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February 18, 2011

VIA EMAIL
Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street. N.E.
Washington, D.C. 20549

Re: Registration of Municipal Advisers (File No. S7-45-10)

Dear Ms. Murphy:

The American Federation of State, County and Municipal Employees ("AFSCME") is the largest union in the AFL-CIO representing 1.6 million state and local government, health care and child care workers. AFSCME members participate in over 150 public pension systems whose assets total over $1 trillion. AFSCME members are elected and appointed trustees at many of these public pension systems. In addition, the AFSCME Employees Pension Plan (the "Plan") is a long-term shareholder that manages $850 million in assets for its participants, who are staff members of AFSCME and its affiliates.

During consideration of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), AFSCME strongly supported the inclusion of provisions establishing the strongest possible market reforms, oversight and transparency for the "shadow markets" and other major reforms addressing corporate governance and investor protection. One of those provisions makes it unlawful for municipal advisors to provide certain advice to, or solicit, municipal entities or certain other persons without registering with the Commission.

Prior to the enactment of Dodd-Frank, serving as a municipal advisor was not the subject of a separate and explicit definition and duty to register with the Commission. Instead, many of the entities that serve as municipal advisors – including brokers, dealers, municipal securities dealers, investment advisers and banks – were subject to regulation by various Federal and State regulators in other capacities or with respect to only limited activities. But with passage of Dodd-Frank, the role of "municipal advisor" will be newly defined and subjected to a fiduciary duty when

advising municipal entities, to registration obligations with the Commission and to public disclosure as well.

Explicit Obligations of Municipal Advisors are Well Founded

Recent years have seen tremendous growth in the complexity of the bundled investment products and services offered to those who manage public pension plans. Some municipal advisory firms have become swap dealers and offer assistance with derivatives transactions while others offer advice regarding a variety of investment strategies. Public pension plans and issuers of municipal securities are often solicited.

Although the case for new protections is strong, the implementation provided by this proposed rule is misdirected and ill-defined. AFSCME strongly recommends several modifications, as follows.

Imposing Advisory Duties on Pension Plan Trustees is a Fundamental Misunderstanding of What They Do and Must be Revised

Municipal entities now owed a heightened duty of care are defined as "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including – (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."[1] Though the text of the proposed rule does not elaborate on this statutory definition, the Commission's discussion of the proposal notes that "the definition includes, but is not limited to, 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."[2]

Newly defined "municipal advisors" who may owe a duty to these entities are defined as "a person (who is not a municipal entity or an employee of a municipal entity) (i) that 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) that undertakes a solicitation of a municipal entity."[3] The statutory definition goes on to specifically include "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors" when they engage in municipal advisory activities.[4]

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[1] 15 U.S.C. 78o-(e)(4).
[2] SEC File. No S7-45-10, Federal Register January 6, 2011, Page 829.
[3] 15 U.S.C. 780-4(e)(4)(A).
[4] 15 U.S.C. 78o-4(e)(4).

Given the magnitude of the public plan assets that should benefit from this new protection, one might expect that the proposal would explicitly address the coordination of this rule with the responsibilities of members of the boards of trustees who act for these plans. The Commission notes that as of U. S. Census data from 2008, public plans held over $2.2 trillion in assets and are of course desirable markets to firms seeking to sell a variety of investment products and services. Yet the closest the rule comes to addressing the role of trustees appears to be in its proposal to include in the definition of municipal entity employees – and therefore exclude from the definition of municipal advisor – elected members of a municipal entity's governing body to the extent those elected officials are acting within the scope of their role as an elected member.

The Commission leaves appointed members of a municipal entity's governing body within the scope of those municipal advisors newly regulated here (unless they are *ex officio* members of the body by virtue of holding an elective office). Why make this distinction? "The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions." Respectfully, this reading is unnecessary and ill advised.

The Commission has received numerous comment letters from government entities and public officials from around the country objecting to the distinction between elected and appointed officials and the inclusion of the latter among "municipal advisors." We certainly concur with these objections and would extend their analysis to public pension plans – pension plan trustees neither advise nor solicit the plans they serve. They are advised and solicited, and should get assistance from the heightened duties and disclosure obligations that the statute provides, not be divided in half and categorized as either sellers or employees. Furthermore, public pension fund trustees are regulated by state and local laws based on the common law of trusts. For the most part, these laws provide that trustees act as "fiduciaries" and are subject to the high standard of conduct that applies to fiduciaries under the law.

We do not believe any tortured effort to define municipal entities' "employees" is needed to reach this conclusion – we believe that the trustees' exclusion follows from the meaning of "advice", something they sometimes seek, they receive and evaluate as they act FOR the plan and fulfill duties to the plan, not as an outside advisor or solicitor of the plan. The proposed rule includes a definition of the "municipal advisory activities" that trigger the obligations under this rule, yet the definition proposed is "providing advice to or on behalf of a municipal entity . . . 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 solicitation of a municipal entity . . . ". The proposal's definition of "advisory activities" as "providing advice" is part of the challenge here. Surely the recipients of advice, the Commission receiving advisors' mandatory registration, and the potential registrants themselves, all would benefit from more clarity around this definition.

Other commenters have also articulated the importance for more content in the proposed definition of municipal advisor. One suggested that the "missing element is that the person must

be acting in some professional capacity and holding him or herself out to the public as having special expertise in the area in which he or she is providing advice."[5] We strongly agree.

In fact, an examination of some of the registration forms to be required also helps to illuminate the distinction between the advisory activities that are important subjects of this proposal and the role that trustees serve as recipients of that advice. For example, among the information to be reported in writing by municipal advisors is information on advice they give and business they solicit regarding guaranteed investment contracts, municipal derivatives, municipal escrow investments, and more. Other activities that registering advisors must disclose include:

- broker-dealer, municipal securities dealer or government securities broker or dealer
- registered representative of a broker-dealer
- commodity pool operator
- commodity trading advisor
- futures commission merchant
- major swap participant
- major security-based swap participant
- other financial product advisor
- swap dealer or security-based swap dealer
- trust company
- real estate broker, dealer, or agent
- insurance company, broker or agent
- banking or thrift institution
- investment adviser
- lawyer or law firm
- accountant or account firm
- engineering firm

In addition, the proposed registration forms require disclosure of financial industry affiliations of the advisor to the municipal entity receiving the advice. These are important disclosures of potential conflicts of interest. The forms also require disclosure of any proprietary interest in municipal advisory client transactions, including specific information about whether the advisor or affiliates buys derivative products for itself from its clients, buys or sells for its own account derivative products it recommends to clients, or enters into derivatives contracts with clients.

The registration process proves our point that the public plans and their trustees – whether elected, appointed or *ex officio* – are clients, not advisors, and that this distinction should be made absolutely clear as the proposal proceeds.

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[5] Submission to S7-45-10 dated Feb 11, 2011, from the Ohio Water Development Authority.

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We appreciate the opportunity to express our views on this matter. Should you have questions regarding our comments, please contact Lisa Lindsley at (202) 429-1275.

Sincerely,

GERALD W. McENTEE
International President