission clarify that this exclusion from the definition of "municipal advisor" would include any person serving as an appointed or elected member of the governing body of a municipal entity, such as a board member, county commissioner or city councilman. This commenter stated that because these persons are not technically "employees" of the municipal entity (but rather are "unpaid volunteers"), these persons would not fall within the exclusion from the definition of "municipal advisor" for "employees of a municipal entity" and, therefore, may have to register as municipal advisors.

76 Fed. Reg. 824, 834 (Jan. 6, 2011). It seems the comment letter's premise was that governing board members would be deemed "municipal advisors," required to register unless the employee exemption were expanded to cover them. In response, the Commission stated that it "does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a 'municipal advisor.'" *Id.* The Commission couched that response in terms of the employee exemption and the elected/appointee question, without exploring the underlying premise that governing board members perform "municipal advisory services," which, in fact, they generally do not. It is a logical fallacy to suppose that not "excluding" appointed members of governing boards under the employee exemption,

would automatically “include” them as “municipal advisors” if they do not otherwise satisfy the “municipal advisor” definition.

The Commission defines municipal advisory activities as

providing advice . . . 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.

76 Fed. Reg. 824, 881 (Jan. 6, 2011) (Proposed 17 C.F.R. § 240.15Ba1–1(e)). Whether any person is a municipal advisor must be determined by inquiry into whether the person provides “advice” as that word is used in the Act, and whether that “advice” is “with respect to Municipal financial products or the issuance of municipal securities” as that phrase is used in the Act.

A governing board member does not provide “advice” to an entity, much less technical “municipal advisory activities” as contemplated by the Act. A governing board member participates in making legislative-type decisions, approving or disapproving actions that may be based, in part, on the advice of municipal advisors. A governing board member is generally charged to review and approve, not to provide expert advisory services. The Act is concerned with persons who make technical recommendations as knowledgeable professionals, not the people who receive those recommendations and make decision based upon them. Thus, the executives, managers and other employees are excluded, as is the entity itself. A governing board is really an organ of the entity itself, of which the board members are component parts. They are not external third-party advisors as contemplated by the Act.

In the review process leading up to final approval of proposed financial action, board members may offer viewpoints, perspectives and judgments, but not, for the most part, in the realm of professional advisory services addressed by the Act. Though not technically limiting, the phrase “including advice with respect to the structure, timing, terms, and other similar matters” indicates that the Act is concerned with persons who make technical recommendations as professionals holding themselves out as knowledgeable on those topics. The Commission’s proposed definition of “municipal advisory activities, “. . . providing advice . . . 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” is consistent with this view. *See* 76 Fed. Reg. 824, 882 (Jan. 6, 2011) (Proposed 17 C.F.R. § 240.15Ba1–1(e)).

The financial professionals targeted by the Act advise municipal entity managers and governing boards about structuring and similar technical aspects of financial products or issues based on purported expertise in such matters. Registration of such individuals makes eminent sense. Governing board members, on the other hand, are generally appointed for completely different sorts of knowledge and acumen: public policy, community concerns, general business or specialty substantive industry expertise. Although one might argue that greater municipal finance expertise on governing boards would be desirable, the Act's requirement for registration of "municipal advisors" cannot reasonably be read to have that intent. Governing boards are consumers, not providers, of municipal advisory services.

There seems to be no reasonable basis for the notion that board members, appointed or not, fall within the class of persons performing the types of activities addressed by the legislation. Since the regulation does not expand the statutory definition of municipal advisor, it seems clear the Commission's comment that it "does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a "municipal advisor," 76 Fed. Reg. 824, 834 (Jan. 6, 2011), either strays far beyond the intent of congress and should be withdrawn, or should be read to have very limited application. Rather than a declaration that all appointed governing board members who act on municipal bonds are municipal advisors subject to regulation, the comment must be read to say only that board membership does not excuse an individual from registration if the person performs municipal advisory services.

Beyond the governing board example, the Commission's comments also raise the specter that volunteer advisory board members would be compelled to register. Unlike governing boards, advisory boards *do* advise rather than exercise approval or decision-making authority. Like governing boards, however, advisory boards deal with and advise primarily at the level of policy, mission and strategy, and not on the technical details of financing activity. Advisory board viewpoints are different in nature from the "advice . . . with respect to municipal financial products or the issuance of municipal securities" contemplated by the Act.

Advisory board members may consider and share their thoughts as to whether capital projects are a good idea, whether bond financing makes sense and whether the entity will be able to afford the debt service. They may, on occasion, be briefed on how the real "municipal advisors" of the kind intended to be covered by the Act recommend that financing be structured and carried out. But on any rare occasions when advisory board members may offer their personal viewpoints, perspectives and judgments relating to a bond offering under consideration, they do so as members of the community, not holding themselves out as finance experts providing "municipal advisory services."

Of course, if any particular board member, whether governing or advisory were to provide core municipal advisory services other than as an employee of a related governmental entity, perhaps membership on the board should not insulate the individual from registration. But the Commission should clarify that just because board membership may not be a basis of automatic exclusion, neither is it a basis for presumptive inclusion as a category of municipal advisor. In addition, the Commission should clarify that a public or government entity employee who serves on the board of a distinct government entity owned by the individual's public employer, will be deemed exempted under the employee exclusion.


Conclusion

Subjecting state and local governing or advisory body appointees to the registration regime under the Act would exceed the intent and purpose of the Act, while doing little or nothing to fulfill its policy objectives. Yet such a requirement would have grave effects on state and local governments, discouraging board service and imposing uncertainty and confusion upon public bodies. The State of Alaska respectfully requests and recommends

1. that the Commission expressly exempt from the Act's registration requirement all members of state and local governing and advisory bodies, elected or appointed, except to any extent a non-public employee member otherwise falls within the definition of "municipal advisor" by reason of activities separate from service and participation on the public board; and
2. that the Commission clarify that an employee of a municipal entity who provides municipal advisory activities to a governmental sub-unit by whom the employee is not directly employed is still considered an "employee of a municipal entity" exempt from registration.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: 
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