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***VIA EMAIL***: rulecomments@sec.gov
Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549-1090

February 21, 2011

Re: File Number S7-45-10
SEC Proposal to Require Officers of Governmental Entities to register as "Municipal Advisors"

Dear Chairman Schapiro and Members of the Commission:

I am writing to comment on the definition of "municipal advisor" as proposed by the Securities and Exchange Commission (the "Commission") in Release 34-63576 concerning registration of municipal advisors.

The proposed new rules (the "Rules") are intended to implement the provisions of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (the "Dodd-Frank Act"), which amends Section 15B of the Securities and Exchange Act of 1934 ( as amended, the "Exchange Act"). The Dodd-Frank Act defines "municipal advisor" 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.

The Dodd-Frank Act makes it unlawful for a "municipal advisor" not to register with the Commission. By registering with the Commission a "municipal advisor" is subjected to various fees, disclosure rules and other Commission requirements.

The Commission's staff in a response to a comment has stated:

> The Commission 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."

Accordingly, it appears that the Commission is presently taking the position that appointed members of boards and entities do constitute municipal advisors.

At the Godfrey Firm, P.L.C., we have served municipal entities in Louisiana as bond counsel and in other capacities for over twenty years. Our experience working with municipal entities has led us to question certain aspects of the interpretation of the Dodd-Frank Act set forth in the Rules. We respectfully request that the Commission consider the following problems that could arise if the Rules are made effective in their current form.

## I. The Proposed Regulation Will Discourage Volunteers of Municipal Entities and Create Additional Expenses for Municipal Entities.

Throughout the United States many local municipal entities are governed by a board the members of which are appointed as opposed to being elected. State, county (parish) and local governments depend upon the individuals of their communities to help facilitate and run their governments through serving as volunteer, appointed members. These volunteers form the bulwark of American democracy and the foundation of our volunteer spirit. Tens of thousands of community volunteers give their time to enable their local governments to plan, to zone, to invest and to run various facets of local government operations. Some are true volunteers and others receive stipends. For example, in the state of Louisiana there are at least 450 state entities that are governed by boards the members of which are appointed. This does not include local and county (parish) entities.

Opening volunteer members to potential penalties, registration requirements and fees will deter people from service. One can expect that the inclusion of appointed members of governing authorities within the term "municipal advisor" and the resulting requirement of registration, payment of fees and exposure to personal liability will result in resignations by many of the appointed board members of municipal entities. This could have a seriously detrimental effect on the operation of state and local government.

The cost to local governments and officials to comply with this regulation will be extensive and comes at the worst time for local governments. Local governments will be required to pay the cost for registering municipal advisors who serve the local government in a volunteer capacity and for those who are its officials. In addition, local governments will need to hire counsel with expertise in dealing with the Commission to be sure that these officials are properly trained and advised in the intricacies of securities law, without reducing the expense for counsel and various advisors who in the past have handled issues on behalf of the municipal entity. Further, the Rules increase the need for boards of municipal entities to carry executive officers liability insurance and the cost of that insurance would increase because of the increased exposure.

## II. Accountability of Appointed Versus Elected Officials.

The Commission opines that elected officials are accountable to the municipal entity whereas appointed members are not directly accountable for their performance. The Commission's argument overlooks the fact that elected officials are elected for a term and during that term are not accountable to the municipal entity but rather only to the electorate and then only at the conclusion of their term. Appointed members are usually appointed for a term, some are appointed to serve at the will of the appointing body or official, and most appointed officials can be removed for cause. Generally elected officials cannot be removed except upon conviction of a crime or by recall petition. Accordingly, elected members are actually less accountable during their terms than appointed members.

Further, members of governing authorities who hold positions of trust within a state or local governmental entity subject themselves to state and local ethics laws and common law responsibilities that include potential penalties for misfeasance or malfeasance. Each of these controls meet the Commission's stated intent of protecting the public by providing significant and sufficient state and local deterrents to misconduct that another layer of protection does not enhance.

## III. Members of a Board, Elected or Appointed, Do Not Give Advice to the Municipal Entity in the Manner Intended to be Regulated by Congress in the Dodd-Frank Act.

The Rules regulate any person who *provides advice to* municipal entities. The members of a governing authority are in essence the governing authority itself as a municipal entity is a fictional entity which can only act through its members, whether those members were chosen by election or appointed. Accordingly, all members of any governing authority of a municipal entity should be excluded because they are in fact the municipal entity which is expressly excluded by the language of the act ". . . which is not a municipal entity . . .".

Further, in its common usage, "advice" is given or provided to third parties. Municipal entities do not advise themselves but rather seek advice from experts. Members of governing authorities do not advise the municipal entity rather they act for it by receiving advice, drawing conclusions from such advice received from third parties and then making determinations based upon their conclusions drawn from the advice of third persons.

I am also concerned about the potential effect on attorneys for government entities. By requiring attorneys for the government entity to register if they stray beyond pure legal advice the Commission will be chilling some of the most effective advice that a lawyer can provide. Attorneys often challenge the analysis of experts and other advisors to their clients and if that challenge strays beyond the purely legal, then those same lawyers may be fearful to fully and ably represent their clients. The Commission should

consider carefully if chilling a lawyer's advice to a client serves the interests it seeks to protect.

## IV. The Rules May Open the Commission to Litigation.

The Rules as proposed may open the Commission to unwanted litigation. In *USA, Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984) the Supreme Court explained the role of a court in the review of interpretative regulation:

> *** if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *** The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

We believe that in defining "municipal advisor," the Rules as proposed go beyond the congressional intent of the Dodd-Frank Act. Therefore, any person affected negatively by the Rules could possibly bring suit against the Commission.

The Dodd-Frank Act requires registration of municipal advisors in an effort to enhance accountability of such persons and provide increased protection to the people they serve. By including appointed officials in the definition of municipal advisors, neither accountability nor protection is enhanced. But rather, the effect is that of chilling discussion and deterring helpful volunteers from serving their communities as appointed members of municipal boards.

## V. Conclusion and Our Proposed Regulation.

The Commission's position quoted above creates at least four problems:

(1) It would require thousands of community spirited volunteers to spend money and to subject themselves to federal regulatory controls, exposing them to potential liability;

(2) It would subject municipalities to greatly increased expense as new registration fees would be required and additional counsel would be required to ensure compliance with the regulations;

(3) The line between giving and getting advice and who is allowed to give that advice without registering as a "municipal advisor" is blurred and will chill important discussions and debates that are an integral part of the everyday functioning of a municipal entity; and

(4) The Commission may be opening itself up to unnecessary litigation.

I ask respectfully that you consider expanding the exclusion for local government officials, including among them, appointed board members and other elected and appointed officials that may advise "municipal entities," from the requirement to register as "municipal advisors" by including them within the definition of "municipal employee."

I propose that the following language of the proposed regulations be changed as indicated below. Underlined language indicates language added:

1. Substitute for the existing definition of Municipal Advisor found at Section 240.15ba1-1 Definitions, the following language:

   (d)(1) Municipal Advisor shall mean a person (who is not a municipal entity, an elected or appointed member of the governing authority of a municipal entity whether an officer or not, 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.

2. Amend sub-part (d)(2) so as to exclude from the term "municipal advisor" members of the governing authority of a municipal entity by adding a new subpart to be denominated (d)(2)(i) and renumbering the original language commencing with the number (d)(2)(ii). Said new sub-part (d)(2)(i) should read as follows:

   (i) The members of the governing authority of a municipal entity, whether elected or appointed and whether an officer or not.

Your consideration of the above comments will be appreciated.

Sincerely,

The Godfrey Firm, PLC

The Godfrey Firm, PLC

cc: Congressional Delegation